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WHY CAN'T WE LEAVE THE RULES ALONE?

The Texas Supreme Court has decided it's time for yet more changes to the Rules of Civil Procedure — but we haven't even gotten used to the old changes yet.

If Will Rogers could sit in the back of a Continuing Legal Education seminar on the Texas Rules of Civil Procedure, he probably could gather enough material for an entire volume of lawyer jokes. The seminar speakers, taking themselves and their subjects so seriously, would sound humorous, at best, to a layman.

The many "little" changes that have occurred in the past decade have produced dozens of court opinions interpreting the changes and unthought-of problems of the supposedly simple words contained in the rules. No one lawyer can keep up with all of them.

CIVIL PROCEDURE
by Richard A. Henderson

The only people who could possibly enjoy this state of affairs are attorneys who bill hourly and folks who write for and publish law books.

Our clients probably would laugh along with Mr. Rogers at the stupidity of the situation until they discovered that the particular merits of their cases might never be heard if their lawyer happens to bungle some procedural point involving one of the many rules that have been changed, rechanged, interpreted and reinterpreted. It is enough to make me want to resign my board certification in civil trial law.

THE HOLY GRAIL

The quest to write the perfect set of Rules of Civil Procedure has been led primarily by Professor William Dorsaneo III of the Southern Methodist University School of Law. To me, while some recent changes have been for the good, the effort largely has been a failure. Most attempts to simplify and fine-tune the rules have resulted only in more loopholes and gaps that often cause discovery fights and other procedural battles to overshadow the facts of a particular litigation.

But if you think the vast 1990 changes to the rules were bad, be forewarned. Supreme Court Justice Nathan Hecht has formed a new committee, headed by Mr. Dorsaneo, whose stated purpose in the Supreme Court's order of June 19, 1991, is "to study, to consult with such other interested persons as may seem appropriate, and to report directly to the Supreme Court as soon as practicable whether those rules should be recodified into a more coherent and easily usable body, either with or without substantive change. . . ."

What they want to do is rewrite the rules, probably in the image of the Federal Rules of Civil Procedure.

STOP THE PRESSES

There are three things that the committee could do. First, it could throw out the current rules and completely rewrite them. Second, it could attempt to keep the old rules and continue to fine-tune them.

Third, and by far the least likely, it could declare a moratorium on all rule changes for at least five years so that the current set can go through a process of judicial interpretation. I recommend this option, and I think I could live with even a 10-year moratorium on rule changes. At least that way we all would have a chance to get used to using the rules and have time to figure out what appellate judges think the rules mean.

The constant little changes for the past 15 years or so have kept things in such a state of flux that about the time there is some judicial interpretation of the meaning of a particular rule, it has changed again.

How many opinions have been written because of the words "shall," "may," "will" and "should"? How many times have we switched who has the burden of ruling on an objection to an interrogatory? How many times have we changed when and where we will file depositions, requests for admissions, requests for productions and interrogatories?

Just as an example, Rule 168 governing interrogatories was changed in 1967, 1973, 1978, 1981, 1984, 1988 and 1990; Rule 169 governing admissions was changed in 1973, 1984, 1988 and 1990.

If the constant changes and "fine-tuning" have not been successful in the past 15 years, how can any new rules committee convince us that it can write a completely new set of rules any better? And how can we not go through multiple changes and interpretations of any "totally new" set of rules? The real question to be asked, though, is, "Will our clients be better off?"

'NEW BLOOD'

It is too late now, but one of my specific recommendations to Justice Hecht would have been that he appoint some new blood to the committee and that it be dominated by people who actually litigate small cases every day.

I specifically would have recommended that the Supreme Court not allow any law professors on the committee and, certainly, they should have excluded anyone who writes a legal publication or makes speeches for profit about the Texas Rules of Civil Procedure. Is there not at least the appearance of a conflict of interest if people sitting on such a committee also make money from legal publications and seminar speeches on the same subject?

But what can you as an everyday litigator do to affect the process? I recommend that this time you do not sit there and just let it happen. Despite the everyday pressures of trying to manage a law practice and keep up with which spouse's turn it is to pick up the kids, more of us must get involved in the process that influences the Texas Rules of Civil Procedure.

If you sit back and do nothing, you will be scrambling to attend seminars and figure out what Justice Hecht's committee did, and you will lose a few more sleepless nights wondering what procedural mistake you made that day to damage a client.

TAKE BACK THE SYSTEM

At the very least, you can pick up your dictation equipment when you have finished reading this commentary and write Justice Hecht and Mr. Dorsaneo about your feelings. Trial judges should do the same. Do you judges want a completely *new* set of rules to learn without the benefit of the briefing attorneys that the appellate judges have?

At the same time, you can write Fred Nation, editor of Matthew Bender's "Texas Litigation Guide" (which bears Mr. Dorsaneo's name), and tell him you are considering canceling your subscription to the publication.

And while you're at it, you can write *Texas Lawyer* and tell them you are tired of paying for "O'Connor's Texas Rules." Matthew Bender and *Texas Lawyer* are two of the primary beneficiaries of rule changes and judicial interpretations of those changes.

Mr. Nation has told me that he keeps 17 lawyers on his payroll to keep up with the changes. I can assure you that when the economic interests at Matthew Bender and *Texas Lawyer* are threatened, there will likely be some results.

So far, I have not canceled my own "Litigation Guide." Without it, it is difficult to keep up with the state of the law. I will admit that they have me over a barrel. If Mr. Nation needs a battery of lawyers to keep up with the changes, how can I, a solo practitioner, expect to do it alone?

It is time that the average litigator took control of our system again. We have sat back for too long and allowed a select group to dictate to us what the rules are going to be. My litigator friends tell me that the rules have been written by big-time litigators for big suits.

Some of them suggest that we should have two sets of rules. One for the "fender-bender simple" suits and one for "big" suits. I think one set of rules that are left alone for awhile will suffice.

If I am wrong in my opinions, then I stand fully ready to say mea culpa and beat a fast retreat. Perhaps an overwhelming majority of litigators think that the Texas Rules of Civil Procedure have been just fine and that the updates to their legal publications as a result of all of the changes and legal interpretations have been a reasonable cost of doing business. Maybe I simply cannot take the heat of the litigators' kitchen. Please write *Texas Lawyer* and let me know.

We can form a committee of the whole to try to influence the rule-making process. Right now, I am a committee of one and I am waiting to hear from you. ■

Richard A. Henderson is a solo practitioner in Fort Worth.

4543.001

4-5-93

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

April 1, 1993

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

Dear Luke:

Enclosed is a letter from Gregory Enos suggesting a proposed amendment to the Texas Rules of Civil Procedure.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
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CHIEF JUSTICE
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ROSE SPECTOR

CLERK
JOHN T. ADAMS

EXECUTIVE ASS'T
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T
MARY ANN DEFIBAUGH

April 1, 1993

Mr. Gregory B. Enos
Burwell Enos & Baron
1501 Amburn Road #9
Texas City TX 77591

Dear Mr. Enos:

Thank you for your letter regarding a proposed revision to the Texas Rules of Civil Procedure. I have sent a copy to the chairman of the Rules Advisory Committee with the request that your comments be considered fully in making additional revisions in the rules.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

c: Mr. Luther H. Soules III

BURWELL, ENOS & BARON, P.C.
ATTORNEYS AT LAW

Russell G. Burwell*
Greg B. Enos*
Neil G. Baron
Russell G. Burwell III
*Board Certified
Personal Injury Trial Law

March 29, 1993

Chief Justice Tom R. Phillips
Texas Supreme Court
Supreme Court Building
P. O. Box 12248, Capitol Station
Austin, Texas 78711

Dear Justice Phillips:

I write to propose a new addition to the Texas Rules of Civil Procedure:

> No person (including judges, attorneys, witnesses, jurors, and court reporters) shall be permitted to smoke during any civil judicial proceeding, including trials, hearings, and depositions, provided that each court may adopt its own rules regarding smoking in a judge's private chambers and in rooms used for jury deliberations.

I recently endured a full day of depositions in a conference room with five lawyers, most of whom smoked during the entire proceeding, despite the repeated requests from me and another attorney to stop. By now, we all know of the ill-health effects caused by second-hand tobacco smoke.

Please refer my suggestion to the committee that studies new rules of civil procedure.

Sincerely,

Gregory B. Enos

GBE/ph

cc: Ms. Harriet Miers, President
State Bar of Texas
P. O. Box 12487, Capitol Station
Austin, Texas 78711

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(409) 945-0660 • (713) 488-0691 • FAX: (409) 935-5859

THE SUPREME COURT OF TEXAS

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CHIEF JUSTICE
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BOB GAMMAGE

CLERK
JOHN T. ADAMS

EXECUTIVE ASS'T
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T
MARY ANN DEFIBAUGH

March 25, 1992

Mr. Michael Northrup
2120 Pacific Avenue #305
San Francisco CA 94115

Dear Mike:

Thank you for your letter regarding discrepancies in the Texas Rules of Civil and Appellate Procedure. I am referring your comments to the Court's Rules Advisory Committee. I assure you that the thoughts you have expressed will receive full consideration by that Committee and by this Court.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

xc: Mr. Luther H. Soules III

March 16, 1992

R. Michael Northrup
2120 Pacific Ave, Apt. 305
San Francisco, Ca. 94115

The Honorable Nathan L. Hecht
The Supreme Court of Texas
P.O. Box 12248
Austin, Tx. 78711

Re: Texas Rules of Civil and Appellate Procedure

Justice Hecht,

I recently started working for Matthew Bender in Oakland. In connection with my job, I discovered some discrepancies in the Texas Rules of Civil and Appellate Procedure. I am writing to you since the rules fall within your purview. I understand that the last set of amendments was supposed to eliminate references to the old rules of civil procedure that are now incorporated into the rules of appellate procedure. However, Tex. R. Civ. P. 75b refers to Rule 379. Rule 379, however, is now Tex. R. App. P. 51(d).

I understand that the last set of amendments were intended to make the rules gender-neutral. However, I noticed that Tex. R. App. P. 10 provides in part, "... if the judgment has been reversed and remanded he shall continue the cause on the docket with its original file number for trial." It appears that, for whatever reason, this rule was overlooked. Also Tex. R. App. P 13(k) provides in part: "... he shall be entitled to file the record in the court of appeals, and, if the decision of the court of appeals is adverse to him, an application for writ of error, without making any deposit for costs. In all other proceedings in which a cost deposit is required by this rule, a party unable to pay such costs may make affidavit of his inability to do so..."

In addition, I have discovered some apparent inconsistencies in the appellate timetables. Tex. R. App. P. 41(a)(1) extends the time for perfecting the appeal 1) if a timely motion for new trial is filed in a jury trial or 2) if a request for findings of fact and conclusions of law is filed in a nonjury trial. Of course the time for requesting the transcript and statement of facts is dependent on the time of perfection. However, the time

for filing the transcript and statement of facts may be extended 1) if a timely motion for new trial is filed, or 2) if a timely motion to modify the judgment is filed, in a case tried with a jury or 3) if a request for findings of fact and conclusions of law is filed in a case tried without a jury. Clearly, the difference is that in one case the filing of a motion to modify extends the time while in the other case it apparently does not.

I would also note that Tex. R. App. P. 52(c)(11) suffers from a similar problem. The time for filing a bill of exception is unaffected by the filing of a motion to modify. Furthermore, the time for filing a bill of exception is unaffected by the filing of a request for findings of fact and conclusions of law in a case tried without a jury.

On a substantive level, I would comment that it is rather odd that the rules provide that exhibits in the trial court must be filed with the trial court clerk, see Tex. R. Civ. P. 75a, and further that the trial court clerk is charged with preparing the transcript, see Tex. R. App. P. 51(c). It is odd because in the case of original exhibits, the court reporter is charged with transmitting them to the court of appeals, see Tex. R. Civ. P. 75b, even though such exhibits are part of the transcript, see Tex. R. App. P. 51(d). From a practical standpoint, I have no objections, but from a theoretical standpoint, making original exhibits part of the transcript while putting the court reporter in charge of the exhibits, is incongruous with other rules relating to the record.

I have noted a few other similar discrepancies, and I am compiling them to send in a later latter. I will send those along when I have had more time to put them together. I hope this information has been of some assistance.

Sincerely,

R. Michael Northrup

R. Michael Northrup

March 24, 1992

Mr. Lloyd M. Lunsford
411 Spencer Highway
South Houston, TX 77587

Dear Mr. Lunsford:

Thank you for your letter suggesting the need for improvements in our discovery rules. I am referring your comments to the Court's Discovery Task Force and our Rules Advisory Committee. I assure you that the thoughts you have expressed will receive full consideration by those groups and by this Court.

Sincerely,

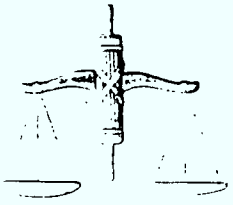
Nathan L. Hecht
Justice

NLH:sm

xc: Hon. David E. Keltner
Mr. Luther H. Soules III

Lloyd M. Lunsford
Attorney at Law

411 Spencer Hwy. • South Houston, Texas 77587
(713) 946-6620



Sally Hofer
Executive Assistant

March 9, 1992

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
Supreme Court Building
P. O. Box 12248 - Capitol Station
Austin, TX 78711

RE: Discovery Task Force

Dear Judge Hecht:

It is my understanding that any suggestions concerning improvement of Discovery Procedure should be addressed to you for consideration by the Task Force. If I am in error, please advise.

For 39 years I have been a solo practitioner, primarily in Plaintiffs' cases.

The burden placed on solo practitioners, and small law firms as well, is becoming almost intolerable. Computers have made it possible for large firms on retainers or per/diem to "swamp" attorneys like me with endless Requests For Admissions, Production, Interrogatories, Medical Reports, etc.

Physicians, who in my experience have always resisted testifying, now have hit upon the idea that if they don't provide a written report, they cannot be called as witnesses. Repeated requests for their findings to be reduced to writing are more and more frequently ignored and attempts to coerce them to do so results in an alienated witness. Fees for the reports are unreasonable and unregulated.

Defense firms obtain the medical records without admissible authentication and Plaintiffs must duplicate the requests.

Physicians and hospital custodians refuse to testify to the necessity and reasonableness of hospital bills forcing the subpoena of custodians, physicians and hospital vice-principals to prove such facts.

Defendants are succeeding in suppressing all testimony of a witness except a verbatim rendition of his report.

Need to supplement on injuries and treatment still persisting at trial is cut-off by local docket-control orders.

Local docket control orders are interfering with effective assistance of counsel by requiring all exhibits to be identified and admitted prior to trial, leaving counsel no right to conduct his trial strategy.

It is hoped that the Task Force will obtain the views of the trial lawyers in arriving at necessary changes and implementation of the rules of discovery. This is my purpose in writing.

Respectfully,

LLOYD M. LUNSFORD

LML/sh

cc: LHS
cc: HHD
2-24-92

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
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2/20
HHD.
Same agenda
- Discuss Sub C
D. Keltner
COA Avant

February 21, 1992

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

Dear Luke:

Enclosed is a letter Chief Justice Phillips received from Alan Schechter regarding the Texas Rules of Civil Procedure.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

Schechter
&
Eisenman

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(512) 546-7113

February 7, 1992

Chief Justice Tom Phillips
Supreme Court of Texas
Supreme Court Building
P.O. Box 12248
Houston, Texas 78711

Dear Judge Phillips:

This is my second letter to you concerning the lack of a cost efficient mechanism in the law in Texas to prove up medical bills in a personal injury action without incurring disproportionate costs in doing so. The current mechanisms allow the defense lawyers to contest the Custodian of Records' knowledge to prove up medical bills as reasonable, customary and necessary. The cost of proving up moderate to small size medical bills is so out of hand that it is impossible to do so because of the cost in taking medical provider depositions and the impossibility of accomplishing it through the subpoena process.

There must be some amendments to the Texas Rules of Civil Procedure, which are under the Court's jurisdiction, which will facilitate an inexpensive method of proving up of medical billing. I'm not complaining about my colleagues because they are just doing their job. I am complaining about the system and the lack of the presence of a process to prove up these bills in an efficient and effective manner.

I am attaching for your attention a set of cross-questions that I received on a case recently. The effect of these will knock out proving up medical bills of $1,300 for a young girl who had her teeth knocked out in an auto accident. Obviously, the bills are due to the accident but since the doctor has left town the cost of getting another medical provider to prove them up exceeds the benefit of doing so. It is absurd in this case because it is so clear that this automobile accident knocked this woman's teeth out.

Accordingly, I again request that you consider amending the process for proving up medical bills in any revisions to the Texas Rules of Civil Procedure.

Please reply [illegible]
FAX# [illegible]

Respectfully yours,

SCHECHTER & EISENMAN

Alan L. Schechter

ALS/clr
Enclosures

CROSS QUESTIONS

TO: [redacted] Plaintiff, by and through her attorney of record; Alan Schechter, 3200 Travis, Houston, Texas 77006

COMES NOW, THOMAS HAYDEN HUGHES, Defendant, and submits the following Cross-Questions to be attached to the Notice of Intention To Take Deposition by Written Questions of the Custodian of Patient Account Records of LISA HIRSCH, to-wit:

Respectfully submitted,

CERTIFICATE OF SERVICE

I hereby certify that I have complied with the provisions of Rule 21 on the 30th day of January, 1992.

PERTAINING TO: Dr. Steven Mandell/Dr. Stephen Schwartz
Dr. Bruce Northrup, Jeff-Care and Drexel U. Health Center

1. As the custodian, you did not prescribe the treatments, did you?

ANSWER:

2. You're not a doctor, are you?

ANSWER:

3. Isn't it true that only a doctor can prescribe such treatment?

ANSWER:

4. Wouldn't the doctor be the best witness as to the necessity of the treatment?

ANSWER:

5. You're not qualified to testify as to the necessity of the treatment, are you?

ANSWER:

6. Do you have any personal knowledge that the treatments resulted from an accident in June of 1989?

ANSWER:

7. You cannot swear under oath what the reasonable charges are for similar services by other doctors in the area, can you?

ANSWER:

8. To your knowledge, was any injury found?

ANSWER:

9. To your knowledge, was any objective evidence of harm or damage to the physical structure of the body found?

ANSWER:

10. Can you swear that any abnormal findings resulted form the accident?

ANSWER:

_____

WITNESS

CROSS QUESTIONS

TO: [redacted] Plaintiff, by and through her attorney of record; Alan Schecter, 3200 Travis, Houston, Texas 77006

COMES NOW, THOMAS HAYDEN HUGHES, Defendant, and submits the following Cross-Questions to be attached to the Notice of Intention To Take Deposition by Written Questions of the Custodian of Patient Account Records of [redacted] to-wit:

Respectfully submitted,

S
H
A

CERTIFICATE OF SERVICE

I hereby certify that I have complied with the provisions of Rule 21 on the 30th day of January, 1992.

PERTAINING TO: Dr. Ira Martin Fine and Dr. Dandy McTabish

1. As the custodian, you did not prescribe the treatments, did you?

ANSWER:

2. You're not a doctor, are you?

ANSWER:

3. Isn't it true that only a doctor can prescribe such treatment?

ANSWER:

4. Wouldn't the doctor be the best witness as to the necessity of the treatment?

ANSWER:

5. You're not qualified to testify as to the necessity of the treatment, are you?

ANSWER:

6. Do you have any personal knowledge that the treatments resulted from an accident in June of 1989?

ANSWER:

7. You cannot swear under oath what the reasonable charges are for similar services by other doctors in the area, can you?

ANSWER:

8. To your knowledge, was any injury found?

ANSWER:

9. To your knowledge, was any objective evidence of harm or damage to the physical structure of the body found?

ANSWER:

10. Can you swear that any abnormal findings resulted form the accident?

ANSWER:

_____

WITNESS

TRCP 4

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
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11/17

January 16, 1992

HHD
Serve Subc
Agenda
Cat J - Amend

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

Dear Luke:

Enclosed is a letter from Judge Michol O'Connor suggesting proposed amendments to Tex. R. Civ. P. 4 and Tex. R. App. P. 5.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

MICHOL O'CONNOR
JUSTICE
First Court of Appeals
1307 San Jacinto
Houston, Texas 77002
(713) 655-2716

December 5, 1991

Hon. Nathan L. Hecht
The Texas Supreme Court
The Texas Supreme Court Building
P.O. Box 12248
Austin, TX 78711

RE: The Supreme Court Advisory Committee

Dear Justice Hecht,

I believe we have a serious due process problem with the rules and statutes that govern legal holidays and filing documents.

Most opinions assume that the holidays listed in TEX.REV.CIV.STAT. ANN. art. 4591 are observed by all the courts. Actually, the holidays in article 4591 are observed by the appellate courts. The trial courts, which are controlled by the commissioners courts, do not necessarily close on those dates. For example, article 4591 lists November 11, Veterans Day, as a holiday. On that date, the Supreme Court, the Court of Criminal Appeals, and all the courts of appeals are closed. The trial courts in Harris and Dallas Counties, however, are open for business.

As far as I can determine, the holidays observed by the trial courts depend on two things: (1) the terms of Appropriations Act for that year; and (2) the decisions of the county commissioners courts that implement the Appropriations Act. I cannot find any source of reliable information that identify county holidays. The lawyer must call each county in which she practices to ask for a list of holidays in that county. Even that can result in misinformation. In the case of ***Seismic & Digital Concepts, Inc. v. Digital Resources Corp.***, 583 S.W.2d 442 (Tex.App.--Houston [1st Dist.] 1979, no writ), the courthouse switchboard operator was mistaken when she told a lawyer that the courthouse would be closed, and this Court held the mistake did not extend the time for filing.

I do not have a suggestion for adopting uniform holidays throughout the state. If the Supreme Court could dictate the holidays for all the courts, that would solve the problem, but I am not sure the Court can do that. Short of that solution, I suggest that the Court amend the rules so that any date a courthouse is closed extends the filing date by one

date, whether the date is listed in article 4591 or is a holiday decreed by the commissioner's court of that county. I also suggest that when a courthouse is closed for any other reason (inclement weather, natural disaster, technical or mechanical failures), the date to file documents should be extended.

Some of the cases have held that a party has the option of taking the document to the house of the clerk or the judge. Realistically, that option is only available to a local lawyer, not a lawyer who is unaware that the courthouse is closed. For example, if a lawyer in Midland sends a document by Federal Express (which means it will be filed only when actually received) to the district clerk of Harris County, and on the date of delivery the Harris County courthouse is closed, the Federal Express delivery will not be completed on time. The problem is particularly acute when a party attempts to file a document for which no motion to extend is permitted, for example, the motion for new trial.

I include proposed amendments to TEX.R.CIV.P. 4 and TEX.R.APP.P. 5.

Yours truly,

Michol O'Connor

cc: Luke Soules

TEXAS RULES OF CIVIL PROCEDURE 4. COMPUTATION OF TIME

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 begins 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, ~~and~~ legal holiday, or a day the courthouse is closed by order of the county commissioners court, in which event the period runs until the end of the next day which is not a Saturday, Sunday, ~~and~~ legal holiday, or a day the courthouse is closed. Saturdays, Sundays, ~~and~~ legal holidays, and days the courthouse is closed by order of the county commissioners court, shall not be counted for any purposes in any time period of five days or less in these rules, except that ~~Saturdays, Sundays, and legal holidays~~, they shall be counted for purposed of the three-day periods in Rules 21 and 21a, extending other periods by three days when service is made by registered or certified mail or by telephonic document transfer, and for purposes of the five-day periods provided for under Rules 748, 749, 749a, 749b, and 749c.

CHARLES ADKIN SPAIN, JR.
Court of Appeals for the Third District of Texas
Post Office Box 12547
Capitol Station
Austin, Texas 78711-2547

Staff Attorney
Telephone: (512) 463-1733

July 20, 1993

The Honorable Nathan Hecht
Justice
The Supreme Court of Texas
Supreme Court Building Room 104
201 West 14th Street
Austin, Texas 78701

TRCP 5

Re: Texas Rules of Appellate Procedure

Dear Justice Hecht:

Here are additional random comments on the Rules. I apologize for not rounding them all up earlier.

(1) Texas Rule of Appellate Procedure 4(b): Does the Court intend that the term "certificate of mailing" refer to Form 3817 described in sections 931.1-.522 of the U.S. Postal Service's *Domestic Mail Manual*, or does the term "certificate of mailing" have a more general meaning that would include a receipt for certified mail (Form 3800) described in sections 912.1-.8?

(2) Texas Rule of Appellate Procedure 19: It would expedite motion practice in the courts of appeals to require a certificate of conference. Motions without opposition would bear the word "unopposed" in their caption and contain a statement that movant has conferred with all parties and no one opposes the motion. The appellate court could then consider such an unopposed motion without waiting the usual ten days. Motions with opposition would contain a statement that movant has conferred with all parties and counsel cannot agree about the disposition of the motion. Agreed or joint motions would be signed by all parties or their counsel similar to Texas Rule of Appellate Procedure 8.

(3) Texas Rules of Appellate Procedure 79(d), (e) and 100(f): Is it a "motion for rehearing en banc" or a "motion for reconsideration en banc"?

(4) Texas Rules of Appellate Procedure 90(c): In theory the rule allows the court of

appeals to order an opinion published after the court rules on the last timely filed motion for rehearing if the parties do not seek relief from the supreme court (no motion for rehearing is required, of course, in a criminal case). This may be a loophole.

(5) Texas Rule of Civil Procedure 5: Why is there no provision regarding prima facie evidence of the date of mailing by means of a certificate of mailing?

(6) Texas Rule of Civil Evidence 204: Do we really need the provisions that refer to taking judicial notice of the contents of the *Texas Register* and the *Texas Administrative Code* in light of the Administrative Procedure and Texas Register Act and the Texas Administrative Code Act? Tex. Rev. Civ. Stat. Ann. art. 6252-13a, § 4(c), art. 6252-13b, § 4 (West Supp. 1993); *Metro Fuels, Inc. v. City of Austin*, 827 S.W.2d 531, 532 n.3 (Tex. App.—Austin 1992, no writ).

(7) When does true plenary jurisdiction of the appellate court expire—after ruling on the last timely filed motion for rehearing, issuance of the mandate, or expiration of the term of court? Theoretically it's probably the expiration of the term of court, but I believe the supreme court would frown if a court of appeals in December sua sponte vacated a judgment the court of appeals originally rendered in January of the same year and rendered a new and different judgment, especially if the mandate issued in April. Perhaps it would be good to have an appellate rule similar to Texas Rule of Civil Procedure 329b that defines the plenary jurisdiction of the appellate court without reference to the term of court.

Once again, thank you for your receptiveness to comments on the Rules. My theory is not to gripe about the Rules, but rather try to correct the perceived flaws. I trust I'm not merely being a pest!

Respectfully,

A543.001

2-5-93

445 hmd

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
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FAX: (512) 463-1365

February 4, 1993

HHD, Spc Agenda Luke Cert Stuff Fax

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

Dear Luke:

Enclosed is a copy of a letter from James Spamer regarding Rule 5.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

PC
re Rule 5

Court of Appeals
Fifth District of Texas at Dallas

JAMES B. SPAMER
CHIEF STAFF ATTORNEY

GEORGE L. ALLEN SR. COURTS BUILDING
600 COMMERCE STREET
DALLAS, TEXAS 75202-4658

(214) 653-6922

January 6, 1993

The Honorable Craig Enoch
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Justice Enoch:

I was asked to determine what day(s) during the third week of January were holidays (for payroll purposes) and went back to the statutes. Article 4591 has once again been amended. In a nutshell, here's what I found:

January 19 is Confederate Heroes Day. TEX. REV. CIV. STAT. ANN. art. 4591 (Vernon Supp. Pamph. 1993). As a legal holiday specifically listed in article 4591, it is a holiday for purposes of TEX. R. APP. P. 5(a) (the "weekend rule"). It is also a state holiday. TEX. REV. CIV. STAT. ANN. art. 4591.2, § 1(5)(A) (Vernon Supp. Pamph. 1993). A state holiday is one for which the Court must have enough state employees on duty during the holiday to conduct the public business of the Court. *See* TEX. REV. CIV. STAT. ANN. art. 4591.2, § 3 (Vernon Supp. Pamph. 1993).

The result is that Confederate Heroes Day is: (1) a legal holiday; (2) on which we are legally required to be open for business. Once again I am praying that no attorney in this area has a jurisdictional deadline falling on January 19.

Sincerely,

Jim

James B. Spamer
Chief Staff Attorney

4543.001

org. hrd
LHS

√9-12-91
SB

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

September 11, 1991

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

Dear Luke:

Enclosed is a letter Chief Justice Phillips received suggesting a change to TRCP 5(b).

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
RAUL A. GONZALEZ
OSCAR H. MAUZY
EUGENE A. COOK
JACK HIGHTOWER
NATHAN L. HECHT
LLOYD DOGGETT
JOHN CORNYN
ROBERT A. "BOB" GAMMAGE

CLERK
JOHN T. ADAMS

EXECUTIVE ASS'T
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T
MARY ANN DEFIBAUGH

September 9, 1991

Joseph A. Connors III, Esquire
Attorney and Counselor at Law
Post Office Box 5838
McAllen, Texas 78502-5838

Dear Mr. Connors:

Thank you for your letter of September 1 regarding the revision of Tex. R. Civil P. 5(b). A copy has been distributed to Justice Nathan Hecht, liaison for Rules, and other members of this court.

With best regards, I am

Sincerely,

Thomas R. Phillips

TRP/ifw

cc: The Honorable Nathan L. Hecht
Justice

S - send to LHS
put in current
rules file

LAW OFFICE OF

JOSEPH A. CONNORS III

ATTORNEY AND COUNSELOR AT LAW

P O BOX 5838

McALLEN, TEXAS 78502-5838

JOSEPH A. CONNORS III

BOARD CERTIFIED
CRIMINAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

512-687-8217

September 1, 1991

Hon. Thomas R. Phillips
Chief Justice
Supreme Court of Texas
Supreme Court Bldg.
P.O. Box 12248
Capitol Station, Texas 78711

RE: Revision of Tex.R. Civil P. 5(b)

Dear Chief Justice:

For convenience, I have enclosed 12 copies of this letter.

In today reviewing Texas R. Civil P. 5(b) and 166b(4), I wondered why there is still a "good cause" standard there, when similar problems occuring in the appellate process only require a "reasonable expalanation." See T.R.A.P. 41(a)(2), 54(c) and 73(b). Can a change be made?

Please refer this letter for consideration to the members of the Supreme Court and to the Court's Committee on rule revisions.

Sincerely yours,

JOSEPH A. CONNORS III

JAC/dg

4543.001

tyh civ

3-21-90

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SAN ANTONIO
DALLAS
LOS ANGELES
LONDON
ZURICH

FULBRIGHT JAWORSKI & REAVIS McGRATH
NEW YORK

March 13, 1990

Re: Proposed Changes

TO: SUPREME COURT ADVISORY COMMITTEE: SUBCOMMITTEE ON RULES 15 TO 166

Enclosed please find a copy of a memorandum from J. Todd Shields regarding proposed changes to Rule 6 of the Texas Rules of Civil Procedure.

Please provide me with your comments on this proposed change as soon as possible.

Thank you for your cooperation.

Very truly yours,

David J. Beck

DJB/st

Enclosures

cc: Luther H. Soules, III, Esq.

1718B

SUPREME COURT ADVISORY COMMITTEE

Mr. Gilbert T. Adams, Jr.
Law Offices of Gilbert T. Adams
1855 Calder Avenue
Beaumont, Texas 77701

Mr. Pat Beard
Beard & Kultgen
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Waco, Texas 76702-1117

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Mr. Broadus A. Spivey
Spivey & Grigg
P. O. Box 2011
Austin, Texas 78768

Honorable Linda B. Thomas
Judge, 256th District Court
Old Red Courthouse, 2nd Floor
Dallas, Texas 75202

Mr. Kenneth D. Fuller
Koons, Rasor, Fuller & McCurley
2311 Cedar Springs Road, Suite 300
Dallas, Texas 75201

1717B

TRCP 6

FULBRIGHT & JAWORSKI
1301 McKinney Street
Houston, Texas

MEMORANDUM

TO: David J. Beck

DATE: March 8, 1990

FROM: J. Todd Shields

RE: Supreme Court Rules Advisory Committee

David, I had occasion to meet with Constable Walter Rankin recently on another matter, and he mentioned that he is trying to get Rule 6 of the Texas Rules of Civil Procedure amended so as to permit service of process and subpoenas on Sundays. The current rule provides as follows:

> No civil suit shall be commenced nor process issued or served on Sunday, except in cases of injunction, attachment, garnishment, sequestration, or distress proceedings; provided that citation by publication published on Sunday shall be valid.

Constable Rankin indicated that his constables are available to serve process on Sunday, and believe that allowing service on Sunday would be beneficial in that in many instances individuals can be located at home on Sunday when they are almost impossible to find at other times. He also indicated that the lower level of traffic and business activity on Sunday would allow the process to be served in a very time-efficient manner.

Although I have not yet had a chance to study the matter in depth, I suspect that the rationale for Rule 6 is probably not much different from our old "Blue Law." As you may recall, our partner Linda Addison was successful in having the Texas Blue Law struck down on constitutional grounds back in 1985. Tom Phillips, sitting as a trial judge, held that there was no rational relationship between the Blue Law and the state's legitimate exercise of the police power to protect the health, safety and welfare of the people, and pending the appeal, the legislature repealed the statute. I think the prohibition against service of process on Sunday is largely an anachronistic vestige of the old Blue Law days and, like the Blue Law, should be repealed.

I personally favor amending Rule 6 to allow service of process and subpoenas on Sunday, and I would appreciate it if you would take it up with the Supreme Court Rules Advisory Committee at the appropriate time.

J.T.S.

JTS/ig

Rule 6. Suits Commenced on Sunday.

No civil suit shall be commenced nor process issued or served on Sunday, except in cases of injunction, attachment, garnishment, sequestration, or distress proceedings; provided that citation by publication on Sunday shall be valid.

Rule 6 is vague inasmuch as no clear or official definition of the word "PROCESS" can be found. It would be helpful if the rule were clarified to define the word "PROCESS". The following definition of "PROCESS" is from Blacks Law Dictionary.

Civil and Criminal Proceedings

Process is defined as any means used by court to acquire or exercise its jurisdiction over a person or over specific property. [Austin Liquor Mart, Inc. v. Department of Revenue, 18 Ill.App.3d 894,310 N.E.2d 719,728] Means whereby court compels appearance of defendant before it or a compliance with its demands. [Dansby v. Dansby, 222 Ga. 118,149 S.E. 2d 252,254].

When actions were commenced by original writ, instead of, as at present, by summons, the method of compelling the defendant to appear was by what was termed "original process," being founded on the original writ, and so called also to distinguish it from "mesne" or "intermediate" process, which was some writ or process which issued during the progress of the suit. The word "process," however, as now commonly understood, refers to a summons, or, summons and complaint, and less commonly, to a writ.

SUBCOMMITTEE REPORT
RULES 1-14
TEXAS RULES OF CIVIL PROCEDURE

Rule 6: There were comments from some of the constables who objected to not being able to serve process on Sunday. Again, since this had not been dealt with previously by the committee as a whole, we reserve for future action.

Respectfully,

Kenneth D. Fuller '58

Kenneth D. Fuller

OFFICE OF
WALTER H. RANKIN, CONSTABLE
PRECINCT NO. 1, HARRIS COUNTY
HOUSTON, TEXAS

November 28, 1989

6
534
536

Rule 6. Suits commenced on Sunday

No civil suit shall be commenced nor process issued or served on Sundays,...

COMMENT: Although this rule is not on the agenda for a proposed amendment, I would like to offer one suggestion. At your first opportunity I would appreciated your consideration on a amendment to Rule 6 of the Texas Rules of Court. Rule 6 presently prohibits service of civil citations on Sundays. Our society has changed greatly to a progressive, mobile one. Law enforcement operates on a 24 hour, 7 day a week schedule. The service of all civil process on Sunday would be one more step toward expediting the civil process system.

4543.001 5-21-92

hhd
LHS

LAW OFFICES OF
Sharpe Bates & Spurlock
A PROFESSIONAL CORPORATION

J. Shelby Sharpe
Gerald A. Bates
Dean Spurlock
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(817) 332-6818 FAX

May 19, 1992

HHD

Mr. Luke Soules
SOULES & WALLACE
Tenth Floor, Republic of Texas Plaza
175 East Houston Street
San Antonio, TX 78205-2230

SCAC Supp

Re: Rule 13 and Rule 215

Dear Luke:

What action, if any, did the Supreme Court Advisory Committee take on Rule 13 and Rule 215 which the Committee on Administration of Justice recommended be substantially rewritten?

Very truly yours,

Shelby

J. SHELBY SHARPE

JSS/bc

Monday, June 3, 1991

HHD TRCP R 13 SubC
Agenda
Jo Heckel
Costs — Evelyn.

THE NATIONAL LAW JOURNAL

Court Panel Recommends Rule 11 Alterations

WASHINGTON — A federal court rules advisory committee will recommend significant changes in the controversial Rule 11, which provides sanctions against attorneys who file "frivolous" pleadings. (NLJ, May 20.)

After two days of discussion ending May 24, the committee, chaired by U.S. District Chief Judge Sam C. Pointer Jr. of Birmingham, Ala., agreed on alterations that will offer new avenues to avoid sanctions in many cases in which they might now be imposed.

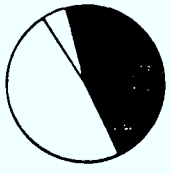
The committee settled on a "safe harbor" concept that would allow lawyers to withdraw frivolous motions once the errors in fact or law were pointed out by either the judge or opposing counsel. "This should satisfy the civil rights bar, who have claimed that sitting without resources somewhere they didn't have a chance to do investigation," said U.S. District Judge William Bertelsman of Covington, Ky.

The draft rule emphasizes deterring frivolous litigation rather than compensating the other party, calling for "appropriate" sanctions and encouraging non-monetary punishments. But a lawyer would be open to sanctions at any point during litigation that a frivolous assertion becomes evident to the lawyer.

These proposed revisions represent the first major step toward final approval.

Should a "safe harbor" be restored to TRCP 13?

Results of Rule 11 *Litigation News* Fax Poll

1. Rule 11 should be:

22% retained in its present form
25% repealed
48% amended
5% no opinion

2. I favor the following amendments to Rule 11:

a) Requiring leave of court to file a sanctions motion:

favor	oppose
37%	63%

b) Requiring peer review of any sanctions motion:

favor	oppose
29%	71%

c) Prohibiting lawyers from passing on the costs of sanctions to their client or its insurer:

favor	oppose
33%	67%

d) Limiting sanctions to deter misconduct rather than compensate the victims of litigation abuse:

favor	oppose
40%	60%

e) Prohibiting the filing of sanctions motions until the end of the litigation:

favor	oppose
31%	69%

f) Requiring an evidentiary hearing on sanctions motions:

favor	oppose
57%	43%

g) Requiring findings of fact and conclusions of law on any award of sanctions:

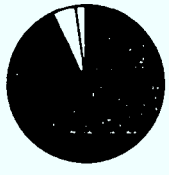
favor	oppose
73%	27%

h) Permitting a broader standard of review than abuse of discretion:

favor	oppose
58%	42%

i) Making sanctions for violations of Rule 11 permissive rather than mandatory:

favor	oppose
63%	37%

3. Rule 11 has had the effect of making lawyers stop and think sufficiently before signing pleadings.

19% agree strongly
53% agree
21% disagree
5% disagree strongly
2% no opinion

4. The cost of Rule 11 proceedings has exceeded its benefit.

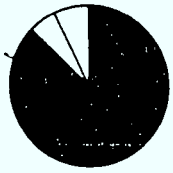
31% agree strongly
23% agree
31% disagree
12% disagree strongly
3% no opinion

5. Rule 11 sanctions have been imposed in a discriminatory fashion against particular groups of lawyers or litigants.

20% agree strongly
18% agree
39% disagree
12% disagree strongly
11% no opinion

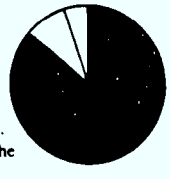
6. Rule 11 injures the civility of litigation because it causes lawyers to impugn one another's motives and professionalism, and to seek to impose burdens directly on one another.

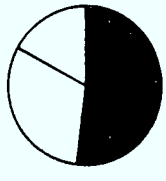
32% agree strongly
25% agree
30% disagree
12% disagree strongly
1% no opinion

7. The filing of a sanctions motion more often reflects the frayed relations between counsel already existing because of the unprofessional conduct giving rise to the motion.

20% agree strongly
38% agree
29% disagree
6% disagree strongly
7% no opinion

8. Rule 11 stifles creativity.

23% agree strongly
21% agree
35% disagree
17% disagree strongly
4% no opinion

9. Sanctions motions should be filed:

59% promptly after the allegedly sanctionable conduct occurs or is discovered.
27% at the end of the litigation.
9% other
5% no opinion

10. In your experience the size of sanctions imposed under Rule 11 is generally:

29% appropriate
23% too large
31% too small
17% no opinion

Unruly Rule 11 Splits Supreme Court

by Mark E. Staib, *Associate Editor*

The Supreme Court's 5-4 decision in *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, (February 26, 1991), has highlighted the growing controversy about Rule 11. Loren Kieve, Washington, DC, Co-Chair of the Federal Procedure Committee, charges that *Business Guides* underscores widespread criticisms of Rule 11. He reiterated two arguments he and other Section leaders, speaking as individuals, had made in a joint comment they submitted last October to the Judicial Conference Advisory Committee on Civil Rules.

Kieve says the case is an example of what the joint comment called the "uneven application of Rule 11 that has itself spawned the very type of aggressive and unfounded litigation tactics that the revised Rule was aimed at ending." He also asserts that the case illustrates the joint comment's argument that "the costs of Rule 11 proceedings, both financial and professional, have exceeded its benefit."

Business Guides upheld the imposition of Rule 11 sanctions on a company whose employee had signed a sworn application for a temporary restraining order. Justice O'Connor's majority opinion relied on the "plain meaning" of the Rule.

Justice Kennedy, writing for the minority, argued that Rule 11 was intended to govern the conduct of counsel, and said that only where "the signer" was acting *pro se* or in some capacity as counsel would sanctions properly be imposed on a party for violating Rule 11's "reasonable inquiry" standard. Because *Business Guides* was represented by counsel, he believed it was inappropriate to sanction the company.

THIS REPORT ON THE *LITIGATION NEWS* FAX POLL WAS PREPARED BY ASSOCIATE EDITOR MARK E. STAIB. AS OF MID-APRIL, APPROXIMATELY 800 MEMBERS RESPONDED TO THE POLL. THIS POLL WAS NOT DESIGNED TO BE STATISTICALLY RELIABLE.

Critics Castigate Rule 11

● "Application of Rule 11 sanctions to counsel handling civil rights or other litigation for plaintiffs on a contingency basis should be outlawed. The potential for blackjack abuse by unscrupulous, well-heeled defense lawyers far outweighs the benefit of present permissibility, where disciplinary remedies are quite sufficient to deal with abusive conduct by the plaintiffs' trial bar.

It is hard enough to fight *and lose* the underdog's uphill battle for equal rights in discrimination cases or for safety for the consuming public, without the constant Sword of Damocles *threat* of sanctions glibly bandied about by corporate and insurance-funded defense lawyers out to "chill"—if not "kill"—such litigation. Once they succeed in knocking off plaintiffs' advocates, as well as the victims of their clients' wrongdoing, their clients will continue their discriminatory and tortious conduct with impunity. Clearly, once plaintiffs' lawyers are discouraged and deterred from this area of litigation, progress in the arena of human rights and tort liability is impeded, if not entirely cut off.

Not until civil rights and other claims traditionally prosecuted by the plaintiffs' trial bar on a contingent fee basis provide those lawyers the same regular, risk-free payments as defense lawyers have, should there be any talk of counsel fee or sanction awards against the plaintiffs' side. Otherwise, equal justice can never become a reality in these important cases, representing the only hope of the poor and disadvantaged segments of our society."

Doris L. Sassower
White Plains, NY

● "Rule 11 has had little effect. The vast majority of lawyers acted in accordance with the spirit of the rule long before it was adopted and will continue to do so if it is repealed. Although the rule has achieved little, it has given rise to a seemingly endless stream of sanctions motions, most of which are unwarranted. The federal courts have enough to do and elimination of Rule 11 would be one way to lessen that burden."

Mark S. Cohen
Omaha, NB

● "Rule 11 has become a red herring in the administration of justice and an obstruction in our judicial system."

Thomas L. Dalrymple
Toledo, OH

● "Rule 11 is another arrow in the S.O.B. litigator's quiver. It serves to protract rather than to expedite litigation."

A veteran plaintiff's lawyer
from the 6th Circuit

● "Rule 11 sanctions were established with a salutary— even laudatory— purpose in mind, the deterrence of unnecessary litigation. In practice, however, Rule 11 sanctions are often used (abused) as a coercive mechanism to force unfavorable settlements or even to force the dismissal of legitimate causes of action. Thus, rather than deter litigation abuses, Rule 11 marshalls under its aegis a whole new series of abuses, making the axiom 'the cure is worse [than] the disease' a truism.

They distract from the judicious consideration of the actual merits of the case, and raise the level of acrimony several decibels. Litigation is supposed to be a civilized manner of resolving disputes which have proved intractable through negotiations. It is not supposed to be a slugfest of recriminations under Rule 11. The rule should be repealed and other solutions proposed to solve the problem of abusive litigation."

Alina A.C.E. Aldape
San Francisco

● "Rule 11 affords another weapon to the arsenal of hate. Rule 11 sanctions simply afford a lawyer another means to spew resentment on the opposing counsel. Such controversies between lawyers become escalated by Rule 11 motions and detract from the real purpose of representing litigants. There must be a means of controlling the conduct of the unscrupulous. Unfortunately, Rule 11 seems not to be the answer. I urge that it be repealed."

Richard J. Mills
Pittsburgh

● "Lay clients have a very difficult time understanding Rule 11 motions. There is some tendency for them to believe that their lawyer has done something wrong for which the client has no responsibility. Every Rule 11 motion causes serious conflict of interest issues.

During the pendency of either the Rule 11 motion or the threat of a Rule 11 motion, settlement or even discussion of settlement is tainted by the question of whether the lawyer is serving personal interests or the interest of the client.

Despite the good intentions underlying Rule 11, its detrimental consequences far outweigh its benefit. Although I have not had the experience myself, I do believe that there are judges out there that have used Rule 11 injudiciously to punish advocacy that does not conform to a particular judge's personal point of view."

William B. Moore
Seattle

● "Amended Rule 11 has simply generated a new subuniverse of adversarial activity which only diverts attention from the merits of the litigation and creates an obsession with a procedural side show.

Rules 26, 36, and 37, 28 U.S.C. § 1927, and the inherent powers of the district court, among others, arm the judiciary with sufficient firepower to control the abuses which amended Rule 11 was apparently designed to prevent, but without the commotion which goes along with it."

Richard M. Bernstein
Philadelphia

● "Whatever [lack of] professionalism exists among lawyers should be addressed in disciplinary proceedings instituted in an unbiased way and not by motions filed by adversaries."

John F. Wells
Oakland

● "I think it would be much more productive to urge judges to control discovery abuse through Rule 37 and to urge judges to grant dismissals and summary judgments earlier in proceedings when warranted.

Unfortunately, far too often judges would rather not take the time and expend the effort needed to use the tools that the Rules already give them to streamline litigation and to clear dockets of cases which should never have been brought. The problem, however, is not in the Rules, but in their application.

Rule 11, with its mushy 'standards,' wastes more precious court time than it saves. It contributes mightily to the disease of which it purports to be the cure."

Alan K. Pollev
Bisbee, AR

● "For limited assets clients/law firms, the additional time and expense of defending frivolous or well-founded Rule 11 actions are chilling."

Michael R. McKenna
Chicago

● "I have been practicing in a law school clinic, and my practice is mostly plaintiff's civil-rights and employment-discrimination. I find that Rule 11 is simply another weapon. Often, the first communication I receive is a Rule 11 threat or an offer to 'settle' for my dropping the case in exchange for a release of Rule 11 liability. I have also experienced judges hinting at or threatening Rule 11 without any cause, in an apparent attempt to make the case go away.

I really do not see the point of Ru... 11. If a pleading is frivolous legally, it should be easy to make it go away. If a pleading is frivolous factually, it should be perjury. Rule 11 does not seem to add anything other than another threat that can be easily perverted."

David L. Lee
Chicago

Inconsistent Decisions Assailed

● "The courts' application of Rule 11 has been grossly inconsistent. Few patterns relevant to the purposes of Rule 11 can seemingly be found among the decisions. This inconsistency seems arbitrary and capricious, in the sense that being struck by lightning is arbitrary and capricious."

Gregory D. Morrison
Las Vegas

● "Perhaps the most disturbing result of Rule 11 proceedings is the great disparity in which the Rule is used by various judges. Some judges' arbitrary and capricious use of the Rule is shocking. Obviously, some judges decisions have been intended to 'send a message' rather than to remedy what appears to be an abuse in that particular case."

William J ...
Tampa

4662.001 hhd LHS

STATE BAR OF TEXAS

5-1-91 SB

Karen R. Johnson
Executive Director

1414 Colorado
P.O. Box 12487
Austin, Texas 78711
(512) 463-1400
FAX: (512) 473-2295

5/1 HLD, Appropriate SCAC Subcs SCAC Agenda TRCP 13 SCAC, Hecht,

April 25, 1991

Mr. Luther H. Soules III
175 E. Houston, 10th Floor
Two Republic Bank Plaza
San Antonio, Texas 78502-2230

RE: Committee on Administration of Justice

Dear Luke:

Enclosed is the report recently filed with the State Bar of Texas Board of Directors by Judge Bob Thomas. This report recommends changes in Rule 13 as well as Rules 226, 226a, and 271 through 279.

The Board of Directors is meeting on May 2nd. At that time this report will be distributed to the members of the Board. The Board members will be advised by President Parsons that the report has been transmitted to the Supreme Court Advisory Committee. Unfortunately, the agenda for the May 2nd meeting had already been posted with the Secretary of State when this request was received. Consequently, the Board can take no official action with regard to these recommendations.

The next meeting of the Board is scheduled for June 19. Rather than delay these recommendations, it was our decision to forward them on to you. Should questions or comments be raised by members of the Board of Directors they will be forwarded to you.

I trust this procedure meets your approval. If you have questions please do not hesitate to contact me.

Sincerely,

Karen R. Johnson

Enclosure

CC: Hon. Nathan Hecht
Hon. Bob Thomas
Mr. James N. Parsons III
Mr. Richard Hile
Mr. Bob Dunn
Ms. Colleen McHugh

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording of existing Rule:

RULE 13. EFFECT OF SIGNING OF PLEADINGS, MOTIONS AND OTHER PAPERS; SANCTIONS

The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, 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. Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215-2b, upon the person who signed it, a represented party, or both.

Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order. "Groundless" for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification or reversal of existing law. A general denial does not constitute a violation of this rule. The amount requested for damages does not constitute a violation of this rule.

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

RULE 13. EFFECT OF ~~SIGNING~~ FILING OF PLEADINGS, MOTIONS AND OTHER PAPERS; SANCTIONS

1. **Sanctionable Conduct.** An attorney or party shall not file a suit, pleading, motion or any other paper in any court proceeding:

(a) which contains a knowingly false statement; or
(b) which is fictitious for the purpose of obtaining an opinion from t h e court; or
(c) which in whole or in part has no basis in law or fact for a good faith argument for the extension, modification or reversal of existing law and is filed either in bad faith or for harassment.

2. **Effect of Signature.** The signature of an attorney or a party constitutes a certificate that such person has read the pleading, motion or other paper and to the best of such person's knowledge, information and belief, after reasonable inquiry, the document filed does not violate Section 1 of this rule.

3. **Failure to Comply.** Any attorney or party who files a document which violates Section 1 of the rule shall be subject to sanctions. The court, upon motion or upon its own initiative, after notice and hearing, shall impose upon the attorney or party or both who signed such document an appropriate sanction taking into consideration the matters in Section 5 of this rule and those available under Rule 215-2b.

4. **Procedure.** The motion or initiative shall be in writing and state the specific grounds therefore. If the motion or initiative alleges a pleading, motion or other paper has no basis in fact, then the motion or initiative shall state specifically each fact which is without basis and be supported by the affidavit of a person or persons with knowledge or other sworn testimony attached. Except on leave of court, the adverse party, not later than seven (7) days prior to the day of hearing may file a written response. Service of any response shall be accomplished on the movant not later than seven (7) days prior to the day of hearing, except on leave of court. No oral testimony shall be received at the hearing unless an issue of fact is raised by a timely filed response. An issue of fact is raised by an affidavit of a person with knowledge or other sworn testimony attached to the response. Oral testimony shall be received only regarding the fact or facts put in issue by the affidavits or other sworn testimony. The courts shall presume that pleadings, motions, and other papers are filed in good faith. A finding of sanctionable conduct shall be based upon clear and convincing proof.

5. **Matters to be Considered in Determining Sanctions.** Following a determination of a violation of this rule, the court will receive testimony to determine appropriate sanctions. In making this determination, the court shall take into account (1)

the severity of the violation; (2) whether bad faith was involved; (3) the history and experience of the one to be sanctioned; (4) a reasonable amount to compensate the injured caused by the violation; (5) an amount necessary for deterrence; and (6) such other matters as the court deems appropriate so that sanctions fit the violation.

6. **Exemptions.** A general denial does not constitute a violation of this rule. The amount requested for damages does not constitute a violation of this rule.

7. **Findings of Fact and Conclusions of Law.** Upon the written request of any attorney or party to the proceedings which is filed with ten (10) days of the signing of an order of sanctions, the court shall file findings of fact and conclusions of law within thirty (30) days of the signing of the order. Notice of the filing of the request shall be served as provided by Rule 21a.

Comment to 1991 changes: Section 1 describes the three kinds of conduct authorizing sanctions. Section 2 clarifies that only those signing are subject to violations of the rule, not non-signing individuals related to the case. Section 3 outlines how the process of the rule is initiated and due process requirements afforded. Section 4 sets out the procedure for enforcement of the rule and declares the level of proof necessary for sanctions to be proper. Section 5 codifies the case law on sanctionable conduct. Section 6 declares two matters in instruments filed which are not subject to the rule. Section 7 provides for discovery of the basis of a sanctions order so the sanctioned person or any other interested person wanting the basis of the order may obtain it.

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

Rule 13 is too ambiguous, poorly organized, lacking in satisfying due process and insufficiently instructive to the bench and bar in observing it. The comments explain the reasons for the need to rewrite it so that sanctionable conduct is clearly defined and how it should be addressed. Because sanctions are so consequential, they should only be assessed based upon a high standard of proof. This will also provide a better appellate review than abuse of discretion.

Respectfully submitted,

/s/ SHELBY SHARPE
SUITE 2400
500 THROCKMORTON STREET
FORT WORTH, TEXAS 76102

Date: April 13, 1991

Rule 13. The committee recommended a complete revision of Rule 13. The changes would (1) specifically define santionable conduct, (2) clarify the effect of an attorney's or party's signature, (3) outline the procedure for enforcing the rule to satisfy due process, (4) increase level of proof to establish a violation of rule to be clear and convincing, and (5) codifies case law on criteria for imposing sanctions.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

JOSEPH F. WEIS, JR
CHAIRMAN

JAMES E. MACKLIN JR
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
JON O. NEWMAN
APPELLATE RULES
JOHN F. GRADY
CIVIL RULES
LELAND C. NIELSEN
CRIMINAL RULES
LLOYD D. GEORGE
BANKRUPTCY RULES

August 2, 1990

TO THE CHAIRMAN, MEMBERS AND REPORTER OF THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE AND THE CHAIRMAN, MEMBERS, AND LIAISON MEMBER OF THE ADVISORY COMMITTEE ON CIVIL RULES

Enclosed is a copy of a "Call for Comment" on Rule 11, and other related rules of the Federal Rules of Civil Procedure, which is being circulated to the bench and bar and to the public generally. The Advisory Committee on the Rules of Civil Procedure seeks such comments prior to November 1, 1990, in order to facilitate its consideration of the operation of the sanctions rules.

Sincerely,

James E. Macklin, Jr.
Secretary

Enclosure

cc: Professor Paul D. Carrington

CALL FOR WRITTEN COMMENTS ON RULE 11

OF THE FEDERAL RULES OF CIVIL PROCEDURE

AND RELATED RULES

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES

AUGUST 1990

STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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Justice Michael D. Zimmerman Supreme Court of Utah	Larrine S. Holbrooke, Esquire
	James Powers, Esquire

Professor Paul D. Carrington, Reporter

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D. C. 20544

TO THE BENCH AND BAR:

The Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure has embarked upon a study of Rule 11 and related rules, and has requested that the bench and bar, and the public generally, provide comments concerning the operation of the sanctions rules.

Written comment should be received in accordance with the attached description no later than November 1, 1990. All communications should be addressed to the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D. C. 20544.

Joseph F. Weis, Jr.
Chairman, Standing Committee on
Rules of Practice and Procedure

James E. Macklin, Jr.
Secretary

August 1, 1990

PROCEDURES FOR THE CONDUCT OF BUSINESS BY THE JUDICIAL CONFERENCE COMMITTEES ON RULES OF PRACTICE AND PROCEDURE

Scope

These procedures govern the operations of the Judicial Conference Committee on Rules of Practice, Procedure, and Evidence (Standing Committee) and the various Judicial Conference Advisory Committees on Rules of Practice and Procedure in drafting and recommending new rules of practice, procedure, and evidence and amendments to existing rules.

Part I - Advisory Committees

1. Functions

Each Advisory Committee shall carry on "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use" in its particular field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary.

2. Suggestions and Recommendations

Suggestions and recommendations with respect to the rules should be sent to the Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544, who shall, to the extent feasible, acknowledge in writing every written suggestion or recommendation so received and shall refer all suggestions and recommendations to the appropriate Advisory Committee. To the extent feasible, the Secretary, in consultation with the Chairman of the Advisory Committee, shall advise the person making a recommendation or suggestion of the action taken thereon by the Advisory Committee.

3. Drafting Rules Changes

a. An Advisory Committee shall meet at such times and places as the Chairman may authorize. All Advisory Committee meetings shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public and states the reason for closing the meeting. Each meeting shall be preceded by notice of the time and place of the meeting, including publication in the Federal Register, sufficient to permit interested persons to attend.

b. The reporter assigned to each Advisory Committee shall, under the direction of the Committee or its Chairman, prepare initial draft rules changes, "Committee Notes" explaining their purpose and intent, copies or summaries of all written recommendations and suggestions received by the Advisory Committee, and shall forward them to the Advisory Committee.

c. The Advisory Committee shall then meet to consider the draft proposed new rules and rules amendments, together with Committee Notes, make revisions therein, and submit them for approval of publication to the Standing Committee, or its Chairman, with a written report explaining the Committee's action, including any minority or other separate views.

4. Publication and Public Hearings

a. When publication is approved by the Standing Committee, the Secretary shall arrange for the printing and circulation of the proposed rules changes to the bench and bar, and to the public generally. Publication shall be as wide as practicable. Notice of the proposed rule shall be published in the Federal Register and copies provided to appropriate legal publishing firms with a request that they be timely included in their publications. The Secretary shall also provide copies to the chief justice of the highest court of each state and, insofar as is practicable, to all individuals and organizations that request them.

b. In order to provide full notice and opportunity for comment on proposed rule changes, a period of at least six months from the time of publication of notice in the Federal Register shall be permitted, unless a shorter period is approved under the provisions of subparagraph d of this paragraph.

c. An Advisory Committee shall conduct public hearings on all proposed rules changes unless elimination of such hearings is approved under the provisions of subparagraph d of this paragraph. The hearings shall be held at such times and places as determined by the chairman of the Advisory Committee and shall be preceded by adequate notice, including publication in the Federal Register. Proceedings shall be recorded and a transcript prepared. Subject to the provisions of paragraph six, such transcript shall be available for public inspection.

d. Exceptions to the time period for public comment and the public hearing requirement may be granted by the Standing Committee or its chairman when the Standing Committee or its chairman determines that the administration of justice requires that a proposed rule change should be expedited and that appropriate public notice and comment may be achieved by a shortened comment period, without public hearings, or both.

5. Subsequent Procedures

a. At the conclusion of the comment period the reporter shall prepare a summary of the written comments received and the testimony presented at public hearings. The Advisory Committee shall review the proposed rules changes in the light of the comments and testimony. If the Advisory Committee makes any substantial change, an additional period for public notice and comment may be provided.

b. The Advisory Committee shall submit proposed rules changes and Committee Notes, as finally agreed upon, to the Standing Committee. Each submission shall be accompanied by a separate report of the comments received and shall explain any changes made subsequent to the original publication. The submission shall also include minority views of Advisory Committee members who wish to have separate views recorded.

6. Records

a. The Chairman of the Advisory Committee shall arrange for the preparation of minutes of all Advisory Committee meetings.

b. The records of an Advisory Committee shall consist of the written suggestions received from the public; the written comments received on drafts of proposed rules, responses thereto, transcripts of public hearings, and summaries prepared by the reporter; all correspondence relating to proposed rules changes; minutes of Advisory Committee meetings; approved drafts of rules changes; and reports to the Standing Committee. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of five years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.

c. Any portion of minutes, relating to a closed meeting and made available to the public, may contain such deletions as may be necessary to avoid frustrating the purposes of closing the meeting as provided in subparagraph 3a.

d. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

Part II - Standing Committee

7. Functions

The Standing Committee shall coordinate the work of the several Advisory Committees, make suggestions of proposals to be studied by them, consider proposals recommended by the Advisory Committees, and transmit such proposals with its recommendation to the Judicial Conference, or recommit them to the appropriate Advisory Committee for further study and consideration.

8. Procedures

a. The Standing Committee shall meet at such times and places as the Chairman may authorize. All Committee meetings shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public and states the reason for closing the meeting. Each meeting shall be preceded by notice of the time and place of the meeting, including publication in the Federal Register, sufficient to permit interested persons to attend.

b. When an Advisory Committee's final recommendations for rules changes have been submitted, the Chairman and Reporter of the Advisory Committee shall attend the Standing Committee meeting to present the proposed rules changes and Committee Notes.

c. The Standing Committee may accept, reject, or modify a proposal. If a modification effects a substantial change, the proposal will be returned to the Advisory Committee with appropriate instructions.

d. The Standing Committee shall transmit to the Judicial Conference the proposed rules changes and Committee Notes approved by it, together with the Advisory Committee report. The Standing Committee's report to the Judicial Conference shall include its recommendations and explain any changes it has made.

9. Records

a. The Secretary shall prepare minutes of all Standing Committee meetings.

b. The records of the Standing Committee shall consist of the minutes of Standing and Advisory Committee meetings, reports to the Judicial Conference, and correspondence concerning rules changes including correspondence with Advisory Committee Chairmen. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of five years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.

c. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

ADVISORY COMMITTEE ON THE CIVIL RULES

JUDICIAL CONFERENCE OF THE UNITED STATES

July 24, 2990

CALL FOR WRITTEN COMMENTS ON RULE 11

OF THE FEDERAL RULES OF CIVIL PROCEDURE

AND RELATED RULES, AS AMENDED IN 1983

In 1983, Civil Rules 11 and 26 were amended to require the district courts to impose sanctions on lawyers or *pro se* litigants who sign pleadings, discovery motions, or other papers having no adequate foundation in law or fact. The purposes of these amendments were to discourage thoughtless or otherwise unjustified uses of the Civil Rules imposing cost, delay, and injustice on adversaries and to encourage the exercise of professional responsibility by lawyers signing papers. The amendments were made with the support of the American Bar Association.

Although a comparable sanction provision was set forth in Rule 37(c) of the original 1938 Civil Rules, and Congress had enacted in 1980 an important amendment to the sanctions provisions of 28 U. S. C. §1927, the 1983 provisions were innovative. There is now a substantial and growing body of experience with these amendments. Over 1000 reported federal decisions have applied or construed the 1983 amendments. There have been several empirical studies of the operation of the rules, and others are now in progress. There is a substantial literature on the subject, as revealed in the bibliography appended to this Call. In addition, the Civil Rules Committee has received a wide variety of comments, some commending the 1983 amendments, others critical of them, and some proposing further revisions of the amended rules.

In light of all the comment, the Committee has resolved to invite written public comments on the operation of the sanctions rules. To be most helpful to the Committee such comments should be brief and, if possible, based on data. Especially desired are specific recomendations responding to apparent problems.

The Committee will review the written comments received before November 1, 1990 at its meeting held at the end of that month. On the basis of that review, it will plan a hearing to be conducted in February, 1991 at which representative views may be presented and discussed. The Committee does not plan to give an audience to every individual who may wish to express a view, but will seek to select discussants who hold diverse positions with respect to the issues raised.

The Committee will also receive in early 1991 an empirical work done by the Federal Judicial Center at the request of the Committee. That report will be circulated to the bench and bar. Additional comment on that study will be welcome, and may be presented at the hearing.

The Committee will review any additional comments on that report as well as the presentations made at the hearing at its regular meeting to be held in late April, 1991. At that meeting, the Committee will consider any proposals for the revision of the sanctions rules. Revisions may be proposed for public comment, or the Committee may conclude to recommend no revisions next year. Or it is possible that the Committee may conclude that further discussions and hearings are in order.

To assist individuals or groups who wish to be heard on any aspect of the sanctions rules, the Committee has compiled a set of ten issues that have been called to its attention and on which comment would be particularly pertinent. The Committee hopes in part to reduce the need for redundant communications by summarizing ideas and suggestions that it has already received, but also it would especially welcome specific proposals addressed to any of these issues that might call for correction. Among the questions to be considered by the Committee are:

1. Have the amendments served their aims in discouraging misuse of the Civil Rules to impose unwarranted expense, delay and other burdens on opposing parties and the courts? Do lawyers more frequently "stop and think" and conduct themselves with professional responsibility before signing pleadings and other papers that may produce unjustifiable burdens on the opposing party? There is now substantial empirical evidence that the amendment of Rule 11 achieved some of the intended effect.

An observation has been made, however, that the 1983 sanctions provisions have been used primarily in connection with alleged pleading abuses, although the ABA and the 1983 Committee were at least as concerned with discovery abuses. Perhaps the discovery abuse problem was overstated, or perhaps it has been remedied by the prophylactic effect of Rule 26(g), or perhaps the potential of that rule has not yet been realized by the bar. If the latter is the case, the Committee would welcome suggestions to enhance the effectiveness of Rule 26(g).

2. Has the financial cost in satellite litigation resulting from the imposition of sanctions perhaps exceeded the benefits resulting from any increased tendency of lawyers to "stop and think?" The Committee was in 1983 concerned about this cost.

It is clear that there have been many motions filed under the rules, and that some of these have themselves been the product of lawyers' failure to "stop and think." On the other hand, it is also clear that some excesses in sanctions motions were the product of the novelty of the rules; a "shakedown" period may have been necessary while lawyers and judges assimilated the innovation and learned to make proper use of it. There is indeed a familiar phenomenon, illustrated by experience with previous revisions of the Federal Rules of Civil Procedure, of a bell-shaped curve of litigation activity responsive to rule change: the activity peaks and then declines to normality as the profession's understanding of the rule is stabilized.

If there is generalized overuse of motions for sanctions that seems likely to continue, are there appropriate amendments that could be made to correct that excess? One proposal on which comment would be welcome is that motions for sanctions might be entertained only by leave of court; it is perhaps questionable whether such a requirement would effect a real economy in the use of the rule, given that the court may often be unable to decide the issue of leave without considering the merits of the sanctions issue. A variation on this suggestion is to eliminate the requirement of leave when the court enters summary judgment or judgment on the pleadings. A third suggestion, also bearing perhaps on other issues arising under the rule, is to require some form of peer review of all motions for sanctions, although this idea lacks sufficient detail to be appraised.

3. Is there an incremental injury to the civility of litigation that results from lawyers impugning one another's motives and professionalism, and seeking to impose burdens directly on one another? Or does the filing of a sanctions motion more often reflect the frayed relations between counsel already existing because of the unprofessional conduct giving rise to the motion?

To some extent, the risk of personal offense to lawyers is inherent in the use of such devices, including such other provisions as those set forth in Rule 37. A decline in the quality of professional relations may, however, result from other aspects of the professional culture, such as changing attitudes towards cooperation, collegiality, and mutual respect.

The frequency of such offenses may have diminished as the bar has become accustomed to the practice. Here, too, the phenomenon of the bell-shaped curve may be functioning.

If injury to professional morale is a continuing problem, would it be helped by requiring an initiative of the court as a predicate to consideration of a sanctions motion? By a system of peer review? Comment on these suggestions or others that might be devised would be welcomed by the Committee.

4. Is there evidence that the sanctions rules have been administered unfairly to any particular group of lawyers or parties? Particular concern has been expressed about the effect on civil rights plaintiffs. Bearing in mind that some categories of cases are extremely unlikely to result in sanctionable conduct (actions by the United States to recover on student loans being an example), it cannot be expected that sanctions will be equally distributed among all categories of federal civil litigation. Data may be subject to conflicting interpretations.

If this is a problem, could an amendment of the Rules alleviate or eliminate it? The Committee would welcome suggestions.

5. It has been suggested that there may be a risk of unfairness to groups even if the sanctions rules are administered with unexceptionable even-handedness by the courts. Such unfairness could accrue from differences in the circumstances of parties and lawyers.

Do the sanctions provisions bear, for example, more heavily on plaintiffs' lawyers than defendants' lawyers? There is some evidence suggesting that courts may be slower to sanction the signing of an answer than a complaint. One suggestion responsive to this concern has been to amend the time for answer under Rule 12 in order to permit more extensive "reasonable inquiry" by defendants. Comment on this suggestion or others addressed to the issue would be welcome.

Differing systems of professional compensation may also cause differences in effects of sanctions on lawyer conduct. Perhaps a *pro bono* lawyer may be more affected by the threat of evenly-administered sanctions than a lawyer representing a client willing and able to invest great resources to wear down a financially weak adversary, and to bear the cost of any sanctions imposed. It seems unlikely that the sanctions provisions deter misconduct by *pro se* litigants for they could but rarely be compelled to pay them. A pertinent proposal has been that attorneys should not be permitted to pass the cost of sanctions on to their clients, or even to liability insurers. Comment on that proposal or others addressed to the issue would be welcome.

6. Concern has also been expressed about the appropriateness of the size of some sanctions imposed under the rules. It is true that large sums have been paid to compensate the full amount of necessary legal expenses incurred as a result of conduct determined by a court to be unprofessional. It has been urged that to require a lawyer to bear the adversary's full legal expenses through discovery and trial because of the lawyer's signing of a pleading with inadequate pre-signing investigation could in some cases be excessive, resulting in "over-deterrence" causing lawyers to be reluctant to assert even marginally well-founded contentions for fear of a sanction colossal in relation to potential benefit to the client served. This effect could combine with that previously stated; large sanctions may be more likely to over-deter lawyers of modest resources, or small firms, than large firms better able to distribute the risk of occasional large sanctions.

In response to this concern, it has been the practice of some courts to favor the use of non-financial sanctions where those may be effective to deter misconduct, because they fall more evenly on lawyers of differing financial means. On the other hand, the aim of the sanctions provisions is to induce lawyers to take into account the unjust consequences of a sanctionable act; those consequences can foreseeably include costs that are disproportionate to any advantage the lawyer may have gained by the misdeed. Moreover, the benefit perceived by the client served by a sanctionable act may in some cases literally be the cost actually inflicted on the adversary by the unprofessional conduct of the lawyer. Is there evidence or experience to illuminate this possible concern for "over-deterrence?" If this is a real problem, what solutions are available?

These concerns for over-deterrence embody the related concern that the rule may have a "chilling effect" on the assertion of meritorious claims or defenses generally, or of some particular category of claims or defenses. The 1983 Committee was concerned about such an effect, particularly with respect to the assertion of novel legal theories. The Committee cautioned courts about sanctioning the assertion of such theories. Has the caution been appropriately observed by the district courts? Are there "chilling effects" that can specifically identified?

One proposal responding to the problems of over-deterrence or chilling effect has been that sanctions should be limited to the purpose of deterrence only, without attempting full compensation of the aggrieved party. Another proposal has been that a party seeking sanctions should be required to show timely notice to the erring opponent that the latter was in violation; this would reduce the risk of over-sized sanctions coming as a surprise to offending counsel.

Another suggestion has been that sanctions should not be imposed on a party or attorney for signing a pleading having sufficient foundation to result in a trial on the merits. This would have the incidental effect of limiting liability for improper certification of a pleading to the expenses associated with securing a summary judgment or a judgment on the pleadings. It is argued in opposition to this proposal that the standard for summary judgment is too forgiving, resolving every doubt in favor of the opposing party. Moreover, there are many cases in which a trial on the merits may be less costly than summary adjudication.

7. Some of these latter suggestions relates to a concern that can be seperately stated regarding the timing of the presentation and resolution of sanctions claims. It has been suggested that some strong defendants have used Rule 11 to intimidate weaker plaintiffs' counsel and to drive a wedge between counsel and client by creating a situation in which counsel has significant self-interests to protect while representing clients. The means to achieve this result is an early motion for large sanctions against the attorney. A suggested response to this problem is to prohibit the making of early sanctions motions, but this conflicts with the aim of affording a sanctioned party or attorney with a full opportunity to avoid the harm. Sanctions motions made at the end of litigation may come as a surprise and as a trap for the unwary that could be equally intimidating to others in later cases. Is there a proper time or occasion that could be specified for the consideration of the sanctions issue? Comment on this question would be welcomed by the Committee.

8. Some observers have regarded the procedures employed in sanctions matters to be deficient. It has been contended that the failure to provide a formal structure to the proceeding may have resulted in dispositions of sanctions issues that have been too summary.

Some proposals for revisions of the rule call for a right to hearing prior to sanction, for a requirement that sanctions be based on findings and conclusions, and that there be a more stringent standard of review than the abuse of discretion standard recently approved by the Supreme Court. Perhaps a revision of the sanctions rules should make provision for a more rigorous procedure. Yet, perhaps it is sufficient in many cases to have the kind of submissions on papers contemplated by Rules 43 and 78.

The extent of the procedure suitable to the sanctions decision may turn in part on the appropriateness of inferences of inadequate investigation drawn from the outcome: if a court is justified in concluding that a bad lawyer product must be the result of bad lawyer investigation, then less procedure is needed. Some courts have approached sanctions in just this way, and there has been sharp criticism of the failure of such courts to inquire into the actual circumstances of a pre-signing investigation. Should the rules address that issue?

Comment and specific suggestions for procedural modifications would be of interest to the Committee.

9. As noted above, it has been argued that the rule leaves more discretion with the district courts than is necessary or desirable, or perhaps tolerable. At the same time, it has also been proposed that the 1983 amendments were too mandatory in language, that "may" should be substituted for "shall" in Rule 11. Comment on that proposal would be welcome.

The Civil Rules have generally favored judicial discretion as a means to secure just results and have avoided procedural rigidity. On the other hand, indeterminacy in the sanctions rules can weaken their instructive value. The conduct of lawyers and litigants is less likely to be influenced by a rule that is unpredictable in application. There may also be a greater injustice associated with a relatively indeterminate rule that gives rise to punitive consequences. Indeterminacy can also increase "occasional" injustice, as where sanctions reflect a bad relationship between the court and an attorney or litigant.

Is the existing law of sanctions too determinate or too indeterminate? Is there data or experience to support either conclusion? One measure of indeterminacy would be a very high degree of difference amongst the individual district judges in the frequency of application of sanctions. On the other hand, such differences amongst individual judges have been closely observed by many lawyers for many decades, and the system has accommodated to them in large measure.

Can the indeterminacy of the rule be diminished? The Committee would welcome suggestions to make the sanctions rules more explicit in order to enable the

judges to be more predictable and even handed in their application if this can be done without causing other perhaps more arbitrary results. At the same time, the Committee is aware of its own inherent limitations; efforts to be more explicit than the subject of the rule will admit are likely to be counterproductive.

10. Concern has been expressed about the relation of the 1983 sanctions rules to related provisions of federal procedure.

Are the sanction rules inconsistent with 28 U.S.C. §1927? With substantive fee-shifting statutes? With F. R. Civ. P. 37? It has been suggested that there are incongruities and that there are an excessive number of overlapping provisions. The Committee would welcome comment and suggestions with respect to the relationship amongst these several sources of sanctions law.

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August 22, 1990

HJD
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✓ Agenda
Cert J
J. Hecht

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

Re: Tex.R.Civ.P. 13

Dear Luke:

Attached is material relating to a study of Federal Rule 11, from which our Rule 13 was derived. I suggest that the Subcommittee Chairman of our Rule 13 be provided this material and follow the progress of the federal rule to see if we want to make any changes in our Rule 13.

Sincerely,

J. Hadley Edgar
Robert H. Bean Professor of Law

JHE/nt
Enclosure

4543.001

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711
(512) 463-1312

February 28, 1990

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

Dear Mr. Soules:

At Justice Hecht's suggestion I am forwarding to you some information on RICO litigation in state courts that was sent to us by a Dallas attorney. As you can glean from his letter to Judge Marshall, Mr. Pezzulli is concerned with avoiding potential problems for the state court system in handling RICO claims in light of procedural differences between the Texas and Federal rules.

I have spoken with Mr. Pezzulli and think I understand why he feels a statewide order is imperative, but do not share his opinion that immediate action is necessary. As a practical matter, creating more paper when no RICO problem yet exists seems premature. I am also unconvinced that a problem, if it develops, cannot be handled more effectively by local rules, on a county-by-county basis. As a procedural matter, I think certain differences between the Texas and Federal rules actually reduce the need for a statewide standing order. The use of special exceptions and summary judgments should be as effective in forcing parties to narrow issues and to weed out inappropriate claims in RICO cases as it is in other litigation. Further, although our Rule 13 does not impose the same duty on lawyers as does Federal Rule 11, Texas Rule 166 should allow a trial judge to keep enough effective control over any potentially complex racketeering case on an individual basis.

I have informed Mr. Pezzulli only that I have forwarded his suggestion to you. If I can be of further assistance, please let me know.

Sincerely,

Elana S. Einhorn
Briefing Attorney to
Justice Nathan L. Hecht

xc: Justice Nathan L. Hecht

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MICHAEL F. PEZZULLI
BOARD CERTIFIED CIVIL TRIAL LAW
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FILE NUMBER

February 21, 1990

VIA TELECOPY

The Honorable Justice Nathan Hecht
Texas Supreme Court
Supreme Court Building, Room A301
Capitol Station
P.O. Box 12248
Austin, Texas 78711

Atten: Elana

Dear Elana:

Pursuant to our telephone conversation of today's date, I am enclosing herewith a copy of the letter I forwarded to Judge Marshall along with the enclosures that may be of some benefit to you.

Please let me know if I can do anything additional to assist the court in formulating a strategy for dealing with state court racketeering litigation.

Very truly yours,

Michael F. Pezzulli

MFP/ar
Enclosures

Ltr-Hecht

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Michael F. Pezzulli
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Texas Board of Legal Specialization

File Number

February 20, 1990

VIA HAND DELIVERY

The Honorable John McClellan Marshall
District Judge
14th District Court
Dallas County Courthouse, 2nd Floor
600 Commerce Street
Dallas, Texas 75202

Re: RICO in State Courts

Dear Judge Marshall:

I am enclosing herewith a copy of the recent Supreme Court Opinion in Tafflin v. Levitt decided on January 22, 1990, wherein the United States Supreme Court held that state courts have concurrent jurisdiction over claims arising under The Racketeer Influenced Corrupt Organizations Act ("RICO"). In addition, I am enclosing herewith a copy of Judge Robert W. Porter's "ORDER REGARDING RICO CLAIM" issued by his court. I am also enclosing a copy of an article from the "Drug Enforcement Newsletter" of the National Association of Attorneys General ("NAAG") where I was interviewed regarding defensive strategies in a racketeering case. I enclose the interview only because it discusses several types of motions that can be filed with respect to a RICO case. I believe the courts should anticipate these various motions and defensive strategies once the RICO cases start being filed in state court.

The problem with RICO cases being filed in Texas state court surrounds the fact that we do not have a corresponding Rule 11 [1] nor do we have a corresponding

[1] Rule 11 provides in relevant part as follows: If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 12(b) [2]. Without these rules, the state courts neither have the capability of sanctioning the parties and the attorneys for improperly filing a RICO case, nor do they have the capability of dismissing the case as having been improvidently filed at the commencement of the litigation. Absent these procedural remedies, there is a distinct chance that the courts could become inundated with RICO litigation sans the ability to dispose of improperly filed matters.

I would suggest that the courts jointly promulgate a standing order regarding RICO claims in the format adopted by Judge Porter. Judge Porter's order is well considered and essentially puts the party advancing the RICO claim to the task of understanding, conceptualizing and determining whether he or she has a bonafide RICO claim immediately after or prior to the filing the action. In the NAAG Newsletter, there is an alternative standing RICO order that was promulgated by the Northern District of Ohio so that you may compare Judge Porter's order with the procedures employed in other jurisdictions.

I would think that the state court has the inherent power to issue the proposed order regarding RICO claims, particularly under Rule 166 dealing with pretrial procedures to the extent that the court may, in its discretion, direct the attorneys to appear before it for a conference to consider the simplification of the issues. The RICO case statement would tend to simplify the issues and may well be an appropriate tool for the court to consider under Rule 166. In the event the party fails to comply with the court's order, then the court has its inherent powers to deal with the direct disobedience of a court order as distinguished from the Rule 13 sanctions, if any.

I also recommend that the court impose a discovery schedule as it relates to the racketeering claim, streamlining the extent of discovery and within what time frames the discovery is to be permitted. This may also tend to streamline the case and make more efficient both the court's and the litigant's time.

I am willing to meet with the Dallas County District Judges to discuss these issues so that any interested party will be able to deal with the anticipated influx of state court actions involving the racketeering statutes in an orderly fashion. If we prepare now, we may be able to circumvent numerous potential problems in the future.

---

[2] Rule 12(b) provides in relevant part as follows: Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19.

I appreciate your taking the time to consider these suggestions and I look forward to working with you in anticipating and dealing with RICO in the state court.

Very truly yours,

Michael F. Pezzulli

MFP/ar
Enclosures

Ltr-Marshall

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA3-88-2161-F

ORDER REGARDING RICO CLAIM

In this action claims have been asserted under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961. Plaintiffs must file by August 25, 1989, a RICO case statement. This statement must include the facts the plaintiffs are relying upon to initiate this RICO complaint as a result of the "reasonable inquiry" required by Fed. R. Civ. P. 11. In particular, this statement shall be in a form which uses the numbers and letters as set forth below, and shall state in detail and with specificity the following information.

1. State whether the alleged unlawful conduct is in violation of 18 U.S.C. §§ 1962(a), (b), (c), and/or (d).

2. List each defendant and state the alleged misconduct and basis of liability of each defendant.

3. List other alleged wrongdoers and state the alleged misconduct of each.

4. List the alleged victims and state how each victim was allegedly injured.

5. Describe the pattern of racketeering activity alleged for each RICO claim. The description of the pattern of racketeering must include the following information:

   a. List the alleged predicate acts and the specific statutes which were allegedly violated;

b. Provide the dates of the predicate acts, the participants in the predicate acts, and a description of the facts surrounding the predicate acts;

c. If the RICO claim is based on the predicate offenses of wire fraud, mail fraud, or fraud in the sale of securities, the "circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). Identify the time, place and contents of the alleged misrepresentations, and the identity of persons to whom and by whom the alleged misrepresentations were made;

d. State whether there has been a criminal conviction for violation of the predicate acts;

e. State whether civil litigation has resulted in a judgment in regard to the predicate acts;

f. Describe how the predicate acts form a "pattern of racketeering activity"; and

g. State whether the alleged predicate acts relate to each other as part of a common plan. If so, describe in detail.

6. Describe in detail the alleged enterprise for each RICO claim. A description of the enterprise shall include the following information:

a. State the names of the individuals, partnerships, corporations, associations, or other legal entities, which allegedly constitute the enterprise;

b. Describe the structure, purpose, function and course of conduct of the enterprise;

c. State whether any defendants are employees, officers or directors of the alleged enterprise;

d. State whether any defendants are associated with the alleged enterprise;

e. State whether you are alleging that the defendants are individuals or entities separate from the alleged enterprise, or that the defendants are the enterprise itself, or members of the enterprise; and

f. If any defendants are alleged to be the enterprise itself, or members of the enterprise, explain whether such defendants are perpetrators, passive instruments, or victims of the alleged racketeering activity.

7. State and describe in detail whether you are alleging that the pattern of racketeering activity and the enterprise are separate or have merged into one entity.

8. Describe the alleged relationship between the activities of the enterprise and the pattern of racketeering activity. Discuss how the racketeering activity differs from the usual and daily activities of the enterprise, if at all.

9. Describe what benefits, if any, the alleged enterprise receives from the alleged pattern of racketeering.

10. Describe the effect of the activities of the enterprise on interstate or foreign commerce.

11. If the complaint alleges a violation of 18 U.S.C. § 1962(a), provide the following information:

a. State who received the income derived from the pattern of racketeering activity or through the collection of an unlawful debt; and

b. Describe the use or investment of such income.

12. If the complaint alleges a violation of 18 U.S.C. § 1962(b), describe in detail the acquisition or maintenance of any interest in or control of the alleged enterprise.

13. If the complaint alleges a violation of 18 U.S.C. § 1962(c), provide the following information:

    a. State who is employed by or associated with the enterprise; and

    b. State whether the same entity is both the liable "person" and the "enterprise" under § 1962(c).

14. If the complaint alleges a violation of 18 U.S.C. § 1962(d), describe in detail the alleged conspiracy.

15. Describe the alleged injury to business or property.

16. Describe the direct causal relationship between the alleged injury and the violation of the RICO statute.

17. List the damages sustained for which each defendant is allegedly liable.

18. Provide any additional information that might be helpful to the court in processing the RICO claim.

Copies of this RICO case statement must be served on opposing counsel. Failure to comply with this order will result in dismissal with prejudice without further notice from the court.

SO ORDERED this 4th day of August, 1989.

ROBERT W. PORTER
CHIEF JUDGE

1ST CASE of Level 1 printed in FULL format.

FRANCINE TAFFLIN, ET AL., PETITIONERS v. JEFFREY A. LEVITT ET AL.

No. 88-1650; The LEXIS pagination of this document is subject to change pending release of the final published version.

SUPREME COURT OF THE UNITED STATES

1990 U.S. LEXIS 568; 58 U.S.L.W. 3468; 58 U.S.L.W. 4157; Fed. Sec. L. Rep. (CCH) P94,880

Argued November 27, 1989

January 22, 1990

SYLLABUS:

[*1] Petitioners, nonresidents of Maryland who are holders of unpaid certificates of deposit issued by a failed Maryland savings and loan association, filed a civil action in the Federal District Court against respondents, former association officers and directors and others, alleging claims under, inter alia, the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. §§ 1961-1968. The court dismissed the action, concluding, among other things, that federal abstention was appropriate as to the civil RICO claims, which had been raised in pending litigation in state court, since state courts have concurrent jurisdiction over such claims. The Court of Appeals affirmed.

Held: State court have concurrent jurisdiction over civil RICO claims. The presumption in favor of such jurisdiction has not been rebutted by any of the factors identified in Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478. Pp. 3-12.

(a) As petitioners concede, there is nothing in RICO's explicit language to suggest that Congress has, by affirmative enactment, divested state courts of civil RICO jurisdiction. To the contrary, § 1964(c)'s grant of federal jurisdiction over civil RICO claims is plainly [*2] permissive and thus does not operate to oust state courts from concurrent jurisdiction. P. 5.

(b) RICO's legislative history reveals no evidence that Congress even considered the question of concurrent jurisdiction, much less any suggestion that Congress affirmative intended to confer exclusive jurisdiction over civil RICO claims on the federal courts. Petitioners' argument that, because Congress modeled § 1964(c) after § 4 of the Clayton Act -- which confers exclusive jurisdiction on the federal courts -- it intended, by implication, to grant exclusive federal jurisdiction over § 1964(c) claims is rejected. Sedima, S. P. R. L. v. Imrex Co., 473 U.S. 479, and Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, are distinguished, since those cases looked to the Clayton Act in interpreting RICO without the benefit of a background juridical presumption of the type presented here. Pp. 5-8.

(c) No "clear incompatibility" exists between state court jurisdiction and federal interests. The interest in uniform interpretation of federal criminal laws, see 18 U. S. C. § 3231, is not inconsistent with such jurisdiction merely state courts would be required to construe the federal crimes [*3] that

constitute RICO predicate acts. Section 1964(c) claims are not "offenses against the laws of the United States," § 3231, and do not result in the imposition of criminal sanctions. There is also no significant danger of inconsistent application of federal criminal law, since federal courts would not be bound by state court interpretations of predicate acts, since state courts would be guided by federal court interpretations of federal criminal law, and since any state court judgments misinterpreting federal criminal law would be subject to direct review by this Court. Moreover, state courts have the ability to handle the complexities of civil RICO actions. Many cases involve asserted violations of state law, over which state courts presumably have greater expertise, and it would seem anomalous to rule that they are incompetent to adjudicate civil RICO claims when such claims are subject to adjudication by U.S. 220, 239. Further, although the fact that RICO's procedural mechanisms are applicable only in federal court may tend to suggest that Congress intended exclusive federal jurisdiction, it does not by itself suffice to create a "clear incompatibility" with federal interests. [*4] And, to the extent that Congress intended RICO to serve broad remedial purposes, concurrent jurisdiction will advance rather than jeopardize federal policies underlying the statute. Pp. 8-12.

865 F. 2d 595, affirmed.

O'CONNOR, J., delivered the opinion for a unanimous Court. WHITE, J., filed a concurring opinion. SCALIA, J., filed a concurring opinion, in which KENNEDY, J., joined.

APPEAL-STATEMENT:
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JUDGES:
Rehnquist, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy

OPINIONBY: O'CONNOR

OPINION:
JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether state courts have concurrent jurisdiction over civil actions brought under the Racketeer Influenced and Corrupt Organizations Act (RICO), Pub. L. 91-452, Title IX, 84 Stat. 941, as amended, 18 U. S. C. §§ 1961-1968.

I

The underlying litigation arises from the failure of Old Court Savings & Loan, Inc. (Old Court), a Maryland savings and loan association, and the attendant collapse of the Maryland Savings-Share Insurance Corp. (MSSIC), a state-chartered nonprofit corporation created to insure accounts in Maryland savings and loan associations [*5] that were not federally insured. See Brandenburg v. Seidel, 859 F. 2d 1179, 1181-1183 (CA4 1988) (reviewing history of Maryland's savings and loan crisis). Petitioners are nonresidents of Maryland who hold unpaid certificates of deposit issued by Old Court. Respondents are the former officers and directors of Old Court, the former officers and directors

of MSSIC, the law firm of Old Court and MSSIC, the accounting firm of Old Court, and the State of Maryland Deposit Insurance Fund Corp., the state-created successor to MSSIC. Petitioners allege various state law causes of action as well as claims under the Securities Exchange Act of 1934 (Exchange Act), 48 Stat. 881, 15 U. S. C. § 78a et seq., and RICO.

The District Court granted respondents' motion to dismiss, concluding that petitioners had failed to state a claim under the Exchange Act and that, because state courts have concurrent jurisdiction over civil RICO claims, federal abstention was appropriate for the other causes of action because they had been raised in pending litigation in state court. The Court of Appeals for the Fourth Circuit affirmed. 865 F. 2d 595 (1989). The Court of Appeals agreed with the District Court that the [*6] Old Court certificates of deposit were not "securities" within the meaning of the Exchange Act, see 15 U. S. C. § 78c(a)(10), and that petitioners' Exchange Act claims were therefore properly dismissed. 865 F. 2d, at 598-599. The Court of Appeals further held, in reliance on its prior decision in Brandenburg v. Seidel, supra, that "a RICO action could be instituted in a state court and that Maryland's comprehensive scheme for the rehabilitation and liquidation of insolvent state-chartered savings and loan associations,' 859 F. 2d at 1191, provided a proper basis for the district court to abstain under the authority of Burford v. Sun Oil Co., 319 U.S. 315 (1943)." 865 F. 2d, at 600 (citations omitted).

To resolve a conflict among the federal appellate courts and state supreme courts, n1 we granted certiorari limited to the question whether state courts have concurrent jurisdiction over civil RICO claims. 490 U.S. (1989). We hold that they do and accordingly affirm the judgment of the Court of Appeals.

n1 Compare McCarter v. Mitcham, 883 F. 2d 196, 201 (CA3 1989) (concurrent jurisdiction); Brandenburg v. Seidel, 859 F. 2d 1179, 1193-1195 (CA4 1988) (same); Lou v. Belzberg, 834 F. 2d 730, 738-739 (CA9 1987) (same), cert. denied, 485 U.S. 993 (1988); Simpson Elec. Corp. v. Leucadia, Inc., 72 N. Y. 2d 450, 530 N. E. 2d 860 (1988) (same); Rice v. Janovich, 109 Wash. 2d 48, 742 P. 2d 1230 (1987) (same); Cianci v. Superior Court, 40 Cal. 3d 903, 710 P. 2d 375 (1985) (same); County of Cook v. MidCon Corp., 773 F. 2d 892, 905, n. 4 (CA7 1985) (dictum); Dubroff v. Dubroff, 833 F. 2d 557, 562 (CA5 1987) (civil RICO claims can "probably" be brought in state court,), with Chivas Products, Ltd. v. Owen, 864 F. 2d 1280, 1286 (CA6 1988) (exclusive jurisdiction); VanderWeyst v. First State Bank of Benson, 425 N. W. 2d 803, 812 (Minn.) (expressing "serious reservations" about assuming concurrent RICO jurisdiction), cert. denied, 488 U.S. (1988). See generally Note, 57 Ford. L. Rev. 271, 271, n. 9 (1988) (listing federal state courts in conflict); Note, 73 Cornell L. Rev. 1047, 1047, n. 5 (1988) (same); Note, 62 St. John's L. Rev. 301, 303, n. 7 (1988) (same). [*7]

II

We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States. See, e. g., Houston v. Moore, 5 Wheat. 1, 25-26 (1820); Claflin v. Houseman, 93 U.S. 130, 136-137 (1876); Plaquemines

P0000087

Tropical Fruit Co. v. Henderson, 170 U.S. 511, 517 (1898); Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507-508 (1962); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-478 (1981). As we noted in Claflin, "if exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it." 93 U.S., at 136; see also Dowd Box, supra, at 507-508 ("We start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law. Concurrent jurisdiction has been a common phenomenon in our judicial history, and [*8] exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule"). See generally 1 J. Kent, Commentaries on American Law *400; The Federalist No. 82 (A. Hamilton); F. Frankfurter & J. Landis, The Business of the Supreme Court 5-12 (1927); H. Friendly, Federal Jurisdiction: A General View 8-11 (1973).

This deeply rooted presumption in favor of concurrent state court jurisdiction is, of course, rebutted if Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim. See, e. g., Claflin, supra, at 137 ("Congress may, if it see[s] fit, give to the Federal courts exclusive jurisdiction") (citations omitted); see also Houston, supra, at 25-26. As we stated in Gulf Offshore:

"In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction. Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or [*9] by a clear incompatibility between state-court jurisdiction and federal interests." 453 U.S., at 478 (citations omitted).

See also Claflin, supra, at 136 (state courts have concurrent jurisdiction "where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case"). The parties agree that these principles, which have "remained unmodified through the years." Dowd Box, supra, at 508, provide the analytical framework for resolving this case.

III

The precise question presented, therefore, is whether state courts have been divested of jurisdiction to hear civil RICO claims "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." Gulf Offshore, supra, at 478. Because we find none of these factors present with respect to civil claims arising under RICO, we hold that state courts retain their presumptive authority to adjudicate such claims.

At the outset, petitioners concede that there is nothing in the language of RICO--much less an "explicit statutory directive"--to suggest that Congress has, by affirmative [*10] enactment, divested the state courts of jurisdiction to hear civil RICO claims. The statutory provision authorizing civil RICO claims provides in full:

"Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U. S. C. § 1964(c) (emphasis added).

This grant of federal jurisdiction is plainly permissive, not mandatory, for "[t]he statute does not state nor even suggest that such jurisdiction shall be exclusive. It provides that suits of the kind described 'may' be brought in the federal district courts, not that they must be." Dowd Box, supra, at 506. Indeed, "[i]t is black letter law . . . that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action." Gulf Offshore, supra, at 479 (citing United States v. Bank of New York & Trust Co., 296 U.S. 463, 479 (1936)).

Petitioners thus rely solely on the second and third factors suggested in Gulf Offshore, arguing that exclusive [*11] federal jurisdiction over civil RICO actions is established "by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests," 453 U.S., at 478.

Our review of the legislative history, however, reveals no evidence that Congress even considered the question of concurrent state court jurisdiction over RICO claims, much less any suggestion that Congress affirmatively intended to confer exclusive jurisdiction over such claims on the federal courts. As the Courts of Appeals that have considered the question have concluded, "[t]he legislative history contains no indication that Congress ever expressly considered the question of concurrent jurisdiction; indeed, as the principal draftsman of RICO has remarked, 'no one even thought of the issue.'" Brandenburg, 859 F. 2d, at 1193 (quoting Flaherty, Two States Lay Claim to RICO, Nat. L. J., May 7, 1984, p. 10, col. 2); see also Lou v. Belzberg, 834 F. 2d 730, 736 (CA9 1987) ("The legislative history provides 'no evidence that Congress ever expressly considered the question of jurisdiction; indeed, the evidence establishes that its attention was focused solely on whether [*12] to provide a private right of action'") (citation omitted), cert. denied, 485 U.S. 993 (1988); Chivas Products Ltd. v. Owen, 864 F. 2d 1280, 1283 (CA6 1988) ("There is no 'smoking gun' legislative history in which RICO sponsors indicated an express intention to commit civil RICO to the federal courts"). Petitioners nonetheless insist that if Congress had considered the issue, it would have granted federal courts exclusive jurisdiction over civil RICO claims. This argument, however, is misplaced, for even if we could reliably discern what Congress' intent might have been had it considered the question, we are not at liberty to so speculate; the fact that Congress did not even consider the issue readily disposes of any argument that Congress unmistakably intended to divest state courts of concurrent jurisdiction.

Sensing this void in the legislative history, petitioners rely, in the alternative, on our decisions in Sedima, S. P. R. L. v. Imrex Co., 473 U.S. 479 (1985), and Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143 (1987), in which we noted that Congress modeled § 1964(c) after § 4 of the Clayton Act, 15 U. S. C. § 15(a). See Sedima, supra, at 489; Agency Holding, supra, [*13] at 151-152. Petitioners assert that, because we have interpreted § 4 of the Clayton Act to confer exclusive jurisdiction on the federal courts, see, e g., General Investment Co. v. Lake Shore & M. S. R. Co., 260 U.S. 261, 286-288

(1922), and because Congress may be presumed to have been aware of and incorporated those interpretations when it used similar language in RICO, cf. Cannon v. University of Chicago, 441 U.S. 677, 694-699 (1979), Congress intended, by implication, to grant exclusive federal jurisdiction over claims arising under § 1964(c).

This argument is also flawed. To rebut the presumption of concurrent jurisdiction, the question is not whether any intent at all may be divined from legislative silence on the issue, but whether Congress in its deliberations may be said to have affirmatively or unmistakably intended jurisdiction to be exclusively federal. In the instant case, the lack of any indication in RICO's legislative history that Congress either considered or assumed that the importing of remedial language from the Clayton Act into RICO had any jurisdictional implications is dispositive. The "mere borrowing of statutory language does not imply that Congress also intended [*14] to incorporate all of the baggage that may be attached to the borrowed language." Lou, supra, at 737. Indeed, to the extent we impute to Congress knowledge of our Clayton Act precedents, it makes no less sense to impute to Congress knowledge of Clafin and Dowd Box, under which Congress, had it sought to confer exclusive jurisdiction over civil RICO claims, would have had every incentive to do so expressly.

Sedima and Agency Holding are not to the contrary. Although we observe in Sedima that "[t]he clearest current in [the legislative] history [of § 1964(c)] is the reliance on the Clayton Act model," 473 U.S., at 489, that statement was made in the context of noting the distinction between "private and governmental actions" under the Clayton Act. Ibid. We intimated nothing as to whether Congress' reliance on the Clayton Act implied any intention to establish exclusive federal jurisdiction for civil RICO claims, and in Sedima itself we rejected any requirement of proving "racketeering injury," noting that to borrow the "antitrust injury" requirement from antitrust law would "creat[e] exactly the problems Congress sought to avoid." Id., at 498-499. Likewise, in Agency Holding we were [*15] concerned with "borrowing," in light of legislative silence on the issue, an appropriate statute of limitations period from an "analogous" statute. 483 U.S., at 146. Under such circumstances, we found it appropriate to borrow the statute of limitations from the Clayton Act. Id., at 152. In this case, by contrast, where the issue is whether jurisdiction is exclusive or concurrent, we are not free to add content to a statute via analogies to other statutes unless the legislature has specifically endorsed such action. Under Gulf Offshore, legislative silence counsels, if not compels, us to enforce the presumption of concurrent jurisdiction. In short, in both Sedima and Agency Holding we looked to the Clayton Act in interpreting RICO without the benefit of a background juridical presumption of the type present in this case. Thus, to whatever extent the Clayton Act analogy may be relevant to our interpretation of RICO generally, it has no place in our inquiry into the jurisdiction of the state courts.

Petitioners finally urge that state court jurisdiction over civil RICO claims would be clearly incompatible with federal interests. We noted in Gulf Offshore that factors indicating clear [*16] incompatibility "include the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims." 453 U.S., at 483-484 (citation and footnote omitted). Petitioners' primary contention is that concurrent jurisdiction is clearly incompatible with the federal interest in uniform interpretation of federal criminal laws, see 18

U. S. C. § 3231, n2 because state courts would be required to construe the federal crimes that constitute predicate acts defined as "racketeering activity," see 18 U. S. C. §§ 1961(1)(B), (C), and (D). Petitioners predict that if state courts are permitted to interpret federal criminal statutes, they will create a body of precedent relating to those statutes and that the federal courts will consequently lose control over the orderly and uniform development of federal criminal law.

n2 Title 18 U. S. C. § 3231 provides in full:

"The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

"Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof." [*17]

We perceive no "clear incompatibility" between the state court jurisdiction over civil RICO actions and federal interests. As a preliminary matter, concurrent jurisdiction over § 1964(c) suits is clearly not incompatible with § 3231 itself, for civil RICO claims are not "offenses against the laws of the United States," § 3231, and do not result in the imposition of criminal sanctions--uniform or otherwise. See Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 240-241 (1987) (civil RICO intended to be primarily remedial rather than punitive).

More to the point, however, our decision today creates no significant danger of inconsistent application of federal criminal law. Although petitioners' concern with the need for uniformity and consistency of federal criminal law is well-taken, see Ableman v. Booth, 62 U.S. 506, 517-518 (1859); cf. Musser v. Utah, 333 U.S. 95, 97 (1948) (vague criminal statutes may violate the Due Process Clause), federal courts, pursuant to § 3231, would retain full authority and responsibility for the interpretation and application of federal criminal laws, for they would not be bound by state court interpretations of the federal offenses constituting [*18] RICO's predicate acts. State courts adjudicating civil RICO claims will, in addition, be guided by federal court interpretations of the relevant federal criminal statutes, just as federal courts sitting in diversity are guided by state court interpretations of state law, see, e. g., Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967). State court judgments misinterpreting federal criminal law would, of course, also be subject to direct review by this Court. Thus, we think that state court adjudication of civil RICO actions will, in practice, have at most a negligible effect on the uniform interpretation and application of federal criminal law, cf. Pan-American Petroleum Corp. v. Superior Court of Delaware, Newcastle County, 366 U.S. 656, 665-666 (1961) (rejecting claim that uniform interpretation of the Natural Gas Act will be jeopardized by concurrent jurisdiction), and will not, in any event, result in any more inconsistency than that which a multi-membered, multi-tiered federal judicial system already creates, cf. H. J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. ---, ---, n. 2 (1989) (surveying conflict among federal appellate courts over RICO's "pattern of racketeering [*19] activity" requirement).

Moreover, contrary to petitioners' fears, we have full faith in the ability of state courts to handle the complexities of civil RICO actions, particularly

since many RICO cases involve asserted violations of state law, such as state fraud claims, over which state courts presumably have greater expertise. See 18 U. S. C. § 1961(1)(A) (listing state law offenses constituting predicate acts); Gulf Offshore, 453 U.S., at 484 ("State judges have greater expertise in applying" laws "whose governing rules are borrowed from state law"); see also Sedima, 473 U.S., at 499 (RICO "has become a tool for everyday fraud cases"); BNA, Civil RICO Report, Vol. 2, No. 44, p. 7 (Apr. 14, 1987) (54.9% of all RICO cases after Sedima involved "common law fraud" and another 18.0% involved either "nonsecurities fraud" or "theft or conversion"). To hold otherwise would not only denigrate the respect accorded co-equal sovereigns, but would also ignore our "consistent history of hospitable acceptance of concurrent jurisdiction," Dowd Box, 368 U.S., at 508. Indeed, it would seem anomalous to rule that state courts are incompetent to adjudicate civil RICO suits when we have recently found [*20] no inconsistency in subjecting civil RICO claims to adjudication by arbitration. See Shearson/American Express, 482 U.S., at 239 (rejecting argument that "RICO claims are too complex to be subject to arbitration" and that "there is an irreconcilable conflict between arbitration and RICO's underlying purposes").

Petitioners further note, as evidence of incompatibility, that RICO's procedural mechanisms include extended venue and service-of-process provisions that are applicable only in federal court, see 18 U. S. C. § 1965. We think it sufficient, however, to observe that we have previously found concurrent state court jurisdiction even where federal law provided for special procedural mechanisms similar to those found in RICO. See, e. g., Dowd Box, supra (finding concurrent jurisdiction over Labor Management Relations Act § 301(a) suits, despite federal enforcement and venue provisions); Maine v. Thiboutot, 448 U.S 1, 3, n. 1 (1980) finding concurrent jurisdiction over 42 U. S. C. § 1983 suits, despite federal procedural provisions in § 1988); cf. Mathorn v. Lovorn, 457 U.S. 255, 269 (1982) (finding concurrent jurisdiction over disputes regarding the applicability of § 5 of the Voting [*21] Rights Act of 1965, 42 U. S. C. § 1973c, despite provision for a three-judge panel). Although congressional specification of procedural mechanisms applicable only in federal court may tend to suggest that Congress intended exclusive federal jurisdiction, it does not by itself suffice to create a "clear incompatibility" with federal interests.

Finally, we note that, far from disabling or frustrating federal interests, "[p]ermitting state courts to entertain federal causes of action facilitates the enforcement of federal rights." Gulf Offshore, 453 U.S., at 478, n. 4; see also Dowd Box, supra, at 514 (conflicts deriving from concurrent jurisdiction are "not necessarily unhealthy"). Thus, to the extent that Congress intended RICO to serve broad remedial purposes, see, e. g., Pub. L. 91-452, § 904(a), 84 Stat. 947 (RICO must "be liberally construed to effectuate its remedial purposes"); Sedima, 473 U.S., at 492, n. 10 ("[I]f Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident"), concurrent state court jurisdiction over civil RICO claims will advance rather than jeopardize federal policies underlying the statute. [*22]

For all of the above reasons, we hold that state courts have concurrent jurisdiction to consider civil claims arising under RICO. Nothing in the language, structure, legislative history, or underlying policies of RICO suggests that Congress intended otherwise. The judgment of the Courts of Appeals is accordingly Affirmed.

1990 U.S. LEXIS 368, *22; 58 U.S.L.W. 3468;
58 U.S.L.W. 4157; Fed. Sec. L. Rep. (CCH) P94,880

CONCURBY: WHITE; SCALIA

CONCUR:

JUSTICE WHITE, concurring,

I agree that state courts have concurrent jurisdiction over civil RICO actions and join the opinion and judgment of the Court. I add a few words only because this Court has rarely considered contentions that civil actions based on federal criminal statutes must be heard by the federal courts. As the Court observes ante, at , the uniform construction of federal criminal statutes is no insignificant matter, particularly because Congress has recognized potential dangers in disuniform construction and has confined jurisdiction over federal criminal cases to the federal courts. There is, therefore, reason for caution before concluding that state courts have jurisdiction over civil claims related to federal criminal statutes and for assessing in each case the danger to federal interests presented by potential inconsistent [*23] constructions of federal criminal statutes.

RICO is an unusual federal criminal statute. It borrows heavily from state law; racketeering activity is defined in terms of numerous offenses chargeable under state law, 18 U. S. C. § 1961(1)(A), as well as various federal offenses. To the extent that there is any danger under RICO of disuniform construction of criminal statutes, it is quite likely that the damage will result from federal misunderstanding of the content of state law--a problem, to be sure, but not one to be solved by exclusive federal jurisdiction. Many of the federal offenses named as racketeering activity under RICO have close, though perhaps not exact, state law analogues, cf. Durland v. United States, 161 U.S. 306, 312 (1896), which construed the federal mail fraud statute, and it is unlikely that the state courts will be incompetent to construe those federal statutes. Nor does incorrect state court construction of those statutes present as significant a threat to federal interests as that posed by improper interpretation of the federal antitrust laws, which could have a disastrous effect on interstate commerce, a particular concern of the federal government. Racketeering [*24] activity as defined by RICO includes other federal offenses without state law analogues, but given the history as written until now of civil RICO litigation, I doubt that state court construction of these offenses will be greatly disruptive of important federal interests.

There is also the possibility that the state courts will disrupt the uniform construction of criminal RICO by launching new interpretations of the "pattern" and "enterprise" elements of the offense when hearing civil RICO suits. This possibility, though not insubstantial, cf. H. J., Inc. v. Northwestern Bell Telephone Co., U.S. (1989), is not enough to require exclusive federal jurisdiction of civil RICO claims. Even though varying interpretations of the "pattern" and "enterprise" elements of RICO may drastically change the consequences that flow from particular acts, these variations cannot make an act criminal in one court system but blameless in another and therefore do not implicate the core due process concerns identified by the Court ante, at , as underlying the need for uniform construction of criminal statutes. Moreover, we have the authority to reduce the risk of, and to set aside, [*25] incorrect interpretations of these elements of RICO liability.

JUSTICE SCALIA, with whom JUSTICE KENNEDY joins, concurring.

1990 U.S. LEXIS 3468, *25; 58 U.S.L.W. 3468;
58 U.S.L.W. 4157; Fed. Sec. L. Rep. (CCH) P94,880

I join the opinion of the Court, addressing the issues before us on the basis argued by the parties, which has included acceptance of the dictum in Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981), that "the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.'" Ante, at 4. Such dicta, when repeatedly used as the point of departure for analysis, have a regrettable tendency to acquire the practical status of legal rules. I write separately, before this one has become too entrenched, to note my view that in one respect it is not a correct statement of the law, and in another respect it may not be.

State courts have jurisdiction over federal causes of action not because it is "conferred" upon them by the Congress; nor even because their inherent powers permit them to entertain transitory causes of action arising under the laws of foreign sovereigns, see, e. g., McKenna v. Fisk, [*26] 1 How. 241, 247-249 (1843); but because "[t]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other . . . ." Claflin v. Houseman, 93 U.S. 130, 136-137 (1876); see also Minneapolis & St. Louis R. Co. v. Bombolis, 241 U.S. 211, 221-223 (1916).

It therefore takes an affirmative act of power under the Supremacy Clause to oust the States of jurisdiction--an exercise of what one of our earliest cases referred to as "the power of congress to withdraw" federal claims from state-court jurisdiction. Houston v. Moore, 5 Wheat. 1, 26 (1820) (emphasis added). See also Bombolis, supra, at 221 (concurrent jurisdiction exists "unless excepted by express constitutional limitation or by valid legislation"); Missouri ex rel. St. Louis, B. & M. R. Co. v. Taylor, 266 U.S. 200, 208 (1924) ("As [Congress] made no provision concerning the remedy, the federal and the state courts have concurrent jurisdiction").

As an original proposition, it [*27] would be eminently arguable that depriving state courts of their sovereign authority to adjudicate the law of the land must be done, if not with the utmost clarity, cf. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 243 (1985) (state sovereign immunity can be eliminated only by "clear statement"), at least expressly. That was the view of Alexander Hamilton:

"When . . . we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited." The Federalist No. 82, p. 132 (E. Bourne ed. 1947).

See also Galveston, H. & S. A. R. Co. v. Wallace, 223 U.S. 481, 490 (1912) ("[J]urisdiction is not defeated by implication"). Although as early as Claflin, see 93 U.S., at 137, and as late as Gulf Offshore, we have said that the exclusion of concurrent state jurisdiction could be achieved by implication, the only cases in which to my knowledge we have acted upon such a principle are those relating to the Sherman Act and the Clayton Act—where [*28] the full extent of our analysis was the less than compelling statement that provisions

giving the right to sue in the United States District Court "show that [the right] is to be exercised only in a 'court of the United States.'" General Investment Co. v. Lake Shore & Michigan Southern R. Co., 260 U.S. 261, 287 (1922) (emphasis added). See also Blumenstock Bros. Advertising Agency v. Curtis Publishing Co., 252 U.S. 436, 440 (1920) (dictum); Freeman v. Bee Machine Co., 319 U.S. 448, 451, n. 6 (1943) (dictum); Mathorn v. Lovorn, 457 U.S. 255, 267, n. 18 (1982) (dictum). In the standard fields of exclusive federal jurisdiction, the governing statutes specifically recite that suit may be brought "only" in federal court, Investment Company Act of 1940, as amended, 84 Stat. 1429, 15 U. S. C. § 80a-35(b) (5); that the jurisdiction of federal courts shall be "exclusive," Securities Exchange Act of 1934, as amended, 48 Stat. 902, 15 U. S. C. § 78aa; Natural Gas Act of 1938, 52 Stat. 833, 15 U. S. C. § 717u; Employee Retirement Income Security Act of 1974, 88 Stat. 892, 29 U. S. C. § 1132(e)(1); or indeed even that the jurisdiction of the federal courts shall be "exclusive of the courts of the [*29] States," 18 U. S. C. § 3231 (criminal cases); 28 U. S. C. §§ 1333 (admiralty, maritime, and prize cases), 1334 (bankruptcy cases), 1338 (patent, plant variety protection, and copyright cases), 1351 (actions against consuls or vice consuls of foreign states), 1355 (actions for recovery or enforcement of fine, penalty, or forfeiture incurred under Act of Congress), 1356 (seizures on land or water not within admiralty and maritime jurisdiction).

Assuming, however, that exclusion by implication is possible, surely what is required is implication in the text of the statute, and not merely, as the second part of the Gulf Offshore dictum would permit, through "unmistakable implication from legislative history." 453 U.S., at 478. Although Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962) after concluding that the statute "does not state nor even suggest that [federal] jurisdiction shall be exclusive," id., at 506, proceeded quite unnecessarily to examine the legislative history, it did so to reinforce rather than contradict the conclusion it had already reached. We have never found state jurisdiction excluded by "unmistakable implication" from legislative history. It is perhaps harmless [*30] enough to say that it can be, since one can hardly imagine an "implication from legislative history" that is "unmistakable"--i. e., that demonstrates agreement to a proposition by a majority of both Houses and the President--unless the proposition is embodied in statutory text to which those parties have given assent. But harmless or not, it is simply wrong in principle to assert that Congress can effect this affirmative legislative act by simply talking about it with unmistakable clarity. What is needed to oust the States of jurisdiction is congressional action (i. e., a provision of law), not merely congressional discussion.

It is perhaps also true that implied preclusion can be established by the fact that a statute expressly mentions only federal courts, plus the fact that state-court jurisdiction would plainly disrupt the statutory scheme. That is conceivably what was meant by the third part of Gulf Offshore dictum, "clear incompatibility between state-court jurisdiction and federal interests." 453 U.S., at 478. If the phrase is interpreted more broadly than that, however--if it is taken to assert some power on the part of this Court to exclude state-court jurisdiction when systemic [*31] federal interests make in undesirable--it has absolutely no foundation in our precedent.

Gulf Offshore cited three cases to support its "incompatibility" formulation. The first was Dowd Box, supra, at 507-508, which contains nothing to support any "incompatibility" principle, except a quotation from the second case Gulf

Offshore cited, Claflin. Indeed, in response to the argument that "[o]nly the federal judiciary . . . possesses both the familiarity with federal labor legislation and the monolithic judicial system necessary" to elaborate a coherent system of national labor laws, the Bowd Box opinion said: "Whatever the merits of this argument as a matter of policy, we find nothing to indicate that Congress adopted such a policy in enacting § 301." 368 U.S., at 507. The second case cited was Claflin, which said that concurrent jurisdiction exists "where it is not excluded by express provision or by incompatibility in its exercise arising from the nature of the particular case." 93 U.S., at 136. The subsequent discussion makes it entirely clear, however, that what the Court meant by "incompatibility in its exercise arising from the nature of the particular case" was that the particular [*32] statute at issue impliedly excluded state-court jurisdiction. "Congress," the Court said, "may, if it sees fit, give to the federal courts exclusive jurisdiction," which it does "sometimes . . . by express enactment and sometimes by implication." Id., at 137. The third case cited, Garner v. Teamsters, 346 U.S. 485 (1953), had nothing to do with state-court jurisdiction over a federal cause of action. It held that the National Labor Relations Act, whose express provision that the jurisdiction of the National Labor Relations Board shall be exclusive had already been held to prevent federal courts from assuming primary jurisdiction over labor disputes, see Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 48 (1938), prevented state courts as well.

In sum: As the Court holds, the RICO cause of action meets none of the three tests for exclusion of state-court jurisdiction recited in Gulf Offshore. Since that is so, the proposition that meeting any one of the tests would have sufficed is dictum here, as it was there. In my view meeting the second test is assuredly not enough, and meeting the third may not be.

State Civil Rico

Drug Enforcement Newsletter

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IN THIS ISSUE

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PROJECT NEWS

Washington, D.C. RICO Seminar

On October 23-25, the NAAG Civil RICO Project held a training seminar in Washington D.C. Approximately 40 individuals attended, including representatives of 18 jurisdictions. Following the seminar, a roundtable discussion took place at which the established demonstration sites in the Washington and Colorado Attorneys General offices and the recently selected new demonstration sites of the Attorneys General offices of Arizona and Oregon presented reports on the current status and future plans for their demonstration projects.

The conference began with a presentation by Mike Pezzulli, a private litigator who has both brought and defended numerous complex civil RICO actions. Many of the valuable pointers given to conference participants on anticipating defense strategies are contained in this issue's interview with Mr. Pezzulli, found on page 10.

Assistant Attorney General Cameron "Kip" Holmes of Arizona Attorney General Bob Corbin's office moderated two panel presentations, the first on managing seized and forfeited assets and the other on civil RICO practice and procedure. Mr. Holmes discussed Arizona's Forfeiture Support Project (FSP), which retains a private property

A DEFENSE PERSPECTIVE
INTERVIEW WITH MICHAEL F. PEZZULLI

Michael P. Pezzulli currently practices law in Dallas Texas. He is a faculty member of the National Institute for Trial Advocacy and previously served as faculty for the Advanced National Institute for Trial Advocacy.

Mr. Pezzulli has presented numerous lectures and publications including, "Pleading a RICO Case," "Civil RICO After Sedima", Southern Methodist University School of Law, January, 1986 and "Parallel Prosecution of Civil and Criminal Proceedings," "Troubled Lending Institution: A Sign of the Times", State Bar of Texas, September, 1988.

Mr. Pezzulli received his Bachelor Degree and Law degree from West Virginia University in 1973 and 1976, respectively . He clerked for the Honorable John A. Field Jr., Senior Circuit Judge, Unites States Court of Appeals for the Fourth Circuit.

Fred Smith former NAAG Civil RICO Project Director interviewed Michael at the recent NAAG Civil RICO conference. He provides pointers on anticipating defense strategies when handling a RICO action.

Smith: Before we start discussing the nuances of defending a RICO case, I want to first find out what you think of the statute?

Pezzulli: The RICO statute, if used properly, is an excellent tool both for Prosecutors and Plaintiff's counsel to deal with illegality in the market place. RICO has received bad press by reason of its use by individuals and companies who either do not understand the statute or seek to use its powers for anything they do not like about a particular transaction, be it a commercial or a personal injury transaction.

Smith: Let's assume you have just been retained by a RICO defendant, tell us generally what your initial approach is to the defense of this type of case?

Pezzulli: The first thing we do is create what I call a "Litigation Profile." This is where we start an analysis of the lawsuit and commence obtaining a basic understanding of the plaintiff's case. We outline our defensive strategies, both from a short and long term perspective. Incidentally, this same approach should be employed by the plaintiff throughout the litigation.

One essential element of the litigation profile is an analysis of both the plaintiff and the defendant's agendas. It is imperative to understand both the stated or obvious agendas, and the hidden agendas of both parties to the litigation. From the defendant's standpoint, one critical agenda is the analysis by the defendant of any potential criminal exposure. From the very beginning of the litigation, any anticipated criminal exposure will probably dramatically affect the entire course of the litigation plan and generate a totally altered or modified litigation plan. This concern would certainly be ex-

exacerbated if the plaintiff was in the government. An integral part of our defense might well be to have as our top priority the delaying of the entire civil proceeding until such time as any potential criminal liability would be barred by the statute of limitations.

Smith: This seems totally inconsistent with the rapid and efficient administration of justice? Do you find any courts willing to go along with this delay tactic?

Pezzulli: Your question certainly poses one of the most often articulated arguments against staying the civil proceeding pending the resolution of the criminal or potential criminal case; however, numerous courts have found that the creation of the dilemma for a RICO defendant, whether he or she must elect between taking the 5th Amendment and forfeiting a potentially defensible position in litigation, or waiving the constitutionally afforded protection of the 5th Amendment and subjecting themselves to criminal prosecution, is unacceptable. For example, in *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084 (5th Cir. 1979), the court found it appropriate to stay the litigation pending the running of the criminal statute of limitations. Unfortunately for most defendants, the courts have generally been very reluctant to stay the proceeding pending the resolution of the potential criminal case.

Regardless of the way your particular judge may rule on the question, the plaintiff should be prepared to immediately seek to rebut any request to stay the litigation. The plaintiff's attorney should be well-versed in this area of the law and be prepared to respond without delay. Any requested continuance in responding to the motion to stay on the part of the plaintiff may be interpreted by the court or defending counsel as a thinly veiled attempt to orchestrate the plaintiff's prosecution of both the criminal and civil litigation, or even worse, the first chink in the plaintiff's armor. Do not let his happen to your case. You should not start your case by showing a weak hand.

Smith: Why don't you tell us a little more about the concern of the defense regarding parallel prosecution?

Pezzulli: Generally, the defendant in a civil RICO case will have a reasonably good idea whether or not he is a target, potential target or "subject" of a criminal investigation. Often, he or his associates or business partners will have either received a grand jury subpoena or he will have been paid a visit by a field agent. When the civil defense counsel reasonably knows or suspects that he may be forced to proceed with the defense of the civil litigation under circumstances where a criminal investigation has been instituted, he should seriously look at filing a motion to stay the civil case pending resolution of the criminal case. The courts have held for years that the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket. *Landis v. North American Company*, 299 U.S. 248, 254 (1936). The test used by the courts in deciding whether or not to grant a stay revolves around the saving of time and effort by the court, counsel and litigant, any hardship to either party and the expedition of the case on the court's calendar. This was the holding in *Clark v. Lutcher*, 77 F.R.D. 415 (M.D. Pa. 1977).

The Supreme Court's decision in *Landis*, as with the earlier cases on stays, appear to have been codified in Rule 26(c) of the Federal Rules of Civil Procedure, which provides, in relevant part, as follows:

"Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court."

As plaintiff's counsel, you need to concentrate on that portion of Rule 26(c) stating that the court may make such orders as justice requires. In the event that you cannot defeat the application for stay, you should at a minimum seek to have the court limit the stay to a short or reasonable period of time. Several courts have reversed stays where the stay was granted until thirty days after completion of all appellate remedies.

It is also important to understand the two primary reasons for a defendant seeking a stay are (1) that the civil discovery permits the government to make the privilege against self incrimination ineffectual and (2) the parallel prosecution circumvents any limits imposed on criminal discovery. It is also important to recognize that there is no rule barring parallel prosecution of separate civil and criminal actions by different federal agencies. Notwithstanding that, the courts at times have determined that the individual's constitutional rights are superior to the government's parallel prosecution. You should read *United States v. Kordel*, 397 U.S. 1 (1970) for an interesting insight into this area of the law.

Remember your distinctions between individuals and corporations when opposing a stay based upon the potential loss of one's privilege against self incrimination. Look at *Belles v. United States*, 417 U.S. 85 (1974) and *Afro-Lecon v. United States*, 820 F. 2d 1198 (1987) for a further discussion of this issue.

You should also be aware of the cases involving civil discovery initiated by the government. The rules here get fairly complex and I recommend reading the following cases: *Donaldson v. United States*, 400 U.S. 517 (1971); *United States v. LaSalle National Bank*, 437 U.S. 298 (1978); and *United States v. Henry*, 491 F. 2d 702 (6th Cir. 1974).

Finally, as the Plaintiff opposing the requested stay, you should remember that a stay is less likely to be granted where you are seeking injunctive relief or where you need to depose witnesses in order to preserve testimony. Just remember, it is a balancing test and you need to try and persuade the court that on balance, you should prevail.

Smith: Alright, where do you go next in setting up your defensive strategy?

Pezzulli: You go back to the litigation profile. By this time you should be setting up your defense timetable. Part of this timetable, which is an integral part of your litigation profile, should include a time line which goes back to the inception of the cause of action and progresses forward on a chronological basis until the present. With the time line you have the ability to analyze the lawsuit in the context of procedural defenses including any limitation or laches defenses. This can be particularly important when the predicate acts alleged by the plaintiff are security violations. Although you have a four year statute of limitations on the RICO violations, frequently, the plaintiff will often add a 1933 or 1934 Securities Act violation and you may be able to substantially limit the lawsuit by the use of your limitations defenses in knocking out the counts other than the RICO count.

The time line is invaluable from the context of understanding the transaction and putting it in perspective. Frequently, while an isolated transaction may at least facially appear to be bad, in the context of the entire transaction, it may be easily explainable. The time line also is very helpful in identifying relevant documents. As a defense counsel, I want to have every document in the possession of or under the control of my clients immediately. With the time line I have created through the debriefing of my client, I can quickly and intelligently organize the documents and identify those that are not subject to production as a result of some privilege or immunity.

The documents are also extremely important in evaluating the merits of your defense. It is our goal to have the time line, document organization and litigation profile at least in a preliminary stage, complete before an answer or preliminary motion is filed in the case. It would serve the plaintiff well to consider the same approach prior to filing the lawsuit.

Smith: All right, let's assume you have your litigation profile complete, what are your approaches to the litigation from the motion practice stage?

Pezzulli: Once we are finally required to respond to the complaint, there are a variety of motions available to the defendant. Some are universally available to defendants in all actions, and some are unique to the defense of a RICO complaint.

Smith: What are the motions you would consider unique to a RICO complaint?

Pezzulli: There are a series of motions beginning with a motion to require what several courts have named a "RICO case statement." This requirement is as much a weeding out process as it is anything else where the plaintiff is essentially required to disgorge the substance of the plaintiff's RICO complaint in excruciating detail. I've provided you with a sample RICO statement required by several Federal district courts.

(See box on following page)

"The plaintiff shall file, within twenty days hereof, a RICO case statement. This statement shall include the facts the plaintiff is relying upon to initiate this RICO complaint as a result of the "reasonable inquiry" required by Fed. R. Civ. P. 11. In particular, this statement shall be in a form which uses the numbers and letters as set forth below, and shall state in detail and with specificity the following information."

1. State whether the alleged unlawful conduct is in violation of 18 U.S.C. § § 1962(a), (b), (c), and/or (d).

2. List each defendant and state the alleged misconduct and basis of liability of each defendant.

3. List the alleged wrongdoers, other than the defendants listed above, and state the alleged misconduct of each wrongdoer.

4. List the alleged victims and state how each victim was allegedly injured.

5. Describe in detail the pattern of racketeering activity or collection of unlawful debts alleged for each RICO claim. A description of the pattern of racketeering shall include the following information:

a. List the alleged predicate acts and the specific statutes which were allegedly violated;

b. Provide the dates of the predicate acts, the participants in the predicate acts, and a description of the facts surrounding the predicate acts;

c. If the RICO claim is based on the predicate offenses of wire fraud, mail fraud, or fraud in the sale of securities, the "circumstances constituting fraud or mistake shall be stated in particularity." Fed. R. Civ. P. 9(b). Identify the time, place and contents of the alleged misrepresentations, and the identity of persons to whom and by whom the alleged misrepresentations were made;

d. State whether there has been a criminal conviction for violation of the predicate acts;

e. State whether civil litigation has resulted in a judgment in regard to the predicate acts;

f. Describe how the predicate acts form a "pattern of racketeering activity;" and

g. State whether the alleged predicate acts relate to each other as part of a common plan. If so, describe in detail.

6. Describe in detail the alleged enterprise for each RICO claim. A description of the enterprise shall include the following information:

a. State the names of the individual partnerships, corporations, associations, or other legal entities, which allegedly constitute the enterprise;

b. Describe the structure, purpose, function and course of conduct of the enterprise;

c. State whether any defendants are employees, officers or directors of the alleged enterprise;

d. State whether any defendants are associated with the alleged enterprise;

e. State whether you are alleging that the defendants are individuals or entities separate from the alleged enterprise, or that the defendants are the enterprise itself, or members of the enterprise; and

f. If any defendants are alleged to be the enterprise itself, or members of the enterprise, explain whether such defendants are perpetrators, passive instruments, or victims of the alleged racketeering activity.

7. State and describe in detail whether you are alleging that the pattern of racketeering activity and the enterprise are separate or have merged into one entity.

8. Describe the alleged relationship between the activities of the enterprise and the pattern of racketeering activity. Discuss how the racketeering activity differs from the usual and daily activities of the enterprise, if at all.

9. Describe what benefits, if any, the alleged enterprise receives from the alleged pattern of racketeering.

10. Describe the effect of the activities of the enterprise on interstate or foreign commerce.

11. If the complaint alleges a violation of 18 U.S.C. § 1962(a), provide the following information:

a. State who received the income derived from the pattern of racketeering activity or through the collection of an unlawful debt; and

b. Describe the use or investment of such income.

12. If the complaint alleges a violation of 18 U.S.C. § 1962(b), describe in detail the acquisition or maintenance of any interest in or control of the alleged enterprise.

13. If the complaint alleges a violation of 18 U.S.C. § 1962(c), provide the following information:

a. State who is employed by or associated with the enterprise

b. State whether the same entity is both the liable "person" and the "enterprise" under § 1962(c).

14. If the complaint alleges a violation of 18 U.S.C. § 1962(d), describe in detail the alleged conspiracy.

15. Describe the alleged injury to business or property.

16. Describe the direct causal relationship between the alleged injury and the violation of the RICO statute.

17. List the damages sustained by reason of the violation of § 1962, indicating the amount for which each defendant is allegedly liable.

18. List all other federal causes of action, if any, and provide the relevant statute number.

19. List all pendent state claims, if any.

20. Provide any additional information on that you feel would be helpful to the Court in processing your RICO claim.

IT IS SO ORDERED.

Providing such a case statement separates the garden variety business tort from those transactions contemplated by the RICO statute. As you can see, if the plaintiff has not thought through the RICO complaint prior to filing, he may be forced to concede that the RICO aspect of the case is not well founded. If this happens, the plaintiff may well be subject to Rule 11 sanctions that could be of a substantial nature. Some district courts have even gone so far as to impose significant sanctions, say in the $50,000+ range, and then expressly order that the sanction not be passed on to the client, but rather is to be paid directly by the attorneys. I doubt that too many people want to file an expense request for a $50,000+ sanction.

In addition to the RICO case statement, one motion that is of substantial benefit to the defendant in a RICO case is that of a Motion to Stay Discovery pending a finding of the plaintiff's right to proceed under RICO. This is a motion that some courts are favorably considering. As a defendant, I would file such a motion requesting that the court put the entire case on hold until the plaintiff demonstrates, through a RICO case statement or a more detailed pleading, that they are even entitled to proceed forward on the RICO counts. If the particular court in which the suit is pending does not employ the RICO case statement approach, I might attach one from a sister court to my motion to stay or a motion for more definite statement.

If the defendant cannot obtain a complete stay of discovery pending a determination of the plaintiff's right to proceed under RICO, an alternative motion is to seek to limit discovery to the RICO issues only. Through this vehicle the defendant can seek to force the plaintiff to essentially reveal his entire RICO case at a time that discovery or other, perhaps equally or more important issues, are completely stayed.

Smith: Lets talk about some of the other motions not unique to a RICO case, that can be filed by the defendant in a RICO case.

Perzulli: There are several motions, not unique to a RICO case, that are very useful from a defense standpoint. If the plaintiff has pled his RICO case with conclusions or in vague terms, the entire case may be subject to dismissal. Rule 9(b) of the Federal Rules of Civil Procedure requires that all averments of fraud be stated with particularity. Generally, allegations that are made on "information and belief" are legally inadequate in a RICO case. Thus, Rule 9(b) is a vehicle used by the courts to dismiss RICO cases that are deficient in these respects. For example, in *Saine v. A.I.A., Inc.*, 582 F. Supp. 1299 (D. Colo. 1954), Judge Kaine held that to "meet the Rule 9(b) standard a claimant must identify the circumstances constituting the fraud. This in turn involves identification of the particular defendants with whom the plaintiff dealt; designation of the occasions on which the fraudulent statements were made, and by whom; and designation of what misstatements or half-truths were made and how." 582 F. Supp. at 1303.

Rule 12 of the Federal Rules of Civil Procedure also provides strong defenses to a RICO complaint.

Rule 12(b) provides as follows:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

"As a Defendant I want to knock the plaintiff off track. I want to divert the plaintiff from his goal of winning the lawsuit and we will use every tool legally available to do just that. The plaintiff that neglects to serve us with discovery first will find himself in he position of having to answer our discovery before he gets his answered."

As can be seen from even a casual reading of Rule 12, one has available a whole series of motions that can be filed through a full use of Rule 12. It is important to note that Rule 12 requires that motions raising any of the defenses contained in the Rule "be made before pleading if a further pleading is permitted." In other words, you must file the Rule 12 motion before you, as a defendant, file your answer and you must raise all of the Rule 12 issues in the same motion. You can file the Rule 12 motion along with the answer, but it is infrequent that a defendant would want to file an answer when one is not required.

If the plaintiff has complied with Rule 9(b) and framed his fraud allegations with particularity, then the plaintiff has essentially set up the first wave of requests for admissions. Under the federal rules, one must answer with particularity and so if the complaint is properly drafted, the defendant may be forced to make admissions in an answer that the defendant does not necessarily desire to admit, particularly in the early stages of the litigation. By the skillful use of Rule 12, not only may the defendant be able to obtain a dismissal of the plaintiff's case, but also he may be able to do so without even having made any untoward admissions.

Now, as an aside, when we are plaintiff in a RICO case we try and simultaneously file with the complaint our first set of interrogatories, requests for production of documents. As a plaintiff you want to come out of the gate with a hard charge. The rules permit the plaintiff to serve his discovery along with the compliant--why not make use of this tool? As a defendant I want to knock the plaintiff off track. I want to divert the plaintiff from his goal of winning the lawsuit and we will use every tool legally available to do just that. The plaintiff that neglects to serve us with discovery first will find himself in the position of having to answer our discovery before he gets his answered.

Now back to rule 12 and the various motions available to the defendant under this Rule. As a plaintiff, you have selected your forum. If I can, as a defendant, establish a colorable claim that your lawsuit is filed in the wrong jurisdiction, I will file my motion pursuant to Rule 12(b)(3) to dismiss as a result of improper venue. Alternatively, I will move to transfer venue pursuant to 12 U.S.C. § 1404 (a) which provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a action to any other district or division where it might have been district court may transfer any civil brought."

In addition, I will probably move to dismiss your lawsuit pursuant to Rule 12(b)(6) on the grounds that your RICO complaint has failed to state a claim upon which relief can be granted. Naturally, you would only file these motions if you had reasonable basis for the motion. However, I have seen few RICO complaints that cannot at least be attacked for failure to state a claim upon which relief can be granted. These are only a few of the motions that can be asserted pursuant to Rule 12. You should be alert to all of them.

Recognizing the hostility many courts have demonstrated toward RICO complaints, the plaintiff should be alert to any attempt by a defendant to convert his motion to dismiss to a Rule 56 motion for summary judgment. Rule 12 provides in relevant part that:

"If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in

Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Therefore, if the defendant attaches an affidavit or some extrinsic evidence to his motion to dismiss, the court may decide to convert the matter to a hearing on a motion for summary judgment and dispose of the claim on the merits. Look at what all of this does to a plaintiff. Assuming things have gone well for the defendant, he has limited the plaintiff to a discussion of the RICO issues, he may have obtained a stay of all discovery against the defendant and worst of all, he may have either obtained a dismissal or summary judgment against the plaintiff, all before the defendant ever even answered. A plaintiff asleep at the switch could well lose the lawsuit before he even starts.

Smith: Are there any other pointers you would give a plaintiff contemplating filing a civil RICO case?

Pezzulli: Yes, I'd recommend they read a recent case out of the Northern District of Texas, *Dondi Properties Corporation, et al. v. Commerce Savings and Loan Association, et al.*, 121 F.D. R. 284 (1988). While the suit involves a civil RICO complaint, this opinion comes out of motions filed in discovery disputes between the parties. The opinion is significant because it demonstrates the growing frustration of the judiciary in, as the court puts it, "refereeing abusive litigation tactics."

The *Dondi* court convened, en banc, to establish standards of litigation conduct to be followed in civil actions in their jurisdiction. The procedure itself was highly unusual, and the Court went so far as to require that the attorneys not charge their clients for the time and expenses incurred with respect to one of the motions for sanction. In short, the *Dondi* court is issuing a mandate: lawyers are to be nice to lawyers. And the courts simply aren't going to tolerate the kind of motion practice that wastes court resources and client money. You should be aware of the rules of conduct set forth in the *Dondi* case and use the case offensively where appropriate. ■

Excerpts from the remarks of Mike Pezzulli at the National Civil RICO/ Drug Enforcement Conference, April 1989.

ON MOTIONS

"Let's talk about some other motions in a RICO case that you can have, that we have filed. One of them is a motion to stay discovery pending a finding of the plaintiff's right to proceed under RICO. There are courts granting those motions. What that means is that this case is going to be phenomenally expensive, and there's probably going to be Rule 11 implications here. You move to stay everything until they can demonstrate to you that they have a basis to proceed under RICO. The courts find that attractive because they want to get rid of RICO cases, so you may find yourself stuck with a motion to stay pending proof that you have the right to go forward under RICO.

The next thing we will do is file what's called a motion to limit discovery to the RICO elements. That's a real cute motion because what happens there is you go into the judge and say: "Look Judge, this is a RICO case. It's the R word, and what we want you to do is tell them that they don't get any discovery until they have established, through discovery limited to the RICO inquiry, that they are entitled to proceed under RICO. That is a motion that some judges have found to be of interest and have granted.

The next motion is the motion to require a RICO statement. The Northern District of Ohio has a standing order and several courts in Georgia are requiring the plaintiff to lay out everything, and to basically expose the whole case. So look what I have done here at this point--I have set it up so that I don't have to answer. So long as I don't have to respond to your complaint, I've got you fighting the entire motion to transfer. I've got you fighting the motion for more definite statement, and the motion to dismiss for failure to state a claim. With all of those motions pending, the judge may begin to see my arguments as to why you don't have a legitimate RICO case. At the same time I'm saying to the judge, "Don't give them any discovery unless they can prove they've got some RICO claims", I'm asking you to disgorge your entire case. So the effect is that you must completely change the focus of your attack. So I've just shut your burners off and what you are doing is responding to motion after motion. I've done successfully what I've wanted to do, which is to disrupt the entire plaintiff's case."

ON COUNTERCLAIMS

"The next thing I'd do is decide whether or not I have a legitimate counterclaim. I love being in the position of a defendant that converts to a plaintiff. That would be very disruptive to your case, so be careful with those facts that are not issues that can generate a counterclaim. Ever have somebody file an application for injunctive relief to seize your budget under a forfeiture for alleged violations of RICO? That would be great, how would you like to try the case with no money?"

ON STAYING OFF THE DEFENSIVE

"At the same time you filed your complaint, you should have sent me a set of interrogatories and a request for admissions, and a request for production of documents. I strongly recommend you do that. When I file a civil RICO case, I am filing the first set of requests for admissions, interrogatories and a request for production to go with it. Usually you are talking about stacks that are three or four inches thick served on each defendant. That's the way you do it. If you haven't done that you may still assume that you are going to get it from me. If you have done it, I will send it all back to you. I will put you on the defensive. I will want to disrupt your ability to develop your case. You can't let that happen, or you will quickly lose sight of your goal, which is to put the case to trial."

ON PRELIMINARY INJUNCTION HEARINGS:

"Let me tell you about one of the greatest pitfalls and traps that I have encountered in RICO as well as the new litigation involving equitable remedies. As a defense counsel, I will look at the injunction not as an area to be completely feared. Frankly, in my set of agendas, winning the injunction is at the flat bottom of the list. I could care

less if I've won or lost that injunction. You know what I'm going to do with that injunction? First, I am going to seek discovery. I'm going to force you to disgorge your case in a mini-trial over that injunction. That may be my number one goal. My number two goal will be to take out the material elements of your case. My number three goal is going to be to limit or box your witnesses' testimony as rapidly as possible and I'm going to do that at the injunction hearing. Finally, but not necessarily, it may be to win the injunction. I may not even care. But what I am going to do is to not agree to that preliminary injunction in order to force you to put your witnesses on.

What do I do when I am the plaintiff seeking injunctive relief in a RICO case? Let me tell you how you neutralize some of those problems, and this is a wonderful tactic: when I go in, I've subpoenaed the defendant to appear prior to the hearing. I may not even bring a witness. You can't imagine how may times the defendant has shown up at an application for a preliminary injunction hearing and his attorney says "Where's your client?" because he intends to cross-examine my client; and I say, "Well, I am here representing my client and you don't need a client for this hearing." That is very disruptive to a defendant because he intended to cross-examine that witness, and that witness isn't there. The flip side to that is if you are going to the injunction, you ought to consider subpoenaing the witness for the defense that you intend to bounce upon the witness stand and chew up.

The second way to neutralize it involves the situation where you decide that you are going to call your witness to the witness stand, and think you are just going to call and put your witness up and go through a quick list of facts and pass the witness. What I do, again, as the defense attorney, is to make every effort to take apart that witness on the witness stand. I have spent hours preparing this cross-examination, and I have a specific agenda of what I want to get from this witness. So, if you haven't prepared your witness for that type of cross-examination, you may find yourself bounced out of the preliminary injunction stage because your witness just destroyed your case without you even knowing it.

Understand it--it's not like the deposition. The guy is up on the witness stand and you are cross-examining him. You object and the judge says "Overruled, answer the question." The guy is unprepared and he is answering a question before he has been prepared to answer that question. I have had lawyers take the witness stand in breach of contract cases admit that they breached the contract--and this is the plaintiff testifying for the defendant in the case at the TRO stage. This sort of thing happens simply because they were unprepared to testify. Don't let that happen to you, when you go into an injunction prepare as if it is going to be a trial. Don't let the other side get hold of your witness and turn them inside out."

ON THE INVESTIGATION

"Let me give you one other little tid-bit. If you think for one second you are the only person who has got an investigator, think again. Too many people never recognize that the defense has the ability to hire people like Kroll Associates, and if you think you are the only person in the world that has ever thought of a trash cover, you had better think again. That's a pretty depressing thought, isn't it?"

ON PLANNING

"One of the things we also do from the defense standpoint, is we analyze our opponents budgetary constraints. We make an analysis of how far we can go. I know how many forms you have to file before you get that airline ticket. I know how may forms you have to file to get approval to pay that court reporter. I am not saying I do that, I'm saying that you need to recognize that the defendants have the ability to do everything you do and they have the ability to sit there on a hundred thousand dollar retainer and not worry about the airline ticket. You are scrambling around not preparing the deposition trying to figure out how you are going to pay that ticket of yours. So you need to talk to your budgetary people and get that worked our in advance so that if there are circumstances that require quick funding you can get that done for you. And don't start thinking about where you are going to get the airline tickets the day before you go to deposition, because all that does is disrupt your ability to go right back to what I talked about in the beginning, which is to keep your focus on your lawsuit."

SUBCOMMITTEE REPORT
RULES 1-14
TEXAS RULES OF CIVIL PROCEDURE

Rule 13: This rule, dealing with frivolous pleadings, drew several very strong coments from judges and others. However, this was of such a volatile nature that we felt further consideration by this sub-committee and the committee as a whole when not under the present time constraints would be advisable.

Respectfully,

Kenneth D. Fuller '88

Kenneth D. Fuller

GUY JONES
DISTRICT JUDGE
202ND JUDICIAL DISTRICT

BI-STATE JUSTICE BUILDING 100 NORTH STATE LINE TEXARKANA, TEXAS 75501

PHONE (214) 798-3004

December 13, 1989 TRCP 13

Honorable Nathan Hecht
Associate Justice
Supreme Court of Texas
Supreme Court Building
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

I sincerely appreciate the privilege of appearing before the Supreme Court to express my view regarding the revision of Rule 13. I applaud the Court for conducting the hearings and trust that it will be helpful in your rule revision process.

I, again, strongly urge the Court to amend Rule 13 so that the trial judges of this state can have an effective tool to deal with frivolous cases and slip-shod law practice. It is our duty to do everything in our power to restore in the legal profession higher standards so that it once again will have the respect it deserves.

Sincerely,

Guy Jones

GJ/cfc

cc: Hon. Thomas R. Phillips
Hon. Franklin S. Spears
Hon. C. L. Ray
Hon. Raul A. Gonzalez
Hon. Oscar H. Mauzy
Hon. Eugene A. Cook
Hon. Jack Hightower
Hon. Lloyd Doggett

00598

RULE 13 - PROPOSED SUBSTITUTION

The signatures of attorneys or parties constitute by them that they have read the pleading, motion, or other paper and that to the best of their knowledge, information and belief, formed after reasonable inquiry, the instrument is not groundless, brought in bad faith, or for the purpose of harassment or delay. Attorneys or parties who shall bring a fictitious suit, or file a fictitious pleading, motion, or other paper, and/or file any paper for experiment, or for harassment, or who shall make any statement in pleadings or other papers knowing same to be false, groundless, frivolous, or file any instrument for the purpose of delay or harassment, or who shall file any instrument without having first made reasonable inquiry as to the accuracy thereof, may be adjudged guilty of contempt. Any attorney or party found, after hearing, to have violated this Rule may be sanctioned as provided under Rule 215-2b, and additionally, any other sanctions the Court may wish to impose as may reasonably be necessary to do equity to an offended party.

No sanctions under this Rule may be imposed except upon hearing after notice, and any sanctions imposed shall be subject to Appellate Review.

A general denial or request for damages does not offend this Rule.

W. HUGH HARRELL
ATTORNEY AND COUNSELOR AT LAW
1708 METRO TOWER, 1220 BROADWAY AVENUE
LUBBOCK, TEXAS 79401
RES. (806) 795-1825
OFFICE (806) 763-4411

Local Rules Sub
20 to
TRAP

November 22, 1989

TRCP 13
305

Justice Nathan L. Hecht
Box 12248
Austin, Texas-78711

Dear Judge Hecht:

As per the request of the Texas Supreme Court, I would like to offer the following suggestions concerning the Rules.

1. Rescind ALL local rules and do not permit local Courts to trap the practicing attorney by making Rules.

2. Require a party taking the deposition or a party or witness to furnish the other attorney a copy of the deposition at the expense of the one taking the deposition.

3. Require the Appellant to deliver the copy of the Transcript and the Statement of Facts to the Appellee's attorney the day of or after the Appellant's Brief is mailed to the Court of Appeals; and, thereafter the Appellee's attorney will file same with the Clerk of the trial Court.

4. Remove, rescind, delete ALL sanctions by opposing counsel for alleged bad faith or frivilous law suits, because opposing counsel NOT having any counter-claim or cross-action is using these allegations alone to intimidate and coerce the opposing side. These allegations have become just as abusive as the party allegedly bringing a bad faith law suit. IF, retained in any manner, let JUST the trial Judge file a Motion and a hearing, and if a fact issue to be tried by a jury.

TRCP 13

5. Require that a Judge NOT discuss any matter concerning the case with one attorney when the other attorney is NOT present, where there are opposing counsel. And, you might ought to say an attorney will not discuss matters with the Court unless the other attorney is present.

7

6. A Rule which would follow due process would require that NO order or judgment of the Court would be rendered or entered unless a hearing is set and notice served on all parties. This business of Courts just signing orders and/or judgments without opposing counself being afforded an opportunity to be heard is for the birds. This would not apply as to a default judgment and this might be clarified as to default judgments and say no motion need be served upon the defaulting party. Other jurisdictions require a Motion asking for a default judgment, and that it be served and a date, time and palce set for a hearing thereon.

7. A Rule that any appeal from an administrative agency will in fact be trial de novo and not test an Administrative Order under the substantial evidence rule.

Yours very truly, Hugh Harrell

Hugh Harrell

WHH:wh cc: Ret.

Pg000110

00600

PLAYING BY THE RULES

Recent Amendments to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence Effective December 1, 1991

by John K. Chapin

On April 30, 1991, the Supreme Court transmitted to Congress a number of changes to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence. These changes are to take effect on December 1, 1991. Following is a discussion of the major changes. Other insubstantial changes were made to F.R.A.P. 6, 10, 26, and 26.1.

FEDERAL RULES OF CIVIL PROCEDURE

(TRCP 18)

Inability of a Judge To Proceed—Rule 63

The amendment to Rule 63 substantially revises the current rule, which limits replacement of a judge to disability of the judge *after* trial and makes no provision for the withdrawal of the judge *during* proceedings. The new rule provides that anytime after a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with record and determining that the proceedings may be completed without prejudice to the parties. In a nonjury trial or hearing, the successor judge must at the request of a party recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness under the new rule.

TO: Judge Hecht June 8, 1990

FROM: Bill Willis

RE: Rule 18a, T. R. C. P.

Sandy Hughes, Judge Ron Chapman's AA, called me this morning about several things, one of which is language in paragraphs (c) and (d) of this Rule.

The Rule speaks of the presiding judge of the administrative judicial DISTRICT. This is a holdover from the old art. 200a, when these things were called Administrative Judicial Districts. As everyone now knows, Tex. Gov't Code sec.74.042 now calls them Administrative Judicial Regions.

You wouldn't think this was a very big deal, but Sandy tells me that the Dallas County P. J. decided in one or more recent recusals that this was HE, with the usual procedural messes and bruised feelings littering the landscape. I promised to call to the attention of the appropriate authorities the need to bring the Rule up to the speed of the statute. The which I have now done.

4543.001

10-18-93

Court of Appeals
State of Texas
Sixth District

CLERK
TIBBY THOMAS

BI-STATE JUSTICE BUILDING
100 NORTH STATE LINE AVENUE #20
TEXARKANA, TEXAS 75501
903/798-3046

October 13, 1993

HHD - Tarp SCAC SubC ✓ Acevedo COAs Staff J. Heath

Mr. Luther H. Soules
1500 Frost Bank Tower
100 W. Houston Street
San Antonio, TX 78205

Dear Luther:

Enclosed is a copy of a letter I sent earlier this week to Chief Justice Tom Phillips. I would appreciate your letting me know if there are any proposed changes to Rule 18a, as suggested in this letter.

Thank you for your assistance.

Very truly yours,

Charles Bleil

CB/djt

Enclosure

October 13, 1993

Chief Justice Tom Phillips
Texas Supreme Court
P.O. Box 12248
Austin, TX 78711

Re: Proposed Rule Changes

Dear Tom:

This is in response to your invitation to submit rules changes suggestions. Our court has two:

1. We would suggest that Texas Rule of Civil Procedure 18a be amended to allow the late filing of a motion to recuse if it is grounded on reasons not known or with due diligence knowable until after the time for filing a motion to recuse has passed. This would allow for a "good cause for late filing" exception in the trial courts, just as exists in the appellate courts currently (see TEX. R. APP. P. 15(a).

2. The second suggested change concerns Rule 166b. We believe that 166b should be amended so that when an expert witness is designated by a party to a suit, then any party ought to be allowed to call that witness to testify at trial.

I trust that you will put these suggestions in the appropriate hands. Thank you.

Warmest regards,

Charles Bleil

CB/djt

LES OF PRACTICE IN DISTRICT ND COUNTY COURTS

TION 1. GENERAL RULES

holding of said court has not expired, such death, resignation, or inability on the part of the judge shall not operate to adjourn said court for the term, but such court shall be deemed to continue in session. If a successor to such judge shall qualify and assume office during the term, or if a judge be transferred to said district from some other judicial district, he may continue to hold said court for the term provided, and all motions undisposed of shall be heard and determined by him, and statements of facts and bills of exception shall be approved by him. If the time for holding such court expires before a successor shall qualify, and before a judge can be transferred to said district from some other judicial district, then all motions pending, including those for new trial, shall stand as continued in force until such successor has qualified and assumed office, or a judge has been transferred to said district who can hold said court, and thereupon such judge shall have power to act thereon at the succeeding term, or on an earlier day in vacation, on notice to all parties to the motion, and such orders shall have the same effect as if rendered in term time. The time for allowing statement of facts and bills of exception from such orders shall date from the time the motion was decided.

(Amended June 16, 1943, eff. Dec. 31, 1943.)

Notes and Comments

Source: Art. 2288.

RULE 18a. RECUSAL OR DISQUALIFICATION OF JUDGES

(a) At least ten days before the date set for trial or other hearing in any court other than the Supreme Court, the Court of Criminal Appeals or the court of appeals, any party may file with the clerk of the court a motion stating grounds why the judge before whom the case is pending should not sit in the case. The grounds may include any disability of the judge to sit in the case. The motion shall be verified and must state with particularity the grounds why the judge before whom the case is pending should not sit. The motion shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence provided that facts may be stated upon information and belief if the grounds of such belief are specifically stated.

(b) On the day the motion is filed, copies shall be served on all other parties or their counsel of record, together with a notice that movant expects the motion to be presented to the judge three days after the filing of such motion unless otherwise ordered by the judge. Any other party may file with the clerk an opposing or concurring statement at any time before the motion is heard.

(c) Prior to any further proceedings in the case the judge shall either recuse himself or request the presiding judge of the administrative judicial district to assign a judge to hear such motion. If the judge recuses himself, he shall enter an order of recusa and request the presiding judge of the administrative judicial district to assign another judge to sit and shall make no further orders and shall take no further action in the case except for good cause stated in the order in which such action is taken

(d) If the judge declines to recuse himself, he shall forward to the presiding judge of the administrative judicial district, in either original form or certified copy, an order of referral, the motion, and all opposing and concurring statements. Except for good cause stated in the order in which further action is taken, the judge shall make no further orders and shall take no further action in the case after filing of the motion and prior to a hearing on the motion. The presiding judge of the administrative judicial district shall immediately set a hearing before himself or some other judge designated by him, shall cause notice of such hearing to be given to all parties or their counsel, and shall make such other orders including orders on interim or ancillary relief in the pending cause as justice may require

(e) If within ten days of the date set for trial or other hearing a judge is assigned to a case, the motion shall be filed at the earliest practicable time prior to the commencement of the trial or other hearing.

(f) If the motion is denied, it may be reviewed for abuse of discretion on appeal from the final judgment. If the motion is granted, the order shall not be reviewable, and the presiding judge shall assign another judge to sit in the case.

(g) The Chief Justice of the Supreme Court may also appoint and assign judges in conformity with this rule and pursuant to the Court Administration Act.[1]

(h) If a party files a motion to recuse under this rule and it is determined by the presiding judge or the judge designated by him at the hearing and on motion of the opposite party, that the motion to recuse is brought solely for the purpose of delay and without sufficient cause, the judge hearing the

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LOS ANGELES

January 11, 1990

TO: SUPREME COURT ADVISORY COMMITTEE

FROM: Subcommittee on Rules 15 to 165

At our subcommittee meeting held on January 8, 1990, we considered (i) the various comments made at the public hearing held on November 30, 1989 addressing the proposed changes in the Texas Rules of Civil Procedure, (ii) the written suggestions and comments of attorneys forwarded to our subcommittee, and (iii) additional proposals for rule changes. The persons participating in the meeting were David Beck, Pat Beard, and Elaine Carlson. The conclusions reached at the meeting were as follows:

---

9. Rule 20. The existing rule deals with the minutes of the court. The concern expressed is that "a special judge" is required to sign the minutes of proceedings that were had before him. However, the current practice apparently is that visiting judges never sign the minutes. The subcommittee believes that the concern expressed raises the more basic question of whether rule 20 is an anachronism. The subcommittee therefore believes that, unless there is some unknown reason why this rule should exist, repeal should be considered. In the alternative, the subcommittee recommends that the last sentence of the rule be deleted.

RECOMMENDED NEW RULE
RELATIVE TO READING AND SIGNING MINUTES

Rule 20. Minutes Read and Signed

On the last day of the session, the minutes shall be read, corrected and signed in open court by the judge. [~~Each special judge shall sign the minutes of such proceedings as were had by him.~~]

4543.001

JUDGE B. F. (BILL) COKER
3823 Calculus Drive
Dallas, Texas 75244
(214) 247-8974

December 30, 1989

Mr. Luther H. Soules
Chairman, Rules Advisory Committee
175 E. Houston Street
San Antonio, Texas 78205-2230

Re: Suggested rule changes

Dear Mr. Soules:

Enclosed are recommended changes and additions to the Texas Rules of Civil Procedure. Additions to existing rules and new rules are designated by underlined text of the rule. Portions of existing rules which are deleted are enclosed in brackets and lined through. Please submit these suggestions to your committee for consideration.

Reading and Signing Minutes:

My recommendation relative to Rule 20, Texas Rules of Civil Procedure, is a pragmatic recommendation.

Rule 20, as it now exists, requires each judge who acts on behalf of a court to sign the minutes of that court at the end of each session. As a visiting judge, I frequently serve a large number of different courts in different areas of the state. I have never been offered an opportunity to sign the minutes of any court at any time in the three years I have been serving as a visiting judge.

The most direct method of remedying this logistic problem is to eliminate it. Therefore, I recommend requiring the judge of the court to sign for all who have served the court. This is accomplished by deleting the last sentence of Rule 20.

A copy of my proposed change to Rules 20 is attached to this letter.

4543.001 1/214-92 445 Hhd 583

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*BOARD CERTIFIED CIVIL TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

DEBORAH A. BYNUM**
DANIEL L. MILLER

**ALSO ADMITTED IN THE DISTRICT OF COLUMBIA

2/14 HHD Save Subj Agenda ✓ CBA - Evelyn J. Heckel. J

February 12, 1992

Mr. Luther Soules
SOULES & WALLACE
10th Floor
175 East Houston Street
San Antonio, Texas 78205-2230

Re: Rule 21
Texas Rules of Civil Procedure

Dear Mr. Soules:

On a somewhat irregular basis I write letters to the various Chairmen (now Chairpersons) of the Rules Committee regarding what I perceive to be a problem with Rule 21. The enclosed last page of a pleading filed by Mr. Charles Jordan is the best example I have received today. Admittedly Mr. Jordan is somewhat behind the times -- Rule 72 was repealed in September of 1990 and I fail to see how the exemplar Certificate of Service could be considered to be "over signature" as now required by Rule 21 -- but I digress. My suggestion is that Rule 21 and 21a together be amended to require that the certificate of service be required to show the persons to whom service was made, the address, the manner of service, and the date of service.

Without unduly picking on Mr. Jordan, a call to his office inquiring as to the identity and location of those persons served produced a very polite and equally unhelpful response along the lines of "I'll have to research that and get back with you."

As defendants often find themselves getting into somewhat larger lawsuits well after the discovery process has started, it is often impossible to determine the current parties. The plaintiffs just chuckle, but the problem is real.

I would appreciate your relaying my concerns to the other members of the Rules Committee. Your failure to do so will result in my making a small cash donation in your name to L. Ron Hubbard.

lww/soules.ltr/smr

Thanks for your assistance.

Very truly yours,

Larry W. Wise

LWW/smr
Enclosure

III.

Any moneys owed by Garnishee to Defendant or claims for money or property belonging to Defendant in the hands of Garnishee are assets of the bankrupt Defendant's estate and subject to the sole control of the Trustee in Bankruptcy. As a result of the filing of said bankruptcy, Plaintiff cannot proceed against the Garnishee for any moneys owed the bankrupt Defendant.

Therefore, Plaintiff respectfully requests that this case of action be abated until such time as the automatic stay in the bankruptcy case described in Exhibit "A" attached hereto is no longer in effect as to the parties herein and the subject matter of this lawsuit.

Respectfully submitted,

MOORE, PAPE & JORDAN, P.C.
ATTORNEYS AT LAW
434 N. TRAVIS STREET
SEGUIN, TEXAS 78156-4934
(512) 379-4962

BY: /S/
CHARLES R. JORDAN
State Bar No. 11006000
CHRISTOPHER H. MOORE
State Bar No. 14323630

CERTIFICATE OF SERVICE

The foregoing signature of counsel is also certification as to compliance with the provisions of Rules 21a and 72, Texas Rules of Civil Procedure.

PLAYING BY THE RULES

Recent Amendments to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence Effective December 1, 1991

by John K. Chapin

On April 30, 1991, the Supreme Court transmitted to Congress a number of changes to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence. These changes are to take effect on December 1, 1991. Following is a discussion of the major changes. Other insubstantial changes were made to F.R.A.P. 6, 10, 26, and 26.1.

FEDERAL RULES OF CIVIL PROCEDURE

(TRCP 21)

Service and Filings of Pleadings and Other Papers—Rule 5

Rule 5(d) is amended to require that the person making service under the rule make and file a certification that service has been effected. Up until now, local rules generally have imposed this requirement. Rule 5(e) has been amended to allow facsimile transmission of court pleadings and other papers if permitted by district court local rules, provided those rules are consistent with standards established by the Judicial Conference of the United States. The amendment also directs that the clerk shall not refuse to accept for filing any paper because it is not presented in proper form. Thus, the new amendment ensures that such refusal of papers for filing is to be performed only by a judicial officer.

4543.001

LHS
HHD

VS-10-91
83

TRCP 21

5/10

HHD,
TCAC Supp.
Agenda
CC: J. Hecht.

WENDELL S. LOOMIS
Attorney at Law
14610 Falling Creek Drive
Houston, Texas 77068-2938
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FAX (713) 893-5732

May 6, 1991

Soules & Wallace
Attorneys-at-Law
Tenth Floor
Republic of Texas Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Re: Proposed Changes to TRCP 21 and 91
Add Rule 200.2.a.; Rule 201.3.

Gentlemen:

Originally I requested consideration of changes to Rule 21, 21a and 21b, as the result of the Trevino vs. Hidalgo Publishing Company case. Please see my letter of March 21, 1991, attached.

In reviewing the rules on another discovery issue, I find that Rule 200 has a similar problem. The first sentence of Rule 200.2.a. is as follows:

> Reasonable notice must be served in writing by the party, or his attorney, proposing to take his deposition upon oral examination to every other party or his attorney of record.

Rule 201.3. also states:

> When a deponent is a party, service of the notice upon the party or his attorney shall have the same effect as a subpoena served on the party. If the deponent is an agent or employee who is subject to the control of a party, notice to take the deposition which is served upon the party or the party's attorney of record shall have the same effect as a subpoena served on the deponent.

There may be other places in the rules that I simply haven't spotted where the same or similar wording is used. Of

course, where you have an unsophisticated client, injury and prejudice could occur by notice to the client and not the lawyer.

May I suggest that wording similar to Rule 168.1. or Rule 169.1. be added to the rules in question. The wording in Rule 168 and 169 is similar as follows:

> Whenever a party is represented by an attorney of record, service of a Request for Admissions shall be made on his attorney unless service on the party himself is ordered by the Court. Rule 169.
>
> When a party is represented by an attorney, service of interrogatories and answers to interrogatories shall be made on the attorney unless service upon the party himself is ordered by the Court. Rule 168.

A review of the Trevino vs. Hidalgo Publishing Company reasoning will point out the necessity for these changes.

Very truly yours,

Wendell S. Loomis

WSL:dkm

cc: Honorable Nathan L. Hecht
David J. Beck
Honorable Bob L. Thomas

WENDELL S. LOOMIS
Attorney at Law
14610 Falling Creek Drive
Houston, Texas 77068-2938
(713) 893-5900
FAX (713) 893-5732

March 21, 1991

Supreme Court of the State of Texas
Supreme Court Building
P.O. Box 12248
Austin, Texas 78711

Attention: Honorable Justice Eugene A. Cook

Re: Rules 21, 21a, 21b Methods of Service
Trevino vs. Hidalgo Publishing Company d/b/a The Edinburgh Daily Review, No. 13-90-025-CV (Corpus Christi), 2-21-91

Dear Gene:

I have just read with horror the above-described case and looking at Rule 21a was aghast to find that the Rule does not absolutely require notice to be served upon the attorney of record, but the rule authorizes the Notice to be served on the party or his attorney of record.

I thought this question had been put to rest several years ago when I complained about Rule 72, which required pleadings to be served only on "adverse" parties instead of all parties, only to discover that Rule 72 and 73 have now been consolidated into Rules 21, 21a, and 21b, which are now the offending wording.

The original reason for my complaint was that where there were multiple plaintiffs and/or multiple defendants, one plaintiff could deal with one defendant independent of the other parties and not be in violation of the rules and create considerable confusion in the case. As I recall, this Rule was amended, then the amendment was withdrawn, then it was re-amended, and now consolidated to Rule 21a and 21b. In the corporate and commercial law practice, trickiness is part of the game (I know I don't have to tell you this) and justice certainly does not prevail under the circumstances described by the Trevino vs. Hidalgo case

Can we have a wording under Rule 21, 21a, 21b, or 21c to the effect that

> pleadings, notices, and documents must be served upon all counsel of record, but if there is no counsel for a party, then upon the party or the parties' designated agent.

Gene, I feel that this matter is urgent! The Trevino case may or may not come up before the Supreme Court. The Trevino case on first blush appears to be technically correct. For that reason, I think all haste must be taken to amend the rules so that all counsel are requested to serve all other counsel with pleadings, notices, motions, and applications.

Your urgent attention to this problem would be very much appreciated.

Very truly yours,

Wendell S. Loomis

WSL:dkm

4543.001

SPIVEY, GRIGG, KELLY AND KNISELY

ATTORNEYS AT LAW
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6/3

WHD
SCAC Agenda
J. Hecht.

April 30, 1991

BAS91.072

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney, Ste. 5100
Houston, TX 77010-8095

Re: Supreme Court Advisory Committee
Proposed Changes to TRCP 21, 47 and 91

Dear David:

I will take this opportunity to reply to your letters of March 7th and April 8th.

On Rules 21, 21a and 21b, I concur with Wendell Loomis that the present provision is inappropriate and unsatisfactory. Mr. Loomis' suggested correction seems to meet the objection appropriately. There are lawyers who will serve a party in order to "technically comply" with the service rules even when they have an attorney. That should not be allowed.

Re TRCP 47, Mr. McMurray points out an area which our rules do not adequately address: the hiatus between county court at law jurisdiction and district court jurisdiction. I do not find that to be a problem in my own practice. I recall that Rule 47 was changed to its present reading in order to avoid the temptation for a plaintiff to plead for a lot of money and thus obtain press coverage. It would not bother me to provide that no amount is required to be pled or to simply provide that a specific amount should be pled. The latter suggestion would probably solve the complaints, but I fear the insurance clients of some of the defense bar would strongly object.

Re TRCP 91, I do not think the suggested amendment to TRCP 91 offers an adequate solution. It seems to me that the rules should be as universal as possible and to improve the rule would require simplifying it. I suggest simply requiring that special exceptions be filed ten days prior to trial period.

It seems to me that providing complicated time period simply multiplies the trial court's burden and certainly complicates the procedure for us practitioners.

Sincerely,

Broadus A. Spivey

BAS/sm

cc: Mr. Luther H. Soules III, Esq.
Soules & Wallace
Republic of Texas Plaza, 10th Floor
175 E. Houston St.
San Antonio, TX 78205-2230

21

WENDELL S. LOOMIS
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FAX (713) 893-5732

March 21, 1991

Supreme Court of the State of Texas
Supreme Court Building
P.O. Box 12248
Austin, Texas 78711

Attention: Honorable Justice Eugene A. Cook

Re: Rules 21, 21a, 21b Methods of Service
Trevino vs. Hidalgo Publishing Company d/b/a The Edinburgh Daily Review, No. 13-90-025-CV (Corpus Christi), 2-21-91

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The original reason for my complaint was that where there were multiple plaintiffs and/or multiple defendants, one plaintiff could deal with one defendant independent of the other parties and not be in violation of the rules and create considerable confusion in the case. As I recall, this Rule was amended, then the amendment was withdrawn, then it was re-amended, and now consolidated to Rule 21a and 21b. In the corporate and commercial law practice, trickiness is part of the game (I know I don't have to tell you this) and justice certainly does not prevail under the circumstances described by the Trevino vs. Hidalgo case

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> pleadings, notices, and documents must be served upon all counsel of record, but if there is no counsel for a party, then upon the party or the parties' designated agent.

Gene, I feel that this matter is urgent! The Trevino case may or may not come up before the Supreme Court. The Trevino case on first blush appears to be technically correct. For that reason, I think all haste must be taken to amend the rules so that all counsel are requested to serve all other counsel with pleadings, notices, motions, and applications.

Your urgent attention to this problem would be very much appreciated.

Very truly yours,

Wendell S. Loomis

WSL:dkm

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL. (512) 463-1312
FAX: (512) 463-1365

March 26, 1991

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

Dear Luke:

Enclosed is a copy of a letter Justice Cook received from Wendell Loomis regarding Texas Rule of Civil Procedure 21.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

CHANGES PROPOSED BY LUKE SOULES:

Rule 21a. METHODS OF SERVICE

Every notice required by these rules, and every pleading, plea, motion, or other form of request required to be served under Rule 21, 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 to the party to be served, or the party's duly authorized agent or attorney of record, as the case may be, either in person or by agent or by courier receipted delivery or by certified or registered mail, to the party's last known address, or by telephonic document transfer to the recipient's current telecopier number, or by 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. ~~Service by telephonic document transfer after 5:00 p.m. local time of the recipient shall be deemed served on the following day.~~ Service by other method shall be complete upon delivery and receipt. Whenever a party has the right or is required to do some act 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. Notice may be served by a party to the suit, an attorney of record, a sheriff or constable, 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 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 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.

4543.001

hhd
LHS

✓ 10-4-90
SB

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711
(512) 463-1312

October 3, 1990

HHD, Scott Soules Rpt
✓ CO AS.

Mr. Jose R. Lopez II
Law Offices of Terry Bryant
West Memorial Office Park
8584 Katy Freeway, Suite 108
Houston TX 77024

Dear Mr. Lopez:

Thank you for your recent letter regarding the 1990 changes in the Texas Rules of Civil Procedure.

Regarding your question whether a trial court can, without notice or hearing, change a pretrial order agreed to by the parties, Rule 166 does not specifically speak to this. Inasmuch as the issue you raise is one which may someday come before this Court, I hope you will understand my inability to venture any further view on your question.

TRCP 8a

Regarding filing and service via facsimile transmission machines, the Court and our Committee fully recognize that there is much potential for problems and abuse, like those you pose. I think it would be fair for me to say that our view of the changes made this year was to allow use of facsimile transmission in filing and serving court documents in recognition of the ready availability of this technology. We are anxious to see what problems may develop and hopeful that they will not be too many or too hard to remedy by future changes. Only time will tell.

Finally, regarding your comments on expert witness fees, and specifically those charged by doctors, you make an interesting suggestion which I will pass along to our Committee for full consideration in the future (along with your other comments). We are greatly benefitted by the expertise and experience of the members of our Committee and look to them for recommendations on ideas like the one you have proposed.

Thank you for your interest in the rules.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

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

TERRY BRYANT
ATTORNEY AT LAW
WEST MEMORIAL OFFICE PARK
8584 KATY FREEWAY, SUITE 108
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TELEPHONE (713) 973-8888

JOSE R. LOPEZ II

October 1, 1990

Texas Supreme Court
Rules Advisory Committee
P. O. Box 12248
Austin, TX 78711

RE: New Texas Rules of Court for 1990

Dear Committee Members:

Recently I attended a meeting on the 1990 changes to the Texas Rules of Civil Procedure. The stamina that you, as a committee, have demonstrated to incorporate these rule changes is commendable. Your time and effort were well spent and are truly appreciated by the Judiciary and the Bar at large.

I have a few questions regarding the rule changes. If you have an opportunity, I would appreciate a short reply from you so that I may better understand and utilize these changes in my practice.

The first question I have concerns Rule 166--Pre-Trial Conference. If Rule 166 allows the attorneys of record to arrive at an agreed docket control order, which includes the discovery schedule, can a Judge change the agreed docket control order without a hearing or notification to the parties, thus circumventing the agreement of counsel?

My next comment concerns the fax machine. Most offices these days have facsimile transmission machines. They have been helpful in obtaining and transmitting information in an expeditious manner. However, sometimes when the fax transmission is smudged or erroneously fax'd to the wrong number, the sender is not aware that the communication was not received. As an example, the sender believes that a motion for summary judgment has been filed and received. Yet, due to some "electronic error", the fax machine does not make it clear to the sender that it has not been received or has been erroneously sent elsewhere. What I perceive in the future are that motions to strike answers, motions for reconsideration, and motions for "hypertechnicalities" will be fax'd, which will lead to headaches in the future. While we appreciate the Courts' and the Committee's efforts to facilitate our communications, I believe in this area that our age-old, standard manner of mailing, personal service, and filing should be maintained. In addition, since the Rules now allow us to fax material to the Courthouse, will there be a sufficient number of fax machines to facilitate the facsimile transmissions that the Courthouse will no doubt be receiving usually at the eleventh hour on a Friday afternoon?

Another comment I have deals specifically with doctors' fees. Recently, I attended several doctors' depositions where they charged fees in excess of $750.00 an hour. While it is true that doctors should be paid for their deposition testimony since they are not tending to their patients, I believe the fees charged by doctors in this area have skyrocketed. Physicians, indeed, are an integral part in the treatment of patients for which they are handsomely compensated, the time they spend on depositions should not be used as a means of extorting additional fees to simply state their treatment of a particular patient. It is well known in our profession that the doctors' fees are not paid by the attorney, but out of the client's settlement. It is the client, the plaintiff or defendant, who needs to be protected from absorbing these costs since it is their money from which these doctors are paid.

The Court has a fixed rule governing fees paid to interpreters. Could the Court not also put a cap on expert fees or appoint doctors from an independent list, similar to the Texas Workers' Compensation Act, to act as an interpreter for the Court? Thus, we would have a truly independent doctor whose compensation will be relatively fixed by that Court.

I do appreciate your time and attention and look forward to hearing from you.

Very truly yours,

Jose R. Lopez II
Attorney at Law

JRL:cw

w:7266a

LYON & LYON

ATTORNEYS AND COUNSELORS AT LAW

ROBERT CHARLES LYON
TED B. LYON, JR.
BRUCE A. PAULEY*
SANDI FUDGE
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74
91
111
114(e)

September 7, 1990

21a

Rules Advisory Committee
The Supreme Court of Texas
Post Office Box 12248
Austin, Texas 78711

Ladies and Gentlemen:

Having read the newly adopted Rules of Civil Procedure and viewed the State Bar videotape regarding same, I would like to make the following comments.

The first three comments are by way of housekeeping. Tex.R.App.P. 90(e) refers to paragraph (c), but this paragraph has been renumbered. It should refer to paragraph (d).

Should not Tex.R.App.P. 74(a), (q) and 91 refer to "parties to the trial court's final judgment or appealable order ..." rather than just the parties to the trial court's final judgment?

Gender neutral changes were missed in Tex.R.App.P. 111 and 114(e).

The provisions of Tex.R.Civ.P. 21a that telephonic document transfer after 5:00 p.m. is deemed to be served on the following day is a positive step. May I suggest that service by hand delivery after 5:00 p.m. should also be deemed to be served on the following day.

The provisions of Rule 21a allowing service by FAX may result in appellate briefs being served on opposing parties by FAX. To me, this is unacceptable. A 60 to 70 page FAX document is unwieldy and generally unworkable. May I suggest that Tex.R.App.P. 74(q) regarding service of briefs be amended to require service of one or two copies of briefs bound in the same manner as those filed with the Court. This would be helpful if for no other reason than to inform opposing counsel of the color of binding to be avoided.

Finally, I would like to suggest that summary judgment Rule 166a(c) be amended to require the filing party to serve briefs upon the adverse party and the Court no later than forty-eight

(48) hours prior to the time of the hearing. The common practice is now for the moving party to file a "bare bones" motion and then to bring a brief with them to the hearing. This can provide the moving party with an unfair advantage if the Court allows the consideration of the brief over the adverse party's objections, particularly since the brief serves to answer the adverse party's response and opposing affidavits.

Thank you for your consideration of these matters. If I may clarify my comments and suggestions in any way, please do not hesitate to contact me and I will gladly do so.

Sincerely yours,

Bruce A. Pauley

Bruce A. Pauley

BAP/jc

BAP.L2

William C. Koons
Board Certified in Family Law
And Civil Trial Law
Texas Board of Legal Specialization

Kenneth D. Fuller
Board Certified in Family Law
Texas Board of Legal Specialization

Mike McCurley
Board Certified in Family Law
Texas Board of Legal Specialization

Ike Vanden Eykel
Board Certified in Family Law
And Civil Trial Law
Texas Board of Legal Specialization

Koons, Fuller, McCurley & Vanden Eykel

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Practice Limited
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Robert E. Holmes, Jr.
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Texas Board of Legal Specialization

Mary Johanna McCurley
Board Certified in Family Law
Texas Board of Legal Specialization

Jimmy L. Verner, Jr.
Board Certified in Civil Trial Law
Texas Board of Legal Specialization

Kevin R. Fuller
Board Certified in Family Law
Texas Board of Legal Specialization

Keith M. Nelson
Board Certified in Family Law
Texas Board of Legal Specialization

Michael R. DeBruin

June 4, 1990

4543.001

✓6-6-90

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney
Houston, Texas 77010

Re: Sevice of Pleadings by FAX

Dear David:

This will acknowledge receipt of your correspondence regarding service by fax dated May 25, 1990.

I have read Dalton's suggestion, and believe me, I can identify with the problem even though we have a small law firm.

Conceptually, service by fax seems to be an ideal solution, however in practice, we are discovering the same problems that Dalton refers to in "getting the information to the person with the real need to know". I would suggest that we consider requiring lawyers who sign pleadings to include the fax number to which service by fax is to be sent. If there is no desiganted number on the pleadings, then no service by fax unless agreed in writing and filed with the Court a la Rule 11. This way, if a firm has multiple fax receivers, the service will only be valid if sent to the number designated on the pleadings.

2311 Cedar Springs, Suite 300, Dallas, TX 75201 / 13355 Noel Rd, Suite 2200, Dallas, TX 75240 / (214) 871-2727 / FAX (214) 871-0196

I am copying Dalton on this letter with a request that he forward copies of his comments to me since I am also on the Committee.

Respectfully,

Kenneth D. Fuller

KDF/mw

cc: W. Dalton Tomlin
Luther H. Soules, III

4543.001

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3700 TRAMMELL CROW CENTER
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May 9, 1990

Luke Soules, Esquire
Soules & Wallace
175 East Houston, 10th Floor
Republic of Texas Plaza
San Antonio, Texas 78205

RE: Service of Pleadings by FAX

Dear Luke:

In a large law firm with numerous FAX machines scattered around the various offices, there is a significant risk that an opponent will serve a pleading on one of the attorneys by sending it to an unattended, automatic-receiving FAX machine. The pleading might sit at the FAX machine for hours or days, or possibly be picked up by some secretary or messenger and discarded or misdelivered.

In our Firm, at least, there is no record when a pleading is received by an unattended, automatic-receiving FAX machine. Thus, while we have distributed some FAX machines configured in a send-only mode, we have resisted distributing FAX machines which will automatically receive documents. We have instead tried to force all incoming FAXs through our manned, central FAX Room. But the pressure continues to mount within our Firm, particularly from the non-litigating attorneys, to widely disseminate FAX machines that both send and receive documents.

The risk of uncontrolled service of pleadings is greatest when dealing with opponents who will deliberately misuse the system. Fortunately, there are only a few such attorneys, but over the years we have encountered a handful of attorneys who I believe would deliberately, if given the chance, serve pleadings on attorneys in our Firm by

sending them to a FAX machine where the document is less likely to be delivered to the proper party.[1] With respect to most lawyers, I believe this problem can be handled by an agreement which would be filed of record with the Court. For example, if I had a FAX machine located outside the door of my office that my secretary could keep an eye on, I would endeavor to work out a written agreement with my opposing counsel by which we stipulated that each of us could serve pleadings upon the other by FAX provided they are sent to the specific FAX numbers stated in the Stipulation. We would then file the Stipulation with the Court. It is my belief that the Texas Rules of Civil Procedure should be amended to embody a similar concept; namely, that pleadings can be served by FAX only when an attorney has consented, in a document filed with the Court, to receiving service of notices by FAX. Perhaps this can be accomplished by amending Rule 21a to add the following sentence:

> . . . *When the attorney of record has consented, in a writing filed with the Court, to receipt of service by telecopy or other electronic medium, every notice required by these Rules, other than the citation to be served upon the filing of a cause of action and except as otherwise provided in these Rules, may be served by transmitting a copy electronically to the prescribed location specified in the written consent* . . .

---

[1] This is the same type of lawyer who now takes advantage of the change in the Texas Rules which eliminates the need for filing interrogatories with the Court. We believe there is at least one attorney who has sent our Firm an empty envelope allegedly containing interrogatories requesting the identification of witnesses. We believe this unscrupulous attorney very carefully addressed the empty envelope to our Firm name only, omitting the name of the attorney to whom the envelope should have been delivered. We further believe he then prepared the green card to be signed by "Vinson & Elkins" and stated on that green card that it was for the service of interrogatories. He carefully made certain the certified number was not on the envelope and that there was no return address. Our Mail Rooms representative signed for the envelope at the post office along with hundreds of other certified letters that we receive each day. The envelope ended up in our Mail Room and of course could not be delivered because there was no attorney name on the envelope. We could not figure out who sent the envelope because there was no return address on the envelope. The green card had been signed for at the post office and sent back to the unscrupulous attorney and therefore we did not have that information. The certified number was not on the envelope. We opened the envelope looking for information and it was empty. Our Mail Room threw up its hands in dismay. At the time of trial, the unscrupulous attorney objected to our attorney putting on key witnesses, claiming that our lawyer failed to identify the witnesses in response to his interrogatories. Our lawyer stated he never received the interrogatories. The unscrupulous attorney then produced the green card and a copy of the interrogatories as proof that they were served and simply not answered.

Please let me know what you think of this suggestion. I will be happy to do anything you suggest to help solve this problem.

With best regards.

Sincerely,

W. Dalton Tomlin

WDT/se

C:\FAX\SOULES.LTR

RULE 21A. NOTICE

Every notice required by these rules, and every pleading, plea, motion, or other from of request required to be served under Rule 21, other than the citation to be served upon filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy to the party to be served, or the party's duly authorized agent, or attorney of record, as the case may be, either in person or by agent or by courier receipted delivery or by certified or registered mail to the party's last known address, or by telephonic document transfer to the recipient's current telecopier number, or by 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 address wrapper, in a post office or official depository under the care and custody of the United Staten Postal Service. Service by telephonic document transfer after 5:00p.m. local time of the recipient shall be deemed served on the following day. Whenever a party has the right or is required to do some act within a prescribed period after service of a notice or other paper upon him and the notice or paper is served upon him by mail or by telephonic document transfer, three days shall be added to the prescribed period. Notice may be served by a party to the suit, an attorney of record, a sheriff or constable, or 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 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 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.

Comment to 1990 change: To allow for service by current delivery means and technologies.

Rule 21a is clear enough concerning those notices that are exchanged between attorneys during the course of the suit but does not address the service of "show cause" orders or "contempt notices". We need a rule that defines a "show cause" or "contempt notice", indicates by whom it may be served, when it may be served and whether an order is required under Rule 103. Case law indicates that in cases of non payment of child support the respondent must be personally

served with the contempt notice but Rule 21a fails to conform to that ruling. See Ex parte Floyd W. Herring, Jr. Relator [438 S.W. 2d 801]. It that case a contempt notice was delivered to the respondents attorney of record who failed to notify him of the hearing. He was subsequently arrested, jailed on a writ of attachment and then brought before the court. The appeals court ruled that where a person is to be deprived of his liberty personal service of the notice ~~bust~~ must be obtained. Rule 21a fails to provide for personal service in cases of contempt.

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711

TEL: (512) 463-1312

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CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
RAUL A. GONZALEZ
OSCAR H. MAUZY
EUGENE A. COOK
JACK HIGHTOWER
NATHAN L. HECHT
LLOYD DOGGETT
JOHN CORNYN
BOB GAMMAGE

CLERK
JOHN T. ADAMS

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

November 18, 1992

HHD, SCAC Subc Agenda ✓ COAD Staff

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

Dear Luke:

Enclosed is a letter from Alwin Pape, Jr. suggesting a proposed amendment to Rule 21A.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan

Nathan L. Hecht
Justice

NLH:sm

Encl.

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711

TEL. (512) 463-1312

FAX. (512) 463-1365

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
RAUL A. GONZALEZ
OSCAR H. MAUZY
EUGENE A. COOK
JACK HIGHTOWER
NATHAN L. HECHT
LLOYD DOGGETT
JOHN CORNYN
BOB GAMMAGE

CLERK
JOHN T. ADAMS

EXECUTIVE ASS'T
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

November 18, 1992

Mr. Alwin E. Pape, Jr.
Moore Pape & Jordan
434 North Travis
Seguin TX 78155-4934

Dear Mr. Pape:

Thank you for your letter regarding revisions to Texas Rule of Civil Procedure 21A. I have sent a copy to the chairman of the Rules Advisory Committee with the request that your comments be considered fully in making additional revisions in the rules.

Sincerely,

/s/ Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

c: Mr. Luther H. Soules III

MOORE, PAPE & JORDAN, P.C.
ATTORNEYS AT LAW
434 N. TRAVIS
SEGUIN, TEXAS 78155-4934

CHARLES R. JORDAN
CHRISTOPHER H. MOORE
ALWIN E. PAPE, JR. (of counsel)

PHONE: (512) 379-4962
FAX: (512) 379-0193

October 28, 1992

Supreme Court of Texas
Supreme Court Building A
Austin, Texas 78701

Re: Suggested Change To Rule 21A,
Texas Rules Of Civil Procedure

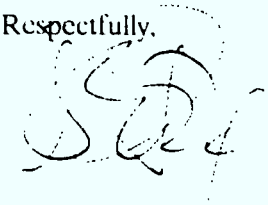
Dear Sirs:

I would propose that Rule 21a be amended to relieve state agencies and other governmental entities from the requirement (and expense) of mailing items by certified or registered mail in limited circumstances.

I would suggest that, after proper service and after the filing of an answer by an attorney, copies and notices by state agencies and governmental entities be sufficient if sent to opposing attorneys (but only attorneys) by regular first class mail.

Thank you for your consideration.

Respectfully,



Alwin E. Pape, Jr.
For The Firm

AEPJ/ks
cc: File

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hhd
LHS

7-1-91
SB

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
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TRCP 21a

7/1

June 28, 1991

H/H D
Sera Appeals
- Subs 21a, 165a, 245, 202, 270-9, etc-
Odds (avant).

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

Dear Luke:

Enclosed are copies of letters from Jim Parker, Howard H. Hasting, Jr., and E. J. Wohlt, Jr. regarding several proposed rules changes.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

HASTING & HASTING
ATTORNEYS AT LAW
1115 MILAM BUILDING
SAN ANTONIO, TEXAS 78205

HOWARD H. HASTING
HOWARD H. HASTING, JR.

AREA CODE 512
223-3001

June 13, 1991

Honorable Nathan L. Hecht
Justice, The Supreme Court of Texas
Post Office Box 12248, Capitol Station
Austin, Texas 78711

RE: Changes to certain Rules of Civil Procedure.

Dear Justice Hecht:

In some of my readings, I have taken note of remarks attributed to you to the effect that the Rules of Civil Procedure need simplification. I could not agree more. Recently, I have found two deficiencies, in my opinion, in the Rules which I feel worthy of the Court's attention. These are found in Rule 21a and Rule 165a.

Rule 21a

Recently this Rule was amended, effective September 1, 1990, to address certain problems and to provide for service by telephonic document transfer. The Rule as now written provides in part that every pleading, etc. required to be served under Rule 21 other than citation and except as otherwise provided in the Rules may be "served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record, as the case may be, either in person or by agent or by courier receipted delivery or by certified or registered mail, to the party's last known address... ." (Emphasis added). Thus, a literal reading of the Rule directs us to send all notices to the party's last known address no matter the person to whom they are sent. I do not have available to me each change of the Rules, the last one being published in the hardbound edition containing only the amendments effective January 1, 1978. However, in that iteration of the Rule it provides that every notice other than citation "may be served by delivering a copy of the notice or of the document to be served, as the case may be, to the party to be served or his duly authorized agent or his attorney of record either in person or by registered mail

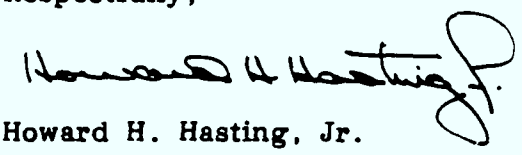
to his last known address... ." It would seem more clear for the Rule to state that the service may be to the party's, the party's duly authorized agent's or attorney of record's last known address. One other problem that should be addressed in the Rules change is to extend the provision that service by telephonic document transfer after 5:00 P.M. local time of the recipient is deemed to be served on the following day, to courier receipted delivery in order to curtail the practice that seems to have grown of sliding envelopes underneath doors late in the evening.

Rule 165a

This Rule does not provide for any minimum time between the giving of notice that a case has been placed upon the dismissal docket and the date for hearing. Most of the cases that are placed upon the dismissal docket fall under the purview of Section 2 of the Rule, Non-Compliance With Time Standards. Although it is supposition on my part, I believe that well in excess of ninety percent of the cases that are placed on the dismissal docket for non-compliance with time standards have either been deliberately ignored by both parties for good reason or have been settled with no motion and order of nonsuit filed with the Court. What is of concern to me with this Rule is the impact that Local Rules may have upon the operation of the dismissal of cases. For example, for many years cases could be set for trial upon the non-jury docket upon ten days notice. However, Rule 245 was amended, effective September 1, 1990, to provide that not less than forty-five days notice must be given to the parties of a first setting of trial. Now, back when the ten day notice was in effect and when the Local Rules in Bexar County provided for twenty-one days notice, things were working well here because the District Clerk would invariably give thirty days notice to the parties. This would permit an attorney who had allowed a case to slip through his system unnoticed, time to set the case for trial prior to the dismissal docket hearing. Bexar County, when I last checked a few weeks ago, was still adhering to giving thirty days notice for the dismissal docket. Yet, we are required to give forty-five days notice for trial. I do not believe that it is the intent of The Supreme Court of Texas and the Rules of Civil Procedure to deliberately place attorneys in front of a grievance committee. It would, therefore, seem to me appropriate that Rule 165a be amended to provide that notice be given in excess of forty-five days (sixty days would seem to be appropriate) or, in the event Local Rules provide for more than forty-five days notice of a trial setting, two weeks more than that extended period.

Your Honor should understand that neither of these Rules has caused me any personal embarrassment or problem but they have, nevertheless, recently come to my attention and I believe they deserve the attention of the Honorable Supreme Court of Texas at some time in the future.

Respectfully,



Howard H. Hasting, Jr.
State Bar No. 09209000

HHH/mk

4543.001

whd
LHS

SCOTT R. BRANN & ASSOCIATES
ATTORNEYS AND COUNSELLORS
3500 TRAVIS
HOUSTON, TEXAS 77002

5-6-91
SB

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TEXAS BOARD OF LEGAL SPECIALIZATION

D. LEE ROMERO

5/6

HOUSTON - (713) 522-6666
BAYTOWN - (713) 421-1985

May 1, 1991

HHD,
SCAC Subc
- Agenda
COAS
1

Mr. Luther Soules
Soules & Wallace, A P.C.
10th fl., 175 E. Houston Street
San Antonio, TX 78205-2230

Re: Advisory Committee, Texas Rules of Civil Procedure

Dear Mr. Soules:

I enclose an excerpt from the Texas Lawyers' Civil Digest of April, 19, 1991, of the case styled Trevino v. Hidalgo Publishing Company. Although I have not read the entire case, I do have some concerns with the Court's construction and application of Rule 21a. If lawyers begin serving each other's clients with required notices and not with the attorney in charge, the spaghetti bowl of problems that will develop is mind-boggling.

I would suggest that Rule 21a be amended to at least require service on the attorney of record at all times. If a party desires to serve notice on the opposing party, that is fine; but if the opposing party also has an attorney of record, then service on the attorney of record should also be required.

I would appreciate any comments you have on this matter.

Sincerely,

SCOTT R. BRANN & ASSOCIATES

SCOTT R. BRANN

SRB/kaf
Enclosure
cc: Honorable Nathan L. Hecht (w/enclosure)

discretionary authority in disbelieving W's unsubstantiated claim that cash was spent, without any substantive accounting of the expenditures—especially when evidence shows the existence of other cash funds that have been sequestered in a foreign account. *All unaccounted for cash is presumed to be in the possession of the debtor; simply asserting "I spent it" is unacceptable.*

Turnover Order For Cash Can Only Reach Cash Then In Possession Of Debtor.

The purpose of a turnover proceeding is to ascertain whether or not an asset is in the possession of the judgment debtor or subject to the debtor's control. *If the asset sought is a cash sum, a turnover proceeding can only order the debtor to turnover as much of the cash amount as is in the possession or control of the debtor. If the debtor can prove that a portion of the cash was spent then that portion must be deducted from the total.*

Turnover Statute Inapplicable To Non-Judgment Debtor.

The turnover statute does not apply to non-judgment debtors.

Appellate Review Of Turnover Order. Abuse Of Discretion Standard.

A trial court's turnover order is reviewed under an abuse of discretion standard. Whether there was no evidence to support the turnover award would be a relevant consideration in determining if the trial court abused its discretionary authority in issuing the order.

COURTS OF APPEAL

Procedure

Chevron USA, Inc v Kennedy
(08-90-00322-CV), 3/20/91, ElP.

Class Action. Numerosity Tied To Impracticability Of Joinder.

This is a class action involving the interpretation of certain oil & gas leases. Ps assert they are owed royalties pursuant to the JHR lease. This lease was contributed by Gulf Oil (now Chevron USA) to the Quito Unit Operating Agreement. This pooling unit consisted of leasehold interest & unleased mineral interest in 9,885.42 acres of land. Under the operating agreement, each working interest owns a specified percentage of the gas produced from the Quito Unit. Chevron USA owns approximately 32% of the gas produced from the Quito Unit. 15 individual proration units were later formed from portions of the acreage committed to the Quito Unit. Some of these proration units also contained acreage that was not committed to the Quito Unit. Portions of the land covered by the JHR lease were included in 3 of the proration units. The Superior Oil Company originally served as operator of the Quito Unit. Superior paid royalties on an average proceeds basis based on the sale of production by all the working interest owners until 10/83. Thereafter, under an alleged theory of cross-conveyances between the owners of working interests that granted Chevron USA a 32% ownership in all leases in the Quito Unit, Chevron USA began paying royalties to its royalty owners based upon a 32 percentage computed upon all the royalties due under all the leases contributed to the Quito Unit by all working interests. This significantly lowered the royalty payments that had been made by Chevron USA to the royalty owners under the leases it had contributed. Ps claim Chevron USA is wrongfully retaining the balance of the royalties under leases committed by Chevron USA to the Quito Unit. The larger royalty owners had commenced litigation over the reduced payments, but the smaller ones had not. The trial court certified a class action. Its classification order excluded the pending litigants from the class order as well as any royalty owners who also had working interest. Ds contend that there are no more than 20 identifiable potential class members & that the class is improper because all could be joined. *Held:* Affirmed. *The requirement of numerosity under R Civ Proc 23(a)(1) is met if the class is so numerous that joinder of all members is impracticable.* No hard & fast number rule can or should be made since "numerosity" is tied to "impracticability" of joinder under the specific circumstances. "Impracticable" does not mean "impossible." *The representatives only need to show that it is extremely difficult or inconvenient to join all the members of the class. Here there was sufficient numerosity. Although Ds contend that there are no more than 20 identifiable potential class members* (providing the 4-year statute of limitations excluded the remainder), *there was testimony that royalty owners under units that had ceased production were not enumerated. Former owners of royalty interests were not included. The difficulty in the search for the royalty owners not listed, & the possible heirs, devisees & assignees, produce the probability of inexpediency in their joinder & the inconvenience of trying their individual suits.*

Class Action. Typicality Requirement Satisfied If Claims Substantially Similar.

The "typicality" requirement for a class action is satisfied when the evidence shows that the claims or defenses of the class representative have the same essential characteristics as those of the class as a whole. Although the class interest may vary, they may not be competing interests within themselves. The absence of antagonism, here, is a vital element in determining whether the representatives will fairly & adequately represent the class interests. It is important to note that if the trial court subsequently determines that the representation is not adequate, it has authority under R Civ Proc 42(c)(1) to alter, amend or withdraw the class determination. It can designate subclass under R 42(d) to assure adequate representation to a particular group with a particular problem. This flexibility accommodates the trial court's finding that the class members' common interests predominate over any class differences.

Trevino v Hidalgo Publishing Company
(13-90-025-CV), 2/21/91, CC.

Notice To Party & Not Attorney Sufficient For Summary Judgment Hearing. Actual Notice.

D gave P actual notice of the summary judgment hear-

ing but did not give notice to P's attorney. P was personally served with the motion for summary judgment on 9/6/89. The summary judgment hearing took place on 10/2/89. On the morning of the hearing, P's attorney, Watts, called the court coordinator & stated that he was ready & he would be over. He did not appear at the hearing or ask for a continuance. The trial court granted summary judgment. *Held:* Affirmed. *R Civ Proc 21a requires service of notice on a party or his attorney of record.* There is no requirement that notice be served only on opposing counsel. Notice was proper. R 21a allows service on a party or counsel. Moreover, R 8 specifies which attorney should receive notice, not that an attorney must receive notice in order to constitute proper service. The court does not hold that in every case the sole act of serving the party, rather than the attorney, is sufficient. However, P failed to establish that D's service of the motion for summary judgment on the party was in any way injurious or prejudicial. P's attorney had actual notice of this hearing, with sufficient time to respond, but failed to appear. Due process concerns are absent.

Nueces County Housing Assistance, Inc v M & M Resources Corporation (13-90-139-CV), 3/28/91, CC.

Writ Of Error. Face Of Record Does Not Include Documents Filed After Default.

This is an appeal by writ of error from the granting of a "no-answer" default judgment against Nueces County Housing Assistance, Inc. (NCHA). P alleged that NCHA was a housing assistance corporation which could be served through its chairman, Valdez. The return of citation was directed to chairman Valdez. Under Rev Civ Stat art 1396-2.07(A), a housing assistance corporation is a non-profit corporation & is served through its president & all vice presidents of the corporation & the registered agent of the corporation, except where the chief executive function of the corporation is authorized to be performed by a committee, then service on any member of such committee is deemed to be service on the president. The record before the trial court when it rendered its default judgment contained no indication that Valdez was NCHA's president, vice president, or registered agent. Likewise, the same record included no proof that NCHA's chief executive function was authorized to be performed by a committee of which Valdez was a member. On the other hand, the appellate record contained several judicial admissions by NCHA indicating that Valdez was a member of a committee authorized to perform NCHA's chief executive functions. *Held:* Reversed & remanded. ***In writ of error proceedings, an appellate court cannot consider documents not before the trial court prior to its rendition of the default judgment. Admissions contained in a post-judgment motion should not be allowed to relate back to the default judgment & relieve the P of what it was originally required to show to obtain its default judgment.*** The supreme court decision in *Higginbotham v General Life & Accident Insurance Company*, 796 SW2d 695 (Tex. 1990), holding that evidence, adduced at a hearing on the D's motion for new trial following a default judgment, could be used to establish proper service of citation where the trial court made an express finding of proper service, is inapplicable to this case because that was an ordinary appeal & this was an appeal by writ of error.

Writ Of Error. Motion For New Trial Does Not Preclude.

The filing of a motion for new trial does not preclude a party from appealing by writ of error rather than by an ordinary appeal. The requirement that a party not participate at trial in order to appeal by writ of error does not include the filing of these motions.

Service Of Citation. Strict Compliance. Default.

Before a default judgment is properly rendered, the record must reflect that the trial court has jurisdiction & that the case is ripe for judgment. When determining whether the case is ripe for judgment, the trial judge has a mandatory duty to determine that the D was duly served with citation & has no answer on file. *The failure of the record to show strict compliance with the rules governing issuance, service, & return of citation will generally void attempted service & require the default judgment to be set aside.* Virtually any deviation from the statutory requisites for service of process will destroy a default judgment. Failure to obtain proper service is "fundamental error" & *voids* the judgment because it was rendered without proof of personal jurisdiction over the D.

Jurisdiction; Probate; Legal Malpractice

Bunnell v Jordan (01-89-00982-CV), 2/28/91, Hou-1.

Jurisdiction. Courts Having Original Probate Jurisdiction Have Power To Hear All Matters Incident To An Estate.

Appeal arising out of 2 suits that were consolidated & then tried by the Galveston Probate & County Court. The 1st suit was filed by P in that court against the executrix of the estate of Donald Bunnell, Jr., for payment of legal services rendered. The 2nd suit was filed in Harris County district court by the executrix & 3 closely held corporations, of which the executrix was the sole shareholder, alleging that P committed legal malpractice, gross negligence, & deceptive trade practices by breaching fiduciary obligations. It is unclear which of the claims belong to the corporations. The probate court entered an agreed order of consolidation of the 2 suits pursuant to the executrix's Motion for Consolidation. A jury found the estate liable to the executrix in the amount of $9,544 & found against all of P's claims. P claimed that the trial court erred in transferring its suit from district court to the probate court, for the reason that the probate court did not have subject matter jurisdiction. *Held:* Affirmed. Subject matter jurisdiction was proper as to claims made by the executrix, individually & as representative of the estate. Courts having original probate jurisdiction have the power to hear all matters incident to an estate. The Texas Supreme Court has held that the phrase "incident to an estate" has a broad meaning; thus, it covers a wide range

21a

WENDELL S. LOOMIS
Attorney at Law
14610 Falling Creek Drive
Houston, Texas 77068-2938
(713) 893-5900
FAX (713) 893-5732

March 21, 1991

Supreme Court of the State of Texas
Supreme Court Building
P.O. Box 12248
Austin, Texas 78711

Attention: Honorable Justice Eugene A. Cook

Re: Rules 21, 21a, 21b Methods of Service
Trevino vs. Hidalgo Publishing Company d/b/a The Edinburgh Daily Review, No. 13-90-025-CV (Corpus Christi), 2-21-91

Dear Gene:

I have just read with horror the above-described case and looking at Rule 21a was aghast to find that the Rule does not absolutely require notice to be served upon the attorney of record, but the rule authorizes the Notice to be served on the party or his attorney of record.

I thought this question had been put to rest several years ago when I complained about Rule 72, which required pleadings to be served only on "adverse" parties instead of all parties, only to discover that Rule 72 and 73 have now been consolidated into Rules 21, 21a, and 21b, which are now the offending wording.

The original reason for my complaint was that where there were multiple plaintiffs and/or multiple defendants, one plaintiff could deal with one defendant independent of the other parties and not be in violation of the rules and create considerable confusion in the case. As I recall, this Rule was amended, then the amendment was withdrawn, then it was re-amended, and now consolidated to Rule 21a and 21b. In the corporate and commercial law practice, trickiness is part of the game (I know I don't have to tell you this) and justice certainly does not prevail under the circumstances described by the Trevino vs. Hidalgo case

Can we have a wording under Rule 21, 21a, 21b, or 21c to the effect that

> pleadings, notices, and documents must be served upon all counsel of record, but if there is no counsel for a party, then upon the party or the parties' designated agent.

Gene, I feel that this matter is urgent! The Trevino case may or may not come up before the Supreme Court. The Trevino case on first blush appears to be technically correct. For that reason, I think all haste must be taken to amend the rules so that all counsel are requested to serve all other counsel with pleadings, notices, motions, and applications.

Your urgent attention to this problem would be very much appreciated.

Very truly yours,

Wendell S. Loomis

WSL:dkm

4543.61

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
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3/27
H/D
SCAC Agenda
Sub C
CC: Hs
J. Heath
Hecht

March 26, 1991

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

Dear Luke:

Enclosed is a copy of a letter Justice Cook received from Wendell Loomis regarding Texas Rule of Civil Procedure 21.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

4543.001

HHD
CHS

9-19-90
SBB

STRASBURGER & PRICE

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MEXICO CITY CORRESPONDENT
GONZALEZ CALVILLO Y FORASTIERI, S.C.
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(905) 207-9409

WRITER'S DIRECT DIAL NUMBER:

(214) 651-4606

HHD, SCAC Subc Agenda 21a ✓ Cox's J. Hedt. ✓

September 17, 1990

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

Re: Supreme Court Advisory Committee -- Texas Rules of Civil Procedure

Dear Mr. Soules:

With regard to the amendments to the Texas Rules of Civil Procedure effective September 1, 1990, it appears that there are at least two errors in Rule 21a and Rule 21b, T.R.C.P., dealing with "Methods of Service" and "Sanctions" in respect thereof.

You will note that while Rule 21a expressly provides that copies of documents may be served by ". . . delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record, as the case may be," the Rule then goes on to seemingly provide that such copy if served "in person or by agent or by courier receipted delivery or by certified or registered mail," must be served on the attorney at "the party's last known address", whereas telephonically transmitted documents may be transferred to the "recipient's current telecopier number,".

It seems that allowing service on a party's attorney, but requiring that it be at the "party's last known address" is an obvious error, and conflicts both with the ethical admonitions against direct contact between attorneys and parties represented by counsel, but also is contrary to the provisions of Rule 8, T.R.C.P., which provides in part that:

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> "All communications from the court or other counsel with respect to a suit shall be sent to the attorney in charge."

Additionally, in Rule 21b, dealing with "Sanctions", the language of that amended provision does not make sense where it states ". . . or other application to the court for an order in accordance with Rules 21 and 21a,. . . ".

I would be happy to discuss this matter with you further if need be, but would appreciate your bringing these problems to the attention of the Supreme Court Advisory Committee.

Sincerely yours,

H. Norman Kinzy

HNK:ts

21b

WENDELL S. LOOMIS
Attorney at Law
14610 Falling Creek Drive
Houston, Texas 77068-2938
(713) 893-5900
FAX (713) 893-5732

March 21, 1991

Supreme Court of the State of Texas
Supreme Court Building
P.O. Box 12248
Austin, Texas 78711

Attention: Honorable Justice Eugene A. Cook

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Trevino vs. Hidalgo Publishing Company d/b/a The Edinburgh Daily Review, No. 13-90-025-CV (Corpus Christi), 2-21-91

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Wendell S. Loomis

WSL:dkm

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL. (512) 463-1312
FAX (512) 463-1365

March 26, 1991

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

Dear Luke:

Enclosed is a copy of a letter Justice Cook received from Wendell Loomis regarding Texas Rule of Civil Procedure 21.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

4543.001

HHD
CHS

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9-19-90
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WRITER'S DIRECT DIAL NUMBER:

(214) 651-4606

HHD, SCAC Subc Agenda 21b

Cc's J. Hedtke

September 17, 1990

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

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With regard to the amendments to the Texas Rules of Civil Procedure effective September 1, 1990, it appears that there are at least two errors in Rule 21a and Rule 21b, T.R.C.P., dealing with "Methods of Service" and "Sanctions" in respect thereof.

You will note that while Rule 21a expressly provides that copies of documents may be served by ". . . delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record, as the case may be," the Rule then goes on to seemingly provide that such copy if served "in person or by agent or by courier receipted delivery or by certified or registered mail," must be served on the attorney at "the party's last known address", whereas telephonically transmitted documents may be transferred to the "recipient's current telecopier number,".

It seems that allowing service on a party's attorney, but requiring that it be at the "party's last known address" is an obvious error, and conflicts both with the ethical admonitions against direct contact between attorneys and parties represented by counsel, but also is contrary to the provisions of Rule 8, T.R.C.P., which provides in part that:

HNK:15001575.90

> "All communications from the court or other counsel with respect to a suit shall be sent to the attorney in charge."

Additionally, in Rule 21b, dealing with "Sanctions", the language of that amended provision does not make sense where it states ". . . or other application to the court for an order in accordance with Rules 21 and 21a,. . . ".

I would be happy to discuss this matter with you further if need be, but would appreciate your bringing these problems to the attention of the Supreme Court Advisory Committee.

Sincerely yours,

H. Norman Kinzy

HNK:ts

HNK:15001575.90

JOHN S. APPLEMAN
DISTRICT CLERK

P. O. BOX 3707
BEAUMONT, TEXAS 77704
409-835-8580
STS 872-8580
FAX 409-835-8527

BARBARA PRESTON
Chief Deputy

JEFFERSON COUNTY

CHILD SUPPORT
P. O. Box 3586
Beaumont, Texas 77704

April 30, 1993

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

Dear Justice Phillips:

It looks as if Jefferson County, among others, is going to elect judges within certain district boundries, according to a recent announcement.

To what extent I am able, I have voiced opposition to this from the standpoint that judges serve the law and not a constituency.

My purpose in writing is to ask you, the members of the Supreme Court who sit on the rules committee, and all others who sit thereon, not to amend the rules as they apply to random case assignment. Rule 23, T.R.C., recites, "It shall be the duty of the clerk to designate the suits by regular consecutive numbers....".

The District Judges of Jefferson County adopted a rule which is designed to discourage and combat forum shopping. Even so, plural petitions are filed trying to land an action in a court of choice. Our computer assigns the courts by randomly choosing the courts so that it is impossible to predict and equally impossible to determine which court is open next.

My concern, and the concern of many others, is that pressure will be brought by voters in a particular district for favorable rulings, using election as blackmail. Of course, I realize that cases will sometimes fall that way as a matter of course, but should happen that way and not by design.

If this issue cannot be decided by the courts so that judges can function independently, without pressure from the electorate, I feel that they should be appointed in some manner as to preserve their ability to administer the law apart from political pressure.

Sincerely yours,

JOHN S. APPLEMAN
District Clerk

file

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sm

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
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May 11, 1993 5/13

HHD, SCAC Agenda Various SCAC Subcs COAJ Staff Tkp

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

Dear Luke:

Enclosed are the following letters:

1. Roger Hurlbut — regarding private process servers;

2. District Clerk John Appleman — regarding Texas Rule of Civil Procedure 23;

3. Stephen Howell — regarding the 1993 Texas Rules of Court;

4. Jeana Lungwitz — regarding Texas Rule of Civil Procedure 145.

I would appreciate your bringing these to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

MEMORANDUM

TO: Judge Hecht

FROM: Bill Willis

DATE: August 24, 1990

RE: Revised Rule 26, T.R.C.P.

==========

A little over a month ago, I got a call from Michael Heskett, with the State Library, expressing concern about the revision of Rule 26, when read together with Rules 2 and 524. (The division in which he works gives guidance to local governments about records retention, storage, etc.) I asked him to write me a brief note to which I could respond. It hasn't been received, but I call the question to your attention anyway, to get it out of the holding pattern on my desk.

Rule 524, T.R.C.P. details all the things a J.P. must enter in the civil docket he or she keeps.

Rule 2, T.R.C.P. says:

> "These rules shall govern the procedure in the justice, county and district courts of the state of Texas in all actions of a civil nature, " etc.

The present Rule 26 says:

> "Each clerk shall also keep a court docket in a well bound book in which he shall enter . . . " etc. The new rules delete the words "well bound book" and substitute "permanent record." This set off shock waves among the archive and records retention people, for whom "permanent" has special and almost sacred meanings.

At the time of the call, I suggested to Heskett that Rule 26 had to be read as being a part of Section 2 of the Rules, which clearly pertain to district or county courts only and that I did not believe it could properly be read as including J.P. courts as well. (Maybe I was so convincing, he decided not to write.)

Was I not correct?

RULE 2. SCOPE OF RULES

These rules shall govern the procedure in the justice, county, and district courts of the State of Texas in all actions of a civil nature, with such exceptions as may be hereinafter stated. Where any statute in effect immediately prior to September 1, 1941, prescribed a rule of procedure in lunacy, guardianship, or estates of decedents, or any other probate proceedings in the county court differing from these Rules, and not included in the "List of Repealed Statutes," such statute shall apply; and where any statute in effect immediately prior to September 1, 1941, and not included in the "List of Repealed Statutes," prescribed a rule of procedure in any special statutory proceeding differing from these rules, such statute shall apply. All statutes in effect immediately prior to September 1, 1941, prescribing rules of procedure in bond or recognizance forfeitures in criminal cases are hereby continued in effect as rules of procedure governing such cases, but where such statutes prescribed no rules of procedure in such cases, these rules shall apply. All statutes in effect immediately prior to September 1, 1941, prescribing rules of procedure in tax suits are hereby continued in effect as rules of procedure governing such cases, but where such statutes prescribed no rules of procedure in such cases, these rules shall apply; provided, however, that Rule 117a shall control with respect to citation in tax suits.

(Amended Sept. 20, 1941, eff. Dec. 31, 1941; June 16, 1943, eff. Dec. 31, 1943; Aug. 18, 1947, eff. Dec. 31, 1947; April 10, 1986, eff. Sept. 1, 1986.)

Notes and Comments

Source: Federal Rule 1, adapted to Texas practice.

Comment: Amended to delete any reference to appellate procedure.

RULE 26. CLERK'S COURT DOCKET

Each clerk shall also keep a court docket in a ~~well bound book~~ permanent record in that he shall ~~enter~~ include the number of the case and the names of parties, the names of the attorneys, the nature of the action, the pleas, the motions, and the ruling of the court as made.

SECTION 2. INSTITUTION OF SUIT

RULE 22. COMMENCED BY PETITION

A civil suit in the district or county court shall be commenced by a petition filed in the office of the clerk.

Notes and Comments

Source: Art. 1971, with minor textual change.

RULE 23. SUITS TO BE NUMBERED CONSECUTIVELY

It shall be the duty of the clerk to designate the suits by regular consecutive numbers, called file numbers, and he shall mark on each paper in every case the file number of the cause.

Notes and Comments

Source: Texas Rule 82 (for District and County Courts).

RULE 24. DUTY OF CLERK

When a petition is filed with the clerk he shall indorse thereon the file number, the day on which it was filed and the time of filing, and sign his name officially thereto.

Notes and Comments

Source: Art. 1972.

RULE 25. CLERK'S FILE DOCKET

Each clerk shall keep a file docket which shall show in convenient form the number of the suit, the names of the attorneys, the names of the parties to the suit, and the nature thereof, and, in brief form, the officer's return on the process, and all subsequent proceedings had in the case with the dates thereof.

Notes and Comments

Source: Art. 1973.

RULE 26. CLERK'S COURT DOCKET

Each clerk shall also keep a court docket in a well bound book in which he shall enter the number of the case and the names of the parties, the names of the attorneys, the nature of the action, the pleas, the motions, and the ruling of the court as made.

Notes and Comments

Source: Texas Rule 79 (for District and County Courts), with minor textual change.

RULE 27. ORDER OF CASES

The cases shall be placed on the docket as they are filed.

Notes and Comments

Source: Texas Rule 80 (for District and County Courts).

RULE 524. DOCKET

Each justice shall keep a civil docket in which he shall enter:

(a) The title of all suits commenced before him.

(b) The time when the first process was issued against the defendant, when returnable, and the nature thereof.

(c) The time when the parties, or either of them, appeared before him, either with or without a citation.

(d) A brief statement of the nature of the plaintiff's demand or claim, and the amount claimed, and a brief statement of the nature of the defense made by the defendant, if any.

(e) Every adjournment, stating at whose request and to what time.

(f) The time when the trial was had, stating whether the same was by a jury or by the justice.

(g) The verdict of the jury, if any.

(h) The judgment signed by the justice and the time of signing same.

(i) All applications for setting aside judgments or granting new trials and the order of the justice thereon, with the date thereof.

(j) The time of issuing execution, to whom directed and delivered, and the amount of debt, damages and costs; and, when any execution is returned, he shall note such return on said docket, with the manner in which it was executed.

(k) All stays and appeals that may be taken, and the time when taken, the amount of the bond and the names of the sureties.

(l) He shall also keep such other dockets, books and records as may be required by law or these rules, and shall keep a fee book in which shall be taxed all costs accruing in every suit commenced before him.

(Amended June 10, 1980, eff. Jan. 1, 1981.)

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* LHS
5-1-92
SB3

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

April 30, 1992

HHD,
Pls Distribute
per usual.

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

TRCP 41

Dear Luke:

Enclosed is a memorandum I received from University of Texas Law Professor Jack Ratliff.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

MEMORANDUM

TO: Justice Hecht

April 30, 1992

FROM: Professor Ratliff

RE: Rules Concerning Joinder of Parties

The language of Rule 40(a), "arising out of the same transaction, occurrence or series of transactions or occurrences . . .", to too confusing. Rules 174 and 41 are at odds with each other and should be changed. Joinder matters should be within the discretion of the TC, and therefore, subject to an abuse of discretion review. The TC should be able to join parties as long as there is not an inordinate amount of expense and no prejudice to the parties.

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√2-23-93 hhd

SB

THE SUPREME COURT OF TEXAS

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HHD
Scott Ayres
Luke
COA Staff

February 22, 1993

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

Dear Luke:

Enclosed is a letter from Herbert Finkelstein regarding Rules 46(b) and 48.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

4543.001

LHS
hha

2-23-93

THE SUPREME COURT OF TEXAS

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FAX (512) 463-1365

February 22, 1993

HHP.
Supp Agenda
Subc
COAJ Staff
file

Mr. Herbert Finkelstein
723 Main Street #510
Houston TX 77002

Dear Mr. Finkelstein:

Because I am the Court's liaison with Court Rules Committee, Chief Justice Phillips has given me a copy of your letter regarding Rules 46(b) and 48. I appreciate your taking the time to write, and I have sent a copy of your letter to the chairman of the Rules Advisory Committee with the request that your comments be considered fully in making additional revisions in the rules.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

c: Mr. Luther H. Soules III

HERBERT FINKELSTEIN
ATTORNEY AT LAW
SUITE 510
723 MAIN STREET
HOUSTON, TEXAS 77002
TEL.: 713-222-8644

February 10, 1993

Hon Thomas R.Phillips
Chief Justice, Supreme Court of Texas
Austin, Texas

Dear Judge Phillips:

Recently, to my surprise, I found that there is no provision in the ules relating to the justice court to permit a defendant against whom a judgment has been rendered to appeal by making a cash deposit. Rule 46 (b) and Rule 48 provide for the making of a deposit in lieu of a bond, but, strangely enough, there is no comparable provision for appeals from judgments in the justice courts. In recent years bond fees have incresed substantially, and in many cases it is more practical and cheaper to make a cash deposit I therefore suggest that the rules relating to appeals from judgments of the justice be amended to provide for a cash deposit in lieu of a bond.

Yours truly,

Herbert Finkelstein

Herbert Finkelstein

4543.001

SPIVEY, GRIGG, KELLY AND KNISELY

ATTORNEYS AT LAW
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BUSINESS MANAGER

FAX: (512) 474-1605

6/3

HAD
SCAC Agenda
J. Hedt.

April 30, 1991

BAS91.022

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney, Ste. 5100
Houston, TX 77010-8095

Re: Supreme Court Advisory Committee
Proposed Changes to TRCP 21, 47 and 91

Dear David:

I will take this opportunity to reply to your letters of March 7th and April 8th.

On Rules 21, 21a and 21b, I concur with Wendell Loomis that the present provision is inappropriate and unsatisfactory. Mr. Loomis' suggested correction seems to meet the objection appropriately. There are lawyers who will serve a party in order to "technically comply" with the service rules even when they have an attorney. That should not be allowed.

Re TRCP 47, Mr. McMurray points out an area which our rules do not adequately address: the hiatus between county court at law jurisdiction and district court jurisdiction. I do not find that to be a problem in my own practice. I recall that Rule 47 was changed to its present reading in order to avoid the temptation for a plaintiff to plead for a lot of money and thus obtain press coverage. It would not bother me to provide that no amount is required to be pled or to simply provide that a specific amount should be pled. The latter suggestion would probably solve the complaints, but I fear the insurance clients of some of the defense bar would strongly object.

Re TRCP 91, I do not think the suggested amendment to TRCP 91 offers an adequate solution. It seems to me that the rules should be as universal as possible and to improve the rule would require simplifying it. I suggest simply requiring that special exceptions be filed ten days prior to trial period.

It seems to me that providing complicated time period simply multiplies the trial court's burden and certainly complicates the procedure for us practitioners.

Sincerely,

Broadus A. Spivey

BAS/sm

cc: Mr. Luther H. Soules III, Esq.
Soules & Wallace
Republic of Texas Plaza, 10th Floor
175 E. Houston St.
San Antonio, TX 78205-2230

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rhd

THE SUPREME COURT OF TEXAS

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February 28, 1991

HHD,
SCAC Sec'C
Agenda
CoAS

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

Dear Luke:

Enclosed is a letter from Pat McMurray suggesting a proposed amendment to Rule 47.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

PAT MCMURRAY
ATTORNEY AT LAW
17330 PRESTON ROAD, SUITE 209B
DALLAS, TEXAS 75252-5619
(214) 250-2871
TELECOPY (214) 248-6290

Copy to LHS
Current Rules

February 22, 1991

Honorable Nathan Hecht
Chairman, Rules Committee
Supreme Court of Texas
P.O. Box 12248
Austin, TX 78711

RE: Rule 47

Dear Justice Hecht:

This is a followup to my letter of January 22, 1991, a copy of which is attached.

My recommendation would help prevent forum shopping. Under the present state of the law it appears that a plaintiff can permanently attach jurisdiction by filing a lawsuit for an indefinite amount in a court of limited jurisdiction then amend his pleadings to allege an amount in excess of the jurisdictional limit.

Thank you for your consideration.

Sincerely,

Pat McMurray

Pat McMurray
Attorney at Law

PM:fs/loda

Enclosure

PAT MCMURRAY
ATTORNEY AT LAW
17330 PRESTON ROAD, SUITE 209B
DALLAS, TEXAS 75252-5619
(214) 250-2871
TELECOPY (214) 248-6290

January 22, 1991

Honorable Nathan Hecht, Chairman
Rules Committee
Supreme Court of Texas
P.O. Box 12248
Austin, TX 78711

RE: Rule 47

Dear Justice Hecht:

It is important for a defendant to know the amount of money for which he is being sued. This is particularly so when liability insurance is involved and the claim may or may not be within the policy limits.

The amount in controversy is also a factor in cases filed in County Courts at Law which have jurisdictional limits but according to Texas case law, the jurisdictional limit is simply jurisdictional and not a cap on the amount of recovery that may be had.

I recommend that Rule 47 be amended to read in pertinent part as follows:

(d) The maximum amount claimed.

Relief in the alternative or of several different types may be demanded.

This suggestion would greatly reduce the filing of Special Exceptions and the resulting burden on the Courts and the expense of litigation.

Respectfully submitted,

Pat McMurray

Pat McMurray
Attorney at Law

PM:fs/loda

4543.001 LHS
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SB

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
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HHD
Scott Ayres
Subc
COA Staff

February 22, 1993

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

Dear Luke:

Enclosed is a letter from Herbert Finkelstein regarding Rules 46(b) and 48.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

4543.001

LHS
hhd

2-23-93

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

February 22, 1993

Mr. Herbert Finkelstein
723 Main Street #510
Houston TX 77002

Dear Mr. Finkelstein:

Because I am the Court's liaison with Court Rules Committee, Chief Justice Phillips has given me a copy of your letter regarding Rules 46(b) and 48. I appreciate your taking the time to write, and I have sent a copy of your letter to the chairman of the Rules Advisory Committee with the request that your comments be considered fully in making additional revisions in the rules.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

c: Mr. Luther H. Soules III

HERBERT FINKELSTEIN
ATTORNEY AT LAW
SUITE 510
723 MAIN STREET
HOUSTON, TEXAS 77002
TEL: 713-222-8644

February 10, 1993

Hon Thomas R.Phillips
Chief Justice, Supreme Court of Texas
Austin, Texas

Dear Judge Phillips:

Recently, to my surprise, I found that there is no provision in the ules relating to the justice court to permit a defendant against whom a judgment has been rendered to appeal by making a cash deposit. Rule 46 (b) and Rule 48 provide for the making of a deposit in lieu of a bond, but, strangely enough, there is no comparable provision for appeals from judgments in the justice courts. In recent years bond fees have incresed substantially, and in many cases it is more practical and cheaper to make a cash deposit I therefore suggest that the rules relating to appeals from judgments of the justice be amended to provide for a cash deposit in lieu of a bond.

Yours truly,

Herbert Finkelstein

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hjh
Uns

✓ 1-29-90

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ATTORNEYS AT LAW

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J. SCOTT BARDOLE
RICHARD B. GEIGER
KIM B. VERNON
BRIAN L. MCELROY
W. DAVID MOORE
PATRICIA M. MCCLUNG
KELLY A. MCDONALD
SHARON M. SCHWEITZER

January 25, 1990

TRCP 63

Justice Nathan L. Hecht
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

RE: Proposed Rule Changes

II. Change Rule 63

A. Change Rule 63 from 7 days prior to trial to 30 Days Prior to trial.

B. Modify the Rules of Pleading, Rules 63 & 67, to provide that the pleadings shall not be amended within 30 days of trial absent leave of court, further providing that the Court shall have discretion to permit leave to file the amended pleadings but that the burden is on the MOVANT SEEKING LEAVE TO SHOW THAT SURPRISE IS NOT SHOWN OR THAT "GOOD CAUSE" OTHERWISE EXISTS TO PERMIT LEAVE TO BE FILED.

Judge, the reasons for the above rules are many, but I will give you only a few.

PLEADINGS.

The Texas time periods of 7 days (pleadings) and 30 days (experts etc.) are ridiculous for anyone who has ever engaged in any serious lawsuits at all. The notion that a mere 7 days before trial after 75 depositions and 3 years of preparation a party can "amend" their pleadings and that such "amendment" will be granted "absent a showing of surprise" can only be viewed as absurd from the point of view of "streamlining" or "fairness or efficiency". We have all of this discovery, all these "rules", and we are AUTHORIZED, should I say invited!, to wait until 7 days prior to trial to "amend".

We know to a certainty that lawyers wait to amend and put off doing until 7 days what they could and should do earlier. At the minimum, NO AMENDMENT TO THE PLEADINGS WITHIN 30 DAYS OF TRIAL.

PLAYING BY THE RULES

Recent Amendments to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence Effective December 1, 1991

by John K. Chapin

On April 30, 1991, the Supreme Court transmitted to Congress a number of changes to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence. These changes are to take effect on December 1, 1991. Following is a discussion of the major changes. Other insubstantial changes were made to F.R.A.P. 6, 10, 26, and 26.1.

FEDERAL RULES OF CIVIL PROCEDURE

(TRCP 63)

Relation Back of Amendments—Rule 15(c)

Rule 15(c) is revised to clarify that it does not preclude any relation back that is permitted under the applicable limitations law. Thus in many cases, such as those based on diversity, relation back will be governed by the applicable state statute, and the amended rule will not apply to preclude any relation back that the applicable state limitations statute permits. According to the Advisory Committee on the Proposed Rules, "[w]hatever may be the controlling body of limitations law, if that law affords a more forgiving principle of relation back than the one provided in [Rule 15(c)], it should be available to save the claim."

Rule 15(c) is also amended to make it applicable to any amendment to a pleading that changes the naming of the party against whom a claim is made (*i.e.*, an amendment in suits in which the correct defendant was identified, but misnamed in the original pleading) as well as an amendment changing the party (*i.e.*, an amendment in suits in which the defendant was misidentified in the original pleading), and to change the period within which such changed defendants must be notified of the action to conform to the provisions of Rule 4 (120 days after filing of a complaint within the applicable limitations period under Rule 4[j]). (Note: The amended Rule 15(c) refers to Rule 4(m); however, the proposed amendment to Rule 4 that would have changed Rule 4[j] and redesignated it as Rule 4[m] has not been adopted by the Supreme Court.) According to the Advisory Committee on the Proposed Rules, this amendment is intended to change the result in *Schiavone v. Fortune*, 477 U.S. 21, 106 S.Ct. 2379 (1986) 86 Fed Lit 248. *Schiavone* held that under the pre-amended version of the rule, the changed defendant must have received notice of the action within the applicable limitations period *without* any additional time during which timely service could be effected. After amended Rule 15 goes into effect, an intended defendant who is notified of an action within the period allowed by Rule 4 for service of a summons and complaint (under Rule 4[j], 120 days after filing of a complaint within the applicable limitations period) may not defeat the action on account of a pleading defect with respect to a misnamed or misidentified defendant if the other requirements of Rule 15 have been met.

4543.001 ✓ 1-16-90

JOHN G. TUCKER
CLEVE BACHMAN
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
JOHN W. NEWTON III
D. ALLAN JONES
HOLLIS HORTON
LOIS ANN STANTON
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B. O. ORGAIN, OF COUNSEL

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

7/20

July 12, 1990

HHP,
Cont
Scott Sears
Brenda
J. Hatchell
Xc Buddy Low

Re: Supreme Court Advisory Committee

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:

For some time I have been concerned that we do not have a provision in the Rules of Civil Procedure of Texas allowing one to amend and take care of a misidentification situation or take care of the situation wherein limitations is about to run and plaintiff does not have time to get out discovery prior to filing suit against all parties that he thinks might have been connected with the accident or occurrence. We should have a rule similar to Federal Rule 15(b) and I recommend adopting such rule as Texas Rule of Civil Procedure 63(a) or it could be a second paragraph in Rule 63. The rule would provide:

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment, that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that,

but for a mistake concerning the identity of the proper party, the action would have been brought against the party."

If this cannot be placed on the agenda when we have our next meeting without having first gone through the Administration of Justice Committee, please let me know so that the same may be submitted to them.

Thank you.

Sincerely,

Gilbert I. Low

GIL:cc

cc: Mr. Franklin Jones, Jr.
Mr. Frank Branson

4543.001

LHS hhc

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SUITE 200
SAN ANTONIO, TEXAS 78216
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P. OTIS HIBLER

RICHARD H. SOMMER
ADMITTED IN
TEXAS, NEW JERSEY & WISCONSIN

9-15-92

9/15
WHD
SCAC Sub C
Agenda
Staff
C2A's
J. Hecht

September 10, 1992

Mr. Luther H. Soules III
Supreme Court Advisory Committee
Rule Amendment Committee
175 East Houston, 10th Floor
Texas Republic Bank Plaza
San Antonio, Texas 78205

Re: Rule 64

Dear Chairman Soules:

Our Courts are flooded every day with thick multi-page pleadings. The more paper filed with the Courts, the greater the demand on the Court staff to catalog, administer and manage this mountain of paper. Meanwhile, the planet is losing its forests at an alarming rate due in large part to our use of paper.

This loss of trees is a major cause of global warming. Excess waste paper exacerbates the landfill problem. In any event, civil Rules 58 and 64 contribute in a very small way to these problems. In particular, by virtue of Rule 64, any amended pleadings must be "complete" and "entire substitutes" for the pleadings they replace. This causes attorneys to print out and file 30-page pleadings even though a single paragraph constitutes the only part that needs to be amended. If I am not mistaken, when I first started practicing law, an attorney could amend the pleadings by simply filing a one-page "supplemental pleading." At that time, a "supplemental pleading" was not defined as it is in our present Rule 62. In other words, back then a supplemental pleading was defined to include any pleading that changed or amended only a part or portion of a prior pleading. In any event, I suggest the following changes to our rules to help save our Court staff and our planet:

Rule 64. A party may amend specified parts or portions of any prior pleadings by filing an amendment thereto which specifically designates the page or paragraph that needs to be amended or changed. Such amendments need not re-plead the entire contents of the prior pleadings, but may instead merely state the allegations that comprise the amendment with a statement that all prior pleadings are re-pleaded and adopted by reference as permitted by Rule 58.

Rule 64 as currently written presupposes that all attorneys have access to computers; and that as a consequence, it is a small task to print out a comprehensive substitute for the prior pleadings. I own a computer and store all my pleadings on a hard disk so it is easy to print out a complete new pleading whenever an amendment is needed. However, the ease of doing this for most of us has two effects:

1. It makes it much easier to waste paper and kill trees; and,

2. It penalizes the old-timers who still use typewriters - this is not fair.

Let's change Rule 64. This <u>will</u> save the life of a significant number of trees; it will ease the storage and space crunch in the District Clerk's Office; and it will save paper and ease the landfill problem.

Sincerely yours,

RICHARD H. SOMMER

RHS/lkm

work\trees\rules.change

4543.001

nyh
uns
✓ 1-29-90

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†BOARD CERTIFIED, CIVIL TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

January 25, 1990

TRCP 67

Justice Nathan L. Hecht
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

RE: Proposed Rule Changes

II. Change Rule 63

A. Change Rule 63 from 7 days prior to trial to 30 Days Prior to trial.

B. Modify the Rules of Pleading, Rules 63 & 67, to provide that the pleadings shall not be amended within 30 days of trial absent leave of court, further providing that the Court shall have discretion to permit leave to file the amended pleadings but that the burden is on the MOVANT SEEKING LEAVE TO SHOW THAT SURPRISE IS NOT SHOWN OR THAT "GOOD CAUSE" OTHERWISE EXISTS TO PERMIT LEAVE TO BE FILED.

Judge, the reasons for the above rules are many, but I will give you only a few.

PLEADINGS.

The Texas time periods of 7 days (pleadings) and 30 days (experts etc.) are ridiculous for anyone who has ever engaged in any serious lawsuits at all. The notion that a mere 7 days before trial after 75 depositions and 3 years of preparation a party can "amend" their pleadings and that such "amendment" will be granted "absent a showing of surprise" can only be viewed as absurd from the point of view of "streamlining" or "fairness or efficiency". We have all of this discovery, all these "rules", and we are AUTHORIZED, should I say invited!, to wait until 7 days prior to trial to "amend".

We know to a certainty that lawyers wait to amend and put off doing until 7 days what they could and should do earlier. At the minimum, NO AMENDMENT TO THE PLEADINGS WITHIN 30 DAYS OF TRIAL.

rcvd
6-10-91

HHD

TRCP 74

SCAC Sue
Rhonda
CAS - Evelyn

COLLIN COUNTY
District Clerk

May 29, 1991

Dear Attorneys:

I am pleased to inform you that the Supreme Court of Texas has signed an order authorizing the implementation of my fax filing plan for the Collin County District Clerk's Office. Attached are copies of this plan.

It is our desire to begin fax filing on July 1, 1991, and for you that are interested in using the system, please contact my bookkeeper Patsy Drake at 548-4367.

We look forward to serving your District Court fax filing needs and ask that you call if you need any additional information.

Sincerely,

Hannah Kunkle

Hannah Kunkle, District Clerk
Collin County, Texas

HK:pc
Enc.

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL. (512) 463-1312
FAX: (512) 463-1365

March 15, 1991

Ms. Hannah Kunkle
District Clerk
Collin County
P. O. Box 578
McKinney, TX 75069

Dear Ms. Kunkle:

Your request that the Court amend its order permitting the district clerk of Collin County to receive and file electronically transmitted court documents appears to contain only one change, apart from the form of order we are using. That change is to eliminate the phrase, "or with incomplete information on the charge authorization or request", from paragraph 3 of the rules attached to the order. I understand that you are reluctant to use any payment mechanism other than an escrow account, and the Court does not require you to do so. We are allowing clerks across the state to use different mechanisms to gain experience as to how they function. The phrase you wish to have eliminated does not require you to use any method of payment other than an escrow account. Therefore, as I have discussed with you, the Court sees no need to amend its order at this time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

FILED
At ____ M
MAR 21 1991
HANNAH KUNKLE
Clerk District Court, Collin County, Texas
By _____

VOL. 96 PAGE 204

VOL 131 PAGE 284

AMENDED FILING OF ORIGINAL COURT ACTIONS VIA FAX

THE SYSTEM FOR ELECTRONIC FILING OF DOCUMENTS IN COLLIN COUNTY HAS BEEN APPROVED BY THE SUPREME COURT AND THE CLERKS ARE ACCEPTING FAXED DOCUMENTS.

Our fax machines use plain paper and a laser printer, making the copies of archival quality. No documents or motions received by the District Clerk's fax machine will be accepted and filed unless the parties transmitting documents have an established escrow or subscription with the Collin County District Clerk's Office. The only exception to this rule will be instruments that a District Judge has requested from a sender.

A fee schedule has been adopted for filing via fax as follows:

SUBSCRIPTION FEES FOR FILING:

Law firms of more than ten attorneys	$300.00 annually
Law firms six to ten attorneys	$240.00 annually
Law firms two to five attorneys	$180.00 annually
Sole practioners	$120.00 annually

Title Companies: same subscription fees as attorneys (based on number of employees.)

Subscriptions entitle the subscriber to file new suits, pleadings, request issuance of service, etc.. A fee of $1.00 per page will be charged for the clerk to prepare copies of pleadings to be attached to issuance (i.e. copy of original petition attached to citation). The copy cost will be added to court cost. Answers and motions not requiring filing fees are filed at no charge to subscribers.

Subscribers conducting business in person and requesting an outgoing transmission of documents from the District Clerk's Office will be charged $1.00 per page.

Subscribers shall pay non-refundable subscription fees annually or sign authorization for clerk to charge yearly subscription fee to escrow account. Subscriptions may be terminated by written request of subscriber or for non-payment of fee to clerk.

In Collin County, subscribers shall establish an escrow account. Court cost will be debited from this account. It is suggested that at least $500.00 be deposited to establish an escrow account since filing of a suit with one issuance is now near $200.00 for court costs. When a debit is made to the escrow account, a receipt will be sent to the escrow holder and he/she can then remit a check in that amount to maintain the established account. The check replenishing the escrow account should be received within five working days. A status report of each escrow account will be made periodically by the clerk.

Although subscriptions are recommended, the fees for non-subscribers are as follows:

Non-subscribers shall only use the fax service while conducting business in person and shall be charged $5.00 plus $1.00 per page for each transmission.

AMENDED ORDER ESTABLISHING A SYSTEM FOR
ELECTRONIC FILING OF DOCUMENTS IN
COLLIN COUNTY, TEXAS

The District Courts of Collin County, Texas, hereby adopt the following system for the electronic filing of documents by the District Clerk of Collin County.

1. The District Clerk is authorized to accept for filing via electronic transmission any document which might be filed in a court action except: (a) returns of service on issuances; (b) bonds; (c) signed orders or judgments.

2. Documents electronically transmitted for filing will be received by the clerk on a plain paper facsimile and printed by a laser printer, thereby rendering the copy of archival quality. No document printed on thermal paper shall be filed.

3. No document electronically transmitted shall be accepted by the clerk for filing until court cost and fees have been paid. Court cost and fees shall be paid by an escrow account established with the clerk. Documents tendered to the clerk electronically without payment of court cost and fees, or which do not conform to applicable rules will not be filed.

4. A fee schedule for electronic filing shall be adopted annually by the clerk and approved by the Courts.

5. An electronically transmitted document accepted for filing will be recognized as the original record for file or for evidentiary purposes when it bears the clerk's official date and time file stamp.

6. Local rules governing implementation of this electronic filing system are hereby adopted as follows:

A. Every document electronically transmitted for filing shall conform to the requirement for filing established by the Texas Rules of Court, i.e. shall be in writing, on paper measuring approximately 8½ x 11 inches, signed by an attorney of record in his individual name, with his State Bar of Texas identification number, address, telephone number and telecopier number. The quality of the original hard copy shall be clear and dark enough to legibly transmit.

B. The sender shall maintain the original hard copy with original signature affixed as required by Section 51.806, Texas Government Code.

C. A cover sheet must accompany every transmission and shall:

(a) clearly identify the sender, the documents being transmitted, and the number of pages;

(b) have clear and concise instructions concerning issuance or other request; and

(c) have complete information on the escrow account debit for court cost and fees.

D. The clerk upon receipt of an electronically transmitted document shall verify the completeness of the transmission.

E. The clerk when satisfied that the transmission is complete shall confirm the escrow account debit. Thereafter, the documents tendered electronically shall be deemed accepted for filing and the clerk shall affix the clerk's official date and time file stamp to the document.

F. If the transmission is found to be incomplete or court cost or fees, if required, are not paid, the clerk will notify the sender as soon as practicable that the transmission has not been filed and the reason.

G. After filing an electronically transmitted document the clerk will electronically transmit to the sender an acknowledgment of the filing, together with cost receipt, if any.

H. No citation or writ bearing the official seal of the court may be transmitted electronically.

I. Electronic transmission of a document does not constitute filing. Filing is complete when the clerk's official date and time file stamp is affixed to the document.

J. Each page of any document received by the clerk will be automatically imprinted with the date and time of receipt. The date and time imprinted on the last page of a document will determine the time of receipt but not time of filing. Transmissions completed during a normal business day before 5:00 p.m. and accepted for filing will be filed on the day of receipt. Transmissions completed after 5:00 p.m., on weekends, or holidays will be verified and filed before 10:00 a.m. on the first business day following receipt of transmission. The sender is responsible for determining if there are any changes in normal business hours.

It is therefore ORDERED that this system for electronic filing of documents in the District Courts of Collin County, Texas, be, and the same is adopted, effective upon approval by the Supreme Court of Texas; that a copy hereof shall be furnished to the Supreme Court of Texas for approval as provided by Section 51.807, Texas Government Code; and that upon approval by the Supreme Court of Texas the same be placed upon the Minutes of the District Courts of Collin County, Texas.

SIGNED this the 26 day of December, 1990.

John R. Roach, Judge of the 199th District Court, Collin County, Texas

Curt Henderson, Judge of the 219th District Court, Collin County, Texas

Verla Sue Holland, Judge of the 296th District Court, Collin County, Texas

12-26-90

Nathan E. White, Jr., Judge of the 366th District Court, Collin County, Texas

P90001192

VOL. 96 PAGE 207

HANNAH KUNKLE
DISTRICT CLERK - COLLIN COUNTY
P.O. Box 578
McKinney, Texas 75069

TO: _____ Date: _____

_____ Cause No. _____

_____ _____District Court

Fax No. _____ Collin County, Texas

( ) DOCUMENTS TRANSMITTED VIA FAX HAVE BEEN RECEIVED AND ACCEPTED FOR FILING IN THE CASE AND COURT INDICATED ABOVE AND AS PER YOUR INSTRUCTION

( ) Citation issued and delivered to _____

( ) Other writ issued and delivered to _____

( ) Other: _____

( ) WE ARE UNABLE TO ACCEPT FOR FILING THE DOCUMENTS TRANSMITTED DUE TO:

( ) Incomplete transmission

( ) No charge authorization given for court costs.

( ) Sender not identified

( ) Other: _____

_____

COST RECEIPT No. _____

PURSUANT TO YOUR REQUEST FOR FILING VIA FAX AND SIGNED AUTHORIZATION FOR CHARGES, A TOTAL COST OF $_____ HAS BEEN CHARGED TO YOUR

( ) ESCROW ACCOUNT

AS FOLLOWS:

Court Cost $_____

Fax fee _____

TOTAL $_____

HANNAH KUNKLE
DISTRICT CLERK
COLLIN COUNTY, TEXAS

BY _____
Deputy

SUGGESTED COVER SHEET FOR FAX FILING
COLLIN COUNTY

Date: _____

TO: Hannah Kunkle, District Clerk, Fax # (214) ~~[illegible]~~

FROM: _____

( ) Subscriber ( ) Non-Subscriber ($5.00 per case fax fee added to court cost

Fax # _____ Phone # _____

NUMBER OR PAGES TRANSMITTED INCLUDING THIS COVER SHEET: _____

RE: _____ VS. _____

( ) NEW SUIT or ( ) CAUSE NO. _____ (If existing case)

PLEASE FILE THE DOCUMENTS WHICH FOLLOW ...AND...

( ) Issue _____ citation(s) and deliver to _____

( ) Issue _____ and deliver to _____

( ) Other _____

_____

_____

( ) Explicit instructions transmitted on separate sheet.

IF TRANSMISSION IS INCOMPLETE OR INSTRUCTIONS NOT CLEAR, PLEASE CALL:

_____ at phone number above.

****

CHARGE AUTHORIZATION

Please charge the total amount due for this transmission to:

( ) ESCROW ACCOUNT # _____

Signature _____

Pg000194

VOL 96 PAGE 209

VOL 1111 PAGE 209

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 90-~~0006~~

ADOPTION OF RULES FOR COLLIN COUNTY FOR RECEIVING AND FILING ELECTRONICALLY TRANSMITTED COURT DOCUMENTS

ORDERED:

At the request of the District Courts of Collin County, the attached rules are adopted governing the procedure for the District Clerk of Collin County to receive and file electronically transmitted court documents. TEX. GOV'T CODE §§ 51.803, 51.807.

This Order shall be effective when recorded in the Minutes of the District Courts of Collin County, and upon compliance with Texas Rule of Civil Procedure 3a.

Pg000195

VOL 96 PAGE 210

VOL 131 PAGE [illegible]

UHS

5-7-91

TRCP 74

BEXAR COUNTY

KEITH BAKER
JUSTICE OF THE PEACE, PRECINCT NO. 3 PL. 1
SAN ANTONIO, TEXAS

KMB, Excellent!

Le HHD SCBA Subc ✓ Agenda ✓ Hecht J. ✓

May 3, 1991

Mr. Steve Flippo
Editor, The Subpoena
c/o San Antonio Bar Association
Bexar County Courthouse, 5th Floor
San Antonio, Texas 78205

RE: The Use of "FAX" Machines at
J.P. Court, Precinct No. 3

Dear Mr. Flippo,

Please find enclosed, a copy of "Rules Governing The Procedure for Justice of the Peace, Precinct Three of Bexar County, to Receive Electronically Transmitted Court Documents."

I would appreciate your publishing same in "The Subpoena." I believe it would be helpful for your members to be familiar with our procedures concerning "fax" transmissions to this court.

Sincerely,

Keith Baker
Justice of the Peace
Precinct No.. 3, Pl. 2

KB/jm
enclo.

cc: Mr. Luther H. Soules, III
The Honorable Andy Mireles
The Honorable David Garcia
The Honorable Robert Green

RULES GOVERNING THE PROCEDURE FOR THE JUSTICE OF THE PEACE COURT, PRECINCT THREE, BEXAR COUNTY TO RECEIVE AND FILE ELECTRONICALLY TRANSMITTED COURT DOCUMENTS

The following rules govern the procedure for the Justice of the Peace Court, Precinct Three, Bexar County, to receive and file electronically transmitted documents.

1. The clerk is authorized to accept for filing via electronic transmission any document which might be filed in a court action except: (a) returns of service on issuances; (b) bonds; (c) signed orders or judgments.

2. No document electronically transmitted shall be accepted by the clerk for filing until court costs have been paid. Documents tendered to the clerk electronically without payment of court costs and fees, or with incomplete information on the charge authorization or request, or which do not conform to applicable rules, will not be filed.

3. The fee schedule for electronic filing is identical to non-electronic filing.

4. An electronically transmitted document accepted for filing will be recognized as the original record for file or for evidentiary purposes when it bears the clerk's official date and time file stamp.

5. Every document electronically transmitted for filing shall conform to the requirements established by the Texas Rules of Civil Procedure, i.e., shall be on paper measuring approximately 8-1/2 x 11 inches, shall be signed individually by the party or the party's attorney of record, and shall contain that individual's State Bar of Texas identification number, if any, address, telephone number and telecopier number. The quality of the original hard copy shall be clear and dark enough to transmit legibly.

6. The sender shall maintain the original of the document with original signature affixed as required by section 51.806, Texas Government Code.

7. A cover sheet must accompany every transmission which shall: (a) clearly identify the sender, the documents being transmitted, and the number of pages; and, (b) have clear and concise instructions concerning issuance or other request.

8. The clerk upon receipt of an electronically transmitted document shall verify the completeness of the transmission.

9. The clerk when satisfied that the transmission is complete shall accept it for filing and the clerk shall affix the clerk's official date and time file stamp to the document.

10. If the transmission is found to be incomplete or court costs or fees, if required, are not paid, the clerk will notify the sender as soon as practicable that the transmission has not been filed and the reason.

11. After filing an electronically transmitted document the clerk may upon request electronically transmit to the sender an acknowledgment of the filing, together with cost receipt, if any.

12. No citation or writ bearing the official seal of the court may be transmitted electronically.

13. Electronic transmission of a document does not constitute filing. Filing is complete when the clerk's official date and time file stamp is affixed to the document.

14. Each page of any document received by the clerk will be automatically imprinted with the date and time of receipt. The date and time imprinted on the last page of a document will determine the time of receipt but not time of filing. Transmissions completed during a normal business day before 5:00 p.m. and accepted for filing will be filed on the day of receipt. Transmissions completed after 5:00 p.m., on weekends or holidays will be verified and filed before 10:00 a.m. on the first business day following receipt of transaction. The sender is responsible for determining if there are any changes in normal business hours.

90(e)
→ 74
91
111
114(e)

LYON & LYON

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ROWLETT, TEXAS 75088
(214) 412-0412
FAX: (214) 475-5804

21a
166a(c)

September 7, 1990

Rules Advisory Committee
The Supreme Court of Texas
Post Office Box 12248
Austin, Texas 78711

Ladies and Gentlemen:

Having read the newly adopted Rules of Civil Procedure and viewed the State Bar videotape regarding same, I would like to make the following comments.

The first three comments are by way of housekeeping. Tex.R.App.P. 90(e) refers to paragraph (c), but this paragraph has been renumbered. It should refer to paragraph (d).

Should not Tex.R.App.P. 74(a), (q) and 91 refer to "parties to the trial court's final judgment or appealable order..." rather than just the parties to the trial court's final judgment?

Gender neutral changes were missed in Tex.R.App.P. 111 and 114(e).

The provisions of Tex.R.Civ.P. 21a that telephonic document transfer after 5:00 p.m. is deemed to be served on the following day is a positive step. May I suggest that service by hand delivery after 5:00 p.m. should also be deemed to be served on the following day.

The provisions of Rule 21a allowing service by FAX may result in appellate briefs being served on opposing parties by FAX. To me, this is unacceptable. A 60 to 70 page FAX document is unwieldy and generally unworkable. May I suggest that Tex.R.App.P. 74(q) regarding service of briefs be amended to require service of one or two copies of briefs bound in the same manner as those filed with the Court. This would be helpful if for no other reason than to inform opposing counsel of the color of binding to be avoided.

Finally, I would like to suggest that summary judgment Rule 166a(c) be amended to require the filing party to serve briefs upon the adverse party and the Court no later than forty-eight

(48) hours prior to the time of the hearing. The common practice is now for the moving party to file a "bare bones" motion and then to bring a brief with them to the hearing. This can provide the moving party with an unfair advantage if the Court allows the consideration of the brief over the adverse party's objections, particularly since the brief serves to answer the adverse party's response and opposing affidavits.

Thank you for your consideration of these matters. If I may clarify my comments and suggestions in any way, please do not hesitate to contact me and I will gladly do so.

Sincerely yours,

Bruce A. Pauley

BAP/jc

BAP.L2

4543.001 LHS
6-7-93 WHD
SB

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

June 4, 1993

WHD
SCAC Subc
Cogsdale
COAS Staff
Hwy

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

Dear Luke:

Enclosed is a letter Chief Justice Phillips received from Bernard Fischman suggesting changes to Tex. R. Civ. P. 76a.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

THE LAW OFFICES OF
TINSMAN & HOUSER
INCORPORATED

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DANIEL J. T. SCIANO
ROBERT SCOTT
RICHARD TINSMAN
JOHN F. YOUNGER, JR.

SHARON COOK
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ANDREA TACHMAN WOO

DAVID G. JAYNE
OF COUNSEL

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700 NORTH ST. MARY'S STREET
SAN ANTONIO, TEXAS 78205
(210) 225-3121
FAX (210) 225-6235

May 18, 1993

Honorable Tom L. Phillips
Chief Justice
Supreme Court of Texas
P. O. Box 12248
Capitol Station
Austin, Texas 78711

Re: Suggested changes in Tex. R. Civ. P. 76a

Dear Chief Justice Phillips:

In the context of working on an appeal brief from a trial court sealing order, I have discovered what I perceive to be a flaw in the procedure for appeal of sealing orders under Tex. R. Civ. P. 76a (the "Rule"). Specifically, ¶8 of the Rule permits the appeal of "any order (or portion of an order of judgment) relating to sealing or unsealing court records . . . .". If taken literally, this means that an appeal from a temporary sealing order under ¶5 of the Rule would also be allowed. Yet, this would seem to defy the intent of the Rule because a temporary sealing order may be entered solely upon affidavit or verified petition that immediate or irreparable injury will result before notice and a full hearing can be held.

Obviously, in order to support the entry of a sealing order, there must be an evidentiary showing that the standards of ¶1 of the Rule have been met. No such requirement is imposed on a temporary sealing order. Therefore, if a temporary sealing order were granted on verified petition or affidavit only, appeal of such an order would likely result in reversal because the required evidence had not been presented.

I would compare the temporary sealing order to a temporary restraining order under Tex. R. Civ. P. 680. A TRO is interlocutory and not appealable. There are provisions in Tex. R. Civ. P. 680 to prohibit abusive tactics such as unlimited successive TRO's or not conducting a hearing on the temporary injunction.

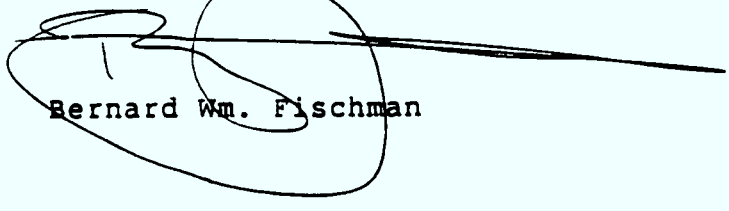
Similar provisions could be enacted to prohibit a trial court from refusing to conduct a merits hearing on a sealing order or using a temporary order to take the place of the permanent order.

I therefore suggest that ¶8 of the Rule be amended to provide that only final sealing orders are appealable whereas temporary sealing orders are not. Concomitant rules requiring early hearings after the entry of a temporary order and requiring that such an order expire of its own terms if the merits hearing is not conducted within a specified time, would lend balance to the suggested change.

Thank you for taking the time to consider this suggestion.

Very truly yours,

TINSMAN & HOUSER, INC.



Bernard Wm. Fischman

BWF/dly

4543.001

hhd
LHS

9-17-91
SD

KIRKLIN & BOUDREAUX
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
1100 LOUISIANA
SUITE 1800
HOUSTON, TEXAS 77002-5233
(713) 757-0000

September 13, 1991

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

Re: Texas Rule of Civil Procedure 76a.

Dear Mr. Soules:

I recently attended the Advanced Civil Trial Course in Houston and enjoyed your presentation. I represent Hyundai in a case in which the First Court of Appeals recently decided, in an unpublished opinion, that Tex.R.Civ.P. 76a does not apply to discovery disputes involving protective orders. Enclosed is a copy of the Court's opinion.

Very truly yours,

KIRKLIN & BOUDREAUX

Jack J. Garland, Jr.

JJG/jlk8
3463
Enclosure

Appeal dismissed and Opinion filed August 8, 1991

In The

Court of Appeals

For The

First District of Texas

NO. 01-91-00498-CV

CHLOE J. CHANDLER, Appellant

V.

HYUNDAI MOTOR COMPANY, Appellee

On Appeal from the 129th District Court
Harris County, Texas
Trial Court Cause No. 87-39802

OPINION

This is an appeal from the trial court's order approving the recommendations of a special master concerning discovery disputes. By order dated April 12, 1991, the trial court denied appellant's request for a hearing to overrule the protective order signed by the special master; overruled appellant's objections to the scope of the protective order; and granted in all respects appellee's motion for protective order.

In response to appellant's motion for extension of time to file her brief, appellee asks this Court to dismiss the appeal for want of jurisdiction because 1) it is an improper appeal from an interlocutory order; 2) appellant has failed to timely file a brief; 3) appellant failed to provide notice to appellee of the appeal; and 4) appellant failed to

provide a complete transcript to this Court. Because appellee's motion raises a question concerning our jurisdiction, we address that issue first.

Excluding four statutory exceptions[1] not applicable here, an appeal can be prosecuted only from a final judgment or order. *North East Independent School Dist. v. Aldridge*, 400 S.W.2d 893, 895 (Tex. 1966); *Denny's Inc. v. Rainbo Baking Co.*, 764 S.W.2d 933 (Tex. App.--Houston [1st Dist.] 1989, no writ); *Prodeco Exploration, Inc. v. Ware*, 684 S.W.2d 199, 201 (Tex. App.--Houston [1st Dist.] 1984, no writ). Until the trial court severs out a party or an issue, a judgment that does not dispose of all issues and parties is purely interlocutory and not yet appealable. *Cherokee Water Co. v. Ross*, 698 S.W.2d 363, 365 (Tex. 1985).

In her motion for extension of time to file her brief, appellant asserts she is bringing the appeal pursuant to TEX. R. CIV. P. 76a. Rule 76a pertains to the sealing of *court records*; it does not address protection from disclosure or dissemination of documents during discovery. In pursuing her appeal at this stage of the litigation, appellant attempts to equate an interlocutory order sealing court records, which is appealable, TEX. R. CIV. P. 76a(8), with an interlocutory order pertaining to discovery, which is not appealable. Appellant's proper remedy in this case is to file an application for writ of mandamus complaining that the trial court abused its discretion in approving the protective order.

The order appealed from is interlocutory and we are without jurisdiction to consider it. Accordingly, the appeal is **dismissed** for want of jurisdiction. Our order of July 18, 1991, granting appellant's motion for extension of time to file her brief, is withdrawn as improvidently granted.

PER CURIAM

Panel consisting of Chief Justice Trevathan and Justices Duggan and Dunn.

Do not publish. TEX. R. APP. P. 90.

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1 *See* in TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon Supp. 1991).

Judgment rendered and opinion delivered August 1, 1991. AUG 8 1991
True Copy Attest:

Kathryn Cox
Clerk of Court

Court of Appeals

First District of Texas

COPY OF JUDGMENT

CHLOE J. CHANDLER, APPELLANT,

NO. 01-91-00498-CV V.

HYUNDAI MOTOR COMPANY,, APPELLEE

Appeal from the 129th District Court of Harris County, Texas (Tr. Ct. No. 87-39802). Per Curiam opinion delivered by Chief Justice Trevathan, and Justices Duggan and Dunn.

On this day came on to be considered the above-entitled cause, and the same having been duly considered, it is therefore **CONSIDERED, ADJUDGED, AND ORDERED** that the appeal herein be, and the same hereby is, **dismissed** for want of jurisdiction.

It is further **ORDERED** that the appellant, **CHLOE J. CHANDLER,** and her surety, **UNIVERSAL SURETY OF AMERICA**, jointly and severally, pay all costs incurred by reason of this appeal.

It is further **ORDERED** that this decision be certified below for observance.

Judgment rendered by panel consisting of Chief Justice Trevathan and Justices Duggan and Dunn.

Judgment entered August 8, 1991.

HARRIS & WESTMORELAND
TEXAS COMMERCE BANK BUILDING
HOUSTON, TEXAS 77002
(713) 546-2900

September 18, 1990

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

Dear Mr. Chief Justice:

I should like my voice added to those who oppose new Rule 76a and urge the Court carefully to consider its withdrawal.

It is beyond cavil that public policy continues to favor right of privacy, equal access to justice, private settlement of private disputes, and finality of litigation. Rule 76a as cast is, I submit, patently at odds with that policy.

Additionally, it appears that the Rule was adopted without adequate notice to and informed comment by those members of the public who will either have to pay its price or forego justiciable resolution of legitimate interests. This circumstance alone should, I think, constrain its withdrawal.

If, as one must assume, the purpose of the rule is to insure media access to proceedings affecting public interest, a purpose consistent with established public policy, that can rationally be achieved by a rule permitting access to any entity who establish their standing and the existence of a public interest in the proceedings.

I understand that only five members of the Court favored adoption and, in keeping with the notion of openness on matters of public interest, suggest that those members who voted for and those who voted against the rule should publish their position.

At a time when all too legitimate criticism of the system is rising geometrically because of inordinate costs and delays which are largely the result of all too permissive discovery rules and the unfettered proliferation of written submissions, it seems odd indeed that we would now make matters worse rather than better.

Respectfully,

Paul E. Harris

PEH:jlh

cc: The Honorable Franklin S. Spears
The Honorable C. L. Ray
The Honorable Raul A. Gonzalez
The Honorable Oscar H. Mauzy
The Honorable Eugene A. Cook
The Honorable Jack Hightower
The Honorable Nathan L. Hecht
The Honorable Lloyd Doggett

4543.001

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Chs

✓10-3-90
BB

Texas Tech University

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September 28, 1990

HHD
Coan
Scott Caperton
TRCP 86

Mr. David Beck
Fulbright and Jaworski
1301 McKinney Street
Houston, Texas 77010

Re: Tex.R.Civ.P. 90, 86, 257 and C.P.R.C. § 15.063(2)

Dear David:

I suggest consideration of the following:

(1) Rule 90 should be changed to conform to the existing practice that a special exception needs to be called to the attention of the trial court prior to trial to avoid waiver.

(2) C.P.R.C. § 15.063(2) requires that a motion to transfer venue based upon the inability to obtain an impartial trial must be filed with or before the filing of the answer. The only reference to the time for filing such a motion in the Rules of Civil Procedure is Rule 86.1 which refers to Rule 257. Rule 257 contains no time reference at all. As you will recall the case law has previously provided that such a motion may be filed on the day of trial. See City of Abilene v. Downs, 367 S.W.2d 153 (Tex. 1963). Suffice to say that we need to get our act together or convince the legislature to amend the statute or both. Seriously, this requires some coordination between your subcommittee and my mine. Do you have any suggestions?

I would appreciate hearing from you at your convenience.

Sincerely yours,

Hadley

J. Hadley Edgar
Robert H. Bean Professor of Law

JHE/nt

cc: Luke Soules ✓

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TOM S. MILAM
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JOE H. NAGY
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MICHAEL L. BYRD
MARK W. HARMON
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MARK O. BLANKENSHIP

OF COUNSEL:
MAX C. ADDISON

March 5, 1990

Honorable Nathan Hecht
Supreme Court of Texas
Post Office Box 12248
Austin, TX 78711

Honorable Michael A. Hatchell
RAMEY, FLOCK, JEFFUS, CRAWFORD,
HARPER & COLLINS, A P.C.
P. O. Box 629
Tyler, TX 75710-0629

Honorable Harry M. Reasoner
VINSON & ELKINS
1001 Fannin, Ste. 3300
Houston, TX 77002-6760

Honorable R. Doak Bishop
1717 Main St., Ste. 2800
Dallas, TX 75201

Honorable David J. Beck
FULBRIGHT & JAWORSKI
1301 McKinney Street
Houston, TX 77010

Re: Proposed Amendments to **Rule 87, Tex. R. Civ. P.**

Gentlemen:

We are writing to you in connection with your service on the Supreme Court Advisory Committee regarding amendments to the Texas Rules of Civil Procedure to advise you of a serious concern which we have concerning **Rule 87 of the Texas Rules of Civil Procedure** and the need for a clarification in regard to the problem discussed below.

Section 15.061 of the Texas Civil Practice and Remedies Code provides that when two or more parties are joined as defendants in the same action and the court has venue of an action or claim against any one defendant, the court has venue of all claims and actions against all defendants unless one or more of the causes of action is governed by the mandatory venue provisions of **Subchapter (b)**.

This section is in essence a consolidation of the old **§ 4** and **§ 29a, art. 1995, V.A.C.S.**

Under the old venue statutes, there were a number of cases holding that the venue provisions providing for venue in the county of residence of one of the defendant contemplated a real defendant against whom plaintiff had a cause of action (***Morgan v. Box***, 449 S.W.2d 499 (11) (Tex. Civ. App.--Dallas 1969, no writ), citing ***Glens Falls Indem. Co. v. Sterling***, 213 S.W.2d 858 (Tex. Civ. App.--Dallas 1948, mandamus overruled).

The courts further held that the trial court should hear evidence in a venue proceeding to rebut the allegation of plaintiff's petition "when it is asserted by the opposing party that the plaintiff's case was fraudulently cast to confer venue." ***Moran Corp. v. 7 J Stock Farm, Inc.***, 591 S.W.2d 316, 319 (5) (Tex. Civ. App.--Waco 1979, no writ).

See also ***Western Steel Co. v. Hayek***, 452 S.W.2d 732 (6) (Tex. Civ. App.--Corpus Christi 1970, no writ).

If the Rule is changed as suggested, the plaintiff will contend that the court cannot even determine whether or not the resident defendant is a real defendant under the provisions of **Rule 87(2)(b)** stating that "It shall not be necessary for a claimant to prove the merits of a cause of action, but the existence of a cause of action, when properly pleaded, shall be taken as established by the pleadings" and that the existence of a cause of action is not a venue fact upon which the court can hear evidence.

If this is in fact the law then plaintiff can of course file suit against any defendant or defendants in any county in the state simply by naming as a defendant some individual or corporation a resident of that county and venue cannot be challenged by defendant on the ground that the "resident defendant" is a "real" defendant.

We feel that **Rule 87** should specifically provide that a cause of action against the resident defendant is a venue fact which must be determined by a preponderance of the evidence when defendant asserts that the resident defendant is simply joined in order to establish venue in the county of suit and is not a real defendant against whom plaintiff has a cause of action.

With best regards, we are

Yours very truly,

CRENSHAW, DUPREE & MILAM

William J. Wade

CK:WJW/bj
trcp.ltr

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HOUSTON, TEXAS 77010

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SAN ANTONIO
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LOS ANGELES
LONDON
ZURICH

FULBRIGHT JAWORSKI &
REAVIS McGRATH
NEW YORK

March 15, 1990

Re: Proposed Changes

TO: SUPREME COURT ADVISORY COMMITTEE: SUBCOMMITTEE ON RULES 15 TO 166

Enclosed please find a copy of a letter from William J. Wade regarding proposed changes to Rule 87 of the Texas Rules of Civil Procedure.

Please provide me with your comments on this proposed change as soon as possible.

Thank you for your cooperation.

Very truly yours,

David J. Beck

DJB/st

Enclosures

cc: Luther H. Soules, III, Esq.

1795B

SUPREME COURT ADVISORY COMMITTEE

Mr. Gilbert T. Adams, Jr.
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Honorable Linda B. Thomas
Judge, 256th District Court
Old Red Courthouse, 2nd Floor
Dallas, Texas 75202

Mr. Kenneth D. Fuller
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September 28, 1990

HHD
LHS
Scac agenda
TRCP 90

Mr. David Beck
Fulbright and Jaworski
1301 McKinney Street
Houston, Texas 77010

Re: Tex.R.Civ.P. 90, 86, 257 and C.P.R.C. § 15.063(2)

Dear David:

I suggest consideration of the following:

(1) Rule 90 should be changed to conform to the existing practice that a special exception needs to be called to the attention of the trial court prior to trial to avoid waiver.

(2) C.P.R.C. § 15.063(2) requires that a motion to transfer venue based upon the inability to obtain an impartial trial must be filed with or before the filing of the answer. The only reference to the time for filing such a motion in the Rules of Civil Procedure is Rule 86.1 which refers to Rule 257. Rule 257 contains no time reference at all. As you will recall the case law has previously provided that such a motion may be filed on the day of trial. See City of Abilene v. Downs, 367 S.W.2d 153 (Tex. 1963). Suffice to say that we need to get our act together or convince the legislature to amend the statute or both. Seriously, this requires some coordination between your subcommittee and my mine. Do you have any suggestions?

I would appreciate hearing from you at your convenience.

Sincerely yours,

Hadley

J. Hadley Edgar
Robert H. Bean Professor of Law

JHE/nt

cc: Luke Soules ✓

LYON & LYON

ATTORNEYS AND COUNSELORS AT LAW

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91
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114(e)

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3301 CENTURY DRIVE - SUITE A
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September 7, 1990

21a
166a(c)

Rules Advisory Committee
The Supreme Court of Texas
Post Office Box 12248
Austin, Texas 78711

Ladies and Gentlemen:

Having read the newly adopted Rules of Civil Procedure and viewed the State Bar videotape regarding same, I would like to make the following comments.

The first three comments are by way of housekeeping. Tex.R.App.P. 90(e) refers to paragraph (c), but this paragraph has been renumbered. It should refer to paragraph (d).

Should not Tex.R.App.P. 74(a), (q) and 91 refer to "parties to the trial court's final judgment or appealable order ..." rather than just the parties to the trial court's final judgment?

Gender neutral changes were missed in Tex.R.App.P. 111 and 114(e).

The provisions of Tex.R.Civ.P. 21a that telephonic document transfer after 5:00 p.m. is deemed to be served on the following day is a positive step. May I suggest that service by hand delivery after 5:00 p.m. should also be deemed to be served on the following day.

The provisions of Rule 21a allowing service by FAX may result in appellate briefs being served on opposing parties by FAX. To me, this is unacceptable. A 60 to 70 page FAX document is unwieldy and generally unworkable. May I suggest that Tex.R.App.P. 74(q) regarding service of briefs be amended to require service of one or two copies of briefs bound in the same manner as those filed with the Court. This would be helpful if for no other reason than to inform opposing counsel of the color of binding to be avoided.

Finally, I would like to suggest that summary judgment Rule 166a(c) be amended to require the filing party to serve briefs upon the adverse party and the Court no later than forty-eight

(48) hours prior to the time of the hearing. The common practice is now for the moving party to file a "bare bones" motion and then to bring a brief with them to the hearing. This can provide the moving party with an unfair advantage if the Court allows the consideration of the brief over the adverse party's objections, particularly since the brief serves to answer the adverse party's response and opposing affidavits.

Thank you for your consideration of these matters. If I may clarify my comments and suggestions in any way, please do not hesitate to contact me and I will gladly do so.

Sincerely yours,

Bruce A. Pauley

BAP/jc

BAP.L2

4543.001

hhd
LHS

LAW OFFICES OF
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BOBBYE L. SULLIVAN
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9-11-90
SB

September 10, 1990

9/12 HH
Scott Sufficient
Cert
J. Hecht

Mr. Luther H. Soules III
Chairman, Texas Rules of
Civil Procedure Committee
Soules & Wallace
175 East Houston #1000
San Antonio Tx 78205

Re: Suggested Modifications to Texas Rules of Civil Procedure Rules 90, 166b, 167 and 168

Dear Luke:

I enjoyed your presentation last week at the Advanced Civil Trial Course up in Dallas. I've got several ideas I'd like to submit for your Committee to look at as modifications to the Texas Rules of Civil Procedure:

Rule 90

Currently the rule, which governs special exceptions, is somewhat vague on the point at which and under what circumstances they are waived. I have a case currently on Motion for Rehearing in the San Antonio Court of Appeals in which the other side, as one of its grounds of error, complains about the trial court not hearing their special exceptions.

They filed the exceptions about a year before trial but never set them down for any hearing. At the beginning of trial on the merits they announced ready for trial, but then attempted to have their exceptions heard. The trial court did not hear them.

The way the rule reads now, technically at least they could get a reversal on this ground, since the rule appears to give the excepting party up until "before the judgment is signed" in non-jury cases to have them heard. There's no good case law I could find on the point.

Imagine if the judge had heard them at the beginning of trial? What if the judge granted some and ordered me to amend? Would this give the excepting party an "ambush" point to get an automatic continuance while I scrambled to amend?

Rule 90 should be amended to provide that the party filing special exceptions shall have the burden, at least 30 days prior to trial, of having them heard, or they are waived.

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BEN F. VAUGHAN, III, P.C.
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CHARLES A. SPAIN, JR.
(512) 480-5689

November 26, 1989

The Honorable Nathan L. Hecht, Justice
The Supreme Court of Texas
Post Office Box 12248
Capitol Station
Austin, Texas 78711

Dear Judge Hecht:

6. The following proposed amendments use the word "nonjury": Texas Rules of Appellate Procedure 41(a)(1) and 54(a). The following proposed amendments use the word "non-jury": Texas Rules of Appellate Procedure 41 comment, 52(d), 52 comment, and 54 comment. The court may wish to standardize the terminology. The term "non-jury" currently appears in Texas Rules of Civil Procedure 90, 156, 216(1), 249, 307, and 542. The term "nonjury" currently appears in Texas Rule of Civil Procedure 324(a) and Texas Rule of Judicial Administration 6(b)(2).

I appreciate the opportunity to comment on the proposed rules amendments and hope that my comments are helpful.

Respectfully,

Charles A. Spain, Jr.

4543.001

LHS
NHD

5-10-91
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5/10 TRCP 91

HHD
TCAC Subc.
Agenda
Ltr
J. Hecht

WENDELL S. LOOMIS
Attorney at Law
14610 Falling Creek Drive
Houston, Texas 77068-2938
(713) 893-5900
FAX (713) 893-5732

May 6, 1991

Soules & Wallace
Attorneys-at-Law
Tenth Floor
Republic of Texas Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Re: Proposed Changes to TRCP 21 and 91
Add Rule 200.2.a.; Rule 201.3.

Gentlemen:

Originally I requested consideration of changes to Rule 21, 21a and 21b, as the result of the Trevino vs. Hidalgo Publishing Company case. Please see my letter of March 21, 1991, attached.

In reviewing the rules on another discovery issue, I find that Rule 200 has a similar problem. The first sentence of Rule 200.2.a. is as follows:

> Reasonable notice must be served in writing by the party, or his attorney, proposing to take his deposition upon oral examination to every other party or his attorney of record.

Rule 201.3. also states:

> When a deponent is a party, service of the notice upon the party or his attorney shall have the same effect as a subpoena served on the party. If the deponent is an agent or employee who is subject to the control of a party, notice to take the deposition which is served upon the party or the party's attorney of record shall have the same effect as a subpoena served on the deponent.

There may be other places in the rules that I simply haven't spotted where the same or similar wording is used. Of

course, where you have an unsophisticated client, injury and prejudice could occur by notice to the client and not the lawyer.

May I suggest that wording similar to Rule 168.1. or Rule 169.1. be added to the rules in question. The wording in Rule 168 and 169 is similar as follows:

> Whenever a party is represented by an attorney of record, service of a Request for Admissions shall be made on his attorney unless service on the party himself is ordered by the Court. Rule 169.
>
> When a party is represented by an attorney, service of interrogatories and answers to interrogatories shall be made on the attorney unless service upon the party himself is ordered by the Court. Rule 168.

A review of the Trevino vs. Hidalgo Publishing Company reasoning will point out the necessity for these changes.

Very truly yours,

Wendell S. Loomis

WSL:dkm

cc: Honorable Nathan L. Hecht
David J. Beck
Honorable Bob L. Thomas

WENDELL S. LOOMIS
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March 21, 1991

Supreme Court of the State of Texas
Supreme Court Building
P.O. Box 12248
Austin, Texas 78711

Attention: Honorable Justice Eugene A. Cook

Re: Rules 21, 21a, 21b Methods of Service
Trevino vs. Hidalgo Publishing Company d/b/a The Edinburgh Daily Review, No. 13-90-025-CV (Corpus Christi), 2-21-91

Dear Gene:

I have just read with horror the above-described case and looking at Rule 21a was aghast to find that the Rule does not absolutely require notice to be served upon the attorney of record, but the rule authorizes the Notice to be served on the party or his attorney of record.

I thought this question had been put to rest several years ago when I complained about Rule 72, which required pleadings to be served only on "adverse" parties instead of all parties, only to discover that Rule 72 and 73 have now been consolidated into Rules 21, 21a, and 21b, which are now the offending wording.

The original reason for my complaint was that where there were multiple plaintiffs and/or multiple defendants, one plaintiff could deal with one defendant independent of the other parties and not be in violation of the rules and create considerable confusion in the case. As I recall, this Rule was amended, then the amendment was withdrawn, then it was re-amended, and now consolidated to Rule 21a and 21b. In the corporate and commercial law practice, trickiness is part of the game (I know I don't have to tell you this) and justice certainly does not prevail under the circumstances described by the Trevino vs. Hidalgo case

Can we have a wording under Rule 21, 21a, 21b, or 21c to the effect that

> pleadings, notices, and documents must be served upon all counsel of record, but if there is no counsel for a party, then upon the party or the parties' designated agent.

Gene, I feel that this matter is urgent! The Trevino case may or may not come up before the Supreme Court. The Trevino case on first blush appears to be technically correct. For that reason, I think all haste must be taken to amend the rules so that all counsel are requested to serve all other counsel with pleadings, notices, motions, and applications.

Your urgent attention to this problem would be very much appreciated.

Very truly yours,

Wendell S. Loomis

WSL:dkm

4543.cc

SPIVEY, GRIGG, KELLY AND KNISELY

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6/3

WHD
SCAC agenda
J. Hedt.

April 30, 1991

BAS91.007

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney, Ste. 5100
Houston, TX 77010-8095

Re: Supreme Court Advisory Committee
Proposed Changes to TRCP 21, 47 and 91

Dear David:

I will take this opportunity to reply to your letters of March 7th and April 8th.

On Rules 21, 21a and 21b, I concur with Wendell Loomis that the present provision is inappropriate and unsatisfactory. Mr. Loomis' suggested correction seems to meet the objection appropriately. There are lawyers who will serve a party in order to "technically comply" with the service rules even when they have an attorney. That should not be allowed.

Re TRCP 47, Mr. McMurray points out an area which our rules do not adequately address: the hiatus between county court at law jurisdiction and district court jurisdiction. I do not find that to be a problem in my own practice. I recall that Rule 47 was changed to its present reading in order to avoid the temptation for a plaintiff to plead for a lot of money and thus obtain press coverage. It would not bother me to provide that no amount is required to be pled or to simply provide that a specific amount should be pled. The latter suggestion would probably solve the complaints, but I fear the insurance clients of some of the defense bar would strongly object.

Re TRCP 91, I do not think the suggested amendment to TRCP 91 offers an adequate solution. It seems to me that the rules should be as universal as possible and to improve the rule would require simplifying it. I suggest simply requiring that special exceptions be filed ten days prior to trial period.

It seems to me that providing complicated time period simply multiplies the trial court's burden and certainly complicates the procedure for us practitioners.

Sincerely,

Broadus A. Spivey

BAS/sm

cc: Mr. Luther H. Soules III, Esq.
Soules & Wallace
Republic of Texas Plaza, 10th Floor
175 E. Houston St.
San Antonio, TX 78205-2230

L S -

4/1/91

Attached is the amendment to TRCP 91 you got from the local rules. Should I send this to Beck?

4/1 h -

yes + scs agenda

CC A+

J. Hecht.

Proposed Amendment to TRCP 91.

TRCP 91. Special Exceptions

A special exception shall not only point out the particular pleading excepted to, but it shall also point out intelligibly and with particularity the defect, omission, obscurity, duplicity, generality, or other insufficiency in the allegations in the pleading excepted to.

Special exceptions which could have been directed to a pleading will be considered as waived if not filed at least thirty days prior to trial, provided that the pleading to which the exception was directed has been previously on file at least thirty days. The Court, for good cause, may allow exceptions to be filed at any time.

90(e)
74
→ 91
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114(e)

LYON & LYON

ATTORNEYS AND COUNSELORS AT LAW

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91a
166a(c)

September 7, 1990

Rules Advisory Committee
The Supreme Court of Texas
Post Office Box 12248
Austin, Texas 78711

Ladies and Gentlemen:

Having read the newly adopted Rules of Civil Procedure and viewed the State Bar videotape regarding same, I would like to make the following comments.

The first three comments are by way of housekeeping. Tex.R.App.P. 90(e) refers to paragraph (c), but this paragraph has been renumbered. It should refer to paragraph (d).

Should not Tex.R.App.P. 74(a), (q) and 91 refer to "parties to the trial court's final judgment or appealable order . . ." rather than just the parties to the trial court's final judgment?

Gender neutral changes were missed in Tex.R.App.P. 111 and 114(e).

The provisions of Tex.R.Civ.P. 21a that telephonic document transfer after 5:00 p.m. is deemed to be served on the following day is a positive step. May I suggest that service by hand delivery after 5:00 p.m. should also be deemed to be served on the following day.

The provisions of Rule 21a allowing service by FAX may result in appellate briefs being served on opposing parties by FAX. To me, this is unacceptable. A 60 to 70 page FAX document is unwieldy and generally unworkable. May I suggest that Tex.R.App.P. 74(q) regarding service of briefs be amended to require service of one or two copies of briefs bound in the same manner as those filed with the Court. This would be helpful if for no other reason than to inform opposing counsel of the color of binding to be avoided.

Finally, I would like to suggest that summary judgment Rule 166a(c) be amended to require the filing party to serve briefs upon the adverse party and the Court no later than forty-eight

(48) hours prior to the time of the hearing. The common practice is now for the moving party to file a "bare bones" motion and then to bring a brief with them to the hearing. This can provide the moving party with an unfair advantage if the Court allows the consideration of the brief over the adverse party's objections, particularly since the brief serves to answer the adverse party's response and opposing affidavits.

Thank you for your consideration of these matters. If I may clarify my comments and suggestions in any way, please do not hesitate to contact me and I will gladly do so.

Sincerely yours,

Bruce A. Pauley

BAP/jc

BAP.L2

S:

C – LHS

f.c. – current rules

HUD,
SCAC Seeks
Agenda
COAJ Staff

TO: Justice Hecht

March 9

FROM: Bill Willis

A local practicing attorney called this afternoon to point out that Rule 93, T.R.C.P. is broken out into numbered paragraphs 1 - 16. However, the notes and Comments that follow 93 refer to letter paragraphs. This happened in the awful year 1983, when the Rules amendments got really messed up and not completely fixed.

The lawyer's question was: Will the Notes & Comments be updated at some point?

mail notification to the plaintiff or his attorney that transfer of the cause has been completed, that the filing fee in the proper court is due and payable within thirty days from the mailing of such notification, and that the case may be dismissed if the filing fee is not timely paid; and if such filing fee is timely paid, the cause will be subject to trial at the expiration of thirty days after the mailing of notification to the parties or their attorneys by the clerk that the papers have been filed in the court to which the cause has been transferred; and if the filing fee is not timely paid, any court of the transferee county to which the case might have been assigned, upon its own motion or the motion of a party, may dismiss the cause without prejudice to the refiling of same.

(Amended June 16, 1943 eff. Dec. 31, 1943; June 15, 1983, eff. Sept. 1, 1983.)

Notes and Comments

Source: Arts. 2019 and 2020.

Change by amendment effective September 1, 1983: To conform to S.B. 898, 68th Legislature, 1983.

RULE 90. WAIVER OF DEFECTS IN PLEADING

General demurrers shall not be used. Every defect, omission or fault in a pleading either of form or of substance, which is not specifically pointed out by exception in writing and brought to the attention of the judge in the trial court before the instruction or charge to the jury or, in a non-jury case, before the judgment is signed, shall be deemed to have been waived by the party seeking reversal on such account; provided that this rule shall not apply as to any party against whom default judgment is rendered.

(Amended June 10, 1980, eff. Jan. 1, 1981.)

Notes and Comments

Source: New rule.

Change by amendment effective January 1, 1981: The words "motion or" before "exception" are deleted, and "rendition of judgment" is changed to "judgment is signed."

RULE 91. SPECIAL EXCEPTIONS

A special exception shall not only point out the particular pleading excepted to, but it shall also point out intelligibly and with particularity the defect, omission, obscurity, duplicity, generality, or other insufficiency in the allegations in the pleading excepted to.

(Amended March 31, 1941, eff. Sept. 1, 1941.)

Notes and Comments

Source: Texas Rule 18 (for the District and County Courts).

RULE 92. GENERAL DENIAL

A general denial of matters pleaded by the adverse party which are not required to be denied under oath, shall be sufficient to put the same in issue. When the defendant has pleaded a general denial, and the plaintiff shall afterward amend his pleading, such original denial shall be presumed to extend to all matters subsequently set up by the plaintiff.

When a counterclaim or cross-claim is served upon a party who has made an appearance in the action, the party so served, in the absence of a responsive pleading, shall be deemed to have pleaded a general denial of the counterclaim or cross-claim, but the party shall not be deemed to have waived any special appearance or motion to transfer venue. In all other respects the rules prescribed for pleadings of defensive matter are applicable to answers to counterclaims and cross-claims.

(Amended Dec. 5, 1983, eff. April 1, 1984; Dec. 19, 1984, eff. April 1, 1985.)

Notes and Comments

Source: Arts. 2006 (part) and 2012 combined without change.

Change by amendment effective April 1, 1985: The second paragraph is new. It clarifies some ambiguity in the law and undertakes to codify the law.

The phrase "plea of privilege" has been corrected to "motion to transfer venue."

RULE 93. CERTAIN PLEAS TO BE VERIFIED

A pleading setting up any of the following matters, unless the truth of such matters appear of record, shall be verified by affidavit.

1. That the plaintiff has not legal capacity to sue or that the defendant has not legal capacity to be sued.

2. That the plaintiff is not entitled to recover in the capacity in which he sues, or that the defendant is not liable in the capacity in which he is sued.

3. That there is another suit pending in this State between the same parties involving the same claim.

4. That there is a defect of parties, plaintiff or defendant.

5. A denial of partnership as alleged in any pleading as to any party to the suit.

6. That any party alleged in any pleading to be a corporation is not incorporated as alleged.

7. Denial of the execution by himself or by his authority of any instrument in writing, upon which any pleading is founded, in whole or in part and charged to have been executed by him or by his authority, and not alleged to be lost or destroyed. Where such instrument in writing is charged to have been executed by a person then deceased, the affidavit shall be sufficient if it states that the affiant has reason to believe and does believe that such instrument was not executed by the decedent or by his authority. In the absence of such a sworn plea, the instrument shall be received in evidence as fully proved.

8. A denial of the genuineness of the indorsement or assignment of a written instrument upon which suit is brought by an indorsee or assignee and in the absence of such a sworn plea, the indorsement or assignment thereof shall be held as fully proved. The denial required by this subdivision of the rule may be made upon information and belief.

9. That a written instrument upon which a pleading is founded is without consideration, or that the consideration of the same has failed in whole or in part.

10. A denial of an account which is the foundation of the plaintiff's action, and supported by affidavit.

11. That a contract sued upon is usurious. Unless such plea is filed, no evidence of usurious interest as a defense shall be received.

12. That notice and proof of loss or claim for damage has not been given as alleged. Unless such plea is filed such notice and proof shall be presumed and no evidence to the contrary shall be admitted. A denial of such notice or such proof shall be made specifically and with particularity.

13. In the trial of any case appealed to the court from the Industrial Accident Board the following, if pleaded, shall be presumed to be true as pleaded and have been done and filed in legal time and manner, unless denied by verified pleadings:

(a) Notice of injury.

(b) Claim for compensation.

(c) Award of the Board.

(d) Notice of intention not to abide by the award of the Board.

(e) Filing of suit to set aside the award.

(f) That the insurance company alleged to have been the carrier of the workers' compensation insurance at the time of the alleged injury was in fact the carrier thereof.

(g) That there was good cause for not filing claim with the Industrial Accident Board within the one year period provided by statute.

(h) Wage rate.

A denial of any of the matters set forth in subdivisions (a) or (g) of paragraph 13 may be made on information and belief.

Any such denial may be made in original or amended pleadings; but if in amended pleadings the same must be filed not less than seven days before the case proceeds to trial. In case of such denial the things so denied shall not be presumed to be true, and if essential to the case of the party alleging them, must be proved.

14. That a party plaintiff or defendant is not doing business under an assumed name or trade name as alleged.

15. In the trial of any case brought against an automobile insurance company by an insured under the provisions of an insurance policy in force providing protection against uninsured motorists, an allegation that the insured has complied with all the terms of the policy as a condition precedent to bringing the suit shall be presumed to be true unless denied by verified pleadings which may be upon information and belief.

16. Any other matter required by statute to be pleaded under oath.

(Amended March 31, 1941, eff. Sept. 1, 1941; Sept. 20, 1941, eff. Dec. 31, 1941; June 16, 1943, eff. Dec. 31, 1943; Oct. 12, 1949, eff. March 1, 1950; July 21, 1970, eff. Jan. 1, 1971; July 22, 1975, eff. Jan. 1, 1976; June 15, 1983, eff. Sept. 1, 1983; Dec. 5, 1983, eff. April 1, 1984.)

Notes and Comments

Source: Arts. 573, 573, 1999, 2010, 3734, and 5074.

Change: The basic statute relating to sworn pleadings was Article 2010. With it have been combined provisions from a number of other specific statutes requiring sworn pleas. No change of meaning has been intended in so far as the combinations, as such, are concerned. The scope of sworn denials has, however, been broadened. Subdivision (b) will under this rule include the plea that "the defendant has not legal capacity to be sued." Subdivision (c) has been extended to include a denial of defendant's liability in the capacity in which he is sued. In subdivision (d) the term "cause of action" has been replaced by the word "claim." Subdivisions (f) and (g) apply to allegations in any pleading, not merely to the petition as formerly stated in Art. 2010.

Change by amendment of March 31, 1941: Subdivisions (m) and (n) (Source: Art. 5546, and Acts 1937, 45th Leg., p. 535, ch. 261, sec. 2) and (o) added.

Change by amendment effective December 31, 1941: Section (6) has been added to subdivision (n).

Change by amendment effective December 31, 1943: Section (7) and the new sentence concerning Sections (1) and (7) have been added to subdivision (n) and minor textual changes have been made in the last paragraph of this subdivision.

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Source: Art

Change by amendment effective March 1, 1950: A new subdivision, designated (o), has been added and the subdivision formerly lettered (o) has been designated (p).

Change by amendment effective January 1, 1971: Final clause of subdivision (k) has been changed to harmonize with Rule 185 as amended; Section (8) has been added to subdivision (n).

Change by amendment effective January 1, 1976: Paragraph (p) is new and is adopted for the purpose of simplifying issues in uninsured motorist cases.

Change by amendment effective September 1, 1983: To conform to S.B. 291 and 898, 68th Legislature, 1983.

Change by amendment effective April 1, 1984: Section 10 is changed to conform to amended Rule 185.

RULE 94. AFFIRMATIVE DEFENSES

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. Where the suit is on an insurance contract which insures against certain general hazards, but contains other provisions limiting such general liability, the party suing on such contract shall never be required to allege that the loss was not due to a risk or cause coming within any of the exceptions specified in the contract, nor shall the insurer be allowed to raise such issue unless it shall specifically allege that the loss was due to a risk or cause coming within a particular exception to the general liability; provided that nothing herein shall be construed to change the burden of proof on such issue as it now exists.

(Amended March 31, 1941, eff. Sept. 1, 1941.)

Notes and Comments

Source: Portion of Federal Rule 8(c), unchanged. See Rule 71 for the balance of Federal Rule 8(c).

RULE 95. PLEAS OF PAYMENT

When a defendant shall desire to prove payment, he shall file with his plea an account stating distinctly the nature of such payment, and the several items thereof; failing to do so, he shall not be allowed to prove the same, unless it be so plainly and particularly described in the plea as to give the plaintiff full notice of the character thereof.

Notes and Comments

Source: Art. 2014.

RULE 96. NO DISCONTINUANCE

Where the defendant has filed a counterclaim seeking affirmative relief, the plaintiff shall not be permitted by a discontinuance of his suit, to prejudice the right of the defendant to be heard on such counterclaim.

Notes and Comments

Source: Art. 2016, unchanged.

RULE 97. COUNTERCLAIM AND CROSS-CLAIM

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim within the jurisdiction of the court, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction; provided, however, that a judgment based upon a settlement or compromise of a claim of one party to the transaction or occurrence prior to a disposition on the merits shall not operate as a bar to the continuation or assertion of the claims of any other party to the transaction or occurrence unless the latter has consented in writing that said judgment shall operate as a bar.

(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party whether or not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party, so long as the subject matter is within the jurisdiction of the court.

(d) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after filing his pleading may be presented as a counterclaim by amended pleading.

(e) Cross-Claim Against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

4662.001

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1-31-90

TRCP 98a

January 29, 1990

The Honorable David Peeples
San Antonio Court of Appeals
500 County Courthouse
San Antonio, Texas 78205

Re: Proposal for Texas Rule for Offer of Judgment

Dear Judge Peeples:

I enclose a copy of a letter from Hugh E. Hackney of Fulbright & Jaworski regarding the above referenced matter.

Sincerely yours,

Charles R. Haworth

270/lfk
Enclosure

cc: Members of the Committee
on the Administration of Justice (w/encls.)

00630

2148558200→ 2149699334;# 2

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January 26, 1990

VIA FAX

Charles R. Haworth, Esq.
Andrews & Kurth
4400 Thanksgiving Tower
Dallas, Texas 75201

RE: Proposal for Texas Rule for Offer of Judgment

Dear Charles:

Thank you very much for sending me the draft memorandum regarding the proposal for a Texas offer of judgment rule. I have review both the memorandum and the proposed rule, and offer the following comments.

While the rule is very well drafted, I would suggest several changes or additions to further achieve the ends sought. For example, I feel that the defendant should be given the option of a dismissal with prejudice or entry of a judgment; this procedure would enable the defendant, if he or she so chooses, to avoid the potential preclusive effects of a judgment. The proposed rule also provides (in subsection [b]) that the offer shall remain open for thirty days unless withdrawn by writing served on the offeree before it is accepted. It may be wise to include in this section a provision (similar to Texas Rule 11 regarding agreements between counsel) that the offer may also be withdrawn "in open court" (i.e., on the record during a hearing or in a deposition). This approach would enable the party who has made an outstanding offer to revoke it during an evidentiary hearing or deposition in which particularly helpful testimony is

elicited which may induce him to withdraw the offer. The proposed rule does not require that an acceptance be in writing, so it may also be wise to include a provision for acceptance in writing or "on the record".

Section (f) of the proposed rule outlines the post-judgment procedure for seeking sanctions for rejection of an offer. It may be advisable to include in this section a provision governing the time limits for the filing of such a motion; however, the general rules regarding the plenary power of the court after final adjudication may provide this time limit.

It is interesting to note that the proposed rule consistently refers to sanctions being imposed "on the offeree, or his attorney, or both." This conforms to the current practice regarding discovery sanctions, which also may be imposed on the party or his attorney or both. The primary drawback to this phraseology is that the court will be called upon to determine who is responsible for the rejection of the offer. Obviously, this may require the disclosure of attorney/client communciations, particularly if the sanctions imposed are severe. While the rules of privilege clearly provide an exception for situations involving a breach of duty between attorney and client, the prospects of an appeal of the judgment and subsequent new trial require that any abrogation of the privilege be undertaken only after careful consideration by the trial court. Perhaps the issues of responsibility for sanctions could be deferred until such time as appeals of the judgment are exhausted or are time-barred.

Section (f) also provides that, when the judgment finally entered is less favorable to the offeree than the rejected offer, the offeree (or his attorney, or both) "shall pay the offeror _____ times the cost incurred" after the offer was made. In keeping with the proposed rule's intent to provide the trial court discretion in setting the amount of sanctions, the legislature (or rules committee) may wish to include a range of multiples (i.e., between two and four times the costs incurred) in the rule, and leave the multiple chosen in the discretion of the court.

Finally, the provision permitting an award of sanctions for filing a frivilous motion to reduce the sanctions imposed for rejection of the offer is particularly interesting. It appears to be an attempt to incorporate into the Texas rules some of the "bite" of Rule 11 of the Federal Rules. It may seem a bit odd, in the context of the other Texas rules, to impose sanctions for the frivilous filing of a motion under this rule only. However, I like it because, if

accepted, application of such a rule may ultimately lead to a general rule prohibiting the filing of frivilous motions.

I hope you find these comments helpful. Again I, appreciate your giving me the opportunity to provide some input on this matter. As you know, I have pushed for the adoption of such a rule for some time, and would be very interested to hear from you regarding how this proposal is received.

Very truly yours,

Hugh E. Hackney

HEH:ds

4543.001

LHS
hnd

✓ 10-16-91

October 15, 1991

HHD
SCAC agenda (Rel 10/03)
✓ Subc
COA (amend)
J. Hecht

Mr. E.J. Wohlt
900 Town & Country Lane #310
Houston TX 77024-2216

Dear E.J.:

Thank you for your recent letter, which I am passing along to our Advisory Committee for further review.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

c: Mr. Luther H. Soules III
Soules and Wallace
Tenth Floor
Republic of Texas Plaza
175 East Houston Street
San Antonio TX 78205-2230

E.J. WOHLT

ATTORNEY AT LAW

BOARD CERTIFIED
PERSONAL INJURY TRIAL LAW
TEXAS BOARD LEGAL SPECIALIZATION

October 11, 1991

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Honorable Justice Nathan L. Hecht
Supreme Court of Texas
Supreme Court Building
P. O. Box 12248
Austin, Texas 78711

Dear Judge Hecht:

I called the Clerk of Galveston County to ask them the date of service upon my client so that I could determine how to proceed with filing an answer because the Constable performing the service did not complete the return on the copy he left with my client.

Upon reaching the District Clerk's office in Galveston, I was told that I had two options (1) I could personally come down and look at the file or (2) I could have $5.00 delivered to them as a research fee along with a written request and at their leisure they would respond.

They advised this is because of a law passed by the State Legislature or a Rule by the Supreme Court, she was not sure.

I understand the money hungry Legislature of the State of Texas but to impede the practice of law and to frustrate the administration of justice would appear to be one of the most stupid applications of money grubbing I have every heard.

While she thought it might have been a Supreme Court Rule, I do not believe our Supreme Court would act in that manner and my research of the Rules fulfills my opinion that the Supreme Court is above such.

Oh yes, I can inconvenience a friend of mine who practices in Galveston by calling him and asking him to go or send someone over to do this for me but it seems like a terrible thing to have to do because the Legislature wanted to grub $5.00 out of people just to ask a simple question of a clerk of the Court who is paid by tax dollars, sits in an office owned by the citizens of the state performing a function for the citizens of this state.

Yours very truly,

E. J. Wohlt
EJW:mp

BUSH, FULTON, HURLBUT & MORRISON, P.C.

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April 5, 1993

Hon. Thomas R. Phillips
Chief Justice
Supreme Court of Texas
Supreme Court Building A
Austin, Texas 78701

Re: Private Process Servers

Dear Justice Phillips:

I am writing this letter about a problem of which I have been informed concerning private process servers. Apparently, some private process servers have been showing "badges" to gain entry or feign authority to serve papers. In fact, I am informed that some servers may have been using purloined sheriff or constable badges. Needless to say, a serious breach of the public's confidence occurs when a private process server impersonates an officer of the law to effect service of process.

Considering the low threshold of qualifications with which our rules presently allow an individual to become a private process server, it is my humble recommendation that this problem be addressed at the rule or statutory level.

I trust that by informing you of this matter it may receive the considered attention it deserves in any revisions of the court rules or otherwise. I remain

Respectfully yours,

ROGER L. HURLBUT

RLH:clr

4543 001 LHS
5 12 93 HHD

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL (512) 463-1312
FAX (512) 463-1365

May 11, 1993 5/13

HHD, SCAC Agenda, Various SCAC Subcs, COAJ Staff, file

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

Dear Luke:

Enclosed are the following letters:

1. Roger Hurlbut — regarding private process servers;

2. District Clerk John Appleman — regarding Texas Rule of Civil Procedure 23;

3. Stephen Howell — regarding the 1993 Texas Rules of Court;

4. Jeana Lungwitz — regarding Texas Rule of Civil Procedure 145.

I would appreciate your bringing these to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

RULE 103, T.R.C.P.

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 the 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 the 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.

(Amended June 10, 1980, eff. Jan. 1, 1981; July 15, 1987, eff. Jan. 1, 1988)

PROPOSED CHANGE:

RULE 103, T.R.C.P.

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 who has registered with the Secretary of State as an authorized Process Server. No person who is less than eighteen years of age or a party to or interested in the outcome of the 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. Authorized Process Servers shall not execute any writ which commands the seizure of property or persons. Writs of Garnishment may be served by the Sheriff, Constable or by an authorized person.

RULE 103 AFTER PROPOSED CHANGE

RULE 103, T.R.C.P.

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 who has registered with the Secretary of State as an authorized Process Server. No person who is less than eighteen years of age or a party to or interested in the outcome of the 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. Authorized Process Servers shall not execute any writ which commands the seizure of property or persons. Writs of Garnishment may be served by the Sheriff, Constable or by an authorized person.

Additional Local Rules

TRCP 103 SCAC Agenda

Amedned Joint Order of the District Courts of the Judicial District Courts of Bexar County, Texas pursuant to Texas Rules of Court 103 concedrning Service of Process by certain private process servers.

The District Courts of Bexar County, Texas, pursuant to Texas Rules Civil Procedure 103, authorize Private Process Servers (list available in District Clerk's office) each of whom is not less that eighteen years of age, to serve all process in all such district courts in all civil suits in which the process server serving such process shall not be a party to or interested in the outcome of the suit:

IT IS FURTHER ORDERED that such process servers shall not undertake any action concerning any parties to any suit or property of any parties to any suit other that the service of process as hereinabove authorized by this Order.

IT IS FURTHER ORDERED that such process servers shall at all time fully comply with all applicable provisions of the Texas Rules of Civil procedure.

Each applicant to be a Private Process Server shall file with the District Clerk of Bexar County, Texas, the affidavit and indemnity agreement prescribed by this order and a Certificate of Coverage for a professional liability insurance policy, including coverage for errors and omissions, with minimum limits of liability of $100,000/ $300,000 and having Bexar County, Texas named as the loss payee. Applicants must also furnish to the District Clerk a current color passport-type photograph.

Appointment as a Private Process Server shall be for a period of two years and may be renewed for additional terms of two years.

Any Private Process Server subject to this order shall notify the District Clerk in writing of any change of address within 10 business days of said change.

Rules of the Civil District Courts

B. Pre-Trial Motions and Non-Jury Trials

3.5 Notice of Hearing

b. Non-jury trials on the merits require reasonable notice of not less that forty-five days before the trial date.

United States District Court
Western District of Texas
Notice

The United States District Court for the Western District of Texas is considering adopting New Local Court Rule AT-9 (Change of Address), to the Local Court Rules to read as follows:

RULE AT-9. Change of Address

Any attorney licensed to practice in this district who changes his or her office address shall, within 30 days after the change, file with the clerk a notice of change of address, showing the attorney's name, firm name, new address and telephone number.

If you wish to comment on this rule, please mail your comments no later than November 14, 1991 to Charles W. Vagner, Cerk, U.S. District Court, 655 E. Durango Blvd., San Antonio, TX 78206.

European trade journey planned

Following a highly successful international trade seminar (on September 19, co-sponsored by the American Bar Association) Robert P. Braubach, Honorary Belgium Consul for the South Texas area and Wilde Sapte international law firm, has organized a European Trade Mission. This trip will allow South Texas companies to explore business opportunities in the European Community. This trade mission will introduce the business men and women of San Antonio and South Texas to the marketing and trade opportunities and how to make the right contacts in Europe.

Braubach states, "The European market is consolidating in '92 and will become the world's largest trading community, representing a $4 trillion market, and 340 million consumers. An integrated market of this size must be recognized by outside investors, and the sooner the better."

The trip will leave San Antonio November 22, with a return date of December 3. The mission will be escorted by Braubach and former San Antonio Mayor, Lila Cockrell. Some of the meetings will be with Count Henry Le Grelle, managing director of EUSACO sales companies and also the official Texas representative in Belgium; European State of Texas offices; Belgium Foreign Trade offices; Commission of the European Communities, etc. For information call Atkins Travel by Design at (512) 828-4000.

HHD
SCAC Agenda
at RCP 103
No Subc

RICHARD MILLICAN
INVESTIGATOR
Texas Lic. #A06151
PERSONAL SERVICE throughout TEXAS & NATION
(512) 344-0401 (24 HRS.)
FAX : (512) 923-1441

AMENDED LOCAL RULES PRIVATE PROCESS SERVERS PURSUANT TO RULE 103 TRCP EFFECTIVE MAY 8, 1991

AMENDED LOCAL RULES PROMULGATED BY THE BEXAR COUNTY DISTRICT JUDGES AND APPROVED BY THE SUPREME COURT TO TAKE EFFECT MAY 8, 1991. PRIVATE PROCESS SERVERS WILL BE AUTHORIZED TO SERVE CITATIONS, TRO, NOTICES, PRECEPTS, ETC.; PURSUANT TO RULE 103 TEXAS RULES OF CIVIL PROCEDURE, ON CASES FILED IN THE COURTS OF BEXAR COUNTY.

PRIVATE PROCESS SERVERS, PREREQUISITE UNDER NEW RULES MUST SHOW PROOF OF PROFESSIONAL LIABILITY INSURANCE INCLUDING ERRORS AND OMISSIONS IN THE AMOUNT OF $300,000.00 WITH BEXAR COUNTY SHOWN AS THE ADDITIONAL INSURED.

PLEASE SEE ATTACHED SCHEDULE OF SERVICES AND PRICES, *I HAVE NOT INCREASE PRICES DUE TO THE REQUIREMENT OF INSURANCE TO BE REGISTERED WITH BEXAR COUNTY DISTRICT CLERK TO SERVE PRIVATE PROCESS ON CASES FILED IN THE COURTS OF BEXAR COUNTY.*

THANK YOU FOR YOUR CONSIDERATION.

RICHARD MILLICAN

MAILING ADDRESS: P.O.BOX 460146 SAN ANTONIO, TEXAS 78246

HOOVER, BAX & SHEARER
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

JOE G. BAX, P.C.
PARTNER
BOARD CERTIFIED-COMMERCIAL REAL ESTATE LAW
BOARD CERTIFIED-RESIDENTIAL REAL ESTATE LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

ATTORNEYS AT LAW
SAN FELIPE PLAZA
5847 SAN FELIPE, SUITE 2200
HOUSTON, TEXAS 77057
(713) 977-8686
FAX (713) 977-5395

REPLY TO
P.O. BOX 4547
HOUSTON, TEXAS 77210

February 4, 1991

HHP 2/12
Sup Ct 10a Subc
Agenda
Copies

The Honorable Justice Eugene A. Cook
Texas Supreme Court
Supreme Court Building
P.O. Box 12248, Capitol Station
Austin, Texas 78711

RE: Private Process Servers/Eviction Cases

Dear Justice Cook,

Our firm has the pleasure of representing a number of commercial and residential landlords in and around the Harris County area. We have learned that some groups may undertake an effort to try and convince the Texas Supreme Court that there is a need to expand the use of private process servers into the eviction area. Our firm opposes such a proposal.

Candidly, many private process firms appear to market fax machines and computer equipment while overlooking some of the ethical considerations of their particular task. We feel more comfortable with the Constables and the accountability that they have not only to the courts but to the electorate. In those rare instances where the question of service is raised, it is our experience that the methods of the Constable's organization are far more reliable, to say nothing of their greater creditability.

We understand that the effort to expand the use of private process servers into the eviction area may be due to isolated problems in certain communities. The last time I checked I believe that the sixteen Justice Courts in Harris County handle approximately 300,000 eviction annually. This process is and has been for some time a very smooth one. It operates efficiently. You seldom hear of any complaint regarding backlog. In fact, it operates so well that you simply do not hear about the eviction process very much. There is no need for private process servers in Harris County. Our local situation falls very much into that scenario that "if it isn't broke don't fix it".

I would respectfully suggest that the voters of those local communities that are experiencing problems are more than capable of addressing those deficiencies at the next election. In

closing, we would think it entirely inappropriate to reward the extraordinary effort of our local constables with a rule modification permitting the use of private process servers in eviction cases.

Sincerely,

HOOVER, BAX & SHEARER

Joe G. Bax

JGB:df

We try to bring fire!

LOUIS LOPEZ

JUDGE

8888 Dyer Street
Suite 313
El Paso, TX 79904-2034

(915) 751-7575

JUSTICE COURT
Precinct 2
El Paso County

February 15, 1990

Nathan L. Hecht
Justice, Texas Supreme Court
P.O. Box 12248
Austin, TX 78711

Re: Suggested Amendment to Rule 103 of the Rules of Civil Procedure

Dear Justice Hecht:

I would like to suggest an amendment to Rule 103 of the Texas Rules of Civil Procedure which I think would be very helpful to those of us who are trial judges. I realize this amendment would probably not take effect with those which will be instituted this year, but hopefully it could be done as soon as possible.

I would like to ask that Rule 103 be changed to allow for service by any person authorized in writing by the plaintiff who is not less than eighteen years of age and that there be no requirement that there be any written order of the court allowing it. This would free judges from the burden of having to approve or disapprove who is to serve process in every case. It seems that a plaintiff or his attorney should be free to choose whomever they want to serve their process without needing the approval of the court everytime. As the rule stands now, it is similar to having the court, by written order, approve who is going to be the attorney for the plaintiff. Surely, no one would believe that this is desireable even if in some cases it may bring about the beneficial result of having the court reject an incompetent lawyer.

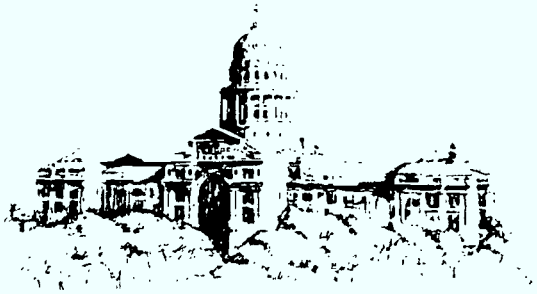
The suggested change would also help avoid the friction some judges may have with sheriffs or constables who resent judges who sign orders for private service. I myself have had considerable trouble with my constable for this reason. There are many constables across the state who feel threatened by the increasing use of private service. My constable has been very resentful, but I have allowed it because all the companies charge less to the citizens. The constables feel threatened that their salaries may be reduced eventually as a result of having fewer papers to serve, or that perhaps their jobs could even be abolished (according to them)! Because I have allowed private service, there seems to have been even the suggestion that I have been paid by the companies, which is totally false. You can see why it would be preferable to take this burden off us. Either that or simply go back to a system that doesn't allow private service at all.

I hope the reasons for this suggestion are clear enough. If you have any questions, please do not hesitate to contact me.

Pg000250

Sincerely,

Louis Lopez



Capital Consultants

February 20, 1990

The Honorable Tom Phillips
Chief Justice
Texas Supreme Court
P. O. Box 12248
Capitol Station
Austin, Texas 78711

Dear Judge:

I am enclosing an article that has some people guessing what the real Rule 103 means. I guess I'm asking you for a clarification or statement from the Court in light of the enclosed article. Thanks for your cooperation.

Sincerely yours,

Bill Clayton
President

BC/bo
enc:

Pg000251

1122 Colorado, Suite 307, Austin, Texas 78701 • (512) 474-1181

and when copies are so furnished the clerk shall make no charge for the copies.

(Amended Oct. 10, 1945, eff. Feb. 1, 1946; July 15, 1987, eff. Jan. 1, 1988.)

Source: Art. 2021.

RULE 100 to 102. [REPEALED]

(Repealed July 15, 1987, eff. Jan. 1, 1988.)

RULE 103. WHO MAY SERVE

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.

(Amended June 10, 1980, eff. Jan. 1, 1981; July 15, 1987, eff. Jan. 1, 1988.)

Source: New rule.

Change by amendment effective January 1, 1981: The rule is amended to permit service by mail by an officer of the county in which the case is pending or the party is found and also service by the clerk of the court.

Comment to 1988 Change: The amendment makes clear that the courts are permitted to authorize persons other than Sheriffs or Constables to serve Citation. Further, Sheriffs or Constables are not restricted to service in their county. The last sentence is added to avoid the necessity of motions and fees.

RULE 104. [REPEALED]

(Repealed July 15, 1987, eff. Jan. 1, 1988.)

Comment to 1988 Change: Rule is rendered unnecessary due to amendments to Rule 103.

RULE 105. DUTY OF OFFICER OR PERSON RECEIVING

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.

(Amended July 11, 1977, eff. Jan. 1, 1978; July 15, 1987, eff. Jan. 1, 1988.)

Source: Art. 2025, unchanged.

Change by amendment effective January 1, 1978: The spelling of the word "indorse" was corrected to "endorse".

RULE 106. METHOD OF SERVICE

(a) Unless the citation or an order of the court otherwise directs, the citation shall be served by any person authorized by Rule 103 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.

(b) 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 reasonably effective to give the defendant notice of the suit.

(Amended Aug. 18, 1947, eff. Dec. 31, 1947; July 22, 1975, eff. Jan. 1, 1976; July 11, 1977, eff. Jan. 1, 1978, June 10, 1980, eff. Jan. 1, 1981; July 15, 1987, eff. Jan. 1, 1988.)

Source: Art. 2026.

Change by amendment effective January 1, 1976: Service "by registered or certified mail" is authorized in certain instances.

Change by amendment effective January 1, 1978: Subsections (b) and (e) are new. The rule is rewritten.

Change by amendment effective January 1, 1981: The rule is reorganized to clarify its meaning. Alternate methods of service are authorized if either (a)(1) or (a)(2) are tried without success. Both methods are not required.

Comment to 1988 Change: Conforms to amendment to Rule 103.

RULE 107. RETURN OF CITATION

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 return of citation by an authorized person shall be verified. When the citation was served by registered or certified mail as authorized by Rule 106, 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

RULE 105 DUTY OF OFFICER OR PERSON RECEIVING

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.
(Amended July 11, 1977, eff. Jan.1, 1978; July 15, 1987, eff. Jan.1, 1988)

PROPOSED CHANGE:

RULE 105 DUTY OF OFFICER OR PERSON RECEIVING

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 officer or authorized person may delay the execution of such process upon the request of the party who caused it to be issued or upon request that party's attorney.

This addition to Rule 105 would reduce the liability to an officer or authorized person who delayed service at the request of the court or an attorney of record.

Present Rule:

RULE 106. METHOD OF SERVICE

(a) Unless the citation or an order of the court otherwise directs, the citation shall be served by any person authorized by Rule 103 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.

(b) Upon motion supported by affidavit stating the location of the defendants usual place of business or usual place of 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 reasonably effective to give the defendant notice of the suit. (Amended Aug. 19, 1947, eff. Dec. 31, 1947; July 22, 1975, eff. Jan. 1, 1976; July 11, 1977, eff. Jan. 1, 1978, June 10, 1980, eff. Jan. 1, 1981; July 15, 1987, eff. Jan.1, 1988)

Proposed change:

RULE 106. METHOD OF SERVICE

(a) Unless the citation or an order of the court otherwise directs, the citation shall be served by any person authorized by Rule 103 by

(1) delivering to the defendant, in person, or by delivering to an occupant over age sixteen years at the defendants place of abode, 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.

(b) Upon motion supported by affidavit stating the location of the defendants usual place of business or usual place of 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~~

in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit. (Amended Aug. 19, 1947, eff. Dec. 31, 1947; July 22, 1975, eff. Jan. 1, 1976; July 11, 1977, eff. Jan. 1, 1978, June 10, 1980, eff. Jan. 1, 1981; July 15, 1987, eff. Jan.1, 1988)

Rule after proposed change:

RULE 106. METHOD OF SERVICE

(a) Unless the citation or an order of the court otherwise directs, the citation shall be served by any person authorized by Rule 103 by

(1) delivering to the defendant, in person, or by delivering to an occupant over age sixteen years at the defendants place of abode, 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.

(b) Upon motion supported by affidavit stating the location of the defendants usual place of business or usual place of 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 in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit.

Notes: Adding the phrase that allows service to an occupant over age 16 brings the State Rule 106 in line with Federal Rule 4. It will allow the proces server to deliver to an adult family member without the neccessity of an affidavit, motion and order as is now required. As the courts are very liberal in granting such motion for subistituted service it will releive the courts of a great amount of paper work and should reduce the cost of the suit to the litigants as well as expidite the service of citations.

90(e)
74
91
→ 111
114(e)

LYON & LYON

ATTORNEYS AND COUNSELORS AT LAW

ROBERT CHARLES LYON
TED B. LYON, JR.
BRUCE A. PAULEY*
SANDI FUDGE
*also licensed in Iowa & Nebraska

3301 CENTURY DRIVE - SUITE A
ROWLETT, TEXAS 75088
(214) 412-0412
FAX: (214) 475-5804

September 7, 1990

91a
166a(c)

Rules Advisory Committee
The Supreme Court of Texas
Post Office Box 12248
Austin, Texas 78711

Ladies and Gentlemen:

Having read the newly adopted Rules of Civil Procedure and viewed the State Bar videotape regarding same, I would like to make the following comments.

The first three comments are by way of housekeeping. Tex.R.App.P. 90(e) refers to paragraph (c), but this paragraph has been renumbered. It should refer to paragraph (d).

Should not Tex.R.App.P. 74(a), (q) and 91 refer to "parties to the trial court's final judgment or appealable order ..." rather than just the parties to the trial court's final judgment?

Gender neutral changes were missed in Tex.R.App.P. 111 and 114(e).

The provisions of Tex.R.Civ.P. 21a that telephonic document transfer after 5:00 p.m. is deemed to be served on the following day is a positive step. May I suggest that service by hand delivery after 5:00 p.m. should also be deemed to be served on the following day.

The provisions of Rule 21a allowing service by FAX may result in appellate briefs being served on opposing parties by FAX. To me, this is unacceptable. A 60 to 70 page FAX document is unwieldy and generally unworkable. May I suggest that Tex.R.App.P. 74(q) regarding service of briefs be amended to require service of one or two copies of briefs bound in the same manner as those filed with the Court. This would be helpful if for no other reason than to inform opposing counsel of the color of binding to be avoided.

Finally, I would like to suggest that summary judgment Rule 166a(c) be amended to require the filing party to serve briefs upon the adverse party and the Court no later than forty-eight

(48) hours prior to the time of the hearing. The common practice is now for the moving party to file a "bare bones" motion and then to bring a brief with them to the hearing. This can provide the moving party with an unfair advantage if the Court allows the consideration of the brief over the adverse party's objections, particularly since the brief serves to answer the adverse party's response and opposing affidavits.

Thank you for your consideration of these matters. If I may clarify my comments and suggestions in any way, please do not hesitate to contact me and I will gladly do so.

Sincerely yours,

Bruce A. Pauley

BAP/jc

BAP.L2

90(e)
74
91
111
→114(e)

LYON & LYON

ATTORNEYS AND COUNSELORS AT LAW

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September 7, 1990

81a
166a(c)

Rules Advisory Committee
The Supreme Court of Texas
Post Office Box 12248
Austin, Texas 78711

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(48) hours prior to the time of the hearing. The common practice is now for the moving party to file a "bare bones" motion and then to bring a brief with them to the hearing. This can provide the moving party with an unfair advantage if the Court allows the consideration of the brief over the adverse party's objections, particularly since the brief serves to answer the adverse party's response and opposing affidavits.

Thank you for your consideration of these matters. If I may clarify my comments and suggestions in any way, please do not hesitate to contact me and I will gladly do so.

Sincerely yours,

Bruce A. Pauley

Bruce A. Pauley

BAP/jc

BAP.L2

4543.001 WRG LHS

David J. Garcia

4-10-91 SB

DISTRICT CLERK — BEXAR COUNTY

BEXAR COUNTY COURT HOUSE
SAN ANTONIO, TEXAS 78205

March 12, 1991

A/10 HHD, SCAC Scott Azludo ✓ J Hecht (2) AS J Thomas E. Bovard

Honorable Raul Rivera
288th District Court
Bexar County Courthouse
San Antonio, Texas 78205

RE: Rule 117A(6) TRCP

Dear Judge:

When Rule 99 TRCP was amended on July 15, 1987, the 90 day return of an unserved citation was deleted and rightly so, however, Rule 117A(6) which concerns delinquent tax suits was not changed to read the same as Rule 99. In Bexar County we file approximately 6,600 tax suits per year and we re-issue about 10% of the citations because of the 90 day provision. When the change in Rule 99 was amended, it saved all concerned with delinquent tax suits money, time, effort and paperwork as well as additional papers to maintain.

I request that consideration be given to amend Rule 117A(6) to delete "if this citation is not served within 90 days after the date of issuance, it shall be returned unserved."

If further information and/or discussion is needed, please let me know.

Very truly yours,

DAVID J. GARCIA
District Clerk

DJG/mls

cc: Hon. Andy Mireles
Ms. Sarah B. Duncan

RAUL RIVERA
JUDGE 288TH DISTRICT COURT
BEXAR COUNTY COURTHOUSE
SAN ANTONIO, TEXAS 78205

April 9, 1991

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

Dear Luke:

Enclosed is the letter from David J. Garcia, District Clerk of Bexar County requesting that the Supreme Court Advisory Committee consider deleting the 90 day provision in T.R.C.P. 117d (6).

Very truly yours

Raul

Raul Rivera

BROWN, HERMAN, SCOTT, DEAN & MILES, L.L.P.

Attorneys at Law

BEALE DEAN
RICHARD E. MILES
JAMES T. BLANTON
GRANT LISER
MORTON L. HERMAN
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LARRY W. WILSHIRE

OF COUNSEL
CATHERINE JANE ALDER, P.C.

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306 WEST 7TH STREET
FORT WORTH, TEXAS 76102-4905

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FAX (817) 870-2427

PAUL E. HANSON
SUSAN E. BAIRD
STEVEN J. GORDON
JEFF C. REES
NIGEL F. GANT

JESSE M. BROWN (1883-1978)
A. M. HERMAN (1905-1987)
JOHN M. SCOTT (1911-1985)
WILLIAM M. BROWN (1912-1987)

May 7, 1993

West Publishing Company
1610 Opperman Drive
P. O. Box 64526
St. Paul, MN 55164-0526

Attn: Corrections (Texas Rules of Court)

Re: 1993 Texas Rules of Court

Gentlemen:

Let me call to your attention a small (very small) error in the 1993 Texas Rules of Court.

In the enclosed copy of Rule 124, the last sentence ends with the phrase "the claim may be served in any manner prescribed for service of citation or as provided in Rule 21(a)." Notice in the enclosed copy of Rules 21 and 21a that there is no Rule 21(a). It is obvious from the context of Rule 124 that it intends to refer back to Rule 21a. The parentheses around the "a" in Rule 124 appears to be in error.

As I said, it is a small point, but one that you may want to discuss with the Clerk of the Supreme Court of Texas to see whether the error originates with your publication or is in the original draft of the Rules passed by the Supreme Court.

Best regards,

Stephen C. Howell

SCH:at
cc: Clerk, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

tionship 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.

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

(6) If a judge does not discover that he is recused under subparagraphs (2)(e) or (2)(f)(iii) until after he has devoted substantial time to the matter, he is not required to recuse himself if he or the person related to him divests himself of the interest that would otherwise require recusal.

(Added July 15, 1987, eff. Jan. 1, 1988; amended April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Comment to 1990 change: The grounds for a judge's mandatory recusal have been expanded from those in prior Rule 18b(2).

RULE 18c. RECORDING AND BROADCASTING OF COURT PROCEEDINGS

A trial court may permit broadcasting, televising, recording, or photographing of proceedings in the courtroom only in the following circumstances:

(a) in accordance with guidelines promulgated by the Supreme Court for civil cases, or

(b) when broadcasting, televising, recording, or photographing will not unduly distract participants or impair the dignity of the proceedings and the parties have consented, and consent to being depicted or recorded is obtained from each witness whose testimony will be broadcast, televised, or photographed, or

(c) the broadcasting, televising, recording, or photographing of investiture, or ceremonial proceedings.

(Added April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Comment to 1990 change: New rule. To provide for guidelines for broadcasting, televising, recording, and photographing court proceedings.

RULE 19. NON-ADJOURNMENT OF TERM

Every term of court shall commence and convene by operation of law at the time fixed by statute without any act, order, or formal opening by a judge or other official thereof, and shall continue to be open at all times until and including the last day of the term unless sooner adjourned by the judge thereof.

(Amended June 16, 1943 eff. Dec. 31, 1943.)

RULE 20. MINUTES READ AND SIGNED

On the last day of the session, the minutes shall be read, corrected and signed in open court by the judge. Each special judge shall sign the minutes of such proceedings as were had by him.

Notes and Comments

Source: Art. 1918.

RULE 21. FILING AND SERVING PLEADINGS AND MOTIONS

Every 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 filed with the clerk of the court in writing, shall state the grounds therefor, shall set forth the relief or order sought, and at the same time a true copy shall be served on all other parties, and shall be 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 parties not less than three days before the time specified for the hearing unless otherwise provided by these rules or shortened by the court.

If there is more than one other party represented by different attorneys, one copy of such pleading shall be delivered or mailed to each attorney in charge.

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.

(Amended Sept. 20, 1941, eff. Dec. 31, 1941; Aug. 18, 1947, eff. Dec. 31, 1947; July 11, 1977, eff. Jan. 1, 1978; June 10, 1980, eff. Jan. 1, 1981; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Source: Art. 2291.

Change by amendment effective January 1, 1978: The phrase, "if it relates to a pending suit." was deleted from the end of the first sentence. The phrase, "If the motion does not relate to a pending suit," was deleted from the beginning of the second sentence.

Change by amendment effective January 1, 1981: The rule is broadened to encompass matters other than motions and to require three-day notice unless the period is shortened.

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.

→ RULE 21a. METHODS OF SERVICE

Every notice required by these rules, and every pleading, plea, motion, or other form of request required to be served under Rule 21, 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 to the party to be served, or the party's duly authorized agent or attorney of record, as the case may be, either in person or by agent or by courier receipted delivery or by certified or registered mail, to the party's last known address, or by telephonic document transfer to the recipient's current telecopier number, or by 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. Service by telephonic document transfer after 5:00 p.m. local time of the recipient shall be deemed served on the following day. Whenever a party has the right or is required to do some act 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. Notice may be served by a party to the suit, an attorney of record, a sheriff or constable, 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 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 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.

(Added Aug. 18, 1947, eff. Dec. 31, 1947: amended July 21, 1970, eff. Jan. 1, 1971; Oct. 3, 1972, eff. Feb. 1, 1973; July 11, 1977, eff. Jan. 1, 1978; June 10, 1980, eff. Jan. 1, 1981; Dec. 5, 1983, eff. April 1, 1984; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Note: Adopted as a new rule effective December 31, 1947.

Change by amendment effective January 1, 1971: The second and third sentences have been added to make service by mail complete upon proper deposit in the mail and to enlarge the time for acting after service by mail; the sentence formerly providing for notice of a motion by filing and entry on the motion docket has been eliminated.

Change by amendment effective February 1, 1973: The words "Postal Service" have been substituted for "Post Office Department" and a sentence has been inserted authorizing the court to grant an extension of time or other relief upon finding that a notice or document was not received or, if service was by mail, was not received within three days from the date of deposit in the mail.

Change by amendment effective January 1, 1978: The phrase "not relating to a pending suit" in the next to last sentence is deleted.

Change by amendment effective January 1, 1981: The next to last sentence from the end of the former rule requiring three-day notice is deleted, because Rule 21 is concurrently amended to require that notice.

Change by amendment effective April 1, 1984: This rule consolidates Rules 21a and 21b.

Comment to 1990 change: To allow for service by current delivery means and technologies.

RULE 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,

RULE 123. REVERSAL OF JUDGMENT

Where the judgment is reversed on appeal or writ of error for the want of service, or because of defective service of process, no new citation shall be issued or served, but the defendant shall be presumed to have entered his appearance to the term of the court at which the mandate shall be filed.

Notes and Comments

Source: Art. 2049, with minor textual change.

RULE 124. NO JUDGMENT WITHOUT SERVICE

In no case shall judgment be rendered against any defendant unless upon service, or acceptance or waiver of process, or upon an appearance by the defendant, as prescribed in these rules, except where otherwise expressly provided by law or these rules.

When a party asserts a counterclaim or a cross-claim against another party who has entered an appearance, the claim may be served in any manner prescribed for service of citation or as provided in Rule 21(a).

(Amended Dec. 5, 1983, eff. April 1, 1984.)

Notes and Comments

Source: Art. 2050, with minor textual change.

Change by amendment effective April 1, 1984: The last sentence clarifies the present uncertainty as to whether service of a counterclaim must be by citation. The amendment is that service of a counterclaim may be done in any manner prescribed for service of citation and also pursuant to Rule 21(a).

SECTION 6. COSTS AND SECURITY THEREFOR

RULE 125. PARTIES RESPONSIBLE

Each party to a suit shall be liable to the officers of the court for all costs incurred by himself.

Notes and Comments

Source: Art. 2051, first sentence, unchanged.

RULE 126. FEE FOR EXECUTION OF PROCESS. DEMAND

No sheriff or constable shall be compelled to execute any process in civil cases coming from any county other than the one in which he is an officer, unless the fees allowed him by law for the service of such process shall be paid in advance; except when affidavit is filed, as provided by law or these rules. The clerk issuing the process shall indorse thereon the words "pauper oath filed," and sign his name officially below them; and the officer in whose hands such process is placed for service shall serve the same.

Notes and Comments

Source: Art. 2051 (second sentence), with minor textual change.

RULE 127. PARTIES LIABLE FOR OTHER COSTS

Each party to a suit shall be liable for all costs incurred by him. If the costs cannot be collected from the party against whom they have been adjudged, execution may issue against any party in such suit for the amount of costs incurred by such party, but no more.

Notes and Comments

Source: Art. 2052, unchanged.

RULE 128. [REPEALED]

(Repealed Dec. 5, 1983, eff. April 1, 1984.)

RULE 129. HOW COSTS COLLECTED

If any party responsible for costs fails or refuses to pay the same within ten days after demand for payment, the clerk or justice of the peace may make certified copy of the bill of costs then due, and place the same in the hands of the sheriff or constable for collection. All taxes imposed on law proceedings shall be included in the bill of costs. Such certified bill of costs shall have the force and effect of an execution. The removal of a case by appeal shall not prevent the issuance of an execution for costs.
(Amended Dec. 5, 1983, eff. April 1, 1984.)

Notes and Comments

Source: R.C.S. Art. 2054, unchanged.

Change by amendment effective April 1, 1984: The words "at the end of the term" are dropped from the last sentence.

RULE 130. OFFICER TO LEVY

The sheriff or constable upon demand and failure to pay said bill of costs, may levy upon a sufficient amount of property of the person from whom said costs are due to satisfy the same, and sell such property as under execution. Where such party is not a resident of the county where such suit is pending, the payment of such costs may be demanded of his attorney of record; and neither the clerk nor justice of the peace shall be allowed to charge

4543 001 LHS
5 12 93 111:21

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

May 11, 1993 5/13

HHD, SCAC Agenda, Various SCAC Subcs, COAJ Staff, Tlx

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

Dear Luke:

Enclosed are the following letters:

1. Roger Hurlbut — regarding private process servers;

2. District Clerk John Appleman — regarding Texas Rule of Civil Procedure 23;

3. Stephen Howell — regarding the 1993 Texas Rules of Court;

4. Jeana Lungwitz — regarding Texas Rule of Civil Procedure 145.

I would appreciate your bringing these to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

46661.001

LHS

STATE BAR OF TEXAS

9-17-93 WLC

TEXAS LAWYERS CARE

Julie Oliver
Executive Director

F/HD — Usual & write her — We will meet later in the year

September 14, 1993

Luther H. Soules III, Chair
Supreme Court Advisory Committee
Soules & Wallace
100 W. Houston Street, Suite 1500
San Antonio, Texas 78205-1457

Re: Proposed revision to Rule 145

Dear Mr. Soules:

Several months ago you received a memo from Karen R. Johnson regarding a revision to Rule 145 as proposed by the State Bar Legal Services to the Poor in Civil Matters Committee. As you recall, Rule 145 establishes guidelines for affidavits of inability to pay costs. A copy of the previous memo and the proposed rule are included for your information.

In late April you notified Karen Johnson that you had referred this matter to David J. Beck for a report to your next committee meeting. Karen suggested that I follow up with you to see if your committee has had an opportunity to consider this proposal and make any recommendations. If so, I would appreciate a report on that. If not, is there anything that we can do to assist your committee in its consideration of this proposal?

Please let me know how we can help your committee in this matter. We are grateful for your and your committee's time and efforts.

Sincerely,

Julie Oliver

Julie Oliver

P. O. Box 12487 / Austin, Texas 78711 Telephone: (512) 463-1544 Fax: (512) 477-8302

April 23,1 993

MEMORANDUM

To: Justice Raul A. Gonzalez,
Supreme Court Liaison
Luther Soules, Chair
Supreme Court Advisory Committee
James R. Sharpe, Chair
Court Rules Committee

Harriet Miers, President
Lonny Morrison, President-Elect
Colleen McHugh, Chair of Board
Pearson Grimes, Chair-Elect

From: Karen R. Johnson, Executive Director

Re: Proposed revision to Rule 145

The Legal Services to the Poor in Civil Matters Committee has looked into some concerns about Rule 145 which establishes the guidelines for affidavits of inability to pay costs. A concern expressed by some court clerks is that they do not have the authority to contest the need for an affidavit by those who file them. An example of the problems that result is that in some communities pro se litigants are advised to file these affidavits even when it is not appropriate. Obviously, a respondent in a pro se matter is unlikely to oppose such an affidavit and the current rule does not allow the clerk to do so.

Additionally, some pro bono attorneys representing clients who have been referred by an organized pro bono program that screens for income eligibility are reluctant to use affidavits of inability to pay costs out of fear that the defendant will demand a time-consuming hearing. This not only discourages the attorney's participation but also makes access more difficult for a client who should qualify for an affidavit of inability to pay costs but who is forced to come up with the filing fees. Alternatively, it may force the legal services program unnecessarily to expend scarce funds on filing fees.

With input from the legal services community, the Legal Services to the Poor in Civil Matters Committee of the State Bar has proposed a revised rule designed to address both of these concerns. A copy of the proposed revised rule with changes indicated by underline is attached.

According to the revision, the clerk would have the authority to contest affidavits of inability to pay costs except in those cases where the client has been screened for income eligibility by an IOLTA funded program. This establishes a presumption that IOLTA program eligible clients meet the rule's standard for eligibility. As you recall, IOLTA income guidelines are established at 125% of federal poverty guidelines.

Section 4 was added to assure that the remote possibility that attorneys fees or costs might be recovered would not affect the client's eligibility for the affidavit.

The Legal Services to the Poor Committee would like for the Supreme Court to consider this proposed revised rule. If you need any additional information, please contact meat 512/463-1400. I will be happy to provide you whatever you need or discuss this with you further. You may also contact Julie Oliver, Texas Lawyers Care at 512/463-1544.

Thank you for your assistance.

P.O. Box 833
Austin, Texas 78767-0833
(512) 326-5959
1-800-777-FAIR
1-800-374-HOPE

THE
WOMEN'S
ADVOCACY
PROJECT,
INC.

May 6, 1993

Justice Nathan Hecht
Supreme Court Building
P.O. Box 12248
Austin, TX 78711

To the Honorable Justice Hecht:

I am writing to you in reference to the proposed revision of Rule 145 of the Texas Rules of Civil Procedure.. The Women's Advocacy Project, on behalf of our poverty level clients, supports the proposed revision of the rule.

I am sure you are aware that as the economic situation in Texas worsened, the number of poverty level Texans increased. The more poverty level Texans there are, the greater the demand on underfunded pro bono legal services programs. This revision would expedite the procedure to declare a person indigent.

Since a client of a pro bono legal service program must go through a fairly extensive screening process to assure their indigency, it only makes sense that this procedure should not have to be repeated in front of a judge. This revision would not only expedite judicial dockets, it would also free up a pro bono attorneys time, so that more clients may be served.

The Women's Advocacy Project would appreciate your careful consideration and support of the proposed revision to Rule 145 of the Texas Rules of Civil Procedure.

Sincerely,

Jeana Lungwitz

Jeana Lungwitz
Family Violence Program Attorney

45-43 001 LHS
5-12-93 HHD

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

May 11, 1993 5/13

HHD, SCAC Agenda Various SCAC Subcs COAJ Staff Thx

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

Dear Luke:

Enclosed are the following letters:

1. Roger Hurlbut — regarding private process servers;

2. District Clerk John Appleman — regarding Texas Rule of Civil Procedure 23;

3. Stephen Howell — regarding the 1993 Texas Rules of Court;

4. Jeana Lungwitz — regarding Texas Rule of Civil Procedure 145.

I would appreciate your bringing these to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

STATE BAR OF TEXAS

4/26 H/T Dave Senate Sec'y Austin AG's staff J. Hecht

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✓4-26-93 SD

Karen R. Johnson
Executive Director

1414 Colorado
P.O. Box 12487
Austin, Texas 78711
(512) 463-1400
FAX: (512) 473-2295

April 23,1 993

MEMORANDUM

To: Justice Raul A. Gonzalez,
Supreme Court Liaison
Luther Soules, Chair
Supreme Court Advisory Committee
James R. Sharpe, Chair
Court Rules Committee

Harriet Miers, President
Lonny Morrison, President-Elect
Colleen McHugh, Chair of Board
Pearson Grimes, Chair-Elect

From: Karen R. Johnson, Executive Director KJ

Re: Proposed revision to Rule 145

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Additionally, some pro bono attorneys representing clients who have been referred by an organized pro bono program that screens for income eligibility are reluctant to use affidavits of inability to pay costs out of fear that the defendant will demand a time-consuming hearing. This not only discourages the attorney's participation but also makes access more difficult for a client who should qualify for an affidavit of inability to pay costs but who is forced to come up with the filing fees. Alternatively, it may force the legal services program unnecessarily to expend scarce funds on filing fees.

With input from the legal services community, the Legal Services to the Poor in Civil Matters Committee of the State Bar has proposed a revised rule designed to address both of these concerns. A copy of the proposed revised rule with changes indicated by underline is attached.

According to the revision, the clerk would have the authority to contest affidavits of inability to pay costs except in those cases where the client has been screened for income eligibility by an IOLTA funded program. This establishes a presumption that IOLTA program eligible clients meet the rule's standard for eligibility. As you recall, IOLTA income guidelines are established at 125% of federal poverty guidelines.

Section 4 was added to assure that the remote possibility that attorneys fees or costs might be recovered would not affect the client's eligibility for the affidavit.

The Legal Services to the Poor Committee would like for the Supreme Court to consider this proposed revised rule. If you need any additional information, please contact meat 512/463-1400. I will be happy to provide you whatever you need or discuss this with you further. You may also contact Julie Oliver, Texas Lawyers Care at 512/463-1844.

Thank you for your assistance.

RULE 145 AFFIDAVIT OF INABILITY

In lieu of filing security for costs of an original action, a party who is unable to afford said costs shall file an affidavit or attorney's certificate as herein described. A "party who is unable to afford costs" is defined as a person who is presently receiving a governmental entitlement based on indigency or any other person who has no ability to pay costs. Except as provided by paragraph 3, the affidavit, and the party's action, shall be processed by the clerk in the manner prescribed by paragraphs 1 and 2. The procedure for contesting an affidavit shall not apply to the attorney's certification set forth in paragraph 3.

1. Procedure. Upon the filing of the affidavit, the clerk shall docket the action, issue citation and provide such other customary services as are provided any party. After service of citation, the defendant or the clerk may contest the affidavit by filing a written contest giving notice to all parties, provided that temporary hearings will not be continued pending the filing of the contest. If the court shall find at the first regular hearing in the course of the action that the party (other than a party receiving a governmental entitlement) is able to afford costs, the party shall pay the costs of the action. Reasons for such a finding shall be contained in an order. Except with leave of court, no further steps in the action will be taken by a party who is found able to afford costs until payment is made. If the party's action results in monetary award, and the court finds sufficient monetary award to reimburse costs, the party shall pay the costs of the action. If the court finds that another party to the suit can pay the costs of the action, the other party shall pay the costs of the action.

2. Affidavit. The affidavit shall contain complete information as to the party's identity, nature and amount of governmental entitlement income, nature and amount of employment income, other income, (interest, dividends, etc.), spouse's income if available to the party, property owned (other than homestead), cash or checking account, dependents, debts and monthly expenses. The affidavit shall contain the following statements: "I am unable to pay the court costs. I verify that the statements made in this affidavit are true and correct." The affidavit shall be sworn before a Notary Public.

3. Attorney's Certification. If a party (1) is receiving free legal services, without contingency, due to the party's indigency and, (2) is represented by an attorney who is providing legal services either directly or by referral from a program funded by the Interest on Lawyers' Trust Accounts (IOLTA) program; the attorney may file a certificate in lieu of the procedures described in paragraphs 1 and 2. The certificate shall confirm that the party has been screened for income eligibility by the IOLTA funded program or that the party has been referred to the attorney from a program funded by IOLTA and such program represents it has screened the party for income eligibility. Upon receipt of such certification, the clerk shall docket the action, issue citation and provide such other customary services as provided any party.

4. Attorney's fees and costs. Nothing herein shall preclude any existing right to recover attorney's fees, expenses or costs from any other party.

Notes and Comments

Source: Art. 2070

Change by amendment effective ___, 1993: This rule has been changed to facilitate participation by pro bono attorneys in representing low income clients. Paragraph three of the rule has been rewritten to accomplish this objective. It allows an attorney associated with an IOLTA funded program to certify the party's eligibility for services based on prior income screening. This avoids the duplication of unnecessary paperwork to establish the party's inability to pay costs. In addition, this predetermination of eligibility, by the IOLTA funded program, eliminates the need for contesting such certifications.

The rule also reestablishes the clerks' authority to contest affidavits to prevent abuses by parties who are able to afford the costs of suit.

STATE BAR OF TEXAS

F A X M E M O R A N D U M

TO: Luther Soules, Harriet Miers
James R. Sharpe, Lonny Morrison
Julie Oliver, Colleen McHugh
Pearson Grimes

FAX: (512) 473-2295

FAX:

FROM: Karen R. Johnson

DATE: April 23, 1993

MESSAGE:

PLEASE SEE ATTACHED MEMO

Total number of pages including cover sheet 3

If you do not receive all of the pages, please call Mary Sue at 512/463-1408.

Pg000273

GRAVES, DOUGHERTY, HEARON & MOODY
2300 NCNB TOWER
POST OFFICE BOX 98
AUSTIN, TEXAS 78767
TELEPHONE: (512) 480-5600

IRELAND GRAVES (1885-1969)
BEN F. VAUGHAN, III, P.C.
OF COUNSEL

CHARLES A. SPAIN, JR.
(512) 480-5689

TELECOPY NUMBER:
(512) 478-1976

November 26, 1989

The Honorable Nathan L. Hecht, Justice
The Supreme Court of Texas
Post Office Box 12248
Capitol Station
Austin, Texas 78711

Dear Judge Hecht:

6. The following proposed amendments use the word "nonjury": Texas Rules of Appellate Procedure 41(a)(1) and 54(a). The following proposed amendments use the word "non-jury": Texas Rules of Appellate Procedure 41 comment, 52(d), 52 comment, and 54 comment. The court may wish to standardize the terminology. The term "non-jury" currently appears in Texas Rules of Civil Procedure 90, 156, 216(1), 249, 307, and 542. The term "nonjury" currently appears in Texas Rule of Civil Procedure 324(a) and Texas Rule of Judicial Administration 6(b)(2).

I appreciate the opportunity to comment on the proposed rules amendments and hope that my comments are helpful.

Respectfully,

Charles A. Spain, Jr.

PLAYING BY THE RULES

Recent Amendments to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence Effective December 1, 1991

by John K. Chapin

On April 30, 1991, the Supreme Court transmitted to Congress a number of changes to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence. These changes are to take effect on December 1, 1991. Following is a discussion of the major changes. Other insubstantial changes were made to F.R.A.P. 6, 10, 26, and 26.1.

FEDERAL RULES OF CIVIL PROCEDURE

(TRCP 162) *Dismissal of Actions—Rule 41*

Rule 41(b) is amended to delete the language that authorized the use of the rule as a means of terminating a nonjury action on the merits when the plaintiff has failed to carry a burden of proof in presenting his or her case. The procedure is replaced by the new provisions of Rule 52(c) (judgment on partial findings) that authorize entry of judgment against the defendant or plaintiff earlier than the close of the party's case against whom judgment is rendered. Thus a motion to dismiss under Rule 41 on the ground that a plaintiff's evidence is legally insufficient should be treated as a motion for judgment on partial findings as provided in amended Rule 52(c), discussed below.

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hhd
LHS

7-1-91
SB

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

7/1
HHD
Scire Quando
- Succo 214 (TRCP 165a, 245, 202, 270-9, etc-
CAB (avant).

June 28, 1991

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

Dear Luke:

Enclosed are copies of letters from Jim Parker, Howard H. Hasting, Jr., and E. J. Wohlt, Jr. regarding several proposed rules changes.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

HASTING & HASTING
ATTORNEYS AT LAW
1115 MILAM BUILDING
SAN ANTONIO, TEXAS 78205

HOWARD H. HASTING
HOWARD H. HASTING JR.

AREA CODE 512
223-3001

June 13, 1991

Honorable Nathan L. Hecht
Justice, The Supreme Court of Texas
Post Office Box 12248, Capitol Station
Austin, Texas 78711

RE: Changes to certain Rules of Civil Procedure.

Dear Justice Hecht:

In some of my readings, I have taken note of remarks attributed to you to the effect that the Rules of Civil Procedure need simplification. I could not agree more. Recently, I have found two deficiencies, in my opinion, in the Rules which I feel worthy of the Court's attention. These are found in Rule 21a and Rule 165a.

Rule 21a

Recently this Rule was amended, effective September 1, 1990, to address certain problems and to provide for service by telephonic document transfer. The Rule as now written provides in part that every pleading, etc. required to be served under Rule 21 other than citation and except as otherwise provided in the Rules may be "served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record, as the case may be, either in person or by agent or by courier receipted delivery or by certified or registered mail, to the party's last known address... ." (Emphasis added). Thus, a literal reading of the Rule directs us to send all notices to the party's last known address no matter the person to whom they are sent. I do not have available to me each change of the Rules, the last one being published in the hardbound edition containing only the amendments effective January 1, 1978. However, in that iteration of the Rule it provides that every notice other than citation "may be served by delivering a copy of the notice or of the document to be served, as the case may be, to the party to be served or his duly authorized agent or his attorney of record either in person or by registered mail

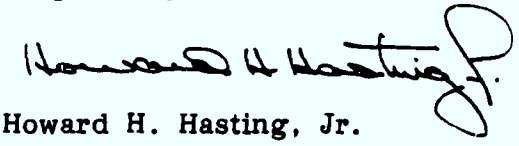
to his last known address... ." It would seem more clear for the Rule to state that the service may be to the party's, the party's duly authorized agent's or attorney of record's last known address. One other problem that should be addressed in the Rules change is to extend the provision that service by telephonic document transfer after 5:00 P.M. local time of the recipient is deemed to be served on the following day, to courier receipted delivery in order to curtail the practice that seems to have grown of sliding envelopes underneath doors late in the evening.

Rule 165a

This Rule does not provide for any minimum time between the giving of notice that a case has been placed upon the dismissal docket and the date for hearing. Most of the cases that are placed upon the dismissal docket fall under the purview of Section 2 of the Rule, Non-Compliance With Time Standards. Although it is supposition on my part, I believe that well in excess of ninety percent of the cases that are placed on the dismissal docket for non-compliance with time standards have either been deliberately ignored by both parties for good reason or have been settled with no motion and order of nonsuit filed with the Court. What is of concern to me with this Rule is the impact that Local Rules may have upon the operation of the dismissal of cases. For example, for many years cases could be set for trial upon the non-jury docket upon ten days notice. However, Rule 245 was amended, effective September 1, 1990, to provide that not less than forty-five days notice must be given to the parties of a first setting of trial. Now, back when the ten day notice was in effect and when the Local Rules in Bexar County provided for twenty-one days notice, things were working well here because the District Clerk would invariably give thirty days notice to the parties. This would permit an attorney who had allowed a case to slip through his system unnoticed, time to set the case for trial prior to the dismissal docket hearing. Bexar County, when I last checked a few weeks ago, was still adhering to giving thirty days notice for the dismissal docket. Yet, we are required to give forty-five days notice for trial. I do not believe that it is the intent of The Supreme Court of Texas and the Rules of Civil Procedure to deliberately place attorneys in front of a grievance committee. It would, therefore, seem to me appropriate that Rule 165a be amended to provide that notice be given in excess of forty-five days (sixty days would seem to be appropriate) or, in the event Local Rules provide for more than forty-five days notice of a trial setting, two weeks more than that extended period.

Your Honor should understand that neither of these Rules has caused me any personal embarrassment or problem but they have, nevertheless, recently come to my attention and I believe they deserve the attention of the Honorable Supreme Court of Texas at some time in the future.

Respectfully,



Howard H. Hasting, Jr.
State Bar No. 09209000

HHH/mk

4543.001

Vhd
LHS

6-7-91
SB

TEXAS TECH UNIVERSITY
School of Law

Lubbock, TX 79409-2171
(806) 742-3791
FAX (806) 742-1629

June 3, 1991

Luther H. Soules III
Soules & Wallace
Attorneys-at-Law
Tenth Floor
Republic of Texas Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Re: T.R.C.P. 165a.3.

Dear Luke:

Shouldn't the first sentence in the last paragraph of T.R.C.P. 165a.3. read as follows:

"In the event for any reason a motion for reinstatement is not decided by signed written order within seventy-five days after the ~~judgment~~ [order of dismissal] is signed. . . ."?

Best regards.

Sincerely,

J. Hadley Edgar
Robert H. Bean Professor of Law

JHE/nt

Pg000280

4543.001

LHS
WHD

2-5-92
SB

TARRANT COUNTY
FORT WORTH, TEXAS 76196-0240

R. BRENT KEIS
JUDGE
COUNTY COURT AT LAW No. 1
817/334-1457

February 4, 1992

2/6 HAD. SCAC Discovery Subc Agenda Quant
CoAJ J. Hedtke.

Mr. Luther Soles
Chair, Supreme Court Advisory Committee
10th Floor
175 East Hoston Street
San Antonio, Texas 78205-2230

Dear Mr. Soles:

The March 1991 issue of The Advocate suggested that interested persons might write to you regarding suggested changes to the Rules of Civil Procedure. I have reduced my comments to the enclosed article, which I have submitted to the Texas Bar Journal for possible publication. I do not know whether the article will be published, but more importantly, I hope you will have an opportunity to scan my comments and perhaps agree with them.

I appreciate this opportunity to write to you regarding the rules. If you have any questions of me, please don't hesitate to call.

Very truly yours,

R. Brent Keis

RBK/dwr
Enclosure

THE DISCOVERY PROCESS:

HAVE WE MISDIAGOSED THE DISEASE?

by R. Brent Keis

On July 1, 1953, then U.S. District Judge Joe Sheehy of Tyler spoke at a luncheon in Fort Worth sponsored by the Texas Association of Claimant's Attorneys. [1] The Texas Bar Journal recounted that the thrust of his talk was that Texas lawyers had not been making full use of the instruments of discovery. Noting that discovery rules existed under both Federal and State systems, Judge Sheehy reportedly emphasized that full utilization of all means of discovery would result in amicable settlements, simplification of issues, elimination of witnesses and reduction of trial time. Although such remarks were reasonable in 1953, if any trial judge made the same comments today, undoubtedly a bill of impeachment would soon follow. Judges and lawyers have heard on a too frequent basis from Rambo and non-Rambo lawyers that a case that was set for trial could not be settled because of the amount of attorneys fees incurred during discovery. What has brought us to this point?

History

During the 1980's the debate among litigators was how to stop or cure what some have classified as a disease. Former

Justice Kilgarlin defined the disease as being one of gamesmanship in discovery; in particular, Rambo litigators who engage in making overbroad discovery requests, exercising unreasonable delaying tactics and making meaningless responses; i.e. discovery abuse. [2] Practicing lawyers became schooled in CLE courses and in legal articles on how to handle "discovery demons." [3] The cure for the disease was believed to have been administered by the 1981 and 1984 amendments to Rule 215 T.R.C.P. Regrettably, it seems to be the consensus among lawyers and jurists that the cure is worse than the disease. [4]

Since 1984, barely a week, certainly not a month, has gone by without one or more state appellate courts in Texas issuing an opinion regarding Rule 215. The most common issue is the exclusion of evidence as a sanction for discovery abuse, error or misdeed. The result, as described by Judge Pat M. Baskin of Midland, has been not to prevent trial by ambush, but at times to "foster" such. [5] The easiest example is the one in which the witness has been deposed, his existence and opinions are known, but his testimony is excluded because he was not identified in answers to interrogatories. [6]

Thus, former Justice Kilgarlin has come full circle and believes that Rule 215 has not worked the way it was hoped. [7] The Texas Supreme Court Advisory Committee and the State Bar of Texas Administration of Justice Committee are looking at the

rules to find a new cure for the disease. [8] In the interim, the Supreme Court has been attempting to cool the fires of sanction orders by its 1990 amendment to Rule 215 and its holding in Transamerican Natural Gas vs. Powell, [9] that the punishment should fit the crime.

In 1953, the professional and technological environment for the practice of law was much different. Today, as the Eastern District of Texas has stated in its Expense and Delay Reduction Plan, a "significant factor that contributes to excessive discovery is the concern lawyers have that they may be criticized or held legally accountable if they fail to exhaust every means at their disposal." [10] Facilitating this professional environment has been technology. We began with copiers and word processors, and now use laser jet printers, fax machines and personal computers. Most recently we have added computer disks that replace hard-bound volumes of legal authority and, more significantly, legal forms. [11] Some would hope that such technology would reduce the cost of litigation, but some believe that "the fee practice of charging for 'billable hours' creates an economic conflict between lawyer and client." [12]

The Objectives of the Rules

Because of our professional and technological environment, we have lost sight of our objective, and we now must redouble

our efforts. To refresh our memories, the objective of our Rules of Procedure, as set out in Rule 1, is to obtain just and fair adjudication of the rights of litigants as quickly and at the least expense possible. [13] Does our current discovery process aid in this objective? Eric R. Galton, a member of the first State Bar Alternative Dispute Resolution Committee and a leading authority on mediation, tells us that discovery costs have become a factor in settlement and "worse, obstruct such discussion." [14]

What is the Disease?

If the cure is not working, perhaps it is because we have misdiagnosed the disease. We must come to the inevitable conclusion that discovery abuse is not the disease, it is the discovery process. The cure is eliminating or at least seriously limiting discovery. One need look no farther than Art. 39.02 of the Texas Code of Criminal Procedure to put such an idea into perspective. In this age of specialization, civil trial lawyers may not be fully aware that under Article 39.02 a criminal Defendant may take a deposition only upon the filing of an affidavit and application to the Court, and thereafter showing a good reason for the taking of such deposition. [15] The case law would seem to indicate that even perpetuation of testimony is not a good reason for taking a deposition. [16] As

a practical matter, depositions are rarely permitted by the Court in criminal cases and there is no discivery as we practice it in civil litigation; yet these cases involve a Defendant's liberty, property and, in capital murder cases, his or her very life. Nevertheless, we do not hear criminal lawyers saying that they are unable to get ready for trial because they could not conduct discovery in the same manner as civil litigators.

If we are able to get past the initial psychological hurdle that discovery should be eliminated or seriously limited, then what plan should be adopted by the state courts?

Alternative Cure No 1.

No Discovery

In an article entitled Discovery Reform in the December 1991 issue of the ABA Journal, Loren Kieve advocates that discovery should be eliminated. [17] In support of this contention, he espouses adoption of the European system, describing a system not too distant from our Texas Criminal Procedure. The Europeans are limited to exchanging names and statements of witnesses, and copies of trial exhibits. Depositions are permitted only when necessary to preserve testimony; i.e. if the witness is unavailable because he's outside the jurisdiction of the Court or is on his death bed. [18]

Barring discovery in all civil cases is simply too big a pill for us to swallow. Requests for exceptions would be rampant. Some would advocate that discovery is necessary in products liability cases because discovery helps promote safe products. [19] Likewise, even Mr. Kieve contends that there should be an exception for employment discrimination. [20] The withdrawal pains of no discovery would be too horrendous, and the economic impact too dramatic.

Alternative Cure No. 2.

Limiting Discovery by Judicial Discretion

Changes to the Federal rules of Procedure have prefaced changes in the State rules. In 1942 Rule 167 T.R.C.P., the discovery procedure rule, was first adopted. This Texas Rule was patterned after the then Rule 34 of the Federal Rules of Civil Procedure. In 1962 Rule 168 T.R.C.P., the written interrogatory rule, was adopted. It was patterned after Rule 33 of the Federal Rules of Civil Procedure. Now the Federal Courts may lead us in a new direction of limited discovery.

On December 1, 1990 the Judicial Improvements Act of 1990, which is applicable to Federal Courts, became law. [21] Pursuant thereto, effective December 31, 1991, the United States District Court for the Eastern District of Texas, as well as other Districts, adopted their Expense and Delay Reduction

Plan. Under the Plan, there are six tracts with ever-increasing amounts of discovery with each tract, beginning with Tract No. 1 and no discovery. Tract No. 2 provides for automatic disclosure. Tract No. 3 provides for depositions of custodians and of parties. Tract No. 4 permits other depositions. [22]

When the case is filed, the Court decides which tract to assign each case. When automatic disclosure is required the parties must exchange information pertaining to witnesses, documents and other significant information within 30 days of their pleading. A management conference would occur within 120 days.

The most vocal criticism from the Bar and Mr. Kieve in particular, has been that this is just another layer - another "monster" - and it will not effect an actual reduction in time or expense. [23] The discretionary aspect of the Plan, to the extent each Federal Judge has discretion, may be utilized to its fullest extent in a politically immune system of lifetime appointed judges rather than a system where judges are subjected to Bar polls and election campaigns.

If too much discretion over discovery is left in the hands of State Trial Judges, it is reasonable to assume that the current rate of applications for writs of mandamus will increase. Thus, will we not, as Mr. Kieve says, simply have

added another "monster"?

Of course, we should all assume that each State Judge will be immune from the pressures exerted by local lawyers who vote in Bar polls, contribute to campaigns and are possible opposing candidates in the next election. We would hope and expect that every State Trial Judge would exhibit that appropriate Profile in Courage [24] necessary to withstand requests for the wider and more open discovery tracts.

Alternative Cure No. 3.

Limited Discovery and Limited Court Discretion

To eliminate the discretion of Trial Judges in determining what tract of discovery to assign a case, the determination must be mandated in the Rules. If the objective of the Rules is to obtain fair and just adjudication of cases as quickly and inexpensively as possible, then there must be a correlation between the cost of discovery and the amount in controversy. If it should follow that cases are assigned to a particular discovery tract based on the amount in controversy, exclusive of statutory penalties and attorney's fees, then a change in the Rules of Procedure pertaining to damages pleadings would be necessary. The pleadings would determine the discovery tract.

In liquidated damages cases, the system would be fairly

simple. In unliquidated damages cases, the question of whether the Plaintiff or Counter-Plaintiff's allegation of the damage amount was groundless or brought in bad faith would be an issue. Do we create another monster of pre-trial procedure pertaining to whether or not the damage amount allegation was groundless? No. We must kill the monster, and it must be by its own hands. In particular, if the finder of fact at trial does not award damages within a certain percentage range of the allegations, the fact finder should be submitted a question that asks whether, based upon the evidence at trial, such allegation of damages was groundless or brought in bad faith. In the case of a jury trial, the appropriate definition would be submitted. A definition of groundless or bad faith could be drawn which could be akin to that applied in DTPA [24] or Rule 13 [26] cases. The definition of "groundless and in bad faith" has been addressed by the Texas Supreme Court on a limited basis in Donwerth vs. Preston II Chrysler-Dodge. [27] The definition should be one that "chills" the groundless or bad faith damage amount allegation and not the good faith allegation which is later not proven by a preponderance of the evidence. If the fact finder answers that such damage amount allegations were groundless or in bad faith, then the Plaintiff and his counsel would be liable for all costs of discovery, including attorney's fees. The Court in a subsequent hearing

could determine the reasonable and necessary amount of such costs and attorney's fees.

Quick Medicine

While changes and cures are being debated, there is one action the Courts and the Bar can take to diminish the disease. Attorneys should seek and Judges should assign cases to mediation prior to discovery. We know that a "significant percentage of the public and the Bar know about ADR." [28] It is in our hands to use it and perhaps fight the spread of the "disease."

1. 16 Tex. Bar J. 500 (1953)

2. William W. Kilgarlin and Don Jackson, Sanctions for Discovery Abuse Under Rule 215, 15 St. Mary's L. J. (1984)

3. Robert E. Shapiro, Wrestling with the Discovery Demons, Litigation (ABA), Fall 1991, at p. 14

4. William W. Kilgarlin, Sanctions for Discovery Abuse: Is the Cure Worse than the Disease? 54 Tex. Bar J. 658 (1991); Judge Pat M. Baskin, Eliminating Automatic Sanctions Under Rule 215.5, 10 The Advocate 3 (1991)

5. Baskin, supra, at 3

6. See Sharp v. Broadway National Bank, 748 S.W.2d 669 (Tex. 1990)

7. Kilgarlin, supra at p. 658

8. Editors Comments, 10 The Advocate 1 (1991)

9. 811 S.W.2d 913 (Tex. 1991)

10. United States District Court for the Eastern District of Texas Civil Justice Expense and Delay Reduction Plan, a/k/a The Plan, (eff. Dec. 31, 1991) Intro at p. 1

11. See, Tom Steinert - Threlkeld, The making of high-tech lawyers: 1992, Dallas Morning News, Jan. 28, 1992, at D1

12. The Plan, supra, Intro at p. 1

13. Rule 1, T.R.C.P.

14 Eric R. Galton, Mediation and Arbitration in DTPA Cases, Advanced DTPA - Consumer Law Course, 1991 at p. D-6

15. Tex. Code Crim. Proc., Art. 39.02

16. Beard v. State, 481 S.W.2d 875 (Tex. Crim. App. 1972)

17. Loren Kieve, Discovery Reform, ABA Journal, Dec. 1991, at p. 79

18. Kieve, supra, at p. 81

19. Charles T. Hvass, Jr. Letter to the Editor, ABA Journal, Feb. 1992, at p. 12

20. Kieve, supra, at p. 81

21. Public Law 101-650 [H.R. 5316]

22. The Plan, supra, at pgs. 1-6

23. Kieve, supra, at p. 81

24. John F. Kennedy, Profiles in Courage (1956)

25. Tex. Bus. & Com. Code, Sec. 17.41 et. seq.

26. Rule 13, T.R.C.P.

27. 775 S.W.2d 634 (Tex. 1989)

28. Concurrent Interests, Texas Bar Foundation, Dec. 1991, at p. 6

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THE SUPREME COURT OF TEXAS

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October 15, 1993

HHD.
Discovery Task
Agenda
COAJ Staff

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed is a letter from Judge Tony Lindsay regarding the Discovery Task Force, a copy of which has been sent to David Keltner.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

October 11, 1993

Judge Tony Lindsay
280th District Court
Civil Courts Building
Houston TX 77002

Dear Judge Lindsay:

Thank you for your letter and thoughtful remarks regarding the Discovery Task Force. I have sent a copy to the chairman of the Rules Advisory Committee with the request that your comments be considered fully in making additional revisions in the rules.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

c: Mr. Luther H. Soules III

PG000293B

TONY LINDSAY
JUDGE, 280TH DISTRICT COURT
CIVIL COURTS BUILDING
HOUSTON, TEXAS 77002
(713) 221-5518

September 29, 1993

TO: TEXAS SUPREME COURT
DISCOVERY TASK FORCE

Having just attended the Judicial Conference in Houston, including the breakout session on the Discovery Task Force Update, I applaud the Discovery Task Force for its tremendous amount of work and its suggestions to improve the discovery mess. I urge incorporation of the following concepts.

(1) **In the absence of a scheduling order setting a sooner deadline, Plaintiffs should be required to designate experts no later than 90 days before trial, and Defendants should designate experts by 60 days before trial.**

30 days before trial is totally unreasonable for the designation-of-expert process to begin, and if practiced, requires either heroic effort on the part of opposing counsel to respond to Plaintiff's proof or a continuance and delay of the trial. Few defendants retain experts if not needed to respond to Plaintiff's expert testimony, but if Plaintiff will have one, then Defendant wants one, too. Defendants should have some time, therefore, after Defendant learns whether Plaintiff will have an expert, to find and designate its own expert. In the rare event that Defendant designates an expert even though Plaintiff has not, then Plaintiff could be allowed another 30 days to designate a responsive expert only.

(2) **Make it absolutely clear that judges can establish reasonable sooner deadlines for the designation of experts and for other discovery, and these deadlines will be upheld by appellate courts—without necessarily requiring the trial judge to hold a pretrial conference on the record to convince the appellate court that the scheduling order is valid per Rule 166.**

It is needful for trial courts to be able to establish schedules for the orderly preparation of cases for trial, and with more than 50 non-tax new cases per month, it is not reasonable to expect a trial court to hold a meaningful oral scheduling conference with each one. A scheduling order setting reasonable deadlines, of which the parties have notice, should be effective even in the absence of an oral hearing; but an oral hearing could be allowed if the parties request it to ask for different deadlines, or the trial judge should be allowed to sign an agreed order that will be enforced by appellate courts. And, of course, the trial court should always have discretion to require a scheduling conference.

Parties should not retain the option of failing or refusing to "decide" whether they will use a certain expert or any expert and thereby avoid their responsibility to designate and disclose their experts.

(3) **Make it clear that, as to the subjects covered by mandatory disclosure, no additional interrogatories are allowed, and the mandatory disclosure cannot be expanded by all-encompassing definitions.**

Attorneys regularly propound pages and pages of definitions that greatly expand the simple questions asked in interrogatories or documents requested. Attorneys also regularly propound interrogatories that, if truly answered completely, would require many pages, if not a whole book.

(4) **Do cut the number of allowed interrogatories, but eliminate the "per set" and make it a certain number of total interrogatories that can be propounded by one party to any other one party, perhaps limiting the total number of sets to two to four that can be propounded from any one party to any one other party.**

So that parties do not have to worry about failing to object to an extra number of interrogatories in the first set and opening themselves to having to still answer the maximum number for another set, but prevent opposing counsel from deliberately dribbling out their questions a little at a time.

(5) **Require any party who requests mandatory disclosure to itself make the same disclosure either at the same time that the other side's disclosure is due or within a certain number of days thereafter; and without any request from the other side.**

(6) **Make clear that parties are under no duty to supplement depositions or production made pursuant to a subpoena duces tecum; and that non-parties are under no duty to supplement discovery at all, except that retained experts should be required to supplement by report if they change or add to their opinions or receive additional information on which to base their old opinions after their deposition is taken. And attorneys should be prohibited from attempting to extract promises on the record of the depo from deponents to supplement their deposition testimony, except as to retained experts.**

Whether or not parties presently have a duty to supplement depo testimony is not clear to me; but whether they do or not, many attorneys extract a "promise" from party and nonparty deponents to supplement, and then try to exclude testimony based on an alleged broken promise to supplement. It needs to be made clear that a subpoena duces tecum is or is not the same as a request for production that requires continuing supplementation.

(7) **Answers to "fact" interrogatories should have to be sworn in supplementation the same as in original answers, but nontestimonial answers to identify experts should not have to be sworn.**

If there is merit in having interrogatory answers sworn in the first place, then there is no reason to allow the responding party to escape having to swear to his answers just because he delays the answer. It is silly, however, to think anybody needs to swear to who his experts are, whether in original or supplementary responses, and this information should be given in a response expected from the attorney, not from the party.

(8) **If requests for admissions are to be retained at all, then limit the scope to discrete questions of fact and to the genuineness of documents.**

Admissions are presently frequently used in a way that seems to comport with the rule, but was probably not anticipated by the rule. Defendants frequently propound to Plaintiffs, particularly to pro se plaintiffs, requests for admissions such as, "Admit or Deny that you have no case against Defendant," or "Admit or Deny that all the allegations in your petition are false." I don't think admissions were ever meant to be used this way, but the present rule does say that you can ask for admissions that relate to opinions of fact or of the application of law to fact, as well as to statements of fact.

(9) **Make it clear that the failure to respond to requests for admissions is no more fatal and final than the total failure to appear for trial is fatal if the Defendant can make the showing required for a new trial.**

It is surely easier to accidentally miss timely responding to a request for admissions than it is to totally forget and fail to show up for trial, but the present literal interpretation of the rules makes it fairly easy to get forgiven for entirely ignoring a trial date (and ignoring the court, so to speak), but requires "good cause" for withdrawal of admissions (ignoring only opposing counsel, so to speak). Is simple negligence of the attorney good cause?

(10) **Clean up the whole process by doing away with the wasteful and expensive system of sloppy petition followed by special exceptions and/or basic discovery to try to find out what the plaintiff claims the case is about. Also do away with more or less unlimited amendments.**

The present system of notice pleading encourages sloppy lawyering, including the filing of suits for which the Plaintiff's attorney has done no research or investigation to figure out whether the Plaintiff really has a case (all the elements of something) or not. Then we put the burden on Defendants (who in theory do not have to prove anything until the Plaintiff proves something), by special exception, to point out to the Plaintiff how to clean up his petition and ask him to do it, or else run the risk of no-telling-what coming in at trial because it might somehow be encompassed in the general stuff Plaintiff has included in the petition. Rule 13, though strengthened somewhat, is still mostly useless to discourage groundless suits, because it is difficult to show that groundless suits are brought in bad faith or for the purpose of harassment--and not merely in the good faith, but mistaken and uninformed belief that there was probably a cause of action in there somewhere.

This gets to do with discovery, because our encouragement of sloppy, factless petitions requires discovery to find out what ought to be set out in the petition. Special exceptions may or may not fill the bill and avoid the need for extra discovery questions in a certain case, but special exceptions certainly take the time of the court that should be spent on trying the cases after the attorneys have spent the time to make their pleadings correct and complete in the first place. Pg000293E

Sometimes, amended pleadings are made necessary by newly developed facts that the party had no reason to discover sooner; but more often amended pleadings are the result of hurried, sloppy, poorly thought out original pleadings that just didn't include everything that occurred to the lawyer on reflection. Each amendment causes the other side to have to re-evaluate whether additional discovery is needed, and frequently leads to a request

for more time and a delay of trial. Go to a system of one amendment as of right and after that only by permission of the court on a showing of why you could not have been expected to plead that matter in your first amendment. And cut off amendments as of right at least 90 days before trial.

(11) **In professional negligence cases, where the Plaintiff must have an expert to prove liability, require designation of an expert on liability within 6 to 9 months after the case is filed.**

It is not unusual for a medical negligence case to be on file for over a year before the Defendant doctor or hospital submits special exceptions to the judge asking that the Plaintiff be required to plead what acts or omissions the Plaintiff alleges to constitute negligence on the part of Defendant, in response to a petition that says little more than that Plaintiff suffered a bad result and that the result was caused by Defendant's negligence--no facts, just a general allegation of negligence. Then, more than a year after filing, the Plaintiff asserts that he should not be required yet to state any specific facts because he has not yet taken the Defendant's deposition and therefore does not yet know what the Defendant did wrong. This is common in spite of rules that now assure that Plaintiff has access to his own medical records to take to any expert he wishes for evaluation. A significant portion of medical malpractice cases are filed without the Plaintiff having any clear idea of what the doctor or hospital did wrong--except for some vague notion of "failure to timely diagnose" or "failure to properly treat."

Or--around about a year after filing, the Defendant is likely to file a motion for summary judgment. To prevail on the motion, the Defendant must prove the negative--that he did nothing wrong, or that whatever he did, it did not cause Plaintiff's injuries. Most of the time, a medical defendant's proof of lack of liability skates close to the edge of not being sufficiently complete to really disprove liability. Frequently the proof fails. Defendants often try to base a summary judgment on the lack of Plaintiff's proof, that is, "he has no expert, judge, so he cannot show negligence." This is insufficient under our present practice, but the rules of summary judgment and discovery should be changed to make this a winning argument after some length of time; and save everybody's time and money.

(12) **Do allow individuals named as parties to testify without further designation of themselves as fact witnesses.**

(13) **Make the time for response the same for response to interrogatories and response for a request for production, and make clear whether the time runs from the time the discovery request is deposited in the mail (served) or from the time the other side receives it. And same for admissions.**

Rule 168 now says interrogatory answers are due "within the time specified ... which specified time shall not be less than thirty days after the service...." Rules 167 and 169 require responses to production and admissions "within 30 days after service." The language of 167, 168, and 169 together with R. 21a seem to indicate clearly that the time runs from the time the request is deposited in the mail, except that you add 3 days per R. 21a. But nearly all attorneys seem to assume that the time runs from the time the request is received and is an absolute 30 days. Make it all due by the 30th day.

Pg000293F

Tony Lindsay

Tony Lindsay
Judge, 280th District Court

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hhd
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THE SUPREME COURT OF TEXAS

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April 30, 1992

HHD
Pls distribute
per usual

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

Dear Luke:

Enclosed is a letter Chief Justice Phillips received from Tom Fleming suggesting a proposed change to TRCP 166.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

To LHS
Current Rules
Acknowledge

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C. G. HALL
DAVIS HIESTER
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ASA V. BLAND (1933-1977)
C. Y. MILLS (1916-1982)

OF COUNSEL
HARRY L. HALL
SCOTT TOOTHAKER
JACK WIECH

April 27, 1992

COPY

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

Dear Chief Justice Phillips:

Enclosed is a copy of a proposed change to Texas Rules of Civil Procedure 166 submitted to the State Bar Committee on Administration of Justice by my partner O. C. Hamilton, Jr. While I know the Supreme Court has its own committee on the rules and that Justice Hecht is the Court's member on that committee, I felt compelled to write directly about this proposal.

The current rule almost encourages both parties to wait until the 31st day before trial to disclose experts. As a result, the last month before trial is spent in depositions rather than preparation. Additionally, the defense has no alternative but to seek out and hire an expert in virtually every case since it never knows if the Plaintiff will designate an expert until the absolute last minute. This proposed change attempts to resolve these problems by requiring a logical and progressive series of disclosures which will allow adequate time for discovery and avoid unnecessary experts on both sides.

I have taken the liberty of furnishing a copy of the proposal and my letter to Justice Hecht as the Court's Rules Committee member and a copy to my friend and fellow Valleyite Justice Gonzalez.

Thank you for your time and consideration.

Yours very truly,

ATLAS & HALL

By:
Tom Fleming

TF/bgw

cc: The Honorable Nathan L. Hecht
Justice
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

The Honorable Raul Gonzalez
Justice
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Mr. O. C. Hamilton, Jr.
ATLAS & HALL
P. O. Drawer 3725
McAllen, Texas 78502

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording of existing Rule:

RULE 166. PRETRIAL CONFERENCE

In an appropriate action, to assist in the disposition of the case without undue expense or burden to the parties, 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, motions and exceptions;

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

(c) A discovery schedule;

(d) Requiring written statements of the parties' contentions;

(e) Contested issues of fact and simplification of the issues;

(f) The possibility of obtaining stipulations of fact;

(g) The identification of legal matters to be ruled on or decided by the court;

(h) 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;

(i) 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 proffered by each expert witnesses;

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

(k) Proposed jury charge questions, instructions, and definitions for a jury case or proposed findings of fact and conclusions of law for a nonjury case;

(l) 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;

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

(n) 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;

(o) The settlement of the case, and to aid such consideration, the court may encourage settlement;

(p) 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 pretrial 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, disposed of by admissions, agreements of counsel, or rulings of the court; and such order when issued 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 pretrial 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.

II. Proposed Rule: The proposed new wording has been underlined.

1. In an appropriate action, to assist in the disposition of the case without undue expense or burden to the parties, 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, motions and exceptions;

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

(c) A discovery schedule;

(d) Requiring written statements of the parties' contentions;

(e) Contested issues of fact and simplification of the issues;

(f) The possibility of obtaining stipulations of fact;

(g) The identification of legal matters to be ruled on or decided by the court;

(h) 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;

(i) 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 proffered by each expert witnesses;

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

(k) Proposed jury charge questions, instructions, and definitions for a jury case or proposed findings of fact and conclusions of law for a nonjury case;

(l) 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;

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

(n) 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;

(o) The settlement of the case, and to aid such consideration, the court may encourage settlement;

(p) Such other matters as may aid in the disposition of the action.

2. The court shall make an order that recites the action taken at the pretrial 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, disposed of by admissions, agreements of counsel, or rulings of the court; and such order when issued 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 pretrial 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.

3. In all cases where expert witnesses will be used at the time of trial, the trial court shall order a discovery schedule which shall schedule the designation of expert witnesses and the taking of such expert witnesses' depositions. In such scheduling order defendant shall be given at least sixty days after plaintiff designates its expert(s) in which to depose such expert(s) and defendant shall be required to designate expert(s) not later than 120 days after plaintiff has designated plaintiff's expert(s). Plaintiff shall be entitled to at least sixty days to depose defendant's expert(s) after defendant has designated such expert(s). In cases involving multiple parties and multiple experts, the trial court may extend such times for designation of experts and taking of experts depositions. The case shall not be set for trial earlier than a date that will afford all parties an opportunity to comply with the schedule of designating experts and taking of experts' depositions. The court shall also order that no discovery shall be had within thirty days of the trial date except by leave of court for good cause shown.

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

Rule 166b 6b allows a party to designate an expert as soon as practicable and not less than thirty days prior to beginning of trial. If a plaintiff designates an expert thirty or even forty or fifty day before trial, there is not sufficient time for the defendant to depose the expert so designated, then determine what sort of expert defendant needs to employ and employ such expert. In products liability cases, there are only a couple of dozen experts in the country who regularly testify in such cases, and it is difficult to schedule their deposition on thirty days' notice. They usually need at least sixty days' scheduling notice in order to accommodate their schedules. In many instances, cases that have been set for trial have to be postpones because the experts cannot be deposed on such short notice and hence the trial may need to be put off another six months to a year to accommodate the court's docket. If the court is required to order the scheduling of the designation of experts and taking of experts depositions, this scheduling can all be done in an orderly manner according to the court's schedule and the trial can then commence at the designated date in most instances. All discovery should also be cut off thirty days prior to trial in order to give the attorneys and parties adequate time to prepare for trial without being required to engage in discovery up to the eve of trial. Such a rule would give all parties ample time to adequately prepare the case for trial and hence cut down on the trial time which is sometimes protracted when the attorneys have not had sufficient time to adequately prepare.

Respectfully submitted,

O. C. HAMILTON, JR.
P. O. DRAWER 3725
McALLEN, TEXAS 78502

Date: March 13, 1992

4543.001

HHD

4-21-92

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April 20, 1992

MR LUTHER H SOULES
SOULES & WALLACE
175 E HOUSTON ST
SAN ANTONIO TX 78205-2230

Re: Texas Rules of Civil Procedure

Dear Luke:

Is it possible to add to Rule 166 [pretrial conference] a provision for telephonic conferencing? More and more courts with counsel strung out all over creation are going to telephonic conferencing. Such telephonic conferencing has resulted in tremendous savings to the clients, attorneys and speeds up the process. If there is a provision in the rules presently existing, please let me know.

I certainly appreciate your attention to this matter.

Very truly yours,

John F. Nichols
For the Firm

JFN:jg

4543.001

hhd
LHS

6-4-91

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

June 3, 1991

HHD
SAC Suit (Discovery)
Appeal
BAS (Evelyn)

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

Dear Luke:

Enclosed is a copy of a letter from David J. Nagle, along with a copy of the California Rules of Civil Procedure relating to expert witnesses, reports, depositions and fees.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

Copy to LHS

orig. to current rule

DAVID NAGLE* AND ASSOCIATES, P.C.

(512) 328-2121
901 MOPAC SOUTH, #2495
AUSTIN, TEXAS 78746
FAX (512) 328-2236

◆ David J. Nagle
❖ Mark R. Mueller
◇ John H. Ferguson

◆ (also licensed California)
❖ (also licensed Louisiana, Wisconsin, Montana)
◇ (only licensed California)

*Board Certified Specialist: Personal Injury Trial Law and Civil Trial Law

May 22, 1991

Justice Nathan Hecht
Texas Supreme Court
P.O. Box 12248
Capitol Station
Austin, Texas 78711

RE: Texas Rules of Civil Procedure
Discovery/Sanctions

Dear Justice Hecht:

I enclose a copy of the California Civil Procedure Manual which states the substance of the California Rules of Civil Procedure concerning expert witnesses, reports, depositions and fees.

I believe such rules, if adopted in Texas, would greatly clarify the obligations of the parties in this regard. Such would also reduce the potential for disputes which could end up in sanction hearings.

Very truly yours,

David J. Nagle

DJN/dp
Enclosure

order, the court may impose a monetary sanction under Section 2023.

(m) [Withdrawal or amendment of admission] A party may withdraw or amend an admission made in response to a request for admission only on leave of court granted after notice to all parties. The court may permit withdrawal or amendment of an admission only if it determines that the admission was the result of mistake, inadvertence, or excusable neglect, and that the party who obtained the admission will not be substantially prejudiced in maintaining that party's action or defense on the merits. The court may impose conditions on the granting of the motion that are just, including, but not limited to, an order that (1) the party who obtained the admission be permitted to pursue additional discovery related to the matter involved in the withdrawn or amended admission, and (2) the costs of any additional discovery be borne in whole or in part by the party withdrawing or amending the admission.

(n) [Effect of admission] Any matter admitted in response to a request for admission is conclusively established against the party making the admission in the pending action, unless the court has permitted withdrawal or amendment of that admission under subdivision (m). However, any admission made by a party under this section is (1) binding only on that party, and (2) made for the purpose of the pending action only. It is not an admission by that party for any other purpose, and it shall not be used in any manner against that party in any other proceeding.

(o) [Sanction for unwarranted refusal to admit] If a party fails to admit the genuineness of any document or the truth of any matter when requested to do so under this section, and if the party requesting that admission thereafter proves the genuineness of that document or the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make this order unless it finds that (1) an objection to the request was sustained or a response to it was waived under subdivision *(l)*, (2) the admission sought was of no substantial importance, (3) the party failing to make the admission had reasonable ground to believe that that party would prevail on the matter, or (4) there was other good reason for the failure to admit. Added Stats 1986 ch 1334 § 2, operative July 1, 1987; Amended Stats 1987 ch 86 § 15, effective and operative July 1, 1987. *Cal Jur 3d (Rev) Discovery and Depositions §§ 314 et seq. Witkin Evidence (3d ed) Discovery and Production of Evidence §§ 1553 et seq., 1606 et seq. Witkin Evidence (3d ed) Discovery and Production of Evidence §§ 1606 et seq., 1621. Witkin Procedure (3d) Courts § 327; Plead § 395, 414; PWT §§ 77, 292; Attack § 147, 157.*

§ 2033.5. [Official forms of interrogatories and requests for admission] The Judicial Council shall develop and approve official form interrogatories and requests for admission of the genuineness of any relevant documents or of the truth of any relevant matters of fact in any civil action in a state court based on personal injury, property damage, wrongful death, unlawful detainer, breach of contract, or fraud. Use of the approved form interrogatories and requests for admission shall be optional.

In developing the form interrogatories and requests for admission required by this section, the Judicial Council shall consult with a representative advisory committee which shall include, but not be limited to, representatives of the plaintiff's bar, the defense bar, the public interest bar, court administrators, and the public. The form interrogatories and requests for admission shall be drafted in nontechnical language and shall be made available through the office of the clerk of the appropriate trial court.

The Judicial Council also shall promulgate any necessary rules to govern the use of the form interrogatories and requests for admission. Added Stats 1986 ch 1334 § 2, operative July 1, 1987; Amended Stats 1987 ch 86 § 16, effective and operative July 1, 1987. *Witkin Evidence (3d ed) Discovery and Production of Evidence §§ 1482, 1483, 1553, 1555.*

§ 2034. [Exchanges of expert trial witness information] (a) [In general] After the setting of a trial date for the action, any party may obtain discovery by demanding that all parties simultaneously exchange information concerning each other's expert trial witnesses to the following extent:

(1) [List of expert witnesses] Any party may demand a mutual and simultaneous exchange by all parties of a list containing the name and address of any natural person, including one who is a party, whose oral or deposition testimony in the form of an expert opinion any party expects to offer in evidence at the trial.

(2) **[Employed or retained expert witnesses]** If any expert designated by a party under paragraph (1) is a party or an employee of a party, or has been retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of the action, the designation of that witness shall include or be accompanied by an expert witness declaration under paragraph (2) of subdivision (f).

(3) **[Reports of expert witnesses]** Any party may also include a demand for the mutual and simultaneous production for inspection and copying of all discoverable reports and writings, if any, made by any expert described in paragraph (2) in the course of preparing that expert's opinion.

This section does not apply to exchanges of lists of experts and valuation data in eminent domain proceedings under Chapter 7 (commencing with Section 1258.010) of Title 7 of Part 3.

(b) **[Commencement of discovery of expert witnesses]** Any party may make a demand for an exchange of information concerning expert trial witnesses without leave of court. A party shall make this demand no later than the 10th day after a trial date has been set, or 70 days before that trial date, whichever is closer to the trial date.

(c) **[Contents of demand]** A demand for an exchange of information concerning expert trial witnesses shall be in writing and shall identify, below the title of the case, the party making the demand. The demand shall state that it is being made under this section.

The demand shall specify the date for the exchange of lists of expert trial witnesses, expert witness declarations, and any demanded production of writings. The specified date of exchange shall be 50 days before the trial date, or 20 days after service of the demand, whichever is closer to the trial date, unless the court, on motion and a showing of good cause, orders an earlier or later date of exchange.

(d) **[Service of demand]** The party demanding an exchange of information concerning expert trial witnesses shall serve the demand on all parties who have appeared in the action.

(e) **[Protective orders]** A party who has been served with a demand to exchange information concerning expert trial witnesses may promptly move for a protective order. This motion shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion.

The court, for good cause shown, may make any order that justice requires to protect any party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense. The protective order may include, but is not limited to, one or more of the following directions:

(1) That the demand be quashed because it was not timely served.

(2) That the date of exchange be earlier or later than that specified in the demand.

(3) That the exchange be made only on specified terms and conditions.

(4) That the production and exchange of any reports and writings of experts be made at a different place or at a different time than that specified in the demand.

(5) That some or all of the parties be divided into sides on the basis of their identity of interest in the issues in the action, and that the designation of any experts as described in paragraph (2) of subdivision (a) be made by any side so created.

(6) That a party or a side reduce the list of employed or retained experts designated by that party or side under paragraph (2) of subdivision (a).

If the motion for a protective order is denied in whole or in part, the court may order that the parties against whom the motion is brought, provide or permit the discovery against which the protection was sought on those terms and conditions that are just.

The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(f) **[Exchange of expert witness information]** All parties who have appeared in the action shall exchange information concerning expert witnesses in writing on or before the date of exchange specified in the demand. The exchange of information may occur at a meeting of the attorneys for the parties involved or by a mailing on or before the date of exchange.

(1) **[List of expert witnesses]** The exchange of expert witness information shall include either of the following:

(A) A list setting forth the name and address of any person whose expert opinion that party expects to offer in evidence at the trial.

(B) A statement that the party does not presently intend to offer the testimony of any expert witness.

(2) **[Expert witness declaration]** If any witness on the list is an expert as described in paragraph (2) of subdivision (a), the exchange shall also include or be accompanied by an expert witness declaration signed only by the attorney for the party designating the expert, or by that party if that party has no attorney. This declaration shall be under penalty of perjury and shall contain:

(A) A brief narrative statement of the qualifications of each expert.

(B) A brief narrative statement of the general substance of the testimony that the expert is expected to give.

(C) A representation that the expert has agreed to testify at the trial.

(D) A representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including any opinion and its basis, that the expert is expected to give at trial.

(E) A statement of the expert's hourly and daily fee for providing deposition testimony.

(g) **[Exchange of reports]** If a demand for an exchange of information concerning expert trial witnesses includes a demand for production of reports and writings as described in paragraph (3) of subdivision (a), all parties shall produce and exchange, at the place and on the date specified in the demand, all discoverable reports and writings, if any, made by any designated expert described in paragraph (2) of subdivision (a).

(h) **[Supplemental exchange]** Within 20 days after the exchange described in subdivision (f), any party who engaged in the exchange may submit a supplemental expert witness list containing the name and address of any experts who will express an opinion on a subject to be covered by an expert designated by an adverse party to the exchange, if the party supplementing an expert witness list has not previously retained an expert to testify on that subject. This supplemental list shall be accompanied by an expert witness declaration under paragraph (2) of subdivision (f) concerning those additional experts, and by all discoverable reports and writings, if any, made by those additional experts. The party shall also make those experts available immediately for a deposition under subdivision (i), which deposition may be taken even though the time limit for discovery under Section 2024 has expired.

(i) **[Deposition of listed expert]** On receipt of an expert witness list from a party, any other party may take the deposition of any person on the list. The procedures for taking oral and written depositions set forth in Sections 2025, 2026, 2027, and 2028 apply to a deposition of a listed trial expert witness except as follows:

(1) **[Place of deposition]** The deposition of any expert described in paragraph (2) of subdivision (a) shall be taken at a place that is within 75 miles of the courthouse where the action is pending. However, on motion for a protective order by the party designating an expert witness, and on a showing of exceptional hardship, the court may order that the deposition be taken at a more distant place from the courthouse.

(2) **[Payment of expert witness fee]** A party desiring (A) to depose any expert described in paragraph (2) of subdivision (a) except one who is a party or an employee of a party, or (B) to depose any treating physician or other treating health care practitioner who is to be asked to express an opinion during the deposition, shall pay the reasonable and customary hourly or daily fee for the actual time consumed in the examination of that expert by any party attending the deposition. In a worker's compensation case arising under Division 4 (commencing with Section 3201) or Division 4.5 (commencing with Section 6100) of the Labor Code, a party desiring to depose any expert on another party's expert witness list shall pay this fee.

The party taking the deposition shall either accompany the service of the deposition notice with a tender of the expert's fee based on the anticipated length of the deposition or tender that fee at the commencement of the deposition. The expert's fee shall be delivered to the attorney for the party designating the expert. If the deposition of the expert takes longer than anticipated, the party giving notice of the deposition shall pay the balance of the expert's fee within five days of receipt of an itemized statement from the expert. The party designating the expert is responsible for any fee charged by the expert for preparing for the deposition and for traveling to the place of the deposition, as well as for any travel expenses of the expert.

(3) **[Compelling deponent's attendance]** The service of a proper deposition notice accompanied by the tender of the expert witness fee described in paragraph (2) is effective to require the party employing or

retaining the expert to produce the expert for the deposition. If the party noticing the deposition fails to tender the expert's fee under paragraph (2), the expert shall not be deposed at that time unless the parties stipulate otherwise.

(4) [Motion to set expert witness fee] If a party desiring to take the deposition of an expert witness under this subdivision deems that the hourly or daily fee of that expert for providing deposition testimony is unreasonable, that party may move for an order setting the compensation of that expert. This motion shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion. Notice of this motion shall also be given to the expert.

The court shall set the fee of the expert for providing deposition testimony if it determines that the fee demanded by that expert is unreasonable.

The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to set expert witness fee, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(j) [Exclusion of testimony of unlisted expert]. Except as provided in subdivisions (k), *(l)*, and (m), on objection of any party who has made a complete and timely compliance with subdivision (f), the trial court shall exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to do any of the following:

(1) List that witness as an expert under subdivision (f).

(2) Submit an expert witness declaration.

(3) Produce reports and writings of expert witnesses under subdivision (f). Make that expert available for a deposition under subdivision (i).

(k) [Motion to augment expert witness information] On motion of any party who has engaged in a timely exchange of expert witness information, the court may grant leave to (1) augment that party's expert witness list and declaration by adding the name and address of any expert witness whom that party has subsequently retained, or (2) amend that party's expert witness declaration with respect to the general substance of the testimony that an expert previously designated is expected to give. This motion shall be made a sufficient time in advance of the time limit for the completion of discovery under Section 2024 to permit the deposition of any expert to whom the motion relates to be taken within that time limit. However, under exceptional circumstances, the court may permit the motion to be made at a later time. This motion shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion. The demand, and all expert witness lists and declarations exchanged in response to it, shall be lodged with the court when their contents become relevant to an issue in any pending matter in the action. The court shall grant leave to augment or amend an expert witness list or declaration only after taking into account the extent to which the opposing party has relied on the list of expert witnesses, and after determining that any party opposing the motion will not be prejudiced in maintaining that party's action or defense on the merits, and that the moving party either (1) would not in the exercise of reasonable diligence have determined to call that expert witness or have decided to offer the different or additional testimony of that expert witness, or (2) failed to determine to call that expert witness, or to offer the different or additional testimony of that expert witness as a result of mistake, inadvertence, surprise, or excusable neglect, provided that the moving party (1) has sought leave to augment or amend promptly after deciding to call the expert witness or to offer the different or additional testimony, and (2) has promptly thereafter served a copy of the proposed expert witness information concerning the expert or the testimony described in subdivision (f) on all other parties who have appeared in the action. Leave shall be conditioned on the moving party making the expert available immediately for a deposition under subdivision (i), and on such other terms as may be just, including, but not limited to, leave to any party opposing the motion to designate additional expert witnesses or to elicit additional opinions from those previously designated, a continuance of the trial for a reasonable period of time, and the awarding to any party opposing the motion of costs and litigation expenses.

The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to augment or amend expert witness information, unless it

finds that the one subject to the sanction acted with substantial justification or that other circumstances made the imposition of the sanction unjust.

(l) **[Motion to submit tardy expert witness information]** On motion of any party who has failed to submit expert witness information on the date specified in a demand for that exchange, the court may grant leave to submit that information on a later date. This motion shall be made a sufficient time in advance of the time limit for the completion of discovery under Section 2024 to permit the deposition of any expert to whom the motion relates to be taken within that time limit. However, under exceptional circumstances, the court may permit the motion to be made at a later time. This motion shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion.

The court shall grant leave to submit tardy expert witness information only after taking into account the extent to which the opposing party has relied on the absence of a list of expert witnesses, and determining that any party opposing the motion will not be prejudiced in maintaining that party's action or defense on the merits, and that the moving party (1) failed to submit that information as the result of mistake, inadvertence, surprise, or excusable neglect, (2) sought that leave promptly after learning of the mistake, inadvertence, surprise, or excusable neglect, and (3) has promptly thereafter served a copy of the proposed expert witness information described in subdivision (f) on all other parties who have appeared in the action. This order shall be conditioned on the moving party making that expert available immediately for a deposition under subdivision (i), and on such other terms as may be just, including, but not limited to, leave to any party opposing the motion to designate additional expert witnesses or to elicit additional opinions from those previously designated, a continuance of the trial for a reasonable period of time, and the awarding to any party opposing the motion costs and litigation expenses.

The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to submit tardy expert witness information, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(m) [Testimony of unlisted experts] A party may call as a witness at trial an expert not previously designated by that party if: (1) that expert has been designated by another party and has thereafter been deposed under subdivision (i), or (2) that expert is called as a witness to testify to the falsity or nonexistence of any fact used as the foundation for any opinion by an expert witness called by any other party at the trial. However, the court shall not permit that undesignated expert witness to contradict the opinions themselves.

(n) [Custody of demand, lists, and declarations] The demand for an exchange of information concerning expert trial witnesses, and any expert witness lists and declarations exchanged shall not be filed with the court. The party demanding the exchange shall retain both the original of the demand, with the original proof of service affixed, and the original of all expert witness lists and declarations exchanged in response to the demand until six months after final disposition of the action. At that time, all originals may be destroyed unless the court, on motion of any party and for good cause shown, orders that the originals be preserved for a longer period. Added Stats 1986 ch 1336 § 2, operative July 1, 1987; Amended Stats 1987 ch 86 § 17, effective and operative July 1, 1987.

§ 2035. [Discovery before action filed] (a) [In general] One who expects to be a party to any action that may be cognizable in any court of the State of California, whether as a plaintiff, or as a defendant, or in any other capacity, may obtain discovery within the scope delimited by Section 2017, and subject to the restrictions set forth in Section 2019, for the purpose of perpetuating that party's own testimony or that of another natural person or organization, or of preserving evidence for use in the event an action is subsequently filed. One shall not employ the procedures of this section for the purpose either of ascertaining the possible existence of a cause of action or a defense to it, or of identifying those who might be made parties to an action not yet filed.

(b) [Methods for pre-suit discovery] The methods available for discovery conducted for the purposes set forth in subdivision (a) are (1) oral and written depositions, (2) inspections of documents, things, and places, and (3) physical and mental examinations.

(c) [Venue for pre-suit discovery] One who desires to perpetuate testimony or pre-

4545.001

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

March 25, 1991

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

Dear Luke:

Enclosed is a letter from Jim Foreman regarding discovery.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

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March 20, 1991

Honorable Judge Nathan Hecht
The Supreme Court of Texas
Supreme Court Building
P. O. Box 12248
Austin, TX 78711

Dear Judge Hecht:

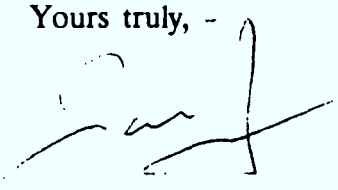
I am not prone to writing to the Supreme Court to complain about various matters, having always in the past gone ahead and accepted what rules have been promulgated by the Supreme Court. However, after some thirty two years of practice, I have absolutely come to the conclusion that our rules of discovery involving interrogatories, requests for production, etc., have become nothing but an area for sharp practice on the part of some attorneys and for those who are attempting to comply reasonably finding themselves trapped more often than not by this morass that has developed. There must be a simplification and reason brought back to the rules. The decisions by the trial courts are without uniformity and those judges that want to knit-pick are making the practice difficult and more technical today than it has ever been. The purpose of the rules changes were supposedly to simplify. I can remember when we fought over the form of issue submission because the defense counsel wanted to keep from the jury what really was going on. Now we are fighting these battles over whether the last address has been supplemented thirty days prior to trial and if not, whether the witness will be struck. Or, when you do supplement original interrogatories where you have only been asked the name, address and telephone number of your expert and you supplement, you have to additionally, even though not asked, set out the substance of his testimony. This is ridiculous.

I implore you as well as all the other members of the Supreme Court to take the rules of discovery in hand, simplify them, standardize them and make them simply what they were intended to be - tools with which to initiate discovery - not to be used as a weapon. Those who are being paid by the hour frankly are justifying their fees by endless gamesmanship with the use of interrogatories. We of the bar who are paid by contingent fees are obviously more concerned with the results obtained for our clients than hours billed.

I ask simply that as a working member of the bar, that you address yourself to changing the mess that has developed.

With kindest regards.

Yours truly, -



Jim Foreman

JF:kwh

4543.001

hhd
LHS

✓ 10-4-90
SB

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711
(512) 463-1312

October 3, 1990

1 of 4

TRCP 166

HHD, SCAC Scelba Oquendo ✓ CoAS.

Mr. Jose R. Lopez II
Law Offices of Terry Bryant
West Memorial Office Park
8584 Katy Freeway, Suite 108
Houston TX 77024

Dear Mr. Lopez:

Thank you for your recent letter regarding the 1990 changes in the Texas Rules of Civil Procedure.

Regarding your question whether a trial court can, without notice or hearing, change a pretrial order agreed to by the parties, Rule 166 does not specifically speak to this. Inasmuch as the issue you raise is one which may someday come before this Court, I hope you will understand my inability to venture any further view on your question.

Regarding filing and service via facsimile transmission machines, the Court and our Committee fully recognize that there is much potential for problems and abuse, like those you pose. I think it would be fair for me to say that our view of the changes made this year was to allow use of facsimile transmission in filing and serving court documents in recognition of the ready availability of this technology. We are anxious to see what problems may develop and hopeful that they will not be too many or too hard to remedy by future changes. Only time will tell.

Finally, regarding your comments on expert witness fees, and specifically those charged by doctors, you make an interesting suggestion which I will pass along to our Committee for full consideration in the future (along with your other comments). We are greatly benefitted by the expertise and experience of the members of our Committee and look to them for recommendations on ideas like the one you have proposed.

Thank you for your interest in the rules.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

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

TERRY BRYANT
ATTORNEY AT LAW
WEST MEMORIAL OFFICE PARK
8584 KATY FREEWAY, SUITE 108
HOUSTON, TEXAS 77024
TELEPHONE (713) 973-8888

JOSE R. LOPEZ II

October 1, 1990

Texas Supreme Court
Rules Advisory Committee
P. O. Box 12248
Austin, TX 78711

RE: New Texas Rules of Court for 1990

Dear Committee Members:

Recently I attended a meeting on the 1990 changes to the Texas Rules of Civil Procedure. The stamina that you, as a committee, have demonstrated to incorporate these rule changes is commendable. Your time and effort were well spent and are truly appreciated by the Judiciary and the Bar at large.

I have a few questions regarding the rule changes. If you have an opportunity, I would appreciate a short reply from you so that I may better understand and utilize these changes in my practice.

The first question I have concerns Rule 166--Pre-Trial Conference. If Rule 166 allows the attorneys of record to arrive at an agreed docket control order, which includes the discovery schedule, can a Judge change the agreed docket control order without a hearing or notification to the parties, thus circumventing the agreement of counsel?

My next comment concerns the fax machine. Most offices these days have facsimile transmission machines. They have been helpful in obtaining and transmitting information in an expeditious manner. However, sometimes when the fax transmission is smudged or erroneously fax'd to the wrong number, the sender is not aware that the communication was not received. As an example, the sender believes that a motion for summary judgment has been filed and received. Yet, due to some "electronic error", the fax machine does not make it clear to the sender that it has not been received or has been erroneously sent elsewhere. What I perceive in the future are that motions to strike answers, motions for reconsideration, and motions for "hypertechnicalities" will be fax'd, which will lead to headaches in the future. While we appreciate the Courts' and the Committee's efforts to facilitate our communications, I believe in this area that our age-old, standard manner of mailing, personal service, and filing should be maintained. In addition, since the Rules now allow us to fax material to the Courthouse, will there be a sufficient number of fax machines to facilitate the facsimile transmissions that the Courthouse will no doubt be receiving usually at the eleventh hour on a Friday afternoon?

Another comment I have deals specifically with doctors' fees. Recently, I attended several doctors' depositions where they charged fees in excess of $750.00 an hour. While it is true that doctors should be paid for their deposition testimony since they are not tending to their patients, I believe the fees charged by doctors in this area have skyrocketed. Physicians, indeed, are an integral part in the treatment of patients for which they are handsomely compensated, the time they spend on depositions should not be used as a means of extorting additional fees to simply state their treatment of a particular patient. It is well known in our profession that the doctors' fees are not paid by the attorney, but out of the client's settlement. It is the client, the plaintiff or defendant, who needs to be protected from absorbing these costs since it is their money from which these doctors are paid.

The Court has a fixed rule governing fees paid to interpreters. Could the Court not also put a cap on expert fees or appoint doctors from an independent list, similar to the Texas Workers' Compensation Act, to act as an interpreter for the Court? Thus, we would have a truly independent doctor whose compensation will be relatively fixed by that Court.

I do appreciate your time and attention and look forward to hearing from you.

Very truly yours,

Jose R. Lopez II
Attorney at Law

JRL:cw

w:7266z

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FAX:(214) 522-0752

J. MICHAEL WESTON

TRCP 166A

October 5, 1992

Supreme Court of Texas
Supreme Court Building
P.O. Box 12248, Capitol Station
Austin, Texas 78711

Re: Proposed Rule Change

Honorable Justices:

Our firm has been retained by financial institutions to file a large number of law suits on written instruments such as notes and guarantees. Our law suits are customarily filed in county courts. In a normal matter, there are no disputed issues of law or fact and the debtor will either default, or will file a general denial and then we will obtain a summary judgment.

We have found that the existing summary judgment procedures delay our clients in obtaining a judgment, lengthen the time the courts have our cases on their dockets, and occupy a large amount of the time on several courts Friday motion dockets. In the vast majority of instances these effects should be avoided because the debtor does not raise any of the defenses allowed under Rules 93 and 94 of the Texas Rules of Civil Procedure.

In researching the matter, we found a procedure adopted in the State of New York which helps alleviate these problems. Section 3213 of the New York Civil Practice and Rules, a copy of which is attached, permits a plaintiff on a written instrument to file its motion for summary judgment with its complaint.

We are requesting the Court to consider adopting a similiar rule applicable to actions on written instrument.

Respectfully,

J. MICHAEL WESTON

encl.

4543.001 LHS hno

✓10-15-92 SB

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL. (512) 463-1312
FAX (512) 463-1365

10/16

HFD; 50 AC Subcr Offices ✓ COAs Staffs

October 12, 1992

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

Dear Luke:

Enclosed are copies of the following letters:

1. Justice of the Peace John Hawkins regarding Rule 528.

2. Michael Weston regarding summary judgment procedures.

3. Charles Spain regarding the Texas Rules of Appellate Procedure.

I would appreciate your bringing these to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

October 12, 1992

Mr. J. Michael Weston
Alexander Weston & Poehner
3100 Monticello
Suite 805, L.B. 17
Dallas TX 75205

Dear Mr. Weston:

Thank you for your letter regarding summary judgment procedures. I have sent a copy to the chairman of the Rules Advisory Committee with the request that your comments be considered fully in making additional revisions in the rules.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

xc: Mr. Luther H. Soules III

4662.001 hhd LHS

STATE BAR OF TEXAS

5-1-91 SB

Karen R. Johnson
Executive Director

1414 Colorado
P.O. Box 12487
Austin, Texas 78711
(512) 463-1400
FAX: (512) 473-2295

5/1 HHD, Appropriate SCAC Subcs SCAC Agenda Hecht, TRCP 166a

April 25, 1991

Mr. Luther H. Soules III
175 E. Houston, 10th Floor
Two Republic Bank Plaza
San Antonio, Texas 78502-2230

RE: Committee on Administration of Justice

Dear Luke:

Enclosed is the report recently filed with the State Bar of Texas Board of Directors by Judge Bob Thomas. This report recommends changes in Rule 13 as well as Rules 226, 226a, and 271 through 279.

The Board of Directors is meeting on May 2nd. At that time this report will be distributed to the members of the Board. The Board members will be advised by President Parsons that the report has been transmitted to the Supreme Court Advisory Committee. Unfortunately, the agenda for the May 2nd meeting had already been posted with the Secretary of State when this request was received. Consequently, the Board can take no official action with regard to these recommendations.

The next meeting of the Board is scheduled for June 19. Rather than delay these recommendations, it was our decision to forward them on to you. Should questions or comments be raised by members of the Board of Directors they will be forwarded to you.

I trust this procedure meets your approval. If you have questions please do not hesitate to contact me.

Sincerely,

Karen R. Johnson

Enclosure

CC: Hon. Nathan Hecht
Hon. Bob Thomas
Mr. James H. Parsons III
Mr. Richard Hile
Mr. Bob Dunn
Ms. Colleen McHugh

STATE BAR OF TEXAS
COMMITTEE ON ADMINISTRATION OF JUSTICE
PROPOSED CHANGE OF EXISTING RULE 166a

1. Exact wording of existing rule:

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion for summary judgment shall state the specific grounds therefor. Expect on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response. No oral testimony shall be received at the hearing. The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response. Issues not expressly presented to the trial court by written motion answer or other response shall not be considered on appeal as grounds for reversal. A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

(d) **Appendices, References and Other Use of Discovery Not Otherwise on File.** Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least twenty-one days before the hearing if such proofs are to be sued to support the summary judgment; or (ii) at least seven days before the hearing if such proofs are to be used to oppose the summary judgment.

(e) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by

interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(f) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

(g) When Affidavits Are Unavailable. 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 refuse the application for judgment or 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.

(h) Affidavits Made in Bad Faith. 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.

2. Proposed rule:

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion for summary judgment shall state the specific grounds therefor. Each party shall, in the motion

for summary judgment or in the response thereto, specifically refer to any portions of depositions relied upon; and copies of said deposition excerpts shall be attached to the motion for summary judgment or response.] Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least ~~twenty-one~~ [forty-five] days before the time specified for hearing. Except on leave of court [for good cause shown], the adverse party, not later than seven days prior to the day of hearing ~~may~~ [shall] file and serve [a] written response. No oral testimony shall be received at the hearing. ~~The~~ judgment sought shall be rendered forthwith if: (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. [Amendment to pleadings within seven days of the date of the hearing, or thereafter, may be made only with leave of court and for good cause shown.] Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal. A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

(d) [Burdens of Movant and Non-Movant. A party moving for summary judgment on an issue upon which the movant would have the burden of proof at trial, shall have the burden to present evidence sufficient to establish facts which, if proved at trial, would entitle the movant to an instructed verdict. The movant shall not have the burden to produce evidence to establish the absence of a genuine issue of material fact with respect to an issue on which the non-movant would have the burden of proof at trial. When a motion for summary judgment is made and supported as provided in this rule, the non-movant may not rest upon the mere allegations or denials of the non-movant's pleadings, but the ~~adverse party's~~ response, by affidavits or as otherwise provided in this rule, must present specific facts showing that there is a genuine issue for trial. If the motion is based upon the absence of proof on an issue upon which the non-movant has the burden of proof, the non-movant must respond with evidence sufficient to entitle the non-movant to submission of the issue to a jury. If the non-movant does not so respond, summary judgment shall be granted in favor of the movant, provided the motion complies with the other requirements of this rule.]

non-movant's

non-movants

[(d)](e) **Appendices, References and Other Use of Discovery Not Otherwise on File.** Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least [twenty-one] [forty-five] days before the hearing if such proofs are to be used to support the summary judgment; or (ii) at least seven days before the hearing if such proofs are to be used to oppose the summary judgment.

[(e)](f) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

[(f)](g) **Form of Affidavits; Further Testimony.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

[(g)](h) **When Affidavits Are Unavailable.** Should it appear [from the] [by] affidavit [of] [that] a party opposing the motion [that] cannot for reasons stated present by affidavit facts essential to justify [his] [that party's] opposition, [and if the affidavit sufficiently describes the expected proof], the court may [refuse the application for judgment or 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.

[(h)][(l)] **Affidavits Made in Bad Faith.** 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] [such other party] to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

[(i)] Appealability of Order Denying Motion for Summary Judgment. An order denying a motion for summary judgment which, if granted, would result in a final judgment, shall be an appealable order.

Discovery Definitions

DEFINITION OF "DOCUMENTS" - FINAL

"Document" and "Documents" include, but are not limited to: **all paper material of any kind**, whether written, typed, printed, punched, filmed, or marked in any way, including all nonidentical copies; and all data stored by, in, or on **mechanical, electronic, or chemical forms or media**, including films, transcriptions, graphic depictions, and other data compilations.

DEFINITION OF "YOU" - FINAL

"Your" and "you" refer to the party to whom these discovery requests are addressed, and all of its predecessors or successors, as well as the party's agents, employees, servants or representatives, and, unless privileged, the party's attorneys.

COMMENTARY UNDER "DOCUMENTS" REGARDING "TANGIBLE THINGS" - FINAL

"Tangible things" is not specifically defined because it includes everything that is not a document.

DEFINITION OF "PERSON" - FINAL

"Person" means a corporation, partnership, organization, association, or entity, a natural person, and any government or governmental body, commission, board, or agency.

"IDENTIFICATION OF PERSON" - FINAL

"Identify" or "identification" when referring to a person means state information sufficient to enable the requesting party to locate such person, including, but not limited to: that person's full name; present or last known residential address and telephone number; and last known employer or business affiliation, including its address.

If the person to be identified is an entity other than a natural person, "identify" or "identification" means to state the entity's full name, the type of entity (e.g., corporation, partnership, proprietorship, organization, etc.) and the present or last known telephone number and address of its principal office or place of doing business.

"IDENTIFICATION OF DOCUMENTS" - FINAL

"Identify" or "identification," when used in reference to a document, means to state the date, the author (and, if different, the signer or signers), the addressee, type of document (e.g., letter, memorandum, telegram, chart, data compilation, etc.), and any other means of identifying it with sufficient particularity to meet the requirements for its inclusion in a request for production. If any such document was, but is no longer in your possession or subject to your control, state what disposition was made of it and the reason for such disposition.

Copy to LHS
current rules

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March 11, 1991

Texas Supreme Court Rules Committee
of Procedure, Evidence and Administration
Justice Nathan Hecht, Chairman
Texas Supreme Court
P. O. Box 12248
200 W. 14th St., Room AG-11
Austin, Texas 78711

Dear Justice Hecht:

It has come to my attention over the past several years here in Harris County, as well as in other counties around the state, that trial judges are taking inordinately long periods of time to rule, and occasionally never rule, on motions for summary judgment. Personally, I have had motions for summary judgment pending in the District Courts of Harris County in not less than three separate courts for over two and a half years each without a ruling. I have heard similar horror stories from fellow practitioners throughout the state.

The failure of these particular trial judges to make timely rulings on motions for summary judgment subject the litigants to inordinate delay and expense, for no apparent reason, other than to accommodate the trial courts admittedly congested docket. Although I empathize with the caseload faced by the average sitting trial court judge, it is my opinion that delays approaching one and two years, regardless of the complexity of the motion or the volume of summary judgment evidence submitted, is a clear derrogation of the Texas Supreme Court Code of Judicial Conduct, Cannon 3, Pt. A (7) (1988), and otherwise contravenes the stated objectives of Texas Rule of Civil Procedure 1.

In one particular case, I risked the ire of that trial judge by attempting a mandamus to compel same to rule on the pending motion for partial summary judgment. The Court of Appeals, in a written opinion, a copy of which is attached hereto, declined to grant my motion for leave to file. If the appellate courts are unwilling or unable to compel trial judges to timely rule upon motions for summary judgment, I would submit that it is in the best interest of the Bar and all litigants to amend Texas Rules of Civil

Procedure 166a(d) to impose certain time constraints on trial judges for making said determinations.

The following is a proposed amendment to Texas Rule of Civil Procedure 166a(d), to be inserted as the first paragraph in that Rule:

> "The Court shall rule on any motion for summary judgment within sixty (60) days following the date specified for hearing or submission thereof; and in any event not later than thirty (30) days prior to trial."

If you think it appropriate, I would request that you bring this matter to the attention of the Rules Committee at your earliest possible convenience.

Very truly yours,

BRILL, SINEX & STEPHENSON
a Professional Corporation

Scott Douglas Cunningham

SDC/cs
enclosures

SDC6.47
CS031191/wp

Opinion

In The

Court of Appeals

For The

First District of Texas

NO. 01-90-00313-CV

JOE ZALTA, LOUIS I. FARBER, AND ALBERT LIZMI, Relators

V.

THE HONORABLE GERALDINE TENNANT, JUDGE OF THE 113TH DISTRICT COURT, HARRIS COUNTY, TEXAS, Respondent

---

Original Proceeding on Motion for Leave to File Petition for Writ of Mandamus

---

Relators, Joe Zalta, Louis I. Farber, and Albert Lizmi, seek leave to file a writ of mandamus ordering the Honorable Geraldine Tennant, Judge of the 113th Judicial District Court, Harris County, Texas, to issue a ruling on relators' motion for partial summary judgment.

In their petition, relators assert that they are "some of the party defendants" in a cause styled, Marcus Dana, Rafeal Dana and Jaime Dana v. Joe Zalta, et al., Cause Number 86-32556, currently pending in the respondent's trial court. They assert that the real parties in interest, Marcus Dana, Rafeal Dana, and Jaime Dana are the plaintiffs in the action, which, relators assert, arises from a $1,000,000 capital

contribution by the plaintiffs to acquire a joint venture interest in a commercial development project known as The I-45 Building. According to relators' petition, the plaintiffs contend that this contribution was made as an investment, subject to state and federal securities laws, and that the defendants guaranteed the return of their investment with interest. Relators attach copies of the plaintiffs' original pleadings, the defendants' first amended answer and counterclaim, and the defendants' motion for a partial summary judgment.

Relators assert that in December 1988, they filed the motion for partial summary judgment "in an attempt to narrow the issues for discovery and trial." Relators allege that the court held a hearing on the motion in January 1989, but to date, the court has not ruled on the motion, despite their request for a second hearing in November 1989 and later reminders sent to the court. Relators conclude that the "trial judge to date simply has not ruled on the motion and no other adequate remedy exists for relators to obtain a ruling."

It is clearly a judge's duty to "dispose promptly of the business of the court." Texas Supreme Court, Code of Judicial Conduct, Canon 3, pt. A(7) (1988). As a general rule, however, mandamus is available only when it is conclusively shown that a judge has a clear legal duty to act and has refused to do so. Pope v. Ferguson, 445 S.W.2d 950, 953-54 (Tex. 1969), cert. denied, 397 U.S. 997 (1970); Brosseau v. Harless, 697 S.W.2d 56, 58 (Tex. App.--Dallas 1985, orig. proceeding); Gibson v. Blanton, 483 S.W.2d 372, 374 (Tex. Civ. App.--Houston [1st Dist.] 1972, orig. proceeding); Crouch v. Shields, 385 S.W.2d 580, 583 (Tex. Civ. App.--Dallas 1964, writ ref'd n.r.e.), cert. denied, 382 U.S. 907 (1965). Mandamus relief is available when the record shows, as a matter of law, that a judge is legally bound to make a final ruling in the case and has refused to do so. Anderson v. Blalock, 272 S.W.2d 741, 742 (Tex. Civ. App.--San Antonio 1954, orig. proceeding).

Only in rare instances will mandamus issue to control or correct rulings on motions that are merely incidental to the normal trial process, when an adequate remedy by appeal can correct an erroneous ruling. See State Bar of Texas v. Heard, 603 S.W.2d 829, 833 (Tex. 1980). Moreover, it has been held that mandamus may not be invoked to control interlocutory rulings of the trial court, even though such rulings may be clearly wrong and may result in delay and inconvenience to one of the parties. See Overton v. City of Austin, 748 F.2d 941, 958 (5th Cir. 1984). A litigant's expense and inconvenience, without more, does not usually establish a basis for the issuance of a mandamus. See Iley v. Hughes, 158 Tex. 362, 368, 311 S.W.2d 648, 652 (1958); Marshall v. Harris, 764 S.W.2d 34, 35 (Tex. App.--Houston [1st Dist.] 1989, orig. proceeding).

In this case, the record does not clearly and conclusively establish that the trial judge has abused her considerable discretion with respect to ruling on relators' motion for a partial summary judgment. The issues raised by the parties' pleadings and relators' motion present serious and complex issues for the court, which will require careful analysis and deliberate consideration. Even accepting relators' assertions that the trial judge has not responded to their "reminders" about the necessity for a prompt ruling, relators have not shown, as a matter of law, that Judge Tennant abused her discretion by refusing to make a ruling she was legally required to make. Thus, relators' petition does not reflect a prima facie basis for the issuance of writ of mandamus, and we need not consider whether relators have shown the absence of an adequate remedy by appeal.

Relators' motion for leave to file a petition for writ of mandamus is **OVERRULED.**

PER CURIAM

Panel consists of Chief Justice Evans and Justices Duggan and Mirabal.

Publish. Tex. R. App. P. 90.

Judgment rendered and opinion delivered May 2, 1990.
True Copy Attest:

/s/ Kathryn Cox
Kathryn Cox
Clerk of Court

STATE OF TEXAS
COUNTY OF HARRIS

I, Kathryn Cox, Clerk of the Court of Appeals, First Supreme Judicial District, Houston, Texas do hereby certify that the foregoing is a true and correct copy of the original record, as appears of record in Vol. 25 Page 506 Minutes of said Court on file in my office.

Witness my official hand and seal of office, this August 9, 1990.

KATHRYN COX, CLERK OF COURT
First Supreme Judicial District
Houston, Harris County, Texas.

By /s/ Kathryn Cox Deputy Clerk

4543.001 nna LHS

✓3-19-91 SB

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
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March 18, 1991

LHD

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

Dear Luke:

Enclosed is a letter from Scott Douglas Cunningham suggesting an amendment to Rule 166a(d).

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

4662.001

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3-20-91

March 11, 1991

Ms. Evelyn Avent, Secretary
Committee on Administration of Justice
7201 Wood Hollow Drive, #414
Austin, Texas 78731

Re: Proposed Changes to Rule 166a

Dear Evelyn:

Enclosed please find a memorandum, together with a revised version of the proposed rule incorporating the amendments that were proposed and adopted at our meeting on March 2. Please distribute copies of the memorandum and revised proposed Rule to all members of the committee.

Thank you for your assistance, as always, and thanks for providing me with the CLE information.

Yours very truly,

Anne Gardner

AG:jrp
Enclosure
48/agg

MEMORANDUM

TO: Members of Committee on Administration of Justice

FROM: Anne Gardner

DATE: March 11, 1991

Enclosed with this memo is a revised version of proposed Rule 166a, including the amendments proposed and adopted at the meeting of this committee on March 2, 1991. Specifically, the phrases relating to "adequate time for discovery" were removed from proposed paragraphs (a) and (b); the comma was removed on the fifth line of page 3; the words "non-movant" were substituted to "adverse party" wherever the latter appeared in proposed paragraph (d); and the word "granted" was substituted for the word "entered" on the third line from the bottom of page 3 in proposed paragraph (d). Steve Tatum was kind enough to draft this cleaned-up copy while I was trying to meet a deadline on a brief. Please let us have your comments and suggestions if this proposed revision is not in accord with the intent of the committee.

47/agg

STATE BAR OF TEXAS
COMMITTEE ON ADMINISTRATION OF JUSTICE
PROPOSED CHANGE OF EXISTING RULE 166a

1. Exact wording of existing rule:

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion for summary judgment shall state the specific grounds therefor. Expect on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response. No oral testimony shall be received at the hearing. The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response. Issues not expressly presented to the trial court by written motion answer or other response shall not be considered on appeal as grounds for reversal. A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

(d) **Appendices, References and Other Use of Discovery Not Otherwise on File.** Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least twenty-one days before the hearing if such proofs are to be sued to support the summary judgment; or (ii) at least seven days before the hearing if such proofs are to be used to oppose the summary judgment.

(e) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by

interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(f) **Form of Affidavits; Further Testimony.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

(g) **When Affidavits Are Unavailable.** 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 refuse the application for judgment or 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.

(h) **Affidavits Made in Bad Faith.** 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.

2. **Proposed rule:**

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion for summary judgment shall state the specific grounds therefor. [Each party shall, in the motion

for summary judgment or in the response thereto, specifically refer to any portions of depositions relied upon; and copies of said deposition excerpts shall be attached to the motion for summary judgment or response.] Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one [forty-five] days before the time specified for hearing. Except on leave of court [for good cause shown], the adverse party, not later than seven days prior to the day of hearing may [shall] file and serve [a] written response. No oral testimony shall be received at the hearing. The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. [Amendment to pleadings within seven days of the date of the hearing, or thereafter, may be made only with leave of court and for good cause shown.] Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal. A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

(d) [Burdens of Movant and Non-Movant. A party moving for summary judgment, on an issue upon which the movant would have the burden of proof at trial, shall have the burden to present evidence sufficient to establish facts which, if proved at trial, would entitle the movant to an instructed verdict. The movant shall not have the burden to produce evidence to establish the absence of a genuine issue of material fact with respect to an issue on which the non-movant would have the burden of proof at trial. When a motion for summary judgment is made and supported as provided in this rule, the non-movant may not rest upon the mere allegations or denials of the non-movant's pleadings, but the ~~adverse party~~'s response, by affidavits or as otherwise provided in this rule, must present specific facts showing that there is a genuine issue for trial. If the motion is based upon the absence of proof on an issue upon which the non-movant has the burden of proof, the non-movant must respond with evidence sufficient to entitle the non-movant to submission of the issue to a jury. If the non-movant does not so respond, summary judgment shall be granted in favor of the movant, provided the motion complies with the other requirements of this rule.]

non-movant

(d)[(e)] **Appendices, References and Other Use of Discovery Not Otherwise on File.** Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least twenty-one [forty-five] days before the hearing if such proofs are to be used to support the summary judgment; or (ii) at least seven days before the hearing if such proofs are to be used to oppose the summary judgment.

(e)[(f)] **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(f)[(g)] **Form of Affidavits; Further Testimony.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

(g)[(h)] **When Affidavits Are Unavailable.** Should it appear from the [by] affidavits of [that] a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his [that party's] opposition, [and if the affidavit sufficiently describes the expected proof], the court may refuse the application for judgment or 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.

~~(h)~~[(i)] **Affidavits Made in Bad Faith.** 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~~ [such other party] to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

3. **Brief Statement of Reasons for Proposed Changes:**

The intent of the proposed changes is to increase the effective use of summary judgments by adopting specific guidelines for the placement of the burden of proof, as set forth by the United States Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) ~~and its companion cases~~. The proposed revision specifies that the movant has the burden to produce evidence which would be sufficient for an instructed verdict at trial. It eliminates the court-imposed requirement that the movant produce evidence to establish the non-existence of a fact as to which the non-movant would have the burden of proof at trial. Once the movant has established his right to summary judgment, the changes would require the non-movant to come forward with summary judgment evidence to establish the existence of a genuine issue of material fact. The changes would also make the filing of a response mandatory, and ~~They~~ lengthen the time period that a motion must be on file prior to the hearing from twenty-one days to forty-five days. Potential problems with premature motions are dealt with by clarification of the section on continuances ~~and by emphasizing that motions are to be filed only "after adequate time for discovery."~~ The changes ~~would~~ also require a showing of good cause and leave of court for filing of amendments to pleadings within seven days of the hearing.

rule.5

MEMORANDUM

TO: MEMBERS OF THE ADMINISTRATION OF JUSTICE COMMITTEE

FROM: J. PATRICK HAZEL

DATE: MARCH 11, 1991

RE: PROPOSED AMENDMENTS TO TEXAS RULES OF CIVIL PROCEDURE
Rules 226, 226a, 236, and 271 - 279
AND ARTICLE FOR THE TEXAS BAR JOURNAL

I enclose the proposed amendments to Rules 226, 226a, 236 and 271-279 in as close as possible to the way we are supposed to do them, *i.e.* (1) the present rule or rules, (2) the proposed amendments with lines through the proposed deletions and underlining for the new parts, and (3) a clean version of the proposed amended rule. For some of the major proposals part (2) is not done because it simply is impossible. The proposal simply is too different.

A few changes in some of the proposed rules have been made since our last meeting on March 2, 1991. They are mostly for clarification and not substantial.

I have also included a very hastily written article to accompany our proposal. I would like your feedback on both the proposed rules and the article.

I would like any feedback from you as quickly as possible. As I recall, we must vote on these at the April 13 meeting. Then, we hope to have them published in the Texas Bar Journal for the entire bar to react. Unfortunately, I do not know what our committee can do about their reactions before the Supreme Court Advisory Committee meets again this summer.

THE COURTS CHARGE AND PROPOSED CHANGES

Prof. J. Patrick Hazel
Austin, Texas

The following proposed changes to the rules with respect to the court's charge are the product of a number of recent proposals. The first proposal (Proposal 1) came from the Supreme Court Advisory Committee. That proposal, along with a number of other proposed rule changes, was published in the Texas Bar Journal of November 1989. The basic thrust was to cut the number of rules regarding the court's charge down to one rule (proposed Rule 271), and to make an objection to the charge a sufficient complaint for appeal. This second part would have done away with the need for a "request" or "tender" in writing of a question, instruction, or definition in substantially correct wording by anyone. This was opposed by the State Bar's Administration of Justice Committee. This committee attempted to consolidate the existing rules for complaining about the court's charge into one rule. That proposed rule (Proposal 2) left intact the need for the relying party to request in writing a question or questions regarding any wholly omitted ground of recovery or defense as well as the need to request in writing any instruction or definition which a party desired but was omitted in the charge. The written request had to be in substantially correct wording. An open meeting before the Supreme Court in October 1989 showed that trial court judges were opposed to the Advisory Committee's proposal (Proposal 1) never requiring a written request. Their fear was "sandbagging." Under the Advisory Committee's proposal a relying party's objection to a wholly omitted ground of recovery or defense would suffice, and the judge had to fashion a properly worded question to avoid reversal. On the other hand several trial lawyers were opposed to the present rule forcing them to request in writing an instruction or definition which was omitted but which pertained to their opponent's claim or defense. It was obvious that some rethinking needed to be done.

The Supreme Court Advisory Committee came forward with another proposal (Proposal 3) to the Supreme Court. Their new proposal was that an objection would suffice unless an entire ground of recovery or defense was omitted. In that instance a written request was necessary. There was nothing about "reliance," because only the relying party would be interested in having the ground submitted. The nonrelying party would not want either to object or request. That party should be happy with the omission.

Some members of the Administration of Justice Committee were not satisfied with this proposal and continued to work on rule changes. Their newer proposal (Proposal 4) was never voted on by the committee, but these individuals submitted the proposal to the Supreme Court and to the Supreme Court Advisory Committee.[1]

1. This proposal was published in the State Bar Litigation Section Report, "The Advocate," Volume 9, No. 2, at page 158-60 (June 1990). Harry Tindall of Houston was a tireless worker on this proposal.

The result of all this was that the Supreme Court determined not to make any changes to the rules to become effective on September 1, 1990, regarding the court's charge and complaints to the charge. Hence, the work has gone on.

This article presents Proposal 5. This proposal comes from the Administration of Justice Committee. Rather than simply proposing a rule for complaining to the court's charge, the Administration of Justice Committee determined to do a major overhaul of all the rules and orders respecting the court's charge. Under this scheme the following rules would govern the court's charge:

Rule 226a.	Instructions to Jury and Jury Panel
Rule 271.	Court's Charge
Rule 272.	Complaints to the Court's Charge
Rule 273.	Reading Court's Charge to Jury
Rule 274.	Questions Omitted from Court's Charge

The above proposed rules include much of what was in the old rules but also much which was not. Old Rules 226a, 271, 272, 273, 274, 275, 276, 277, 278, and 279 would be repealed and replaced with these new rules. Five proposed rules would replace ten old rules. The point is that a lawyer can go to a rule which should tell that lawyer what it is about and, hopefully, understand it without reference to a lot of other rules. Rule 226a is simply the "boilerplate" instructions which the jury panel is given before voir dire (Part 1), the written instructions given to the juror after they are sworn or affirmed (Part 2), and the instructions which are given to the jury in every court's charge (Part 3). Then, proposed Rule 271 refers to proposed Rule 226a, Part 3, which is not done in the present rules.[2] Two proposed rules (226a and 271) would contain everything about the contents, preparation, and time for complaints to the court's charge. One proposed rule (272) would contain the method of complaining to that charge. One proposed rule (273) would contain the instruction to read the court's charge to the jury before argument. One proposed rule (274) would contain the provisions about what happens when questions are omitted from the court's charge and no complaints have been made.

We also proposed some revisions to two other rules: Rules 226 (oath to the jury panel)and 236 (oath to the jury). We thought we were being modern until we consulted Article I, §5 of the Texas Constitution[3] which provides that "all oaths or affirmations shall be administered in the mode most binding upon the conscience, and shall be taken subject to the pains and penalties of perjury."

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2. Interestingly present Rule 226a is only one short sentence. The remainder of that "rule," as it appears in the rule books, is a 1984 order of the Supreme Court. We thought it would be better to include the "order" in the rule itself.

3. The 1876 version!

Because of the import these rules and any changes to them have to the members of the bench and bar of this state, the Administration of Justice Committee did not believe these changes should be made without the advice and consent (or at least consultation) of the entire membership of the Texas Bar. For this reason we are publishing them in this issue of the Texas Bar Journal. The Supreme Court Advisory Committee will meet again sometime this summer to consider this and many other rule changes. They will also be meeting to see if any new legislation requires new or revised rules. The Administration of Justice Committee will not meet again until the Fall. Hence, if you have any gripes, suggestions, or whatever to our proposals let this be known to either (or both) Justice Nathan Hecht of the Texas Supreme Court[4] or Luther Soules,[5] Chair of the Supreme Court Advisory Committee. If you contact them in writing, I would appreciate a copy.[6]

The overall purpose of these changes boils down to two words: simplicity and clarity. Such words from the mouths of lawyers bespeak mendacity. Truth would force me to say that the words "simplicity and clarity" must be put in the context of the present rules. We hope that in comparison with what now exists, our purpose is accomplished.

The way the old and new rules are written in this article are that Rules 226 and 236 have three versions: (1) the old rule, (2) the proposed amendment with the new parts underlined and the deleted parts marked through, and (3) a clean version of the proposed rule. We could not do this with our proposed Rules 226a, 271, 272, 273, and 274. For these we resorted to giving you the old rule or rules followed by the proposals. In the proposals there are a number of footnotes and underlinings. These are designed to explain what we believe to be the most important changes. We hope that the simpler look of the rules needs no apology or explanation. We hope everyone wants this sort of clarity.

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4. P.O. Box 12248, Capitol Station, Austin, Texas 78711.

5. 10th Floor, 175 E. Houston St., San Antonio, Texas 78205-2230.

6. 727 E. 26th St., Austin, Texas 78705.

PRESENT RULE

Rule 226. Oath to Jury Panel

Before the parties or their attorneys begin the examination of the jurors whose names have thus been listed, the jurors shall be sworn by the court or under its direction, as follows: "You, and each of you, do solemnly swear that you will true answers give to all questions propounded to you concerning your qualifications as a juror, so help you God."

PROPOSED AMENDMENT

Rule 226. ~~Oath to~~ Jury Panel's Oath or Affirmation

Before the start of the ~~parties or their attorneys begin~~ voir dire examination of the jury panel, ~~jurors whose names have thus been listed,~~ the jury panel ~~jurors~~ shall be sworn by the court or under the court's ~~its~~ direction, as follows: "Do ~~Y~~you~~,~~ ~~and each of you, do~~ ~~solemnly~~ swear or affirm that you will give true answers ~~give~~ to all questions asked ~~propounded to~~ you concerning your qualifications as a juror~~; so help you God~~? Answer 'I do.'"

CLEAN VERSION OF PROPOSAL

Rule 226. Jury Panel's Oath or Affirmation

Before the start of the voir dire examination of the jury panel, the jury panel shall be sworn by the court or under the court's direction, as follows: "Do you swear or affirm that you will give true answers to all questions asked you concerning your qualifications as a juror? Answer 'I do.'"

PRESENT RULE

Rule 226a. Admonitory Instructions to Jury Panel and Jury

The court shall give such admonitory instructions to the jury panel and to the jury as may be prescribed by the Supreme Court in an order or orders entered for that purpose.

APPROVED INSTRUCTIONS

Pursuant to the provisions of Rule 226a, Texas Rules of Civil Procedure, it is ordered [July 20, 1966] by the Supreme Court of Texas, effective January 1, 1967; January 1, 1971; February 1, 1973; December 5, 1983, effective April 1, 1984:

I.

That the following oral instructions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the jurors after they have been sworn as provided in Rule 226 and before the voir dire examination:

Ladies and Gentlemen of the Jury Panel:

The case that is now on trial is____ vs. _____. This is a civil action which will be tried before a jury. Your duty as jurors will be to decide the disputed facts. It is the duty of the judge to see that the case is tried in accordance with the rules of law. In this case, as in all cases, the actions of the judge, parties, witnesses, attorneys and jurors must be according to law. The Texas law permits proof of any violation of the rules of proper jury conduct. By this I mean that jurors and others may be called upon to testify in open court about acts of jury misconduct. I instruct you, therefore, to follow carefully all instructions which I am now going to give you, as well as others which you will receive while this case is on trial. If you do not obey the instructions I am about to give you, it may become necessary for another jury to re-try this case with all of the attendant waste of your time here and the expense to the litigants and the taxpayers of this county for another trial. These instructions are as follows:

1. Do not mingle with nor talk to the lawyers, the witnesses, the parties, or any other person who might be connected with or interested in this case, except for casual greetings. They have to follow these same instructions and you will understand it when they do.
2. Do not accept from, nor give to, any of those persons any favors however slight, such as rides, food or refreshments.
3. Do not discuss anything about this case, or even mention it to anyone whomsoever, including your wife or husband, nor permit anyone to mention it in your

hearing until you are discharged as jurors or excused from this case. If anyone attempts to discuss the case, report it to me at once.

4. The parties through their attorneys have the right to direct questions to each of you concerning your qualifications, background, experiences and attitudes. In questioning you, they are not meddling in your personal affairs, but are trying to select fair and impartial jurors who are free from any bias or prejudice in this particular case.

a. Do not conceal information or give answers which are not true. Listen to the questions and give full and complete answers.

b. If the attorneys ask some questions directed to you as a group which require an answer on your part individually, hold up your hand until you have answered the questions.

Do you understand these instructions? If not, please let me know now.

Whether you are selected as a juror for this case or not, you are performing a significant service which only free people can perform. We shall try the case as fast as possible consistent with justice, which requires a careful and correct trial. If selected on the jury, unless I instruct you differently, you will be permitted to separate at recesses and for meals, and at night.

The attorneys will now proceed with their examination.

II.

That the following oral and written instructions, with such modifications as the circumstances of the particular case may require shall be given by the court to the jury immediately after the jurors are selected for the case:

ORAL INSTRUCTIONS

Ladies and Gentlemen:

By the oath which you take as jurors, you become officials of this court and active participants in the public administration of justice. I now give you further instructions which you must obey throughout this trial.

It is your duty to listen to and consider the evidence and to determine fact issues later submitted to you, but I, as judge, will decide matters of the law. You will now receive written instructions which you will observe during this trial, together with such other instructions as I may hereafter give, or as heretofore I have given to you.

(A copy of the written instructions set out below in this Section II shall thereupon be handed to each juror.)

As you examine the instructions which have just been handed to you, we will go over them briefly together. The first three instructions have previously been stated, and you will

continue to observe them throughout the trial. These and the other instructions just handed to you are as follows:

(The written instructions set out below in this Section II shall thereupon be read by the court to the jury.)

Counsel, you may proceed.

WRITTEN INSTRUCTIONS

1. Do not mingle with nor talk to the lawyers, the witnesses, the parties, or any other person who might be connected with or interested in this case, except for casual greetings. They have to follow these same instructions and you will understand it when they do.

2. Do not accept from, nor give to, any of those persons any favors however slight, such as rides, food or refreshments.

3. Do not discuss anything about this case, or even mention it to anyone whomsoever, including your wife or husband nor permit anyone to mention it in your hearing until you are discharged as jurors or excused from this case. If anyone attempts to discuss the case, report it to me at once.

4. Do not even discuss this case among yourselves until after you have heard all of the evidence, the court's charge, the attorneys' arguments and until I have sent you to the jury room to consider your verdict.

5. Do not make any investigation about the facts of this case. Occasionally we have a juror who privately seeks out information about a case on trial. This is improper. All evidence must be presented in open court so that each side may question the witnesses and make proper objection. This avoids a trial based upon secret evidence. These rules apply to jurors the same as they apply to the parties and to me. If you know of, or learn anything about, this case except from the evidence admitted during the course of this trial, you should tell me about it at once. You have just taken an oath that you will render a verdict on the evidence submitted to you under my rulings.

6. Do not make personal inspections, observations, investigations, or experiments nor personally view premises, things or articles not produced in court. Do not let anyone else do any of these things for you.

7. Do not tell other jurors your own personal experiences nor those of other persons, nor relate any special information. A juror may have special knowledge of matters such as business, technical or professional matters or he may have expert knowledge or opinions, or he may know what happened in this or some other lawsuit. To tell the other jurors any of this information is a violation of these instructions.

8. Do not discuss or consider attorney's fees unless evidence about attorney's fees is admitted.

9. Do not consider, discuss, nor speculate whether or not any party is or is not protected in whole or in part by insurance of any kind.

10. Do not seek information contained in law books, dictionaries, public or private records or elsewhere, which is not admitted in evidence.

At the conclusion of all the evidence, I may submit to you a written charge asking you some specific questions. You will not be asked, and you should not consider, whether one party or the other should win. Since you will need to consider all of the evidence admitted by me, it is important that you pay close attention to the evidence as it is presented.

The Texas law permits proof of any violation of the rules of proper jury conduct. By this I mean that jurors and others may be called upon to testify in open court about acts or jury misconduct. I instruct you, therefore, to follow carefully all instructions which I have given you, as well as others which you later receive while this case is on trial.

You may keep these instructions and review them as the case proceeds. A violation of these instructions should be reported to me.

III.

That the following written instructions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the jury as part of the charge:

Ladies and Gentlemen of the Jury:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any

trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten* or more members of the jury. The same ten* or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten* jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

(Definitions, questions and special instructions given to the jury will be transcribed here.)

*"five" in the case of a jury of six members.

IV.

That the following oral instructions shall be given by the court to the jury after the verdict has been accepted by the court and before the jurors are discharged:

The court has previously instructed you that you should observe strict secrecy during the trial and during your deliberations, and that you should not discuss this case with anyone except other jurors during your deliberations. I am now about to discharge you. After your discharge, you are released from your secrecy. You will then be free to discuss the case and your deliberations with anyone. However, you are also free to decline to discuss the case and your deliberations if you wish.

After you are discharged, it is lawful for the attorneys or other persons to question you to determine whether any of the standards for jury conduct which I have given you in the course of this trial were violated and to ask you to give an affidavit to that effect. You are free to discuss or not to discuss these matters and to give or not to give an affidavit.

PROPOSED AMENDMENT - CLEAN VERSION

Rule 226a. Instructions to Jury Panel and Jury

The judge shall give such instructions to the jury panel and to the jury as set forth in this rule.

Part 1 - Jury Panel

After the members of the panel have been sworn or affirmed as provided in Rule 226 and before the voir dire examination, the judge shall read the following oral instructions to the jury panel.

JURY PANEL MEMBERS:

This lawsuit is _____ vs. _____. It is a civil case before a jury. My duty, as a judge, is to conduct a trial under rules of law. Therefore, you must carefully follow my instructions during the trial. These instructions are as follows:

1. Do not talk with the parties, the lawyers, the witnesses, or other interested persons about the case, except for casual greetings. These people have the same instructions.

2. Do not accept any favors from these people, and do not give them favors. You must avoid even slight favors, such as rides, food, or refreshments.

3. Do not discuss this case with anyone, including your spouse, and do not permit anyone to discuss it in your hearing until I release you to do so. If anyone tries to talk to you about the case, tell me immediately.

4. The parties or their lawyers have the right to ask you about your qualifications, background, experiences, and attitudes. These questions are intended to help in selecting impartial jurors and eliminating persons with any bias or prejudice about the case.

5. Listen to the questions and give true and complete answers. Do not conceal information. If you cannot hear or understand the questions, please let me know.

6. If the panel is asked a question that requires an answer from you, raise your hand.

7. If you see another person violating my instructions, immediately caution that person not to do so again.

8. I may be asked to review your conduct. Disregarding these instructions will be jury misconduct and may require another trial by another jury.

9. If you do not understand these instructions, inform me now.

10. Whether you are chosen as a juror or not, you are performing an important civic duty, and you are to be commended.

The parties will now proceed with their questions.

Part 2 - Jury

Immediately after the jurors are selected and have been sworn or affirmed as provided in Rule 226, the judge shall give each juror a copy of the following written instructions. The judge shall then read to the jury the written instructions.

Written Instructions

JURY MEMBERS:

Your juror's oath or affirmation makes you an officer of the Court and a participant in this trial. You must carefully follow all earlier instructions as well as these written instructions.

As you examine the instructions just handed you, we will review them together. The first three instructions were stated earlier and you will continue to observe them during this trial.

1. Do not talk with the parties, the lawyers, the witnesses, or other interested persons about the case, except for casual greetings. These people have the same instructions.

2. Do not accept any favors from these people, and do not give them favors. You must avoid even slight favors, such as rides, food, or refreshments.

3. Do not discuss this case with anyone, including your spouse, and do not permit anyone to discuss it in your hearing until I release you to do so. If anyone tries to talk to you about the case, tell me immediately.

4. You have just taken an oath that you will return a verdict based on the evidence. Consider only evidence admitted in open court. If you learn anything about the case except from the evidence admitted in open court, tell me immediately.

5. Do not make personal inspections, observations, investigations, or experiments about the case. Do not personally view premises or articles not produced in court. Do not let anyone else do any of these things for you.

6. Do not seek information in law books, dictionaries, public or private records, or elsewhere that is not admitted in evidence.

7. When the evidence is completed, I will submit the Court's Charge with written questions for you to answer. Since you are to consider all the evidence I admit, you must pay careful attention to that evidence.

8. Do not discuss the case among yourselves until after you have heard all the evidence, the Court's charge, and the attorney's arguments and have retired to the jury room.

9. If you see another juror violating my instructions, immediately caution that juror not to do so again.

10. I may be asked to review your conduct. Disregarding these instructions will be jury misconduct and may require another trial by another jury.

11. Keep these instructions and review them as the case proceeds. Tell me at once about any violation of these rules.

The parties will now proceed with their opening statements.

Part 3 - Court's Charge

The judge shall give the jury the following written instructions, modified as required by the circumstances of the particular case, as part of the charge.

COURT'S CHARGE

JURY MEMBERS:

I submit this case to you for answers to questions. In discharging this responsibility, follow all previous instructions as well as these additional ones:

1. In answering a question, consider only the testimony and exhibits admitted by me and any instructions I give you. You are entitled to have all admitted exhibits with you in the jury room.

2. You alone decide whether to believe the testimony of any witness and any admitted exhibit and how much weight to give them. My instructions govern in matters of law.

3. Do not let bias, prejudice, or sympathy affect your answers.

4. Every question is important. It is improper to state or consider that any required answer is not important.

5. Do not consider attorney's fees. [Omit when attorney's fees are an issue.]

6. Do not consider whether insurance protects any party. [Omit when coverage is an issue.]

7. Do not tell other jurors about any special knowledge, information, opinions, or experiences of a business, technical, or professional nature that you or anyone else has. Do not tell what happened in other lawsuits.

8. Do not discuss the case with anyone but other jurors; only do so when all jurors are present and assembled in the jury room. If anyone other than a juror tries to talk to you about the case before you reach a verdict, whether at the courthouse, your home, or elsewhere, inform me immediately.

9. Your conduct is reviewable. Disregarding these instructions will be jury misconduct and may require another trial by another jury.

10. If you see another juror violating my instructions, immediately caution that juror not to do so again.

11. After you retire to the jury room, first select a presiding juror. The presiding juror will then read aloud the complete Court's Charge. Then deliberate on your answers to the questions asked.

12. You may reach your verdict on a vote of ten or more jurors. The same ten or more jurors must agree on all answers. [Use "five" instead of "ten" in cases of six-person juries.][7]

13. The presiding juror's duties are:

a. to preside during the deliberations;

b. to conduct the deliberations in an orderly manner, following the instructions in the Court's Charge;

c. to write and hand to the bailiff any communications about the case that you wish to have delivered to me;

d. to vote on the questions;

e. to write the answer to each question in the space provided;

f. if the verdict is unanimous, to sign the verdict in the space provided for the presiding juror's signature, or, if the verdict is less than unanimous, to get the signatures of all the jurors who agree with the verdict.

14. The court will assist you in determining your schedule for deliberations, breaks, and meals.

15. When you have answered all questions and properly signed the verdict, inform the bailiff. When you return to the courtroom with your verdict, the presiding juror will hand me the verdict.

[Definitions, questions, and special instructions given to the jury will be transcribed here.]

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7. Note that #'s 12 - 15 are presently not in Rule 226a. They are contained in Texas Pattern Jury Charges. It seems appropriate to include them here.

_____
JUDGE PRESIDING

JURY'S VERDICT

We, the jury, have answered the questions as shown and return these answers to Court as our Verdict.

Signature of presiding juror, if unanimous.

_____
Presiding Juror

Signatures of jurors voting for the verdict, if not unanimous.

_____ _____
_____ _____
_____ _____
_____ _____
_____ _____
_____

Part 4 - Jury Release

The judge shall give the jury the following oral instructions after accepting the verdict and, thereby, release them.

JURY MEMBERS:

Earlier I instructed you to observe strict secrecy during the trial and your deliberations and not to discuss this case with anyone except other jurors during your deliberations. I am now about to release you.

When you are released, you may then discuss the case and your deliberations with anyone, although you are free to decline to do so. After you are released, it will be lawful for the attorneys or anyone else to question you to determine whether any of the instructions I have given you about jury conduct were violated and to ask you to give an affidavit to that effect. You are free to discuss these matters or not and to give an affidavit or not.

Thank you for your service as jurors in this case. You have performed an important civic duty.

You are now released.

PRESENT RULE

Rule 236. Oath to Jury

The jury shall be sworn by the court or under its direction, in substance as follows: "You, and each of you, do solemnly swear or affirm that in all cases between parties which shall be to you submitted, you will a true verdict render, according to the law stated, as it may be given you in charge by the court, and to the evidence submitted to you under the rulings of the Court? So help you God."

PROPOSED AMENDED RULE

Rule 236. ~~Oath to Jury~~ Jurors' Oath or Affirmation.

The jury shall be sworn by the court or under the court's ~~its~~ direction~~, in substance~~ as follows: "Do y~~Y~~ou~~, and each of you, do solemnly~~ swear or affirm that in the ~~all~~ cases ~~between parties~~ that ~~which~~ will ~~shall~~ be ~~to you~~ submitted to you, you will ~~a true verdict~~ render~~,~~ a verdict according to the law stated in the Court's Charge~~, as it may be given you in charge by the court,~~ and ~~to~~ the evidence submitted to you under the rulings of this ~~the~~ Court? ~~So help you God.~~ Answer 'I do.'"

CLEAN VERSION OF AMENDED RULE

Rule 236. Jurors' Oath or Affirmation

The jury shall be sworn by the court or under the court's direction as follows: "Do you swear or affirm that in the case that will be submitted to you, you will render a verdict according to the law stated in the Court's Charge and the evidence submitted to you under the rulings of this Court? Answer 'I do.'"

PRESENT RULES

Rule 271. Charge to the Jury

Unless expressly waived by the parties, the trial court shall prepare and in open court deliver a written charge to the jury.

Rule 272. Requisites

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.

Rule 273. Jury Submissions

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 separate and apart from such party's objections to the court's charge.

Rule 274. Objections and Requests

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 or concealed by voluminous unfounded objections, minute differentiations or numerous unnecessary requests, such objection or request shall be untenable. No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only.

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.

Rule 276. Refusal or Modification

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.

Rule 277. Submission to the Jury

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.

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.

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 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 predicate the damage question or questions upon affirmative findings of liability.

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.

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.

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

Rule 279. Omissions 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.

PROPOSED RULES

Rule 271. Court's Charge

At the conclusion of the evidence in all jury cases, unless expressly waived by the parties, the court shall submit the case to the jury in a written court's charge asking the jury questions about the facts.

(1) Contents

The court's charge shall contain those applicable parts of Rule 226a, Part 3,[8] and be subject to the following requirements:

(a) Jury Questions

The court's charge:

(i) shall submit only questions controlling the disposition of the case[9] which are raised by affirmative written pleadings and evidence. No question shall be submitted when raised only by a general denial unless specifically allowed by statute or other rules of procedure;

(ii) shall submit the questions in broad form, whenever feasible;

(iii) shall not submit various phases or shades of questions already submitted;

(iv) shall not submit inferential rebuttal questions;

(v) shall not submit advisory questions;[10]

---

8. Nothing in our present rules mentions the existence and importance of Rule 226a to the court's charge. Since that is the bulk of the charge, it is mentioned here for clarity.

9. This language was dropped from the rules in 1988. It primarily points out that merely evidentiary (and advisory?) questions which, when answered, could have no possible effect on the judgment are not to be asked. There is an abundance of case law about the phrase "controlling the disposition of the case."

10. This may be controversial. In so far as I know only family law has "advisory questions" to the jury. I understand the Pattern Jury Charge folks dealing with Volume 5 are also trying to discourage these questions going to the jury. I am a strong advocate of the jury trial in civil cases. Where, however, others have decided not to allow a jury to determine a matter, it strikes me as illogical, unnecessary, and expensive to ask a jury for its advice. One may question whether the legislature has taken this matter out of the hands of the Texas Supreme Court by enacting §11.13 of the Texas Family Code. That provision states that the court "may submit or refuse to submit" certain questions to the jury, and, if they are submitted, the jury verdict on them is

(vi) shall, in any case in which the jury is required to apportion the loss among the parties, submit questions inquiring what percentage, if any, of the causation, responsibility, or negligence, as the case may be, that caused the occurrence or injury in question is attributable to each of the parties found to have been responsible. In such instances the court shall instruct the jury that the percentage must total 100%[11] and to answer the damage questions without any reduction because of the percentage, if any, attributed to the injured party; and

(vii) may submit questions disjunctively when it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists.

(b) Instructions and Definitions

The court's charge:

(i) shall submit only those instructions and definitions as are proper to enable the jury to render a verdict;

(ii) shall submit instructions regarding inferential rebuttal matters raised by the written pleadings and evidence;[12] and

(iii) may place the burden of proof by instruction rather than by inclusion in a question.

(c) Other Requirements

The court's charge:

"advisory only." Since the "court" is given discretion in this matter, I suppose the Texas Supreme Court could make that discretionary determination for all the trial courts and say that these questions shall not be submitted. Of course, where one of those questions is before the court, a party has a right to a jury. That right has been found, however, not to be an absolute right to a jury on those matters because the findings are not binding. Martin v. Martin, 776 S.W.2d 572 (Tex. 1989).

11. This is usually done, and it seems appropriate to include it. It is especially important where the jury has more than one such percentage question in the court's charge, e.g. TEX. CIV. PRAC. & REM. CODE, §§ 33.004 and 33.016(c).

12. This is presently stated only in case law, e.g. Scott v. Atchison Topeka and Santa Fe Ry. Co., 572 S.W.2d 273 (Tex. 1978). Our present rules prohibit questions on inferential rebuttal matters, but they fail to advise of the right to an instruction.

(i) shall not comment directly on the weight of the evidence or advise the jury of the effect of their answers, except that the court's charge may comment incidentally on these matters when it is properly a part of a question,[13] instruction, or definition; and

(ii) may predicate the damage questions upon affirmative findings of liability.

(2) Preparation and Time for Complaints

(a) Requiring Written Suggestions

In addition to ordering a request pursuant to Rule 272(5)(b)(ii), at any reasonable time the court may require[14] the parties to present to the court written, suggested jury questions, instructions, and definitions. These suggestions shall not be necessary to preserve error for appeal or entitle any party to the right to a jury finding. They are solely to assist the court in preparing the court's charge.

(b) Charge Conference

Before preparing and delivering a proposed written charge, the court may conduct a charge conference with the parties. At the charge conference any party may present suggested questions, instructions, and definitions for inclusion in the court's charge.[15]

(c) Proposed Charge

The court shall prepare and deliver its proposed written charge to the parties for their examination and shall allow them a reasonable time in which to examine and prepare complaints to the proposed court's charge.

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13. There may be a reason, but I am not aware of it, why such is proper in an instruction or definition but not in a question (so long as it is properly a part of the question for another or other reasons). Hence, unless someone knows of a reason, we ought to include questions.

14. The Supreme Court Advisory Committee's recommendation suggested the word "order" rather than "require." But the "order" would be meaningless since it has nothing to do with preserving error for appeal. Further, it might only lead to confusion and, possibly, other types of sanctions. Note, however, that Rule 166(k) allows the court in a pretrial conference to "order" "[p]roposed jury charge questions, instructions, and definitions for a jury case***."

15. This provision simply gives the customary charge conference rule status, albeit discretionary with the trial judge.

(d) Hearing

The court shall conduct a hearing outside the presence of the jury for the parties to present their complaints pursuant to Rule 272.

(e) Modifying the Court's Charge

The court may modify the proposed charge at any time before it is read to the jury. When modified, the court shall deliver the modified charge to the parties and proceed as provided in (c) and (d) above.[16]

(f) Ruling on, Signing, and Filing Court's Charge

When the court has completed any modifications, heard and ruled on all complaints, the court shall sign the court's charge and have it filed. The court's charge so filed shall be a part of the record in the case.

(g) Further Instructions

Nothing in this rule prohibits the court from further instructing the jury as provided in Rule 286.

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16. This simply means that when the trial court accepts some objection or request as valid and incorporates it into the court's charge, other parties must now be given their opportunity to complain.

Rule 272. Complaints[17] to the Court's Charge

(1) Time

All complaints to the court's charge must be made before the charge is read to the jury. It shall be presumed, unless otherwise shown in the record, that all complaints were presented at the proper time.

(2) Type of Complaint

A complaint to the court's charge is made by an objection or a request.

(3) An Objection must:

(a) be made either in writing or dictated to the court reporter in the presence of the court and opposing counsel;

(b) point out distinctly the portion of the charge to which objection is made and the matter specifically objected to;

(c) state specific grounds;

(d) be complete in itself and not adopt any other complaints by reference; and

(e) not be obscured or concealed by numerous unfounded objections or minute differentiations.

(4) A Request must:

(a) be in writing and in substantially correct wording; and

(b) not be obscured or concealed by numerous unfounded requests or minute differentiations.

(5) Preserving Error for Appeal and Right to Jury Finding

(a) An objection is a sufficient complaint except when a request is required.

(b) A request by a complaining party is required:

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17. The word "complaint" is used to include both an objection and a request.

(i) when an entire ground of recovery or defense is omitted from the charge;[18] and/or

(ii) when the trial court orders an objecting party to submit a request regarding:

(A) an omitted question upon which that party relies for its claim or defense;[19] or

(B) an omitted instruction or definition which is properly a part of that party's claim or defense.[20]

(c) Improper Complaints

An objection to a submitted question either (1) that the evidence is factually insufficient to support a given answer to that question or (2) that a given answer to that submitted question would be against the overwhelming weight of the evidence are improper complaints. Where there is some evidence to support a given answer, the question must be submitted.[21]

---

18. This is required by present law and is the compromise accepted by the Supreme Court Advisory Committee.

19. This would apply when a question (usually an element) is omitted and objected is made to the omission. If the objecting party relies on the question, the court may order that party to tender a request. If an objection is made by the nonrelying party, the court cannot order either party to tender a request. In that event, the relying party would have to object (if the relying party believes a question has been omitted) and then the court can order a request to be tendered.

20. This provision applies when a party objects to the omission of an instruction or definition which is properly a part of that party's claim or defense. If an objection is made by another party, that party cannot be ordered to tender a request either of an instruction or definition which is not properly a part of that party's claim or defense.

21. This provision is apparently now included in the last sentence of Rule 279. However, the wording of the present rule is that such complaints "may be made for the first time after verdict." It does not advise that they are improper when made to the court's charge. Remember, the trial court must submit the question when there is some evidence to support it even though an answer would have factually insufficient support or be against the overwhelming support of the evidence.

Legal insufficiency (no evidence) or conclusive evidence are proper objections to the court's charge. However, these may be made after the verdict as well, e.g. in a motion for new trial or (better) a motion to set aside the judgment and render a judgment n.o.v.

Further, the present placement of this provision seems improper.

(6) Court's Ruling on Complaints

(a) Express Ruling

The court shall rule on complaints before reading the charge to the jury either by endorsing the rulings on written complaints or, when the complaints are not in writing, by dictating the rulings to the court reporter in the presence of counsel. All rulings may be made a part of the record for appeal.

(b) Implied Ruling

Any complaint not expressly ruled on by the court shall be deemed overruled when the court's charge is not modified to comply with the complaint.[22]

Rule 273. Reading Court's Charge to the Jury

After ruling on all complaints to the court's charge and before argument is begun, the trial court shall read the entire charge to the jury in the precise words in which it is finally written, signed, and filed.

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22. This puts the law regarding "requests," see Acord v. General Motors Corp., 669 S.W.2d 111 (Tex. 1984), into the rule and expands the law to "objections." A similar provision is included in the Supreme Court Advisory Committee's recommended Rule 273-7.

Rule 274. **Questions Omitted from the Court's Charge**[23]

(1) Waiver of Grounds

All independent grounds of recovery or of defense not conclusively established under the evidence and no element of which is submitted are waived unless complained of in compliance with Rule 272.

(2) Waiver of Jury Finding

When a ground of recovery or defense consists of more than one element, and one or more of the elements necessary to sustain that ground of recovery or defense, and necessarily referable to it, are submitted to and found by the jury, and one or more of those elements are omitted from the charge, without complaint in compliance with Rule 272, and there is factually sufficient evidence to support a finding thereon, a jury finding on the omitted element or elements is waived, but:

(a) Explicit Finding by Court

The trial court, at the request of either party may, after notice and hearing, make and file written findings on the omitted element or elements and render an appropriate judgment on all material findings.

(b) Deemed Finding by Court

If no explicit written findings are made, the omitted element or elements shall be deemed by an appellate court to be found by the trial court in such manner as to support the judgment.[24]

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23. This rule is rewritten with headings to make it clear what it means.

24. This is present Rule 279 and proposed Rule 275 with the last sentence moved to suggested Rule 272(5)(c). See note 13 above. The rule is slightly rewritten and organized to make clear what it involves.

90(e)
74
91
111
114(e)

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September 7, 1990

166a(c)

Rules Advisory Committee
The Supreme Court of Texas
Post Office Box 12248
Austin, Texas 78711

Ladies and Gentlemen:

Having read the newly adopted Rules of Civil Procedure and viewed the State Bar videotape regarding same, I would like to make the following comments.

The first three comments are by way of housekeeping. Tex.R.App.P. 90(e) refers to paragraph (c), but this paragraph has been renumbered. It should refer to paragraph (d).

Should not Tex.R.App.P. 74(a), (q) and 91 refer to "parties to the trial court's final judgment or appealable order ..." rather than just the parties to the trial court's final judgment?

Gender neutral changes were missed in Tex.R.App.P. 111 and 114(e).

The provisions of Tex.R.Civ.P. 21a that telephonic document transfer after 5:00 p.m. is deemed to be served on the following day is a positive step. May I suggest that service by hand delivery after 5:00 p.m. should also be deemed to be served on the following day.

The provisions of Rule 21a allowing service by FAX may result in appellate briefs being served on opposing parties by FAX. To me, this is unacceptable. A 60 to 70 page FAX document is unwieldy and generally unworkable. May I suggest that Tex.R.App.P. 74(q) regarding service of briefs be amended to require service of one or two copies of briefs bound in the same manner as those filed with the Court. This would be helpful if for no other reason than to inform opposing counsel of the color of binding to be avoided.

Finally, I would like to suggest that summary judgment Rule 166a(c) be amended to require the filing party to serve briefs upon the adverse party and the Court no later than forty-eight

(48) hours prior to the time of the hearing. The common practice is now for the moving party to file a "bare bones" motion and then to bring a brief with them to the hearing. This can provide the moving party with an unfair advantage if the Court allows the consideration of the brief over the adverse party's objections, particularly since the brief serves to answer the adverse party's response and opposing affidavits.

Thank you for your consideration of these matters. If I may clarify my comments and suggestions in any way, please do not hesitate to contact me and I will gladly do so.

Sincerely yours,

Bruce A. Pauley

BAP/jc

BAP.L2

4543.001

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512-222-0586

March 14, 1990

Mr. Luke Soules
Soules & Wallace
Republic of Texas Plaza,
10th Floor
175 East Houston Street
San Antonio, Texas 78205

Re: Texas Summary Judgment Procedure

Dear Mr. Soules:

I have enclosed a copy of an article you may have read in a recent Texas Bar Journal concerning Texas summary judgment practice. I agree whole heartedly with the author of the article. Texas summary judgment practice nowhere nearly lives up to its potential, nor to what the drafters of the rule intended, and I think that some of the recommendations made by Mr. Livesay should be considered by the Supreme Court.

This is to request that you urge these recommendations for consideration by the rules committee in its deliberations on changes in the Texas Rules of Civil Procedure.

Thank you for your work on that committee and for your consideration of this issue.

Sincerely yours,

Edgar C. Morrison, Jr.

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ECM\cz\Soules.ltr

Enclosure

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ECM\cz\Soules.ltr

Enclosure

Summary Judgment Practice: A Plea for Reform

By Keith C. Livesay

Keith C. Livesay is a research attorney with the McAllen firm of Ewers & Toothaker, P.C., where he concentrates on state civil appellate matters. He is a cum laude graduate of Baylor School of Law where he was an associate editor of the Baylor Law Review. He is the author of several legal articles, the most recent, on appealing summary judgments, was published in the September edition of the Texas Bar Journal.

A customer counterclaims against his water district for breach of good faith and fair dealing after the district shuts off his water when the customer's bill remains unpaid after four months, and no dispute exists as to the validity of the bill. A construction supplier sues the general contractor for payment after failing to give the proper statutory notices and also after the statute of limitations has run. Lawsuits expeditiously resolved by summary judgment? Unfortunately, these actual lawsuits were not.

The initial adoption of summary judgment practice in Texas was envisioned as a useful tool for both courts and litigants. But trial courts are (and increasingly so) reluctant to grant summary judgments, even in cases where it is clearly merited. The result is that summary judgments inhabit a vast procedural wasteland, scorned by litigants and courts alike, and court dockets remain crowded, waiting for cases to be settled or tried, which could otherwise be resolved by Rule 166a. Clearly, it was not meant to be this way.

After the initial adoption of Tex. R. Civ. P. 166-A, commentators noted that summary judgments were seldom granted and those which were granted usually suffered mortally on appeal. Recognizing this problem, the Texas Supreme Court drastically revised Tex. R. Civ. P. 166-A in 1978 to encourage the granting of more summary judgments.

First, the movant is no longer required to negate every conceivable issue of law and fact. Second, the non-movant can no longer play "hide the ball"; if he has reasons why summary judgment should not be granted, he must present them in a written response or forever hold his peace. Third, with new time deadlines imposed, ambush responses to summary judgments were to be abolished. But the results of such reform have been disappointing.

Granted, summary judgments do not suffer as high a mortality rate on appeal as they once did. However, summary judgment cases still account for the highest percentage of reversals. Further, and what is difficult to empirically verify, is the continued failure of trial courts to grant summary judgments when justified. The result is crowded court dockets, needless trials, waste of judicial resources, or settlements reached where cases should have been disposed of by unliquidated or take-nothing judgments.

What is the cause of this judicial reluctance? Both Judge David Hittner of Houston, the recognized authority on summary judgment practice, and Prof. McDonald before him, have commented it stems from the lack of effective appellate review. As noted previously, the granting of a motion for summary judgment is appealable and frequently reversed; denial of a summary judgment motion, however, is an interlocutory order which is *not reviewable after a trial on the merits*. So a trial court is often inclined to deny a summary motion because the decision is unreviewable.

Denial of a summary judgment should be reviewable on appeal. Other pretrial orders are reviewable after a trial on the merits, such as denial of a special appearance, denial of a motion to transfer venue, and various discovery orders, such as failure to require the production of discovery, or the granting or denial of sanctions. Why should the denial of a motion for summary judgment be treated differently?

If the supreme court and/or the rules committee is serious about freeing crowded dockets, Tex. R. Civ. P. 166a should be amended to permit review of a denial of a summary judgment. This would eliminate the implicit incentive which presently exists to perfunctorily deny summary judgment motions; if the trial judge knows a summary judgment denial will be reviewed, he will consider the matter more thoroughly and hopefully grant meritorious summary judgment motions more frequently. This will expedite the disposition of cases, freeing crowded dockets and permitting scant judicial resources to be spent on other matters.

Denial of summary judgment should also be reviewable by writ of mandamus. Currently, mandamus is not available because it has been held that the party has an adequate remedy by appellate review. But, there is *no appeal* of the summary judgment denial, so how can there be an adequate remedy? In addition, this ignores the increased expenses which result from improperly denied motions, such as costs of discovery, trial preparation, and trial (perhaps before a jury) which accompany the adverse verdict that leads to the appeal. Several other states permit interlocutory review of denials of motions for summary judgment by mandamus or other appellate writs.[1] It should be noted that frivolous mandamus applications are not likely to congest the courts of appeal. Under the current appellate rules, a court of appeals does not even hear the mandamus application unless the court is initially convinced that the relator is entitled to the relief sought. Additionally, any lawyer who files such a frivolous request can be sanctioned under Tex. R. Civ. P. 13.

The supreme court and/or the rules committee should reform Tex. R. Civ. P. 166a to decrease reversals. First, despite the time limits contained in the rule, a non-movant commonly files its response on the day of or the day before the hearing. Currently, the trial court has discretion to permit the late filing. While this discretion should continue, it should be subject to a standard similar to that of Tex. R. Civ. P. 166b concerning non-identified witnesses. A witness not identified in discovery can testify, but

only if his proponent demonstrates good cause. Likewise, the non-movant should not have a late response considered unless good cause is shown to justify the late filing.

Second, the confusion concerning late responses must be elimi-ated. Our supreme court has held that a late-filed response will t be considered on appeal unless an order appears of record permitting its filing. But some courts of appeal have moved away from this rule, requiring that the movant object to a late-filed response and obtain an order from the trial court demonstrating its exclusion. This rule should be resolved in the rule by requiring only when late filing is permitted, without need for objection by the movant.

A second area which needs reform is amendment of pleadings as a response to summary judgment motions. Scrupulous non-movants often amend their pleadings in response to a motion for summary judgment, typically adding causes of actions or filling counterclaims. The result is that the motion for summary judgment is denied as improper; unless movant's attorney is clairvoyant, his motion cannot address the address that claims. Granting the motion renders it merely interlocutory or partial, or worse, legally erroneous, because the summary judgment does not address the new claims.

To add insult to injury, the time limits regarding pleading *de facto* do not exist in the summary judgment context. Normally, a party most obtain leave of court to amend its pleadings seven days before trial, and this includes seven days before the summary judgment hearing. Unfortunately, the non-movant is free to amend its pleadings at any time, and it is the movant's burden to obtain a specific order excluding the amendment of pleadings. The solution is simple: filing of a motion; of a motion for a motion for summary judgment should "freeze" the pleadings, *i.e.*, the pleadings could only be amended upon obtaining leave of court. Further, leave of court could only be granted when good cause is demonstrated.

The U.S. Supreme Court has noted that under the federal rules, 'mmary judgments are not considered a procedural shortcut ıt rather an intricate part of the rules, designed to obtain fast, just, and inexpensive relief. This view should be mirrored by Texas law. Summary judgments are not like flat soda, only to be consumed in cases of dire thirst. Rather, summary judgments constitute a crucial tool to be used by advocates and trial courts to perform their function expeditiously. But tragically, summary judgments fail to fulfill their potential, being treated instead as procedural pariahs.

Reform is needed. First, denial of a summary judgment muset be reviewable, either on direct appeal after trial on the merits, or by mandamus. Second, late-filed responses should not be considered unless good cause is demonstrated to the court. Third, the filing of a summary judgment should "freeze" all pleadings, with amendment allowed only after demonstrating good cause. Only after such reforms are instituted will the summary judgment rule achieve its intended purpose.

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1. *See, Safeway Stores, Inc. v. Maricopa County Superior Court*, 19 Ariz. App. 210, 505 P.2d 1383, 1383 (1973) (special action); *Bank of America National Trust & Savings Ass'n v. Superior Court of San Diego County*, 4 Cal. App. 3d 386, 84 Cal. Rptr. 421, 424 (1970) (mandamus); *State v. Superior Court of San Mateo County*, 263 Cal. App. 2d 396, 69 Cal. Rptr. 683, 685 (1968) (prohibition); *Lippman v. Hunt*, 249 Mich. 86, 227 N.W. 668 (1929) (mandamus); *State exrel. Sisters of St. Mary v. Campbell*, 511 S.W.2d 141, 148-49 (Mo. App. 1974) (prohibition); *State v. ex rel. J.C. Penney Co., Inc. v. District Court*, 154 Mont. 481, 465 P.2d 824 (1970) (supervisory control); *Dzack v. Marshall*, 80 Nev. 345, 393 P.2d 610, 611-12 (1964) (mandamus); *Hill v. Graham*, 424 P.2d 35, 38 (Okla. 1967) (prohibition).

Generations of Justice: 1990 Law Day Theme

"Generations of Justice" is the theme for Law Day USA 1990.

The 1990 theme encourages Law Day program and event planners to focus their efforts on promoting the legal rights of children and the elderly. "Generations of Justice" also allows events planners to address the historical changes in the law and to help all generations of Americans to become better informed about the legal system.

State and local bar associations, libraries, community organizations, schools, churches, law enforcement agencies, service clubs, legal auxiliaries, and scouting organizations are among the many groups sponsoring Law Day USA programs and events. The events are numerous and varied ranging from no-cost legal consultations, mock trials conducted in schools, court ceremonies, poster and essay contests to television and radio call-in programs. Recent innovative programs have included coordination with sponsors of local campaigns against drunk driving, outreach programs to senior citizens, and community participation in dispute resolution programs.

The American Bar Association, as the national sponsor of Law Day USA, prepares a detailed planning guide to assist individuals and organizations conducting Law Day programs. In addition, the ABA makes available many reasonably priced promotional and educational informational materials ranging from buttons and balloons to leaflets, brochures, booklets, speech texts and mock trial scripts.

The purpose of Law Day USA, celebrated annually on May 1st, is to reserve a special day of celebration by the American people in appreciation of their liberties and to provide an occasion for rededication to the ideals of equality and justice under laws. Law Day USA was established by United States Presidential Proclamation in 1958 and reaffirmed by a joint resolution of Congress in 1961.

If you would like to learn more about Law Day USA and how you and your organization can participate, write for a FREE copy of the Law Day Planning Guide to Law Day USA, American Bar Association, 8th Floor, 750 North Lake Shore Drive, Chicago, IL 60611; or telephone 312/988-6134.

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✓ 2-26-90
sgm

February 23, 1990

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

Re: Reform of Tex. R. Civ. P. 166a

Dear Sir:

Cindy Malone of Judge Shannon's firm suggested I write to you concerning reform of Tex. R. Civ. P. 166a. As you probably know, my views on the current deficiencies of the summary judgment rule were published in the February edition of the Texas Bar Journal. Apparently, I have struck a nerve with other lawyers around the state, several of whom have written and agreed with me.

To provide additional support for my pleas for reform, enclosed herewith please find a copy of the draft of my article with the supporting legal authorities. These authorities were deleted at the request of the Bar Journal in order for the article to be published. They also provided authority for the problems I state in the article.

I sincerely hope the article sparks debate. Several lawyers, including Cindy and I believe reform is definitely needed in this area.

Sincerely,

EWERS & TOOTHAKER

Keith C. Livesay

KCL/sgm
Enclosure
cc: Cindy Malone (w/o enc.)

* BOARD CERTIFIED BY THE TEXAS STATE BOARD OF LEGAL SPECIALIZATION

SUMMARY JUDGMENT PRACTICE: A PLEA FOR REFORM

by: Keith C. Livesay*

A customer counterclaims against his water district for breach of good faith and fair dealing after the district shuts off his water when the customer's bill remains unpaid after four months, and no dispute exists as to the validity of the bill. A construction supplier sues the general contractor for payment after failing to give the proper statutory notices and also after the statute of limitations has run. Lawsuits expeditiously resolved by summary judgment? Unfortunately, these actual lawsuits were not.

The initial adoption of summary judgment practice in Texas was envisioned as a useful tool for both courts and litigants.[1/] But trial courts are (and increasingly so) reluctant to grant summary judgments, even in cases where it is clearly merited. The result is that summary judgments inhabit a vast procedural wasteland, scorned by litigants and courts alike. Obviously, it was not meant to be this way.

After the first version of Tex. R. Civ. P. 166-A[2/] was in force, commentators noted that summary judgments were seldom granted and those which were granted usually suffered mortally on appeal.[3/] Recognizing this problem, the Texas Supreme Court drastically revised Tex. R. Civ. P. 166-A in 1978 to encourage the granting of more summary judgments. First, the movant is no longer required to negate every conceivable issue of law and fact. Second, the non-movant can no longer play "hide the ball"; if he has reasons why summary judgment should not be granted, he must present them in a written response or forever hold his peace.[4/] Third, with new time

deadlines imposed, ambush responses to summary judgments were to have been abolished.[5/] But the results of such reform have been disappointing. Granted, summary judgments do not suffer as high a mortality rate on appeal as they once did. However, summary judgment cases still account for the highest percentage of reversals.[6/] Further (and what is difficult to empirically verify), there is a continued failure of trial courts to grant summary judgments when justified. The result is crowded court dockets, needless trials, waste of judicial resources, or settlements reached where cases should have been disposed of by take-nothing judgments.

What is the cause of this judicial reluctance? Judge Hittner of Houston, the recognized authority on summary judgment practice, has commented that it stems from the lack of effective appellate review.[7/] As noted previously, the granting of a motion for summary judgment is appealable and frequently reversed; denial of a summary judgment motion, however, is an interlocutory order which is not reviewable after a trial on the merits.[8/] So a trial court may feel inclined to deny a summary judgment motion because the decision is unreviewable.

Denial of a summary judgment should be reviewable.[9/] Other pretrial orders are reviewable after a trial on the merits, such as denial of a special appearance,[10/] denial of a motion to transfer venue,[11/] and various discovery orders, such as failure to require the production of discovery,[12/] or the granting or denial of sanctions.[13/] Why should the denial of a motion for summary judgment be treated differently?

If the Supreme Court and/or the Rules Committee is serious about docket management, Tex. R. Civ. P. 166a should be amended to permit review

of a denial of summary judgment. This would eliminate the implicit incentive which presently exists to perfunctorily deny summary judgment motions; if the trial judge knows a summary judgment denial will be reviewed, he will consider the matter more thoroughly and hopefully grant meritorious summary judgment motions more frequently. This will expedite the disposition of cases, freeing crowded dockets and permitting scant judicial resources to be spent on other matters.

Denial of summary judgment should also be reviewable by writ of mandamus. Currently, mandamus is not available because it has been held that the party has an adequate remedy by appellate review.[14/] But, there is no appeal of the summary judgment denial, so how can there be an adequate remedy? In addition, this ignores the increased expenses which result from improperly denied motions, such as costs of discovery, trial preparation, and trial (perhaps before a jury) which accompany the adverse verdict that leads to the appeal. Several other states permit interlocutory review of denials of motions for summary judgment by mandamus or other appellate writs.[15/] It should be noted that frivolous mandamus applications are not likely to congest the Courts of Appeal. Under the current appellate rules, a Court of Appeals does not even hear the mandamus application unless the court is initially convinced that the relator is entitled to the relief sought.[16/] Additionally, any lawyer who files such a frivolous request can be sanctioned under Tex. R. Civ. P. 13.

The Supreme Court and/or the Rules Committee should reform Tex. R. Civ. P. 166a to decrease reversals. First, despite the time limits contained in the rule, a non-movant commonly files its response on the day of or the day

before the hearing. Currently, the trial court has discretion to permit the late filing.[17/] While this discretion should continue, it should be subject to a standard similar to that of Tex. R. Civ. P. 166b concerning non-identified witnesses. A witness not identified in discovery can testify, but only if his proponent demonstrates good cause.[18/] Likewise, the non-movant should not have a late response considered unless good cause is shown to justify the late filing. Second, the confusion concerning late responses must be eliminated. Our Supreme Court has held that a late-filed response will not be considered on appeal unless an order appears of record permitting its filing.[19/] But some courts of appeal have moved away from this rule, requiring that the movant object to a late-filed response and obtain an order from the trial court demonstrating its exclusion.[20/] This should be resolved in the rule by requiring an order only when late filing is permitted, without need for objection by the movant.

A second area which needs reform is amendment of pleadings as a response to summary judgment motions. Scrupulous non-movants often amend their pleadings in response to a motion for summary judgment, typically adding causes of actions or filing counterclaims. The result is that the motion for summary judgment is denied as improper; unless movant's attorney is clairvoyant, his motion cannot address the new claims. Granting the motion renders it merely interlocutory or partial, or perhaps legally erroneous, because the summary judgment does not address the new claims.[21/] To add insult to injury, the time limits regarding pleading de facto do not exist in the summary judgment context. Normally, a party must obtain leave of court to amend its pleadings seven (7) days before

trial, and this includes seven (7) days before the summary judgment hearing.[22/] Unfortunately, the non-movant is free to amend its pleadings at any time, and it is the movant's burden to obtain a specific order excluding the amendment of pleadings.[23/] The solution is simple: filing of a motion for summary judgment should "freeze" the pleadings, i.e., the pleadings could only be amended upon obtaining leave of court. Further, leave of court could only be granted when good cause is demonstrated.

The U. S. Supreme Court has noted that under the federal rule, summary judgment is not considered a procedural shortcut but rather an intricate part of the rules, designed to obtain fast, just, and inexpensive relief.[24/] This view should be mirrored by Texas law. Summary judgments are not like flat soda, only to be consumed in cases of dire thirst. Rather, summary judgments constitute a crucial tool to be used by advocates and trial courts to perform their function expeditiously. But tragically, summary judgments fail to perform this function, being treated instead as procedural pariahs. Reform is needed. First, denial of a summary judgment must be reviewable, either on direct appeal after trial on the merits, or by mandamus. Second, late-filed responses should not be considered unless good cause is demonstrated to the court. Third, the filing of a summary judgment should "freeze" all pleadings, with amendment allowed only after demonstrating good cause. Only after such reforms are instituted will the summary judgment rule achieve its intended purpose.

Respectfully submitted,

Keith C. Livesay

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* Keith C. Livesay is a research attorney with the McAllen firm of Ewers & Toothaker, P.C., where he concentrates on state civil appellate matters. He is a cum laude graduate of Baylor School of Law where he was an Associate Editor of the Baylor Law Review and recipient of the Shank Irwin & Conant Law Review Award and the Clifton Cummings Scholarship. He formerly was employed as briefing attorney with the Fort Worth Court of Appeals. He is the author of several legal articles. The most recent on appealing summary judgments, was published by the Texas Bar Journal.

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1/ Stayton, Notes on Summary Judgment, 13 Tex. B. J. 445, 470, 474 (1950).

2/ The summary judgment rule was initially promulgated on October 12, 1949. It is now contained in Tex. R. Civ. P. 166a.

3/ Pittsford and Russell, Summary Judgments in Texas: A Selective Survey, 14 Hous. L. Rev. 854, 854-55 (1977). Schechan, Summary Judgment: Let the Movant Beware, 8 St. Mary's L.J. 253, 254 (1976); McDonald, The Effective Use of Summary Judgment, 15 SW. L.J. 365, 365-66 (1961).

4/ See generally, City of Houston v. Clear Creek Basin, 589 S.W.2d 671, 676-79 (1979).

5/ Formerly, the response only needed to be filed one day before the summary judgment hearing. Now they are required to be filed seven (7) days before the hearing. But see note 17 and accompanying text.

6/ Gellis, Reasons for Case Reversal in Texas: An Analysis, 16 St. Mary's L.J. 299, 301, 309 (1985).

7/ Judge Hittner has repeatedly made this observation in his Saturday Morning in Court Seminar. This observation was also made by Prof. McDonald over twenty-five (25) years ago. See, McDonald, supra, at 373.

8/ Novak v. Stevens, 596 S.W.2d 848 (Tex. 1980); Valencia v. Garza, 765 S.W.2d 893, 897 (Tex.App.--San Antonio 1989, no writ); Logan v. Grady, 482 S.W.2d 313, 322 (Tex.Civ.App.--Fort Worth 1972, no writ); Dyche v. Simmons, 264 S.W.2d 208, 214 (Tex.Civ. App.--Fort Worth 1954, writ ref'd n.r.e.).

9/ Because providing for interlocutory appeals of summary judgment denials would require substantial additions to the Texas rules, we are confining our suggestions to the procedural routes that currently exist. A separate article would be required to address interlocutory appeals.

10/ Tex. R. Civ. P. 120a(3); Carpenter Body Works, Inc. v. McCulley, 389 S.W.2d 331 (Tex.Civ.App.--Houston 1965, writ ref'd), cert. denied 382 U.S. 979, 86 S.Ct. 550, 15 L.Ed.2d 469 (1966).

11/ Tex. Civ. Prac. & Rem. Code Ann. §15.064 (Vernon 1986).

12/ Robinson v. Harkins & Co., 711 S.W. 619 (Tex. 1986).

13/ See, Street v. Second Court of Appeals, 716 S.W.2d 638, 639 (Tex. 1986); Larson v. H. E. Butt Grocery Co., 769 S.W.2d 694, 696-97 (Tex.App.--Corpus Christi 1989, no writ).

14/ See, Denny's Inc. v. Harris, 1988 W.L. 125244 (Tex.App.--Houston [14th Dist.] 1988, no writ) (not published); Ratcliff v. Dickson, 495 S.W.2d 35, 36 (Tex.Civ.App.--Houston [1st Dist.] 1973, no writ).

15/ See, Safeway Stores, Inc. v. Maricopa County Superior Court, 19 Ariz. App. 210, 505 P.2d 1383, 1385 (1973) (special action); Bank of America National Trust & Savings Ass'n v. Superior Court of San Diego County, 4 Cal. App. 3d, 84 Cal. Rptr. 421, 424 (1970) (mandamus); State v. Superior Court of San Mateo County, 263 Cal. App. 2d 396, 69 Cal. Rptr. 683, 685 (1968) (prohibition); Lippman v. Hunt, 249 Mich. 86, 227 N.W. 668 (1929) (mandamus); State ex rel. Sisters of St. Mary v. Campbell, 511 S.W.2d 141, 148-49 (Mo. App. 1974) (prohibition); State v. ex rel. J. C. Penney Co., Inc. v. District Court, 154 Mont. 481, 465 P.2d 824 (1970) (supervisory control); Dzack v. Marshall, 80 Nev. 345, 393, P.2d 610, 611-12 (1964) (mandamus); Hill v. Graham, 424 P.2d 35, 38 (Okla. 1967) (prohibition).

16/ Tex. R. App. P. 121(c).

17/ Tex. R. Civ. P. 166a(c); Mark v. Tomoco Equipment Co., 738 S.W.2d 710, 713 (Tex.App.--Houston [14th Dist.] 1987,

no writ); Whiteintl Corp. v. Justin Companies, 669 S.W.2d 875, 877 (Tex.App.--Fort Worth 1984, writ ref'd n.r.e.).

18/ Tex. R. Civ. P. 166b; see, Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

19/ INA of Texas v. Bryant, 686 S.W.2d 614, 615 (Tex. 1985).

20/ City of Coppell v. General Homes Corp., 763 S.W.2d 448, 452 (Tex.App.--Dallas 1988, writ denied).

21/ See, e.g., Wheeler v. Yettie Kersting Memorial Hospital, 761 S.W.2d 785, 786-87 (Tex.App.--Houston [1st Dist.] 1988, no writ); Golden Triangle Energy v. Wickes Lumber, 725 S.W.2d 439 (Tex.App.--Beaumont 1987, no writ); Tingley v. Northwest National Ins. Co., 712 S.W.2d 649 (Tex.App.--Austin 1986, no writ).

22/ Tex. R. Civ. P. 63; Energo International Corp. v. Modern Industrial Heating, Inc., 722 S.W.2d 149, 151 (Tex.App.--Dallas 1986, no writ).

23/ Goswami v. Metropolitan Savings & Loan Ass'n, 751 S.W.2d 487, 490 (Tex. 1988).

24/ Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986).

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njh
LHS

✓2-1-90

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711
(512) 463-1312

February 28, 1990

NJH
SCAC Subc
✓ Agenda
Thanks Elaine!

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

Dear Mr. Soules:

At Justice Hecht's suggestion I am forwarding to you some information on RICO litigation in state courts that was sent to us by a Dallas attorney. As you can glean from his letter to Judge Marshall, Mr. Pezzulli is concerned with avoiding potential problems for the state court system in handling RICO claims in light of procedural differences between the Texas and Federal rules.

I have spoken with Mr. Pezzulli and think I understand why he feels a statewide order is imperative, but do not share his opinion that immediate action is necessary. As a practical matter, creating more paper when no RICO problem yet exists seems premature. I am also unconvinced that a problem, if it develops, cannot be handled more effectively by local rules, on a county-by-county basis. As a procedural matter, I think certain differences between the Texas and Federal rules actually reduce the need for a statewide standing order. The use of special exceptions and summary judgments should be as effective in forcing parties to narrow issues and to weed out inappropriate claims in RICO cases as it is in other litigation. Further, although our Rule 13 does not impose the same duty on lawyers as does Federal Rule 11, Texas Rule 166 should allow a trial judge to keep enough effective control over any potentially complex racketeering case on an individual basis.

I have informed Mr. Pezzulli only that I have forwarded his suggestion to you. If I can be of further assistance, please let me know.

Sincerely,

Elana S. Einhorn
Briefing Attorney to
Justice Nathan L. Hecht

xc: Justice Nathan L. Hecht

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MICHAEL F. PEZZULLI
BOARD CERTIFIED CIVIL TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

FILE NUMBER

February 21, 1990

VIA TELECOPY

The Honorable Justice Nathan Hecht
Texas Supreme Court
Supreme Court Building, Room A301
Capitol Station
P.O. Box 12248
Austin, Texas 78711

Atten: Elana

Dear Elana:

Pursuant to our telephone conversation of today's date, I am enclosing herewith a copy of the letter I forwarded to Judge Marshall along with the enclosures that may be of some benefit to you.

Please let me know if I can do anything additional to assist the court in formulating a strategy for dealing with state court racketeering litigation.

Very truly yours,

Michael F. Pezzulli

MFP/ar
Enclosures

Ltr-Hecht

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Michael F. Pezzulli
Board Certified Civil Trial Law
Texas Board of Legal Specialization

File Number

February 20, 1990

VIA HAND DELIVERY

The Honorable John McClellan Marshall
District Judge
14th District Court
Dallas County Courthouse, 2nd Floor
600 Commerce Street
Dallas, Texas 75202

Re: RICO in State Courts

Dear Judge Marshall:

I am enclosing herewith a copy of the recent Supreme Court Opinion in Tafflin v. Levitt decided on January 22, 1990, wherein the United States Supreme Court held that state courts have concurrent jurisdiction over claims arising under The Racketeer Influenced Corrupt Organizations Act ("RICO"). In addition, I am enclosing herewith a copy of Judge Robert W. Porter's "ORDER REGARDING RICO CLAIM" issued by his court. I am also enclosing a copy of an article from the "Drug Enforcement Newsletter" of the National Association of Attorneys General ("NAAG") where I was interviewed regarding defensive strategies in a racketeering case. I enclose the interview only because it discusses several types of motions that can be filed with respect to a RICO case. I believe the courts should anticipate these various motions and defensive strategies once the RICO cases start being filed in state court.

The problem with RICO cases being filed in Texas state court surrounds the fact that we do not have a corresponding Rule 11 [1] nor do we have a corresponding

[1] Rule 11 provides in relevant part as follows: If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 12(b) [2]. Without these rules, the state courts neither have the capability of sanctioning the parties and the attorneys for improperly filing a RICO case, nor do they have the capability of dismissing the case as having been improvidently filed at the commencement of the litigation. Absent these procedural remedies, there is a distinct chance that the courts could become inundated with RICO litigation sans the ability to dispose of improperly filed matters.

I would suggest that the courts jointly promulgate a standing order regarding RICO claims in the format adopted by Judge Porter. Judge Porter's order is well considered and essentially puts the party advancing the RICO claim to the task of understanding, conceptualizing and determining whether he or she has a bonafide RICO claim immediately after or prior to the filing the action. In the NAAG Newsletter, there is an alternative standing RICO order that was promulgated by the Northern District of Ohio so that you may compare Judge Porter's order with the procedures employed in other jurisdictions.

I would think that the state court has the inherent power to issue the proposed order regarding RICO claims, particularly under Rule 166 dealing with pretrial procedures to the extent that the court may, in its discretion, direct the attorneys to appear before it for a conference to consider the simplification of the issues. The RICO case statement would tend to simplify the issues and may well be an appropriate tool for the court to consider under Rule 166. In the event the party fails to comply with the court's order, then the court has its inherent powers to deal with the direct disobedience of a court order as distinguished from the Rule 13 sanctions, if any.

I also recommend that the court impose a discovery schedule as it relates to the racketeering claim, streamlining the extent of discovery and within what time frames the discovery is to be permitted. This may also tend to streamline the case and make more efficient both the court's and the litigant's time.

I am willing to meet with the Dallas County District Judges to discuss these issues so that any interested party will be able to deal with the anticipated influx of state court actions involving the racketeering statutes in an orderly fashion. If we prepare now, we may be able to circumvent numerous potential problems in the future.

---

[2] Rule 12(b) provides in relevant part as follows: Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19.

I appreciate your taking the time to consider these suggestions and I look forward to working with you in anticipating and dealing with RICO in the state court.

Very truly yours,

Michael F. Pezzulli

MFP/ar
Enclosures

Ltr-Marshall

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA3-88-2161-F

ORDER REGARDING RICO CLAIM

In this action claims have been asserted under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961. Plaintiffs must file by August 25, 1989, a RICO case statement. This statement must include the facts the plaintiffs are relying upon to initiate this RICO complaint as a result of the "reasonable inquiry" required by Fed. R. Civ. P. 11. In particular, this statement shall be in a form which uses the numbers and letters as set forth below, and shall state in detail and with specificity the following information.

1. State whether the alleged unlawful conduct is in violation of 18 U.S.C. §§ 1962(a), (b), (c), and/or (d).

2. List each defendant and state the alleged misconduct and basis of liability of each defendant.

3. List other alleged wrongdoers and state the alleged misconduct of each.

4. List the alleged victims and state how each victim was allegedly injured.

5. Describe the pattern of racketeering activity alleged for each RICO claim. The description of the pattern of racketeering must include the following information:

   a. List the alleged predicate acts and the specific statutes which were allegedly violated;

b. Provide the dates of the predicate acts, the participants in the predicate acts, and a description of the facts surrounding the predicate acts;

c. If the RICO claim is based on the predicate offenses of wire fraud, mail fraud, or fraud in the sale of securities, the "circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). Identify the time, place and contents of the alleged misrepresentations, and the identity of persons to whom and by whom the alleged misrepresentations were made;

d. State whether there has been a criminal conviction for violation of the predicate acts;

e. State whether civil litigation has resulted in a judgment in regard to the predicate acts;

f. Describe how the predicate acts form a "pattern of racketeering activity"; and

g. State whether the alleged predicate acts relate to each other as part of a common plan. If so, describe in detail.

6. Describe in detail the alleged enterprise for each RICO claim. A description of the enterprise shall include the following information:

a. State the names of the individuals, partnerships, corporations, associations, or other legal entities, which allegedly constitute the enterprise;

b. Describe the structure, purpose, function and course of conduct of the enterprise;

c. State whether any defendants are employees, officers or directors of the alleged enterprise;

d. State whether any defendants are associated with the alleged enterprise;

e. State whether you are alleging that the defendants are individuals or entities separate from the alleged enterprise, or that the defendants are the enterprise itself, or members of the enterprise; and

f. If any defendants are alleged to be the enterprise itself, or members of the enterprise, explain whether such defendants are perpetrators, passive instruments, or victims of the alleged racketeering activity.

7. State and describe in detail whether you are alleging that the pattern of racketeering activity and the enterprise are separate or have merged into one entity.

8. Describe the alleged relationship between the activities of the enterprise and the pattern of racketeering activity. Discuss how the racketeering activity differs from the usual and daily activities of the enterprise, if at all.

9. Describe what benefits, if any, the alleged enterprise receives from the alleged pattern of racketeering.

10. Describe the effect of the activities of the enterprise on interstate or foreign commerce.

11. If the complaint alleges a violation of 18 U.S.C. § 1962(a), provide the following information:

a. State who received the income derived from the pattern of racketeering activity or through the collection of an unlawful debt; and

b. Describe the use or investment of such income.

12. If the complaint alleges a violation of 18 U.S.C. § 1962(b), describe in detail the acquisition or maintenance of any interest in or control of the alleged enterprise.

13. If the complaint alleges a violation of 18 U.S.C. § 1962(c), provide the following information:

    a. State who is employed by or associated with the enterprise; and

    b. State whether the same entity is both the liable "person" and the "enterprise" under § 1962(c).

14. If the complaint alleges a violation of 18 U.S.C. § 1962(d), describe in detail the alleged conspiracy.

15. Describe the alleged injury to business or property.

16. Describe the direct causal relationship between the alleged injury and the violation of the RICO statute.

17. List the damages sustained for which each defendant is allegedly liable.

18. Provide any additional information that might be helpful to the court in processing the RICO claim.

Copies of this RICO case statement must be served on opposing counsel. Failure to comply with this order will result in dismissal with prejudice without further notice from the court.

SO ORDERED this 8th day of August, 1989.

ROBERT W. PORTER
CHIEF JUDGE

1ST CASE of Level 1 printed in FULL format.

FRANCINE TAFFLIN, ET AL., PETITIONERS v. JEFFREY A. LEVITT ET AL.

No. 88-1650; The LEXIS pagination of this document is subject to change pending release of the final published version.

SUPREME COURT OF THE UNITED STATES

1990 U.S. LEXIS 568; 58 U.S.L.W. 3468; 58 U.S.L.W. 4157; Fed. Sec. L. Rep. (CCH) P94,880

Argued November 27, 1989

January 22, 1990

SYLLABUS:

[*1] Petitioners, nonresidents of Maryland who are holders of unpaid certificates of deposit issued by a failed Maryland savings and loan association, filed a civil action in the Federal District Court against respondents, former association officers and directors and others, alleging claims under, inter alia, the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. §§ 1961-1968. The court dismissed the action, concluding, among other things, that federal abstention was appropriate as to the civil RICO claims, which had been raised in pending litigation in state court, since state courts have concurrent jurisdiction over such claims. The Court of Appeals affirmed.

Held: State court have concurrent jurisdiction over civil RICO claims. The presumption in favor of such jurisdiction has not been rebutted by any of the factors identified in Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478. Pp. 3-12.

(a) As petitioners concede, there is nothing in RICO's explicit language to suggest that Congress has, by affirmative enactment, divested state courts of civil RICO jurisdiction. To the contrary, § 1964(c)'s grant of federal jurisdiction over civil RICO claims is plainly [*2] permissive and thus does not operate to oust state courts from concurrent jurisdiction. P. 5.

(b) RICO's legislative history reveals no evidence that Congress even considered the question of concurrent jurisdiction, much less any suggestion that Congress affirmative intended to confer exclusive jurisdiction over civil RICO claims on the federal courts. Petitioners' argument that, because Congress modeled § 1964(c) after § 4 of the Clayton Act -- which confers exclusive jurisdiction on the federal courts -- it intended, by implication, to grant exclusive federal jurisdiction over § 1964(c) claims is rejected. Sedima, S. P. R. L. v. Imrex Co., 473 U.S. 479, and Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, are distinguished, since those cases looked to the Clayton Act in interpreting RICO without the benefit of a background juridical presumption of the type presented here. Pp. 5-8.

(c) No "clear incompatibility" exists between state court jurisdiction and federal interests. The interest in uniform interpretation of federal criminal laws, see 18 U. S. C. § 3231, is not inconsistent with such jurisdiction merely state courts would be required to construe the federal crimes [*3] that

constitute RICO predicate acts. Section 1964(c) claims are not "offenses against the laws of the United States," § 3231, and do not result in the imposition of criminal sanctions. There is also no significant danger of inconsistent application of federal criminal law, since federal courts would not be bound by state court interpretations of predicate acts, since state courts would be guided by federal court interpretations of federal criminal law, and since any state court judgments misinterpreting federal criminal law would be subject to direct review by this Court. Moreover, state courts have the ability to handle the complexities of civil RICO actions. Many cases involve asserted violations of state law, over which state courts presumably have greater expertise, and it would seem anomalous to rule that they are incompetent to adjudicate civil RICO claims when such claims are subject to adjudication by U.S. 220, 239. Further, although the fact that RICO's procedural mechanisms are applicable only in federal court may tend to suggest that Congress intended exclusive federal jurisdiction, it does not by itself suffice to create a "clear incompatibility" with federal interests. [*4] And, to the extent that Congress intended RICO to serve broad remedial purposes, concurrent jurisdiction will advance rather than jeopardize federal policies underlying the statute. Pp. 8-12.

865 F. 2d 595, affirmed.

O'CONNOR, J., delivered the opinion for a unanimous Court. WHITE, J., filed a concurring opinion. SCALIA, J., filed a concurring opinion, in which KENNEDY, J., joined.

APPEAL-STATEMENT:
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JUDGES:
Rehnquist, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy

OPINIONBY: O'CONNOR

OPINION:
JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether state courts have concurrent jurisdiction over civil actions brought under the Racketeer Influenced and Corrupt Organizations Act (RICO), Pub. L. 91-452, Title IX, 84 Stat. 941, as amended, 18 U. S. C. §§ 1961-1968.

I

The underlying litigation arises from the failure of Old Court Savings & Loan, Inc. (Old Court), a Maryland savings and loan association, and the attendant collapse of the Maryland Savings-Share Insurance Corp. (MSSIC), a state-chartered nonprofit corporation created to insure accounts in Maryland savings and loan associations [*5] that were not federally insured. See Brandenburg v. Seidel, 859 F. 2d 1179, 1181-1183 (CA4 1988) (reviewing history of Maryland's savings and loan crisis). Petitioners are nonresidents of Maryland who hold unpaid certificates of deposit issued by Old Court. Respondents are the former officers and directors of Old Court, the former officers and directors

of MSSIC, the law firm of Old Court and MSSIC, the accounting firm of Old Court, and the State of Maryland Deposit Insurance Fund Corp., the state-created successor to MSSIC. Petitioners allege various state law causes of action as well as claims under the Securities Exchange Act of 1934 (Exchange Act), 48 Stat. 881, 15 U. S. C. § 78a et seq., and RICO.

The District Court granted respondents' motion to dismiss, concluding that petitioners had failed to state a claim under the Exchange Act and that, because state courts have concurrent jurisdiction over civil RICO claims, federal abstention was appropriate for the other causes of action because they had been raised in pending litigation in state court. The Court of Appeals for the Fourth Circuit affirmed. 865 F. 2d 595 (1989). The Court of Appeals agreed with the District Court that the [*6] Old Court certificates of deposit were not "securities" within the meaning of the Exchange Act, see 15 U. S. C. § 78c(a)(10), and that petitioners' Exchange Act claims were therefore properly dismissed. 865 F. 2d, at 598-599. The Court of Appeals further held, in reliance on its prior decision in Brandenburg v. Seidel, supra, that "a RICO action could be instituted in a state court and that Maryland's comprehensive scheme for the rehabilitation and liquidation of insolvent state-chartered savings and loan associations,' 859 F. 2d at 1191, provided a proper basis for the district court to abstain under the authority of Burford v. Sun Oil Co., 319 U.S. 315 (1943)." 865 F. 2d, at 600 (citations omitted).

To resolve a conflict among the federal appellate courts and state supreme courts, n1 we granted certiorari limited to the question whether state courts have concurrent jurisdiction over civil RICO claims. 490 U.S. (1989). We hold that they do and accordingly affirm the judgment of the Court of Appeals.

n1 Compare McCarter v. Mitcham, 883 F. 2d 196, 201 (CA3 1989) (concurrent jurisdiction); Brandenburg v. Seidel, 859 F. 2d 1179, 1193-1195 (CA4 1988) (same); Lou v. Belzberg, 834 F. 2d 730, 738-739 (CA9 1987) (same), cert. denied, 485 U.S. 993 (1988); Simpson Elec. Corp. v. Leucadia, Inc., 72 N. Y. 2d 450, 530 N. E. 2d 860 (1988) (same); Rice v. Janovich, 109 Wash. 2d 48, 742 P. 2d 1230 (1987) (same); Cianci v. Superior Court, 40 Cal. 3d 903, 710 P. 2d 375 (1985) (same); County of Cook v. MidCon Corp., 773 F. 2d 892, 905, n. 4 (CA7 1985) (dictum); Dubroff v. Dubroff, 833 F. 2d 557, 562 (CA5 1987) (civil RICO claims can "probably" be brought in state court,), with Chivas Products, Ltd. v. Owen, 864 F. 2d 1280, 1286 (CA6 1988) (exclusive jurisdiction); VanderWeyst v. First State Bank of Benson, 425 N. W. 2d 803, 812 (Minn.) (expressing "serious reservations" about assuming concurrent RICO jurisdiction), cert. denied, 488 U.S. (1988). See generally Note, 57 Ford, L. Rev. 271, 271, n. 9 (1988) (listing federal state courts in conflict); Note, 73 Cornell L. Rev. 1047, 1047, n. 5 (1988) (same); Note, 62 St. John's L. Rev. 301, 303, n. 7 (1988) (same).
[*7]

II

We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States. See, e. g., Houston v. Moore, 5 Wheat. 1, 25-26 (1820); Claflin v. Houseman, 93 U.S. 130, 136-137 (1876); Plaquemines

Tropical Fruit Co. v. Henderson, 170 U.S. 511, 517 (1898); Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507-508 (1962); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-478 (1981). As we noted in Claflin, "if exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it." 93 U.S., at 136; see also Dowd Box, supra, at 507-508 ("We start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law. Concurrent jurisdiction has been a common phenomenon in our judicial history, and [*8] exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule"). See generally 1 J. Kent, Commentaries on American Law *400; The Federalist No. 82 (A. Hamilton); F. Frankfurter & J. Landis, The Business of the Supreme Court 5-12 (1927); H. Friendly, Federal Jurisdiction: A General View 8-11 (1973).

This deeply rooted presumption in favor of concurrent state court jurisdiction is, of course, rebutted if Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim. See, e. g., Claflin, supra, at 137 ("Congress may, if it see[s] fit, give to the Federal courts exclusive jurisdiction") (citations omitted); see also Houston, supra, at 25-26. As we stated in Gulf Offshore:

"In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction. Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or [*9] by a clear incompatibility between state-court jurisdiction and federal interests." 453 U.S., at 478 (citations omitted).

See also Claflin, supra, at 136 (state courts have concurrent jurisdiction "where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case"). The parties agree that these principles, which have "remained unmodified through the years." Dowd Box, supra, at 508, provide the analytical framework for resolving this case.

III

The precise question presented, therefore, is whether state courts have been divested of jurisdiction to hear civil RICO claims "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." Gulf Offshore, supra, at 478. Because we find none of these factors present with respect to civil claims arising under RICO, we hold that state courts retain their presumptive authority to adjudicate such claims.

At the outset, petitioners concede that there is nothing in the language of RICO--much less an "explicit statutory directive"--to suggest that Congress has, by affirmative [*10] enactment, divested the state courts of jurisdiction to hear civil RICO claims. The statutory provision authorizing civil RICO claims provides in full:

"Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U. S. C. § 1964(c) (emphasis added).

This grant of federal jurisdiction is plainly permissive, not mandatory, for "[t]he statute does not state nor even suggest that such jurisdiction shall be exclusive. It provides that suits of the kind described 'may' be brought in the federal district courts, not that they must be." Dowd Box, supra, at 506. Indeed, "[i]t is black letter law . . . that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action." Gulf Offshore, supra, at 479 (citing United States v. Bank of New York & Trust Co., 296 U.S. 463, 479 (1936)).

Petitioners thus rely solely on the second and third factors suggested in Gulf Offshore, arguing that exclusive [*11] federal jurisdiction over civil RICO actions is established "by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests," 453 U.S., at 478.

Our review of the legislative history, however, reveals no evidence that Congress even considered the question of concurrent state court jurisdiction over RICO claims, much less any suggestion that Congress affirmatively intended to confer exclusive jurisdiction over such claims on the federal courts. As the Courts of Appeals that have considered the question have concluded, "[t]he legislative history contains no indication that Congress ever expressly considered the question of concurrent jurisdiction; indeed, as the principal draftsman of RICO has remarked, 'no one even thought of the issue.'" Brandenburg, 859 F. 2d, at 1193 (quoting Flaherty, Two States Lay Claim to RICO, Nat. L. J., May 7, 1984, p. 10, col. 2); see also Lou v. Belzberg, 834 F. 2d 730, 736 (CA9 1987) ("The legislative history provides 'no evidence that Congress ever expressly considered the question of jurisdiction; indeed, the evidence establishes that its attention was focused solely on whether [*12] to provide a private right of action'") (citation omitted), cert. denied, 485 U.S. 993 (1988); Chivas Products Ltd. v. Owen, 864 F. 2d 1280, 1283 (CA6 1988) ("There is no 'smoking gun' legislative history in which RICO sponsors indicated an express intention to commit civil RICO to the federal courts"). Petitioners nonetheless insist that if Congress had considered the issue, it would have granted federal courts exclusive jurisdiction over civil RICO claims. This argument, however, is misplaced, for even if we could reliably discern what Congress' intent might have been had it considered the question, we are not at liberty to so speculate; the fact that Congress did not even consider the issue readily disposes of any argument that Congress unmistakably intended to divest state courts of concurrent jurisdiction.

Sensing this void in the legislative history, petitioners rely, in the alternative, on our decisions in Sedima, S. P. R. L. v. Imrex Co., 473 U.S. 479 (1985), and Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143 (1987), in which we noted that Congress modeled § 1964(c) after § 4 of the Clayton Act, 15 U. S. C. § 15(a). See Sedima, supra, at 489; Agency Holding, supra, [*13] at 151-152. Petitioners assert that, because we have interpreted § 4 of the Clayton Act to confer exclusive jurisdiction on the federal courts, see, e g., General Investment Co. v. Lake Shore & M. S. R. Co., 260 U.S. 261, 286-288

(1922), and because Congress may be presumed to have been aware of and incorporated those interpretations when it used similar language in RICO, cf. Cannon v. University of Chicago, 441 U.S. 677, 694-699 (1979), Congress intended, by implication, to grant exclusive federal jurisdiction over claims arising under § 1964(c).

This argument is also flawed. To rebut the presumption of concurrent jurisdiction, the question is not whether any intent at all may be divined from legislative silence on the issue, but whether Congress in its deliberations may be said to have affirmatively or unmistakably intended jurisdiction to be exclusively federal. In the instant case, the lack of any indication in RICO's legislative history that Congress either considered or assumed that the importing of remedial language from the Clayton Act into RICO had any jurisdictional implications is dispositive. The "mere borrowing of statutory language does not imply that Congress also intended [*14] to incorporate all of the baggage that may be attached to the borrowed language." Lou, supra, at 737. Indeed, to the extent we impute to Congress knowledge of our Clayton Act precedents, it makes no less sense to impute to Congress knowledge of Clafin and Dowd Box, under which Congress, had it sought to confer exclusive jurisdiction over civil RICO claims, would have had every incentive to do so expressly.

Sedima and Agency Holding are not to the contrary. Although we observe in Sedima that "[t]he clearest current in [the legislative] history [of § 1964(c)] is the reliance on the Clayton Act model," 473 U.S., at 489, that statement was made in the context of noting the distinction between "private and governmental actions" under the Clayton Act. Ibid. We intimated nothing as to whether Congress' reliance on the Clayton Act implied any intention to establish exclusive federal jurisdiction for civil RICO claims, and in Sedima itself we rejected any requirement of proving "racketeering injury," noting that to borrow the "antitrust injury" requirement from antitrust law would "creat[e] exactly the problems Congress sought to avoid." Id., at 498-499. Likewise, in Agency Holding we were [*15] concerned with "borrowing," in light of legislative silence on the issue, an appropriate statute of limitations period from an "analogous" statute. 483 U.S., at 146. Under such circumstances, we found it appropriate to borrow the statute of limitations from the Clayton Act. Id., at 152. In this case, by contrast, where the issue is whether jurisdiction is exclusive or concurrent, we are not free to add content to a statute via analogies to other statutes unless the legislature has specifically endorsed such action. Under Gulf Offshore, legislative silence counsels, if not compels, us to enforce the presumption of concurrent jurisdiction. In short, in both Sedima and Agency Holding we looked to the Clayton Act in interpreting RICO without the benefit of a background juridical presumption of the type present in this case. Thus, to whatever extent the Clayton Act analogy may be relevant to our interpretation of RICO generally, it has no place in our inquiry into the jurisdiction of the state courts.

Petitioners finally urge that state court jurisdiction over civil RICO claims would be clearly incompatible with federal interests. We noted in Gulf Offshore that factors indicating clear [*16] incompatibility "include the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims." 453 U.S., at 483-484 (citation and footnote omitted). Petitioners' primary contention is that concurrent jurisdiction is clearly incompatible with the federal interest in uniform interpretation of federal criminal laws, see 18

U. S. C. § 3231, n2 because state courts would be required to construe the federal crimes that constitute predicate acts defined as "racketeering activity," see 18 U. S. C. §§ 1961(1)(B), (C), and (D). Petitioners predict that if state courts are permitted to interpret federal criminal statutes, they will create a body of precedent relating to those statutes and that the federal courts will consequently lose control over the orderly and uniform development of federal criminal law.

n2 Title 18 U. S. C. § 3231 provides in full:

"The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

"Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof." [*17]

We perceive no "clear incompatibility" between the state court jurisdiction over civil RICO actions and federal interests. As a preliminary matter, concurrent jurisdiction over § 1964(c) suits is clearly not incompatible with § 3231 itself, for civil RICO claims are not "offenses against the laws of the United States," § 3231, and do not result in the imposition of criminal sanctions--uniform or otherwise. See Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 240-241 (1987) (civil RICO intended to be primarily remedial rather than punitive).

More to the point, however, our decision today creates no significant danger of inconsistent application of federal criminal law. Although petitioners' concern with the need for uniformity and consistency of federal criminal law is well-taken, see Ableman v. Booth, 62 U.S. 506, 517-518 (1859); cf. Musser v. Utah, 333 U.S. 95, 97 (1948) (vague criminal statutes may violate the Due Process Clause), federal courts, pursuant to § 3231, would retain full authority and responsibility for the interpretation and application of federal criminal laws, for they would not be bound by state court interpretations of the federal offenses constituting [*18] RICO's predicate acts. State courts adjudicating civil RICO claims will, in addition, be guided by federal court interpretations of the relevant federal criminal statutes, just as federal courts sitting in diversity are guided by state court interpretations of state law, see, e. g., Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967). State court judgments misinterpreting federal criminal law would, of course, also be subject to direct review by this Court. Thus, we think that state court adjudication of civil RICO actions will, in practice, have at most a negligible effect on the uniform interpretation and application of federal criminal law, cf. Pan-American Petroleum Corp. v. Superior Court of Delaware, Newcastle County, 366 U.S. 656, 665-666 (1961) (rejecting claim that uniform interpretation of the Natural Gas Act will be jeopardized by concurrent jurisdiction), and will not, in any event, result in any more inconsistency than that which a multi-membered, multi-tiered federal judicial system already creates, cf. H. J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. ---, ---, n. 2 (1989) (surveying conflict among federal appellate courts over RICO's "pattern of racketeering [*19] activity" requirement).

Moreover, contrary to petitioners' fears, we have full faith in the ability of state courts to handle the complexities of civil RICO actions, particularly

since many RICO cases involve asserted violations of state law, such as state fraud claims, over which state courts presumably have greater expertise. See 18 U. S. C. § 1961(1)(A) (listing state law offenses constituting predicate acts); Gulf Offshore, 453 U.S., at 484 ("State judges have greater expertise in applying" laws "whose governing rules are borrowed from state law"); see also Sedima, 473 U.S., at 499 (RICO "has become a tool for everyday fraud cases"); BNA, Civil RICO Report, Vol. 2, No. 44, p. 7 (Apr. 14, 1987) (54.9% of all RICO cases after Sedima involved "common law fraud" and another 18.0% involved either "nonsecurities fraud" or "theft or conversion"). To hold otherwise would not only denigrate the respect accorded co-equal sovereigns, but would also ignore our "consistent history of hospitable acceptance of concurrent jurisdiction," Dowd Box, 368 U.S., at 508. Indeed, it would seem anomalous to rule that state courts are incompetent to adjudicate civil RICO suits when we have recently found [*20] no inconsistency in subjecting civil RICO claims to adjudication by arbitration. See Shearson/American Express, 482 U.S., at 239 (rejecting argument that "RICO claims are too complex to be subject to arbitration" and that "there is an irreconcilable conflict between arbitration and RICO's underlying purposes").

Petitioners further note, as evidence of incompatibility, that RICO's procedural mechanisms include extended venue and service-of-process provisions that are applicable only in federal court, see 18 U. S. C. § 1965. We think it sufficient, however, to observe that we have previously found concurrent state court jurisdiction even where federal law provided for special procedural mechanisms similar to those found in RICO. See, e. g., Dowd Box, supra (finding concurrent jurisdiction over Labor Management Relations Act § 301(a) suits, despite federal enforcement and venue provisions); Maine v. Thiboutot, 448 U.S 1, 3, n. 1 (1980) finding concurrent jurisdiction over 42 U. S. C. § 1983 suits, despite federal procedural provisions in § 1988); cf. Mathorn v. Lovorn, 457 U.S. 255, 269 (1982) (finding concurrent jurisdiction over disputes regarding the applicability of § 5 of the Voting [*21] Rights Act of 1965, 42 U. S. C. § 1973c, despite provision for a three-judge panel). Although congressional specification of procedural mechanisms applicable only in federal court may tend to suggest that Congress intended exclusive federal jurisdiction, it does not by itself suffice to create a "clear incompatibility" with federal interests.

Finally, we note that, far from disabling or frustrating federal interests, "[p]ermitting state courts to entertain federal causes of action facilitates the enforcement of federal rights." Gulf Offshore, 453 U.S., at 478, n. 4; see also Dowd Box, supra, at 514 (conflicts deriving from concurrent jurisdiction are "not necessarily unhealthy"). Thus, to the extent that Congress intended RICO to serve broad remedial purposes, see, e. g., Pub. L. 91-452, § 904(a), 84 Stat. 947 (RICO must "be liberally construed to effectuate its remedial purposes"); Sedima, 473 U.S., at 492, n. 10 ("[I]f Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident"), concurrent state court jurisdiction over civil RICO claims will advance rather than jeopardize federal policies underlying the statute. [*22]

For all of the above reasons, we hold that state courts have concurrent jurisdiction to consider civil claims arising under RICO. Nothing in the language, structure, legislative history, or underlying policies of RICO suggests that Congress intended otherwise. The judgment of the Courts of Appeals is accordingly Affirmed.

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CONCURBY: WHITE; SCALIA

CONCUR:

JUSTICE WHITE, concurring,

I agree that state courts have concurrent jurisdiction over civil RICO actions and join the opinion and judgment of the Court. I add a few words only because this Court has rarely considered contentions that civil actions based on federal criminal statutes must be heard by the federal courts. As the Court observes ante, at , the uniform construction of federal criminal statutes is no insignificant matter, particularly because Congress has recognized potential dangers in disuniform construction and has confined jurisdiction over federal criminal cases to the federal courts. There is, therefore, reason for caution before concluding that state courts have jurisdiction over civil claims related to federal criminal statutes and for assessing in each case the danger to federal interests presented by potential inconsistent [*23] constructions of federal criminal statutes.

RICO is an unusual federal criminal statute. It borrows heavily from state law; racketeering activity is defined in terms of numerous offenses chargeable under state law, 18 U. S. C. § 1961(1)(A), as well as various federal offenses. To the extent that there is any danger under RICO of disuniform construction of criminal statutes, it is quite likely that the damage will result from federal misunderstanding of the content of state law--a problem, to be sure, but not one to be solved by exclusive federal jurisdiction. Many of the federal offenses named as racketeering activity under RICO have close, though perhaps not exact, state law analogues, cf. Durland v. United States, 161 U.S. 306, 312 (1896), which construed the federal mail fraud statute, and it is unlikely that the state courts will be incompetent to construe those federal statutes. Nor does incorrect state court construction of those statutes present as significant a threat to federal interests as that posed by improper interpretation of the federal antitrust laws, which could have a disastrous effect on interstate commerce, a particular concern of the federal government. Racketeering [*24] activity as defined by RICO includes other federal offenses without state law analogues, but given the history as written until now of civil RICO litigation, I doubt that state court construction of these offenses will be greatly disruptive of important federal interests.

There is also the possibility that the state courts will disrupt the uniform construction of criminal RICO by launching new interpretations of the "pattern" and "enterprise" elements of the offense when hearing civil RICO suits. This possibility, though not insubstantial, cf. H. J., Inc. v. Northwestern Bell Telephone Co., U.S. (1989), is not enough to require exclusive federal jurisdiction of civil RICO claims. Even though varying interpretations of the "pattern" and "enterprise" elements of RICO may drastically change the consequences that flow from particular acts, these variations cannot make an act criminal in one court system but blameless in another and therefore do not implicate the core due process concerns identified by the Court ante, at , as underlying the need for uniform construction of criminal statutes. Moreover, we have the authority to reduce the risk of, and to set aside, [*25] incorrect interpretations of these elements of RICO liability.

JUSTICE SCALIA, with whom JUSTICE KENNEDY joins, concurring.

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I join the opinion of the Court, addressing the issues before us on the basis argued by the parties, which has included acceptance of the dictum in Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981), that "the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." Ante, at 4. Such dicta, when repeatedly used as the point of departure for analysis, have a regrettable tendency to acquire the practical status of legal rules. I write separately, before this one has become too entrenched, to note my view that in one respect it is not a correct statement of the law, and in another respect it may not be.

State courts have jurisdiction over federal causes of action not because it is "conferred" upon them by the Congress; nor even because their inherent powers permit them to entertain transitory causes of action arising under the laws of foreign sovereigns, see, e. g., McKenna v. Fisk, [*26] 1 How. 241, 247-249 (1843); but because "[t]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other . . . ." Claflin v. Houseman, 93 U.S. 130, 136-137 (1876); see also Minneapolis & St. Louis R. Co. v. Bombolis, 241 U.S. 211, 221-223 (1916).

It therefore takes an affirmative act of power under the Supremacy Clause to oust the States of jurisdiction--an exercise of what one of our earliest cases referred to as "the power of congress to withdraw" federal claims from state-court jurisdiction. Houston v. Moore, 5 Wheat. 1, 26 (1820) (emphasis added). See also Bombolis, supra, at 221 (concurrent jurisdiction exists "unless excepted by express constitutional limitation or by valid legislation"); Missouri ex rel. St. Louis, B. & M. R. Co. v. Taylor, 266 U.S. 200, 208 (1924) ("As [Congress] made no provision concerning the remedy, the federal and the state courts have concurrent jurisdiction").

As an original proposition, it [*27] would be eminently arguable that depriving state courts of their sovereign authority to adjudicate the law of the land must be done, if not with the utmost clarity, cf. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 243 (1985) (state sovereign immunity can be eliminated only by "clear statement"), at least expressly. That was the view of Alexander Hamilton:

"When . . . we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited." The Federalist No. 82, p. 132 (E. Bourne ed. 1947).

See also Galveston, H. & S. A. R. Co. v. Wallace, 223 U.S. 481, 490 (1912) ("[J]urisdiction is not defeated by implication"). Although as early as Claflin, see 93 U.S., at 137, and as late as Gulf Offshore, we have said that the exclusion of concurrent state jurisdiction could be achieved by implication, the only cases in which to my knowledge we have acted upon such a principle are those relating to the Sherman Act and the Clayton Act--where [*28] the full extent of our analysis was the less than compelling statement that provisions

giving the right to sue in the United States District Court "show that [the right] is to be exercised only in a 'court of the United States.'" General Investment Co. v. Lake Shore & Michigan Southern R. Co., 260 U.S. 261, 287 (1922) (emphasis added). See also Blumenstock Bros. Advertising Agency v. Curtis Publishing Co., 252 U.S. 436, 440 (1920) (dictum); Freeman v. Bee Machine Co., 319 U.S. 448, 451, n. 6 (1943) (dictum); Mathorn v. Lovorn, 457 U.S. 255, 267, n. 18 (1982) (dictum). In the standard fields of exclusive federal jurisdiction, the governing statutes specifically recite that suit may be brought "only" in federal court, Investment Company Act of 1940, as amended, 84 Stat. 1429, 15 U. S. C. § 80a-35(b) (5); that the jurisdiction of federal courts shall be "exclusive," Securities Exchange Act of 1934, as amended, 48 Stat. 902, 15 U. S. C. § 78aa; Natural Gas Act of 1938, 52 Stat. 833, 15 U. S. C. § 717u; Employee Retirement Income Security Act of 1974, 88 Stat. 892, 29 U. S. C. § 1132(e)(1); or indeed even that the jurisdiction of the federal courts shall be "exclusive of the courts of the [*29] States," 18 U. S. C. § 3231 (criminal cases); 28 U. S. C. §§ 1333 (admiralty, maritime, and prize cases), 1334 (bankruptcy cases), 1338 (patent, plant variety protection, and copyright cases), 1351 (actions against consuls or vice consuls of foreign states), 1355 (actions for recovery or enforcement of fine, penalty, or forfeiture incurred under Act of Congress), 1356 (seizures on land or water not within admiralty and maritime jurisdiction).

Assuming, however, that exclusion by implication is possible, surely what is required is implication in the text of the statute, and not merely, as the second part of the Gulf Offshore dictum would permit, through "unmistakable implication from legislative history." 453 U.S., at 478. Although Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962) after concluding that the statute "does not state nor even suggest that [federal] jurisdiction shall be exclusive," id., at 506, proceeded quite unnecessarily to examine the legislative history, it did so to reinforce rather than contradict the conclusion it had already reached. We have never found state jurisdiction excluded by "unmistakable implication" from legislative history. It is perhaps harmless [*30] enough to say that it can be, since one can hardly imagine an "implication from legislative history" that is "unmistakable"--i. e., that demonstrates agreement to a proposition by a majority of both Houses and the President--unless the proposition is embodied in statutory text to which those parties have given assent. But harmless or not, it is simply wrong in principle to assert that Congress can effect this affirmative legislative act by simply talking about it with unmistakable clarity. What is needed to oust the States of jurisdiction is congressional action (i. e., a provision of law), not merely congressional discussion.

It is perhaps also true that implied preclusion can be established by the fact that a statute expressly mentions only federal courts, plus the fact that state-court jurisdiction would plainly disrupt the statutory scheme. That is conceivably what was meant by the third part of Gulf Offshore dictum, "clear incompatibility between state-court jurisdiction and federal interests." 453 U.S., at 478. If the phrase is interpreted more broadly than that, however--if it is taken to assert some power on the part of this Court to exclude state-court jurisdiction when systemic [*31] federal interests make in undesirable--it has absolutely no foundation in our precedent.

Gulf Offshore cited three cases to support its "incompatibility" formulation. The first was Dowd Box, supra, at 507-508, which contains nothing to support any "incompatibility" principle, except a quotation from the second case Gulf

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Offshore cited, Claflin. Indeed, in response to the argument that "[o]nly the federal judiciary . . . possesses both the familiarity with federal labor legislation and the monolithic judicial system necessary" to elaborate a coherent system of national labor laws, the Dowd Box opinion said: "Whatever the merits of this argument as a matter of policy, we find nothing to indicate that Congress adopted such a policy in enacting § 301." 368 U.S., at 507. The second case cited was Claflin, which said that concurrent jurisdiction exists "where it is not excluded by express provision or by incompatibility in its exercise arising from the nature of the particular case." 93 U.S., at 136. The subsequent discussion makes it entirely clear, however, that what the Court meant by "incompatibility in its exercise arising from the nature of the particular case" was that the particular [*32] statute at issue impliedly excluded state-court jurisdiction. "Congress," the Court said, "may, if it sees fit, give to the federal courts exclusive jurisdiction," which it does "sometimes . . . by express enactment and sometimes by implication." Id., at 137. The third case cited, Garner v. Teamsters, 346 U.S. 485 (1953), had nothing to do with state-court jurisdiction over a federal cause of action. It held that the National Labor Relations Act, whose express provision that the jurisdiction of the National Labor Relations Board shall be exclusive had already been held to prevent federal courts from assuming primary jurisdiction over labor disputes, see Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 48 (1938), prevented state courts as well.

In sum: As the Court holds, the RICO cause of action meets none of the three tests for exclusion of state-court jurisdiction recited in Gulf Offshore. Since that is so, the proposition that meeting any one of the tests would have sufficed is dictum here, as it was there. In my view meeting the second test is assuredly not enough, and meeting the third may not be.

State Civil Rico

Drug Enforcement Newsletter

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IN THIS ISSUE

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PROJECT NEWS

Washington, D.C. RICO Seminar

On October 23-25, the NAAG Civil RICO Project held a training seminar in Washington D.C. Approximately 40 individuals attended, including representatives of 18 jurisdictions. Following the seminar, a roundtable discussion took place at which the established demonstration sites in the Washington and Colorado Attorneys General offices and the recently selected new demonstration sites of the Attorneys General offices of Arizona and Oregon presented reports on the current status and future plans for their demonstration projects.

The conference began with a presentation by Mike Pezzulli, a private litigator who has both brought and defended numerous complex civil RICO actions. Many of the valuable pointers given to conference participants on anticipating defense strategies are contained in this issue's interview with Mr. Pezzulli, found on page 10.

Assistant Attorney General Cameron "Kip" Holmes of Arizona Attorney General Bob Corbin's office moderated two panel presentations, the first on managing seized and forfeited assets and the other on civil RICO practice and procedure. Mr. Holmes discussed Arizona's Forfeiture Support Project (FSP), which retains a private property

A DEFENSE PERSPECTIVE
INTERVIEW WITH MICHAEL F. PEZZULLI

Michael P. Pezzulli currently practices law in Dallas Texas. He is a faculty member of the National Institute for Trial Advocacy and previously served as faculty for the Advanced National Institute for Trial Advocacy.

Mr. Pezzulli has presented numerous lectures and publications including, "Pleading a RICO Case," "Civil RICO After Sedima", Southern Methodist University School of Law, January, 1986 and "Parallel Prosecution of Civil and Criminal Proceedings," "Troubled Lending Institution: A Sign of the Times", State Bar of Texas, September, 1988.

Mr. Pezzulli received his Bachelor Degree and Law degree from West Virginia University in 1973 and 1976, respectively . He clerked for the Honorable John A. Field Jr., Senior Circuit Judge, Unites States Court of Appeals for the Fourth Circuit.

Fred Smith former NAAG Civil RICO Project Director interviewed Michael at the recent NAAG Civil RICO conference. He provides pointers on anticipating defense strategies when handling a RICO action.

Smith: Before we start discussing the nuances of defending a RICO case, I want to first find out what you think of the statute?

Pezzulli: The RICO statute, if used properly, is an excellent tool both for Prosecutors and Plaintiff's counsel to deal with illegality in the market place. RICO has received bad press by reason of its use by individuals and companies who either do not understand the statute or seek to use its powers for anything they do not like about a particular transaction, be it a commercial or a personal injury transaction.

Smith: Let's assume you have just been retained by a RICO defendant, tell us generally what your initial approach is to the defense of this type of case?

Pezzulli: The first thing we do is create what I call a "Litigation Profile." This is where we start an analysis of the lawsuit and commence obtaining a basic understanding of the plaintiff's case. We outline our defensive strategies, both from a short and long term perspective. Incidentally, this same approach should be employed by the plaintiff throughout the litigation.

One essential element of the litigation profile is an analysis of both the plaintiff and the defendant's agendas. It is imperative to understand both the stated or obvious agendas, and the hidden agendas of both parties to the litigation. From the defendant's standpoint, one critical agenda is the analysis by the defendant of any potential criminal exposure. From the very beginning of the litigation, any anticipated criminal exposure will probably dramatically affect the entire course of the litigation plan and generate a totally altered or modified litigation plan. This concern would certainly be ex-

exacerbated if the plaintiff was in the government. An integral part of our defense might well be to have as our top priority the delaying of the entire civil proceeding until such time as any potential criminal liability would be barred by the statute of limitations.

Smith: This seems totally inconsistent with the rapid and efficient administration of justice? Do you find any courts willing to go along with this delay tactic?

Pezzulli: Your question certainly poses one of the most often articulated arguments against staying the civil proceeding pending the resolution of the criminal or potential criminal case; however, numerous courts have found that the creation of the dilemma for a RICO defendant, whether he or she must elect between taking the 5th Amendment and forfeiting a potentially defensible position in litigation, or waiving the constitutionally afforded protection of the 5th Amendment and subjecting themselves to criminal prosecution, is unacceptable. For example, in *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084 (5th Cir. 1979), the court found it appropriate to stay the litigation pending the running of the criminal statute of limitations. Unfortunately for most defendants, the courts have generally been very reluctant to stay the proceeding pending the resolution of the potential criminal case.

Regardless of the way your particular judge may rule on the question, the plaintiff should be prepared to immediately seek to rebut any request to stay the litigation. The plaintiff's attorney should be well-versed in this area of the law and be prepared to respond without delay. Any requested continuance in responding to the motion to stay on the part of the plaintiff may be interpreted by the court or defending counsel as a thinly veiled attempt to orchestrate the plaintiff's prosecution of both the criminal and civil litigation, or even worse, the first chink in the plaintiff's armor. Do not let his happen to your case. You should not start your case by showing a weak hand.

Smith: Why don't you tell us a little more about the concern of the defense regarding parallel prosecution?

Pezzulli: Generally, the defendant in a civil RICO case will have a reasonably good idea whether or not he is a target, potential target or "subject" of a criminal investigation. Often, he or his associates or business partners will have either received a grand jury subpoena or he will have been paid a visit by a field agent. When the civil defense counsel reasonably knows or suspects that he may be forced to proceed with the defense of the civil litigation under circumstances where a criminal investigation has been instituted, he should seriously look at filing a motion to stay the civil case pending resolution of the criminal case. The courts have held for years that the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket. *Landis v. North American Company*, 299 U.S. 248, 254 (1936). The test used by the courts in deciding whether or not to grant a stay revolves around the saving of time and effort by the court, counsel and litigant, any hardship to either party and the expedition of the case on the court's calendar. This was the holding in *Clark v. Lutcher*, 77 F.R.D. 415 (M.D. Pa. 1977).

The Supreme Court's decision in *Landis*, as with the earlier cases on stays, appear to have been codified in Rule 26(c) of the Federal Rules of Civil Procedure, which provides, in relevant part, as follows:

"Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court."

As plaintiff's counsel, you need to concentrate on that portion of Rule 26(c) stating that the court may make such orders as justice requires. In the event that you cannot defeat the application for stay, you should at a minimum seek to have the court limit the stay to a short or reasonable period of time. Several courts have reversed stays where the stay was granted until thirty days after completion of all appellate remedies.

It is also important to understand the two primary reasons for a defendant seeking a stay are (1) that the civil discovery permits the government to make the privilege against self incrimination ineffectual and (2) the parallel prosecution circumvents any limits imposed on criminal discovery. It is also important to recognize that there is no rule barring parallel prosecution of separate civil and criminal actions by different federal agencies. Notwithstanding that, the courts at times have determined that the individual's constitutional rights are superior to the government's parallel prosecution. You should read *United States v. Kordel*, 397 U.S. 1 (1970) for an interesting insight into this area of the law.

Remember your distinctions between individuals and corporations when opposing a stay based upon the potential loss of one's privilege against self incrimination. Look at *Belles v. United States*, 417 U.S. 85 (1974) and *Afro-Lecon v. United States*, 820 F. 2d 1198 (1987) for a further discussion of this issue.

You should also be aware of the cases involving civil discovery initiated by the government. The rules here get fairly complex and I recommend reading the following cases: *Donaldson v. United States*, 400 U.S. 517 (1971); *United States v. LaSalle National Bank*, 437 U.S. 298 (1978); and *United States v. Henry*, 491 F. 2d 702 (6th Cir. 1974).

Finally, as the Plaintiff opposing the requested stay, you should remember that a stay is less likely to be granted where you are seeking injunctive relief or where you need to depose witnesses in order to preserve testimony. Just remember, it is a balancing test and you need to try and persuade the court that on balance, you should prevail.

Smith: Alright, where do you go next in setting up your defensive strategy?

Pezzulli: You go back to the litigation profile. By this time you should be setting up your defense timetable. Part of this timetable, which is an integral part of your litigation profile, should include a time line which goes back to the inception of the cause of action and progresses forward on a chronological basis until the present. With the time line you have the ability to analyze the lawsuit in the context of procedural defenses including any limitation or laches defenses. This can be particularly important when the predicate acts alleged by the plaintiff are security violations. Although you have a four year statute of limitations on the RICO violations, frequently, the plaintiff will often add a 1933 or 1934 Securities Act violation and you may be able to substantially limit the lawsuit by the use of your limitations defenses in knocking out the counts other than the RICO count.

The time line is invaluable from the context of understanding the transaction and putting it in perspective. Frequently, while an isolated transaction may at least facially appear to be bad, in the context of the entire transaction, it may be easily explainable. The time line also is very helpful in identifying relevant documents. As a defense counsel, I want to have every document in the possession of or under the control of my clients immediately. With the time line I have created through the debriefing of my client, I can quickly and intelligently organize the documents and identify those that are not subject to production as a result of some privilege or immunity.

The documents are also extremely important in evaluating the merits of your defense. It is our goal to have the time line, document organization and litigation profile at least in a preliminary stage, complete before an answer or preliminary motion is filed in the case. It would serve the plaintiff well to consider the same approach prior to filing the lawsuit.

Smith: All right, let's assume you have your litigation profile complete, what are your approaches to the litigation from the motion practice stage?

Pezzulli: Once we are finally required to respond to the complaint, there are a variety of motions available to the defendant. Some are universally available to defendants in all actions, and some are unique to the defense of a RICO complaint.

Smith: What are the motions you would consider unique to a RICO complaint?

Pezzulli: There are a series of motions beginning with a motion to require what several courts have named a "RICO case statement." This requirement is as much a weeding out process as it is anything else where the plaintiff is essentially required to disgorge the substance of the plaintiff's RICO complaint in excruciating detail. I've provided you with a sample RICO statement required by several Federal district courts.

(See box on following page)

"The plaintiff shall file, within twenty days hereof, a RICO case statement. This statement shall include the facts the plaintiff is relying upon to initiate this RICO complaint as a result of the "reasonable inquiry" required by Fed. R. Civ. P. 11. In particular, this statement shall be in a form which uses the numbers and letters as set forth below, and shall state in detail and with specificity the following information."

1. State whether the alleged unlawful conduct is in violation of 18 U.S.C. § § 1962(a), (b), (c), and/or (d).

2. List each defendant and state the alleged misconduct and basis of liability of each defendant.

3. List the alleged wrongdoers, other than the defendants listed above, and state the alleged misconduct of each wrongdoer.

4. List the alleged victims and state how each victim was allegedly injured.

5. Describe in detail the pattern of racketeering activity or collection of unlawful debts alleged for each RICO claim. A description of the pattern of racketeering shall include the following information:

a. List the alleged predicate acts and the specific statutes which were allegedly violated;

b. Provide the dates of the predicate acts, the participants in the predicate acts, and a description of the facts surrounding the predicate acts;

c. If the RICO claim is based on the predicate offenses of wire fraud, mail fraud, or fraud in the sale of securities, the "circumstances constituting fraud or mistake shall be stated in particularity." Fed. R. Civ. P. 9(b). Identify the time, place and contents of the alleged misrepresentations, and the identity of persons to whom and by whom the alleged misrepresentations were made;

d. State whether there has been a criminal conviction for violation of the predicate acts;

e. State whether civil litigation has resulted in a judgment in regard to the predicate acts;

f. Describe how the predicate acts form a "pattern of racketeering activity;" and

g. State whether the alleged predicate acts relate to each other as part of a common plan. If so, describe in detail.

6. Describe in detail the alleged enterprise for each RICO claim. A description of the enterprise shall include the following information:

a. State the names of the individual partnerships, corporations, associations, or other legal entities, which allegedly constitute the enterprise;

b. Describe the structure, purpose, function and course of conduct of the enterprise;

c. State whether any defendants are employees, officers or directors of the alleged enterprise;

d. State whether any defendants are associated with the alleged enterprise;

e. State whether you are alleging that the defendants are individuals or entities separate from the alleged enterprise, or that the defendants are the enterprise itself, or members of the enterprise; and

f. If any defendants are alleged to be the enterprise itself, or members of the enterprise, explain whether such defendants are perpetrators, passive instruments, or victims of the alleged racketeering activity.

7. State and describe in detail whether you are alleging that the pattern of racketeering activity and the enterprise are separate or have merged into one entity.

8. Describe the alleged relationship between the activities of the enterprise and the pattern of racketeering activity. Discuss how the racketeering activity differs from the usual and daily activities of the enterprise, if at all.

9. Describe what benefits, if any, the alleged enterprise receives from the alleged pattern of racketeering.

10. Describe the effect of the activities of the enterprise on interstate or foreign commerce.

11. If the complaint alleges a violation of 18 U.S.C. § 1962(a), provide the following information:

a. State who received the income derived from the pattern of racketeering activity or through the collection of an unlawful debt; and

b. Describe the use or investment of such income.

12. If the complaint alleges a violation of 18 U.S.C. § 1962(b), describe in detail the acquisition or maintenance of any interest in or control of the alleged enterprise.

13. If the complaint alleges a violation of 18 U.S.C. § 1962(c), provide the following information:

a. State who is employed by or associated with the enterprise.

b. State whether the same entity is both the liable "person" and the "enterprise" under § 1962(c).

14. If the complaint alleges a violation of 18 U.S.C. § 1962(d), describe in detail the alleged conspiracy.

15. Describe the alleged injury to business or property.

16. Describe the direct causal relationship between the alleged injury and the violation of the RICO statute.

17. List the damages sustained by reason of the violation of § 1962, indicating the amount for which each defendant is allegedly liable.

18. List all other federal causes of action, if any, and provide the relevant statute number.

19. List all pendent state claims, if any.

20. Provide any additional information on that you feel would be helpful to the Court in processing your RICO claim.

IT IS SO ORDERED.

Providing such a case statement separates the garden variety business tort from those transactions contemplated by the RICO statute. As you can see, if the plaintiff has not thought through the RICO complaint prior to filing, he may be forced to concede that the RICO aspect of the case is not well founded. If this happens, the plaintiff may well be subject to Rule 11 sanctions that could be of a substantial nature. Some district courts have even gone so far as to impose significant sanctions, say in the $50,000+ range, and then expressly order that the sanction not be passed on to the client, but rather is to be paid directly by the attorneys. I doubt that too many people want to file an expense request for a $50,000+ sanction.

In addition to the RICO case statement, one motion that is of substantial benefit to the defendant in a RICO case is that of a Motion to Stay Discovery pending a finding of the plaintiff's right to proceed under RICO. This is a motion that some courts are favorably considering. As a defendant, I would file such a motion requesting that the court put the entire case on hold until the plaintiff demonstrates, through a RICO case statement or a more detailed pleading, that they are even entitled to proceed forward on the RICO counts. If the particular court in which the suit is pending does not employ the RICO case statement approach, I might attach one from a sister court to my motion to stay or a motion for more definite statement.

If the defendant cannot obtain a complete stay of discovery pending a determination of the plaintiff's right to proceed under RICO, an alternative motion is to seek to limit discovery to the RICO issues only. Through this vehicle the defendant can seek to force the plaintiff to essentially reveal his entire RICO case at a time that discovery or other, perhaps equally or more important issues, are completely stayed.

Smith: Lets talk about some of the other motions not unique to a RICO case, that can be filed by the defendant in a RICO case.

Perzulli: There are several motions, not unique to a RICO case, that are very useful from a defense standpoint. If the plaintiff has pled his RICO case with conclusions or in vague terms, the entire case may be subject to dismissal. Rule 9(b) of the Federal Rules of Civil Procedure requires that all averments of fraud be stated with particularity. Generally, allegations that are made on "information and belief" are legally inadequate in a RICO case. Thus, Rule 9(b) is a vehicle used by the courts to dismiss RICO cases that are deficient in these respects. For example, in *Saine v. A.I.A., Inc.*, 582 F. Supp. 1299 (D. Colo. 1954), Judge Kaine held that to "meet the Rule 9(b) standard a claimant must identify the circumstances constituting the fraud. This in turn involves identification of the particular defendants with whom the plaintiff dealt; designation of the occasions on which the fraudulent statements were made, and by whom; and designation of what misstatements or half-truths were made and how." 582 F. Supp. at 1303.

Rule 12 of the Federal Rules of Civil Procedure also provides strong defenses to a RICO complaint.

Rule 12(b) provides as follows:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

"As a Defendant I want to knock the plaintiff off track. I want to divert the plaintiff from his goal of winning the lawsuit and we will use every tool legally available to do just that. The plaintiff that neglects to serve us with discovery first will find himself in he position of having to answer our discovery before he gets his answered."

As can be seen from even a casual reading of Rule 12, one has available a whole series of motions that can be filed through a full use of Rule 12. It is important to note that Rule 12 requires that motions raising any of the defenses contained in the Rule "be made before pleading if a further pleading is permitted." In other words, you must file the Rule 12 motion before you, as a defendant, file your answer and you must raise all of the Rule 12 issues in the same motion. You can file the Rule 12 motion along with the answer, but it is infrequent that a defendant would want to file an answer when one is not required.

If the plaintiff has complied with Rule 9(b) and framed his fraud allegations with particularity, then the plaintiff has essentially set up the first wave of requests for admissions. Under the federal rules, one must answer with particularity and so if the complaint is properly drafted, the defendant may be forced to make admissions in an answer that the defendant does not necessarily desire to admit, particularly in the early stages of the litigation. By the skillful use of Rule 12, not only may the defendant be able to obtain a dismissal of the plaintiff's case, but also he may be able to do so without even having made any untoward admissions.

Now, as an aside, when we are plaintiff in a RICO case we try and simultaneously file with the complaint our first set of interrogatories, requests for production of documents. As a plaintiff you want to come out of the gate with a hard charge. The rules permit the plaintiff to serve his discovery along with the compliant--why not make use of this tool? As a defendant I want to knock the plaintiff off track. I want to divert the plaintiff from his goal of winning the lawsuit and we will use every tool legally available to do just that. The plaintiff that neglects to serve us with discovery first will find himself in the position of having to answer our discovery before he gets his answered.

Now back to rule 12 and the various motions available to the defendant under this Rule. As a plaintiff, you have selected your forum. If I can, as a defendant, establish a colorable claim that your lawsuit is filed in the wrong jurisdiction, I will file my motion pursuant to Rule 12(b)(3) to dismiss as a result of improper venue. Alternatively, I will move to transfer venue pursuant to 12 U.S.C. § 1404 (a) which provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a action to any other district or division where it might have been district court may transfer any civil brought."

In addition, I will probably move to dismiss your lawsuit pursuant to Rule 12(b)(6) on the grounds that your RICO complaint has failed to state a claim upon which relief can be granted. Naturally, you would only file these motions if you had reasonable basis for the motion. However, I have seen few RICO complaints that cannot at least be attacked for failure to state a claim upon which relief can be granted. These are only a few of the motions that can be asserted pursuant to Rule 12. You should be alert to all of them.

Recognizing the hostility many courts have demonstrated toward RICO complaints, the plaintiff should be alert to any attempt by a defendant to convert his motion to dismiss to a Rule 56 motion for summary judgment. Rule 12 provides in relevant part that:

"If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in

Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Therefore, if the defendant attaches an affidavit or some extrinsic evidence to his motion to dismiss, the court may decide to convert the matter to a hearing on a motion for summary judgment and dispose of the claim on the merits. Look at what all of this does to a plaintiff. Assuming things have gone well for the defendant, he has limited the plaintiff to a discussion of the RICO issues, he may have obtained a stay of all discovery against the defendant and worst of all, he may have either obtained a dismissal or summary judgment against the plaintiff, all before the defendant ever even answered. A plaintiff asleep at the switch could well lose the lawsuit before he even starts.

Smith: Are there any other pointers you would give a plaintiff contemplating filing a civil RICO case?

Pezzulli: Yes, I'd recommend they read a recent case out of the Northern District of Texas, *Dondi Properties Corporation, et al. v. Commerce Savings and Loan Association, et al.*, 121 F.D. R. 284 (1988). While the suit involves a civil RICO complaint, this opinion comes out of motions filed in discovery disputes between the parties. The opinion is significant because it demonstrates the growing frustration of the judiciary in, as the court puts it, "refereeing abusive litigation tactics."

The *Dondi* court convened, en banc, to establish standards of litigation conduct to be followed in civil actions in their jurisdiction. The procedure itself was highly unusual, and the Court went so far as to require that the attorneys not charge their clients for the time and expenses incurred with respect to one of the motions for sanction. In short, the *Dondi* court is issuing a mandate: lawyers are to be nice to lawyers. And the courts simply aren't going to tolerate the kind of motion practice that wastes court resources and client money. You should be aware of the rules of conduct set forth in the *Dondi* case and use the case offensively where appropriate. ■

Excerpts from the remarks of Mike Pezzulli at the National Civil RICO/ Drug Enforcement Conference, April 1989.

ON MOTIONS

"Let's talk about some other motions in a RICO case that you can have, that we have filed. One of them is a motion to stay discovery pending a finding of the plaintiff's right to proceed under RICO. There are courts granting those motions. What that means is that this case is going to be phenomenally expensive, and there's probably going to be Rule 11 implications here. You move to stay everything until they can demonstrate to you that they have a basis to proceed under RICO. The courts find that attractive because they want to get rid of RICO cases, so you may find yourself stuck with a motion to stay pending proof that you have the right to go forward under RICO.

The next thing we will do is file what's called a motion to limit discovery to the RICO elements. That's a real cute motion because what happens there is you go into the judge and say: "Look Judge, this is a RICO case. It's the R word, and what we want you to do is tell them that they don't get any discovery until they have established, through discovery limited to the RICO inquiry, that they are entitled to proceed under RICO. That is a motion that some judges have found to be of interest and have granted.

The next motion is the motion to require a RICO statement. The Northern District of Ohio has a standing order and several courts in Georgia are requiring the plaintiff to lay out everything, and to basically expose the whole case. So look what I have done here at this point--I have set it up so that I don't have to answer. So long as I don't have to respond to your complaint, I've got you fighting the entire motion to transfer. I've got you fighting the motion for more definite statement, and the motion to dismiss for failure to state a claim. With all of those motions pending, the judge may begin to see my arguments as to why you don't have a legitimate RICO case. At the same time I'm saying to the judge, "Don't give them any discovery unless they can prove they've got some RICO claims", I'm asking you to disgorge your entire case. So the effect is that you must completely change the focus of your attack. So I've just shut your burners off and what you are doing is responding to motion after motion. I've done successfully what I've wanted to do, which is to disrupt the entire plaintiff's case."

ON COUNTERCLAIMS

"The next thing I'd do is decide whether or not I have a legitimate counterclaim. I love being in the position of a defendant that converts to a plaintiff. That would be very disruptive to your case, so be careful with those facts that are not issues that can generate a counterclaim. Ever have somebody file an application for injunctive relief to seize your budget under a forfeiture for alleged violations of RICO? That would be great, how would you like to try the case with no money?"

ON STAYING OFF THE DEFENSIVE

"At the same time you filed your complaint, you should have sent me a set of interrogatories and a request for admissions, and a request for production of documents. I strongly recommend you do that. When I file a civil RICO case, I am filing the first set of requests for admissions, interrogatories and a request for production to go with it. Usually you are talking about stacks that are three or four inches thick served on each defendant. That's the way you do it. If you haven't done that you may still assume that you are going to get it from me. If you have done it, I will send it all back to you. I will put you on the defensive. I will want to disrupt your ability to develop your case. You can't let that happen, or you will quickly lose sight of your goal, which is to put the case to trial."

ON PRELIMINARY INJUNCTION HEARINGS:

"Let me tell you about one of the greatest pitfalls and traps that I have encountered in RICO as well as the new litigation involving equitable remedies. As a defense counsel, I will look at the injunction not as an area to be completely feared. Frankly, in my set of agendas, winning the injunction is at the flat bottom of the list. I could care

less if I've won or lost that injunction. You know what I'm going to do with that injunction? First, I am going to seek discovery. I'm going to force you to disgorge your case in a mini-trial over that injunction. That may be my number one goal. My number two goal will be to take out the material elements of your case. My number three goal is going to be to limit or box your witnesses' testimony as rapidly as possible and I'm going to do that at the injunction hearing. Finally, but not necessarily, it may be to win the injunction. I may not even care. But what I am going to do is to not agree to that preliminary injunction in order to force you to put your witnesses on.

What do I do when I am the plaintiff seeking injunctive relief in a RICO case? Let me tell you how you neutralize some of those problems, and this is a wonderful tactic: when I go in, I've subpoenaed the defendant to appear prior to the hearing. I may not even bring a witness. You can't imagine how may times the defendant has shown up at an application for a preliminary injunction hearing and his attorney says "Where's your client?" because he intends to cross-examine my client; and I say, "Well, I am here representing my client and you don't need a client for this hearing." That is very disruptive to a defendant because he intended to cross-examine that witness, and that witness isn't there. The flip side to that is if you are going to the injunction, you ought to consider subpoenaing the witness for the defense that you intend to bounce upon the witness stand and chew up.

The second way to neutralize it involves the situation where you decide that you are going to call your witness to the witness stand, and think you are just going to call and put your witness up and go through a quick list of facts and pass the witness. What I do, again, as the defense attorney, is to make every effort to take apart that witness on the witness stand. I have spent hours preparing this cross-examination, and I have a specific agenda of what I want to get from this witness. So, if you haven't prepared your witness for that type of cross-examination, you may find yourself bounced out of the preliminary injunction stage because your witness just destroyed your case without you even knowing it.

Understand it--it's not like the deposition. The guy is up on the witness stand and you are cross-examining him. You object and the judge says "Overruled, answer the question." The guy is unprepared and he is answering a question before he has been prepared to answer that question. I have had lawyers take the witness stand in breach of contract cases admit that they breached the contract--and this is the plaintiff testifying for the defendant in the case at the TRO stage. This sort of thing happens simply because they were unprepared to testify. Don't let that happen to you, when you go into an injunction prepare as if it is going to be a trial. Don't let the other side get hold of your witness and turn them inside out."

ON THE INVESTIGATION

"Let me give you one other little tid-bit. If you think for one second you are the only person who has got an investigator, think again. Too many people never recognize that the defense has the ability to hire people like Kroll Associates, and if you think you are the only person in the world that has ever thought of a trash cover, you had better think again. That's a pretty depressing thought, isn't it?"

ON PLANNING

"One of the things we also do from the defense standpoint, is we analyze our opponents budgetary constraints. We make an analysis of how far we can go. I know how many forms you have to file before you get that airline ticket. I know how may forms you have to file to get approval to pay that court reporter. I am not saying I do that, I'm saying that you need to recognize that the defendants have the ability to do everything you do and they have the ability to sit there on a hundred thousand dollar retainer and not worry about the airline ticket. You are scrambling around not preparing the deposition trying to figure out how you are going to pay that ticket of yours. So you need to talk to your budgetary people and get that worked our in advance so that if there are circumstances that require quick funding you can get that done for you. And don't start thinking about where you are going to get the airline tickets the day before you go to deposition, because all that does is disrupt your ability to go right back to what I talked about in the beginning, which is to keep your focus on your lawsuit." ■

4543.001

LHS
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10-18-93
83

Court of Appeals
State of Texas
Sixth District

CHIEF JUSTICE
WILLIAM J. CORNELIUS

JUSTICES
CHARLES BLEIL
BEN Z. GRANT

CLERK
TIBBY THOMAS

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100 NORTH STATE LINE AVENUE #20
TEXARKANA, TEXAS 75501
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October 13, 1993

HHD -
Trap Sctt SubC
✓ Agenda
COAs Staff
J. Heath
fax ✓

Mr. Luther H. Soules
1500 Frost Bank Tower
100 W. Houston Street
San Antonio, TX 78205

Dear Luther:

Enclosed is a copy of a letter I sent earlier this week to Chief Justice Tom Phillips. I would appreciate your letting me know if there are any proposed changes to Rule 18a, as suggested in this letter.

Thank you for your assistance.

Very truly yours,

Charles Bleil

CB/djt

Enclosure

October 13, 1993

Chief Justice Tom Phillips
Texas Supreme Court
P.O. Box 12248
Austin, TX 78711

Re: Proposed Rule Changes

Dear Tom:

This is in response to your invitation to submit rules changes suggestions. Our court has two:

1. We would suggest that Texas Rule of Civil Procedure 18a be amended to allow the late filing of a motion to recuse if it is grounded on reasons not known or with due diligence knowable until after the time for filing a motion to recuse has passed. This would allow for a "good cause for late filing" exception in the trial courts, just as exists in the appellate courts currently (see TEX. R. APP. P. 15(a).

2. The second suggested change concerns Rule 166b. We believe that 166b should be amended so that when an expert witness is designated by a party to a suit, then any party ought to be allowed to call that witness to testify at trial.

I trust that you will put these suggestions in the appropriate hands. Thank you.

Warmest regards,

Charles Bleil

CB/djt

CHANGES PROPOSED BY LUKE SOULES:

RULE 166b. FORMS AND SCOPE OF DISCOVERY; PROTECTIVE ORDERS; SUPPLEMENTATION OF RESPONSES

1. **Forms and Notice of Discovery.**

a. Permissible forms of discovery are (a) oral or written depositions of any party or non-party, (b) written interrogatories to a party, (c) requests of a party for admission of facts and the genuineness or identity of documents or things, (d) requests and motions for production, examination, and copying of documents or other tangible materials, (e) requests and motions for entry upon and examination of real property and (f) motions for a mental or physical examination of a party or person under the legal control of a party.

b. All discovery requests, responses, and notices shall be served on all parties by methods provided in Rule 21a.

2. (No change)
3. (No change)
4. (No change)

5. **Protective Orders.** (No change)
   a. (No change)
   b. (No change)
   c. (No change)
   d. An application for an order by a deponent who is not a party, agent or employee of a party, or person subject to control of a party, may be made to the court in the district where the deposition is taken.

6. (No change)
7. (No change)

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1-26-93 hrd
CB

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
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July 23, 1993

HTD, SCAC agenda + Subc + COAJ Staff Ref

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

Dear Luke:

Enclosed is a letter I received from Wally Kronzer regarding Rule 166b.2.g.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

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THURMAN M. GUPTON
COUNSEL TO THE FIRM

July 21, 1993

The Honorable Nathan Hecht
Texas Supreme Court
Supreme Court Bldg.
P. O. Box 12248
Austin, Texas 78711

Re: Rule 166b.2.g. of the Texas Rules of Civil Procedure

Dear Justice Hecht,

Your involvement and concern with the Texas Rules of Civil Procedure are well known. Consequently, I write to you to question whether Rule 166b.2.g. of the Texas Rules of Civil Procedure contains a typographical error. The sentence containing the word at issue is:

> For the purpose of this paragraph, a statement previously made is (a) a written statement signed or otherwise adopted or approved by the person making it, ***and*** (b) a stenographic, mechanical, electrical or other type of recording, or any transcription thereof which is substantially verbatim recital of a statement made by the person and contemporaneously recorded. Tex. R. Civ. P. 166b.2.g. (emphasis added).

I find the use of the word "and" to be puzzling since the rules of grammatical construction would require a statement to be both (a) and (b) to fit within the definition of Rule 166b.2.g.

Frankly, I had never thought about this word usage until I recently reviewed Rule 56.01(b)(3) of the Missouri Rules of Civil Procedure. Missouri's Rule 56.01(b)(3) is virtually identical to our Rule 166b.2.g. However, the Missouri Rule uses "or" instead of "and" to combine the two phrases.

Assuming "and" is not a typographical error, it would be my suggestion that Rule 166b.2.g. be changed to use "or" to bridge the two phrases. The use of "or" would provide a

Please contact me if I can be of any help in the future to you or the Court. I appreciate your time and consideration in this matter.

Very truly yours,

WALTER J. KRONZER III
For the Firm

WJK/mjc

general\letters\hecht.sup

December 17, 1992

Mr. Robert C. Alden
McGinnis Lochridge & Kilgore
1300 Capitol Center
919 Congress Avenue
Austin TX 78701

Dear Mr. Alden:

Thank you for your letter regarding revisions to the Rules of Civil Procedure. I have sent a copy to the chairman of the Rules Advisory Committee with the request that your comments be considered fully in making additional revisions in the rules.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

c: Mr. Luther H. Soules III

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WRITER'S DIRECT DIAL NUMBER:
(512) 495-6071

December 8, 1992

The Honorable Justice Nathan Hecht
c/o The Supreme Court of Texas
P.O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

I am writing this letter, as you suggested, regarding two changes or clarifications to the Rules of Civil Procedure that we discussed at the recent Advanced Evidence and Discovery seminar. I would greatly appreciate the Court and the Rules Committee considering the following issues:

1. **Does the requirement of supplementation contained in Rule 166b apply to depositions?** During the recent seminar, three speakers took the position that depositions should be supplemented like all other discovery, although all three acknowledged that the rules were unclear and that there is little, if any, case law on point. But see Foster v. Cunningham, 825 S.W.2d 806 (Tex.App.--Fort Worth 1992).

I can think of forceful arguments both for and against supplementation of depositions. Because of the nature of depositions, in which numerous questions may be asked or not asked, I personally would lean towards not requiring supplementation. Such a requirement would become extremely burdensome when representing corporate parties where many employees or agents may be deposed, or in cases involving a significant number of experts. A requirement of supplementation would further increase the cost of litigation. Leaving my personal preferences aside, clarification in the rules in either direction would be of great benefit to the bar, and would eliminate one additional area of discovery disputes.

2. **May a party be asked in interrogatories to describe the facts known by a "person with knowledge of relevant facts"?** This issue seems to come up in every lawsuit, and no one has been able to give me a definitive answer. Again, arguments could be made both for and against allowing such discovery. I personally would not be in favor of a rule requiring disclosure to the same extent required for experts opinions, especially as to nonparty or

unrelated witnesses. However, a middle ground of permitting discovery of a witness's connection with the events or occurrences involved in the lawsuit would help parties discern the relative importance of potential witnesses. I would be in favor of such a clarification to the Rules.

I would hasten to add that although these issues come up quite frequently in my civil practice, and are often resolved by agreement, I am not involved in any lawsuits in which such issues are pending before any court. I offer these thoughts solely in the interests of increasing the efficiency of the judicial process and eliminating two areas of frequent dispute. Your consideration would be much appreciated by at least this member of the Bar.

Sincerely,

Robert C. Alden

Robert C. Alden

10/3/91 4543.001 LHS
WHd

W. JAMES KRONZER

Rules Changes

1900 MEMORIAL
HOUSTON, TEXAS 77007
(713) 236-1722

Luke Soules —

As I told you on the phone, Judge Russell Lloyd has devised a very workable basis to avoid judicial in camera inspections. Using 166b.5b.+c. he requires the respondent to bring all the documents to the Court, and then he cuts an order permitting 1 or 2 lawyers on the movants side to examine the materials under a stringent protective (permanent) order never to disclose anything there lawyers see to their client or co-counsel unless the state in writing under seal to the Court what they want. If the Court decides some of these materials are admissible or discoverable, it so orders. Before putting them out to the public, so that a mandamus will lie, they are reviewed as are any the lawyers desired there may be some media problems, but it works.

10/11

Xc Chuck Herring, for Discovery Task Force
Duncan for Rules Task Force
COAJ (Enlightenment)
J. Heckt
SCAC Agenda
SCAC Secy

J

Xc CWJK

4543.001

LHS hnd

9-23-91

9/19/91

91/24

HHD Scott Sul C TRCP 166b (Agenda) (10 pts (Realty))

W. JAMES KRONZER

Texas Rules

1900 MEMORIAL
HOUSTON, TEXAS 77007
(713) 236-1722

Hon. Nathan Hecht —

I would like to put some-thing in the Rules "hopper".

I believe we would be much better off if we return to the olden days wherein the only discovery was depositions and ex parte interrog.

When depos are taken it will be impermissible for the lawyer purporting to represent the deponent to object to any question except claimed privileges; and as to those, require those materials to be passed to the reporter for immediate sealing.

In Civil cases I see no reason to attorneys protect the deponent.

cc Luke Soules

Jim Kronzer

PLAYING BY THE RULES

Recent Amendments to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence Effective December 1, 1991

by John K. Chapin

On April 30, 1991, the Supreme Court transmitted to Congress a number of changes to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence. These changes are to take effect on December 1, 1991. Following is a discussion of the major changes. Other insubstantial changes were made to F.R.A.P. 6, 10, 26, and 26.1.

FEDERAL RULES OF CIVIL PROCEDURE

(TRCP 166b) *Authentication of Official Records—Rule 44(a)*

Rule 44(a)(1) is amended to replace its applicability to specific territories with a general reference to territories subject to the United States administrative or judicial jurisdiction. Rule 44(a)(2) is amended to provide that final certification by diplomatic officers of a foreign official record is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which the United States and the foreign country in which the record is located are parties.

X/c Nancy Task Force
Kittens
Supp Appendix 1666

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July 31, 1991

Mr. J. Ross Hostetter
Weiner & Hostetter
Attorneys and Counselors
8300 Douglas Avenue
Suite 800
Dallas, Texas 75225

RE: Cause No. 90-6985-C
Mickey Calvin
Vs
Cullum Companies
Your File No. 8300.154

Dear Mr. Hostetter:

I am sure you are a nice man. You probably meant no harm by your letter of July 30. However, I want you to know I have had a very difficult year. I am not intimidated by your July 30 letter nor will I be intimidated by a Judge. It is becomming more and more difficult to practice law with the silly rules we have to practice under, obviously written by people who never carried a trial docket. We have the State rules of procedure, we have the Federal rules of procedure, we have the individual courts' rules, we have demands now being made upon us by mediators.

One of the silliest things a lawyer has to do this day and time is go to a seminar on discovery. It is hard to sit there and think that you are looking at men over twenty-one years of age with two degrees talking about the silly, petty, discovery mess we are now involved in.

I trust you read the recent opinion in American Home Assurance Company vs Cooper, 786 SW2D 769, 774, where the Court stated:

> "But, this will all come to naught, because we will soon realize that at the present rate and cost of discovery, "trial by ambush" was not so bad after all."

I feel better. I hope you have a good day.

Very truly yours,

BURT BERRY

BB:bg
cc: Mr. James H. Holmes, III
Burford & Ryburn
Attorneys and Counselors
3131 Lincoln Plaza
500 North Akard
Dallas, Texas 75201
cc: Ms. Pat Robins
Court Coordinator
68th District Court
Dallas County Courthouse
Dallas, Texas 75202

4543.001 HHD UHS
6-19-91

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6/19
HHD
SCAC Sec'y 1666
Copies
Copies

June 12, 1991

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

Dear Luke:

Enclosed is a copy of a letter from Robert H. Martin, Jr. regarding the anticipated rules revisions.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

5: copy to - the Court
LHS

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orig to current valis files

June 5, 1991

Honorable Nathan L. Hecht
Justice, Supreme Court of Texas
Supreme Court Building
Austin, Texas 78711

Dear Justice Hecht:

Since comment had been invited with respect to the anticipated effort of the Court to make major revisions in the rules, I had intended to write you as the liaison member of the Court, with the request that you express the sentiments of this letter to other members of the Court engaged in the rule-making process. A recent article by Tommy Jacks stimulated my latent intentions and produced this letter.

Mr. Jacks' letter makes a good point. As a defendant, we had the experience he speaks of in securing a ruling that the plaintiff was barred from testifying at trial in a personal injury case. Needless to say, the case settled favorably for the defendant. However, I did not consider the result of the ruling with any great feeling of satisfaction. Without reiterating the arguments made in Mr. Jacks' open letter, I would agree that something needs to be changed with respect to Rule 166b.

The problem that I discern in trial practice today is considerably broader than the application of one of the rules of civil procedure. The problem relates to unbridled discovery, and I am not quite sure how to solve the abuse which I perceive. The scenario of a recent case, however, may be instructive. Discovery in the case stretched over a period of two-plus years; it was commenced by an extremely well-heeled plaintiff who had received a settlement in an earlier case, providing financing for the pursuit of the remaining defendants. A number of defendants fell out during the expensive proceedings, and some took bankruptcy. By the time the case was ready for trial the time and attorneys' fees for the three remaining defendants approached $1,000,000; the case can and will be tried for a total expenditure of lawyers' time of about $200,000. The discovery fee number does not include enormous travel expenses, hotel charges, document duplication and similar items producing a room full of paper. Many of the 200 depositions taken involve peripheral witnesses.

This phenomenon, where the cost of pre-trial preparation is so enormous as compared with the amount of time required to try the case and also is out of proportion to the amount involved, is not

peculiar to state courts or federal courts. The Federal Rules probably started the trend of unlimited discovery, and many of the courts have, by local or individual Judge rules, tried to limit discovery, as for example, a limit on the number of interrogatories. Nothing really seems to work, and with the incentive of billable hours imposed by many firms, and with the perception that no trial judge will make any effort to limit discovery either by hours or dollar amount, attorneys on both sides are inclined to proceed to include everybody from the CEO to the janitor in their deposition efforts.

If one lawyer is representing General Motors and the other lawyer is representing Mercedes Benz, perhaps it makes no difference. What we have done, however, is price not only the poor out of the range of legal services, but many people who are relatively well-to-do, whether plaintiff or defendant. The economic advantage of expensive discovery can belong either to the plaintiff or to the defendant, and it is used very deliberately as a weapon. The history of the federal jurisdictional amount is instructive. It used to be $3,000, it went to $10,000, it is now at $50,000; there is an amendment to the judicial code which apparently is being tried on a pilot basis in two or three federal districts, where the court can impose compulsory arbitration in fights over cases involving money only, where the amount does not exceed $100,000.

It is hard to envision a solution without major surgery, akin to what the federal courts have done. I would assume that the Supreme Court of Texas cannot take certain steps to improve the affordability of the judicial system without legislative action, and perhaps that is what it will eventually come down to. The only limitation on discovery that would be helpful would be a dollar type limitation, and so far as I know, that has not been undertaken by anyone. Also, it might produce an unmanageable administrative burden for the trial courts.

The only thing that crosses my mind that might be productive is the combination of a military law proceeding, Article 32, and mediation, which has caught on very well in the last few years,

In the military system, before a case goes to trial, beginning immediately after charges are filed, the trial counsel (prosecution) and defense counsel, get together under the direction of the Article 32 officer, in a proceeding where every witness and every allegation is discussed and some discovery is accomplished. The net result in the military is that a very high percentage of cases either go to the plea of guilty, or on the other hand, the charges are dismissed by the convening authority. A mandatory

mediation before any discovery is commenced might get the parties and the lawyers together early on for a dress rehearsal of the discovery. I have had one experience with mediation, which was highly successful, and the interesting thing was the fact that my plaintiff client came out with less money than we might have gotten on a jury trial, but I think he was completely satisfied that it was fair. He saw the other side's point of view.

Such a procedure would not be as drastic as the program I mentioned in the Federal courts where the trial judge can mandatorily require arbitration, but it might get results in cases of limited dollar amount, say $50,000 - $100,000.

It is my impression that the people engaged in the mediation process perhaps will not agree that early mediation is a good idea. They seem to operate on the theory that discover should be complete. If this is a necessary pre-requisite of mediation, then it will not help on the sizeable pre-trial discovery costs which burden the system.

There perhaps may be variations which would work. Perhaps the trial judge could have an early pre-trial session before any discovery, set some sort of a temporary limit on discovery, in relation to the amount involved, and then order a mandatory mediation after some lapse of time, say 90 days from filing.

These suggestions may sound somewhat fanciful, but I can assure you that litigation is too expensive for the relatively small claim; the drafters of the Federal compulsory arbitration experiment who set the number at $100,000, were probably about right. Below that number a lawsuit in the district court is ridiculous.

The ancillary benefits of some sort of compulsory early-on limitation of discovery and enforced mediation would be two-fold: speedier resolution of disputes and a faster disposition of cases by the trial courts of this State.

Something in the nature of what I have suggested may be an idea whose time has not yet come, but it seems to me it is reasonably close.

Sincerely,

Robert M. Martin, Jr.

RMM:vjp

THE SUPREME COURT OF TEXAS

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February 4, 1991

Mr. Luther H. Soules III
Soules and Wallace
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175 East Houston Street
San Antonio, TX 78205-2230

Dear Luke:

Enclosed is a letter from Judge Scott McCown in which he discusses the need for a state rule regarding the disclosure of grand jury testimony.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

345TH DISTRICT COURT
F. SCOTT McCOWN
JUDGE

TRAVIS COUNTY COURTHOUSE
P.O. BOX 1748
AUSTIN, TEXAS 78767
512-473-9374

January 29, 1991

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

The Honorable Michael J. McCormick
Presiding Judge, Texas Court of Criminal Appeals
P. O. Box 12308
Austin, Texas 78711

Re: Disclosure of Grand Jury Testimony

Dear Chief Justice Phillips and Presiding Judge McCormick:

A recent case brought to my attention the need for a state rule regarding the disclosure of grand jury testimony like Federal Rule of Criminal Procedure 6. A copy of my order discussing this problem is enclosed. If the courts cannot address this need by rule, perhaps we should seek legislation.

I hope you agree with me that we need a rule regarding when and how grand jury testimony is disclosed.

Very truly yours,

F. Scott McCown

F. SCOTT McCOWN
Judge, 345th District Court
Travis County, Texas

FSM/pc
cc: Counsel in Cause No. 475,134

COPY

NO. 475,134

THERESE HUNTZINGER,	;	IN THE DISTRICT COURT OF
VS.	;	
BEXAR COUNTY and FRED RODRIGUEZ, DANIEL E. MAESO, and JAMIE C. BOYD in their official and individual capacities.	;	TRAVIS COUNTY, T E X A S
	;	201ST JUDICIAL DISTRICT

ORDER

On the 18th day of December 1990 came on to be heard the San Antonio Light's First Amended Intervention and Motion to Compel Disclosure of Court Records. This request concerns grand jury testimony in an ongoing criminal case and raises difficult questions about new Texas Rule of Civil Procedure 76a.

I. Facts

This case arises out of Therese Huntsinger's termination as an assistant district attorney for Bexar County, Texas. As a result of her termination, Ms. Huntzinger has sued, among others, the then District Attorney of Bexar County. The case has been brought in Travis County pursuant to the special venue provisions of the Whistleblower's Act. Ms. Huntzinger claims her dismissal stems from her investigation of witness tampering allegations involving a prominent San Antonio lawyer, Jack Paul Leon, and a part-time Leon employee, Joe Navarro.

In 1989, Mr. Leon defended Tina Miranda, who was accussed of murdering her husband, Andrew Miranda. She was convicted. Leon and Navarro were subsequently indicted by a Bexar County grand jury for tampering with a crucial witness in the Miranda case.

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1991 JAN 30 AM 11:34
DISTRICT CLERK
TRAVIS COUNTY, TEXAS

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The charge against Leon was later dismissed by a district attorney pro tem for lack of evidence. Navarro was convicted and sentenced to prison. He is appealing his conviction.

Huntzinger claims she was fired for her persistence in investigating Leon, a political supporter of the District Attorney. Her investigation was conducted in conjunction with a grand jury. The grand jury's records are arguably relevant to establishing her persistence. As a matter of custom, after a grand jury's term expires, its records are kept by whatever attorney representing the state assisted the grand jury with its investigation. See Tex. Code Crim. Pro. Art. 20.03 & 20.05. In this instance, the grand jury's records were kept by the District Attorney because Ms. Huntzinger, then an assistant district attorney, assisted with the grand jury's investigation.

On July 2, 1990, the court, after considering plaintiff's motion to compel and defendants' motion for protective order, ordered that the District Attorney produce to plaintiff the following documents from the grand jury investigation:

1. 10/26/86 Grand Jury testimony of Pat Maloney, Jr.
2. 10/21/88 Grand Jury testimony of Joe Navarro.
3. 10/21/88 Grand Jury testimony of Connie Peña.
4. 10/21/88 Grand Jury testimony of Richard Lucio.
5. 10/21/88 Grand Jury testimony of Melissa Peña Lucio.
6. 08/10/89 Grand Jury testimony of Joe Navarro.
7. Notes regarding R. Lucio Grand Jury testimony.
8. Internal memorandum (no date).

9. Investigatory files (entitled):

a. Inquiries-status (Vitale) G.J. Navarro.

b. Subpoenaed bank records-Navarro.

c. Subpoenaed bank records-R. Lucio.

d. Subpoenaed personal file-Joe Navarro.

The court order provided that the documents would be used by counsel only for purposes of the lawsuit; only two copies would be made; and the copies in plaintiff's possession were to be shown only to counsel for plaintiff, plaintiff, or necessary witnesses. All copies were to be returned at the conclusion of the litigation. By its motion, the Light seeks access to these documents pursuant to Texas Rule of Civil Procedure 76a.

II. Applicability of Rule 76a

The court must first determine whether Rule 76a applies to this case. For three independent reasons, the court holds that it does not.

A. Grand Jury Records Are Not Court Records

Rule 76a only applies to "court records." The rule has a specific definition of court records. Court records are all documents filed in connection with a civil case with three exceptions. Grand jury records fall within exception (2): "documents in court files to which access is otherwise restricted by law." The law that otherwise restricts access to grand jury records is Article 20.02 of the Texas Code of Criminal Procedure. It provides that the "deliberations of the grand jury shall be kept secret."

Thus, by law, access to grand jury records is restricted. The courts have developed an exception to Article 20.02, but this exception is deliberate and narrow. A litigant must show some special reason or particularized need for the testimony. See Torres v. State, 493 S.W.2d 874, 875 (Tex. Crim App. 1973). Nothing about the history or terms of Rule 76a suggests that it was intended to expand this exception. Thus, Rule 76a does not apply to this case.

B. Rule 76a is Prospective Only

Furthermore, Rule 76a operates prospectively only. Section 9 provides (emphasis added):

> This rule applies to cases already pending on its effective date only with regard to:
>
> (a) all court records filed or exchanged after the effective date;
>
> (b) any motion to alter or vacate an order restricting access to court records, issued before the effective date.

Section 9 could admittedly be clearer, but properly understood it is a prospective provision. Subdivision (a) explicitly requires prospective application. By its terms it says Rule 76a applies only to "court records filed or exchanged after the effective date [September 1, 1990]."

The question is what subdivision (b) means. Under the Light's interpretation of the rule, Subdivision (b) authorizes it to intervene and move to vacate an earlier order, which motion must be decided under Rule 76(a). The court rejects this

construction of subdivision (b) because it makes subdivision (a) meaningless. Under standard principles of construction, both (a) and (b) are presumed to have logical, consistent, and independent meaning.

The only logical way to give consistent, independent meaning to both (a) and (b) is to recognize that the purpose of (b) is to prevent the court from altering or vacating pre-September 1 protective orders without engaging in the analysis required by Rule 76a. In other words, what is done is done, but if the court revisits what is done, it must do so pursuant to Rule 76a.

The Supreme Court undoubtedly realized that many pre-September 1 protective orders would of necessity be revisited because they governed both completed and future discovery. Production would have been made before September 1 and further production would be contemplated on or after September 1. Under subdivision (a), parties cannot protect documents filed or exchanged after the effective date of the rule merely by relying upon a protective order that predated the rule's enactment. Thus the Supreme Court promulgated subdivision (b) in contemplation of motions by the parties to alter or vacate existing protective orders. Subdivision (b) seeks to ensure that documents filed or exchanged after the effective date of the rule are protected only if the requirements of the rule have been met.

The Supreme Court did not contemplate non-party intervenors moving under subdivision (b) to vacate previous orders, thus triggering Rule 76a. The proof of this proposition is a

Catch-22. Rule 76a has no application to pre-September 1 protective orders unless application of the rule is triggered by subdivision (b). The Light needs authority to intervene and move for a pre-September 1 protective order to be vacated. But Rule 76a cannot be the authority for the Light's motion because the rule does not apply until there is a motion. Catch-22.

This Catch-22 proves the point. Rule 76a applies only if there is a motion. The Light must have some authority for its motion. Rule 76a cannot be the authority for the motion because it only applies if there is a motion. Obviously then subdivision (b) contemplates only motions by parties to reconsider orders, which is a prospective act. Thus, Rule 76a has no application in this case.

C. Retrospective Application Would Work an Injustice

If the court is reading Rule 76a incorrectly and by its terms it would be applied to this case, then the rule works an injustice and therefore does not apply. When the Supreme Court amends the rules of procedure and applies the amendment to pending cases there are often unforeseen results. Sometimes those results are unworkable or unjust. Thus, the Supreme Court has wisely invested in the trial courts the discretion to not apply a particular amendment on a case-by-case basis if its application would be infeasible or would be unjust.

Rule 814 provides this authority:

> These rules shall . . . govern all proceedings in actions brought after they take effect, and also all further proceedings in actions then pending, except

> to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure shall apply.

See Heid Bros. v. Smiley, 166 S.W.2d 181, 182 (Tex. Civ. App.--Texarkana 1942, writ ref'd w.o.m.).

Here the injustice is plain. The District Attorney objected to producing the grand jury testimony. The district attorney pro tem objected. The appealing criminal defendant objected. None sought a writ of mandamas, however, because they could abide production as long as there was a protective order. Thus, they relied upon the court's order of protection. The court would be acting unjustly to strip them of that protection now that their opportunity to seek a mandamus has passed. In these perhaps unique circumstances, Rule 76a should not be applied.

III. Jurisdictional Questions

As previously discussed, under Article 20.02 of the Texas Code of Criminal Procedure, the "deliberations of the grand jury shall be kept secret." In spite of this express statutory provision, courts have ordered grand jury testimony produced in limited circumstances in both criminal and civil cases. E.g., State ex rel. Hightower v. Smith, 671 S.W.2d 32 (Tex. 1984)(witness impeached by introduction of portions of grand jury testimony was entitled to introduce any portions tending to explain the apparent inconsistency): Euresti v. Valdez, 769 S.W.2d 575 (Tex. App.--Corpus Christi 1989, no writ)(plaintiff in malicious prosecution suit alleging defendant maliciously gave

false, misleading testimony to a grand jury and leaked information concerning testimony before a grand jury to media entitled to grand jury transcript); Smith v. State, 653 S.W.2d 835, 839 (Tex. App.--Corpus Christi 1982), rev'd on other grounds, (Tex. Crim. App. Sept. 14, 1988, not published)(production ordered when state used for cross examination).

But neither our rules or decisions provide much guidance for when and how grand jury records should be disclosed. The federal courts have a carefully crafted rule regarding disclosure of grand jury testimony. See Fed. R. Crim. P. 6(e)(3). We have nothing but a collection of ad hoc decisions based on special reasons or particularized need.

Among other problems, our courts have not thought through two serious jurisdictional questions raised by ordering disclosure of grand jury testimony. The Texas Supreme Court has authority to promulgate rules only in civil cases. Grand jury records are criminal records. If the Rules of Civil Procedure apply to disclosure of grand jury testimony, then the Supreme Court might be by rule interfering with the criminal jurisdiction of the courts. See Wood v. McCown, 784 S.W.2d 126, 127-29 (Tex. App.--Austin 1990, n.w.h.).

Equally troubling jurisdictionally is whether a district court in Travis County should be ordering the disclosure of grand jury testimony relevant to an on-going criminal case in Bexar County. Under federal procedure, a request for disclosure of

grand jury testimony must be filed in the district where the grand jury convened. The request may be transferred to the court in which the need for disclosure arises, but if it is transferred, the original court sends along its written evaluation of the need for secrecy. See Fed. R. Crim. P. 6(e)(3); In Re Grand Jury Proceedings, 841 F.2d 1264, 1269-72 (6th Cir. 1988). We have no such provisions in Texas.

The Texas Supreme Court and the Texas Court of Criminal Appeals, or perhaps the Legislature, need to address this issue of disclosing grand jury testimony. Without better guidance, this court hesitates to act.

IV. Request For Disclosure Denied Without Prejudice

Plaintiff and defendants have settled, or all but settled, this case. The parties have no need for further disclosure of the grand jury testimony to adjudicate this dispute. The Light claims a right to disclosure of the testimony. Beyond considering the application of Rule 76a, this court has not evaluated that right and does not rule upon it. If the Light is entitled to disclosure on some basis other than Rule 76a, it may seek disclosure from the district court in Bexar County. That court, not this court, is the proper forum to evaluate the Light's need and weigh it against the need of the district attorney pro tem and the appealing criminal defendant.

The Light's amended motion is DENIED.

Signed this 30th day of January, 1991.

F. Scott McCown

F. SCOTT McCOWN
Judge Presiding

4543.001

LHS
hhd

11-28-90
83

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TEXAS BOARD OF LEGAL SPECIALIZATION

WRITER'S DIRECT DIAL NUMBER:

November 27, 1990

HHD
see agenda
J. Hecht

Mr. Luther H. Soules III
Soules & Wallace
10th Floor
Republic of Texas Plaza
175 E. Houston Street
San Antonio, TX 78205-2230

Re: Tex.R.Civ.P--166b--Proposed Amendment

Dear Luke:

Enclosed is a letter I received from Richard E. Tulk. I will report on this letter at the next Rules Advisory Committee Meeting.

Very truly yours,

Steve McConnico

SMc:jdk

cc: Richard Tulk

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RICHARD E. TULK
BOARD CERTIFIED
PERSONAL INJURY TRIAL LAW
CIVIL TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION
WM. DAVID DEADERICK

November 14, 1990

Mr. Stephen E. McConnico
SCOTT, DOUGLASS & LUTON
600 Congress Avenue
15th Floor
Austin, Texas 78701

RE: Discovery Rules

Dear Steve:

I am in a case where there are five parties with numerous experts. Everyday I get a set of supplemental interrogatory answers from one party identifying more fact and expert witnesses. I then send out a supplement naming the same fact and expert witnesses and two or three days later receive in the mail three more sets of supplemental answers from other parties disclosing the same fact and expert witnesses. In all, five sets of supplemental answers are being filed in this case every time somebody discloses a new fact witness or a new expert.

It seems to me that the lawyers' lives would be a lot simpler, their secretary's fingers would be less overworked and there would be less papers filed at the district clerk's office if Rule 166b(6) and Rule 166b(6)(b) contained provisions to the effect that persons with knowledge of relevant facts and expert witnesses designated by one party to a suit shall be deemed to have been designated by all parties to the suit at the same time and that the other parties don't have to file supplemental discovery responses designating witnesses already disclosed by any other party or former party in the case (except to the extent they deem it necessary to do so to properly disclose the subject matter an expert witness may testify to).

It just seems to me that everybody is wasting an awful lot of time, expense and paper in lawsuits nowadays duplicating everybody else's discovery responses and it would be easier, cheaper and save a lot of trees if the rules provided that designation by one party constitutes designation by all parties regardless of whether or not the party that filed the original discovery responses remains in the case or not.

I am writing to you about this since you are on the Rules Advisory Committee. If you think the idea has some merit to it, please pass it to the rules committee for their consideration.

Very truly yours,

RICHARD E. TULK

RET:ln

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Ans'd.....

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hhd
LHS

✓ 10-4-90
SB

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711
(512) 463-1312

October 3, 1990

HHD, Scott Ogeda
C2 AS

Mr. Jose R. Lopez II
Law Offices of Terry Bryant
West Memorial Office Park
8584 Katy Freeway, Suite 108
Houston TX 77024

Dear Mr. Lopez:

Thank you for your recent letter regarding the 1990 changes in the Texas Rules of Civil Procedure.

Regarding your question whether a trial court can, without notice or hearing, change a pretrial order agreed to by the parties, Rule 166 does not specifically speak to this. Inasmuch as the issue you raise is one which may someday come before this Court, I hope you will understand my inability to venture any further view on your question.

Regarding filing and service via facsimile transmission machines, the Court and our Committee fully recognize that there is much potential for problems and abuse, like those you pose. I think it would be fair for me to say that our view of the changes made this year was to allow use of facsimile transmission in filing and serving court documents in recognition of the ready availability of this technology. We are anxious to see what problems may develop and hopeful that they will not be too many or too hard to remedy by future changes. Only time will tell.

TRCP 166b

Finally, regarding your comments on expert witness fees, and specifically those charged by doctors, you make an interesting suggestion which I will pass along to our Committee for full consideration in the future (along with your other comments). We are greatly benefitted by the expertise and experience of the members of our Committee and look to them for recommendations on ideas like the one you have proposed.

Thank you for your interest in the rules.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

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

TERRY BRYANT
ATTORNEY AT LAW
WEST MEMORIAL OFFICE PARK
8584 KATY FREEWAY, SUITE 108
HOUSTON, TEXAS 77024
TELEPHONE (713) 973-8888

JOSE R. LOPEZ II

October 1, 1990

Texas Supreme Court
Rules Advisory Committee
P. O. Box 12248
Austin, TX 78711

RE: New Texas Rules of Court for 1990

Dear Committee Members:

Recently I attended a meeting on the 1990 changes to the Texas Rules of Civil Procedure. The stamina that you, as a committee, have demonstrated to incorporate these rule changes is commendable. Your time and effort were well spent and are truly appreciated by the Judiciary and the Bar at large.

I have a few questions regarding the rule changes. If you have an opportunity, I would appreciate a short reply from you so that I may better understand and utilize these changes in my practice.

The first question I have concerns Rule 166--Pre-Trial Conference. If Rule 166 allows the attorneys of record to arrive at an agreed docket control order, which includes the discovery schedule, can a Judge change the agreed docket control order without a hearing or notification to the parties, thus circumventing the agreement of counsel?

My next comment concerns the fax machine. Most offices these days have facsimile transmission machines. They have been helpful in obtaining and transmitting information in an expeditious manner. However, sometimes when the fax transmission is smudged or erroneously fax'd to the wrong number, the sender is not aware that the communication was not received. As an example, the sender believes that a motion for summary judgment has been filed and received. Yet, due to some "electronic error", the fax machine does not make it clear to the sender that it has not been received or has been erroneously sent elsewhere. What I perceive in the future are that motions to strike answers, motions for reconsideration, and motions for "hypertechnicalities" will be fax'd, which will lead to headaches in the future. While we appreciate the Courts' and the Committee's efforts to facilitate our communications, I believe in this area that our age-old, standard manner of mailing, personal service, and filing should be maintained. In addition, since the Rules now allow us to fax material to the Courthouse, will there be a sufficient number of fax machines to facilitate the facsimile transmissions that the Courthouse will no doubt be receiving usually at the eleventh hour on a Friday afternoon?

Another comment I have deals specifically with doctors' fees. Recently, I attended several doctors' depositions where they charged fees in excess of $750.00 an hour. While it is true that doctors should be paid for their deposition testimony since they are not tending to their patients, I believe the fees charged by doctors in this area have skyrocketed. Physicians, indeed, are an integral part in the treatment of patients for which they are handsomely compensated, the time they spend on depositions should not be used as a means of extorting additional fees to simply state their treatment of a particular patient. It is well known in our profession that the doctors' fees are not paid by the attorney, but out of the client's settlement. It is the client, the plaintiff or defendant, who needs to be protected from absorbing these costs since it is their money from which these doctors are paid.

The Court has a fixed rule governing fees paid to interpreters. Could the Court not also put a cap on expert fees or appoint doctors from an independent list, similar to the Texas Workers' Compensation Act, to act as an interpreter for the Court? Thus, we would have a truly independent doctor whose compensation will be relatively fixed by that Court.

I do appreciate your time and attention and look forward to hearing from you.

Very truly yours,

Jose R. Lopez II
Attorney at Law

JRL:cw

w:7266z

SCHOOL OF LAW
THE UNIVERSITY OF TEXAS AT AUSTIN

727 East 26th Street · Austin, Texas 78705-3299 · (512) 471-5151
Telecopier Number (512) 471-6988

June 29, 1990

The Honorable Nathan L. Hecht
Supreme Court
Supreme Court Bldg.
P. O. Box 12248, Capitol Station
Austin, TX 78711

Dear Judge Hecht,

Enclosed is a copy of an article concerning the recent amendment to Rule 166b, which will be in The Texas Lawyer in the next couple of weeks. I have been hearing complaints from several lawyers about the amendment and the more Pat Hazel and I discuss it the worse it gets. I think the amendment deserves a second look and a change before the amendments become effective in September.

I am working on an article on the Rule 166b (3) discovery privileges as you suggested last winter. I hope to have it finished this fall. It is certainly an area that is need of change.

Sincerely

Alex Albright

Enclosure

It's Back! McKinney I is BACK!!!

By Alex Wilson Albright

In June of 1989, I published an article in this space complimenting the Texas Supreme Court on their opinion in McKinney v. National Union Fire Insuance Co., 772 S.W.2d 72 (1989) (McKinney II) in which they reconsidered and withdrew their first opinion in that case, McKinney I, 32 Tex.S.Ct.J. 306 (April 8, 1989). McKinney II held that the party requesting discovery, rather than the party making the objection, had the burden of obtaining a ruling on objections to discovery requests. As I said then, "The practical result of McKinney II is that parties may implicitly agree that certain obvious objections are valid (such as the objection to the interrogatory requesting identification of trial witnesses), but are encouraged to request hearings of those objections that fall within a gray area. Sanctions would be imposed at pretrial hearings against any party makeing a frivilous objection or request. Clearly objectional requests and clearly invalid requests are no longer rewarded."

For the last year, discovery practice under McKinney II has been working well. It is certainly better than its alternative, set forth in McKinney I, where the party resisting discovery has the burden of obtaining a ruling on its objection before trial, or the objection is waived. The Supreme Court, and its advisory committees, which drafted the proposed rules, seemed to like

McKinney II: The proposed amendment to Rule 166b(4), published in the November 1989 Texas Bar Journal codified the Supreme Court's opinion in McKinney II.

The proposed rule said,

> 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 obection to discovery or motion for protective order does not waive such objection or motion.

Apparently, lawyers and judges were also happy with McKinney II. From what I have heard, there was little, if any, comment on this in the public hearings the Supreme Court held on the proposed rules.

Someone didn't like McKinney II, however. In the last few weeks, the Supreme Court has published a new version of the amendments to the Texas Rules of Civil Procedure, to become effective September 1, 1990. The recently released version of Rule 166b(4) is not the same as the earlier proposed rule. It has a new provision at the

end:

> but, any matter that is withheld from discovery pursuant to any objection or motion for protective order, whether or not ruled upon prior to trial, shall not be admitted in evidence to the benefit of the withholding party absent timely supplemental production of the matter pursuant to paragraph 6." (emphasis added)

What does this new provision do? At least, it takes us back to the days of McKinney I. It may, however, be worse.

This provision does make sense when considered in some contexts. Suppose a party requests the report of an investigation done in anticipation of litigation, and the opposing party objects to the request on the grounds that the report consitutes a protected party communication. If the objection is not ruled upon, and thus accepted by the requesting party, or sustained by the court in a hearing, the objecting party should not be able to introduce the report at trial, unless it is disclosed through supplementation under Rule 166(b)(6). This situation can be taken care of, however, and has been, under the current rules.

But what about other, more frequent, situations? Suppose a party receives an interrogatory asking what documents it intends to blow up and use at trial? (Yes, I have actually heard of such an

interrogatory.) The party obviously objects on the ground that the interrogatory requests the work product of an attorney and is privileged from discovery. Under McKinney II, the party could proceed to trial without requesting a hearing on the objection, secure in the knowledge that whatever blowups she wanted could be used at trial. If the requesting party wanted to pursue the request, he could request a hearing, but in this case, risk sanctions for an obviously spurious request. Most likely, the court would never be bothered with the request or objection.

Under the new rule, however, all of this is changed. If the parties proceed to trial without a ruling on the objection, the party that sent the interrogatory can object to the admission of the blowup into evidence. The rule says that any matter withheld from discovery pursuant to an objection cannot be used for the benefit of the withholding party at trial. So the objecting party must get a ruling on the objection before trial to be sure the objection is good, and the blowups won't be barred as evidence. But getting a favorable ruling at a hearing is not enough. The rule bars the evidence even when the objecting party gets a ruling on the objection, and the objection is sustained. The only thing that the objecting party can do to protect herself in this type of situation is to have a hearing and ask that the judge strike the discovery request.

The new rule says that the objection alone is sufficient "to

preserve the objection" and a failure to get a ruling "does not waive such objection." But what does it mean to have the objection preserved and not waived? Not much. The proviso says that the objecting party is barred from using the withheld information as evidence, even if the objection is good, and sustained by the judge at a hearing. So, an unscrupulous lawyer can make obviously objectionable requests, in the hopes of barring any responsive matter as evidence at trial. Certainly, this is not what the Supreme Court intended by this amendment.

These types of situations occur in every lawsuit. There are requests that are objectionable because they are overly broad ("produce all documents relevant to your cause of action"), or they blatently request the lawyer's trial strategy ("identify your trial witnesses and their testimony"). Anytime an objection is made, the objecting party will need to request a hearing, get a ruling on the objection, and have the request stricken to be protected against possible inability to introduce the withheld information at trial.

The Supreme Court should delete this added proviso from Rule 166b(4). The proviso is written far too broadly. Its result is simply not fair in all situations. It assumes that the request is proper, and that the objection, although proper when made, is not proper if the objecting party seeks to introduce the material as evidence at trial.

If the Court insists on some type of addition to Rule 166b(4), however, there are better ways to accomplish what I assume to be the Court's goal. If there is an objection to evidence upon the grounds that the evidence was matter requested in discovery, but withheld upon an objection or motion for protective order, the trial judge should evaluate the request, the objection, and the evidence, to determine whether it is appropriate to sustain the evidentiary objection. This is an unnecessary addition, however, because the trial courts now make this evaluation when there is an objection for failure to supplement discovery under Rule 166b(5). In order to preserve the benefits of McKinney II, and discourage unneeded hearings to rule on valid objections, the rule should also state that, at trial, the courts must presume that the objection is valid unless specifically overruled by a judge at a hearing held for that purpose before trial. Otherwise, the objecting party must request a hearing before trial to be certain that she will not be barred from introducing evidence at trial.

This added provision has created a real problem for lawyers making valid objections to requests for discovery. The Court has time to remove it before September 1, and I urge it to do so.

4543.001

hhd
LHS

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9-11-90
SB

September 10, 1990

9/12 HH
Sc Ad Suite Agenda
Cat
J. Hedt.

Mr. Luther H. Soules III
Chairman, Texas Rules of
Civil Procedure Committee
Soules & Wallace
175 East Houston #1000
San Antonio Tx 78205

Re: Suggested Modifications to Texas Rules of Civil Procedure
Rules 90, 166b, 167 and 168

Dear Luke:

I enjoyed your presentation last week at the Advanced Civil Trial Course up in Dallas. I've got several ideas I'd like to submit for your Committee to look at as modifications to the Texas Rules of Civil Procedure:

Rule 166b

1. Currently, it is clear that, as to expert witnesses, you are entitled to discover, in addition to name, address and telephone number, a summary of the facts and opinions about which they have knowledge or will testify. As to fact witnesses, however, the rule only purports to allow discovery of name, address and phone number, not fact summaries or information about any impressions or opinions they might have.

Some lawyers are starting to object to supplying even the most rudimentary summary of facts about which the witnesses have knowledge, relying on the lack of mention of same in the rule. A short summary of facts about which they have knowledge should be explicitly discoverable and would enable lawyers to economically determine who they need to depose, etc.

Similarly inquiry about any opinions/impressions of fact (lay) witnesses would probably draw objections on the same basis. Yet Rule 701, Texas Rules of Evidence expressly permits such lay opinions under certain circumstances, and they should therefore be discoverable just as are expert opinions.

Rule 166b should be amended to expressly provide that, along with name, address and telephone number of fact witnesses, discovery may also seek a summary of facts about which they have knowledge, and of any lay opinions or impressions they have.

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CIVIL TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION
WM. DAVID DEADERICK
BRIAN K. TRUNCALE

August 7, 1990

Justice Nathan Hecht
Supreme Court of Texas
Post Office Box 12248
Capitol Station
Austin, Texas 78701

Justice Lloyd Doggett
Supreme Court of Texas
Post Office Box 112248
Capitol Station
Austin, Texas 78701

Mr. Steve McConnico
SCOTT, DOUGLAS & LUTON
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Mr. Charles F. Herring, Jr.
JONES, DAY, REAVIS & POGUE
301 Congress Avenue
Suite 1200
Austin, Texas 78701

Mr. Luther H. Soules, III
SOULES & WALLACE
175 E. Houston Street
10th Floor
San Antonio, Texas 78205-2230

RE: Proposed Addition to Texas Rule of Civil Procedure 166b

Gentlemen:

Last month I wrote a short letter to Charles Herring voicing some concerns that I have about the amendment to Texas Rule of Civil Procedure 166b that will take effect September 1, 1990, which will provide "any matter that is withheld from discovery pursuant to any objection or motion for protective order, whether or not ruled upon prior to trial, shall not be admitted in evidence to the benefit of the withholding party absent timely supplemental production of the matter pursuant to Paragraph 6." Chuck suggested that I should write a letter to all of you about this matter.

I am enclosing a request for production that was served on me earlier this year. Actually it has been served on me several times in the last year in different cases and seems to be on its way to becoming a popular form. It was clearly designed to take advantage of the Supreme Court's rulings that if a party doesn't object to discovery requests even though they are obviously improper, he is bound by them and must comply with them. You will note that about half of the discovery requests are clearly improper and objectionable because they request information privileged from discovery under the provisions of Rule 166b(3) as attorney work product, party communications or witness statements or because the requests are so broad as to be virtually meaningless.

Today of course I object to most of these requests and to similar interrogatories that get off into areas privileged as attorney work product or that are otherwise objectionable and the trial court invariably sustains the objections and that is the end of the matter. As I understand the proposed change in Rule 166b, however, even objectionable requests have to be answered and any evidence that might fall within those requests be disclosed under penalty of a self-implementing sanction that the evidence will be excluded at the trial if the party offering it didn't turn it over to the other side in discovery.

I understand the purpose of the rule change is to require disclosure of everything that might be offered into evidence at trial regardless of whether it is privileged from discovery under the rules or some other law. I think, however, the committee and the court have picked a very poor vehicle for accomplishing a rather laudable goal. The basic problem with the amendment is the fact that the rule doesn't set out any kind of guidelines, standards or limits on what can be asked for or what has to be disclosed. Thus, it encourages each side to frame discovery requests in such a way that they can hopefully trap the other side and keep it from being able to offer evidence at trial. In short, the amendment encourages "all bets off" discovery requests since the more oppressive the request is the more likely it is down the road to possibly exclude evidence. Since there is already one automatic exclusion sanction in the discovery rules that each side tries to bludgeon the other one with, I think it is a mistake for the court to put in a second. It simply leads to requests for production like the ones I am enclosing and interrogatories like the following:

1. State the title, author, edition, chapter and page number of every statement and every learned treatise that your attorney might use in his cross-examination of Dr. X and quote verbatim any statements therein that your attorney may read to Dr. X.

2. State verbatim every question your attorney will ask Mr. Y on cross-examination.

3. State exactly all testimony that will be given by every witness that you will call at the trial of this case. You are notified that any testimony offered at the trial of this case that is not set out in detail in your answer will be objected to under the provisions of Texas Rule of Civil Procedure 166b(4).

4. State every bit of evidence, including admissions, that you may offer at the trial of this case for the purpose of impeaching Ms. A.

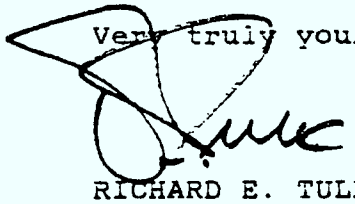
I am sure that with a little time to sit around and think of some really tricky discovery requests, someone will be able to come up with a set of extraordinarily oppressive discovery requests even more objectionable than these and the ones I am attaching.

I have heard people voice the idea that lawyers won't send oppressive discovery requests to the other side for fear they will be sanctioned in the form of having to pay attorney's fees to the other side for its costs in having to file objections and have a hearing on them (assuming they are not worked out on the telephone ahead of time). That argument overlooks two things. First, there are a lot of cases where paying some attorney's fees for the other side would be money well spent to obtain the benefit of either having the other side waive a privilege and produce something in discovery you weren't entitled to or to obtain the benefit of being able to keep some of the other side's evidence out at the time of trial. Secondly, the argument erroneously assumes some kind of a hearing would be necessary. If I was the lawyer that had sent the objectionable requests, when I received the objections I would immediately call up and stipulate they are good and offer to prepare, sign and file an agreed order sustaining the objections to avoid having to pay any attorney's fees. (Remember, while these are objectionable and oppressive requests that I can't win a hearing on, regardless of the court's ruling the other side will have to either give me the information or not be able to use it at trial. I've accomplished my goal by just sending the request.)

I think the court would have been much better off if it had promulgated a pretrial order requirement and a statewide rule on what has to be in the pretrial order (such as the names of all people who will be called as witnesses; a general summary of the areas in which they may testify; listing of the exhibits that will be offered; etc.). I think this is a much better approach than writing a rule that encourages each side to think of tricky and

nasty discovery requests to send to the other one in hopes that it can compel the other side to either waive privilege or succeed in excluding evidence that the other sides offers. I think it is poor policy to adopt a rule that encourages one side to send oppressive and objectionable discovery requests and then sanctions the other side when it asserts the privileges created by law and the trial court sustains the objection to discovery. This simply places too much power (and temptation) in the hands of the party framing the discovery requests because the sanction is borne by the other side. I think you have inadvertently inserted another meat cleaver into the rules that each side can use to hack and chop at the other one under the guise of discovery in hopes of excluding the other party's witnesses or evidence.

Very truly yours,



RICHARD E. TULK

RET:ln
Enclosures

"Exhibit A"

DOCUMENTS TO BE PRODUCED

(1) All documents and tangible things that have been made or prepared by any expert who may be called to testify as a witness in this case. In the event that there is an expert witness about which you or your attorney have knowledge, whom you or your attorney cannot positively aver will not testify, then you are hereby requested that the factual observations, test, supporting data, calculations, photographs, and opinions of each such expert be recorded and reduced to a tangible form and provided to Plaintiff.

(2) All documents and tangible things that have been made or prepared for any expert in anticipation of the expert's trial and/or deposition testimony.

(3) All documents and tangible things that have been made or prepared by any expert used for consultation purposes that forms the basis, either in whole or in part, of the opinion(s) of an expert who may be called as a witness.

(4) All letters and correspondence whatsoever between you (as that term is defined herein) and any person who may be called as an expert witness.

(5) All photographs, moving pictures, films, videotapes, and audio recordings that are connected with or related, in any way, to this lawsuit.

(6) All documents and other documentary evidence which you or your attorney will offer as evidence at the time of trial in defense of the claims made the basis of this lawsuit.

(7) All maps, plats, surveys and reports which you intend to use as evidence at the trial of this case or which you or your attorney have obtained for use in any way upon the trial of such case.

(8) Copies of any written, verbal, recorded, or any other kind of statement of plaintiff or employees, agents, or representatives of plaintiff.

(9) All records, recordings, films, videotapes, or other tangible record of any kind whatsoever concerning any testing related to this lawsuit about which you or your attorney are aware.

(10) All diaries, calendars or any other lists or notes kept

by you regarding or related in any way to the occurrence in question and/or events thereafter.

(11) All newspaper articles that pertain to or reference the occurrence in question.

(12) All documents, statements, and communications that pertain, in any way, to the occurrence in question.

(13) All statements made by persons not a party to this suit, either written, recorded or otherwise, that pertain to the occurrence in question.

(14) All published treatises, periodicals, or pamphlets that you may offer or use in the trial of this case under Rule 803(18) of the Texas Rules of Evidence.

(15) All formal and informal reports and documents prepared by an officer or employee of any law enforcement agency or other governmental agency which pertains, in any way, to the occurrence in question.

(16) A listing of each person, including name, address, and telephone number, acting in your behalf who investigated any part of the occurrence in question.

(17) All employment records pertaining to you, if self-employed, for the past ten (10) years.

(18) All reports, writings, or other documents rendered by any witnesses, expert or otherwise, whom you intend to call at the trial of this case.

(19) All documents which support and/or upon which you will rely to support your defense in this lawsuit that the occurrence in question was not caused, in whole or in part, by the negligence, conduct and/or actions of Defendant.

(20) All documents which negate or tend to negate, in whole or in part, your defense in this lawsuit that the occurrence in question was not caused, in whole or in part, by the negligence, conduct and/or actions of Defendant.

(21) All automobile and liability insurance policies held by you and their declaration pages.

(22) The certificate of title to the automobile which you were driving at the time of the accident made the basis of this suit.

A6407

COPY

NO. _____

KRISTEN E. BEAUDETTE	X	IN THE DISTRICT COURT
PLAINTIFF	X	
	X	
VS.	X	TRAVIS COUNTY, TEXAS
	X	
JESSICA STARKEY	X	
DEFENDANT	X	_____ JUDICIAL DISTRICT

REQUEST FOR PRODUCTION AND INSPECTION

TO Jessica Starkey, Respondent.

Plaintiff Kristen Beaudette, requests that you produce for discovery under the provisions of Texas Rules of Civil Procedure 167 the items specified in the paragraphs below, at the time and place set out herein.

Definitions: As used herein, the following terms shall have the meaning indicated below:

a. "Person" means natural persons, corporations, partnerships, sole proprietorships, unions, associations, federations or any other kind of entity.

b. "Document" means any printed, typewritten, handwritten, mechanically produced or otherwise recorded matter, of whatever character, including but not limited to letters, purchase orders, memoranda, telegrams, notes, catalogues, brochures, diaries, reports, calendars, inter- or intra-office communications, statements, investigative reports, announcements, depositions, answers to interrogatories, pleadings, judgments, newspaper articles, photographs, tape recordings, motion pictures and any carbon or photographic copies of any such material if you do not have custody or control of the original. If any document requested to be identified was but is no longer in your possession or control or is no longer in existence, state whether it is:

1. Missing or lost;

2. Destroyed;

3. Transferred voluntarily or involuntarily to others, and, if so, to whom; or

4. Otherwise disposed of. In each instance explain the circumstances surrounding an authorization of such disposition thereof, state the approximate date thereof and

describe its contents.

c. "You" and "your" shall mean the party to whom these questions are directed as well as agents, employees, attorneys, investigators and all other "persons" acting for said party.

d. "Statement" includes any written or graphic statement, any stenographic, mechanical, electrical or other recording or transcription thereof which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

e. "Respondent" means all representatives of Respondent, acting or purporting to act on (his/her/its) behalf with respect to any matter inquired about in these requests for production, including but not limited to, all employees, attorneys, consultants, agents, adjusters
or any other representatives.

Documents to be Produced:

See Exhibit "A" attached hereto

Objections to Documents: If you object to producing any requested documents, or if you feel that a court order should be obtained by this party for such information, please so state.

Continuing Duty to Supplement: You should be advised that you are under a duty to supplement your responses to this Request for Production and Inspection.

Place for Production: The documents are to be produced at the law offices of Hardesty and Hardin, 1008 Mopac Circle, Suite 100, Austin, Texas 78746, within fifty (50) days of your receipt of this request.

Respectfully submitted,

HARDESTY AND HARDIN
1008 Mopac Circle, Suite 100
Austin, TX 78746
(512) 328-7703

By _____
Danny L. Hardesty
State Bar Card No.08957400

4543.001

5-11-90

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711
(512) 463-1312

May 9, 1990

Ms. Dana L. Timaeus
Benckenstein, Oxford, Radford & Johnson
P. O. Drawer 150
Beaumont, TX 77704

Dear Ms. Timaeus:

Thank you for your comments regarding the proposed changes in Texas Rule of Civil Procedure 166b. Discovery abuses, as in the circumstances you suggest, can be curbed in appropriate cases by sanctions under Rule 215.3. As you can well imagine, the possibilities for abuse of discovery are myriad, and therefore addressing each specifically in the rules is most difficult if not impossible. However, we certainly do not want any of the rules to be read as encouraging such abuses.

I have delivered a copy of your letter to the chairman of Rules Advisory Committee with the request that they consider your comments fully in making additional revisions in the rules. Thank you for your interest and assistance.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

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

TREC 166

BENCKENSTEIN, OXFORD, RADFORD & JOHNSON
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NED W. JOHNSON
ALAN G. SAMPSON
RICHARD Y. FERGUSON
GUY N. GOODSON
JAMES E. BROWN, JR.
FRANK D. CALVERT
DANA L. TIMAEUS
MARY ELLEN BLADE
WILLIAM H. YOES 3
GEORGE MICHAEL JAMAIL 1, 5
C. SCOTT MANN, JR. 4, 6
WILLIAM M. TOLIN, III
FRANCES BLAIR BETHEA
KIP KEVIN LAMB
GARY M. BRAUGH
ROBERT J. ROSE, SR.
JUDITH BROWN STREET
MARCY LYNN ROTHMAN
DAVID M. KOPPA

L. J. BENCKENSTEIN (1894-1968)
F. L. BENCKENSTEIN (1918-1987)
JAMES D. McNICHOLAS, OF COUNSEL

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May 1, 1990

Justice Nathan L. Hecht
Texas Supreme Court
Supreme Court Building
P. O. Box 12248, Capitol Station
Austin, TX 78711

Dear Justice Hecht:

I was one of the attendees at your Dallas presentation to the SMU Advanced Civil Trial Short Course last Thursday. This letter is to comment on one of the rule changes which went into effect last Thursday. Though I have not read the revisions to Rule 166b as finally adopted, the speakers at the seminar explained that the intent of the rule change, regarding objections to discovery, was to provide that either party might bring an objection to discovery to the court's attention, but that a party cannot go to trial on its objection and introduce evidence which would have otherwise been responsive to the discovery request.

While the rule sounds just and balanced, the procedure which you and other speakers described lends itself to discovery abuse. In our area, for example, we have often received requests for production for "all documents or tangible things which are relevant to the subject matter in the pending action whether it relates to a claim or defense of the parties seeking discovery or the claim or defense of any other party," or a request for production of documents and things "which constitute or contain matters within the scope of Rule 166b." While these requests for production quote or paraphrase Texas Rules of Civil Procedure 166b and 167, they are clearly objectionable.

As a practical matter, the attorneys who propound these and similar requests for production do so out of a fear of specificity, a fear that they will miss documents that otherwise would be discoverable, laziness, or to harass. All of the attorneys know that an overbroad request for production is objectionable.

Unfortunately, the rule change encourages overbroad and harassing requests for production because the responding party, without producing the documents at least for in camera inspection or suffering the harassment of a Motion for Protection and hearing, will be precluded from using any document that might have been produced in response to the objectionable discovery requests.

There should be some provision in the rule which halts an abusive discovery request when a clearly objectionable request for discovery is met by a clearly proper objection. Judicial economy, the economy of litigation to clients, harmony among members of the bar, and professionalism are not served by a rule which allows an abusive discovery request to preclude the introduction of proper evidence or otherwise harms a harassed responding party.

Yours truly,

BENCKENSTEIN, OXFORD,
RADFORD & JOHNSON

DANA L. TIMAEUS

DLT/sc

DLT:sc:05/01/90
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√5-4-90

May 1, 1990

SCAC
SCAC
Rules 165, 168, 169
CO AJ

Honorable Nathan Hecht, Chairman
Rules Committee
Supreme Court of Texas
P.O. Box 12248
Austin, TX 78711

RE: Discovery - Texas Style

Dear Justice Hecht:

This concerns problems generated by Rule 166 b et seq.

The intent of the rules is to provide for trial on the basis of what is revealed rather than on the basis of what is concealed, and to avoid trial by ambush. The reverse is often the case.

The rules seem geared toward business litigation growing out of a relationship between the parties and as to which the parties have substantial knowledge of the issues involved.

I am a sole practitioner specializing in defense of automobile accident litigation. Almost invariably my clients have no knowledge of matters pertaining to the damage issues. They have no investigation; that is handled by their liability insurance carrier. Yet they are required to answer interrogatories concerning matters of which they really know nothing.

The problem is compounded when supplemental answers signed by the party are required.

I practice before a multitude of County Courts and District Courts in nine counties. There is little uniformity on the benches with respect to various technical discovery issues. Some courts require sworn Interrogatory answers only when the party has personal knowledge of the subject matter and can be impeached with his answers. Other courts treat an unsworn answer to any interrogatory, including supplemental answers, as no answer at all.

Lawyers spend hours drafting interrogatories and responding to them, not addressing the equities of the case but instead, setting traps and trying to avoid them.

There is considerable dispute with regard to whether a timely objection to a discovery request removes the duty to respond further unless there is a hearing on the objection. One school of thought is that a party who fails to fully answer an interrogatory subject to his own objection does so at his own peril; that the duty to fully answer is governed by the propriety of the discovery request itself; that an improper objection to a proper discovery request is treated as no answer at all unless there is a hearing.

Our entire judicial system spends entirely too much time wrangling with such matters. The focus is on the war of technicalities waged by opposing counsel and not on the real issues. The merits of the case become mired in the morass of procedure. The parties become incidental pawns.

There appears to be little relationship to each other of the various forms of discovery and related rules of evidence. For example, an expert's records can be produced in response to a discovery request, his deposition taken, and his identity declared in response to a pre-trial order concerning the same. But if he is not identified in interrogatory answers (or if identified only in an unverified supplemental interrogatory answer) many courts will not allow his testimony.

A business records affidavit may be timely and properly filed and served but if the documents are not produced in response to a discovery request directly addressed to the matter, or if the affiant is not identified in interrogatory answers as a person with knowledge of relevant facts, many courts will not allow the business records affidavit to be introduced.

CONCLUSIONS

1. Interrogatories should be directed at the personal knowledge of the party or that of his servants and employees. A party should not be required to answer an interrogatory of which neither he nor his true agents (as opposed to his insurance company investigators) have personal knowledge.

2. The identity of expert witnesses have no place in interrogatories. This should be handled by the court pre-trial order or by a separate Rule of Civil Procedure requiring designation of experts within a certain time.

3. Request for Admission should not be directed at ultimate issues. In any event they should not be used to contravene pleadings. A party who claims damages due to the negligence of another should not be asked to admit he was not damaged and that the defendant was not negligent.

4. Considerably more discretion should be allowed the bench in admitting evidence that is technically objectionable due to non-compliance with strict interpretation of discovery rules and with respect to unanswered admissions. This discretion should be quite broad and overturned only when there was an apparent abuse of discretion leading to an improper verdict.

5. Emphasis should be on substance over form.

Respectfully submitted,

Pat McMurray

Pat McMurray
Attorney at Law
State Bar No. 13807700

PM:fs/loda

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→ 166b(3)
168
TRCE 703
167a

February 28, 1990

Re: Proposed Changes to Texas Rules of Civil Procedure 166b(3)(c) and 168

Chambers of the Hon. Nathan L. Hecht, Justice
Texas Supreme Court
P. O. Box 12248 - Capitol Station
Austin, Texas 78711
(512) 463-1348

Dear Justice Hecht:

In mid-December, I attended a Houston Bar Association function in which Chief Justice Phillips was the featured speaker. The Chief Justice indicated the Court had received some very good feedback from the Bar concerning the Court's 1990 changes to the Texas Rules of Civil Procedure. He encouraged those attendees who had not responded to do so. This letter is in response to that request. I addressed this letter to you as I am told you are the Justice who is coordinating the changes for the Texas Rules of Civil Procedure.

I have three concerns I wish the Court to consider. The first concern deals with the proper construction of what constitutes a "written statement" under TEX. R. CIV. P. 166b(3)(c)(ii). The second concern deals with a conflict between TEX. R. EVID. 703--Basis of Opinion Testimony and TEX. R. CIV. P. 168--Interrogatories to Parties. The third concern is the need for a new rule that would permit a vocational rehabilitation expert to examine a party.

RULE 166b(3)(c) -- WITNESS STATEMENTS

My research indicates that the definition of a witness statement requires some clarification. Rule 166b(3)(c) defines witness statements in the disjunctive. The first definition states a written statement is one "signed or otherwise adopted or approved by the person making it." TEX. R. CIV. P. 166b(3)(c)(i). This definition is straightforward and presents no problem.

The second definition does present a problem because it is ambiguous. The second definition states that a written statement includes 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*." TEX. R. CIV. P. 166b(3)(c)(ii) (emphasis added). Neither phrase is defined by the rule. Neither phrase has been construed by any Texas court. The ambiguous phrases lead to potential unfairness, as the following hypothetical illustrates:

> P sues D for a tort committed in 1985. Suit is filed in 1986. In 1987 and 1988, P's attorney interviews W, a key fact witness and liability expert. Through the course of several conferences with W, P's attorney spends approximately ten hours with W. P's attorney neither tape records nor video records any of the interviews. He merely makes selective notations about the substance of those interviews. The notations are contained in two separate documents. One document is handwritten with none of the notations in any sensible order. The other document is an internal firm memorandum that says "W said . . ." or "W told me . . . ." Between the two notes, W's remarks total one hundred words and were derived from ten hours of conferences.
>
> Since W is a favorable expert for P, P does not wish to take his deposition. Unfortunately, W dies suddenly in 1989. After W's death, D moves the court to compel production of P's attorney notes of the oral conferences conducted with W. D claims counsel's notes constitute witness statements within the meaning of TEX. R. CIV. P. 166b(3)(c)(ii), and that the notes are discoverable under the substantial need

> and undue hardship provisions of Rule 166b(3)(e).

The issue is whether selected notations and/or occasional verbatim recitals constitute "substantially verbatim recitals" that were "contemporaneously recorded." The "substantially verbatim recital" language of subparagraph (3)(c) was only recently adopted in January 1988 from FED. R. CIV. P. 26(b)(3). The federal rule, in turn, adopted the same language from the Jencks Act. 18 U.S.C. § 3500(e) (1957). Under Texas law, where a state rule adopts the language of a federal rule, "it is presumed that [the federal rule] was adopted in light of the decisions construing it." *Ex parte Odom*, 153 Tex. 537, 271 S.W.2d 796, 797 (1953). Thus, under *Odom*, a Texas court should look to the federal court's interpretation of the Jencks Act's use of the phrase "substantially verbatim recital."

The leading federal case on this point is *Palermo v. United States*.[1] In *Palermo*, the Supreme Court emphasized that Congress intended a "substantially verbatim recital" to be the recording of continuous, narrative statements. *Id.* at 352. Congress chose the phrase "substantially verbatim recital" so as to "eliminate the danger of distortion and misrepresentation inherent in a report which merely selects portions, albeit accurately, from a lengthy oral recital." *Id.* Moreover, the Court stated as follows:

> [w]e think it consistent with this history,[2] and with the generally restrictive terms of the statutory provision, to require that summaries of an oral statement which evidence substantial selection of material, or which were prepared after the interview without the aid

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[1] 360 U.S. 343 (1959). It is tempting to distinguish *Palermo* on the basis that it is a criminal case. Nevertheless, both the Texas and Federal Civil Rules define the term "statement" in language that is itself a substantially verbatim recital of the Jencks Act. Under *Odom*, the logical conclusion is that the drafters of the Texas Rules intended to embrace the reasoning of the Supreme Court and the intent of Congress. 271 S.W.2d at 797. If the drafters had intended otherwise, they would have defined the term differently. *See id.* Nevertheless, some enlightenment from the Rule would be beneficial to the lower courts and Bar at large.

[2] (Citation omitted).

> of complete notes, and hence rest on the memory of the agent, *are not to be produced. Neither, of course, are statements which contain the [attorney's] interpretations or impressions.*

Id. at 352-53 (emphasis added).

In our hypothetical, none of counsel's notes qualify as a record of continuous, narrative statements because there is nothing continuous or narrative about the notes. More specifically, the longhand notes are nothing more than a collage of virtually unintelligible words, phrases, and unrelated sentence fragments. As such, they cannot be substantially verbatim recitals.[3/] The second document is not even an attorney's notes of oral remarks made by W, but is an internal firm memorandum. The memorandum includes the mental impressions, conclusions, opinions, and legal theories of P's counsel. The statements attributable to W are nothing more than isolated points that counsel chose to summarize. They are selective notations. The summary is neither continuous nor narrative. As such, it does not qualify as a substantially verbatim recital. *Palermo*, 360 U.S. at 352-358. Expressed another way, counsel's notes contain at best an occasional recital of what counsel thought W said. Occasional verbatim recitals do not rise to the level of substantially verbatim recitals. *Cole*, 634 F.2d at 867. Accordingly, such statements are not subject to production. *See id.*

In addition, if one compares the time counsel spent with W to the paucity of words that were reduced to writing, it is clear that counsel's notes cannot be substantially verbatim recitals.[4/] Rather, the notes reflect counsel's "selection

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[3/] *United States v. Cole*, 634 F.2d 866, 867 (5th Cir.) *cert. denied*, 452 U.S. 918 (1981) (notes containing phrases and isolated sentences identical to the language used by the witness were not a substantially verbatim report of the interview); *United States v. Consolidated Packaging Corp.*, 575 F.2d 117, 129 (7th Cir. 1978) (original notes, as far as they are intelligible, are mere longhand words and phrases and fall far short of coming within the substantially verbatim recital requirements of the Jencks Act).

[4/] *Palermo*, 360 U.S. at 355 n.12. In *Palermo*, the Supreme Court said that a 600-word summary of a 3-1/2 hour

Footnote continued on next page

of those items of information deemed appropriate for inclusion in the memorandum." *Palermo*, 360 U.S. at 355 n.12; *see also Hickman v. Taylor*, 329 U.S. 495, 513 (1947). As *Palermo* and *Hickman* make clear, documents "which evidence substantial selection of materials should not be produced," because of the "danger of distortion and misrepresentation inherent in a report which merely selects portions, albeit accurately, from a lengthy oral recital." *Palermo*, 360 U.S. at 352-53; *see also Hickman*, 329 U.S. at 513. In light of the above, TEX. R. CIV. P. 166(b)(c)(ii) should clarify what constitutes a substantially verbatim recital.

Rule 166b(3)(c)(ii) should also clarify its second requirement that a substantially verbatim recital be contemporaneously recorded. In applying that requirement to the facts of our hypothetical, the notes cannot be considered as contemporaneously recorded because neither summary offers a firm indication as to when the notes were taken or even when W made the comments that are reflected in the notes. For example, suppose the handwritten note had different dates and that it was not clear which date, if any, reflects when the notes were taken or when the statements were made. Thus, it is conceivable that the dates might be dates of future events mentioned by W during the course of his discussions with P's attorney. If P's attorney cannot recall the significance of these dates, and if the notes themselves are at best ambiguous, it is incongruent to say the notes were contemporaneously recorded.

With regard to the internal firm memorandum, suppose that the memorandum does not indicate in any whatsoever when the remarks attributable to W were made. As such, days, weeks, or months may have passed between the date of the memorandum and the dates W made the remarks. W clearly did not wait by counsel's side as this memorandum was prepared. In fact, one can reasonably infer that the memorandum represents counsel's post-interview attempts to reconstruct what W said. The inference is totally consistent with the fact that the hypothetical offers no other facts that indicate that there is

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[4/] Footnote continued from previous page

interview, prepared after the conference and consisting of brief statements of the witness, did not constitute a substantially verbatim recital. *Id.* Therefore, under *Palermo*, counsel's 100-word summary, which was derived from several conferences does not constitute a substantially verbatim recital.

any additional documentation containing these remarks. The end result is that Rule 166b(3)(c)(ii) should be modified and incorporate the Seventh Circuit's policy of prohibiting disclosure of any documents that were prepared subsequent to an interview with a witness (i.e., not contemporaneously recorded), "no matter how accurate [the document] may be." *Consolidated Packaging*, 575 F.2d at 129 (citing *Palermo*, 360 U.S. at 352-53).

Therefore, I propose that Rule 166b(3)(c) be modified as follows:

> (1) . . . The term "written statements" includes (i) . . ., 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.
>
> (2) *A substantially verbatim recital is a recording of continuous and narrative statements. Selected notations that contain phrases or isolated sentences identical to the language used by the witness do not constitute a substantially verbatim recital. A recording is contemporaneous if it was made or prepared during the conference or interview in which the witness made the oral remarks.*
>
> (3) *The court shall review IN CAMERA documents alleged to be witness statements. The documents shall not be ordered produced unless the court finds by clear and convincing evidence that the documents are witness statements within the meaning of this rule.*

new rules that will become effective this summer or later this year. Please call or write if I may be of further assistance.

Very truly yours,

Stephen A. Mendel

SAM/bao

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4543.001

August 21, 1990

Honorable Nathan Hecht, Associate Justice
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

RE: Change Needed To New Tex. R. Civ. P. 166b(4)

Dear Justice Hecht:

In all due respect, I have serious concerns about an amendment to Texas Rule of Civil Procedure 166b(4), which goes into effect on September 1, 1990 and will be applied retroactively. Enclosed is a copy of my 343-page article on "Discovery and Sanctions" wherein I discuss this rule change at page 272.

In General

The 1990 amendment the subject of my concern is the new third sentence to revised Rule 166b(4):

> 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; but any matter that is withheld from discovery pursuant to any objection or motion for protective order, whether or not ruled upon prior to trial, shall not be admitted in evidence to the benefit of the withholding party absent timely supplemental production of the matter pursuant to paragraph six.

My concerns are shared by many others. See, e.g., Albright, Discovery - Now Who's Supposed To Object, 6 The Texas Lawyer no. 16 (July 9, 1990), at 22. An analysis follows.

Laudable Intent

I commend the Court for attempting to prevent trial by ambush by the use of seemingly frivolous objections. Apparently, the rule was intended to preclude results such as the one reached in McKinney v. National Union Fire Ins. Co., 772 S.W.2d 72 (Tex. 1989) (on rehearing). In McKinney, a proper interrogatory requested the identity and location of all persons with knowledge of relevant facts. An available objection, otherwise valid on its face (i.e., that the request was unduly burdensome and harassing), was used in a seemingly frivolous fashion to extinguish the responding party's duty to respond to the interrogatory; therefore, the objecting party was allowed to call numerous undisclosed fact witnesses at

trial. The application of the new rule would prevent such "trial by ambush."

Rule is too Broad and Vague

The problem is, the new rule seems to be too broad and vague and, I fear, is going to provide a new device for "trial by ambush" unless it is deleted or substantially amended.

First, note that the rule is all-inclusive. It applies to "any matter," to all "discovery," and to "any objection," regardless of the grounds for the objection.

Second, it applies across the board despite the validity of any type of objection. The phrase, "whether or not relied upon prior to trial," can mean only three possible results: (1) objection is not ruled upon; (2) objection is ruled upon, but is overruled; or (3) objection is ruled upon and is sustained. Therefore, a fair reading of the expressed phrase means that even if the objection is valid (i.e., the request was improper), a pre-trial order upholding the objection still does not allow the admission of the protected discovery at trial unless it is produced at least thirty (30) days before trial under subparagraph 6 of Rule 166b. Thus, the party making the improper discovery request benefits to the detriment of the party lodging a proper (and, perhaps, court-sanctioned) objection. At first glance, a rule which in essence provides that if you are going to use the evidence at trial, you must produce it to the requesting party despite any objection, seems fair and promotes a policy of no trial by ambush. On closer analysis, however, the rule may unfortunately be used as a new device for "trial by ambush" to be used to the benefit of a party making an improper discovery request and to the detriment of the party making a proper objection.

In reviewing the following hypotheticals, remember that the rule applies to "any objection" and an objection can be based on at least four grounds: (1) the matter sought is nondiscoverable on the ground that it is not within the permissible scope of discovery (e.g., not relevant, fact-witness list, etc.); (2) the matter sought is nondiscoverable on the basis of an exemption or immunity (e.g., work-product privilege, privilege against self-incrimination, etc.); (3) the matter sought is discoverable, but the requested is unduly vague, burdensome or harassing or invades certain rights; or (4) the type or form of discovery is improperly used (e.g., too many interrogatory responses required, use of an interrogatory to require the production of documents, etc.).

Example 1: A request for production seeks "all exhibits, charts and summaries you will offer at trial." The trial court sustains a timely objection grounded on, inter alia, the work-product privilege. Under the new rule, all exhibits, summaries and charts prepared by the attorney would still be excluded at trial unless they were produced at least thirty (30) days before trial.

Example 2: A request for production seeks "all notes, records, memoranda, documents and communications that the carrier contends supports its allegations." Trial court sustains an objection that the request is "vague, ambiguous, and over broad." See Loftin v. Martin, 776 S.W.2d 145 (Tex. 1989) (involving exact hypothetical fact situation). At trial, under the new rule, all documents would still be excluded unless produced at least thirty days before trial.

Example 3: Interrogatory: "State any information relevant to cause of action." The trial court sustains a timely objection on the grounds that the interrogatory is overly broad. See Lunsmann v. Spector, 761 S.W.2d 112 (Tex. App.--San Antonio 1988, orig. proc.). At trial, under the new rule, all information will be excluded unless produced at least thirty (30) days before trial.

Example 4: Interrogatory: "State the identity and location of any person with knowledge of relevant facts and, as to each such person, state (1) whether you intend to call said person at trial, (2) the subject matter of each such person's testimony, (3) all lay opinions and impressions of each such person, (4) the facts which serve as the basis for each said lay opinion, and (5) all other facts known to said fact witness." (I actually get similar requests all the time). The trial court sustains an objection to the request based on the grounds that the request is outside the permissible grounds of discovery and the request is overly burdensome, harassing and vague, and based on certain privileges (e.g., work-product, attorney-client, witness-statement, party-communication privileges, etc.); however, the responding party is ordered to list the identity and location of all persons with knowledge of relevant facts. When called at trial, under the new rule, virtually no trial testimony is allowed from said fact witnesses unless the interrogatory was amended to supplement all of the above-referenced (improperly requested) information at least thirty (30) days before trial.

Example 5: One set of interrogatories contains seventy (70) questions (which requires well over seventy (70) responses), and objection is raised as to the number of responses required. The Court orders the responding party to answer any thirty (30) of the seventy (70) questions (or the first thirty (30) questions, etc.). At trial, one un-answered interrogatory was the "fact witness" interrogatory or the "expert witness" interrogatory. Under the new

rule, the fact witnesses and expert witnesses could not be called unless disclosed thirty (30) days before trial.

Example 6: At deposition, a party "takes the 5th," which objection and refusal to answer are subsequently sustained by the trial court. However, after a week of trial, the decision is made to waive the 5th and to offer the testimony. Would this be admissable under the new rule absent a thirty-day supplementation? (I realize that special considerations may be involved with constitutionally based objections).

The hypotheticals could go on. But I submit that under a fair reading of the express wording of the rule, the properly objected to, yet undisclosed, matters sought in the above hypotheticals would not be admissable despite any pre-trial ruling by the Court sustaining the objection unless produced to the requesting party at least thirty (30) days before trial. Hopefully, this is not the intent behind the rule.

Query: Why Object At All?

If this is a fair interpretation of the expressed wording of the new rule, then why bother to object at all? And, since any matter is now discoverable absent a proper and timely objection, discovery requests may become abusive.

Query: Retroactive Application

This new rule which goes into effect on September 1, 1990, will apply, at trials tried thereafter, to discovery objections made in responses to requests for discovery made prior to September 1, 1990. This new rule's contrast with the old rule is undoubtedly going to cause a great deal of trial by ambush as to cases pending on September 1, 1990.

One Suggested interpretation

At two discovery workshops at the Advanced Family Law Course in Houston last week, this issue was analyzed. It is estimated that 300-500 attorneys attended. It was the general consensus that, although the above interpretation of the rule did not seem to be intended by the Court, that a fair reading of the express wording of the new rule would support the above interpretation. See also Albright supra.

One suggestion was that the phrase, "whether or not ruled upon," could be interpreted to mean that if the objection was sustained at a pre-trial hearing, then the information properly objected to could be used at trial without prior supplementation. But even this interpretation was admitted by its proponent to be

a stretching of the rule to reach a supposed logical result based on pure implication. However, if this interpretation is correct, then why even have the new sentence, for this interpretation would be the law without the new rule. Further, if this implied interpretation is correct, then it clearly switches to the objecting party the duty to set a hearing and obtain a ruling, which is contrary to another sentence in Rule 166b(4) and the McKinney holding.

Suggested remedies (?)

Professor Albright in her article cited above suggests that the trial court could enter an order "striking the request." I suppose a trial court could also, for example, stay the proceedings until the requesting party voluntarily withdraws the questionable request, and so on. But, under any of these remedies, the apparent intent behind the new rule would be clearly controverted and the rule rendered a nullity. And certainly the burden would be switched to the objecting party to request the hearing (which is contrary to another sentence in Rule 166b(4) and McKinney). Further, the objecting party would generally need to obtain a ruling at least forty (40) or fifty (50) days before trial. All considered, I believe all of the suggested remedies would not be in compliance with the apparent intent behind the rule.

Possible Amendment to the Rule

My first suggestion is to delete new sentence three in its entirety. Perhaps add a sentence which states, in essence (as a reminder), that the Court may impose sanctions under Rule 215 for any inappropriate or improperly used discovery request or objection. Perhaps limit the new rule only to objections based on the request being unduly burdensome, harassing, overbroad or an invasion of rights. Perhaps expressly exclude from the rule objections based on (1) being outside the permissible scope of discovery and (2) an exemption or immunity. But again, my first suggestion, to delete the rule all together, seems most appropriate. Then, under the reasoning of McKinney, if a party really wants the information, they can seek a motion to compel and for sanctions.

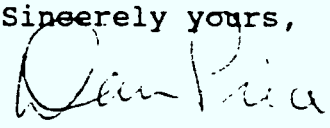
In the alternative, although I do not personally agree with this suggestion, if the Court is of the opinion that all parties should disclose all information they intend to use at trial and to do so at least thirty (30) days before trial, then please simply expressly state such a rule to make it clear and simple for the benefit of the bench and bar (and to avoid a clogging of the appellant courts).

In any event, I would urge the Court to make some alteration

or clarification to new Rule 166b(4) prior to its effective date on September 1, 1990.

I write this letter solely on my behalf and not on behalf of any other person or organization. By copy of this letter, I am informing other members of the Court and certain members of the bench and bar of my concern over the new rule. The Court's prompt consideration of this matter would be most appreciated. Thank you for your time and attention to this matter.

Sincerely yours,



Dan R. Price

DRP/la
Enclosures
cc: Other eight justices, Supreme Court of Texas
Luther H. Soules, III
Professor Pat Hazel
Honorable David Peeples
Doak R. Bishop
James N. Parsons, III
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June 28, 1990

Mr. Luther H. Soules, III
Soules & Wallace, P.C.
10th Floor
175 E. Houston Street
San Antonio, Texas 78205-2230

Re: Amendments to the Texas Rules of Civil Procedure

Dear Mr. Soules:

The purpose of this letter is to express my concerns regarding one of the Amendments to the Texas Rules of Civil Procedure.

Specifically, I am referring to Rule 166b(4) which provides in part, "[B]ut any matter that is withheld from discovery pursuant to any objection or motion for protective order, whether or not ruled upon prior to trial, shall not be admitted in evidence to the benefit of the withholding party absent timely supplemental production of the matter pursuant to paragraph 6."

As I read and understand this rule, providing that applicable discovery requests are made, every matter or thing which a party wishes to admit in evidence must be produced and/or identified prior to trial. This could be a very hard rule to work with.

For example, suppose I am presented with a request for production which requests "any and all documents and tangible things which are relevant to this lawsuit." Obviously, I would have a number of objections to this request for production. However, pursuant to Rule 166b(4) I will be required to produce every document or tangible thing relevant to the lawsuit which I would like to admit into evidence at trial. Perhaps the pretrial production of trial exhibits is not that significant, but more distressing scenarios could occur.

As another example, suppose I have been sent and interrogatory stating, "describe, state and identify each and every fact relevant to this lawsuit." Again, the interrogatory is obviously objectionable, but any fact which I desire to be

admitted into evidence at trial must be disclosed prior to trial pursuant to Rule 166b(4). It would be a great burden indeed to describe every relevant fact that may be testified to at trial and could be an even greater burden to do so thirty days before trial.

It is also my understanding of the Rule that even if a hearing is held on the objections and they are sustained and/or a protective order is entered, the supplementation of anything to be admitted into evidence at trial must still be made pursuant to Rule 166b(4).

While I do not hold myself out as an expert in interpreting rules or as a legal scholar, this appears to me to be a troublesome rule.

If I am mistaken in my interpretation, I would appreciate any information or explanation that you can give me. If I am not mistaken, was it really the intent of the persons drafting this rule to allow situations as discussed above to occur? In effect, a party could discover every fact or item another party intends to solicit or use at trial by sending the two discovery requests used as examples above.

Very truly yours,

Jeff T. Harvey

17JTHbm:nc

SCHOOL OF LAW
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nhd
LHS

8-21-90
SB

August 17, 1990

8/21 HSH Sctac Agenda Supp
Cobb

Justice Nathan L. Hecht
Supreme Court of Texas
P.O. Box 12248, Capitol Station
Austin, Texas 78711

Re: Revised Rule 166b-4

Dear Justice Hecht,

I am sure you have heard enough about the "punitive provision" of this revised rule by now. I have tried to come up with a solution. I believe the intent behind the revised rule is good, but the outcome can be terrible. My worry is an objection to an interrogatory asking, "What evidence do you intend to offer at trial?" The right objection is obviously good, but under the present revised rule an objection at trial by the interrogating party could prevent introducing any evidence at all if that bad interrogatory was not answered.

I believe that the following might accomplish what was intended, follows closely upon language used in another part of the same rule, and would prevent the accomplishment of my fears:

> "***but any matter that is withheld from discovery pursuant to any objection or motion for protective order based upon an exemption or immunity from discovery, whether or not ruled upon prior to trial, shall not be admitted in evidence to the benefit of the withholding party absent timely supplemental production of the matter pursuant to paragraph 6."

Hence, I recommend this change at the earliest possible time.

Sincerely,

J. Patrick Hazel

cc: Justice Lloyd Doggett
Mr. Luke Soules

2877

service announcements on the fund. But they never materialized. Since then the only official Bar policy adopted has been a requirement that all local grievance committees tell

I BLE

ıfraid of a court order to force hi
›ack to proceedings he didn't w t to
egitimize by his presence.

Despite his father's unexpe d
light, Bob Kearns said he wa 't
'orried about the safety of hi
ıther, an avid camper. He sa
eporters covering the trial w re
ıore concerned.

But his lawyer, Arnold, W te
ırtner Paul Janicke, had r son to
mightily concerned. The ght of
s "star witness" caused J icke to
ange his trial strategy qu kly.

Afterwards, Janicke was t
rprised to learn Kearns h d gone
mping. After all, he said, uly is a
›nderful time to spend ou oors.

But Kearns won't be slee ing
der the stars for some ti e.

nicke said Aug. 8 that K rns was
ouple of weeks into a 12 day
ıtence in the Montgome County,
.., jail for contempt of so e orders
ıated to a divorce.

.rnold, White intends to epresent
ırn pending infringe ent
s a ıst other automa rs,
›ite behavior some woul
racterize as eccentric.

People who are very crea ve tend
ıarch to a different drum er
ı others," Janicke said. "
ldn't say he's more eccent c
our average client. He's
cted more publicity than
s."

...ed adjusted," Parsons said.

As the Sunset staff noted, the $20,000 cap keeps the payouts low and can greatly reduce a victim's compensa

CONTINUED ON NEXT

LETTER

Rule 166b Analysis Misses the Point

To the Editor:

I enjoyed Alex Albright's analysis [*"Now Who's Supposed to Object?" page 22, July 9, 1990*] of the imminent Sept. 1, 1990, changes in Rule 166b, but I suggest that her article misses the point.

It seems reasonable that the objectives of the "new" rule are: 1) to ensure that anything presented to the finder of fact be disclosed in timely fashion, regardless of the mechanical precision of the request, and 2) to eliminate privileges as to witnesses or things actually to be presented in evidence.

It is arguable that the best combination of economy, speed and efficiency in the discovery process would be served by two inquiries: 1) "Who are your witnesses and what will they say?" and 2) "What physical or documentary evidence will you present at trial?" both to be permissible with no privileges attaching.

Possibly the expensive and often trivial discovery process of objections and hearings could then be eliminated, or at least minimized.

Reed Jackson
Fairfield

TxLwr 8-13-90

Texas Lawyer's Corrections Policy

We always publish corrections at least as prominently as the original mistake was published. If we make a mistake on page one, we will correct it there.

We are eager to make corrections quickly and candidly.

Although we welcome letters to the editor that are critical of our work, an aggrieved party need not have a letter to the editor published for us to correct a mistake. We will publish corrections on our own and in our voice as soon as we are told about them by anyone — our staff, an uninvolved reader, or an aggrieved reader — and can confirm them.

Our corrections policy should not be mistaken for a policy of accommodating readers who are simply unhappy about a story that has been published.

Any information about corrections or complaints should be directed to Editor and Publisher Mark Obbie, or to American Lawyer Media Editor in Chief Steven Brill.

TRCP 166b.

5. Protective Orders. On motion specifying the grounds and made by any person against or from whom discovery is sought under these rules, the court may make any order in the interest of justice necessary to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights. Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents. Specifically, the court's authority as to such orders extends to, although it is not necessarily limited by, any of the following:

a. (No change.)

b. (No change.)

c. (No change.)

[d. A trial court shall have continuing jurisdiction beyond its plenary power over the merits of a case to rule on motions by any party or non-party to a case seeking to rescind an order sealing discovery.]

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BRUCE E. ANDERSON
MEMBER OF THE FIRM

July 21, 1993

TRCP 166b(6)

Justice Nathan Hecht.
Chairman
Supreme Court Rules Committee
P. O. Box 12248
Austin, TX 78711

Re: Suggested change in Texas Rules of Civil Procedure

Dear Justice Hetch:

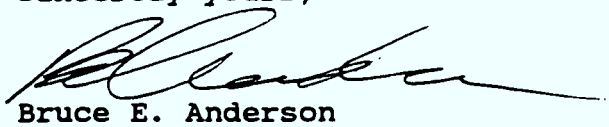
I have just completed drafting Amended Answers to Interrogatories and Request for Production to be filed 31 days prior to Trial. The sole purpose of this amendment was to identify factual and expert witnesses and documents containing relevant information which had already been designated or identified by other parties to the same lawsuit. I am quite confident that each of the attorneys involved in this case is now or has recently been through the same ritual. The waste in time and paper is enormous and, I believe, unnecessary.

I would recommend that Rule 166b(6), or perhaps Rule 215.5 be amended to provide that the identification of a person as someone having knowledge of relevant facts, or of an expert witness who may be called to testify at time of Trial, or of a document as containing relevant information, by any party in answer to discovery requests by any other party, shall be sufficient to permit any party to call the witness, or introduce the evidence, at time of Trial.

The present practice does nothing to further the legitimate aims of discovery or to avoid ambush at Trial. Rather, it creates a procedural trap whereby a party may be denied the right to call a witness or use a piece of documentary evidence simply because another party has been dismissed or settled prior to Trial. In addition, you have the ridiculous spectacle of a party objecting to the opposing party calling a witness whom the objecting party has identified as a person having knowledge of relevant facts.

I appreciate any consideration which might be given to this suggestion. If I may be of any assistance to the committee in bringing about this change, I would be pleased to help.

Sincerely yours,



Bruce E. Anderson

BEA/vfh

July 22, 1993

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

Dear Luke:

Enclosed are letters from Charles Spain and Bruce Anderson regarding the Texas Rules of Appellate Procedure and the Texas Rules of Civil Evidence and Civil Procedure.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

4543.001

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January 25, 1990

Justice Nathan L. Hecht
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

RE: Proposed Rule Changes

I. Change Rule 166b(6)(b)

A. Change the Rule 166b(6)(b) from 30 days to, at a minimum, 60 days.

Judge, the reasons for the above rules are many, but I will give you only a few.

THE THIRTY DAY RULE

Further, I talked to a great lawyer a few days ago. This lawyer is one of the best in this state in my opinion . His statement: "my whole life revolves around the 30 day rule. I stay up at night worrying about the 30 day rule".

Judge, if this is true, why not make it 60 days and not 30. The fact is, and all lawyers with any experience now know it, is that the exclusionary provisions of Rule 166b and the cases interpreting it (i.e. excluding experts or witnesses for failure to supplement or supplementation within the "30 day rule") have drastically changed our practice. The Courts are saying: you can NOT wait any more to disclose experts or witnesses. This did not use to be the real Texas practice. I can remember the "old days" when a trial judge would grant a continuance and permit a party to "supplement" as late as the day of trial and even in major cases.

We have moved far away from this, and properly so. But I submit that the time is now to make a realistic decision to get to a realistic number: not 30 days, but a minimum of 60 days prior to trial.

30 days prior to trial is not enough time. If a party does bring in a new expert, the depositions can not be set up, the other party wants new experts etc. The case is put off. Depositions are noticed. Lawyers are unhappy. Rambo tactics become more common within the last "30 days". All of this "pressure" is not necessary. Just back the dates back to, at a minimum, 60 days.

DAN R. PRICE
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(512) 476-7086

166 200
166a 205
166(b) 166.
166(b)6
167a 215
168
169

November 28, 1989

Honorable Nathan L. Hecht
P.O. Box 12248
Austin, TX 78711

RE: Comment on Proposed Rules Changes Regarding Discovery

Comm on Jud Econ

Dear Justice Hecht:

TRCP 166c

Other matters: Rule 166c. I believe new Rule 166c should be clarified. The last part of the rule discusses agreement in non-deposition discovery. The question is whether or not Rule 166c, if read in conjunction with Rule 11, requires that such an agreement be in writing, signed by the parties, and filed with the court? I believe this should be clarified by the new rules.

4543.001

njh
UNS
✓ 1-29-90

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TEXAS BOARD OF LEGAL SPECIALIZATION

January 25, 1990

Justice Nathan L. Hecht
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

RE: Proposed Rule Changes

IV. New Rule

A. Finally, I would create a new Rule, let us say "Rule 166c".

B. This rule would say in essence:

1. A Lawyer files a Motion "Pursuant to Rule 166c" for Discovery.

2. That is about all that the "Rule 166c Motion" would say.

3. When a lawyer received a "Rule 166c Motion", the content of his/her response would be governed by Rule 166c.

4. Rule 166c would provide that, within 30 days after receipt of a Rule 166c Motion, the respondent would provide the following information:

Suggested Content of Statement Required by Rule 166c

Within 30 days after receipt of a Rule 166c Request, all parties shall each serve on each other, and all other involved counsel a document styled as "Rule 166c Pre-trial Statement of Witnesses, Experts and Documents".

Such statement shall designate and contain the following information:

a. The name, address and telephone number of all persons who have knowledge of relevant facts. The statement shall designate from this list of people identified those persons that a party "will probably call" if the lawyer, in the exercise of good faith, knows that he/she will, in all probability, call that person as a witness at the time of trial.

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b. The name, address and telephone number of all experts which the party filing the statement may call at the time of the trial.

c. The name, address and telephone number of every expert used for consultation who is not expected to be called as a witness at trial, if the consulting expert's opinions or impressions have been reviewed by a testifying expert.[1]

d. As to each such expert identified pursuant to either paragraph b or c above the following information shall be stated in detail:

(1) the subject matter on which the witness is expected to testify;

(2) the mental impressions and opinions held by the expert;

(3) a statement of whether the expert has prepared any report or summary of his opinions or mental impressions;

(4) identification of any document prepared by the expert or used by the expert on which the expert may rely for any opinions at the time of hearing or trial.

e. Identify all documents or tangible items which the party filing the statement believes at this time that it intends to introduce at the time of trial or documents which the party filing the statement believes supports his/her/its claim or defense. All documents shall be designated which the lawyer believes that he/she will probably use at trial, that is, any document that the lawyer, in the exercise of good faith, believes that he/she will, in all probability, introduce the document at the time of trial.

By the term **"identify"**, it is intended that a party shall identify a document by giving the date of the document, a general description of the contents of the document and the source of the document where applicable.

By the term **"identify"**, it is intended that a party shall identify a tangible item by giving a reasonably specific description of the item so that the Court or opposing counsel can be put on notice of the character of the tangible item.

f. As to any tangible item which is not a document, the party identifying the tangible item shall have the duty of notifying all counsel and unrepresented parties that a tangible item has been identified but not produced and shall set a reasonable time and place for the examination and inspection of the tangible item.

---

[1] This language follows the proposed language change under Rule 166b(e).

g. EACH Rule 166c PRE-TRIAL STATEMENT SHALL BE SIGNED BY COUNSEL. THIS PROCEDURE SHALL BE CONSIDERED IN LIEU OF INTERROGATORIES AND REQUEST FOR PRODUCTION INQUIRING AS TO (A) WITNESSES WITH KNOWLEDGE OF RELEVANT FACTS; (B) EXPERTS WHO MAY BE CALLED; (C) EXPERTS FOR CONSULTATION WHO WILL NOT BE CALLED BUT WHO MAY BE RELIED ON BY AN EXPERT WHO MAY BE CALLED; AND (D) IDENTIFICATION AND PRODUCTION AS TO RELEVANT DOCUMENTS. COUNSEL NEED NOT OBTAIN THE SIGNATURES OF THE CLIENTS ON THE PRE-TRIAL STATEMENTS.

On or before 60 days prior to any trial setting in the cause, this Rule 166c Pre-Trial Statement shall be supplemented.

All parties shall file in the papers of the cause and serve on counsel this supplementation of the pre-trial statement. This supplementation shall cover each and every item required in the pre-trial statement, including persons with knowledge of relevant facts, experts, identification and production of documents. This first supplementation of this pre-trial statement should be made as soon as practical, but in no event later than 60 days prior to trial. In this supplementation, there is no need or requirement to list again experts, documents or witnesses who were previously named by the party.

No witness or expert shall be permitted to testify or document be introduced unless said witness, expert, or document is properly identified in timely filed pre-trial statements filed on or before 60 days prior to trial as described in this Order except on leave of Court and unless the Court finds that good cause exists for permitting or requiring supplementation not in compliance with the timetable contained in this Rule. [2]

This Rule 166c Motion and Pre-Statement shall not relieve any party from any duty of disclosure or supplementation which is not specifically addressed, controlled or imposed otherwise by the Court or by these Rules.

---

[2] The purpose here is to conform to the supplementation requirements of 166b. I have not tracked the language exactly, but that is the general intent. Refinements would have to include making it conform to Rule 166b and to make "Rule 166c" and Rule 166b work together.

Judge, the reasons for the above rules are many, but I will give you only a few.

My New Rule 166c

I am also admitted into the bar of the State of Colorado. That state passed a Rule which is similar, though even broader, that the Rule 166c which I am suggesting.

I do not have the time in this letter to argue at length why such a rule would be helpful. However, I am convinced that it would be of immense help for the Supreme Court to tell every lawyer in this state that within 30 days after getting a "Rule 166c" Motion, a "statement" from the lawyer giving the information which I have set out about would be required and that the content of that response was something that the lawyers were definite about and knew exactly what was coming.

If you are at all interested in following up on this suggestion, I would be willing to do whatever you think is appropriate to flush out my reasons for this suggestion, the Colorado experience, a survey of the literature on it etc.

In conclusion, these suggestions are probably not totally new at all. But I am completely convinced that our Texas practice as it now stands has much going for it. But we need to get utterly realistic, and I strongly believe that our current practice of amending pleading 7 days prior to a trial date and designation of expert 30 days prior to trial is absurd given the realities of practice in 1990.

The unpleasant truth is: when a lawyer has to designate experts and HIRE THEM, and when a lawyer has to finally and truly amend pleadings, then and sometimes only then do many of us think about settlement, getting very realistic with our clients about the cost and probable outcome of this vast litigation process that we have been involved with.

3-19-93

L-HS,

FYI.

§ 13.02 calls for Chief Justice of Supreme Court to appoint a "Health Care Liability Discovery Panel" which would attempt to prepare mandatory standard sets of interrogatories & request for production.

MJS

9/4 HD, SVAD Designee See Agenda V CAJ Staff CAJ Head. J. Hecht

CHAPTER 624

S.B. No. 274

AN ACT

relating to restroom facilities in places where the public congregates.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Subchapter D, Chapter 341, Health and Safety Code, is amended by adding Section 341.068 to read as follows:

Sec. 341.068. RESTROOM AVAILABILITY WHERE THE PUBLIC CONGREGATES. (a) Publicly and privately owned facilities where the public congregates shall be equipped with sufficient temporary or permanent restrooms to meet the needs of the public at peak hours.

(b) The board shall adopt rules to implement Subsection (a), including a rule that in providing sufficient restrooms a ratio of not less than 2:1 women's-to-men's restrooms or other minimum standards established in consultation with the Texas State Board of Plumbing Examiners shall be maintained if the use of the restrooms is designated by gender. The rules shall apply to facilities where the public congregates and on which construction is started on or after January 1, 1994, or on which structural alterations, repairs, or improvements exceeding 50 percent of the entire facility are undertaken on or after January 1, 1994.

(c) In this section:

(1) "Facilities where the public congregates" means sports and entertainment arenas, stadiums, community and convention halls, specialty event centers, and amusement facilities. The term does not include hotels, churches, restaurants, bowling centers, public or private elementary or secondary schools, or historic buildings.

(2) "Restroom" means toilet, chemical toilet, or water closet.

(d) The board may adopt rules consistent with Subsection (c)(1) to define "facilities where the public congregates."

SECTION 2. This Act takes effect September 1, 1993.

SECTION 3. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

Passed the Senate on March 18, 1993, by a viva-voce vote; May 19, 1993, Senate refused to concur in House amendment and requested appointment of Conference Committee; May 22, 1993, House granted request of the Senate; May 28, 1993, Senate adopted Conference Committee Report by a viva-voce vote; passed the House, with amendment, on May 18, 1993, by a non-record vote; May 22, 1993, House granted request of the Senate for appointment of Conference Committee; May 27, 1993, House adopted Conference Committee Report by a non-record vote.

Approved June 10, 1993.

Effective Sept. 1, 1993.

CHAPTER 625

S.B. No. 1409

AN ACT

relating to medical liability actions and medical liability insurance; providing penalties.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Section 41.02, Part 4, Chapter 817, Acts of the 65th Legislature, Regular Session, 1977, as it relates to Parts 2 and 3 of that chapter, not previously repealed by Section 2, Chapter 608, Acts of the 72nd Legislature, Regular Session, 1991, is hereby repealed.

SECTION 2. Section 41.02, Part 4, Chapter 817, Acts of the 65th Legislature, Regular Session, 1977, is amended to read as follows:

Sec. 41.02. *Part 1 of this* [~~This~~] Act expires at midnight on August 31, *2009* [~~1993~~].

SECTION 3. The Medical Liability and Insurance Improvement Act of Texas (Article 4590i, Vernon's Texas Civil Statutes), is amended by adding Subchapter M to read as follows:

SUBCHAPTER M. PROCEDURAL PROVISIONS

Sec. 13.01. AFFIDAVIT OR COST BOND. (a) In a health care liability claim, the plaintiff's attorney or, if the plaintiff is not represented by an attorney, the plaintiff shall, within 90 days after the date the action was commenced, file an affidavit attesting that the attorney or plaintiff has obtained a written opinion from an expert who has knowledge of accepted standards of care for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim, that the acts or omissions of the physician or health care provider were negligent and a proximate cause of the injury, harm, or damages claimed.

(b) A plaintiff or plaintiff's attorney shall be deemed to be in compliance with Subsection (a) of this section if, within 90 days after the date the action was commenced, the plaintiff posts a bond with surety or any other equivalent security approved by the court, including cash in an escrow account, for costs in an amount of $2,000.

(c) If on the expiration of the 90th day after the date the action was commenced or the expiration of the extension period described in Subsection (d) of this section, whichever is later, the plaintiff has failed to post security as described in Subsection (b) of this section or alternatively has failed to file an affidavit as described in Subsection (a) of this section, then the court on the motion of any party or on the court's own motion shall increase the amount of security required by Subsection (b) of this section to an amount not to exceed $4,000. If the plaintiff fails to post the increased security within 30 days after being served with a copy of the court's order or fails to provide an affidavit as provided by Subsection (a) of this section, the court shall on motion unless good cause is shown for such failure dismiss the action without prejudice to its refiling and assess costs of court against plaintiff.

(d) The court on motion of any party and for good cause shown may extend the time for the plaintiff to comply with Subsection (a) or (b) of this section for a period not to exceed 90 days. The time for the plaintiff to comply with Subsection (a) or (b) of this section may also be extended by written agreement of the parties filed with the court.

(e) Discovery concerning the affidavit, including the written opinion and the identity of the physician or health care provider who supplied the opinion, shall not be allowed unless the physician or health care provider who supplied the opinion is designated as an expert witness by the plaintiff.

Sec. 13.02. DISCOVERY PROCEDURES. (a) In every health care liability claim the plaintiff shall within 45 days after the date of filing of the original petition serve on the defendant's attorney or, if no attorney has appeared for the defendant, on the defendant full and complete answers to the appropriate standard set of interrogatories and full and complete responses to the appropriate standard set of requests for production of documents and things promulgated in accordance with Subsection (c) of this section.

(b) Every physician or health care provider who is a defendant in a health care liability claim shall within 45 days after the date on which an answer to the petition was due serve on the plaintiff's attorney or, if the plaintiff is not represented by an attorney, on the plaintiff full and complete answers to the appropriate standard set of interrogatories and complete responses to the standard set of requests for production of documents and things promulgated pursuant to Subsection (c) of this section.

(c) The chief justice of the Supreme Court of Texas shall within 30 days after the effective date of this Act appoint as members of the Health Care Liability Discovery Panel three persons from a list of attorneys to be submitted by a statewide association of attorneys whose members include persons who customarily represent patients in health care liability actions

and three persons from a list of attorneys to be submitted by a statewide association of attorneys whose members include persons who customarily represent defendants in health care liability actions. Members of the Health Care Liability Discovery Panel serve without compensation. On or before the 1st day of November, 1993, the Health Care Liability Discovery Panel shall promulgate standard sets of interrogatories and requests for production of documents and things appropriate for each of the categories of plaintiffs and defendants usually involved in health care liability claims. In preparing standard sets of interrogatories the Health Care Liability Discovery Panel shall not be restricted in number by any limit imposed under the Texas Rules of Civil Procedure.

(d) The Supreme Court of Texas shall review the standard sets of interrogatories and requests for production of documents and things promulgated by the Health Care Liability Discovery Panel and shall, no later than January 1, 1994, approve them in their entirety, disapprove them in their entirety, or approve them with modifications. If the supreme court disapproves such standard sets of interrogatories and requests for production of documents and things in their entirety, then such standard sets shall be null and void and of no effect, and the Health Care Liability Discovery Panel shall be disbanded. If the supreme court approves such standard sets of interrogatories and requests for production of documents and things with modifications, then the Health Care Liability Discovery Panel shall either approve or disapprove of such standard sets of interrogatories and requests for production of documents and things as modified by the supreme court by a vote of at least five of the six members of the panel. If the modifications made by the supreme court fail to obtain the necessary vote for approval by the panel, then such standard sets of interrogatories and requests for production of documents and things shall be null and void and of no effect and the panel shall be disbanded. If the panel approves the modified standard sets of interrogatories and requests for production of documents and things, then the supreme court shall proceed to publish the standard sets in accordance with Subsection (e) of this section.

(e) As soon as practical after the approval of such standard sets of interrogatories and requests for production of documents and things by the Health Care Liability Discovery Panel and the Supreme Court of Texas, and in any event no later than February 1, 1994, the supreme court shall publish such standard sets. Notwithstanding any other law, the supreme court shall not be required to publish such standard sets of interrogatories and requests for production of documents and things for public comment. Beginning on April 1, 1994, all plaintiffs and all physicians or health care providers who are defendants in a health care liability claim in which the plaintiff's original petition is filed on or after that date shall file full and complete answers and responses in accordance with Subsections (a) and (b) of this section.

(f) Nothing in this section shall limit or impede the Supreme Court of Texas in exercising its rulemaking authority pursuant to Sections 22.003 and 22.004, Government Code.

(g) Except on motion and for good cause shown, no objection may be asserted regarding any standard interrogatory or request for production of documents and things, but no response shall be required where a particular interrogatory or request is clearly inapplicable under the circumstances of the case.

(h) Failure to file full and complete answers and responses to standard interrogatories and requests for production of documents and things in accordance with Subsections (a) and (b) of this section or the making of a groundless objection under Subsection (g) of this section shall be grounds for sanctions by the court in accordance with the Texas Rules of Civil Procedure on motion of any party.

(i) The time limits imposed under Subsections (a) and (b) of this section may be extended by the court on the motion of a responding party for good cause shown and shall be extended if agreed in writing between the responding party and all opposing parties. In no event shall an extension be for a period of more than an additional 30 days.

(j) If a party is added by an amended pleading, intervention, or otherwise, the new party shall file full and complete answers to the appropriate standard set of interrogatories and full and complete responses to the standard set of requests for production of documents and things no later than 45 days after the date of filing of the pleading by which the party first appeared in the action.

(k) If information or documents required to provide full and complete answers and responses as required by this section are not in the possession of the responding party or attorney when the answers or responses are filed, the party shall supplement the answers and responses in accordance with the Texas Rules of Civil Procedure.

(l) Nothing in this section shall preclude any party from taking additional non-duplicative discovery of any other party. The standard sets of interrogatories provided for in this section shall not constitute, as to each plaintiff and each physician or health care provider who is a defendant, the first of the two sets of interrogatories permitted under the Texas Rules of Civil Procedure.

(m) Notwithstanding any other provisions of this section, if a court of this state has, prior to the effective date of this section, signed an order in tort litigation in which cases have been consolidated for discovery providing for standard sets of interrogatories and requests for production of documents and things, compliance with such an order shall be deemed to be compliance with the requirements of this section.

SECTION 4. The Medical Liability and Insurance Improvement Act of Texas (Article 4590i, Vernon's Texas Civil Statutes), is amended by adding Subchapter O to read as follows:

SUBCHAPTER O. ARBITRATION AGREEMENTS

Sec. 15.01. ARBITRATION AGREEMENTS. (a) No physician, professional association of physicians, or other health care provider shall request or require a patient or prospective patient to execute an agreement to arbitrate a health care liability claim unless the form of agreement delivered to the patient contains a written notice in 10-point boldface type clearly and conspicuously stating:

UNDER TEXAS LAW, THIS AGREEMENT IS INVALID AND OF NO LEGAL EFFECT UNLESS IT IS ALSO SIGNED BY AN ATTORNEY OF YOUR OWN CHOOSING. THIS AGREEMENT CONTAINS A WAIVER OF IMPORTANT LEGAL RIGHTS, INCLUDING YOUR RIGHT TO A JURY. YOU SHOULD NOT SIGN THIS AGREEMENT WITHOUT FIRST CONSULTING WITH AN ATTORNEY.

(b) A violation of this section by a physician or professional association of physicians constitutes a violation of the Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes), and shall be subject to the enforcement provisions and sanctions contained in Subchapter D of that Act.

(c) A violation of this section by a health care provider other than a physician shall constitute a false, misleading, or deceptive act or practice in the conduct of trade or commerce within the meaning of Section 17.46 of the Deceptive Trade Practices-Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code), and shall be subject to an enforcement action by the consumer protection division pursuant to said Act and subject to the penalties and remedies contained in Section 17.47 of that Act, notwithstanding Section 12.01 of this Act or any other law.

(d) Notwithstanding any other provision of this section, a person who is found to be in violation of this section for the first time shall be subject only to injunctive relief or other appropriate order requiring the person to cease and desist from such violation, and not to any other penalty or sanction.

SECTION 5. Section 4.01, Medical Liability and Insurance Improvement Act of Texas (Article 4590i, Vernon's Texas Civil Statutes), is amended by adding Subsection (e) to read as follows:

(e) For the purposes of this section, and notwithstanding Section 5.08, Medical Practices Act (Article 4495b, Vernon's Texas Civil Statutes), or any other law, a request for the medical records of a deceased person or a person who is incompetent shall be deemed to be valid if accompanied by an authorization signed by a parent, spouse, or adult child of the deceased or incompetent person.

SECTION 6. Section 161.032, Health and Safety Code, is amended to read as follows:

Sec. 161.032. RECORDS AND PROCEEDINGS CONFIDENTIAL. (a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.

(b) The records and proceedings may be used by the committee and the committee members only in the exercise of proper committee functions.

(c) This section *and Section 5.06, Medical Practices Act (Article 4495b, Vernon's Texas Civil Statutes), do* [~~does~~] not apply to records made or maintained in the regular course of business by a hospital, health maintenance organization, *medical organization, university medical center or health science center,* or extended care facility.

SECTION 7. This Act takes effect immediately except that Sections 3, 4, 5, and 6 take effect on September 1, 1993.

SECTION 8. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force according to its terms, and it is so enacted.

Passed the Senate on May 18, 1993: Yeas 31, Nays 0; passed the House on May 25, 1993: Yeas 134, Nays 0, two present not voting.

Approved June 10, 1993.

Effective June 10, 1993, except §§ 3 to 6 effective Sept. 1, 1993.

CHAPTER 626

S.B. No. 1477

AN ACT

relating to the creation, administration, powers, duties, operation, and financing of the Edwards Aquifer Authority and the management of the Edwards Aquifer; granting the power of eminent domain; authorizing the issuance of bonds; providing civil and administrative penalties; and validating the creation of the Uvalde County Underground Water Conservation District.

Be it enacted by the Legislature of the State of Texas:

ARTICLE 1

SECTION 1.01. FINDINGS AND DECLARATION OF POLICY. The legislature finds that the Edwards Aquifer is a unique and complex hydrological system, with diverse economic and social interests dependent on the aquifer for water supply. In keeping with that finding, the Edwards Aquifer is declared to be a distinctive natural resource in this state, a unique aquifer, and not an underground stream. To sustain these diverse interests and that natural resource; a special regional management district is required for the effective control of the resource to protect terrestrial and aquatic life, domestic and municipal water supplies, the operation of existing industries, and the economic development of the state. Use of water in the district for beneficial purposes requires that all reasonable measures be taken to be conservative in water use.

SECTION 1.02. CREATION. (a) A conservation and reclamation district, to be known as the Edwards Aquifer Authority, is created in all or part of Atascosa, Bexar, Caldwell, Comal, Guadalupe, Hays, Medina, and Uvalde counties. A confirmation election is not necessary. The authority is a governmental agency and a body politic and corporate.

(b) The authority is created under and is essential to accomplish the purposes of Article XVI, Section 59, of the Texas Constitution.

SECTION 1.03. DEFINITIONS. In this article:

(1) "Aquifer" means the Edwards Aquifer, which is that portion of an arcuate belt of porous, water-bearing, predominately carbonate rocks known as the Edwards and Associated Limestones in the Balcones Fault Zone extending from west to east to northeast from

4543.001 LWS hnd

12-19-91 BB

LaDONNA K. OCKINGA

...orney and Counselor at Law

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HNP, SCAC Subcom Appellate Rules (Evelyn) COATS J. Hecht

Luther H. Soules, Attorney at Law
175 East Houston, 10th Floor
Two Republicbank Plaza
San Antonio, Texas 78205-2230

RE: Suggestion for a proposed change in the Texas Rules of Civil Procedure

Dear Mr. Soules:

I have a suggestion that may alleviate a constant abuse I see in regards to Motions to Produce Documents. The normal practice of "rambo litigators" is to return the response stating that the documents will be produced at a time convenient to both parties. The attorney requesting production makes two to three phone calls and sends letters to the party that has agreed to produce the documents. There never is a convenient time, but no denial of the request is ever made. Until the person is threatened with sanctions before the Court, the documents are not produced. This drives up the cost of discovery and is an avoidable harassment in the discovery process.

My suggestion is that if the documents are not actually produced to the party requesting the documents, at the time required, the party's response must include at least three times when the person desiring to review the documents may come to observe the documents. There should be a further provision that the time to review the documents cannot be restricted to these times. Hopefully, this small suggestion may make a large change in the abuses of the discovery process. I submit it for your consideration.

Yours very truly,

LaDonna K. Ockinga
Attorney at Law

LKO/cca
cc: Frank L. Branson, Attorney at Law
John E. Collins, Attorney at Law
Vester T. Hughes, Jr., Attorney at Law
Honorable Linda B. Thomas
Professor William V. Dorsaneo, III
Kenneth D. Fuller, Attorney at Law

PLAYING BY THE RULES

Recent Amendments to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence Effective December 1, 1991

by John K. Chapin

On April 30, 1991, the Supreme Court transmitted to Congress a number of changes to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence. These changes are to take effect on December 1, 1991. Following is a discussion of the major changes. Other insubstantial changes were made to F.R.A.P. 6, 10, 26, and 26.1.

FEDERAL RULES OF CIVIL PROCEDURE

(TRCP 167)

Production of Documents and Things and Entry Upon Land for Inspection—Rule 34

Rule 34(c) (persons not parties) is amended to provide that a person not a party to an action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45 (subpoenas). The amendment reflects the change effected by the revision to Rule 45, discussed below, to provide for subpoenas to compel nonparties to produce documents and things and to submit to inspections.

4543.001

hhd
LHS

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9-11-90
SB

September 10, 1990

Mr. Luther H. Soules III
Chairman, Texas Rules of
Civil Procedure Committee
Soules & Wallace
175 East Houston #1000
San Antonio Tx 78205

Re: Suggested Modifications to Texas Rules of Civil Procedure Rules 90, 166b, 167 and 168

Dear Luke:

I enjoyed your presentation last week at the Advanced Civil Trial Course up in Dallas. I've got several ideas I'd like to submit for your Committee to look at as modifications to the Texas Rules of Civil Procedure:

Rules 167 & 168

The concepts of propounding and objecting to interrogatories and requests for production, what is and not "correct" versus objectionable, etc. is one that is consuming a great deal of case law, rule amendments, and so forth. These matters are also costing clients a lot of money and taking up a lot of lawyers' time that could be more productively utilized.

Often a minor alteration in a lawyer's choice of words in discovery can spell the difference between an objectionable discovery request and one that is not. Certain types of information, such as identity of fact witnesses and testifying experts, key documents, etc. are almost universally the subject of discovery requests.

The Supreme Court, through the Committee, should promulgate a short set of "generic" interrogatories the basics that get asked in virtually every case), and a "generic" set of requests for production of documents (again, the basics), to be appended to Rules 168 and 167, respectively with the proviso that, if these discovery items are propounded verbatim they are <u>not</u> objectionable on the investigatory and other privilege grounds.

This concept of a promulgated "form" has precedent. For example, the Texas Business Corporation Act contains a form promulgated and appended to the Act, and if you follow that form verbatim, your Articles <u>will</u> be approved and filed by the Secretary of State. Similarly, Article 4590h, which regulates durable powers of attorney, promulgates therein a form for same which has been approved by the Legislature as valid.

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RULE 167. DISCOVERY AND PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION, COPYING OR PHOTOGRAPHING

1. **Procedure.** Any party may serve on any other party a REQUEST:

a. to produce and permit the party making the REQUEST, or someone acting on his behalf, to inspect, sample, test, photograph and/or copy, any designated documents or tangible things which constitute or contain matters within the scope of Rule 166b which are in the possession, custody or control of the party upon whom the request is served; or

b. to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon within the scope of Rule 166b.

c. The REQUEST shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The REQUEST shall specify a reasonable time, place and manner for making the inspection and performing the related acts.

d. The party upon whom the REQUEST is served shall serve a written RESPONSE which shall state, with respect to each item or category of items, that inspection or other requested action will be permitted as requested, and he shall thereafter comply with the REQUEST, except only to the extent that he makes objections in writing to particular items, or categories of items, stating specific reasons why such discovery should not be allowed.

RESPONSES, including any objections, shall be preceded by the REQUEST to which the RESPONSE or objection pertains.

e. All parties to the action shall be served with copies of each REQUEST and RESPONSE.

f. A party who produces documents for inspection shall produce them as they are kept in the usual course of business, or shall organize and label them to correspond with the categories in the request.

g. Testing or examination shall not extend to destruction or material alteration of an article without notice, hearing, and prior approval by the court.

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CHS

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LAW OFFICES OF
TINSMAN & HOUSER, INC.

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Scott Sulc
Scott Ayres
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Xc John Hadden
Julie Hall
9-12-89

September 8, 1989

Mr. Luke Soules
Law Offices of Luther Soules, III
175 E. Houston Street, 10th Floor
San Antonio, Texas 78205

Re: Proposed Amendment of Texas Rules of Civil Procedure

Dear Luke:

This letter is written to you in your capacity as a member of the Supreme Court Advisory Committee for the Texas Rules of Civil Procedure.

Recently, I have had an occasion to notice and appreciate a significant difference in procedural response between Rule 168, T.R.C.P. (Interrogatories to parties) on the one hand, and Rule 167, T.R.C.P. (Discovery and Production of Documents and Things for Inspection, Copying or Photographing) and Rule 169, T.R.C.P. (Requests for Admission), on the other.

Rule 168 (Interrogatories), in an unnumbered paragraph included under Rule 168.5, provides "Answers to interrogatories shall be preceded by the question or interrogatory to which the answer pertains." Much to my surprise, I have discovered that there is no similar provision in Rule 167 (Discovery and Production) or Rule 169 (Admissions).

The subject provision contained in Rule 168 regarding interrogatories is good and makes the record clear. In most circumstances, unless there has been amended or supplemental answers or responses filed, the attorneys have to handle only one document relating to interrogatories and responses. That document contains both the questions and the answers and/or objections. Because there is no similar provision in the rules providing for responses to requests for production (Rule 167) or for requests for admissions (Rule 169), unless the attorney, as a matter of courtesy, has copied the particular requests for production or requests for admission in order that they precede the response or objection thereto (which I have made it my practice to do), then the attorneys are having to constantly flip back and forth between the requests for production or requests for admission and the responses.

It seems to me that for the sake of consistency and for clarity of the record, a provision similar to that quoted and found in Rule 168 should be incorporated in Rules 167 and 169. I have included for your reference copies of Rules 167, 168 and 169, along with the language which I propose should be added to Rules 167 and 169 to make them consistent with Rule 168 and which I believe will ultimately simplify the process. It may require a bit more of the secretaries or paralegals in copying the requests for production or requests for admission that precede the response or objection, but clarity for the record would be greatly enhanced. It is further my contention that such a procedure would not unduly overload the filing capacity of the District Clerks, who seem to not file much of anything anymore anyway.

If there is some reason why the language and change in format I have suggested for Rules 167 and 169 was not included purposefully, then I would like to know that reason. If it was merely oversight, then I believe the language and the slight change in format which I have suggested should be added to those rules would ultimately save time and simplify the process. Ultimately, it would save money, as well.

Please let me hear from you in this regard.

Very truly yours,

TINSMAN & HOUSER, INC.

John F. Younger, Jr.

JFYjr/mlh

Enclosures

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LOS ANGELES

December 8, 1989

TRCP 166b (4)
TRCP 167
TRCP 168
TRCP 169
TRCP 201

Re: Comments Regarding Proposed Amendments to Texas Court Rules

Justice Nathan L. Hecht
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

Please consider the following as my personal comments on the proposed amendments to the Texas Rules of Civil Procedure and are not to be construed as the comments of this firm or any of its attorneys:

Rules 167, 168 and 169. The proposed change to Rule 169 gives a Defendant fifty (50) days after service of the citation and petition to respond to requests for admission. However, Rules 167 and 168 allow a defendant fifty (50) days to respond to requests for production and interrogatories only if such discovery requests accompany the citation. I have recently been party to a situation where after the citation is served, the plaintiff has issued discovery requests upon the defendant prior to the time the party appears but after the citation is issued. In such a situation, the defendant may only have thirty (30) days to respond to the discovery request since the request did not accompany the citation.

I would suggest that Rules 167, 168 and 169 be re-drafted so that they are consistent in allowing a defendant fifty (50) days after service of the citation to respond to any discovery requests. In other words, the defendant should not need to respond to any discovery requests for fifty (50) days after citation has been served upon him.

I hope these suggestions are of some benefit.

Yours very truly,

Keith S. Dubanevich

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KSD/lc

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167 ←
TRCP 168
200
201

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December 11, 1989

Texas Supreme Court
Rules Committee
P. O. Box 12248
Austin, Tx 78711

In Re: Recent Discovery Rules Changes

Gentlemen:

I respectfully recommend changes in discovery rules as follows:

1. Limit written interrogatories to 10 single questions, except upon leave of court. (Rule 168(5)

2. Followup or clarification interrogatories: 2 each for any interrogatory imperfectly answered, to which the answer is not understood, or needs clarifying.

3. File discovery papers. Presenty rules dispense with filing. This results in disorder and irresponsibility. Anything important enough to consume a lawyer's time should be kept on record, (including opinions of the Court of Appeals).

4. Limit depositions to one each per attorney per witness, except upon leave of court.

5. Provide for the party taking the depositions to make a deposit to cover time and expense of witness and the attorney representing the witness if the deposition requires more than one day. This should be a requirement in all multiple party or extended depositons where a client and his lawyer are held in a vice grip for several days for a long, long, deposition. Particularly where the witness is a party-witness, and his lawyer's expenses are mounting uncontrollably anyway.

6. Go back to the requirement that the deposition be taken in the county where the witness resides, except by agreement or special leave of court. Should apply to party witnesses as well as others. This is not an unreasonable requirement.

7. Require the party giving notice to take the deposition to also give notice of the subject matter or zone of inquiry, and require the same thing of the opposite attorney if he intends to pursue an independent line of questioning. Allow "free for all" depositions only on leave of court, if at all, and with

limitations. Each deposition notice, whether for oral depositions or interrogatories, should contain the name of the individual court reporter, and the phone number of the court reporter.

8. Require 10 days notice when the witness is required to produce documentary material. "Reasonable notice" is probably adequate in other situations.

Yours very truly,

Ernest L. Sample

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nyh
UVO

✓9-18-89
DD

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711
(512) 463-1312

September 14, 1989

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

Dear Luke:

I enclose a copy of a letter from Charles Griggs of Sweetwater to Justice Cook regarding Texas Rules of Civil Procedure 168 and 169. The letter raises the question of how to treat the filing of an instrument which contains both interrogatories and requests for admission, and the responsive instrument.

Please schedule this subject for discussion by the Committee.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

September 14, 1989

Mr. Charles R. Griggs
Nunn, Griggs, Jones & Sheridan
P. O. Box 488
Sweetwater, Texas 79556-0488

Dear Mr. Griggs:

Justice Cook has referred to me your letter to him regarding Texas Rules of Civil Procedure 168 and 169. As the Court's liaison to the Rules Advisory Committee, I have sent a copy of your letter to the chairman, Luther H. Soules of San Antonio, for consideration by the Committee.

You have raised a legitimate issue. The Court appreciates your interest in the rules.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

NUNN, GRIGGS, JONES & SHERIDAN

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August 28, 1989

The Honorable Eugene A. Cook, Justice
The Supreme Court of Texas
P. O. Box 12248, Capitol Station
Austin, Texas 78711

Dear Justice Cook:

There is a matter arising out of the discovery process that is causing some confusion at the trial court level. I would bring this to your attention with the thought that the Court may want to clarify discovery rules in order to eliminate this problem.

Sometime ago, the Court put an end to the filing of depositions with the District or County Clerks, probably in the interest of saving storage space. About that time, Rules 168 and 169 were rewritten. Rule 168 contemplates the serving of interrogatories and responses to interrogatories directly upon the parties or their attorneys. The Rule does not forbid the filing of interrogatories or responses with the Clerk but it does not contemplate the filing of copies in that office. Rule 169 specifically provides that requests for admissions and responses to requests for admissions will "be filed promptly in the Clerk's office..."

It is not unusual for an attorney to prepare a discovery document which incorporates both interrogatories and requests for admissions of fact; in fact, this vehicle can be quite useful and can result in increased clarity and efficiency of the discovery process.

However, Clerks in my part of the country are beginning to refuse to file a discovery document that has the characteristics of interrogatories and of requests for admissions.

I hope the Court will consider an amendment to Rule 169 to eliminate the requirement of a filing with the Clerk in order

that the discovery process may have a bit more flexibility than it has under the current state of affairs.

Sincerely,

NUNN, GRIGGS, JONES & SHERIDAN

By: 

CRG:cw

PLAYING BY THE RULES

Recent Amendments to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence Effective December 1, 1991

by John K. Chapin

On April 30, 1991, the Supreme Court transmitted to Congress a number of changes to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence. These changes are to take effect on December 1, 1991. Following is a discussion of the major changes. Other insubstantial changes were made to F.R.A.P. 6, 10, 26, and 26.1.

FEDERAL RULES OF CIVIL PROCEDURE

(TRCP 167a) *Physical and Mental Examinations of Persons—Rule 35*

Rule 35 is amended to authorize the district court to require physical or mental examinations conducted by any person who is suitably licensed or certified, rather than just by a physician or a psychologist.

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NEW YORK
LOS ANGELES

166b
168
TRCE 703
→ 167a

February 28, 1990

Re: Proposed Changes to Texas Rules of Civil Procedure 166b(3)(c) and 168

Chambers of the Hon. Nathan L. Hecht, Justice
Texas Supreme Court
P. O. Box 12248 - Capitol Station
Austin, Texas 78711
(512) 463-1348

Dear Justice Hecht:

In mid-December, I attended a Houston Bar Association function in which Chief Justice Phillips was the featured speaker. The Chief Justice indicated the Court had received some very good feedback from the Bar concerning the Court's 1990 changes to the Texas Rules of Civil Procedure. He encouraged those attendees who had not responded to do so. This letter is in response to that request. I addressed this letter to you as I am told you are the Justice who is coordinating the changes for the Texas Rules of Civil Procedure.

I have three concerns I wish the Court to consider. The first concern deals with the proper construction of what constitutes a "written statement" under TEX. R. CIV. P. 166b(3)(c)(ii). The second concern deals with a conflict between TEX. R. EVID. 703--Basis of Opinion Testimony and TEX. R. CIV. P. 168--Interrogatories to Parties. The third concern is the need for a new rule that would permit a vocational rehabilitation expert to examine a party.

RULE 167a -- PHYSICAL AND MENTAL EXAMINATION OF PERSONS

Rule 167a permits a court to order the physical or mental@ examination of a party. The Rule further provides that the examination must be conducted by a physician. I support the policy reasons of this Rule in that medical examinations are intrusive and, as such, there must be a showing of good cause and a court order.

However, there are numerous situations where a defendant needs to have a plaintiff examined by a vocational rehabilitation expert. Unfortunately, many plaintiffs refuse to submit to such an examination, simply because they feel they cannot be compelled to do so. Such an examination is not intrusive the way a physical or mental examination can be. Moreover, the information to be derived does go to the issue of damages and would probably further settlement negotiations. While a strong argument exists for permitting such an examination under the general discovery rules, a specific rule would save the attorneys, parties, and courts a lot of time.

Furthermore, I recently discovered, and the Court may be interested to know, that the Federal Judicial Conference Advisory Committee is presently considering a similar change to FED. R. CIV. P. 35, the federal counterpart to TEX. R. CIV. P. 167a. According to the advisory committee note, most states permit licensed persons other than medical doctors to provide diagnostic services. PROPOSED RULES, 127 F.R.D. 237, 335 (September 1989). Under the proposed changes, "[a] party wishing to employ the services of an examiner other than a medical doctor would be permitted to do so with the consent of the court." *Id.* Therefore, in light of this new trend and the general trend toward a more open discovery process, I recommend that Rule 167a be modified or a new rule created to permit upon request and without court order, the examination of a party by a vocational rehabilitation expert.

I hope this letter assists the Court. I apologize for this letter's delay, but I wanted to tender recommendations that were fully researched. These recommendations touch upon matters that would immediately benefit the Courts, the Bar, and litigants. Thus, I strongly urge the Court to consider my recommendations along with those proposals, now pending before the Court, and to include these recommendations as part of the

new rules that will become effective this summer or later this year. Please call or write if I may be of further assistance.

Very truly yours,

Stephen A. Mendel

SAM/bao

0413o/0414o

4543.001
cc: LHS
Orig: HHD
5/10/93

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DANIEL L. TATUM

May 7, 1993

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

James S. Sharp, Chairman
Court Rules Committee, State Bar of Texas
2400 Team Bank Building
500 Throckmorton
Fort Worth, Texas 76102

Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
175 East Houston
Tenth Floor
Two Republic Bank Plaza
San Antonio, Texas 78205-2230

HHD, Scott Sudc
Cassandra Stoff
Cont
J. Hecht.

Re: Rule 168(5), TEXAS RULES OF CIVIL PROCEDURE

Dear Sirs:

I am an attorney practicing in Fort Worth, Texas. I am writing to bring to your attention a shortcoming in the wording of Rule 168 of the TEXAS RULES OF CIVIL PROCEDURE, Paragraph 5, concerning the number of interrogatories permitted under that rule, and to suggest a possible change to correct the problem.

As it is currently worded, Rule 168 permits no more than thirty answers in any set of interrogatories and no more than two sets of interrogatories. Although it does not say so, I believe that the intended spirit of the rule is that after submitting the first thirty interrogatories, and receiving responses thereto, if a party still requires additional information, that party may submit thirty more interrogatories. I have always followed this practice, as do, I believe, most lawyers. However, because the rule does not specifically set out this system, certain unscrupulous lawyers frequently take advantage of that shortcoming to submit sixty interrogatories at once by simply serving them in two parts titled "First Interrogatories" and "Second Interrogatories." Indeed, I have even heard attorneys serving sixty interrogatories in a single document entitled "First and Second Interrogatories." The effect of this practice is that

instead of having thirty days to respond to thirty interrogatories, as I believe the rule intends, the respondent now has thirty days to respond to sixty. If the case in question involves any complex issues at all, this can be a very difficult and time consuming task. Such a practice clearly circumvents the intended spirit of the rule.

I would suggest one of two possible corrections to this oversight in Rule 168(5): Either (a) amend the rule to state that the second set of interrogatories may be served only after the responses to the first set are received, or (b) amend the rule to eliminate the distinction between first and second sets of interrogatories, allow one set of sixty interrogatories only, and provide for additional time to respond under subsection 4. The implementation of one of these changes, or perhaps some hybrid of the two, will eliminate the unfair practice of some attorneys in circumventing the spirit of Rule 168(5). Some have said the proper remedy is to object and to obtain relief from the court. This, however, requires additional time for counsel and the courts, as well as additional expense to the client. The better remedy is a clarification of the rule.

The trend today is to promote greater civility and collegiality among counsel, with the ultimate purpose of improving the general reputation of the legal profession and making the practice of law less cutthroat, less time-consuming, and hence, less costly. In my experience, most attorneys are courteous to their colleagues without the necessity of the rules and statutes requiring that they be so. Unfortunately for all of us, there are some who must be dragged into the light, and the only vehicles by which this can be accomplished are the laws and rules of civil practice of the state of Texas. Therefore, I urge you to give my proposal your most serious consideration.

Thank you for your time and attention to this matter.

Sincerely,

Daniel L. Tatum

dlt/jc

210-224-7073

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April 15, 1993

HHD,
SCAC Supp (R168)
v Applicable

BY HAND DELIVERY

Honorable Thomas R. Phillips
Honorable Nathan L. Hecht
Supreme Court of Texas
Austin, TX 78701

Dear Chief Justice Phillips and Associate Justice Hecht:

I enclose for your information a redraft of the provision you saw yesterday which does make clear that the Court's rule-making authority is unaffected and which provides the Court with authority to approve, disapprove or approve with modifications the work of the Panel (although in the latter event, a "super-majority" of the Panel would have to acquiesce in the Court's change).

Tommy Townsend and Kim Ross are very anxious to get this bill filed today or tomorrow. I would greatly appreciate your letting me or, in my absence from the office, Carol Taylor at TTLA (476-3852) know whether we have at least your tacit blessing to proceed along these lines.

Sincerely,

TOMMY JACKS

TJ/cgr
Enclosures
COACR.582

Sec 13.02 DISCOVERY PROCEDURES (a) In every health care liability claim, the plaintiff shall, within forty-five days after the date of filing of the original petition, serve upon the defendant's attorney, or, if no attorney has appeared for the defendant, shall serve upon the defendant, full and complete answers to the appropriate standard set of interrogatories and full and complete responses to the appropriate standard set of requests for production of documents and things promulgated in accordance with subsection (c).

(b) Every physician or health care provider who is a defendant in a health care liability claim shall, within forty-five days after the date on which an answer to the petition was due, serve upon the plaintiff's attorney, or, if the plaintiff is not represented by an attorney, upon the plaintiff, full and complete answers to the appropriate standard set of interrogatories and complete responses to the standard set of requests for production of documents and things promulgated pursuant to subsection (c)

(c) The Chief Justice of the Supreme Court shall, within thirty days after the effective date of this act, appoint as members of the Health Care Liability Discovery Panel three persons from a list of attorneys to be submitted by a statewide association of attorneys whose members include persons who customarily represent patients in health care liability actions, and three persons from a list to be submitted by a statewide association whose members include persons who customarily represent defendants in health care liability actions. Members of the Health Care Liability Discovery Panel shall serve without compensation. On or before the 1st day of November, 1993, the Health Care Liability Discovery Panel shall promulgate standard sets of interrogatories and requests for production of documents and things appropriate for each of the categories of plaintiffs and defendants usually involved in health care liability claims. In preparing standard sets of interrogatories the Health Care Liability Discovery Panel shall not be restricted in number by any limit imposed under the Texas Rules of Civil Procedure.

(d) The Supreme Court shall review the standard sets of interrogatories and requests for production of documents and things promulgated by the Health Care Liability Discovery Panel, and shall, no later than November 15, 1993, either approve them in their entirety, or disapprove them in their entirety, or approve them with modifications. If the Supreme Court disapproves such standard sets of interrogatories and requests for production of documents and things in their entirety, then such standard sets shall be null and void and of no effect, and the Panel shall thereupon be disbanded. If the Supreme Court approves of such standard sets of interrogatories and requests for production of documents and things with modifications, then the Panel

shall either approve or disapprove of such standard sets of interrogatories and requests for production of documents and things as modified by the Supreme Court by a vote of at least five of the six members of the Panel. If the modifications made by the Supreme Court fail to obtain the necessary vote for approval by the Panel, then such standard sets of interrogatories and requests for production of documents and things shall be null and void and of no effect and the Panel shall be disbanded. If the Panel approves of the modified standard sets of interrogatories and requests for production of documents and things, then the Supreme Court shall proceed to publish same in accordance with subsection (e).

(e) As soon as practical after the approval of such standard sets of interrogatories and requests for production of documents and things by the Health Care Liability Discovery Panel and the Supreme Court, and in any event, no later than December 15, 1993, the Supreme Court shall publish such standard sets. Notwithstanding any other law, the Supreme Court shall not be required to publish such standard sets of interrogatories and requests for production of documents and things for public comment. Beginning on January 1, 1994, all plaintiffs and all physicians or health care providers who are defendants in a health care liability claim in which the plaintiff's original petition is filed on or after that date, shall file full and complete answers and responses in accordance with subsections (a) and (b) of this section.

(f) Nothing in this section shall limit or impede the Supreme Court of Texas in exercising its rulemaking authority pursuant to Sections 22.003 and 22.004, Government Code.

(g) Except upon motion and for good cause shown, no objection may be asserted regarding any standard interrogatory or request for production of documents and things; but no response shall be required where a particular interrogatory or request is clearly inapplicable under the circumstances of the case.

(h) Failure to file full and complete answers and responses to standard interrogatories and requests for production and things in accordance with sections (a) and (b) of this section or the making of a groundless objection under section (g) of this section shall be grounds for sanctions by the court in accordance with the Texas Rules of Civil Procedure upon motion of any party.

(i) The time limits imposed under subsections (a) and (b) may be extended by the court upon the motion of a responding party for good cause shown, and shall be extended if agreed in writing between the responding party and all opposing parties. In no event shall an extension be for a period of more than an additional thirty (30) days.

(j) If a party is added by an amended pleading, intervention, or otherwise, the

now party shall file full and complete answers to the appropriate standard set of interrogatories and full and complete responses to the standard set of requests for production of documents and things no later than forty-five days after the date of filing of the pleading by which said party first appeared in the action.

(k) If information or documents required to provide full and complete answers and responses as required by this section are not in the possession of the responding party or attorney when the answers or responses are filed, the party shall supplement said answers and responses in accordance with the Texas Rules of Civil Procedure.

(l) Nothing in this section shall preclude any party from taking additional non-duplicative discovery of any other party. The standard sets of interrogatories provided for in this section shall not constitute, as to each plaintiff and each physician or health care provider who is a defendant, the first of the two sets of interrogatories permitted under the Texas Rules of Civil Procedure.

(m) Notwithstanding any other provisions of this section, if a court of this state has, prior to the effective date of this section, signed an order in tort litigation in which cases have been consolidated for discovery providing for standard sets of interrogatories and requests for production of documents and things, compliance with such an order shall be deemed to be compliance with the requirements of this section.

December 17, 1992

Mr. Robert C. Alden
McGinnis Lochridge & Kilgore
1300 Capitol Center
919 Congress Avenue
Austin TX 78701

Dear Mr. Alden:

Thank you for your letter regarding revisions to the Rules of Civil Procedure. I have sent a copy to the chairman of the Rules Advisory Committee with the request that your comments be considered fully in making additional revisions in the rules.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

c: Mr. Luther H. Soules III

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WRITER'S DIRECT DIAL NUMBER:
(512) 495-6071

December 8, 1992

The Honorable Justice Nathan Hecht
c/o The Supreme Court of Texas
P.O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

I am writing this letter, as you suggested, regarding two changes or clarifications to the Rules of Civil Procedure that we discussed at the recent Advanced Evidence and Discovery seminar. I would greatly appreciate the Court and the Rules Committee considering the following issues:

1. **Does the requirement of supplementation contained in Rule 166b apply to depositions?** During the recent seminar, three speakers took the position that depositions should be supplemented like all other discovery, although all three acknowledged that the rules were unclear and that there is little, if any, case law on point. But see Foster v. Cunningham, 825 S.W.2d 806 (Tex.App.--Fort Worth 1992).

I can think of forceful arguments both for and against supplementation of depositions. Because of the nature of depositions, in which numerous questions may be asked or not asked, I personally would lean towards not requiring supplementation. Such a requirement would become extremely burdensome when representing corporate parties where many employees or agents may be deposed, or in cases involving a significant number of experts. A requirement of supplementation would further increase the cost of litigation. Leaving my personal preferences aside, clarification in the rules in either direction would be of great benefit to the bar, and would eliminate one additional area of discovery disputes.

2. **May a party be asked in interrogatories to describe the facts known by a "person with knowledge of relevant facts"?** This issue seems to come up in every lawsuit, and no one has been able to give me a definitive answer. Again, arguments could be made both for and against allowing such discovery. I personally would not be in favor of a rule requiring disclosure to the same extent required for experts opinions, especially as to nonparty or

unrelated witnesses. However, a middle ground of permitting discovery of a witness's connection with the events or occurrences involved in the lawsuit would help parties discern the relative importance of potential witnesses. I would be in favor of such a clarification to the Rules.

I would hasten to add that although these issues come up quite frequently in my civil practice, and are often resolved by agreement, I am not involved in any lawsuits in which such issues are pending before any court. I offer these thoughts solely in the interests of increasing the efficiency of the judicial process and eliminating two areas of frequent dispute. Your consideration would be much appreciated by at least this member of the Bar.

Sincerely,

Robert C. Alden

Robert C. Alden

11-18-91 T345.001

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06910-0471

November 15, 1991

VIA FACSIMILE - (817) 347-1799

Mr. Stephen L. Tatum
Suite 1600
801 Cherry Street
Fort Worth, Texas 76102

Re: Proposed Change to Texas Rule of Civil Procedure 168

Dear Mr. Tatum:

A problem which consistently comes up in my practice and one which should be addressed when considering changes to the Rules of Civil Procedure involves the signing of Interrogatories by representatives of business entity parties. Rule 168 requires that Interrogatories shall be answered separately and fully in writing under oath. When the party answering the Interrogatories is a large business entity, the representative signing on behalf of the business entity seldom has personal knowledge of the facts reflected in the Interrogatory Answers. Usually, these Answers are formulated with the input of many different individuals. The person signing the Interrogatories on behalf of the business entity is usually a high-ranking officer in the company who does not have actual personal knowledge of the facts reflected in the Answers. All practicing attorneys understand this fact; however, it places the representative of the business entity in the delicate position of having to swear to facts of which he has no personal knowledge. The only way to possibly avoid such a predicament is to have verifications regarding each specific Interrogatory signed by the persons who do have actual personal knowledge of the facts reflected in each Interrogatory. Of course, this is never done, and it would be a logistical nightmare to attempt it.

To avoid this problem, a change to the Rule should be considered which allows representatives of business entities to sign Interrogatory Answers without requiring

L0063/0507/02NR01

them to swear that they have personal knowledge of the facts reflected in those Interrogatory Answers.

Very truly yours,

Larry

Larry F. York LE

LFY:ks

cc: Luther H. Soules, III

L0063/0507/02NR01

4-245.001

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COMMERCIAL REAL ESTATE LAW
RESIDENTIAL REAL ESTATE LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

Letter to Boca
SCAC Subc
Agenda
J. Hecht

September 5, 1991

Luther H. Soules, III., Attorney
175 E. Houston
San Antonio, Texas 78205

Re: Texas Rule of Civil Procedure No. 168

It is my understanding that you are the chairman of the State Bar of Texas Supreme Court Advisory Committee and you would be the person to contact regarding a complaint concerning Texas Rule of Civil Procedure 168 (5). Rule 168 (5) states that "Answers to interrogatories shall be preceded by the question or interrogatory to which the answer pertains." I would assume that this requirement was included in the rule to provide a unity between the question and answer so that it would be easier to compare question and answer. However, this rule must have been formulated before the age of the computer, high speed printers and the laser printer.

Because of the use of computers and laser printers, it is extremely difficult to put the answers on the original interrogatory document sent to the answering party. Therefore, as a practical matter, what is required is for the answering party to retype all of the questions and then place the responses after the questions. (Unless, one has a document scanner which will scan the questions into a computer.) Obviously, this requires a great deal more staff time and expense in order to comply with this rule.

The requirement of placing the answer after the question may have been a good idea for the requesting party in the age of typewriters; however, the modern law office has passed them by except for filling in forms or addressing envelopes.

I would request that your committee reexamine this rule and recommend the elimination of this requirement. Surely, the cost in the thousands of hours of extra staff time in the law offices of Texas, outweighs the convenience to the requesting party in having the answers placed after the request. Also, if someone has discovered an easier method of complying with the rule, than retyping the questions, I would be pleased to hear about it. One method I heard about was from a lawyer who stated he sent a diskette of the interrogatories along with the set when he served the interrogatories. This is a nice, but largely unworkable solution, since law offices use different word processing programs and different size diskettes.

Thank you very much for any consideration your committee might give in recommending a change in this rule to the Supreme Court.

Danny C. Wash

DCW/mjr

CC: Judge David Peeples

P.S. I originally sent a similar letter to Judge David Peeples of the Fourth Court of Appeals because the State Bar told me he was the chairman of the Administration of Justice Committee. He telephoned me and said that he was no longer on the committee but gave me your name. He also stated that he agreed with the suggestion to change the rule.

4543.001 UNC HNC

STATE BAR OF TEXAS

4-9-91

Direct correspondence to:
P.O. Box 12487
Austin, Texas 78711
(512) 463-1450
FAX: (512) 473-2295

James N. Parsons III
President

April 5, 1991

HJP, SCAC Subc TRCP 168
Agenda
J. Hackett
COAS.

Mr. Luther H Soules III
1St Republicbank Plz, 10Th Fl.
175 East Houston Street
San Antonio, Tx 78205-2230

Dear Luther:

I am attaching a letter I recently received from Jim Foreman of the Dallas law firm of Foreman, Boudreaux, Smith & Johnson. I think the letter speaks for itself, and speaks very well.

I share Jim's concerns in these matters and hope that they can be addressed by you and your committee.

I would appreciate your giving them due consideration. I know we are all working for the same goals in this matter.

Very truly yours,

James N. Parsons III

JNP/db
Enc/

Home Office: 501 E. Kolstad Street P.O. Drawer 2210 Palestine, Texas 75802-2210 (214) 729-6087 FAX: (214) 729-7605

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March 20, 1991

Mr. Jim Parsons, President
State Bar of Texas
P. O. Drawer 1670
Palestine, TX 75801

Dear Jim:

This letter is written to you because of my concern regarding what has developed in the practice with discovery. I am continually amazed at the rulings of the court concerning requirements of answering interrogatories, etc. The case law which is developing, for instance, which requires when asked the name of an expert and their address and telephone number, and which answer we must later supplement with additional experts requires, because of the way the supplementation rule is written, that we not only provide that information, even though not asked on the original interrogatory, but set out the substance of their testimony. This is simply an illustration of what has developed. The purpose of the rules, as you and I both know, is to seek basic information as an initiating point for discovery, but it has now become a weapon in the hands of those who work by the hour. I don't know what you, as bar president can do, but I only hope that you will push for a simplification and standardization of what we are doing or else you and I will be driven out of the practice by simply not putting the most recent telephone number down of a witness thirty days prior to trial.

If there is anything that I can do, please let me know.

With kindest regards.

Yours truly,

Jim Foreman

JF:kwh

4543.001

2-26-91

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

February 25, 1991

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

Dear Luke:

Enclosed is a letter Justice Mauzy received from John Wright suggesting a proposed amendment to Rule 168.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

John Wright
Certified Specialist:
Civil Trial
Personal Injury
Martha C. Wright
Saul Friedman
Linda S. Tyson
Michael Kelly

Wright
&
Associates, P.C.
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February 18, 1991

Justice Oscar Mauzy
P. O. Box 12248
Austin, Texas 78711

RE: PROPOSED AMENDMENT TO RULE 168.-INTERROGATORIES TO PARTIES

Dear Justice Mauzy:

It has occurred to me that too much time is spent by lawyers bickering about whether or not there are more than 30 answers required to Interrogatories (the limit set out in Section in Rule 168.-(5)).

I propose a solution by adding the underlined Section quoted below:

Rule 168-5. Number of Interrogatories. The number of questions including subsections in a set of interrogatories shall be limited so as not to require more than thirty answers. No more than two sets of interrogatories may be served by a party to any other party, except by agreement or as may be permitted by the court after hearing upon a showing of good cause. The court may, after hearing, reduce or enlarge the number of interrogatories or sets of interrogatories if justice so requires. The provisions of Rule 166b are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.

The party answering interrogatories who receives more than thirty interrogatories but less than sixty shall answer the interrogatories received and shall inform the proponent of the interrogatories how many interrogatories in excess of thirty the answering party has received and that the answering party shall consider such excess interrogatories to be the second set of

Wright & Assoc.
ATTORNEYS AND COUNSELORS

interrogatories of the party serving the interrogatories and the party responding to such interrogatories shall not thereafter be required to answer further interrogatories except on order of the court.

I believe this Proposal (or something like it) would cut down on the bickering about how many Interrogatories are received. Most of the time the sender has 18 or so basic questions on his computer that he really needs answers to (i.e. experts, persons with relevant knowledge of insurance and medical or repair) the rest are generally peripheral.

So if sender has a few too many sub parts, sender will still get answers and Respondent is not required to answer further without Court order.

The local practice now seem to be that the first set of Interrogatories is sent and answered to set up depositions and follow up Interrogatories are not there after significant. So it might work very well.

Respectfully,

JOHN WRIGHT

JW/cjr

cjr\personal\mauzy\ltr

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NEW YORK
LOS ANGELES

166bCE
→ 168
TRCE 703

February 28, 1990

Re: Proposed Changes to Texas Rules of Civil Procedure 166b(3)(c) and 168

Chambers of the Hon. Nathan L. Hecht, Justice
Texas Supreme Court
P. O. Box 12248 - Capitol Station
Austin, Texas 78711
(512) 463-1348

Dear Justice Hecht:

In mid-December, I attended a Houston Bar Association function in which Chief Justice Phillips was the featured speaker. The Chief Justice indicated the Court had received some very good feedback from the Bar concerning the Court's 1990 changes to the Texas Rules of Civil Procedure. He encouraged those attendees who had not responded to do so. This letter is in response to that request. I addressed this letter to you as I am told you are the Justice who is coordinating the changes for the Texas Rules of Civil Procedure.

I have three concerns I wish the Court to consider. The first concern deals with the proper construction of what constitutes a "written statement" under TEX. R. CIV. P. 166b(3)(c)(ii). The second concern deals with a conflict between TEX. R. EVID. 703--Basis of Opinion Testimony and TEX. R. CIV. P. 168--Interrogatories to Parties. The third concern is the need for a new rule that would permit a vocational rehabilitation expert to examine a party.

RULE 703 -- BASIS OF OPINION TESTIMONY
RULE 168 -- INTERROGATORIES TO PARTIES

There is a direct conflict between TEX. R. EVID. 703 and TEX. R. CIV. P. 168. The problem is whether an expert witness may rely on hearsay in the form of interrogatory answers filed by a non-adverse party. Please consider the following hypothetical:

> P sues D in tort. D sues T/P-D for contribution and indemnity. T/P-D is one of P's designated expert witnesses and a key fact witness. D serves interrogatories upon T/P-D. T/P-D's answers are favorable to P. T/P-D dies without his deposition having been taken. However, T/P-D's deposition was twice scheduled and twice cancelled by D long before T/P-D's death. Nevertheless, P has an accident reconstruction expert who interviewed the decedent several times. The information P's expert obtains from T/P-D is consistent with the physical evidence in the case and the opinions of P's other experts, and is of the type reasonably relied upon by experts. Likewise, T/P-D's interrogatory answers are also of a type reasonably relied upon by experts. Further, suppose that at the trial neither D nor T/P-D's estate read T/P-D's answers to D's interrogatories. P wants his expert to read to the jury T/P-D's answers to D's interrogatories in P's case against D. Can he do so?

Although this is an issue of first impression, P's expert should be allowed to read T/P-D's answers to the jury. The issue presents a conflict between TEX. R. CIV. P. 168, which states that interrogatory answers may only be used against an answering party, and TEX. R. EVID. 703, which states that experts may rely on hearsay statements as a basis for their opinion. Rule 168 should yield to Rule 703 for the following reasons:

1. Rule 703 does not limit the form of hearsay upon which an expert may rely;

2. The cases which construe Rule 703 allow experts to rely on hearsay which is no more trustworthy than sworn interrogatory answers;

3. The categories of admissible hearsay should be interpreted broadly, in accord with the courts' policy of liberally construing Rule 703;

4. Rule 168's policy reasons do not apply to these facts; and

5. The proposed approach presents no inherent procedural difficulties, as demonstrated by the fact that FED. R. CIV. P. 33(b), the federal counterpart to TEX. R. CIV. P. 168, contains no such restriction on the use of interrogatory answers.

First, TEX. R. EVID. 703 simply provides that if facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." This language does not otherwise restrict the form of admissible hearsay in any way. Nowhere does Rule 703 prohibit the use of sworn interrogatory answers.

Second, the cases which construe Rule 703 have permitted experts to rely on hearsay that was no more trustworthy than sworn interrogatory answers. *Liptak v. Pensabene*, 736 S.W.2d 953, 957 (Tex. App.--Tyler 1987, no writ); *Sharpe v. Safway Scaffolding Co.*, 687 S.W.2d 386, 392 (Tex. App.--Houston [14th Dist.] 1985, no writ). In *Liptak*, the expert testified about reasonable attorneys' fees. He relied in part upon such hearsay as time sheets and discussions with the attorney handling the case. In *Sharpe*, the expert relied in part upon statements of witnesses who were at the accident scene. Both *Liptak* and *Sharpe* permit P's expert to rely upon hearsay information derived from his face-to-face conversations with T/P-D.

Thus, in comparison with the hearsay relied upon in *Liptak* and *Sharpe*, T/P-D's sworn interrogatory answers have, if anything, a higher indicia of trustworthiness. The answers are sworn. The answers are consistent with the physical evidence in the case and the opinions of other experts. Yet, interrogatory answers should not be automatically admitted into evidence simply because they have a higher indicia of trustworthiness. Nor should their use be limited simply because they are not being used against the answering party. On the contrary, interrogatory answers should be treated just like all other out-of-court statements. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2180 at 574 (1970). In other words, they should be subject to the same hearsay exceptions as other out-of-court statements. *See id.*

Third, the categories of admissible hearsay should be interpreted broadly. Both the *Liptak* and *Sharpe* courts held that when the Texas Supreme Court adopted the Texas Rules of Evidence, which became effective September 1, 1983, the Supreme Court effectively overruled its more restrictive holding in *Moore v. Grantham.*[5/] Thus, *Liptak* and *Sharpe* liberally construe Rule 703 to permit an expert to base his opinion entirely upon hearsay. *See Liptak*, 736 S.W.2d at 957; *Sharpe*, 687 S.W.2d at 392. If Rule 703 should be liberally construed to allow an expert to rely entirely upon hearsay, then the categories of available hearsay should also be liberally construed. This furthers the purpose of Rule 703: to remove technical barriers to the truth so that all information which an expert relies upon comes into evidence.

The fourth reason Rule 168 should yield to Rule 703 is because the policy reasons underlying Rule 168 do not apply to these facts. While the case law does not clearly articulate them, there appear to be two policy reasons for Rule 168's limited use at trial. First, the Rule prevents admissions from being used against any party except the party which made the admissions. *See Ford Motor Credit Co. v. Draper*, 401 S.W.2d 848, 850 (Tex. Civ. App.--Texarkana 1966, no writ). Second, an answering party should not be able to use self-serving answers that were not subject to the hazards of cross-examination. *See Black v. Frank Paxton Lumber Co.*, 405 S.W.2d 412, 414 (Tex. Civ. App.--Dallas 1966, writ ref'd n.r.e.).

Neither reason applies here. P is not seeking to use T/P-D's interrogatory answers as admissions against other parties. Rather, P wants to show the jury that the events observed by this deceased eyewitness are consistent with the

---

[5/] 599 S.W.2d 287 (Tex. 1980). In *Moore*, the Texas Supreme Court said that expert opinion testimony based solely on hearsay is inadmissible. 599 S.W.2d at 290. However, where an expert relies in part upon hearsay and in part upon statements that are properly in evidence, then the opinion testimony is admissible. *Id.* Under *Moore*, an expert witness's opinion must be based upon facts within the expert's personal knowledge, or assumed from common or judicial knowledge, or established by evidence." 599 S.W.2d at 290 (quoting *Reed v. Barlow*, 157 S.W.2d 933, 935 (Tex. Civ. App.--San Antonio 1941, writ ref'd)). An expert's opinion "is without value, and is inadmissible, if based upon facts and circumstances claimed by him from ex parte statements of third persons, and not established by legal evidence before a jury trying the ultimate issues to which the opinion relates." *Moore*, 599 S.W.2d at 290.

physical evidence, which thereby corroborates and further strengthens P's theory of the case. Moreover, D can hardly complain about his inability to cross-examine T/P-D when it is D who propounded the interrogatories. T/P-D could have hurt D's case just as easily with the answers he might have given in a timely taken deposition. Interrogatory answers are no more self-serving than other types of statements.[6/]

Finally, the proposed approach presents no inherent procedural difficulties for either the Texas Rules of Civil Procedure or the Rules of Evidence. This is demonstrated by the fact that the Federal Rules of Civil Procedure do not impose the restrictions of Rule 168. FED. R. CIV. P. 33(b) states as follows:

> (b) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.

Under the Federal Rules, an expert witness could read into evidence the interrogatory answers of a non-adverse party. Therefore, I recommend that TEX. R. CIV. P. 168 be amended to state as follows:

> 2. Scope. Interrogatories may relate to any matters which may be inquired into under Rule 166b, *and the answers may be used to the extent permitted by the rules of evidence....*

In the event the Court is not comfortable in going as far as FED. R. CIV. P. 33(b), then I recommend that TEX. R. CIV. P. 168 be amended to state as follows:

> 2. Scope. Interrogatories ... may be used only against the party answering the interrogatories. *However, if such interrogatory answers would be otherwise admissible under TEX. R. EVID. 703, then Rule 703 shall control as to their admissibility....*

[6/] While D should not be allowed to argue a lack of the right to cross-examine, the same cannot be said if this were a multi-party case. Nevertheless, the trial court could accommodate P's request and allay the concerns of other defendants by giving the jury a limiting instruction.

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hrd
LHS

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9-11-90

September 10, 1990

Mr. Luther H. Soules III
Chairman, Texas Rules of
Civil Procedure Committee
Soules & Wallace
175 East Houston #1000
San Antonio Tx 78205

Re: Suggested Modifications to Texas Rules of Civil Procedure Rules 90, 166b, 167 and 168

Dear Luke:

I enjoyed your presentation last week at the Advanced Civil Trial Course up in Dallas. I've got several ideas I'd like to submit for your Committee to look at as modifications to the Texas Rules of Civil Procedure:

Rules 167 & 168

The concepts of propounding and objecting to interrogatories and requests for production, what is and not "correct" versus objectionable, etc. is one that is consuming a great deal of case law, rule amendments, and so forth. These matters are also costing clients a lot of money and taking up a lot of lawyers' time that could be more productively utilized.

Often a minor alteration in a lawyer's choice of words in discovery can spell the difference between an objectionable discovery request and one that is not. Certain types of information, such as identity of fact witnesses and testifying experts, key documents, etc. are almost universally the subject of discovery requests.

The Supreme Court, through the Committee, should promulgate a short set of "generic" interrogatories the basics that get asked in virtually every case), and a "generic" set of requests for production of documents (again, the basics), to be appended to Rules 168 and 167, respectively with the proviso that, if these discovery items are propounded verbatim they are <u>not</u> objectionable on the investigatory and other privilege grounds.

This concept of a promulgated "form" has precedent. For example, the Texas Business Corporation Act contains a form promulgated and appended to the Act, and if you follow that form verbatim, your Articles <u>will</u> be approved and filed by the Secretary of State. Similarly, Article 4590h, which regulates durable powers of attorney, promulgates therein a form for same which has been approved by the Legislature as valid.

4543.001 TRCP 166b hjr UNO

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√5-4-90

May 1, 1990

SCAC
SCAC
Rules 165, 168, 169
CO AJ

Honorable Nathan Hecht, Chairman
Rules Committee
Supreme Court of Texas
P.O. Box 12248
Austin, TX 78711

RE: Discovery - Texas Style

Dear Justice Hecht:

This concerns problems generated by Rule 166 b et seq.

The intent of the rules is to provide for trial on the basis of what is revealed rather than on the basis of what is concealed, and to avoid trial by ambush. The reverse is often the case.

The rules seem geared toward business litigation growing out of a relationship between the parties and as to which the parties have substantial knowledge of the issues involved.

I am a sole practitioner specializing in defense of automobile accident litigation. Almost invariably my clients have no knowledge of matters pertaining to the damage issues. They have no investigation; that is handled by their liability insurance carrier. Yet they are required to answer interrogatories concerning matters of which they really know nothing.

The problem is compounded when supplemental answers signed by the party are required.

I practice before a multitude of County Courts and District Courts in nine counties. There is little uniformity on the benches with respect to various technical discovery issues. Some courts require sworn Interrogatory answers only when the party has personal knowledge of the subject matter and can be impeached with his answers. Other courts treat an unsworn answer to any interrogatory, including supplemental answers, as no answer at all.

Lawyers spend hours drafting interrogatories and responding to them, not addressing the equities of the case but instead, setting traps and trying to avoid them.

There is considerable dispute with regard to whether a timely objection to a discovery request removes the duty to respond further unless there is a hearing on the objection. One school of thought is that a party who fails to fully answer an interrogatory subject to his own objection does so at his own peril; that the duty to fully answer is governed by the propriety of the discovery request itself; that an improper objection to a proper discovery request is treated as no answer at all unless there is a hearing.

Our entire judicial system spends entirely too much time wrangling with such matters. The focus is on the war of technicalities waged by opposing counsel and not on the real issues. The merits of the case become mired in the morass of procedure. The parties become incidental pawns.

There appears to be little relationship to each other of the various forms of discovery and related rules of evidence. For example, an expert's records can be produced in response to a discovery request, his deposition taken, and his identity declared in response to a pre-trial order concerning the same. But if he is not identified in interrogatory answers (or if identified only in an unverified supplemental interrogatory answer) many courts will not allow his testimony.

A business records affidavit may be timely and properly filed and served but if the documents are not produced in response to a discovery request directly addressed to the matter, or if the affiant is not identified in interrogatory answers as a person with knowledge of relevant facts, many courts will not allow the business records affidavit to be introduced.

CONCLUSIONS

1. Interrogatories should be directed at the personal knowledge of the party or that of his servants and employees. A party should not be required to answer an interrogatory of which neither he nor his true agents (as opposed to his insurance company investigators) have personal knowledge.

2. The identity of expert witnesses have no place in interrogatories. This should be handled by the court pre-trial order or by a separate Rule of Civil Procedure requiring designation of experts within a certain time.

3. Request for Admission should not be directed at ultimate issues. In any event they should not be used to contravene pleadings. A party who claims damages due to the negligence of another should not be asked to admit he was not damaged and that the defendant was not negligent.

4. Considerably more discretion should be allowed the bench in admitting evidence that is technically objectionable due to non-compliance with strict interpretation of discovery rules and with respect to unanswered admissions. This discretion should be quite broad and overturned only when there was an apparent abuse of discretion leading to an improper verdict.

5. Emphasis should be on substance over form.

Respectfully submitted,

Pat McMurray

Pat McMurray
Attorney at Law
State Bar No. 13807700

PM:fs/loda

RULE 168. INTERROGATORIES TO PARTIES

Any party may serve upon any other party written interrogatories to be answered by the party served, or, if the party served is a public or private corporation or a partnership or association, or governmental agency, by an officer or agent who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after the service of the citation and petition upon that party.

1. **Service.** When a party is represented by an attorney, service of interrogatories and answers to interrogatories shall be made on the attorney unless service upon the party himself is ordered by the court.

2. **Scope.** Interrogatories may relate to any matters which can be inquired into under Rule 166b, but the answers, subject to any objections as to admissibility, may be used only against the party answering the interrogatories. Where the answer to an interrogatory may be derived or ascertained from:

a. public records; or

b. from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served;

it is sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and, if applicable, to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. The specification of records provided shall include sufficient detail to permit the interrogating party to locate and to identify as readily as can the party served, the records from which the answers may be ascertained.

3. **Procedure.** Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice requires.

4. **Time to Answer.** The party upon whom the interrogatories have been served shall serve answers on the party submitting the interrogatories within the time specified by the party serving the interrogatories, which specified time shall not be less than thirty days after the service of the interrogatories, except that, if the request accompanies citation, a defendant may serve answers within 50 days after service of the citation and petition upon that defendant. The court, on motion and notice for good cause shown, may enlarge or shorten the time for serving answers or objections.

5. **Number of Interrogatories.** The number of questions including subsections in a set of interrogatories shall be limited so as not to require more than thirty answers. No more than two sets of interrogatories may be served by a party to any other party, except by agreement or as may be permitted by the court after hearing upon a showing of good cause. The court may, after hearing, reduce or enlarge the number of interrogatories or sets of interrogatories if justice so requires. The provisions of Rule 166b are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.

The interrogatories shall be answered separately and fully in writing under oath. Answers to interrogatories shall be preceded by the question or interrogatory to which the answer pertains. True copies of the interrogatories, and answers and objections thereto, shall be served on all parties or their attorneys, and copies thereof shall be provided to any additional parties upon request. The answers shall be signed and verified by the person making them and the provisions of Rule 14 shall not apply.

6. **Objections.** On or prior to the date on which answers are to be served, a party may serve written objections to specific interrogatories or portions thereof. Objections served after the date on which

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SB

LAW OFFICES OF
TINSMAN & HOUSER, INC.

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SCAC Agenda
Xc John Young
Justice Hecht
9-12-89

September 8, 1989

Mr. Luke Soules
Law Offices of Luther Soules, III
175 E. Houston Street, 10th Floor
San Antonio, Texas 78205

Re: Proposed Amendment of Texas Rules of Civil Procedure

Dear Luke:

This letter is written to you in your capacity as a member of the Supreme Court Advisory Committee for the Texas Rules of Civil Procedure.

Recently, I have had an occasion to notice and appreciate a significant difference in procedural response between Rule 168, T.R.C.P. (Interrogatories to parties) on the one hand, and Rule 167, T.R.C.P. (Discovery and Production of Documents and Things for Inspection, Copying or Photographing) and Rule 169, T.R.C.P. (Requests for Admission), on the other.

Rule 168 (Interrogatories), in an unnumbered paragraph included under Rule 168.5, provides "Answers to interrogatories shall be preceded by the question or interrogatory to which the answer pertains." Much to my surprise, I have discovered that there is no similar provision in Rule 167 (Discovery and Production) or Rule 169 (Admissions).

The subject provision contained in Rule 168 regarding interrogatories is good and makes the record clear. In most circumstances, unless there has been amended or supplemental answers or responses filed, the attorneys have to handle only one document relating to interrogatories and responses. That document contains both the questions and the answers and/or objections. Because there is no similar provision in the rules providing for responses to requests for production (Rule 167) or for requests for admissions (Rule 169), unless the attorney, as a matter of courtesy, has copied the particular requests for production or requests for admission in order that they precede the response or objection thereto (which I have made it my practice to do), then the attorneys are having to constantly flip back and forth between the requests for production or requests for admission and the responses.

It seems to me that for the sake of consistency and for clarity of the record, a provision similar to that quoted and found in Rule 168 should be incorporated in Rules 167 and 169. I have included for your reference copies of Rules 167, 168 and 169, along with the language which I propose should be added to Rules 167 and 169 to make them consistent with Rule 168 and which I believe will ultimately simplify the process. It may require a bit more of the secretaries or paralegals in copying the requests for production or requests for admission that precede the response or objection, but clarity for the record would be greatly enhanced. It is further my contention that such a procedure would not unduly overload the filing capacity of the District Clerks, who seem to not file much of anything anymore anyway.

If there is some reason why the language and change in format I have suggested for Rules 167 and 169 was not included purposefully, then I would like to know that reason. If it was merely oversight, then I believe the language and the slight change in format which I have suggested should be added to those rules would ultimately save time and simplify the process. Ultimately, it would save money, as well.

Please let me hear from you in this regard.

Very truly yours,

TINSMAN & HOUSER, INC.

John F. Younger, Jr.

JFYjr/mlh

Enclosures

4543.001

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711
(512) 463-1312

September 14, 1989

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

Dear Luke:

I enclose a copy of a letter from Charles Griggs of Sweetwater to Justice Cook regarding Texas Rules of Civil Procedure 168 and 169. The letter raises the question of how to treat the filing of an instrument which contains both interrogatories and requests for admission, and the responsive instrument.

Please schedule this subject for discussion by the Committee.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711
(512) 463-1312

September 14, 1989

Mr. Charles R. Griggs
Nunn, Griggs, Jones & Sheridan
P. O. Box 488
Sweetwater, Texas 79556-0488

Dear Mr. Griggs:

Justice Cook has referred to me your letter to him regarding Texas Rules of Civil Procedure 168 and 169. As the Court's liaison to the Rules Advisory Committee, I have sent a copy of your letter to the chairman, Luther H. Soules of San Antonio, for consideration by the Committee.

You have raised a legitimate issue. The Court appreciates your interest in the rules.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

NUNN, GRIGGS, JONES & SHERIDAN

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August 28, 1989

The Honorable Eugene A. Cook, Justice
The Supreme Court of Texas
P. O. Box 12248, Capitol Station
Austin, Texas 78711

Dear Justice Cook:

There is a matter arising out of the discovery process that is causing some confusion at the trial court level. I would bring this to your attention with the thought that the Court may want to clarify discovery rules in order to eliminate this problem.

Sometime ago, the Court put an end to the filing of depositions with the District or County Clerks, probably in the interest of saving storage space. About that time, Rules 168 and 169 were rewritten. Rule 168 contemplates the serving of interrogatories and responses to interrogatories directly upon the parties or their attorneys. The Rule does not forbid the filing of interrogatories or responses with the Clerk but it does not contemplate the filing of copies in that office. Rule 169 specifically provides that requests for admissions and responses to requests for admissions will "be filed promptly in the Clerk's office..."

It is not unusual for an attorney to prepare a discovery document which incorporates both interrogatories and requests for admissions of fact; in fact, this vehicle can be quite useful and can result in increased clarity and efficiency of the discovery process.

However, Clerks in my part of the country are beginning to refuse to file a discovery document that has the characteristics of interrogatories and of requests for admissions.

I hope the Court will consider an amendment to Rule 169 to eliminate the requirement of a filing with the Clerk in order

that the discovery process may have a bit more flexibility than it has under the current state of affairs.

Sincerely,

NUNN, GRIGGS, JONES & SHERIDAN

By: 

CRG:cw

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hhd

LHS

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LHD,

SCAC Seeb Agenda

AJ - newsletter

J. Hecht.

Xc Jennifer Flanagan!

April 9, 1992

Mr. Luther H. Soules, III
Soules & Wallace
1000 Republic of Texas Plaza
175 E. Houston St.
San Antonio, TX 78205

Dear Luke:

I recently came upon a quirk in the Rules that probably should be addressed. Rule 169 provides in effect that Requests for Admissions are deemed admitted 31 days after service of the request. Rule 21(a) provides that service by mail is complete upon deposit of the paper in a properly addressed enveloped with the post office. Three days is added to the time period for service by mail. A certificate of service is prima facie evidence of the fact of service.

Based on those Rule provisions, it would appear that a party receiving Requests for Admissions by mail more than three days after they were deposited in the mail that answers them within 30 days may unknowingly have those Requests deemed admitted.

Collision Center Paint and Body, Inc. v. Campbell, 773 S.W.2d 354, 356 (Tex.App.-Dallas 1989) appears to say in that situation that the Requests are deemed admitted. A number of cases, however, appear to count the period from the date of receipt in dealing with Requests for Admissions. See *White v. Tricontinental Leasing Corp.*, 760 S.W.2d 23 (Tex.App.-Dallas 1988); *Shaw v. National County Mutual Fire Insurance Co.*, 723 S.W.2d 236 (Houston 1st Dist. 1986); and *Benger Builders, Inc. v. Business Credit Leasing, Inc.*, 764 S.W.2d 336 (Tex.App.-Houston 1st Dist. 1988). While there is a related problem dealing with objections to Requests for Production and Interrogatories, it is more significant with Requests for Admission because they are

deemed admitted by operation of law. Perhaps Rule 169 should simply be amended to provide that in the absence of court order no answers are required within 30 days from the date of receipt of the Requests for Admissions.

I am not sure what taskforce would be dealing with this, but I would appreciate your consideration in transferring it to the taskforce(s) that appears to you are appropriate. Your courtesy is appreciated, as well as your service to the bar.

Sincerely,

Lewin Plunkett

Lewin Plunkett

ALP:tec

4543.001 TRCP 166b hjr UHD

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√5-4-90

May 1, 1990

SCPC
SCPC
Rules 166b, 168, 169
CO AJ

Honorable Nathan Hecht, Chairman
Rules Committee
Supreme Court of Texas
P.O. Box 12248
Austin, TX 78711

RE: Discovery - Texas Style

Dear Justice Hecht:

This concerns problems generated by Rule 166 b et seq.

The intent of the rules is to provide for trial on the basis of what is revealed rather than on the basis of what is concealed, and to avoid trial by ambush. The reverse is often the case.

The rules seem geared toward business litigation growing out of a relationship between the parties and as to which the parties have substantial knowledge of the issues involved.

I am a sole practitioner specializing in defense of automobile accident litigation. Almost invariably my clients have no knowledge of matters pertaining to the damage issues. They have no investigation; that is handled by their liability insurance carrier. Yet they are required to answer interrogatories concerning matters of which they really know nothing.

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Lawyers spend hours drafting interrogatories and responding to them, not addressing the equities of the case but instead, setting traps and trying to avoid them.

There is considerable dispute with regard to whether a timely objection to a discovery request removes the duty to respond further unless there is a hearing on the objection. One school of thought is that a party who fails to fully answer an interrogatory subject to his own objection does so at his own peril; that the duty to fully answer is governed by the propriety of the discovery request itself; that an improper objection to a proper discovery request is treated as no answer at all unless there is a hearing.

Our entire judicial system spends entirely too much time wrangling with such matters. The focus is on the war of technicalities waged by opposing counsel and not on the real issues. The merits of the case become mired in the morass of procedure. The parties become incidental pawns.

There appears to be little relationship to each other of the various forms of discovery and related rules of evidence. For example, an expert's records can be produced in response to a discovery request, his deposition taken, and his identity declared in response to a pre-trial order concerning the same. But if he is not identified in interrogatory answers (or if identified only in an unverified supplemental interrogatory answer) many courts will not allow his testimony.

A business records affidavit may be timely and properly filed and served but if the documents are not produced in response to a discovery request directly addressed to the matter, or if the affiant is not identified in interrogatory answers as a person with knowledge of relevant facts, many courts will not allow the business records affidavit to be introduced.

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1. Interrogatories should be directed at the personal knowledge of the party or that of his servants and employees. A party should not be required to answer an interrogatory of which neither he nor his true agents (as opposed to his insurance company investigators) have personal knowledge.

2. The identity of expert witnesses have no place in interrogatories. This should be handled by the court pre-trial order or by a separate Rule of Civil Procedure requiring designation of experts within a certain time.

3. Request for Admission should not be directed at ultimate issues. In any event they should not be used to contravene pleadings. A party who claims damages due to the negligence of another should not be asked to admit he was not damaged and that the defendant was not negligent.

4. Considerably more discretion should be allowed the bench in admitting evidence that is technically objectionable due to non-compliance with strict interpretation of discovery rules and with respect to unanswered admissions. This discretion should be quite broad and overturned only when there was an apparent abuse of discretion leading to an improper verdict.

5. Emphasis should be on substance over form.

Respectfully submitted,

Pat McMurray

Pat McMurray
Attorney at Law
State Bar No. 13807700

PM:fs/loda

Copy to LHS
Orig to HJH
7/5/89

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June 27, 1989

Luther H. Soules, III, Esq., Chairman
Supreme Court Advisory Committee
175 E. Houston, 10th Floor
Two RepublicBank Plaza
San Antonio, TX 78205-2230

Re: 1990 Rules- Tex. R. Civ. P. Rule 169

Dear Luke:

This is to request that the Committee amend Rule 169 to restore the pre-1984 requirement of a sworn statement when the party receiving a request for admissions either denies a request or states that he cannot truthfully admit or deny the matters requested. Also, the signature and oath should be by the party signing the denial or statement, not by its attorney of record.

It seems that the requirement of a sworn statement or denial was deleted in the 1984 amendments. Cf. Reyes v. International Metals Supply Company, 666 S.W.2d 622, 624 (Tex. App.- Hous. 1st 1984, no writ).

It appears incongruous to me that the standard of reliability for responding to requests for admissions should be less strict than for interrogatories. Rule 168, paragraph 5, requires the answers to be in writing, under oath, signed and verified by the person making them, not by the attorney. The same standard should apply to responding to requests for admissions, unless the request is admitted.

Thank you for your consideration of these comments. Also, please know of my gratitude to Holly Halfacre in your office for her gracious and prompt response to my telephone inquiry about this.

Very truly yours,

Harold D. Hammett

Harold D. Hammett

HDH:cjr

cc: Holly Halfacre

00664

RULE 169. REQUESTS FOR ADMISSION

1. **Request for Admission.** At any time after the defendant has made appearance in the cause, or time therefor has elapsed, a party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 166b set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of the documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Whenever a party is represented by an attorney of record, service of a request for admissions shall be made on his attorney unless service on the party himself is ordered by the court.

Responses, including any objections, shall be preceded by the request for admission to which the response or objection pertains.

A true copy of a request for admission or of a written answer or objection, together with proof of the service thereof as provided in Rule 21a, shall be filed promptly in the clerk's office by the party making it.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted without necessity of a court order unless, within thirty (30) days after service of the request, or within such time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of forty-five (45) days after service of the citation and petition upon him. If objection is made, the reason therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons that the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or easily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission is requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of paragraph 3 of Rule 215, deny the matter or set forth reasons why he cannot admit or deny it.

2. **Effect of Admission.** Any matter admitted under this rule is conclusively established as to the party making the admission unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 166

4543.001

HJH
CHS

9-11-89
813

LAW OFFICES OF
TINSMAN & HOUSER, INC.

RICHARD TINSMAN
FRANKLIN D. HOUSER
JOHN F. YOUNGER, JR.
MARGARET M. MAISEL
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ROBERT SCOTT
BRUCE M. MILLER
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W. D. SEYFRIED, III
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900 NATIONAL BANK OF COMMERCE BUILDING
SAN ANTONIO, TEXAS 78205
AREA CODE 512-225-3121

9/11 HJH
COAJ
SCAC Subc
SCAC Agenda
SCAC Agenda
Xc John Young
Justice Hecht
9-12-89
813

September 8, 1989

Mr. Luke Soules
Law Offices of Luther Soules, III
175 E. Houston Street, 10th Floor
San Antonio, Texas 78205

Re: Proposed Amendment of Texas Rules of Civil Procedure

Dear Luke:

This letter is written to you in your capacity as a member of the Supreme Court Advisory Committee for the Texas Rules of Civil Procedure.

Recently, I have had an occasion to notice and appreciate a significant difference in procedural response between Rule 168, T.R.C.P. (Interrogatories to parties) on the one hand, and Rule 167, T.R.C.P. (Discovery and Production of Documents and Things for Inspection, Copying or Photographing) and Rule 169, T.R.C.P. (Requests for Admission), on the other.

Rule 168 (Interrogatories), in an unnumbered paragraph included under Rule 168.5, provides "Answers to interrogatories shall be preceded by the question or interrogatory to which the answer pertains." Much to my surprise, I have discovered that there is no similar provision in Rule 167 (Discovery and Production) or Rule 169 (Admissions).

The subject provision contained in Rule 168 regarding interrogatories is good and makes the record clear. In most circumstances, unless there has been amended or supplemental answers or responses filed, the attorneys have to handle only one document relating to interrogatories and responses. That document contains both the questions and the answers and/or objections. Because there is no similar provision in the rules providing for responses to requests for production (Rule 167) or for requests for admissions (Rule 169), unless the attorney, as a matter of courtesy, has copied the particular requests for production or requests for admission in order that they precede the response or objection thereto (which I have made it my practice to do), then the attorneys are having to constantly flip back and forth between the requests for production or requests for admission and the responses.

It seems to me that for the sake of consistency and for clarity of the record, a provision similar to that quoted and found in Rule 168 should be incorporated in Rules 167 and 169. I have included for your reference copies of Rules 167, 168 and 169, along with the language which I propose should be added to Rules 167 and 169 to make them consistent with Rule 168 and which I believe will ultimately simplify the process. It may require a bit more of the secretaries or paralegals in copying the requests for production or requests for admission that precede the response or objection, but clarity for the record would be greatly enhanced. It is further my contention that such a procedure would not unduly overload the filing capacity of the District Clerks, who seem to not file much of anything anymore anyway.

If there is some reason why the language and change in format I have suggested for Rules 167 and 169 was not included purposefully, then I would like to know that reason. If it was merely oversight, then I believe the language and the slight change in format which I have suggested should be added to those rules would ultimately save time and simplify the process. Ultimately, it would save money, as well.

Please let me hear from you in this regard.

Very truly yours,

TINSMAN & HOUSER, INC.

John F. Younger, Jr.

JFYjr/mlh

Enclosures

LAW OFFICES

SOULES & WALLACE
ATTORNEYS-AT-LAW
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MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
ELIZABETH P. HOLBERT
RONALD J. JOHNSON
REBA BENNETT KENNEDY
PHIL STEVEN KOSUB
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J. KEN NUNLEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
JUDITH RAMSEY SALDAÑA
MARC J. SCHNALL *
LUTHER H. SOULES III †‡
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

TELEFAX
SAN ANTONIO
(512) 224-7073
AUSTIN
(512) 327-4105

December 26, 1989

Mr. Steve McConnico
Scott, Douglass & Keeton
12th Floor, First City Bank Building
Austin, Texas 78701-2494

Re: Proposed Changes to Texas Rules of Civil Procedure 167, 168, 169, 188, and 206

Dear Steve:

Enclosed herewith please find a copies of letters sent to me by Harold D. Hammett, Jess W. Young, Charles Griggs and John F. Younger, Jr. regarding proposed changes to the above captioned rules. 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
Mr. John F. Younger, Jr.
Mr. Charles Griggs
Mr. Jess W. Young
Mr. Harold D. Hammett

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CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

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

4543.001

hhd
LHS

3-7-91

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

3/8

March 6, 1991

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

Dear Luke:

Enclosed is a letter Chief Justice Phillips received suggesting a proposed amendment to Rule 170.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711

TEL. (512) 463-1312

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CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
RAUL A. GONZALEZ
OSCAR H. MAUZY
EUGENE A. COOK
JACK HIGHTOWER
NATHAN L. HECHT
LLOYD DOGGETT
JOHN CORNYN
ROBERT A. "BOB" GAMMAGE

CLERK
JOHN T. ADAMS

EXECUTIVE ASS'T
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T
MARY ANN DEEHAUGH

March 5, 1991

Ms. Deborah D. Tucker
Executive Director
Texas Council on Family Violence
3415 Greystone Drive, Suite 220
Austin, Texas 78731

Dear Ms. Tucker:

Thank you for your recent letter and the TCFV Public Policy Committee's *Proposed Language for Rule Change* for Rule 107 of the Rules of Civil Procedure.

Your offer to assist in the resolution process is appreciated. I have sent copies to Justice Nathan Hecht, this court's liaison for Rules of Civil Procedure for his information.

Sincerely yours,

Thomas R. Phillips

Thomas R. Phillips

TRP/ifw

cc: The Honorable Nathan Hecht ✓

TEXAS COUNCIL ON FAMILY VIOLENCE
3415 Greystone Drive, Suite 220 Austin, TX 78731 512/794-1133

Write & thank her and send a copy to Justice Hecht —

February 28, 1991

The Honorable Tom Phillips
Chief Justice, Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Chief Justice Phillips:

The Public Policy Committee of the Texas Council on Family Violence has identified an apparent conflict between Rule 107 of the Rules of Civil Procedure and certain provisions of Chapter 71 of the Texas Family Code regarding protective orders. Specifically, while Chapter 71 neither specifically allows nor specifically prohibits default judgements in protective order cases after the required 48 hours notice has been provided the respondent, such default judgements are routinely entered in practice. The requirement in Rule 107 for ten days notice, without exception, seems to be in possible conflict with this practice, as well as with the legislative intent of Chapter 71 to expedite the issuance of protective orders while observing due process.

The TCFV Public Policy Committee has determined two steps we believe must be pursued to resolve this ambiguity:

1. Legislative Clarification. Senator Cyndi Taylor Krier and Representative Robert Eckels have agreed to introduce legislation that will modify 71.09 (Hearing) to clarify that a default judgement may be entered on a protective order application after sufficient notice.

2. Rule Modification. I also enclose proposed language to modify Rule 107 to minimize confusion and ensure judicial awareness that protective orders are to be handled differently in respect to default judgements from other civil matters requiring notice or service.

I would be happy to visit with you personally to discuss the steps that should be taken to resolve the confusion around this issue and how I or TCFV can assist in that process. I appreciate your attention to this matter.

Sincerely,

Deborah D. Tucker
Executive Director

cc: Senator Cyndi Taylor Krier
Representative Robert Eckels
Lisa McGiffert, Chair, TCFV Public Policy Committee
Rhonda Gerson, TCFV Public Policy Committee

PROPOSED LANGUAGE FOR RULE CHANGE

Amend Rule 107, Texas Rules of Civil Procedure, as follows:
RULE 107. RETURN OF SERVICE

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 return of citation by an authorized person shall be verified. When the citation was served by registered or certified mail as authorized by Rule 106, 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 failure 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 106, proof of service shall be made in the manner ordered by the court.

Except as otherwise provided by this rule, no default judgment shall be granted in any cause until cause until the citation, or process under rules 108 or 108a, with proof of service as provided by this rule or by Rules 108 or 108a, or as ordered by the court in the event citation is executed under Rule 106, shall have been on file with the clerk of the court ten days, exclusive of the day of filing and the day of judgment.

A court may grant a default judgment in a suit for a protective order against family violence brought under Chapter 71, Family Code, in the manner provided by that chapter.

4543.001

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

April 13, 1990

Mr. Steve McConicco
Scott, Douglass & Luton
12th Floor, First City Bank Building
Austin, Texas 78701-2494

Re: Proposed Texas Rules Civil Procedure 170
--Supreme Court Advisory Committee

Dear Steve:

I am directing this letter to you as the subcommittee chairman of Rule 166(b) 215. Further, since you have not heard of the proposed rule, some background is necessary. At the Saturday morning session of our last SCAC meeting, we discussed a proposal which had been generated as a result of the open forum by the Supreme Court in November of last year. In that open forum, someone suggested that the SCAC recommend a rule with respect to motions in limine. For some reason it was the responsibility of my subcommittee to report on this suggestion.

Since motions in limine are most often prior to trial, I suggested that such a rule might comfortably fit as Rule 170. There was general consensus in this regard so I was able to transfer this chore to you.

Feeling somewhat "guilty," I decided that maybe I could ease my conscience somewhat by helping you a little bit. Therefore, I asked one of my students to write a proposed rule on motions in limine with supporting data. A copy of his labors is attached. You might also recall that Pat Hazel wrote a similar proposal in 21 Houston Law Review 919 in 1984. Between the two of these proposals, I hope this gives your subcommittee a good starting point.

Warmest personal regards,

J. Hadley Edgar
Robert H. Bean Professor of Law

JHE/nt
Enclosure

cc: Mr. Luke Soules

4543.001

njh
Uns
✓ 1-29-90

DAVIS, WELCH, EWBANK, OTTO & WILKERSON, P.C.
ATTORNEYS AT LAW

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J. SCOTT BARDOLE
RICHARD B. GEIGER
KIM B. VERNON
BRIAN L. MCELROY
W. DAVID MOORE
PATRICIA M. MCCLUNG
KELLY A. MCDONALD
SHARON M. SCHWEITZER

January 25, 1990

Justice Nathan L. Hecht
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

RE: Proposed Rule Changes

III. New Rule Regarding Motions in Limine

A. Create a new rule which provides that all Motions in Limine of all parties in a jury trial case shall be filed in the papers of the cause at least 7 days before trial.

B. The new rule would further provide that in the event the Motion was not timely filed, the Court would have the discretion to consider a late filed Motion in Limine if the Court found that the opponent was not prejudiced because of the late filing or that justice required consideration of the contents of the Motion. In short, give the trial court discretion, but state that the trial court should not hear the late filed Motion in general, but it would have discretion to consider is the merits of the trial required consideration.

C. Further, the trial court would be told that it could consider what sanctions, if any, in its discretion would be appropriate if a party wanted to urge an untimely Motion and the Court found that justice required a consideration and even granting of the Motion. In short, some message to the trial court that it has the power to prevent lawyers from "late filing" even though a particular trial required a that a late motion to be considered.

Judge, the reasons for the above rules are many, but I will give you only a few.

MOTIONS IN LIMINE

Nothing in our rules, to my knowledge, even mentions Motions in Limine. But they are a vital part of a trial jury practice, a technique for the trial court to get involved early in what the case is <u>really about.</u> Also, it is way to alert the lawyers about evidentiary issues of vital importance.

All experienced trial lawyers have had the experience of handling in the Motion stage the decisive issues in the case: whether "other accident" would be admitted; whether the plaintiffs drinking would come in etc. The list could go on and on. I am sure that you have had many cases that turned on the ruling at the Motion stage.

Why not provide a simple rule that the lawyer must file these critical motions 7 days before trial. Why wait? Why put off? Why leave uncertain? Why leave it to local rules and local "practice"?

PLAYING BY THE RULES

Recent Amendments to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence Effective December 1, 1991

by John K. Chapin

On April 30, 1991, the Supreme Court transmitted to Congress a number of changes to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence. These changes are to take effect on December 1, 1991. Following is a discussion of the major changes. Other insubstantial changes were made to F.R.A.P. 6, 10, 26, and 26.1.

FEDERAL RULES OF CIVIL PROCEDURE

(TRCP 171) *Masters Reports—Rule 53(e)*

Rule 53(e) is amended to require that a master serve notice of the filing of his or her report with the court clerk and serve a copy of the report on each party. Some local rules have previously required this action. The current rule requires only a filing of the master's report, with the clerk then notifying the parties of the filing.

9/11/91

LHS —

I have been able to match up TRCP's for all except these two.

HHD holly

Send to R171
McConnico

PLAYING BY THE RULES

Recent Amendments to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence Effective December 1, 1991

by John K. Chapin

On April 30, 1991, the Supreme Court transmitted to Congress a number of changes to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence. These changes are to take effect on December 1, 1991. Following is a discussion of the major changes. Other insubstantial changes were made to F.R.A.P. 6, 10, 26, and 26.1.

FEDERAL RULES OF CIVIL PROCEDURE

TRCP 171

Magistrates; Pretrial Orders—Rule 72

Rule 72(a) (nondispositive matters) is amended to eliminate a discrepancy with Rule 72(b) (dispositive matters) in measuring the 10 day period for serving and filing objections to a magistrate's action. The new Rule 72(a) provides that within 10 days *after being served* with a copy of the magistrate's order, a party may serve and file objections to the order. A party may not thereafter assign as error a defect in the magistrate's order to which objection was not timely made. The current Rule 72(a) requires the objections be made within 10 days *after entry* of the order.

PLAYING BY THE RULES

Recent Amendments to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence Effective December 1, 1991

by John K. Chapin

On April 30, 1991, the Supreme Court transmitted to Congress a number of changes to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence. These changes are to take effect on December 1, 1991. Following is a discussion of the major changes. Other insubstantial changes were made to F.R.A.P. 6, 10, 26, and 26.1.

FEDERAL RULES OF CIVIL PROCEDURE

TRCP 171

Intervention—Rule 24

Rule 24(c) is amended to conform to 28 U.S.C. 2403 (intervention by a state or the United States when constitutionality of state or federal law is challenged), clarifying that it is the duty of the court to notify the attorney general of a state when an action draws into question the constitutionality of a state statute. The amendment states that although a party challenging the constitutionality of legislation should call the attention of the court to this duty, failure to do so is not a waiver of any constitutional rights asserted.

PROPOSED CHANGE TO RULE 174(b)
Adopted by the Committee on Court Rules February 20, 1993

Exact wording of existing Rule:

(b) Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

PROPOSED CHANGE:

(b) Separate Trials. The court, in furtherance of convenience, or to avoid prejudice or to promote efficiency and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue, including liability and damages issues, or any issues that may be a prerequisite to the determination of another issue or issues, or of any number of claims, cross-claims, counterclaims, third-party claims, or issues. Where two or more separate issues are to be tried to a jury, the Court where practicable shall allow the same jury to try both issues.

COMMENT: The proposed change is merely intended to codify existing law and to give some better rule guidance to the bench and bar in situations involving possible bifurcation or separation of some portions of a case for separate determination. There is nothing about the proposal that is intended in any way to modify any existing law.

3/23

HFP, SCAC Sub Co. Agenda ✓ J. Hecht.

March 11, 1993

Mr. Luther H. Soules, III
1st Republic Bank Plaza
Tenth Floor
175 East Houston Street
San Antonio, Texas 78205-2230

RE: Committee on Court Rules

Dear Luke:

I'm sure you'll be surprised to hear from me but I was asked to work for the committee one more year to just attend meetings and prepare the minutes. The new secretary to the committee is Emily Casstevens who is with the Services Department of the State Bar. Her number is 512/463-1515 in case you need to contact her.

At its meeting held February 20, 1993, the Court Rules Committee approved amendments to three Rules, these being Rule 174(b), Rule 226a and Rule 292.

The exact wording of the existing Rules, the proposed amendments as adopted and the comments relating thereto are enclosed.

With my very best wishes, I remain

Sincerely,

Evelyn A. Avent

Enclosures
Copies w/enclosures to:
J. Shelby Sharpe, Chair of the Court Rules Committee
Emily Casstevens, Secretary to the Committee

4543.001 J4-5-93 LHS HHD

LAW OFFICES OF
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A PROFESSIONAL CORPORATION

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FORT WORTH, TEXAS 76102
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(817) 429-2301 METRO
(817) 332-6818 FAX

April 1, 1993

HHD

Mr. Luther H. Soules, III
First Republic Bank Tower, 10th Floor
175 E. Houston St.
San Antonio, Texas 78205-2230

RE: Committee on Court Rules; Rule 174 (b), Texas Rules of Civil Procedure

Dear Luke:

Evelyn Avent sent you a letter of March 11, 1993 containing three (3) rules which had been approved by the Committee on Court Rules, one of which was Rule 174 (b). I have had sufficient requests from members of the committee that the action of the committee on this rule needs to be reexamined. According, I would appreciate the Supreme Court Advisory Committee not taking any action on this rule until you hear from the committee.

Very truly yours,

J. Shelby Sharpe

JSS/jec

cc: Anne Gardner

4543.001 6-17-92 LHS

TEXAS ASSOCIATION OF DEFENSE COUNSEL

400 West 15th Street, Suite 315, Austin, Texas 78701 512/476-5225 Fax 512/476-5384

Office of the President
Lewin Plunkett
Plunkett, Gibson & Allen
P.O. Box BH002
San Antonio, TX 78201
512/734-7092
512/734-0379 FAX

June 15, 1992

6/17 HHD, Scott Sabo, Luanda ✓ Staff OAJ J. Hecht Tex 7

Mr. Luther H. Soules
Soules & Wallace
175 E. Houston St.
10th Floor
San Antonio, TX 78205-2230

Dear Luke:

At its April meeting the Board of Directors of the Texas Association of Defense Counsel adopted a resolution in support of a revision of the Texas Rules of Civil Procedure that would allow bifurcation of civil trials including a bifurcation of liability and damages and a bifurcation of punitive damage claims. We did not endorse specific language, although the officers (but not the directors) had in front of them a copy of the enclosed amendment that would accomplish that purpose.

By this resolution, we understand that we join a number of other groups supporting this proposal to expedite the trial of cases and to make civil trials more efficient and hopefully, more just.

As you consider revisions to the Texas Rules of Civil Procedure, we urge you to support this amendment.

Thank you for your consideration.

Sincerely,

Lewin Plunkett
President

ALP:tec
enclosure

PROPOSED AMENDMENT
TO RULE 174(b)
TEXAS RULES OF CIVIL PROCEDURE

In all cases, including actions in which personal injury is alleged, [~~The~~] the court in furtherance of convenience or to avoid prejudice or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue, including liability and damages issues, or such issue as may be a prerequisite to the determination of another issue or issues, or of any number of claims, cross-claims, counterclaims, third-party claims, or issues. Where two or more separate issues are to be tried to a jury, the court may allow the same jury to try both issues.

(New language is underlined; deleted language is bracketed and stricken.)

4543.001 nhd

5-1-92

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

April 30, 1992

HHD. Pls Distribute per request.

TRCP 174

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

Dear Luke:

Enclosed is a memorandum I received from University of Texas Law Professor Jack Ratliff.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

MEMORANDUM

TO: Justice Hecht April 30, 1992

FROM: Professor Ratliff

RE: Rules Concerning Joinder of Parties

The language of Rule 40(a), "arising out of the same transaction, occurrence or series of transactions or occurrences . . .", to too confusing. Rules 174 and 41 are at odds with each other and should be changed. Joinder matters should be within the discretion of the TC, and therefore, subject to an abuse of discretion review. The TC should be able to join parties as long as there is not an inordinate amount of expense and no prejudice to the parties.

JOHN B. BECKWORTH
Attorney at Law
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
(713) 651-5134
FAX (713) 651-5246

3/23

HHD, Sub Agenda ✓

J. Herbst

March 18, 1992

VIA FAX (512) 473-2295

Ms. Evelyn A. Avent
State Bar of Texas
Committee on the Administration
of Justice
P. O. Box 12487
Austin, TX 78711

Dear Ms. Avent:

In line with our conversation yesterday and on behalf of the Bifurcation Sub-Committee, I am enclosing for distribution to the members of the State Bar Committee on the Administration of Justice a proposed amendment to Tex. R. Civ. P. 174 (b).

We would appreciate your timely distribution of the enclosure to the committee membership for consideration at our March 27 meeting.

Very truly yours,

John B. Beckwerth

JBB/tcm
Enclosure

cc: Mr. Ernest Reynolds, III
Chairman
Bifurcation Sub-Committee
Cantey & Hanger
801 Cherry Street, Suite 2100
Fort Worth, TX 76102-6899
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PROPOSED AMENDMENT TO RULE 174 (b)

In all cases, including actions in which personal injury is alleged, the court in furtherance of convenience or to avoid prejudice or when separate trials will promote efficiency and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue, including liability and damages issues, or any issues that may be a prerequisite to the determination of another issue or issues, or of any number of claims, cross-claims, counterclaims, third-party claims, or issues. Where two or more separate issues are to be tried to a jury, the court shall allow the same jury to try both issues, unless the parties, by written agreement, specify otherwise.

4543.001

LHS
hhd

12-12-91
SB

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December 10, 1991

HHD
Ltr. sent
✓ Agenda
Cert'd Evelyn
J. Hecht

Mr. Luther H. Soules III
Soules & Wallace
175 E. Houston Street, 10th Floor
San Antonio, Texas 78205-2230

Re: *Amendment to Rule 174(b), Texas Rules of Civil Procedure*
Bifurcation of Liability and Damage Issues in Civil Trials

Dear Mr. Soules:

We urge your favorable consideration of an amendment to Rule 174(b) of the Texas Rules of Civil Procedure to allow the bifurcation of liability and damage issues in civil trials.

We believe very sincerely that bifurcated trials will reduce costs, speed up the trial process, expedite settlement, and improve the fairness of the civil judicial system in Texas.

Thank you for your favorable consideration of this proposal.

Yours very truly,

Frank Finn

Frank Finn

FF:tw

4543.001 11-15-91 NMS LHS

Proposal for Bifurcation of Civil Trials

11/15 HHP, Sara, Agenda, Sara ✓ COAS (Amount) J. Heckt.

November 13, 1991

Mr. Luther H. Soules III
Soules & Wallace
175 E. Houston St., 10th Floor
San Antonio, TX 78205-2230

Dear Mr. Soules:

We urge your consideration of an amendment to Rule 174(b), Texas Rules of Civil Procedure, to allow the bifurcation of liability and damage issues in civil trials. We believe that bifurcated trials will reduce costs, speed up the trial process, expedite settlements, and improve the fairness of the civil judicial system in Texas.

In support of our proposal we enclose the following:

a. Proposed language for an amendment.

b. A brief entitled "Proposal for Express Authorization in Texas for Bifurcating and Severing Issues for Trial in Personal Injury Cases," prepared by the American Insurance Association.

c. An article published in the May, 1990 issue of *The Review of Litigation* entitled "Bifurcated Trials in Texas Practice: The Advantages of Greater Use of Texas Rules of Civil Procedure 174(b)," by J.D. Page and Doug Sigel. A version of this article was published in the April, 1990 issue of *The Texas Bar Journal* under the same title.

d. A reprint of an editorial by Stephen B. Middlebrook appearing in the June 13, 1988 issue of *The Wall Street Journal*.

e. A list of citations to statutes and rules of the Federal Government and other states regarding bifurcation of issues in civil trials.

We very much appreciate your consideration of this proposal.

If you would like additional information or would like to discuss this matter, please contact Forrest Roan, Bob Simpson, or Dana Chiodo at the law firm of Roan, Simpson & Autrey, 400 West 15th Street, Austin, Texas 78701, Phone: (512) 474-4200.

This proposal is submitted by the following organizations:

Richard Beck, CAE
Assistant Executive Director
Texas Pharmaceutical Association

Larry Milner
President and CEO
Texas Chamber of Commerce

Ron Cobb
Vice President
American Insurance Association

Gerhardt Schulle, Jr.
Executive Director
Texas Society of Professional Engineers

H. Dane Harris
President
Texas Association of Business

Ralph Wayne
Executive Vice President
Texas Civil Justice League

Ken King
Executive Director
Consulting Engineers Council of Texas, Inc.

Donald P. Wilcox
General Counsel
Texas Medical Association

(A copy of this proposal is being sent to the members of the Supreme Court of Texas, The Rules Advisory Committee, and the Rules Revision Task Force

Proposed Amendment
To Rule 174 (b)
Texas Rules of Civil Procedure

In all cases, including actions in which personal injury is alleged, [~~The~~] the court in furtherance of convenience or to avoid prejudice or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue, including liability and damages issues, or such issue as may be a prerequisite to the determination of another issue or issues, or of any number of claims, cross-claims, counterclaims, third-party claims, or issues. Where two or more separate issues are to be tried to a jury, the court may allow the same jury to try both issues.

(New language is underlined; deleted language is bracketed and stricken.)

PROPOSAL FOR EXPRESS AUTHORIZATION IN TEXAS FOR BIFURCATING AND SEVERING[1] ISSUES FOR TRIAL IN PERSONAL INJURY CASES

In its 1958 decision in Iley v. Hughes,[2] the Texas Supreme Court disallowed trial judges, in personal injury actions, the discretion to bifurcate liability and damages issues, under Texas Rule of Civil Procedure 174(b).[3] While the Court's stated reason in Iley was that those issues are intertwined, the Court's implicit concern seemed to be the effect of the then-applicable doctrine of contributory negligence. However, Texas abolished the doctrine of contributory negligence in favor of comparative negligence in 1973. In a comparative negligence environment, there are compelling reasons for permitting issue severance.

This paper proposes an amendment to Rule 174(b) to clearly authorize separate trial of liability, damages and other issues in personal injury cases; and to give judges standards to which they can refer in exercising their discretion to bifurcate. Prefacing the presentation of the proposed amendment (Section V), are several considerations demonstrating the current invalidity of the Iley decision, and supporting the proposed amendment. These considerations relate to: extensive adoption of bifurcation rules nationwide (Section I); value of bifurcation when practiced (Section II); unsoundness of traditional objections to bifurcation (Section III); and, most importantly, significant changes in Texas negligence law, since the 1958 Iley decision, because of the adoption of comparative negligence (Section IV).

I. Background and Overview of Adoption of Bifurcation Rule

Bifurcation is a procedural tool for separating trial of issues, typically, liability and damages. A trial can also be

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[1] Although bifurcation is the term commonly used to refer to the practice of separating issues for trial, issue severance is a more accurate term since it is not uncommon to split the issues into more than two parts.

[2] 311 S.W. 2d 648 (Tex. 1958); see also Eubanks v. Winn, 420 S.W. 2d 698 (Tex. 1967).

[3] Rule 174(b) currently reads as follows:

(b) **Separate Trials:** The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

Source: Federal Rule 42, unchanged.

Note: Supersedes Art. 2160.

split into several issues, with the linchpin or dispositive issue, such as an affirmative defense, or causation, determined first. The purposes of this procedure are to avoid unnecessary adjudication of issues, reduce costs and delay, and enhance fairness.

The concept of splitting issues for separate determination originated with the adoption, in 1938, of Federal Rule of Civil Procedure 42(b) authorizing separate trial of liability and damages issues for reasons of "convenience or to avoid prejudice." That rule was later amended, in 1966, to allow bifurcation when it would also be "conducive to expedition and economy."

Federal Rule 42(b) states, in full:

> (b) **Separate Trials:** The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

Forty-three states -- many of which adopted the language in Federal Rule 42(b) -- have a rule expressly authorizing bifurcation in civil trials. In addition, some[4] Federal District Courts have adopted a local rule designed to bifurcate liability and damages issues routinely in personal injury and other civil litigation. Other[5] Districts require that mandatory joint pretrial statements submitted to the judge mention whether or not bifurcation is feasible and desired.

The rules of only six states do not expressly provide litigants a clear basis for requesting separate trials of issues such as liability and damages: Connecticut, Hawaii, Illinois, Louisiana, Nebraska and New Hampshire. In Texas, while bifurcation of issues is clearly allowed by rule, the Texas Supreme Court has rejected the use of Rule 174(b) to authorize separate trials of liability and damages issues in personal injury litigation, in the Iley v. Hughes case.

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[4] N.D. Ill. Civil Rule 21; N.D. N.Y. Rule 40; N.D. Ohio Civil Rule 18:01; and D. Conn. Rule 10(b).

[5] N.D. Cal. Rule 235. 7(p); D. Hawaii Rule 235-7(p); D. Idaho Rule 2-123 (o); M.D.N.C. Civil Rule 204(c)(10). Under E.D. Pa. Rule 21, liability and damages witnesses are to be listed separately in pretrial memoranda.

II. Value of Issue Severance Where Practiced

Bifurcation has been used in complex litigation including antitrust, patent and property cases; in multi-party property and personal injury cases; in federal class actions; and in standard negligence cases. When bifurcation has been used, it is viewed by many judges and lawyers as highly efficient, effective and equitable.

A 1988 Louis Harris poll[6] of federal and state judges found that an overwhelming majority -- 94% federal, 82% state -- had granted or required bifurcation. Among those judges, an overwhelming majority also said it speeds up the trial process (82% federal, 77% state); expedites settlements (85% federal, 80% state); reduces transactions costs (79% federal, 70% state); and improves the fairness of the outcome (80% federal, 77% state). A subsequent 1989 Harris poll[7] of plaintiff, defense and public interest lawyers, corporate counsel and federal judges also reinforced the finding that bifurcation is viewed as highly effective.

Current statistics developed by a bifurcation pioneer, Senior U.S. District Judge Hubert Will of the Northern District of Illinois, provide strong additional support for the benefits of bifurcation. Judge Will supports bifurcation because of its use in promoting efficiency, settlements and fairness. His statistics on the outcome of 154 trials he bifurcated between 1961 and 1988, show that plaintiffs won 80 and defendants won 67. The remaining 7 settled before a liability determination was made. Of the 80 won by plaintiffs, only 25 had to be tried on damages, the other 55 were settled after liability was found.[8]

Judge Will has influenced many colleagues who have shared his success with bifurcation. One such colleague is Senior U.S. District Judge Clyde Atkins of the Southern District of Florida. His experience, like Judge Will's, indicates that bifurcation promotes settlements: "I have had similar experience as that of Judge Will. By resolution of the liability issue first in a substantial percentage of these cases, the parties settle the

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[6] Louis Harris and Associates, Judges' Opinions on Procedural Issues (Fieldwork: October-December 1987).

[7] Louis Harris and Associates, Procedural Reform of the Civil Justice System (March 1989).

[8] Telephone conversation of David Rome, Esq., Aetna Life and Casualty Co. Law Department, with Judge Will, Nov. 9, 1988.

damage issue without a trial."[9] In addition, Judge Atkins says: "Bifurcation makes the thrust of the liability issue more understandable and prevents what occurs in many personal injury actions -- letting the damages support the liability if there are any deficiencies."[10]

Senior U.S. District Judge Carl Rubin of the Southern District of Ohio is another colleague influenced by Judge Will. Judge Rubin's technique[11] has also been widely acclaimed. He bifurcates 90 to 95 percent of his cases.[12] For according to Judge Rubin, if a plaintiff cannot prove liability, it doesn't

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[9] Atkins, Litigation on the Fast Track/Clearing the Path to Settlement: A View from the Bench, address to the Senior Judges' Committee, Senior Lawyers' Division, American Bar Association, Aug. 5, 1988.

[10] Id.

[11] Judge Rubin initially permits discovery to be conducted only on the first phase of the trial. If liability is found, he recesses the jury for a month or more to allow discovery on the second phase. He also conducts a settlement conference during this period. If settlement does not occur, he reconvenes the same jury to hear the next phase. He reports a very high rate of settlements and a rare need to recall the jury. (Discussion at meeting of Brookings Institution, Washington, D.C., Jan. 30, 1989.)

[12] One of Judge Rubin's better known cases was a consolidated Bendectin products liability case. In that case, the plaintiffs alleged that Bendectin, a drug sometimes used for morning sickness, caused birth defects. Judge Rubin split the liability issue into causation and liability. The jury first heard the issue of scientific causation -- whether the drug was capable of causing the harm alleged. The jury concluded it was not. This obviated the need to consider the liability and damages issues. In re Richard-Merrell, Inc. "Bendectin" Products Liability Litigation, 624 F. Supp. 1212 (S.D. Ohio 1985), aff'd 857 F. 2d 290 (6th Cir. 1988), cert. denied, 109 S. Ct. 788 (1989).

matter what his damages are.[13] He also reports a very high rate of settlements.[14]

Other benefits of issue severance are: reducing court trial load or congestion, as well as the delay and costs associated with the adjudication of disputes and delivery of justice. When issues are tried in stages and the jury finds for one party on an issue, such as liability, trials will be shortened as adjudication of damages is unnecessary, or the parties are likely to settle.[15] This avoidance of unnecessary adjudication of issues can save trial time and contribute to reducing the backlogs with which many Texas courts are plagued.

Impact on trial time of separation of issues -- thus, effect on court trial load -- was the focus of the seminal Zeisel/ Callahan study[16] on the first two years' experience under the Northern District of Illinois bifurcation rule. The authors found, based on 69 bifurcated trials and 117 regular unified personal injury trials, with an assumption that damages account for 40% of trial time, that severance in personal injury cases can save approximately 20% of the time it takes to try liability and damages together. They concluded that separation is a powerful remedy for court congestion.[17]

At the same time, settlement or early adjudication, due to issue severance, can also avert the severe financial hardships that litigation delay can cause to a plaintiff. In addition, all parties benefit from the transaction costs[18] savings of avoiding an overall trial with respect to all issues. Importantly, the practice of issue severance was among the recommendations of the recent Brookings Institution Report addressing the causes of and

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[13] Telephone conversation of Constance Subadan, Esq., American Insurance Association, Policy Development and Research Department, with Judge Rubin, June 14, 1989.

[14] See note 11, supra.

[15] See e.g., notes 6, 8 and 9, supra, and accompanying text. See also note 16, infra.

[16] Zeisel and Callahan, Split Trials and Time Sharing: A Statistical Analysis, 76 Harv. L. Rev. 1606 (1963). See also Comment, Implications of Bifurcation in the Ordinary Negligence Case, 26 Univ. of Pitt. L. Rev 99 (1964).

[17] Zeisel and Callahan at 1619, 1624.

[18] See note 6 supra, and accompanying text.

recommending practical methods for reducing civil litigation costs and delay.[19]

III. Traditional Obstacles To Use Of Issue Severance In Personal Injury Cases

a. Opposition From Plaintiff's Lawyers

Plaintiff's lawyers oppose bifurcation on the belief that defendants win more often than in the traditional unitary trial process. Statistics previously discussed do not support that theory. However, the outcome may be different in some separated trials, as shown by the Horowitz/Bordens experiment, discussed below. Plaintiff's lawyers may also resist bifurcation as their strategy may be to influence the jury with evidence of injuries, at the first opportunity,[20] even if causation or liability evidence may be doubtful. This practice is inconsistent, however, with the principle that justice requires the avoidance of passion or prejudice; it intrudes on the jury's sworn duty to determine facts and apply them to the rules of law given in the judge's instructions; and it presents the jury with evidence that is rarely pertinent to the other issues.

A recent experimental study[21] by Horowitz and Bordens examined the effect of issue severance on verdicts in a hypothetical torts case. All the evidence was weighted in favor of the plaintiffs, except the general causation evidence, which was ambiguous. The study found that experimental juries exposed to the same evidence in unitary trials, as juries in separate trials, were more likely to find that the chemical was the cause of plaintiffs' illnesses and the defendant liable, than the juries in separated trials.

That study showed, however, that while juries in unitary trials considered each trial decision in seriatim, they did tend to buttress their decisions on one issue with evidence from other trial issues not directly related to the issue under consideration. At each decision point, unitary juries searched in other areas, especially for evidence concerning damages, to

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[19] See Brookings Institution, Justice for All: Reducing Costs and Delay in Civil Litigation (1989).

[20] See e.g., Judge Francis Marnell, Bifurcation in Tort Action or Defense Counsel's Lament, For The Defense (May 1982). (Judge Marnell sits on the Superior Court of the State of California, County of Los Angeles.)

[21] Horowitz and Bordens, An Experimental Investigation of Procedural Issues in Complex Tort Trials (1989) (available in Dept. of Psychology, Univ. of Toledo).

buttress their decisions. This was most evident when juries were faced with the most ambiguous trial issue, general causation. Separated trials are structured so that this reinterpretation of evidence is less likely. Thus, issue severance accommodates the jury's role and duty to determine facts and apply them to the rules of law given by the judge.

b. Opposition on Theory Bifurcation is a Substantive Rule

A traditional reason for resisting bifurcation is the theory that it changes the jury system so radically it would effect a substantial change in litigants' rights. This is a theory articulated by an early critic of bifurcation, Professor Weinstein (current Chief Judge, U.S. District Court, Eastern District of New York). This would also appear to be the implicit rationale for the Texas Supreme Court's decision in Iley.[22]

In a 1961 article,[23] Judge Weinstein maintained that an appropriate role for the jury is tempering the law and giving impressionistic reactions to the evidence submitted rather than strict application of the facts as they find them to the law as stated by the judge. An example of the jury's tempering role, according to Judge Weinstein, is its amelioration of the contributory negligence doctrine through substituting a form of comparative negligence by discounting damages rather than finding no liability at all.[24]

The adoption of comparative negligence in all but a few jurisdictions eliminates the need for any tempering role for the jury, as articulated by Judge Weinstein. That change in Texas negligence law, effectuated subsequent to the Texas Supreme Court's 1958 and 1967 rulings on the bifurcation issue, is a

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[22] Compare Rosales v. Honda Motor Co., 726 F. 2d 259 (5th Cir. 1984), a diversity personal injury suit. In Rosales, the Fifth Circuit held that the District Court was authorized to bifurcate liability and damages issues under Federal Rule 42(b), despite the Texas state law/policy disallowing such bifurcation. The Fifth Circuit found that under Hanna v. Plumer, the state's characterization of its law as substantive rather than procedural, had to yield to the federal procedural rule.

[23] Weinstein, Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power, 14 Vand. L. Rev. 831 (1961).

[24] Id. at 834.

crucial reason, additional to the considerations previously discussed, warranting reconsideration of the Court's position.

IV. Bifurcation in Texas

In Iley v. Hughes, decided in 1958, the issue whether a trial judge has discretion, under Rule 174(b), to allow separate trial of liability and damages issues in personal injury cases, was one of first impression in the state. The Texas Supreme Court would not interpret Rule 174(b) to authorize such discretion. It held that under Texas policy and practice those issues are so intertwined that bifurcating them is impermissible.

Before reaching the above conclusion, the Court reviewed, but disregarded, persuasive authority favoring bifurcation of liability and damages issues in personal injury suits. That authority was, as follows: the plain[25] language of Rule 174(b); a prior[26] decision interpreting that rule to confer broad discretion on trial judges; personal injury and other decisions allowing bifurcation of other issues;[27] other rules -- Rules

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[25] The Court noted that the literal language in Rule 174(b) allowing trial judges "in furtherance of convenience or to avoid prejudice" to order a separate trial "of any separate issue or of any number of.... issues" would appear to facially authorize bifurcation of the liability and damages issues in personal injury actions.

[26] In that decision, Landers v. East Texas Salt Water Disposal Co., 248 S.W. 2d 731 (Tex. 1952), the Court held that the discretion conferred on trial judges by Rule 174(b) and other rules is "about as broad as language could make it." The Iley Court noted that that decision would also seem to favor bifurcating liability and damages issues in personal injury cases.

[27] Personal injury and other suits referenced by the Court in which the trial court's discretion to bifurcate other types of issues under Rule 174(b) was either approved on review or not challenged in the trial court were: Shelton v. Belknap (citations omitted) (issue whether plaintiff was married to deceased, thus entitled to maintain suit for wrongful death); Hernandez v. Light Publishing Co. (citation omitted) (issue whether plaintiff was an independent contractor, thus entitled to recover damages); Meredith v. Massie (citation omitted) (issue of limitations in a suit for damages for alienation of affection); H. Rouw Co. v. Railway Express Agency (citation omitted) (issue of

(continued...)

166-A[28] and 243[29] -- specifically authorizing separate trial of damages issues; and Rule 174(b)'s similarity to Federal Rule 42(b), and the interpretation[30] of the latter, by federal courts, to allow separate trial of liability and damages issues.

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[27](...continued)
limitations in a suit for damages arising out of a shipment of strawberries); Sterett v. Dyer (citation omitted) (issue of plaintiff's right to share profits of the business in a suit to establish right to a share of net profits and for an accounting); and Cone v. Cone (citation omitted), as well as Lesage v. Gately (citation omitted) (issue of divorce in advance of a trial of property rights of the parties).

[28] Rule 166-A allows summary judgment on liability, and separate trial of damages. It states in part:

SUMMARY JUDGMENT

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

[29] Rule 243 authorizes default judgment on liability, and separate trial of damages, when a cause of action is unliquidated. That Rule states:

UNLIQUIDATED DEMANDS

If the cause of action is unliquidated or be not proved by an instrument in writing, the court shall hear evidence as to damages and shall render judgment therefor, unless the defendant shall demand and be entitled to a trial by jury in which case the judgment by default shall be noted, a writ of inquiry awarded, and the case entered on the jury docket.

(Amended March 31, 1941, eff. Sept. 1. 1941.)

Source: Art. 2157 unchanged.

[30] See e.g., Nettles v. General Accident Fire & Life Assurance Corp., 234 F. 2d 243 (5th Cir. 1956), cited by the Iley Court.

The Court found that the previously mentioned authority was overborne by stronger considerations of longstanding policy and practice in Texas. Implicit and central to the logic of the Court's rationale was the then applicability, in Texas, of the longstanding doctrine of contributory negligence. For contributory negligence, if established, acted as a total bar to recovery, relieving a defendant of liability if the plaintiff's negligent conduct contributed as a proximate cause to his injury.[31]

The premise that the applicability of contributory negligence is central to the Court's reasoning is substantiated by a review of the following concerns raised by the Court. It should be noted that these considerations address "all or nothing" doctrines or defenses associated with the applicability of a contributory negligence regime:

> If Rule 174(b) were now interpreted to permit separate trial of liability and damage issues, on what basis could we later deny to a trial court the right to try only the primary[32] negligence issues? Or the contributory negligence issues? Or, more appropriately perhaps, the issue of unavoidable[33] accident, since a finding that an accident was unavoidable would ordinarily relieve the defendant of liability?[34]

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[31] See e.g., Lowery v. Berry, 269 S.W. 2d 795 (Tex. 1954) and Hudson v. West Central Drilling Co., 195 S.W. 2d 387 (Tex. Civ. App. 1946).

[32] Primary negligence depends upon reasons to anticipate injury plus failure to perform duty arising on account of that anticipation. Strong v. Caudill, 389 S.W. 2d 736 (Tex. Civ. App. 1965). See also 65 C.J.S. Negligence, Section 1(14) (1966) (negligence has been referred to as either contributory or primary, or as primary or subsequent).

[33] The defense of unavoidable accident is an affirmative defense and must be plead to secure submission of such issue. Breaux v. Slocum, 438 S.W. 2d 403 (Tex. Civ. App. 1968). Note that in Yarbrough v. Berner, 467 S.W. 2d 188 (Tex. 1971) the Texas Supreme Court reduced the issue of unavoidable accident from a special issue to a jury instruction. The Court said that the separate issue of unavoidable accident merely served to confuse juries.

[34] 311 S.W. 2d at 651.

Texas adopted the doctrine of comparative negligence by legislation in 1973.[35] That doctrine has been revised[36] to apply to other causes of action, in addition to negligence. However, it retains the rule, in a personal injury negligence action, that a plaintiff may recover damages if his fault is 50 percent or less. That doctrine thus ameliorates the consequences of the contributory negligence rule by apportioning liability and damages rather than by applying an "all or nothing standard." It also negates the concern, such as that expressed by Judge Weinstein, that forcing juries to separate damages from liability

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[35] Tex. Rev. Civ. Stat. Ann. Art. 2212a, Section 1 (Vernon Supp. 1974-75) states:

> Contributory negligence shall not bar recovery in an action by any person or party or the legal representative of any person or party to recover damages for negligence resulting in death or injury to persons or property if such negligence is not greater than the negligence of the person or party or persons or parties against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person or party recovering.

The current law is found at Tex. Civ. Prac. & Rem. Code Ann., Section 33.001 (Vernon 1986 and 1989 Supp.), note 26, infra. See generally Durbin et al., Texas Tort Law in Transition, 57 Tex. L. Rev. 381 (1979) and Note, Doctrine of Last Clear Chance: Should It Survive The Adoption of Comparative Negligence in Texas?, 6 Tex. Tech. L. Rev. 131 (1974).

[36] The Texas comparative responsibility statute currently applies to negligence, as well as strict tort liability and other causes of action. It states in relevant part:

> **33.001. Comparative Responsibility**
>
> (a) In an action to recover damages for negligence resulting in personal injury, property damage, or death or an action for products liability grounded in negligence, a claimant may recover damages only if his percentage of responsibility is less than or equal to 50 percent.
>
> (b) In an action to recover damages for personal injury, property damage, or death in which at least one defendant is found liable on a basis of strict tort liability, strict products liability, or breach of warranty under Chapter 2, Business & Commerce Code, a claimant may recover damages only if his percentage of responsibility is less than 60 percent.

would prejudice a plaintiff's rights, by infringing on the jury's role of tempering the contributory negligence rule.

It is noteworthy that since the enactment of the Texas comparative negligence legislation, the Texas Supreme Court has affirmatively acted to abolish several common law doctrines associated with the old contributory negligence law.[37] The Court has also acted to refine negligence actions, prior to the legislative adoption of comparative negligence, such as by changing the issue of unavoidable accident from a special issue to a jury instruction.[38]

The adoption of comparative negligence should render nugatory the Court's concern about allowing bifurcation of liability and damages issues in personal injury cases under Rule 174(b).

In Iley, the Court also found that its interpretation of Rule 174(b) was consistent with its refusal to interpret Rules 434 (now 81) and 503 (now 184) to allow separate retrial of liability or damages issues. It noted that it had held[39] that the broad language of those rules directing reversal of only the part of a judgment affected by error, "where the issues are severable," does not allow separate trial of liability and damages on retrial.

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[37] See, e.g., French v. Grigsby, 571 S.W. 2d 867 (Tex. 1978) (doctrine of last clear chance or discovered peril eliminated in light of the comparative negligence legislation); Davila v. Sanders, 557 S.W. 2d 770 (Tex. 1977) (imminent peril doctrine abolished in light of the comparative negligence legislation) and Farley v. M.M. Cattle Co., 529 S.W. 2d 751 (Tex. 1975) (abolishing voluntary assumption of risk in negligence cases as incompatible with the comparative negligence legislation).

[38] See note 33, supra.

[39] See e.g., Waples-Platter Co. v. Commercial Standard Insurance Co., 294 S.W. 2d 375 (Tex. 1956) cited by the Court in Iley v. Hughes at 651.

However, in 1976, the Court amended[40] Rules 434 and 503 to more clearly [41] provide for a new trial only on the part of the judgment affected by error. Those amendments to the retrial rules are additional reasons for the Court to now amend Rule 174(b) to clearly authorize separate trial of liability, damages and other issues in personal injury cases.

A rule explicitly authorizing trial courts to sever liability, damages, or other issues in personal injury cases is consistent with and supported by the previously discussed changes in Texas negligence law and the retrial rules. Such a rule is consistent with Texas practice of bifurcating other dispositive issues in personal injury cases.[42] It would also be consistent with the practice in the federal courts and the majority of states. Finally, such a rule would provide litigants, the judiciary, and the Texas civil justice system, at large, the many benefits related to the practice of bifurcation.

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[40] The 1976 amendments provided, as follows, with respect to both Rules 434 and 503:

> "and if it appear to the court that the error affects a part only of the matter in controversy ~~and the issues are severable~~ and that such part is clearly severable without unfairness to the parties, the judgment shall only be reversed and a new trial ordered as to that part affected by such error, provided that a separate trial on unliquidated damages alone shall not be ordered if liability issues are contested.
>
> (Strike-throughs indicate matter which was deleted; underlining indicates new language.)

[41] See Simpson v. Phillips Pipe Line Co., 603 S.W. 2d 307 (Tex. Civ. App. 1980), noting that the Texas Supreme Court amended Rules 434 and 503 in 1975 (sic) to provide for a new trial only as to the part of a judgment affected by error. Compare Page and Sigel, Bifurcated Trials in Texas Practice: The Advantages of Greater Use of Texas Rules of Civil Procedure 174(b), 54 Tex. B. J. 318 (1990). Page and Sigel argue that the 1975 (sic) amendments implicitly repealed Iley.

[42] See the cases cited by the Court in note 27, supra. Compare also Phipps v. Miller, 597 S.W. 2d 458 (Tex. Civ. App. 1980) (bifurcation of issue of limitations approved in a personal injury action).

Bifurcated Trials in Texas Practice: The Advantages of Greater Use of Texas Rule of Civil Procedure 174(b)

J. D. Page*
and Doug Sigel**

Table of Contents

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I. Introduction

Although federal courts routinely order bifurcated trials to safeguard against confusion and injustice and to encourage expedition and economy, Texas state courts rarely do so. Texas Rule of Civil Procedure 174(b) (Texas Rule 174(b)) gives trial courts the authority to order a separate trial on any issue, in any kind of case. This Article encourages greater use of bifurcation by Texas courts.

Part II introduces several benefits of bifurcation: effective management of time, conservation of judicial resources, and avoidance of unfair prejudice. Part III outlines the procedural aspects of bifurcated trials: authority to bifurcate, sua sponte bifurcation, relation of bifurcation to other procedural rules, appellate review of bifurcation orders, and use of the same or separate juries in bifurcated trials. Part IV discusses ten considerations that courts should use to decide whether to order a bifurcated trial.

Part V examines two "hot topics" in Texas courts: bifurcation of bad-faith claims against insurers and use of bifurcation to avoid prejudice in actions involving claims for punitive damages. Subpart V(A) argues that bifurcation can be a fair and efficient device for resolving the causes of action for bad-faith dealing by an insurer recognized by the Texas Supreme Court in *Arnold v. National County Mutual Fire Insurance Co.*,[1] *Aranda v. Insurance Co. of North America*,[2] and *Vail v. Texas Farm Bureau Mutual Insurance Co.*[3] Subpart V(B) examines proposals for the bifurcation of punitive damages as discussed by Justice Gonzalez in *Lunsford v. Morris*.[4] Part VI examines the policy behind *Tiley v Hughes*,[5] which prohibits separate trial of liability and damages in personal injury actions.

II. Benefits of Bifurcated Trials

Judicious application of Texas Rule 174(b) benefits both the legal system and the litigants who use it. Bifurcated trials con-

1. 725 S.W.2d 165 (Tex. 1987).
2. 748 S.W.2d 210 (Tex. 1988).
3. 754 S.W.2d 129 (Tex. 1988).
4. 746 S.W.2d 471, 474 (Tex. 1988) (Gonzalez, J., dissenting).
5. 158 Tex. 362, 311 S.W.2d 648 (1958).

serve judicial resources and save litigants time and money. In addition, separating complex or emotionally charged issues often reduces jury confusion and helps avoid unfair prejudice to litigants.

A. *Conserving Judicial Resources and Reducing Trial Delays*

A bifurcated trial can save precious judicial resources and reduce trial delay. Trial of other issues is unnecessary when a single issue has the potential to dispose of a case, and separate trial of the dispositive issue often saves time. In particular, bifurcated trials are appropriate when a defendant asserts an affirmative defense that, if proven, would completely bar the action. Thus, it is appropriate, and may be more efficient, for Texas state courts to bifurcate trials involving defenses such as statute of limitations,[6] res judicata,[7] and estoppel.[8]

Federal case law reveals an increasing acceptance of bifurcation in cases with potentially dispositive affirmative defenses. Bifurcated trials also are appropriate in complex litigation; in complex cases, liability often can and should be determined prior to assessing damages. A verdict on the issue of liability frequently resolves a complex case through either dismissal or settlement and thereby saves the time and expense of litigating the issue of damages, which is often the most complex aspect of complex litigation.[9]

B. *Ensuring a Fair and Impartial Trial*

If a case contains a large number of dissimilar and complex issues, bifurcating the trial will often prevent confusion.[10] One

6. *See, e.g.*, Phipps v. Miller, 597 S.W.2d 458, 459 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.); Meredith v. Massie, 173 S.W.2d 799, 800 (Tex. Civ. App.—Amarillo 1943, writ ref'd).

7. *See, e.g.*, Hunt v. Hunt, 453 S.W.2d 377, 378 (Tex. Civ. App.—Houston [14th Dist.] 1970, no writ).

8. *See, e.g.*, Kennedy v. Hyde, 666 S.W.2d 325, 325 (Tex. App.—Fort Worth 1984), *rev'd on other grounds*, 682 S.W.2d 525 (Tex. 1985); Chapman v. Ferd Staffel Co., 362 S.W.2d 173, 174 (Tex. Civ. App.—Waco 1962, writ ref'd n.r.e.).

9. *See In re* Beverly Hills Fire Litig., 695 F.2d 207, 216 (6th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); *see also* White Chem. Corp. v. Walsh Chem. Corp., 116 F.R.D. 580, 581 (W.D.N.C. 1987).

10. Akzona Inc. v. E.I. Du Pont De Nemours & Co., 607 F. Supp. 227, 232 (D. Del. 1984).

federal district court separated a suit's patent and antitrust issues into distinct trials because "[t]he consideration of all these divergent issues at one trial would impose a heavier burden than is sensible on the single judge."[11] Another federal district court ordered separate trials for each defendant in a condemnation suit, reasoning that the interests of each landowner were sufficiently divergent to confuse a single jury.[12]

Federal district courts, aware that the "benchmark of our judiciary rests on the ability of the courts to provide all parties with a fair trial,"[13] often order bifurcated trials on sensitive issues. In a case in which evidence is admissible only on certain issues, a bifurcated trial may be ordered to avoid unfair prejudice to a party.[14] Used in this manner, bifurcated trials help safeguard the jury's ability to reach a decision based on relevant evidence rather than on emotional factors.

III. Procedural Aspects of Bifurcated Trials

A. Authority to Bifurcate Trials: Texas Rule 174(b)

Texas Rule 174(b) authorizes bifurcated trials in Texas practice. Bifurcated trials were unknown in Texas prior to the 1941 incorporation of Federal Rule of Civil Procedure 42(b) (Federal Rule 42(b)) into the Texas Rules of Civil Procedure.[15] Texas Rule 174(b) provides that "[t]he court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues."[16] According to the Interpretations Subcommittee for the Texas Rules of Civil Procedure, Texas Rule 174(b) "authorize[s] the trial court to require a trial for a specified

11. Fischer & Porter Co. v. Sheffield Corp., 31 F.R.D. 534, 535 (D. Del. 1962).

12. United States v. 1,071.08 Acres of Land, 564 F.2d 1350, 1353 (9th Cir. 1977).

13. Helminski v. Ayerst Laboratories, 766 F.2d 208, 217 (6th Cir.), *cert. denied*, 474 U.S. 981 (1985).

14. Simpson v. Phillips Pipe Line Co., 603 S.W.2d 307, 311-12 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.).

15. *See* Meredith v. Massie, 173 S.W.2d 799, 800 (Tex. Civ. App.—Amarillo 1943, writ ref'd); McFarlane v. Griffin, 80 S.W.2d 1100, 1100 (Tex. Civ. App.—Fort Worth 1935, no writ).

16. Tex. R. Civ. P. 174(b).

plea in bar or issue (to the exclusion of the other pleas or issues in the case), and then render judgment solely on the issue tried if that issue is found to be decisive of the case."[17]

Texas Rule 174(b) adopts its language from Federal Rule 42(b), which authorizes bifurcated trials in federal practice.[18] This authority emerged from federal rules of equity (rules existing before equity and law were merged in 1938) that allowed separate hearings when necessary to dispose expeditiously of separate issues in complex suits.[19] Federal Rule 42(b) provides that:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by statute of the United States.[20]

The framers of Federal Rule 42(b) designed it to give federal courts the discretion to order separate trials when such an order promotes convenience or avoids prejudice.[21] The Advisory Committee added language to Federal Rule 42(b) in 1966 that clarified the bifurcation rule in admiralty and maritime actions.[22] As a counterbalance to the modern system of pleading permitting liberal joinder and class actions,[23] bifurcation grants trial courts broad discretion to manage their dockets efficiently while providing justice to the parties.[24] Texas state courts should study closely the federal courts' experiences with bifurcation and emulate their actions since federal and state courts have virtually identical discretion to order bifurcated trials.

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17. *Civil Procedure*, 5 TEX. B.J. 124, 125 (1942).

18. *See* FED. R. CIV. P. 42(b).

19. *See* Sup. Ct. R. 26, 226 U.S. 656 (1912) (authorizing separate trial of causes of action that "cannot be conveniently disposed of together"); Sup. Ct. R. 29, 226 U.S. 656, 657 (1912) (permitting court in its discretion to hear defenses separately before trial of principal case).

20. FED. R. CIV. P. 42(b).

21. *See* FED. R. CIV. P. 42(b) advisory committee's note.

22. *See id.*

23. *See* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2387, at 278 (1971 & Supp. 1989); Comment, *Complex Civil Litigation: Reconciling the Demands of Due Process with the Right to Trial by Jury*, 42 U. PITT. L. REV. 693, 703 (1981).

24. Wilson v. Johns-Manville Sales Corp., 107 F.R.D. 250, 252 (S.D. Tex. 1985).

In certain instances, however, Texas courts have interpreted the limits of their discretion quite differently from federal courts. One of the major differences between Texas and federal practice is found in *Iley v. Hughes*.[25] In *Iley*, the Texas Supreme Court held that Texas Rule 174(b), unlike Federal Rule 42(b), does not permit bifurcation of liability and damages in a personal injury case.[26]

B. *Sua Sponte Bifurcation*

Both Texas Rule 174(b) and Federal Rule 42(b) authorize a court to bifurcate a trial on its own motion;[27] the trial court may order separate trial of issues to expedite the litigation. When litigants fail to move for a bifurcated trial, Texas courts should use bifurcation as a management device to reduce the backlog of cases.[28] In addition, courts should use Texas Rule 174(b) to help alleviate the confusion and prejudice that may result from joinder under Texas Rules of Civil Procedure 37-40.[29]

C. *Relation of Bifurcation to Other Procedural Rules*

1. Bifurcation Versus Severance.—Bifurcation, as authorized by Texas Rule 174(b), is distinct from severance under Texas Rule of Civil Procedure 41.[30] Confusion about the procedural distinction between "separate trial" and "severance" often has been compounded by incorrect use of the terms as synonyms. The Texas Supreme Court noted in *Kansas University Endowment Association v. King*[31] that the trial judge had erroneously ordered "severance" under Texas Rule 174(b), but generously suggested that "the court

25. 158 Tex. 362, 311 S.W.2d 648 (1958).

26. *See infra* text accompanying notes 146-47.

27. *See* Ellerman Lines, Ltd. v. Atlantic & Gulf Stevedores, Inc., 339 F.2d 673, 675 (3d Cir. 1964), *cert. denied*, 382 U.S. 812 (1965); Spence v. Flynt, 647 F. Supp. 1266, 1266 (D. Wyo. 1986); Rice v. Travelers Express Co., 407 S.W.2d 534, 536 (Tex. Civ. App.—Houston [14th Dist.] 1966, no writ).

28. *See Ellerman Lines, Ltd.*, 339 F.2d at 675.

29. *See* Program Centers of Grace Union Presbytery, Inc. v. Earle, 726 S.W.2d 628, 631-32 (Tex. App.—Fort Worth 1987, no writ); Simpson v. Phillips Pipe Line Co., 603 S.W.2d 307, 312 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.).

30. *See* Comment, *Severance and Separate Trial in Texas*, 36 TEX. L. REV. 339 (1958).

31. 162 Tex. 599, 350 S.W.2d 11 (1961).

probably was led into such error by the opinions of this and other courts in which the terms 'separate trial' and 'severance' have been treated as synonymous."[32] In *King*, the court specifically pointed out the distinction between Texas Rule 174(b) and Rule 41:

> A severance divides the lawsuit into two or more independent causes, each of which terminates in a separate, final and enforceable judgment. The separate trial contemplated by Rule 174 results in an interlocutory order determining the claims or issues so tried, but there is only one final judgment which is entered after all claims and issues involved in the suit have been tried.
>
> An issue that is tried separately under Rule 174 need not constitute a complete lawsuit in itself. Severance is proper, however, only where the suit involves two or more separate and distinct causes of action. Each of the causes into which the action is severed must be such that the same might properly be tried and determined if it were the only claim in controversy. A severable cause of action may be tried separately under the provisions of Rule 174, but an issue that might properly be the subject of a separate trial is not necessarily severable.[33]

Thus, under Texas Rule 174(b), a severable cause of action may be tried separately, but issues subject to separate trial are severable pursuant to Rule 41 only if each issue may be resolved as if it were the only claim in controversy.[34]

2. Bifurcation in Class Actions.—In federal practice, bifurcation has evolved into a tool for restructuring class actions. Bifurcation allows federal courts to postpone calculation and distribution of damages until liability is determined; the issue of damages can become moot because parties often settle once the court has determined that liability exists.[35] The policy articulated in *Iley v. Hughes* discourages the bifurcation of class actions;[36] however, in class ac-

32. *Id.* at 611, 350 S.W.2d at 19.

33. *Id.* at 611-12, 350 S.W.2d at 19 (citations omitted); *see also* Hall v. City of Austin, 450 S.W.2d 836, 837-38 (Tex. 1970); Penna Stone-Surfa Shield Co. v. Merideth, 752 S.W.2d 224, 226 (Tex. App.—San Antonio 1988, no writ).

34. *King*, 162 Tex. at 611-12, 350 S.W.2d at 19; *see also* 9 C. Wright & A. Miller, *supra* note 23, § 2387, at 277 (discussing the distinction between separate trial under Fed. R. Civ. P. 42(b) and severance under Fed. R. Civ. P. 21).

35. *See* Comment, *Bifurcation of Liability and Damages in Rule 23(b)(3) Class Actions: History, Policy, Problems, and a Solution*, 36 Sw. L.J. 743, 743-44 (1982).

36. *Cf.* Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 Tex. L. Rev. 1039, 1059 (1986) (rule allowing a class action suit on some issues while other issues are tried separately of "limited utility" in jurisdictions that resist split trials in negligence suits).

tions not involving personal injury,[37] Texas courts would benefit from using bifurcation as a management device to expedite cases and save time and money. The growing complexity of class actions requires a reconsideration of traditional Texas procedures.

3. Bifurcation as an Aid to Streamlining Discovery.—Bifurcated trials allow courts to streamline discovery. If a potentially dispositive issue is tried separately, the court initially can limit discovery to that issue.[38] One of the purposes behind bifurcation is deferring costly, potentially unnecessary discovery and trial preparation until preliminary dispositive issues are resolved.[39] The federal bifurcation procedure implicitly gives the court power to limit discovery to segregated issues pursuant to the court's expansive power to facilitate the discovery process.[40] Moreover, a trial judge can limit discovery under Federal Rule of Civil Procedure 26(c) and (d), which grants a district court the authority to control the sequence and timing of discovery.[41]

D. Appellate Review

In both federal and state practice, bifurcation orders are reviewable under a "clear abuse of discretion" standard.[42] Bifurcation orders, however, are interlocutory and not appealable until all claims and issues in the suit have been litigated.[43] Federal courts have rejected attempts to obtain review of bifurcation orders under the "collateral order" doctrine.[44] In exceptional cases, how-

37. *See infra* text accompanying notes 146–47 (noting that Iley v. Hughes controls only personal injury actions).

38. *See* 9 C. WRIGHT & A. MILLER, *supra* note 23.

39. Ellingson Timber Co. v. Great N. Ry. Co., 424 F.2d 497, 499 (9th Cir.), *cert. denied*, 400 U.S. 957 (1970).

40. *Id.*

41. Compagnie Francaise D'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co., 105 F.R.D. 16, 37 (S.D.N.Y. 1984).

42. *See* Gonzalez-Marin v. Equitable Life Assurance Soc'y of the United States, 845 F.2d 1140, 1145 (1st Cir. 1988); Easton v. City of Boulder, Colo., 776 F.2d 1441, 1447 (10th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986); Akzona Inc. v. E.I. Du Pont De Nemours & Co., 607 F. Supp. 227, 232 (D. Del. 1984); Van Dyke v. Boswell, O'Toole, Davis & Pickering, 697 S.W.2d 381, 384 (Tex. 1985); Iley v. Hughes, 158 Tex. 362, 365, 311 S.W.2d 648, 650 (1958).

43. *See* Atari, Inc. v. JS & A Group, Inc., 747 F.2d 1422, 1430 (Fed. Cir. 1984) (citing 9 C. WRIGHT & A. MILLER, *supra* note 23, §§ 2387, 2392); *Van Dyke*, 697 S.W.2d at 383.

44. *See In re* Master Key Antitrust Litig., 528 F.2d 5, 14 (2d Cir. 1975), *dismissing*

ever, bifurcation orders can be certified under the federal interlocutory appeal statute.[45] When reviewing bifurcation orders, federal courts have found reversible error when bifurcation was prejudicial to a party.[46]

An order for a separate trial is not an appealable judgment.[47] In *Womack v. Berry*,[48] however, the Texas Supreme Court decided to permit mandamus review of bifurcation orders under Texas Rule 174(b). This decision is an exception to the general rule that mandamus will not lie to correct a trial court's discretionary act. The supreme court reasoned that in cases involving a clear abuse of discretion, a trial court violates its legal duty under Texas Rule 174(b) if it fails to bifurcate.[49] In addition, if it appears that the injustice caused by the failure to bifurcate cannot be remedied later on appeal, the court's action is subject to mandamus review.[50] Thus, state practice, unlike federal practice, provides for mandamus review of bifurcation orders under limited circumstances.[51] Texas appellate courts have based findings of legal error on prejudice,[52] convenience,[53] and inseparability of issues.[54]

E. Same or Separate Juries for Bifurcated Issues

Bifurcation orders must preserve the constitutional right to

appeal from 70 F.R.D. 23 (D. Conn.); Travelers Indem. Co. v. Miller Mfg. Co., 276 F.2d 955, 956 (6th Cir. 1960). *But see In re* Innotron Diagnostics, 800 F.2d 1077, 1084 (Fed. Cir. 1986) (accepting mandamus review of order bifurcating patent and antitrust claims and upholding the bifurcation order).

45. *See* United Air Lines, Inc. v. Wiener, 286 F.2d 302, 304 (9th Cir.), *cert. denied*, 366 U.S. 924 (1961); *cf.* 9 C. WRIGHT & A. MILLER, *supra* note 23, § 2392, at 304 (arguing that interlocutory review of bifurcation orders "should be permitted rarely, if at all"). For the federal interlocutory appeal statute, see 28 U.S.C. § 1292(b).

46. *See* C.W. Regan, Inc. v. Parsons, Brinckerhoff, Quade & Douglas, 411 F.2d 1379, 1388 (4th Cir. 1969); *United Air Lines, Inc.*, 286 F.2d at 306.

47. *See* Hall v. City of Austin, 450 S.W.2d 836, 838 (Tex. 1970).

48. 156 Tex. 44, 291 S.W.2d 677 (1956).

49. *Id.* at 51, 291 S.W.2d at 683; *see also* St. Paul Ins. Co. v. McPeak, 641 S.W.2d 284, 289 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.).

50. *Womack*, 156 Tex. at 51, 291 S.W.2d at 683.

51. *See, e.g.*, Motors Ins. Corp. v. Fashing, 747 S.W.2d 13, 14 (Tex. App.—El Paso 1988, no writ).

52. *See Womack*, 156 Tex. at 51, 291 S.W.2d at 683 (failure to order bifurcation); Utilities Natural Gas Corp. v. Hill, 239 S.W.2d 431, 434-35 (Tex. Civ. App.—Dallas 1951, writ ref'd n.r.e.) (failure to order bifurcation).

53. *See Hill*, 239 S.W.2d at 435.

54. *See* Iley v. Hughes, 158 Tex. 362, 367, 311 S.W.2d 648, 651 (1958); Riley v. Industrial Fin. Serv. Co., 157 Tex. 306, 312-13, 302 S.W.2d 652, 656-57 (1957).

trial by jury. The Advisory Committee made explicit what was already the law in the 1966 amendment to Federal Rule 42(b) by adding the phrase "always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States."[55] Although Texas Rule 174(b) does not contain an explicit reference to the right to jury trial, and although the seventh amendment does not apply to proceedings in Texas courts,[56] the Texas Constitution provides that the right to trial by jury shall be inviolate.[57]

The seventh amendment right to trial by jury does not require that all issues be determined by the same jury; bifurcation of issues does not violate any constitutional guarantee.[58] Separate trials of separate issues, with the same jury sitting in each trial, is constitutional.[59] Convenience normally dictates using the same jury for all issues, even though the issues may be tried at different times.[60] Nevertheless, it is constitutional to have separate trials of separate issues before different juries.[61] Sometimes the use of different juries is desirable in a case involving complex litigation.[62] Use of separate juries is analogous to the situation in which an appellate court reverses a jury verdict in part and remands for new trial on a limited issue. The practical effect is that different juries resolve the issues.

In *Gasoline Products Co. v. Champlin Refining Co.*, the United States Supreme Court approved retrial by a separate jury

55. FED. R. CIV. P. 42(b).

56. *See* Brown v. New Jersey, 175 U.S. 172, 174-75 (1899).

57. TEX. CONST. art. I, § 15.

58. *In re* Master Key Antitrust Litig., 528 F.2d 5, 14 (2d Cir. 1975), *dismissing appeal from* 70 F.R.D. 23 (D. Conn.); United Air Lines, Inc. v. Wiener, 286 F.2d 302, 306 (9th Cir.), *cert. denied*, 366 U.S. 924 (1961); Swofford v. B & W, Inc., 34 F.R.D. 15, 20 (S.D. Tex. 1963), *aff'd*, 336 F.2d 406 (5th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965); O'Donnell v. Watson Bros. Transp. Co., 183 F. Supp. 577, 585 (N.D. Ill. 1960).

59. Moss v. Associated Transp., Inc., 344 F.2d 23, 26 (6th Cir. 1965); Martin v. Bell Helicopter Co., 85 F.R.D. 654, 659 (D. Colo. 1980).

60. *See* Link v. Mercedes-Benz of N. Am., Inc., 550 F.2d 860, 864 (3d Cir.), *cert. denied*, 431 U.S. 933 (1977); Wilson v. Johns-Manville Sales Corp., 107 F.R.D. 250, 253 (S.D. Tex. 1985).

61. *Martin*, 85 F.R.D. at 659; *O'Donnell*, 183 F. Supp. at 585-86. *But cf.* Witco Chem. Corp. v. Peachtree Doors, 787 F.2d 1545, 1549 (Fed. Cir.), *cert. denied*, 479 U.S. 877 (1986) (considering the totality of circumstances, including the evidence presented and arguments made at trial, it was inappropriate to have one jury decide validity, enforceability, and contract issues and to leave patent infringement question to a second jury).

62. *See* Comment, *supra* note 23, at 702.

if the retried issue is "distinct and separable" from the other issues.[63] Therefore, since two juries may be used in a retrial, two juries may also be used in the initial trial of the case.[64] However, separate trial of issues before different juries is unconstitutional if the issues submitted are not separate and distinct.[65] If separate juries are allowed to pass on issues involving overlapping legal and factual questions, the possibility of inconsistent verdicts infringes on the right to trial by jury.[66] The constitutional prohibition exists not because two juries review the same evidence, but rather because two juries decide the same essential issues.[67] Case law has not further defined "distinct and separable" other than to note that application of the *Gasoline Products* test "must be made on an individual case basis."[68]

The question of whether an issue is so interwoven with other issues that it cannot be tried separately involves more than whether two juries can be used. If an issue cannot be submitted to the jury independent of other issues without causing confusion, then a court abuses its discretion and denies litigants a fair trial by ordering a separate trial, even if the same jury hears both trials.[69]

In Texas, the right to trial by jury is subject to certain procedural rules.[70] Thus, Texas practice can follow the precedent set by *Gasoline Products*, which held that separate trials, whether heard by the same or different juries, are constitutional if the issues are separate and distinct.

IV. Grounds for Bifurcation Orders

Federal Rule 42(b) and Texas Rule 174(b) are sweeping in

63. 283 U.S. 494, 500 (1931).

64. *See* Greenhaw v. Lubbock County Beverage Ass'n, 721 F.2d 1019, 1025 (5th Cir. 1983); Arthur Young & Co. v. United States Dist. Court, 549 F.2d 686, 693 (9th Cir. 1977); *Wilson*, 107 F.R.D. at 253; Martin v. Bell Helicopter Co., 85 F.R.D. 654, 659 (D. Colo. 1980); 9 C. WRIGHT & A. MILLER, *supra* note 23, § 2391, at 302.

65. *Gasoline Prods. Co.*, 283 U.S. at 500.

66. *Greenhaw*, 721 F.2d at 1025; *Arthur Young & Co.*, 549 F.2d at 693; United Air Lines, Inc. v. Wiener, 286 F.2d 302, 306 (9th Cir.), *cert. denied*, 366 U.S. 924 (1961).

67. *In re* Innotron Diagnostics, 800 F.2d 1077, 1086 (Fed. Cir. 1986) (citing Paine, Webber, Jackson & Curtis, Inc. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 587 F. Supp. 1112, 1117 (D. Del. 1984)).

68. *See Martin*, 85 F.R.D. at 660.

69. 9 C. WRIGHT & A. MILLER, *supra* note 23, § 2391, at 303-04.

70. Barclay v. Ochiltree Appraisal Dist. Bd., 730 S.W.2d 878, 880 (Tex. App.—

their terms and authorize a trial court to grant a separate trial of any issue in any kind of case.[71] However, the Advisory Committee's note to the 1966 amendment of Federal Rule 42(b) states that bifurcation "is not to be routinely ordered," and that it should be "encouraged where experience has demonstrated its worth."[72] The trial court must determine whether separate trials best serve the convenience of the parties and the court, avoid prejudice, and minimize expense and delay. Ultimately, the trial court must decide whether bifurcating a trial is more likely to result in a just final disposition of the litigation than is trying all issues together.[73]

Ten different considerations, outlined in *Martin v. Bell Helicopter Co.*,[74] traditionally have been weighed by courts in determining whether to bifurcate trials.

"*1. Will separate trials be conducive to expedition of the litigation and economy?*"[75] Courts must have a clear understanding of the ways in which bifurcation can save time and reduce delay. For example, if all issues are considered in a single trial, the issue of damages must be litigated although the court may ultimately find that no liability exists. If the issues of liability and damages are tried separately, however, there is no need to consider damages unless the court finds that liability exists. The court's determination that liability exists may encourage the parties to settle, in which case litigation of damages is unnecessary.[76] One study found that bifurcation reduced the overall length of jury trials by an average of eighteen percent.[77]

In deciding whether to bifurcate a particular trial, the court should consider "whether resolution of a single issue would likely

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Amarillo 1987, no writ); Wooten v. Dallas Hunting & Fishing Club, Inc., 427 S.W.2d 344, 346 (Tex. Civ. App.—Dallas 1968, no writ).

71. *Contra* Iley v. Hughes, 158 Tex. 362, 365, 311 S.W.2d 648, 651 (1958) (holding that Texas Rule 174(b) does not authorize separate trials of liability and damages in personal injury litigation).

72. FED. R. CIV. P. 42(b) advisory committee's note.

73. *See In re* Innotron Diagnostics, 800 F.2d 1077, 1084 (Fed. Cir. 1986) (citing 9 C. WRIGHT & A. MILLER, *supra* note 23, § 2388, at 283).

74. 85 F.R.D. 654, 658 (D. Colo. 1980).

75. *Id.*

76. *See* Zeisel & Callahan, *Split Trials and Time Savings: A Statistical Analysis*, 76 HARV. L. REV. 1606, 1607-08 (1963).

77. *Id.* at 1624.

be dispositive of an entire claim."[78] One federal trial judge analyzed the projected length of trial and the likelihood that separate resolution of the causation issue could shorten it:

> This is a class action on behalf of approximately 200 persons against 23 defendants who have been grouped together as the "Aluminum Wire and Device Group." The parties estimate that approximately 40 trial days will be required for the presentation of several hundred witnesses. Critical to plaintiffs' case is the issue of causation. Before any determination of liability upon any of these defendants can be made, it must be established that "old technology" aluminum wire either caused or contributed to the fire at the Beverly Hills Supper Club May 28, 1977. While such establishment does not in and of itself determine liability of any or all of the defendants, a negative determination would free them from such liability. There is reason to believe that a determination of this issue would materially reduce the time required to try this case. While a determination for the defendants would as a matter of law end the proceedings, it is entirely possible that an affirmative determination might enhance the likelihood of settlement.[79]

"2. Will separate trials be in furtherance of convenience to the parties and avoid prejudice?"[80] Courts must consider convenience to the parties and avoidance of prejudice[81] in deciding whether to grant or deny motions for separate trials.[82]

"3. Are the issues sought to be tried separately significantly different?"[83] Trial judges must consider overlap between issues in exercising their discretion to bifurcate trials. Bifurcation is inappropriate if issues are so interwoven that their independent trial would cause confusion and uncertainty;[84] however, bifurcation may

78. *In re* Beverly Hills Fire Litig., 695 F.2d 207, 216 (6th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983).

79. *Id.* at 216 n.14 (quoting *In re* Beverly Hills Fire Litig., C. No. 77-79 (E.D. Ky. Dec. 12, 1979)).

80. Martin v. Bell Helicopter Co., 85 F.R.D. 654, 658 (D. Colo. 1980).

81. *See supra* text accompanying notes 10-14 & 38-41; *infra* text accompanying notes 88-89, 92, 97-99, 101 & 121-29. *But see* Ilcy v. Hughes, 158 Tex. 362, 311 S.W.2d 648 (1958); *infra* text accompanying notes 102-05 & 146-47 (rejecting bifurcated trial of liability and damages in personal injury cases).

82. *See, e.g.*, Tri-R Sys., Ltd. v. Friedman & Sons, Inc., 94 F.R.D. 726, 727 (D. Colo. 1982); Van Dyke v. Boswell, O'Toole, Davis & Pickering, 697 S.W.2d 381, 384 (Tex. 1985); Utilities Natural Gas Corp. v. Hill, 239 S.W.2d 431, 434-35 (Tex. Civ. App.—Dallas 1951, writ ref'd n.r.e.).

83. *Martin*, 85 F.R.D. at 658.

be appropriate if the overlap between issues is not significant.[84] For example, in *White Chemical Corp. v. Walsh Chemical Corp.*, the court noted that "any overlap between questions of liability and damages, and the resulting duplication of some evidence, appears minimal as well as outweighed by interests of convenience and economy [which are best served by a bifurcated trial]."[85][86]

"4. Are the issues triable by jury or by the court?"[87] In deciding whether to bifurcate a trial to avoid prejudice, the court must consider who will act as finder of fact.[88] Less danger of prejudice exists in a single trial before a judge, since a judge should be able to sort out evidentiary issues and causes of action brought by all the parties, whereas a jury may be unable to make such distinctions.[89] In addition to avoiding prejudice, courts also should consider judicial economy in deciding whether to bifurcate a trial. In *Compagnie Francaise D'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co.*,[90] the court found that

> [b]oth the liability and damage claims may have to be tried by a jury. Bifurcation may therefore require this court to choose between having one jury hear both trials or impanelling a different jury for each trial. Neither course is practical.
>
> If one jury is to hear both trials and Phillips is found liable, the jury would have to sit by indefinitely while the parties complete discovery before a trial on damages could commence. To try the damage issue before a different jury, in view of the overlap of issues, would not promote judicial economy. Consequently, this factor mitigates [sic] against bifurcation.[91]

Of course, to the extent that the first trial involves a potentially dispositive issue, or an issue likely to lead to settlement, the decision to designate one jury for both trials would promote judicial economy. And in complex litigation, the benefits of bifur-

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84. *See* Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 515 (1931); Kahnke v. Hener, 579 F. Supp. 1523, 1525 (D. Minn. 1984).

85. *See* Akzona Inc. v. E.I. Du Pont De Nemours & Co., 607 F. Supp. 227, 233 (D. Del. 1984).

86. White Chem. Corp. v. Walsh Chem. Corp., 116 F.R.D. 580, 582 (W.D.N.C. 1987).

87. Martin v. Bell Helicopter Co., 85 F.R.D. 654, 658 (D. Colo. 1980).

88. *See* Tri-R Sys., Ltd. v. Friedman & Sons, Inc., 94 F.R.D. 726, 727 n.3 (D. Colo. 1982).

89. *Id.*

90. 105 F.R.D. 16 (S.D.N.Y. 1984).

91. *Id.* at 38 (citations omitted).

cated trials—reduced jury confusion and inducement of settlement—would offset the possible inconvenience created by the empaneling of two juries.[92]

"*5. Has discovery been directed to single trial of all issues or separate trials?*"[93] One argument in favor of bifurcated trials is that they may allow deferral of costly, possibly avoidable discovery proceedings until potentially dispositive preliminary issues are resolved.[94] If discovery requests cannot be limited to the issue segregated for initial discovery, a bifurcated trial might not expedite the case or save litigants money.[95]

"*6. Will substantially different witnesses and evidence be required if issues are tried separately?*"[96] One important factor in determining whether bifurcated trials are more convenient for the court and the parties is the extent to which separate trials of issues require different witnesses and different evidence.[97] The need for duplicate presentation of witnesses and evidence militates against a bifurcation order based on convenience,[98] although a bifurcated trial still may be justified because it prevents unfair prejudice to one of the litigants.[99]

"*7. Will a party opposing bifurcation be significantly prejudiced if it is granted?*"[100] Economy and convenience are important considerations, but neither is the ultimate objective of bifurcation. The trial courts' primary concern is to give all

92. *See* Comment, *supra* note 23, at 744-46.

93. Martin v. Bell Helicopter Co., 85 F.R.D. 654, 658 (D. Colo. 1980).

94. *See* Ellingson Timber Co. v. Great N. Ry. Co., 424 F.2d 497, 499 (9th Cir.), *cert. denied*, 400 U.S. 957 (1970); Akzona Inc. v. E.I. Du Pont De Nemours & Co., 607 F. Supp. 227, 232 (D. Del. 1984); Washington Whey Co. v. Fairmont Foods Co., 72 F.R.D. 180, 182 (D. Neb. 1976).

95. Compagnie Francaise D'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co., 105 F.R.D. 16, 38 (S.D.N.Y. 1984).

96. *Martin*, 85 F.R.D. at 658.

97. *See In re* Innotron Diagnostics, 800 F.2d 1077, 1085 (Fed. Cir. 1986).

98. *See* United States v. Mottolo, 107 F.R.D. 267, 270 (D.N.H. 1985) (refusing to try action for recovery of past and future cleanup costs in two stages because separate trials would duplicate discovery and trial testimony); United States v. Marietta Mfg. Co., 53 F.R.D. 390, 400 (S.D. W. Va. 1971) (denying motion for severance of liability and damages since separate trials would entail duplicate evidence and would lengthen the proceedings); Eichinger v. Fireman's Fund Ins. Co., 20 F.R.D. 204, 208 (D. Neb. 1957) (finding separate trials of liability and damages not required to promote convenience and economy and lessen prejudice).

99. Martin v. Bell Helicopter Co., 85 F.R.D. 654, 658 (D. Colo. 1980).

100. *Id.*

litigants a fair and impartial trial.[101] The rule of *Iley v. Hughes* reflects the view that since the issues of liability and damages in a personal injury suit are inseparable, bifurcation is unfair to plaintiffs.[102] This view is supported by a study showing that although defendants usually win in forty-two percent of the cases tried routinely, they win in seventy-nine percent of the cases in which the liability issue is tried separately.[103] While commentators and courts disagree as to whether jury verdicts on liability should reflect their emotional reaction to the plaintiff's injury,[104] the long-standing practice in Texas reflects the belief that bifurcation of liability and damages in a personal injury suit is unfair to plaintiffs.[105]

"8. Will an unfair advantage be afforded to a party if bifurcation is granted?"[106] The importance of an impartial trial is linked to avoiding prejudice;[107] a trial should not be bifurcated if the separate trial of an issue will give either party an unfair advantage.

"9. Will management of trial, delineation of issues, and clarity of factual questions be substantially enhanced by bifurcation?"[108] In general, a bifurcated trial should not be ordered unless bifurcation will increase the likelihood of promptly resolving the litigation.[109] Motions for bifurcated trial must be considered on a case-by-case basis; the court "must appraise each case according to its own setting and issues."[110]

"10. Will bifurcation assist efficient judicial administration of the case?"[111] The interests of judicial administration, rather than the wishes of the parties, should control the decision to bifurcate.[112] For example, in *Dillard v. Crenshaw County*, the trial court noted that the court's great familiarity with the issues and

101. *See id.*; *see also* Womack v. Berry, 156 Tex. 44, 51, 291 S.W.2d 677, 683 (1956).
102. Iley v. Hughes, 158 Tex. 362, 365, 311 S.W.2d 648, 651 (1958).
103. *See* 9 C. WRIGHT & A. MILLER, *supra* note 23, § 2390, at 299.
104. *See id.*
105. *Iley*, 158 Tex. at 365, 311 S.W.2d at 651.
106. Martin v. Bell Helicopter Co., 85 F.R.D. 654, 658 (D. Colo. 1980).
107. *See id.*
108. *Id.*
109. *See* United States v. International Business Machs. Corp., 60 F.R.D. 654, 657 (S.D.N.Y. 1973).
110. Eichinger v. Fireman's Fund Ins. Co., 20 F.R.D. 204, 208 (D. Neb. 1957).
111. Martin v. Bell Helicopter Co., 85 F.R.D. 654, 658 (D. Colo. 1980).
112. 9 C. WRIGHT & A. MILLER, *supra* note 23, § 2388, at 279.

the evidence justified a denial of the motion for bifurcation;[113] the interests of judicial administration outweighed arguments of inconvenience to the parties. Another important consideration in granting bifurcation is the extent to which determination of issues in one case may eliminate the need for a trial on some or all of the issues in a second case.

V. Bifurcation in Actions Involving Bad-Faith Claims or Claims for Punitive Damages

A. *Bad-Faith Claims Against Insurers*

Plaintiffs' lawyers, who long sought to have Texas courts recognize a cause of action for bad-faith dealing by insurance carriers (bad-faith claim), were no doubt heartened by the Texas Supreme Court's decisions in *Arnold v. National County Mutual Fire Insurance Co.*,[114] *Aranda v. Insurance Co. of North America*,[115] and *Vail v. Texas Farm Bureau Mutual Insurance Co.*[116] The recognition of a bad-faith claim has brought with it a procedural dilemma. Under current Texas law, a plaintiff alleging bad faith cannot fully discover the carrier's file until the underlying coverage dispute has been resolved.[117] Therefore, according to the majority of decisions, the plaintiff who brings a claim for coverage as well as a bad-faith claim must make a choice. The plaintiff

113. 640 F. Supp. 1347, 1371 (M.D. Ala. 1986).

114. 725 S.W.2d 165 (Tex. 1987). "[T]here is a duty on the part of insurers to deal fairly and in good faith with their insureds." *Id.* at 167.

115. 748 S.W.2d 210 (Tex. 1988) (workers' compensation carriers owe a duty of good faith and fair dealing to claimants).

116. 754 S.W.2d 129 (Tex. 1988) (recovery allowed under the Deceptive Trade Practices Act, TEX. BUS. & COM. CODE ANN. § 17.50(a)(4) (Vernon 1987), and under the Texas Insurance Code, TEX. INS. CODE ANN. art. 21.21 (Vernon Supp. 1988), for an insurer's failure to settle the insured's claim in good faith after the carrier's liability became reasonably clear).

117. *See* Maryland Am. Gen. Ins. Co. v. Blackmon, 639 S.W.2d 455 (Tex. 1982) (discovery of the carrier's file privileged under Texas Rule of Civil Procedure 166(b) until the coverage dispute had been resolved); Service Lloyds Ins. Co. v. Clark, 714 S.W.2d 437 (Tex. App.—Austin 1986, no writ) (workers' compensation carrier's file discoverable after the underlying claim had been resolved); Texas Employers' Ins. Ass'n v. Fashing, 706 S.W.2d 801 (Tex. App.—El Paso 1986, no writ) (privilege against production ceased to exist after the underlying coverage dispute on workers' compensation claim had been resolved). *But see* Cupples Prods. Co. v. Marshall, 690 S.W.2d 623 (Tex. App.—Dallas 1985, no writ) (privilege against production continued after resolution of the underlying coverage dispute in a workers' compensation case).

can either proceed to trial immediately on the bad-faith claim without the benefit of full discovery or delay trial on the bad-faith claim until the coverage dispute is resolved to secure greater discovery. If the plaintiff chooses the former approach, the court may expedite the proceedings by bifurcating discovery and trial of the coverage and bad-faith claims; ordering further discovery to begin as soon as the plaintiff prevails on the issue of coverage; and trying the bad-faith issue promptly, perhaps even to the same jury.

Arnold indicates that bad-faith claims and disputes regarding insurance coverage for uninsured motorists can be tried without bifurcation.[118] The Texas Supreme Court has held that a trial judge abused his discretion in failing to sever an insurance claim from the underlying workers' compensation claim.[119] In *Motors Insurance Corp. v. Fashing*, the appellate court argued that the better approach may be to allow the trial court discretion to decide whether to bifurcate the trial.[120] Neither *Arnold* nor *Fashing* provides any policy arguments against trial courts bifurcating bad-faith claims. Indeed, since bifurcation has proven to be a fair and efficient device for trial of such claims in other jurisdictions, bifurcation may yet prove beneficial to Texas courts in the wake of *Arnold*, *Aranda*, and *Vail*. In a suit with claims for breach of contract and bad faith, bifurcation avoids the prejudicial effect that evidence of the bad-faith claim may have on the jury's evaluation of the breach-of-contract claim.[121]

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118. *Arnold*, 725 S.W.2d at 168.

119. *See* St. Paul Ins. Co. v. McPeak, 641 S.W.2d 284, 289 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.).

120. 747 S.W.2d 13, 14 (Tex. App.—El Paso 1988, no writ).

121. *See* O'Malley v. United States Fidelity and Guar. Co., 776 F.2d 494 (5th Cir. 1985) (trial court did not abuse discretion by ordering separate trial of coverage and bad-faith claims); Kurkierewicz v. Loewen, 109 F.R.D. 601 (D. Mont. 1986) (joint trial of liability and bad-faith claims would confuse jury and result in unfair trial of these issues); White v. Western Title Ins. Co., 40 Cal. 3d 870, 710 P.2d 309, 221 Cal. Rptr. 509 (1985) (bifurcation endorsed); Downey Sav. and Loan Ass'n v. Ohio Casualty Ins. Co., 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987) (bifurcation discussed with approval but trial court's discretionary denial upheld); McCain v. Northwestern Nat'l Ins. Co., 484 So. 2d 1001 (Miss. 1986) (bifurcation of bad-faith claim endorsed); *see also St. Paul Ins. Co.*, 641 S.W.2d at 289; Beckman, *Constitutional Issues in Insurance Claim Litigation*, 22 TORT INS. L.J. 244 (1987); McMillan & Pugatch, *Bad Faith Litigation: Defense Viewpoint—Tactics and Strategy*, in BAD FAITH LITIGATION AND INSURER VS. INSURER DISPUTES 1988, at 83, 107-08 (1988).

Bifurcated trials in insurance suits with bad-faith claims also may serve the interests of judicial convenience. The bad-faith claim is derivative of the primary claim; therefore, if the plaintiff loses on the primary claim, the case can be dismissed without considering the bad-faith claim.[122] A verdict for the plaintiff on the primary claim can be dispositive if it encourages the parties to settle.

Furthermore, joint trial of the primary claim and the bad-faith claim may be prejudicial.[123] If the claims are tried together, evidence that would be irrelevant and immaterial to the primary claim may be presented under the guise of the bad-faith claim. Trying claims together might confuse the jury and unfairly prejudice them against the insurance company.[124] Even plaintiffs may find significant advantages in bifurcated trials since evidence inadmissible in the underlying dispute regarding coverage—for example, evidence about the carrier's settlement offers—may be admissible in a trial on the bad-faith claim.[125] Although not a perfect solution, bifurcation would at least reduce the delay between trial of the coverage issue and trial of the bad-faith claim and would eliminate the need to select and educate a second jury.

B. *Proof of a Defendant's Net Worth in Actions Involving Claims for Punitive Damages: Bifurcation or Limiting Instructions?*

In a lawsuit containing a punitive damage claim, bifurcation reduces the risk that inflammatory evidence introduced to justify an award of punitive damages will improperly influence the jury's verdict on the liability issue.[126] Under the bifurcation procedures

122. *See O'Malley*, 776 F.2d at 501 ("Since a recovery on the bad faith claim would not have been possible unless O'Malley prevailed on his coverage claim, the district court acted correctly in bifurcating the issues to avoid prejudice and to expedite the trial.").

123. *See Kurkierewicz*, 109 F.R.D. at 602.

124. *Id.*

125. *See* Liberty Mut. Ins. Co. v. Davis, 412 F.2d 475, 483 (5th Cir. 1969); *White*, 40 Cal. 3d at 887, 710 P.2d at 317, 221 Cal. Rptr. at 519; Fireman's Fund Ins. Co. v. Superior Court of Los Angeles County, 72 Cal. App. 3d 786, 789, 140 Cal. Rptr. 677, 679 (1977); Nelson, *White v. Western Title: Unsettled Waters*, 14 W. ST. U.L. REV. 173 (1986).

126. *See* Powell & Leiferman, *Results Most Embarrassing: Discovery and Admissibility of Net Worth of the Defendant*, 40 BAYLOR L. REV. 527, 543-44 (1988); Wheeler, *The Constitutional Case for Reforming Punitive Damage Procedures*, 69 VA. L. REV. 299,

of certain jurisdictions, evidence of the defendant's net worth is admitted only after the jury determines that the plaintiff is entitled to punitive damages. The jury then reconvenes to determine the amount of punitive damages. The problem that the delay between the first and second trial presents may be avoided by allowing discovery of the defendant's net worth. If pre-trial discovery of net worth is allowed, then a second trial to determine the amount of punitive damages can begin as soon as the jury decides that the plaintiff is entitled to punitive damages.[127]

Federal courts often bifurcate the determination of compensatory and punitive damages to mitigate jury prejudice against the defendant.[128] Likewise, other states' courts have seen the wisdom of bifurcating compensatory and punitive damages to avoid prejudicing a jury by admitting proof of a defendant's net worth.[129]

In a recent case, *Lunsford v. Morris*,[130] the Texas Supreme Court reasoned that a defendant's net worth is relevant to the issue of punitive damages and therefore is discoverable under Rule 166(b)(2) of the Texas Rules of Civil Procedure. Although *Lunsford* came before the court on a writ of mandamus arising from a dispute over pre-trial discovery, the court reviewed the admissibility as well as the discoverability of evidence relating to net worth. Writing for the majority, Justice Kilgarlin allowed discovery of the defendant's net worth but noted that "[s]ome states allowing discovery of net worth require a prima facie showing of entitlement to punitive damages before information about a defendant's net worth may be sought."[131]

300-02, 320-22 (1983); Annotation, *Necessity of Determination or Showing of Liability for Punitive Damages Before Discovery or Reception of Evidence of Defendant's Wealth*, 32 A.L.R. 4th 432, 436 (1984).

127. *See* Powell & Leiferman, *supra* note 126, at 544.

128. *See* Emerick v. United States Suzuki Motor Corp., 750 F.2d 19 (3d Cir. 1984) (plaintiffs' liability theory did not require an inquiry into defendant's conduct and inquiry into that conduct at liability stage for the purpose of determining punitive damages could confuse the jury); Campolongo v. Celotex Corp., 681 F. Supp. 261 (D.N.J. 1988) (severance of punitive damages and compensatory damages in asbestos case); Tillery v. Lynn, 607 F. Supp. 399 (S.D.N.Y. 1985) (trial bifurcated as to punitive damages in action by patient against dentist for alleged misrepresentations). *But see* Kociemba v. G.D. Searle & Co., 695 F. Supp. 432 (D. Minn. 1988) (bifurcated trial would be unduly burdensome and time consuming when cautionary instructions as to proof introduced on issue of punitive damages would protect manufacturer from unfair trial).

129. *See, e.g.*, McCain v. Northwestern Nat'l Ins. Co., 484 So. 2d 1001 (Miss. 1986).

130. 746 S.W.2d 471 (Tex. 1988).

131. *Id.* at 473; *see also* Curtis v. Partain, 272 Ark. 400, 614 S.W.2d 671 (1981).

In other jurisdictions, plaintiffs cannot introduce evidence of net worth until the jury has heard evidence supporting an award of punitive damages.[132] One state subjects a plaintiff to a show-cause hearing in which a prima facie right to punitive damages must be proved.[133]. In Wyoming, a plaintiff must overcome two hurdles. First, the plaintiff must make a prima facie showing of entitlement to punitive damages before the trial court permits discovery of net worth. Second, after the court orders a bifurcated trial on the issue of punitive damages, the jury must find that the plaintiff is entitled to punitive damages. Only after these two hurdles are overcome can the plaintiff introduce evidence of net worth.[134]

While Justice Kilgarlin indicated that bifurcation was not necessary, he may have left the trial courts with enough discretion to determine whether bifurcation would be appropriate in individual cases:

> Our rules of civil procedure and evidence do not require similar practices before net worth may be discovered. Absent a privilege or specifically enumerated exemption, our rules permit discovery of any "relevant" matter; thus, there is no evidentiary threshold the litigant must cross before seeking discovery. Tex. R. Civ. P. 166b(2)(a). Neither do the rules of evidence contemplate exclusion of otherwise relevant proof unless the evidence proffered is . . . otherwise *legally* inadmissible. Tex. R. Civ. Evid. 401, 403, 501-10, 601. . . . We do not circumscribe, however, a trial judge's authority to consider on motion whether a party's discovery request involves unnecessary harassment or invasion of personal or property rights.[135]

Justice Gonzalez dissented in *Lunsford*. While not expressly disagreeing with the primary thrust of the majority's holding that a defendant's net worth was admissible on the issue of punitive damages, Justice Gonzalez did object to the court's granting mandamus to reverse the settled authority of *Young v. Kuhn*.[136] However, to help the trial court implement the majority's decision, Justice Gonzalez suggested specific procedural guidelines, modeled

132. *See, e.g.*, Ruiz v. Southern Pac. Transp. Co., 97 N.M. 194, 638 P.2d 406 (N.M. Ct. App. 1981).

133. *See* Leidholt v. District Court, 619 P.2d 768, 771 (Colo. 1980).

134. *See* Campen v. Stone, 635 P.2d 1121, 1132 (Wyo. 1981); *see also* Annotation, *supra* note 126, at 473.

135. Lunsford v. Morris, 746 S.W.2d 471, 473 (Tex. 1988).

136. 71 Tex. 645, 9 S.W. 860 (1886).

on the two-step Wyoming plan, for discovering and introducing evidence of a defendant's net worth:

> (1) The plaintiff would claim in his petition a right to punitive damages and then seek pre-trial discovery of defendant's net worth.
>
> (2) The defendant would move for a protective order requiring the plaintiff to make a prima facie showing to the trial court that a viable issue exists for punitive damages. Upon such a showing, the pre-trial discovery would be allowed. If plaintiff's claim for punitive damages is groundless and brought in bad faith, Tex. R. Civ. P. 13 authorizes the trial court to impose sanctions.
>
> (3) At trial, if sufficient evidence is produced establishing a prima facie case for punitive damages, the jury charge would make provision for compensatory damages, and additionally ask the jury whether punitive damages should or should not be awarded. However, no provision would be made for the jury to determine the amount of punitive damages to be awarded at that point.
>
> (4) If the jury finds that punitive damages should be awarded, it would then hear evidence of the defendant's net worth and return a separate verdict setting the amount of punitive damages.[137]

Chief Justice Phillips filed a separate dissent criticizing Justice Gonzalez's opinion for its "apparent suggestion that this court should mandate a bifurcated trial whenever punitive damages are to be awarded."[138]

In *Miller v. O'Neill*,[139] a Texas appellate court interpreted *Lunsford* to allow both pre-trial discovery of net worth and a bifurcated trial on punitive damages. The court granted the portion of a writ of mandamus seeking pre-trial discovery of net worth, concluding that "neither the 'Wyoming Plan' nor Texas law provides a basis for prohibiting the pretrial discovery of net worth."[140] The court denied the portion of the writ challenging a bifurcation order because "the trial court's action ordering a 'Wyoming Plan' trial [could not] be characterized as an abuse of discretion . . . or [a violation of] a clear duty under the law."[141]

Since net worth has not been judicially defined, further ques-

137. *Lunsford*, 746 S.W.2d at 475.

138. *Id.* at 477.

139. 775 S.W.2d 56 (Tex. App.—Houston [1st Dist.] 1989, n.w.h.).

140. *Id.* at 58.

141. *Id.* at 59.

tions arise from the *Lunsford* holding that evidence may be introduced regarding the defendant's net worth. Should the plaintiff be entitled to prove the existence and limits of the defendant's insurance coverage? Should the jury be advised as to whether the defendant's insurance would cover punitive damages? Should the jury likewise be advised of any reservation of rights or nonwaiver agreements affecting the putative coverage? In his dissent, Justice Gonzalez predicted that if a "plaintiff attempts to offer net worth evidence that includes insurance coverage, the defendant should be able to keep this out pursuant to Tex. R. Civ. Evid. 411, which provides that liability insurance is inadmissible to prove negligent or otherwise wrongful conduct."[142] Given the holding in *Lunsford*, however, it is unclear whether proof of insurance is inadmissible evidence for resolving the issue of punitive damages.[143] Furthermore, once a jury has been informed of a defendant's insurance coverage, the jury is unlikely to obey a limiting instruction when considering the issue of liability. Again, the best approach would be to allow such proof—if at all—only in a bifurcated proceeding.

VI. The Curious Policy of *Iley v. Hughes*

In federal practice, the trial court has discretion to bifurcate liability and damages in personal injury actions.[144] Commentators disagree as to the wisdom of bifurcating liability and damages in routine personal injury actions.[145]

142. Lunsford v. Morris, 746 S.W.2d 471, 476 (Tex. 1988).

143. *See* Blakely, *Article IV: Relevancy and Its Limits*, 20 Hous. L. Rev. 151, 266-67 (1983); Powell & Leiferman, *supra* note 126, at 532-534.

144. *See* Kostelecky v. NL Acme Tool/NL Indus., Inc., 837 F.2d 828 (8th Cir. 1988) (not abuse of discretion to order separate trials on issues of liability and damages); Helminski v. Ayerst Laboratories, 766 F.2d 208 (6th Cir. 1985), *cert. denied*, 474 U.S. 981 (1985) (not abuse of discretion in products liability action to separate issues of liability and damages at virtual close of plaintiffs' proof); Moss v. Associated Transp., Inc., 344 F.2d 23 (6th Cir, 1965) (not abuse of discretion to order separate trials on liability and damages issues submitted to same jury); *In re* Richardson-Merrill, Inc. Bendectin Prods. Liab. Litig., 624 F. Supp. 1212 (S.D. Ohio 1985) (admonition to jury cured any prejudicial effect to the plaintiffs caused by the alleged "sterile" environment of the liability phase of trial). *But see* Candelaria Indus. v. Occidental Petroleum Corp., 662 F. Supp. 1002 (D. Nev. 1984) (when proof of damages is inextricably intermingled with proof of liability, bifurcated trial separating liability from damages inappropriate); Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. 357 (E.D. Pa. 1982) (bifurcation of liability and damages granted in asbestosis case while bifurcation of punitive damages and compensatory damages denied).

In *Iley v. Hughes*, the Texas Supreme Court held that Texas Rule 174(b), unlike Federal Rule 42(b), does not authorize separate trials of liability and damages in personal injury litigation.[146] The opinion noted that Texas courts have always frowned on piecemeal trials in personal injury actions and concluded that Texas Rule 174(b) was not meant "to work such a radical departure from long settled practice."[147] In contrast, Federal Rule 42(b) authorizes separate trials for liability and damages in personal injury litigation even if the substantive state law employed in a diversity case prohibits bifurcated trials.[148]

Curiously, the *Iley* court's reliance on "long settled practice" against bifurcation of personal injury cases seems misplaced. As discussed above, Texas courts did not bifurcate cases prior to the adoption of Texas Rule 174; personal injury cases were not unique.[149] After the adoption of Texas Rule 174, but before the *Iley* opinion, Texas courts did bifurcate personal injury actions pursuant to Texas Rule 174. *Waples Platter Co. v. Commercial Standard Insurance Co.* provided for a new trial only as to the part of a judgment affected by error, as long as the issues were severable.[150] *Iley*, decided in the context of disharmony between Texas Rule 174(b) and Rules 434 and 503, rejected the *Waples* approach.[151] One court has noted that the 1975 amendment to Rules 434 and

145. *Compare* Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power*, 14 VAND. L. REV. 831 (1961) (opposing separate adjudication of liability and damages) *with* Miner, *Court Congestion: A New Approach*, 45 A.B.A. J. 1265, 1268 (1959) (supporting separate adjudication of liability and damages by the same or different jury).

146. 158 Tex. 362, 365, 311 S.W.2d 648, 651 (1958).

147. *Id.*; *see also* Eubanks v. Winn, 420 S.W.2d 698 (Tex. 1967) (damages in a personal injury action arising out of an automobile collision must be decided by the same jury that decides liability); Piper Aircraft Corp. v. Yowell, 674 S.W.2d 447 (Tex. App.—Fort Worth 1984), *rev'd on other grounds*, 703 S.W.2d 630 (Tex. 1986) (issues of liability and damages must be tried together in a tort case).

148. *See* Sellers v. Baisier, 792 F.2d 690, 694 (7th Cir. 1986); Rosales v. Honda Motor Co., 726 F.2d 259, 262 (5th Cir. 1984).

149. *See* Texas & N.O. Ry. Co. v. Thompson, 12 S.W.2d 963, 966 (Tex. Comm'n App. 1929, judgm't adopted) (argument that trial should have been bifurcated "is a novel one, and we know of no authority that will sustain it.").

150. 156 Tex. 234, 237, 294 S.W.2d 375, 377 (1956). The 1975 amendments to Texas Rules of Civil Procedure 434 and 503, which are now Texas Appellate Rules of Procedure 81 and 184 respectively, eliminated the requirement for a partial retrial.

503 undercuts the rationale behind *Iley* and justifies an extremely narrow reading of the decision.[152] If the Texas Supreme Court revisits *Iley*, perhaps it will consider whether the 1975 amendments repealed *Iley* by implication.

While *Iley* specifically precludes bifurcation of liability and damages in personal injury actions, it does not prohibit separate trials for other issues in personal injury actions, such as the validity of a release,[153] nor does it prohibit separate trials for separate theories of liability.[154] Moreover, *Iley* only prevents bifurcation in personal injury actions, not in all other suits.[155]

Texas courts can accommodate the limitation imposed by *Iley* and still order bifurcation in personal injury cases by reading *Iley* narrowly. First, orthodox theory of the jury's role holds that a jury's verdict on liability should not be influenced by its sympathy for the plaintiff's injuries;[156] bifurcation can avoid the prejudice created by joint trial of damages and liability.[157] Second, a bifurcated trial of damages and liability in a personal injury case is not per se unfair to the plaintiff. Even if the issue of liability is tried separately, the plaintiff still can introduce the fact and cause of injury at the liability trial.[158] Read narrowly, *Iley* could be inter-

151. Iley v. Hughes, 158 Tex. 362, 365, 311 S.W.2d 648, 650 (1958) (prohibited appellate courts from ordering partial retrial).

152. *See* Simpson v. Phillips Pipe Line Co., 603 S.W.2d 307, 312 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.).

153. *See* Chapman v. Ferd Staffel Co., 362 S.W.2d 173 (Tex. Civ. App.—Waco 1962, writ ref'd n.r.e.).

154. *See* Thomas v. St. Joseph Hosp., 618 S.W.2d 791 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.) (separate trial of the strict liability issue apart from issues of negligence and breach of warranty in wrongful death action approved under Texas Rule of Civil Procedure 434).

155. *See* Durham v. Barrow, 600 S.W.2d 756 (Tex. 1980) (bifurcation of trial on issues of natural parent's standing to attack adoption and standing to attack prior decree terminating parental rights); Great Nat'l Corp. v. Campbell, 687 S.W.2d 450 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (bifurcation appropriate on issues of declaratory judgment and attorneys' fees); Kennedy v. Hyde, 666 S.W.2d 325 (Tex. App.—Fort Worth), *rev'd on other grounds*, 682 S.W.2d 525 (Tex. 1984) (bifurcation of trial on validity of release); Simpson v. Phillips Pipe Line Co., 603 S.W.2d 307, 312 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.) (bifurcation of action for damage to land); McKellar v. Bracewell, 473 S.W.2d 542, 546 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.) (bifurcation of breach of contract action). *But see* Coastal States Crude Gathering Co. v. Strauch, 410 S.W.2d 945 (Tex. Civ. App.—Corpus Christi 1967, no writ) (dicta extending *Iley* to a suit for damage to land).

156. 9 C. Wright & A. Miller, *supra* note 23, § 2390, at 299.

157. Crummett v. Corbin, 475 F.2d 816, 817 (6th Cir. 1973).

preted as denying trial courts the discretion to bifurcate only in personal injury cases in which the issues of liability and damages are so intertwined that separation is impossible. Federal courts have used similar analyses in numerous personal injury cases.[159]

Given the inadequacies of the present system, however, bifurcation of personal injury actions may help alleviate such problems as court congestion and high litigation cost. Researchers studying bifurcated personal injury cases in the United States District Court for the Northern District of Illinois found that bifurcating liability and damages saved approximately twenty percent of trial time.[160] Bifurcation saves trial time because the issue of damages is frequently resolved either by a finding of no liability or by settlement.[161] In addition, federal courts often bifurcate liability and damages to expedite resolution of personal injury cases involving multiple plaintiffs.[162]

There is also a compelling argument for bifurcating liability and damages in a trial involving a single plaintiff with extreme injuries. Courts fear that the extent of a plaintiff's injuries may generate such sympathy for the plaintiff that a jury will labor to find liability capable of furnishing the plaintiff with some compensation.[163]

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158. *See* Kostelecky v. NL Acme Tool/NL Indus., Inc., 837 F.2d 828, 832 (8th Cir. 1988).

159. *See* C.W. Regan, Inc. v. Parsons, Brinckerhoff, Quade & Douglas, 411 F.2d 1379, 1388 (4th Cir. 1969) (liability and damages too overlapping to be separated); United Air Lines, Inc. v. Wiener, 286 F.2d 302, 306 (9th Cir.), *cert. denied*, 366 U.S. 924 (1961) (error to order separation of interwoven issues).

160. *See* Zeisel & Callahan, *supra* note 76, at 1619.

161. *Id.* at 1624.

162. *See In re* Texas City Disaster Litig., 197 F.2d 771 (5th Cir. 1952) (consolidation of 273 claims filed by 8,485 plaintiffs against the United States under the Federal Tort Claims Act); New York v. Waterfront Airways, Inc., 620 F. Supp. 411 (S.D.N.Y. 1985) (court allowed consolidation of eight claims arising out of the collision of a float plane and a helicopter, but ordered separate trial of liability and damages); Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. 357 (E.D. Pa. 1982) (asbestos litigation involving multiple parties); Stoddard v. Ling-Temco-Vought, Inc., 513 F. Supp. 314 (C.D. Cal. 1980), *rem'd on other grounds*, 711 F.2d 1431 (9th Cir. 1983) (mass accident case involving plane crash); Martin v. Bell Helicopter Co., 85 F.R.D. 654 (D. Colo. 1980) (multiple party action arising from helicopter crash).

163. *See* McKeller v. Clark Equip. Co., 101 F.R.D. 93 (D. Me. 1984); *see also* Beeck v. Aquaslide 'N' Dive Corp., 562 F.2d 537 (8th Cir. 1977); Kushner v. Hendon Constr., Inc., 81 F.R.D. 93 (M.D. Pa. 1979), *aff'd*, 609 F.2d 501 (3d Cir. 1980).

VII. Conclusion

The experience with bifurcated trials in federal court suggests important benefits from greater use of bifurcated trials in Texas courts. Texas Rule 174(b) provides Texas courts with the authority to bifurcate trials in a wide variety of situations, despite *Iley v. Hughes*. And, as Part VI suggests, the Texas Supreme Court should revisit *Iley v. Hughes* and follow federal practice in bifurcation. The federal model provides a mechanism to conserve judicial resources, save litigants time and money, and improve the quality of the fact-finding process. In this age of crowded dockets, soaring legal costs, and declining public confidence in the legal system, courts should use bifurcation in all cases in which appropriate grounds for bifurcated trial exist.

An editorial reprinted from the June 13, 1988 WALL STREET JOURNAL

Liability v. Damages: A Fair Trial Often Means a Split Trial

by Stephen B. Middlebrook

Smart business people understand that large, complex problems become more manageable when broken into units and addressed one piece at a time. The technique has become a First Principle of executive success. Yet, in the big business of managing civil litigation (RAND Corp. estimates that between $27 billion and $34 billion was expended in 1985) we muddle along with an unnecessarily complex and inefficient trial process.

The norm for most trials is for the jury to hear in one unified process all the issues pertinent to the liability of the defendant and the value of the damages. This often results in a marathon of expert witnesses and exhibits on a diverse set of issues. The typical results: confused juries, courts congested with trials that last longer than necessary, and excessive transaction costs in the form of legal fees, expert witnesses and court costs.

A simple alternative is to bifurcate, or split, issues of liability from issues of damages and to try them separately. If the issue of liability is heard alone, and no liability is found, none of the evidence relating to the extent and value of the damages need be presented. The savings would be at least some of the time the lawyers would have spent developing their client's case on the damage issues, the time the court would have spent hearing the related evidence and arguments, and the costs of expert witnesses. Without liability, all the issues of damages become moot. If liability is found, experience teaches us that litigants are more likely to reach settlement, thus again avoiding the added expense and burden of a separate trial.

Juror effectiveness can also be improved. Narrowing the questions for immediate consideration sharpens the jury's focus and increases the likelihood that jurors will comprehend complex legal or technical issues. Presenting the issues in shorter phases also enhances juror recall (of particular value in courts where note-taking is prohibited).

The current process was carried to its most absurd extreme in a trial involving Monsanto Co., which 'uded last fall. An award of $16.2 million in puni..e damages was made to 65 plaintiffs exposed to one teaspoon of dioxin, despite the jury's conclusion that the plaintiffs suffered no ill effects. The verdict followed a complex trial of three years and eight months. The legal costs generated by this lengthy process, which included more than 200 witnesses and 6,000 exhibits, must have been staggering. Other litigants awaiting trial before the same court were denied access over this nearly four-year period - clearly a major disservice.

In the case that Texaco defended - and lost - against Pennzoil, Texaco chose not to enter any evidence regarding the value of potential damages out of fear that such evidence would undercut the credibility of its position on the liability issues. Had the case been split, Texaco would have presented the damage-related evidence it intentionally withheld. The damages - $10.5 billion - might well have been smaller, and Texaco might not have had to file for bankruptcy.

Other famous cases have been split. In a class-action suit in which Merrell Dow defended against charges that its drug Bendectin caused birth defects, the jury first heard the issues of scientific causation - whether the drug was capable of causing the harm alleged. The jury concluded it was not, obviating the need to hear any discussion of damages.

In a hazardous waste case tried in 1986 in Woburn, Mass., against W.R Grace Co. and Beatrice Foods Co., the court split the trial into four phases. After the first phase was completed (in which the court found that Grace was, and Beatrice was not, responsible for the contamination of the wells in question) Grace settled with the plaintiffs. Although Grace maintained that it was not responsible for the contamination, the jury determination was a likely stimulus to settlement.

Judges strongly support the value of bifurcating trials, according to a Louis Harris poll released in April of 800 state and 200 federal trial court judges. Of those judges who had used bifurcation, an overwhelming majority - 94% at the federal level and 82% at the state level - said its effects were positive. Most judges believe t' reduces transaction costs (79%, federal; 70%, st..), that it speeds up the trial process (82%, federal; 77%, state), that it expedites settlements (85%, federal; 80%, state), and that it improves the fairness of the outcome (80%, federal; 77%, state).

Yet that same poll confirms that bifurcation is not used very often. More than half the polled judges who presided in jurisdictions where bifurcation is permitted and who have granted bifurcation have granted it less than five times over the past three years.

The explanations for this contradiction between opinion and action are largely a matter of conjecture. One possibility is that it just may not occur to overworked judges to split a trial without special prompting by the litigating parties.

A second possibility could be opposition from the plaintiffs' bar. Why? Some attorneys may seek to cloud the question of liability by emphasizing their clients' misfortunes. Experience suggests that juries may overlook weaknesses in the liability side of the case when sympathy is aroused by vivid evidence of damage.

The plaintiffs' bar recognizes this dynamic. For example, an article in the March issue of Trial magazine ("Bifurcated Trials, How to Avoid Them - and How to Win Them") discusses a 1963 study published in the Harvard Law Review. The study shows that split trials take less time and plaintiffs are less likely to win them. For the latter reason, the article recommends that plaintiffs' lawyers develop strategies opposing bifurcation.

There will always be cases, of course, that do not lend themselves to bifurcation. Issues such as liability and damage are not always separable. Also, issues may not be sufficiently complex to warrant this treatment. And, in eight states (including Illinois, the site of the Monsanto trial) there are no statutes or judicial rules permitting bifurcation. However, in those cases in which a split trial is appropriate, it is a sensible technique for streamlining civil litigation. A fair trial on liability, with any compensation delivered quickly and efficiently, advances the rights of all the litigating parties. Bifu n should be one item on a broad agenda of reform o. court procedures.

Statutes or Rules Which Authorize Separate Trial of Issues

The following statutes or rules allow separate trial of issues, with limitations as noted. Additional limitations may be in effect by Court interpretation.

United States:	Federal Rules of Civil Procedure, 42(b)
Alabama:	Alabama Rule of Civil Procedure 42(b)
Alaska:	Alaska Rule of Civil Procedure 42(b)
Arizona:	Arizona Rule of Civil Procedure 42(b)
Arkansas:	Arkansas Rule of Civil Procedure 42(b)
California:	California Civil Procedure Code, Section 598 (West Supp. 1991) and California Civil Procedure Code, Section 1048(b) (West 1980)
Connecticut:	None
Colorado:	Colorado Rule of Civil Procedure 42(b)
Delaware:	Delaware Superior Court Civil Rule 42(b)
Florida:	Florida Rule of Civil Procedure 1.270 (b)
Georgia:	Georgia Civil Practice Act 9-11-42(b) (Michie 1982)
Hawaii:	Hawaii Rule of Civil Procedure 42(b)
Idaho:	Idaho Rule of Civil Procedure 42(b)
Illinois:	None
Indiana:	Indiana Trial Rule 42(b)
Iowa:	Iowa Rule of Civil Procedure 186 (provides for separate trial of issues of fact)
Kansas:	Kansas Rule of Civil Procedure 60-242(b)
Kentucky:	Kentucky Rule of Civil Procedure 42.02

Louisiana:	Louisiana Code of Civil Procedure, Article 1562 (allows separate trial of liability and damages issues with the consent of all parties) (West 1990)
Maine:	Maine Rule of Civil Procedure 42(b)
Maryland:	Maryland Circuit Court Rule of Civil Procedure 2-503(b)
Massachusetts:	Massachusetts Rule of Civil Procedure 42(b)
Michigan:	Michigan Court Rule 2-505(B)
Minnesota:	Minnesota Rule of Civil Procedure 42.02
Mississippi:	Mississippi Rule of Civil Procedure 42(b)
Missouri:	Missouri Rule of Civil Procedure 66.02
Montana:	Montana Rule of Civil Procedure 42(b)
Nebraska:	None
Nevada:	Nevada Rule of Civil Procedure 42(b)
New Hampshire:	None
New Jersey:	New Jersey Court Rule 4:38-2
New Mexico:	New Mexico Rule of Civil Procedure for District Court 1-042(B)
New York:	New York Civil Practice Law and Rule 603 (McKinney 1976), also see Uniform Civil Rule for Supreme Court and County Court 202.42
North Carolina:	North Carolina Rule of Civil Procedure 42(b)
North Dakota:	North Dakota Rule of Civil Procedure 42(b)
Ohio:	Ohio Rule of Civil Procedure 42(b)
Oklahoma:	Oklahoma Pleading Code, Title 12, Section 2018D (West Supp. 1991)
Oregon:	Oregon Rule of Civil Procedure 53 B

Pennsylvania:	Pennsylvania Rule of Civil Procedure 213(b)
Rhode Island:	Rhode Island Superior Court Rule of Civil Procedure 42(b)
South Carolina:	South Carolina Rule of Civil Procedure 42(b)
South Dakota:	South Dakota Rule of Procedure in Circuit Court 15-6-42(b)
Tennessee:	Tennessee Rule of Civil Procedure 42.02 (where jury trial waived by all parties or in nonjury trials)
Texas:	Texas Rule of Civil Procedure 174(b) (Interpreted in Iley v. Hughes, 311 S.W.2d 648 (Tex. 1958) not to allow bifurcation of liability and damages issues in personal injury cases.)
Utah:	Utah Rule of Civil Procedure 42(b)
Vermont:	Vermont Rule of Civil Procedure 42(b)
Virginia:	Virginia Civil Remedies and Procedure Code 8.01-281B (Michie 1984)
Washington:	Washington Superior Court Civil Rule 42(b)
West Virginia:	West Virginia Rule of Civil Procedure 42(b)
Wisconsin:	Wisconsin Rule of Civil Procedure 803.04(2)(b) (in negligence actions where insurer is made a party defendant, this joinder rule allows separate trial of specified issues: liability issue and issue whether insurance policy provides coverage; note that Rule 805.05(2) allowing separate trials does not include separate trial of issues, only of claims)
Wyoming:	Wyoming Rule of Civil Procedure 42(b)

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TRCP 176

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HHD Seek Appeals ✓ CAJ Staff J. Hedges

June 12, 1993

Luther H. Soules, III
175 E. Houston 10th Floor
Two Republic Bank Plaza
San Antonio, Texas 78205-2230

Dear Luke:

Enclosed is my memorandum to the Committee on Court Rules along with my letter to Emily Casstephens regarding the impact of HB 887 on subpoena practice. I would ask that this matter be placed on the agenda for your next meeting of the Supreme Court Advisory Committee.

Thank you very much for your attention to this matter.

Sincerely,

Harry L. Tindall

/ejb

Enclosure

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June 11, 1993

Emily Casstevens
State Bar of Texas
P.O. Box 12487
Capitol Station
Austin, Texas 78711

Dear Ms. Casstevens:

Please circulate the enclosed memo to members of the Committee on Court Rules in preparation for our next meeting.

Sincerely,

Harry L. Tindall

/ejb
Enc.

cc: Shelby Sharpe

MEMORANDUM

TO: Committee on Court Rules

FROM: Harry L. Tindall

DATE: June 11, 1993

RE: House Bill 887

The Texas Legislature has just enacted HB 887 which was approved by Governor Ann Richards on May 7, 1993. The legislation increases the witness fee for a witness from $1.00 to $10.00 and increases the range of a subpoena from 100 miles to 150 miles. I attach a copy of the newly enacted legislation.

Accordingly, it is my suggestion that Rules 176 and 201(5) Texas Rules of Civil Procedure, be amended to read as follows:

Rule 176. WITNESSES SUBPOENAED

The clerk of the district or county court, or justice of the peace, as the case may be, at the request of any party to a suit pending in his court, or of any agent or attorney, shall issue a subpoena for any witness or witnesses who may be represented to reside within one hundred <u>fifty</u> miles of the courthouse of the county in which the suit is pending or who may be found within such distance at the time of trial; provided that any clerk, justice of the peace or other officer issuing a subpoena pursuant to the provisions of this rule, or of any other rule or statute, shall issue a separate subpoena, together with a copy thereof, for each witness subpoenaed.

Notes and Comments

Changed by amendment effective January 1, 1994. Change from one hundred to one hundred fifty miles was made to conform with HB 887 (73rd Legislature 1993) amending Chapter 22, Civil Practice and Remedies Code.

Rule 201. COMPELLING APPEARANCE; PRODUCTION OF DOCUMENTS AND THINGS; DEPOSITION OF ORGANIZATION

5. Time and Place. The time and place designated shall be reasonable. The place of taking a deposition shall be in the county of the witness' residence or, where he is employed or regularly transacts business in person or at such other convenient place as may be directed by the court in which the cause is pending; provided, however, the deposition of a party or the person or persons designated by a party under paragraph 4 above may be taken in the count of suit subject to the provisions of

paragraph 5 of Rule 166b. A nonresident or transient person may be required to attend in the county where he is served with a subpoena, or within one hundred fifty miles from the place of service, or at such other convenient place as the court may direct. The witness shall remain in attendance from day to day until such deposition is begun and completed.

Notes and Comments

Changed by amendment effective January 1, 1994. Change from one hundred to one hundred fifty miles was made to conform with HB 887 (73rd Legislature 1993) amending Chapter 22, Civil Practice and Remedies Code.

By Thompson of Harris H.B. No. 837

A BILL TO BE ENTITLED

AN ACT

relating to witness fees, privileges, and appearances in court.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 22, Civil Practice and Remedies Code, is amended to read as follows:

CHAPTER 22. WITNESSES

SUBCHAPTER A. WITNESSES

Sec. 22.001. WITNESS FEE [FEES]. (a) A witness is entitled to 10 dollars[~~:~~

[~~(1)--one--dollar~~] for each day the witness attends court[~~;--and~~

[~~(2)--six-cents-for-each-mile-the--witness--travels--in going--to--and--returning--from--court~~]. This fee includes the entitlement for travel and the witness is not entitled to any reimbursement for mileage traveled.

(b) [~~After-receiving--the--witness's--affidavit,--the--court clerk--shall--issue--a--certificate-stating-the-fees-incurred-under this-section:~~

[~~(c)~~] The party who summons the witness shall pay that witness's fee for one day, as [fees] provided [for] by this section, at the time the subpoena is served on the witness.

(c) [~~(d)~~] The witness fee [fees] must be taxed in the bill of costs as other costs.

Sec. 22.002. DISTANCE FOR SUBPOENAS. A witness who is

represented to reside 150 miles or less from a county in which a suit is pending or who may be found within that distance at the time of trial on the suit may be subpoenaed in the suit.

SUBCHAPTER B. PRIVILEGES

Sec. 22.011. PRIVILEGE FROM ARREST. (a) A witness is privileged from arrest while attending, going to, and returning from court.

(b) The privilege provided by this section extends for a period computed by allowing one day of travel for each 150 [25] miles of the distance from the courthouse to the witness's residence.

(c) This section does not apply to an arrest for a felony, treason, or breach of the peace.

SECTION 2. This Act takes effect January 1, 1994.

SECTION 3. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

PLAYING BY THE RULES

Recent Amendments to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence Effective December 1, 1991

by John K. Chapin

On April 30, 1991, the Supreme Court transmitted to Congress a number of changes to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence. These changes are to take effect on December 1, 1991. Following is a discussion of the major changes. Other insubstantial changes were made to F.R.A.P. 6, 10, 26, and 26.1.

FEDERAL RULES OF CIVIL PROCEDURE

(TRCP 176)

Subpoenas—Rule 45

The new amendments completely reorganize and rewrite Rule 45. Among the significant changes is new Rule 45(a)(1), which abolishes the requirement that a subpoena be under seal. This subsection also authorizes the issuance of a subpoena to compel a nonparty to produce evidence or to compel the inspection of premises independent of any deposition. This will eliminate the necessity of deposing the record custodian.

Pursuant to new Rule 45(a)(2), a subpoena for a deposition must still issue from the court in which the deposition or production would be compelled. Thus a motion to quash a subpoena must still be presented to the court for the district in which the deposition would occur. According to the Advisory Committee, under new Rule 45(a)(2) the person subject to the subpoena is required to produce materials in that person's control whether or not the materials are located within the district or territory within which the subpoena can be served. The subpoena must include a statement of the rights and duties of witnesses by setting forth the full text of new Rule 45(c) and (d).

New Rule 45(a)(3) authorizes the issuance and signing of subpoenas by an attorney as an officer of the court on behalf of a court in which the attorney is authorized to practice, or on behalf of a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice. This provision thus effectively authorizes service of a subpoena anywhere in the United States by an attorney representing any party.

New Rule 45(b)(1) retains the text of the current Rule 45(c) covering service of subpoenas, with minor changes, including a provision requiring service of prior notice under Rule 5 of compulsory pretrial production or inspection. New Rule 45(b)(2) retains language of the current Rule 45(e) and extends it to subpoenas for depositions or production. New Rule 45(b)(3) retains the language of the current Rule 45(d)(1) and extends it to subpoenas for trial or hearing or production.

New Rule 45(c) states the rights of witnesses. New Rule 45(c)(1) prohibits an attorney from imposing undue burden and expense on a person subject to a subpoena and specifies liability for loss of earnings and attorneys' fees lost by a person as a result of subpoena misuse.

New Rule 45(c)(2) retains language from the current Rule 45(b) and (d)(1), and protects a nonparty required to produce documents or materials from significant expense. The 10-day period for response to a subpoena is extended to 14 days.

New Rule 45(c)(3) replaces and enlarges the current Rule 45(b) and tracks the provisions of Rule 26(c) on protective orders, identifying those circumstances in which a subpoena must be quashed or modified. The new rule establishes the right of nonretained experts to withhold their expertise unless the party seeking it shows a substantial need for it that cannot be otherwise met without undue hardship and assures that the expert will be reasonably compensated.

New Rule 45(c)(3) also expands the current Rule 45(d)(2) and (e)(1) on mandatory travel by authorizing a federal court to compel a witness to come from any place in the state to attend trial, whether or not the local state law so provides. However, under new Rule

45(c)(3)(B)(iii), the court may condition a subpoena requiring travel of more than 100 miles on reasonable compensation.

New Rule 45(d)(1), along with new Rule 34(c), extends to nonparties the duty to produce subpoenaed documents as they are kept in the usual course of business or organize them to correspond with the categories in the demand. New Rule 45(d)(2) provides that a person receiving a subpoena for information that is privileged or covered by work product protection must expressly assert the claim and support it by a description of the information's nature that is sufficient to enable the demanding party to contest the claim.

Finally, new Rule 45(e) retains the language on contempt for failure to obey a subpoena that is contained in the current Rule 45(f), and adds that an adequate cause for failure to obey exists when a subpoena purports to command a nonparty to travel to greater distances than can be compelled under the Rule.

2/1 HJH R176 Subc Agenda & Xc J. Hecht.

Art 24.011 Code Crim. Procedure

Suggested by Judge John Specia 225th Dist. Ct.

By Melton, Glasgow

B. No. 698

A BILL TO BE ENTITLED

AN ACT

relating to the use of subpoenas to obtain the testimony of children in criminal cases.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 24, Code of Criminal Procedure, is amended by adding Article 24.011 to read as follows:

Art. 24.011. SUBPOENAS; CHILD WITNESSES. (a) If a witness is younger than 18 years, the court may issue a subpoena directing a person having custody, care, or control of the child to produce the child in court.

(b) If a person, without legal cause, fails to produce the child in court as directed by a subpoena issued under this article, the court may impose on the person penalties for contempt provided by this chapter. The court may also issue a writ of attachment for the person and the child, in the same manner as other writs of attachment are issued under this chapter.

SECTION 2. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

Pg000644

SUPREME COURT ADVISORY COMMITTEE

NOVEMBER 19 - 20, 1993

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TRAP 52	Pg001053 - 1058
TRAP 53(k)	Pg001059 - 1061
TRAP 54	Pg001062 - 1064
TRAP 57	Pg001065 - 1069

TRAP 61	Pg001070
TRAP 72	Pg001071
TRAP 74	Pg001072 - 1078
TRAP 75	Pg001079
TRAP 79	Pg001080 - 1084
TRAP 80(c)	Pg001085 - 1087
TRAP 84	Pg001088 - 1089
TRAP 86	Pg001090 -1092
TRAP 87	Pg001093
TRAP 88	Pg001094
TRAP 90	Pg001095 - 1105
TRAP 120	Pg001106 - 1107
TRAP 100	Pg001108 - 1109
TRAP 121	Pg001110 - 1114
TRAP 131	Pg001115 - 1116
TRAP 136	Pg001117 - 1118
TRAP 172	Pg001119 - 1120
TRAP 211	Pg001121 - 1122
TRAP 213	Pg001123 - 1124
TRAP 234	Pg001125 - 1128
MISC TRCE	Pg001129 - 1131
TRCE 204	Pg001132 - 1133

TRCP 185

The Forty-third Judicial District Court

Weatherford, Texas 76086

JAMES MULLIN
JUDGE

June 7, 1990

The Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

RE: Rules of Civil Procedure
Recusal of Assigned Judge

Gentlemen:

Recognizing that you have certain standard procedure, as well as certain standard time frameworks for modifying the Rules of Civil Procedure, please permit me to offer a suggestion or a concern regarding the matter of recusal of visiting judges. No reply is necessary. I would just ask that you include this in the matters that you talk about, at whatever time is appropriate.

This Court has one case in which this matter has been a bit of a problem. There are numerous parties and numerous attorneys. Early in the proceedings I recused myself for the reason that there appeared to be some disputed facts about which I might have some personal knowledge, of such a nature that it might interfere with my deciding one of the many issues in the case. It appears to be a complicated case, with numerous parties, and it is possible that the matter I might know something about would not turn out to be relevant. But it is simpler to ask for another judge to be assigned so that things can move along promptly without any problem.

The problem that came up is that the first assigned judge was recused by one of the attorneys. Now the second assigned judge has been recused by a different attorney. As far as I can tell, there was no particular reason for anybody objecting to either of these assigned judges, except that the attorneys chose to do so. In a case in which there are only two parties, this would be less of a problem. But in this case, we will gradually go through a large number of judges if each party is allowed to object to one visiting judge for no particular reason.

My understanding of the present law is that assigned visiting judges may be recused without any particular reason or cause. This may be done one time by each party.

My suggestion is that you could simplify it just a bit if you would provide that there would be no automatic recusal of

assigned judges unless (a) the assigned judge did not have jurisdiction over this sort of matter when he was active -- for example, the assigned judge was a criminal District Court judge when active and had been assigned to a domestic relations case, or (b) some exception or criterion relating to continuing legal education -- for example, that the assigned judge had not within the past two years completed as many as ____ hours of continuing legal education relevant to the field of law of the assigned case.

I haven't had any problems in this area, prior to this one case. I have had some problems on the general subject of recusal "for cause" filed repetitively as a delaying tactic. I do not have any quick suggestions on that subject, since one of the primary purposes of the rule is to ensure that the trial may be conducted by a judge whose fairness is not in dispute. I do wish we had a group of available, assignable judges who could not be challenged for any reason so that the administrative judge would have a tool with which to quiet these matters when they come to light.

As a suggestion, it recently occurs to me that if the recusal process could be modified in some instances so that the Motion for Recusal would be done entirely in writing, to be heard (in Fort Worth, for example) by the administrative judge at a time and place of his convenience, it might expedite things. It would give the administrative judge a bit more leverage, as well as entrusting to the administrative judge the opportunity to determine if the presiding judges within his area were, in fact, being fair. Also, providing for sanctions for use of recusal motions for delay or frivolity would help.

At any rate, I do appreciate your careful work on all the rules and will respect your decision on same.

With kindest regards, I am

Yours very truly,

Jim Mullin

James O. Mullin
District Judge

JOM/mbm

TRCP 188

4543.001

high
Und

JESS W. YOUNG, INC.
LAWYER
P. O. BOX 15948
SAN ANTONIO, TEXAS 78212
TELEPHONE (512) 490-5299

JESS W. YOUNG

RONALD S. SCHMIDT
OF COUNSEL

✓ 10-16-89
SB

October 12, 1989

HH,
SOAC Sub
Agenda
COA's Tex
to Justice Hecht

Mr. Luke Soules, III
c/o Soules & Wallace
Republic of Texas Plaza Bldg.
175 E. Houston Street
San Antonio, TX 78205

Dear Luke:

Confirming my conversation with you of the hiatus between Rules 188 (Foreign Jurisdiction Depositions) and 206 (Domestic Depositions and Return) please note the highlighted portions.

As I explained to you, I had reason to take out-of-state depositions in my daughter's divorce case, and this led to the problem of the court reporter in the foreign jurisdiction adhering to Rule 188 and returning the depositions and bill of costs back to our District Clerk. On such occasion, they were returned to the court reporter in the foreign jurisdiction, both deposition and cost bill.

Rule 206 states that the lawyer that asks the first question gets the honor of being the custodian, and of course when you send it out to a foreign jurisdiction you never know who's going to ask the first question. It would occur to me that it would be better stated to cause the return of the foreign deposition to the party who caused the issuance of the same, without regard to who asks the first question. The bill of costs should be filed with the Clerk of the proper Court to be compiled as part of the costs of court.

The foreign court reporters in reading Rule 188 have seized upon the unnumbered second paragraph of paragraph number 2 of Rule 188 and returned the depositions to the Clerk. The Clerk then, pursuant to Rule 206, 2, returns it to them as he takes the position, and properly, that he is not the custodian.

In short, it seems to me that the two Rules conflict to some degree, or in any event are confusing to foreign court reporters and clarification, simple if at all possible, should be made when the new Rules are promulgated.

Kindest regards,

Pg000647

JESS W. YOUNG, INC.

Jess
JY/vh

00670

"interrogatories", and a sentence has been added permitting the time and place of taking the deposition to be stated in the order or by means of notice.

Change by amendment effective February 1, 1973: The first sentence of paragraph 4 has been rewritten to make it clear that the taking of a deposition to perpetuate testimony is to be authorized only when the court is satisfied that a failure or delay of justice may be prevented thereby.

RULE 188. DEPOSITIONS IN FOREIGN JURISDICTIONS

1. Whenever the deposition, written or oral, of any person is to be taken in a sister state or a foreign country, or in any other jurisdiction, foreign or domestic, for use in this state, such deposition may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the State of Texas, or (2) before a person commissioned by the court in which the action is pending, and such person shall have the power, by virtue of such person's commission, to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory or a letter of request, or (4) pursuant to the means and terms of any applicable treaty or convention.

A commission, a letter rogatory, or a letter of request shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission, a letter rogatory or a letter of request that the taking of the deposition in any other manner is impracticable or inconvenient; and a commission, a letter rogatory or a letter of request may all be issued in proper cases.

2. Upon the granting of a commission to take the oral deposition of a person under paragraph 1 above, the clerk of the court in which the action is pending shall immediately issue a commission to take the deposition of the person named in the application at the time and place set out in the application for the commission. The commission issued by the clerk shall be styled: "The State of Texas." The commission shall be dated and attested as other process; and the commission shall be addressed to the several officers authorized to take depositions as set forth in Section 20.001, Civil Practice and Remedies Code. The commission shall authorize and require the officer or officers to whom the commission is addressed immediately to issue and cause to be served upon the person to be deposed a subpoena directing that person to appear before said officer or officers at the time and place named in the commission for the purpose of giving that person's deposition.

Upon the granting of a commission to take the deposition of a person on written questions under paragraph 1 above, the clerk of the court in which the action is pending shall, after the service of the notice of filing the interrogatories has been completed, issue a commission to take the deposition of the person named in the notice. Such commission shall be styled, addressed, dated and attested as provided for in the case of an oral deposition and shall authorize and require the officer or officers to whom the same is addressed to summon the person to be deposed before the officer or officers forthwith and to take that person's answers under oath to the direct and cross interrogatories, if any, a copy of which shall be attached to such commission, and to return without delay the commission, the interrogatories and the answers of the person thereto to the clerk of the proper court, giving his official title and post office address.

3. Upon the granting of a letter rogatory under paragraph 1 above, the clerk of the court in which the action is pending shall issue a letter rogatory to take the deposition of the person named in the application at the time and place set out in the application for the letter rogatory. The letter rogatory issued by the clerk shall be styled, dated and attested as provided for in the case of a commission. The letter rogatory shall be addressed: "To the Appropriate Authority in [here name the state, territory or country]". The letter rogatory shall authorize and request the appropriate authority to summon the person to be deposed before the authority forthwith and to take that person's answers under oath to the oral or written questions which are addressed to that person; the letter rogatory shall also authorize and request that the appropriate authority cause the deposition of the person to be reduced to writing, annexing to the writing any items marked as exhibits and to cause the written deposition, with all exhibits, to be returned to the clerk of the proper court under cover duly sealed and addressed.

4. Upon the granting of a letter of request, or any other device pursuant to the means and terms of any other applicable treaty or convention, to take the deposition, written or oral, of any person under paragraph 1 above, the clerk of the court in which the action is pending shall issue a letter of request or other device to take the deposition of the person named in the application at the time and place set out in the application for the letter of request or other device. The letter of request or other device shall be styled in the form prescribed by the treaty or convention under which the deposition is to be taken, such form to be presented to the clerk by the party seeking the deposition. Any error in the form of the letter of request or other device shall be waived unless objection thereto is filed and served on or before the time fixed in the order granting the letter of request or other device.

5. Evidence obtained in response to a letter rogatory or a letter of request need not be excluded

4543.001

LHS
hhd

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HARRY L. TINDALL*
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DONNA S. ANDERSON
MILENIA I. SOTO

BOARD CERTIFIED - TEXAS BOARD OF LEGAL SPECIALIZATION

*FAMILY LAW
**IMMIGRATION & NATIONALITY LAW

√11-30-92
SB

11/30 HHD, send Agenda ✓ WPJ Staff J. Hedt.

November 25, 1992

Luther H. Soules, III
Chair, Supreme Court Advisory Committee
175 E. Houston, 10th Floor
Two Republic Bank Plaza
San Antonio, Texas 78205-2230

Dear Luke:

I propose that Rule 200, Texas Rules of Civil Procedure, be amended by adding a new subpart 3 to read as follows:

Rule 200

. . .

"3. Any witness, party, attorney or other person lawfully attending a deposition may designate the place where the deposition is being taken as a nonsmoking area. Such designation shall be binding upon all those in attendance during the deposition."

Our law firm is a designated no smoking area as many law firms in this city are. However, from time to time I am noticed for depositions in opposing counsel's office and frequently I have encountered smoking witnesses and attorneys who will not observe a request for no smoking. If my client and I are forced to attend a deposition, it would seem that we could insist on a smoke free environment.

Please circulate the proposed rule to the committee for review and comment.

Sincerely,

Harry L. Tindall
/ejb

4543.001 hhd

√ 3-26-92

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

3/27

HHD; SCAC Supc Agenda (?) ✓ ODJ J Hecht

March 25, 1992

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

Dear Luke:

Enclosed is a letter Chief Justice Phillips received from Hardy Moore regarding Rule 200.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

xc: Mr. Hardy Moore

MOORE, PAYNE, CLEM, RODGERS & HODGKISS
ATTORNEYS AT LAW
300 FIRST NATIONAL BANK BUILDING
PARIS, TEXAS 75460-4171

W. F. MOORE (1868-1956)
HARDY MOORE
BILL PAYNE
A. W. CLEM
JAMES R. RODGERS
JUDY HODGKISS

(903) 784-4393
FAX (903) 785-0312

FEBRUARY 21, 1992

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

DEAR SIR:

IT SEEMS TO ME RULE 200 SHOULD BE AMENDED TO REQUIRE THE DEPONENT TO BE IDENTIFIED THE SAME AS IN THE CASE OF "A PERSON HAVING KNOWLEDGE OF RELEVANT FACTS" BY INCLUDING HIS RESIDENCE AND BUSINESS ADDRESSES, RESIDENCE AND BUSINESS TELEPHONE NUMBERS.

RESPECTFULLY,

/Hardy Moore

HARDY MOORE

4543.001

WENDELL S. LOOMIS
Attorney at Law
14610 Falling Creek Drive
Houston, Texas 77068-2938
(713) 893-5900
FAX (713) 893-5732

May 6, 1991

Soules & Wallace
Attorneys-at-Law
Tenth Floor
Republic of Texas Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Re: Proposed Changes to TRCP 21 and 91
Add Rule 200.2.a.; Rule 201.3.

Gentlemen:

Originally I requested consideration of changes to Rule 21, 21a and 21b, as the result of the Trevino vs. Hidalgo Publishing Company case. Please see my letter of March 21, 1991, attached.

In reviewing the rules on another discovery issue, I find that Rule 200 has a similar problem. The first sentence of Rule 200.2.a. is as follows:

> Reasonable notice must be served in writing by the party, or his attorney, proposing to take his deposition upon oral examination to every other party or his attorney of record.

Rule 201.3. also states:

> When a deponent is a party, service of the notice upon the party or his attorney shall have the same effect as a subpoena served on the party. If the deponent is an agent or employee who is subject to the control of a party, notice to take the deposition which is served upon the party or the party's attorney of record shall have the same effect as a subpoena served on the deponent.

There may be other places in the rules that I simply haven't spotted where the same or similar wording is used. Of

course, where you have an unsophisticated client, injury and prejudice could occur by notice to the client and not the lawyer.

May I suggest that wording similar to Rule 168.1. or Rule 169.1. be added to the rules in question. The wording in Rule 168 and 169 is similar as follows:

> Whenever a party is represented by an attorney of record, service of a Request for Admissions shall be made on his attorney unless service on the party himself is ordered by the Court. Rule 169.
>
> When a party is represented by an attorney, service of interrogatories and answers to interrogatories shall be made on the attorney unless service upon the party himself is ordered by the Court. Rule 168.

A review of the Trevino vs. Hidalgo Publishing Company reasoning will point out the necessity for these changes.

Very truly yours,

Wendell S. Loomis

WSL:dkm

cc: Honorable Nathan L. Hecht
David J. Beck
Honorable Bob L. Thomas

WENDELL S. LOOMIS
Attorney at Law
14610 Falling Creek Drive
Houston, Texas 77068-2938
(713) 893-5900
FAX (713) 893-5732

March 21, 1991

Supreme Court of the State of Texas
Supreme Court Building
P.O. Box 12248
Austin, Texas 78711

Attention: Honorable Justice Eugene A. Cook

Re: Rules 21, 21a, 21b Methods of Service
Trevino vs. Hidalgo Publishing Company d/b/a The Edinburgh Daily Review, No. 13-90-025-CV (Corpus Christi), 2-21-91

Dear Gene:

I have just read with horror the above-described case and looking at Rule 21a was aghast to find that the Rule does not absolutely require notice to be served upon the attorney of record, but the rule authorizes the Notice to be served on the party or his attorney of record.

I thought this question had been put to rest several years ago when I complained about Rule 72, which required pleadings to be served only on "adverse" parties instead of all parties, only to discover that Rule 72 and 73 have now been consolidated into Rules 21, 21a, and 21b, which are now the offending wording.

The original reason for my complaint was that where there were multiple plaintiffs and/or multiple defendants, one plaintiff could deal with one defendant independent of the other parties and not be in violation of the rules and create considerable confusion in the case. As I recall, this Rule was amended, then the amendment was withdrawn, then it was re-amended, and now consolidated to Rule 21a and 21b. In the corporate and commercial law practice, trickiness is part of the game (I know I don't have to tell you this) and justice certainly does not prevail under the circumstances described by the Trevino vs. Hidalgo case

Can we have a wording under Rule 21, 21a, 21b, or 21c to the effect that

> pleadings, notices, and documents must be served upon all counsel of record, but if there is no counsel for a party, then upon the party or the parties' designated agent.

Gene, I feel that this matter is urgent! The Trevino case may or may not come up before the Supreme Court. The Trevino case on first blush appears to be technically correct. For that reason, I think all haste must be taken to amend the rules so that all counsel are requested to serve all other counsel with pleadings, notices, motions, and applications.

Your urgent attention to this problem would be very much appreciated.

Very truly yours,

Wendell S. Loomis

WSL:dkm

4543.001 LHS hnd

6-17-93 SB

TRCP 201

TINDALL & FOSTER, P. C.
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HARRY L TINDALL
BOARD CERTIFIED - FAMILY LAW
TEXAS BOARD OF LEGAL SPECIALIZATION
FELLOW, AMERICAN ACADEMY OF MATRIMONIAL LAWYERS

HHD Scott Aquela ✓ COA Staff J. Heckel

June 12, 1993

Luther H. Soules, III
175 E. Houston 10th Floor
Two Republic Bank Plaza
San Antonio, Texas 78205-2230

Dear Luke:

Enclosed is my memorandum to the Committee on Court Rules along with my letter to Emily Casstephens regarding the impact of HB 887 on subpoena practice. I would ask that this matter be placed on the agenda for your next meeting of the Supreme Court Advisory Committee.

Thank you very much for your attention to this matter.

Sincerely,

Harry L. Tindall

/ejb

Enclosure

TINDALL & FOSTER, P. C.
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HARRY L. TINDALL
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TEXAS BOARD OF LEGAL SPECIALIZATION
FELLOW, AMERICAN ACADEMY OF MATRIMONIAL LAWYERS

June 11, 1993

Emily Casstevens
State Bar of Texas
P.O. Box 12487
Capitol Station
Austin, Texas 78711

Dear Ms. Casstevens:

Please circulate the enclosed memo to members of the Committee on Court Rules in preparation for our next meeting.

Sincerely,

Harry L. Tindall

/ejb
Enc.

cc: Shelby Sharpe

MEMORANDUM

TO: Committee on Court Rules

FROM: Harry L. Tindall

DATE: June 11, 1993

RE: House Bill 887

The Texas Legislature has just enacted HB 887 which was approved by Governor Ann Richards on May 7, 1993. The legislation increases the witness fee for a witness from $1.00 to $10.00 and increases the range of a subpoena from 100 miles to 150 miles. I attach a copy of the newly enacted legislation.

Accordingly, it is my suggestion that Rules 176 and 201(5) Texas Rules of Civil Procedure, be amended to read as follows:

Rule 176. WITNESSES SUBPOENAED

The clerk of the district or county court, or justice of the peace, as the case may be, at the request of any party to a suit pending in his court, or of any agent or attorney, shall issue a subpoena for any witness or witnesses who may be represented to reside within one hundred <u>fifty</u> miles of the courthouse of the county in which the suit is pending or who may be found within such distance at the time of trial; provided that any clerk, justice of the peace or other officer issuing a subpoena pursuant to the provisions of this rule, or of any other rule or statute, shall issue a separate subpoena, together with a copy thereof, for each witness subpoenaed.

Notes and Comments

Changed by amendment effective January 1, 1994. Change from one hundred to one hundred fifty miles was made to conform with HB 887 (73rd Legislature 1993) amending Chapter 22, Civil Practice and Remedies Code.

Rule 201. COMPELLING APPEARANCE; PRODUCTION OF DOCUMENTS AND THINGS; DEPOSITION OF ORGANIZATION

5. Time and Place. The time and place designated shall be reasonable. The place of taking a deposition shall be in the county of the witness' residence or, where he is employed or regularly transacts business in person or at such other convenient place as may be directed by the court in which the cause is pending; provided, however, the deposition of a party or the person or persons designated by a party under paragraph 4 above may be taken in the count of suit subject to the provisions of

paragraph 5 of Rule 166b. A nonresident or transient person may be required to attend in the county where he is served with a subpoena, or within one hundred fifty miles from the place of service, or at such other convenient place as the court may direct. The witness shall remain in attendance from day to day until such deposition is begun and completed.

Notes and Comments

Changed by amendment effective January 1, 1994. Change from one hundred to one hundred fifty miles was made to conform with HB 887 (73rd Legislature 1993) amending Chapter 22, Civil Practice and Remedies Code.

By Thompson of Harris H.B. No. 887

A BILL TO BE ENTITLED

AN ACT

relating to witness fees, privileges, and appearances in court.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 22, Civil Practice and Remedies Code, is amended to read as follows:

CHAPTER 22. WITNESSES

SUBCHAPTER A. WITNESSES

Sec. 22.001. WITNESS FEE [FEES]. (a) A witness is entitled to 10 dollars[~~:~~

[~~(1)--one--dollar~~] for each day the witness attends court[~~;--and~~

[~~(2)--six-cents-for-each-mile-the--witness--travels--in going--to--and--returning--from--court~~]. This fee includes the entitlement for travel and the witness is not entitled to any reimbursement for mileage traveled.

(b) [~~After-receiving--the--witness's--affidavit,--the--court clerk--shall--issue--a--certificate-stating-the-fees-incurred-under this-section.~~

[~~(c)~~] The party who summons the witness shall pay that witness's fee for one day, as [fees] provided [for] by this section, at the time the subpoena is served on the witness.

(c) [~~(d)~~] The witness fee [fees] must be taxed in the bill of costs as other costs.

Sec. 22.002. DISTANCE FOR SUBPOENAS. A witness who is

represented to reside 150 miles or less from a county in which a suit is pending or who may be found within that distance at the time of trial on the suit may be subpoenaed in the suit.

SUBCHAPTER B. PRIVILEGES

Sec. 22.011. PRIVILEGE FROM ARREST. (a) A witness is privileged from arrest while attending, going to, and returning from court.

(b) The privilege provided by this section extends for a period computed by allowing one day of travel for each 150 [25] miles of the distance from the courthouse to the witness's residence.

(c) This section does not apply to an arrest for a felony, treason, or breach of the peace.

SECTION 2. This Act takes effect January 1, 1994.

SECTION 3. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

4543.001

WENDELL S. LOOMIS
Attorney at Law
14610 Falling Creek Drive
Houston, Texas 77068-2938
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FAX (713) 893-5732

May 6, 1991

Soules & Wallace
Attorneys-at-Law
Tenth Floor
Republic of Texas Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Re: Proposed Changes to TRCP 21 and 91
Add Rule 200.2.a.; Rule 201.3.

Gentlemen:

Originally I requested consideration of changes to Rule 21, 21a and 21b, as the result of the Trevino vs. Hidalgo Publishing Company case. Please see my letter of March 21, 1991, attached.

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Very truly yours,

Wendell S. Loomis

WSL:dkm

cc: Honorable Nathan L. Hecht
David J. Beck
Honorable Bob L. Thomas

WENDELL S. LOOMIS
Attorney at Law
14610 Falling Creek Drive
Houston, Texas 77068-2938
(713) 893-5900
FAX (713) 893-5732

March 21, 1991

Supreme Court of the State of Texas
Supreme Court Building
P.O. Box 12248
Austin, Texas 78711

Attention: Honorable Justice Eugene A. Cook

Re: Rules 21, 21a, 21b Methods of Service
Trevino vs. Hidalgo Publishing Company d/b/a The Edinburgh Daily Review, No. 13-90-025-CV (Corpus Christi), 2-21-91

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Very truly yours,

Wendell S. Loomis

WSL:dkm

4543.001

lhs
hhd

4-15-92

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4/5
HHD
SCAC agenda
Sub C
COA staff

April 14, 1992

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

Dear Luke:

Enclosed is a letter I received from Perry Archer regarding Rule 202.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

PERRY ARCHER & ASSOCIATES
ATTORNEYS AT LAW
ASHFORD CROSSING BUILDING - SUITE 125
1880 DAIRY ASHFORD
HOUSTON, TEXAS 77077
TELEPHONE NUMBER (713) 496-3140
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PERRY ARCHER
HOWARD W. KAFFENBERGER*
SHEILA MOLLOY

*BOARD CERTIFIED IN
PERSONAL INJURY TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

April 10, 1992

Justice Nathan Hecht
Texas Supreme Court
P. O. Box 12248
Austin, Texas 78711

RE: Texas Rule of Civil Procedure, Rule 202 - Use of Audio Court Recording Services for Depositions

Dear Justice Hecht:

This firm is an insurance defense firm that operates as in-house counsel for the Farmers Insurance Group of Companies in the Houston area. In an effort to reduce litigation expense, we have, with the agreement of the Houston Branch Claims Offices for Farmers, instituted a program of using an audio recording firm for depositions and have requested our outside counsel firms to use the audio-recording firm exclusively. This firm saves us fifteen to twenty percent per deposition. It produces a cassette, a computer disk and typewritten transcript in booklet form, the same as with any reported deposition. All depositions taken are taken after the required five days' written notice. In addition, a written agreement is entered into pursuant to Rule 11 of the Texas Rules of Civil Procedure just before any deposition starts, by which all counsel agree, by their signatures, to the means of taking the deposition in question. This firm has used audio court recording for the last two years and has saved considerable money. No attorney has objected.

The purpose of this letter is to raise a question that might be referred to the Rules Committee concerning subparagraph e. of Rule 202. Some attorneys interpret this section of the Rule to mean that a stenographer has to be in attendance at an audio recorded deposition, taking the testimony. We, and most others whom I have contacted, consider it to mean that the tape recording has to be reduced to writing and put in booklet form as with any deposition, by a stenographer who transcribes from the audio cassette. We think that the consideration of these questions by the Rules Committee is exceedingly important not only to the Houston area but to Texas in general, because of the explosion of litigation costs. Each recorded deposition costs from fifteen percent to twenty percent less than the least

expensive court reporter that we have been able to find, as mentioned. This saving is so significant that we think it contributes to the larger good. Therefore, we are asking that the question be referred to the Rules Committee for its consideration and comment.

Very truly yours,

PERRY ARCHER

PA:njk

copy to LHS

E.J. WOHLT

ATTORNEY AT LAW

BOARD CERTIFIED
PERSONAL INJURY TRIAL LAW
TEXAS BOARD LEGAL SPECIALIZATION

900 TOWN & COUNTRY LANE #310
HOUSTON, TEXAS 77024-2216
PHONE (713) 464-1492
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May 23, 1991

TRCP 202

Justice Nathan Hecht
Texas Supreme Court
Supreme Court Building
Austin, Texas 78701

Re: The VIDEO deposition rules, and
Proposed New Rules regarding Court's Charge

Dear Justice Hecht:

At the Evidence seminar, you asked if any attendee desires to have a comment on the proposed rules, to write, so here goes:

Video Rule (202): My interest is to reduce costs of litigation. Therefore, I like to use VIDEO to depose, but Rule 202 seems to say at the beginning that no transcript is needed, but then ends with the requirement of a transcript. Why? **Why must we also have a stenographic record?**

I believe the better practice is to allow a party to notice depositions straight VIDEO without a written transcript, and if anyone wants a written transcript, let them arrange for a reporter to be there also and make one. Reporter charges are often unnecessary, especially for collateral or pure discovery witnesses, and they are very, very expensive.

Court's Charge: As to the New Rules proposed regarding the Court's Charge (published in the May Bar Journal), generally I like them, but I have a few suggestions (additions):

Part 3 (page 442, May Bar Journal). After "JURY MEMBERS" begin with the following:

> "Your function now is to resolve certain questions raised by the evidence about which the parties do not totally agree. By your answers to the following questions, you will resolve these disputed matters.
>
> "In discharging this responsibility, follow ..."
>
> Why? Lets the jury know their role, and that they are not necessarily deciding every facet of the case.

Proposed Rule 271 (page 445, May Bar Journal).

Part (2)(d) Hearing, change to read:

"Before submission to the jury, the court shall conduct a hearing outside the presence of the jury for the parties to present their complaints pursuant to Rule 272."

Why? Because we still have Judges saying "Lets do that while the jury is out." The present rule would allow that to continue, even though it would be a waste. Why not just spell it out.

Proposed Rule 272 (page 446)

Part (5)(b)(i), change to read:

"when an entire ground of recovery or defense of the complaining party is omitted from the charge;/or"

Why? To be clear that you do not have to submit your opponent's case; i.e., you do not have to say: "Judge, it is not raised by the evidence, but if you are hell bent on submitting it, here is the proper way."

Proposed Rule 272 (page 446)

Part (5)(c), change by adding the following sentence:

"The omission of these 'improper complaints' shall not preclude a party from asserting these points on appeal."

Why? To be clear that if they are "improper" but valid, you have not waived them.

Proposed Rule 273 (page 446)

Change by adding the following sentence:

"The court shall not give additional oral instructions."

Why? Usually the court reporter is not taking down this reading, and some Judges feel free to "explain" to the jury what the question means. I know the proposed rule uses the phrase "precise words" in the rule, but Racehorse Haynes points out that for some courts, you need to write the instructions in crayon.

Proposed Rule 274 (page 446)

Part (1), change by adding the following:

", except no evidence and against great weight points."

Proposed Rule 274 (page 446)

Part (2), change by correcting a typo error:

"recovery of defense" to "recovery or defense."

", except no evidence and against great weight points."

I hope you will at least review my suggestions.

Very sincerely yours,

E. J. Wohlt, Jr.
EJW/ew

4543.001 2/23/93 LHS HHC

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February 22, 1993

HHD
Agenda

Mr. Luther H. Soules, III
Chairman, Supreme Court Advisory Committee
1000 Two Republic Bank Plaza
175 East Houston
San Antonio, Texas 78205-2230

Dear Mr. Soules:

I have received a copy of your letter to Mr. Steve McConnico regarding proposed changes to TRCP 206. We are very pleased the Advisory Committee is looking into the problems generated by that rule.

The Texas Court Reporters Association would very much appreciate an opportunity to address this matter with the Committee, either by attendance at the Committee's next meeting and/or by discussion with Mr. McConnico prior to preparation of his report to the Committee. It is a matter of deep concern to the reporting profession in Texas.

Thank you for your consideration of this request. I shall look forward to hearing from you at your earliest convenience.

Sincerely,

Jaye Thompson

Jaye Thompson
President

xc: Mr. Charles M. Jordan
Mr. Steve McConnico
TCRA Executive Committee

4543.001

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Reply to: O Houston
O Galveston

† 520 - 20th St.
Galveston, Texas 77550-2014
[409] 765-5515

January 28, 1993

Luther H. Soules III
Chairman of the Supreme Court of Texas Advisory Committee
175 E. Houston
10th Floor
Two Republic Bank Plaza
San Antonio, Texas 78205-2230

Dear Mr. Soules,

I would like to voice my concern regarding the 1988 Amendment to Rule 206, subdivision 2 of the Texas Rules of Civil Procedure. Tex. R. Civ. P. 206, subd. 2. I understand the necessity of changing the rule to provide for the safekeeping of depositions by a custodial attorney. This is a very pragmatic amendment in light of the necessity of relieving courts of the burden of storing sometimes voluminous depositions. However, I have come to regret the portion of subdivision 2 which requires the custodial attorney to "...make the original deposition transcript available for inspection or photocopying by any other party to the suit."

I have practiced law now for about 18 years and have found the court reporting industry to be among the most efficient and cooperative service providers of the our justice system. This rule allows some clients and lawyers trying to save a buck to take money away from a person, and her family, who have served the legal profession and the community well. Unfortunately, I have been on the receiving end lately of two different lawyers trying to do things cheaply, asking for the original of the deposition to photocopy instead of ordering a copy from the reporter. This is just not fair to the reporter, or frankly, to my client who has paid for the transcription and copy.

Further I have noticed that deposition costs have increased several fold over the last four years. This leads me to the conclusion that the reporting services are no longer able to defray

the cost of the deposition transcription to all of the parties to the suit since the non-custodial parties may access the deposition for copying via the custodial attorney. Thus the custodial party bears all the cost of transcription and the other attorney gets near costless access to the deposition. This discourages the use of the deposition as a discovery tool as attorneys to multiparty suits wait each other out to avoid bearing the full cost of deposition transcription. Certainly the rule is not intended to redistribute cost, nor to discourage the discovery of pertinent facts, however I am afraid this is exactiy what has been happening subsequent to the enactment of this amendment.

I respectfully suggest the committee take another look at this rule and a way to improve the same. I would be glad to provide input to the committee if you felt it was appropriate.

Very truly yours,

Charles M. Jordan

CMJ/lbf

cc: Jaye Thompson
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Texas Court Reporters Ass'n
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1/29/90

Justice Nathan Hecht
P.O. Box 12248
Austin, TX 78711

Re: Duties and Responsibilities
Court Reporters

Dear Justice Hecht:

It was a pleasure talking to you at the Dallas Bar Association President's inaugaration.

I am interested in a couple of issues involving Rules governing Court Reporters. The present Rules do not cover retention of notes taken in depositions.

Also, with regard to Official Court Reporters notes and deposition notes, I feel an acceptable form of storage would be a computer diskette or tape. Attached are my propsed changes for your Rules committee.

In addition, it is TSRA's desire to initiate a continuing education program requiring all Certified Shorthand Reporters to comply with requirements set forth by the Supreme Court. TSRA would be happy to recommend such guidelines and with the CSR Board's guidance monitor such a program.

If you feel these are viable issues to be addressed by the Supreme Court, I would be interesed in your comments.

Sincerely yours,

Dan L. Stunkard
President-Elect
TSRA

cc: Judy Werlinger
President TSRA

Vernon's Texas Codes Annotated
52.046. General Powers and Duties
(a) On request, an official court reporter shall:

PRESENTLY

(4) preserve the notes for future reference for three years from the date on which they were taken; and

PROPOSED

(4) preserve the notes <u>in a retrievable format</u> for future reference for three years from the date on which they were taken; and

Texas Criminal Procedure
Rule 11

PRESENTLY

(d) When a defendant is convicted and sentenced to a term of more than two years and no appeal is taken, the court reporter shall file the nontranscribed notes of the proceeding with the district clerk within 20 days following the expiration of the time for perfecting appeal. The district clerk shall not be required to retain the notes beyond 15 years from the date of their filing.

PROPOSED

(d) When a defendant is convicted and sentenced to a term of more than two years and no appeal is taken, the court reporter shall file the nontranscribed notes <u>in a retrievable format</u> of the proceeding with the district clerk within 20 days following the expiration of the time for perfecting appeal. The district clerk shall not be required to retain the notes beyond 15 years from the date of their filing.

Texas Rules of Court
Rules of Civil Procedure
Rule 206

Certification by Officer; Exhibits; Copies;
Notice of Delivery; Retention of Notes

(There is no present Rule Governing the retention of deposition notes of a Reporter)

PROPOSED

7. The deposition officer shall preserve the notes in a retrievable format for future reference for five years from the date on which they were taken.

Eddie Morris Court Reporters, Inc.
6243 N.W. Expressway, Suite 430
San Antonio, Texas 78201
(512) 734-5396

1/31/90

HJH, TRP
SCAC Subc 2613
+ Agenda

TELECOPIER TRANSMITTAL SHEET

DATE: 1/30/90

TO: Luke Soules

FROM: Eddie Morris

SENDING TO TELECOPIER NUMBER: 224-7013

NUMBER OF PAGES (INCLUDING THIS PAGE)

IF ALL PAGES ARE NOT RECEIVED, PLEASE CALL 512-734-5396 AND ASK FOR

MESSAGE

Luke, This is a letter from Tinsman + Houser substantiating my discussion with you earlier that Rule 206.a will increase the costs of original depositions + interrogatories. The court reporting community cannot survive this type of situation. Thanks — EDDIE.

OUR TELECOPIER NUMBER IS: 734-7962

Pg000678

THE LAW OFFICES OF
TINSMAN & HOUSER
INCORPORATED

FRANKLIN D. HOUSER
MARGARET M. MAISEL
BRUCE M. MILLER
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ONE RIVERWALK PLACE, 14TH FLOOR
700 NORTH ST. MARY'S STREET
SAN ANTONIO, TEXAS 78205
(512) 225-3121

January 29, 1990

Mr. G. Thomas Coghlan
LANG, LADON, GREEN,
COGHLAN & FISHER
1700 NCNB Plaza
San Antonio, Texas 78205

Re: Cause No. 89-CI-09116
Universal Underwriters Insurance
Company vs. Constant C. Laskowski

Dear Mr. Coghlan:

Enclosed with regard to the referenced cause is a copy of Cross-Questions we are submitting to the Custodian of Records for:

Dr. James Strauch Dr. Barry Beller

In addition, pursuant to Rule 206.2, Texas Rules of Civil Procedure, request is hereby made that you produce for inspection and photocopying the original deposition transcripts, including all exhibits attached thereto, of these records as soon as the same are received by your office.

Please call my secretary, Mrs. Sylvia Escobedo, and let her know when these transcripts can be picked up. We will photocopy them and return them to you immediately.

Very truly yours,

TINSMAN & HOUSER, INC.

Rey Perez

Rey Perez

RP/sse
Enclosure
cc: Mr. Constant Laskowski
Eddie Morris Court Reporters ✓

4543.001

TRCP 206

JESS W. YOUNG, INC.
LAWYER
P. O. BOX 15948
SAN ANTONIO, TEXAS 78212
TELEPHONE (512) 490-5299

JESS W. YOUNG

RONALD S. SCHMIDT
OF COUNSEL

October 12, 1989

Mr. Luke Soules, III
c/o Soules & Wallace
Republic of Texas Plaza Bldg.
175 E. Houston Street
San Antonio, TX 78205

Dear Luke:

Confirming my conversation with you of the hiatus between Rules 188 (Foreign Jurisdiction Depositions) and 206 (Domestic Depositions and Return) please note the highlighted portions.

As I explained to you, I had reason to take out-of-state depositions in my daughter's divorce case, and this led to the problem of the court reporter in the foreign jurisdiction adhering to Rule 188 and returning the depositions and bill of costs back to our District Clerk. On such occasion, they were returned to the court reporter in the foreign jurisdiction, both deposition and cost bill.

Rule 206 states that the lawyer that asks the first question gets the honor of being the custodian, and of course when you send it out to a foreign jurisdiction you never know who's going to ask the first question. It would occur to me that it would be better stated to cause the return of the foreign deposition to the party who caused the issuance of the same, without regard to who asks the first question. The bill of costs should be filed with the Clerk of the proper Court to be compiled as part of the costs of court.

The foreign court reporters in reading Rule 188 have seized upon the unnumbered second paragraph of paragraph number 2 of Rule 188 and returned the depositions to the Clerk. The Clerk then, pursuant to Rule 206, 2, returns it to them as he takes the position, and properly, that he is not the custodian.

In short, it seems to me that the two Rules conflict to some degree, or in any event are confusing to foreign court reporters and clarification, simple if at all possible, should be made when the new Rules are promulgated.

Kindest regards,

JESS W. YOUNG, INC.

Pg000680

Jess
JY/vh

00674

together with a statement of the reasons given by the witness for making such changes. The changes and the statement of the reasons for the changes shall be attached to the deposition by the deposition officer. The deposition transcript and any changes shall then be subscribed by the witness under oath, before any officer authorized to administer an oath, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the witness does not sign and return the original deposition transcript within twenty days of its submission to him or his counsel of record, the deposition officer shall sign a true copy of the transcript and state on the record the fact of the waiver of examination and signature or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor. The copy of the deposition transcript may then be used as fully as though signed, unless on motion to suppress, made as provided in Rule 207, the Court determines that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(Added Dec. 5, 1983, eff. April 1, 1984; amended July 15, 1987, eff. Jan. 1, 1988.)

This is a new rule effective April 1, 1984. Former Rule 205 is incorporated into Rule 204. This new rule is former Rule 209 with modification. The modification gives the court reporter authority to file an unsigned deposition for both party and non-party witnesses.

Comment to 1988 Change: The amendments to this rule are to update the rule to conform to the usual practices used in finalizing the deposition.

RULE 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) that the witness was duly sworn by the officer;

(ii) that the transcript is a true record of the testimony given by the witness;

(iii) the amount of charges for the officer's preparation of the completed deposition transcript and any copies of exhibits;

(iv) that the deposition transcript was submitted on a specified date to the witness or to the attorney of record for a party who was the witness for examination, signature and return to the officer by a specified date;

(v) that changes, if any made by the witness, in the transcript and otherwise are attached thereto or incorporated therein;

(vi) that the witness returned or did not return the transcript;

(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 with return receipt requested, to the attorney or party who asked the first question appearing in the transcript for safekeeping and use at trial;

(viii) that a copy of the certificate was served on all parties pursuant to Tex.R.Civ.P. 21a.

The officer shall file with the court in which the cause is pending a copy of said certificate, and the clerk of the court where such certification is filed shall tax as costs the charges for preparing the original deposition transcript and making and attaching copies of all exhibits to the original deposition.

2. Delivery. Unless otherwise requested or agreed to by the parties on the record in the deposition transcript, the officer, after certification, shall securely seal the original deposition transcript, or a copy thereof in the event the original is not returned to the officer, and copies of all exhibits in a wrapper endorsed with the title of the action and marked "Deposition of (here insert name of witness)," and shall thereafter deliver, or mail in a postpaid, properly addressed wrapper, certified with return receipt requested, such deposition transcript and copies of all exhibits to the attorney or party who asked the first question appearing in the transcript, and shall give notice of delivery to all parties. The custodial attorney shall, upon reasonable request, make the original deposition transcript available for inspection or photocopying by any other party to the suit.

3. Exhibits. Original documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to the deposition transcript and may be inspected and copied by any party, except that the person producing the materials may (a) offer copies to be marked for identification and annexed to the deposition transcript and to serve thereafter as originals if he affords to all parties fair opportunity at the deposition to verify the copies by comparison with the originals, or (b) offer the originals to be marked for identification, in which event the materials may then be used in the same manner as if annexed to the deposition transcript. In the event that original exhibits rather than copies are marked for identification, the deposition officer shall make copies of all original exhibits to be annexed to the original deposition transcript for delivery, and shall thereafter return the originals of the exhibits to the witness or

BRIN & BRIN, P.C.
ATTORNEYS AT LAW

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100 SAVANNAH ST.
ONE PARK PLACE, SUITE 400
McALLEN, TEXAS 78503
TELEPHONE (210) 682-1323
FAX (210) 682-1329

BRUCE E. ANDERSON
MEMBER OF THE FIRM

July 21, 1993

TRCP 215.5

Justice Nathan Hecht,
Chairman
Supreme Court Rules Committee
P. O. Box 12248
Austin, TX 78711

Re: Suggested change in Texas Rules of Civil Procedure

Dear Justice Hetch:

I have just completed drafting Amended Answers to Interrogatories and Request for Production to be filed 31 days prior to Trial. The sole purpose of this amendment was to identify factual and expert witnesses and documents containing relevant information which had already been designated or identified by other parties to the same lawsuit. I am quite confident that each of the attorneys involved in this case is now or has recently been through the same ritual. The waste in time and paper is enormous and, I believe, unnecessary.

I would recommend that Rule 166b(6), or perhaps Rule 215.5 be amended to provide that the identification of a person as someone having knowledge of relevant facts, or of an expert witness who may be called to testify at time of Trial, or of a document as containing relevant information, by any party in answer to discovery requests by any other party, shall be sufficient to permit any party to call the witness, or introduce the evidence, at time of Trial.

The present practice does nothing to further the legitimate aims of discovery or to avoid ambush at Trial. Rather, it creates a procedural trap whereby a party may be denied the right to call a witness or use a piece of documentary evidence simply because another party has been dismissed or settled prior to Trial. In addition, you have the ridiculous spectacle of a party objecting to the opposing party calling a witness whom the objecting party has identified as a person having knowledge of relevant facts.

I appreciate any consideration which might be given to this suggestion. If I may be of any assistance to the committee in bringing about this change, I would be pleased to help.

Sincerely yours,

Bruce E. Anderson

BEA/vfh

4543.001 5-21-92

LAW OFFICES OF

Sharpe Bates & Spurlock

A PROFESSIONAL CORPORATION

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May 19, 1992

Mr. Luke Soules
SOULES & WALLACE
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175 East Houston Street
San Antonio, TX 78205-2230

Re: Rule 13 and Rule 215

Dear Luke:

What action, if any, did the Supreme Court Advisory Committee take on Rule 13 and Rule 215 which the Committee on Administration of Justice recommended be substantially rewritten?

Very truly yours,

J. SHELBY SHARPE

JSS/bc

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FORT WORTH TX MAY 1992

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May 11, 1992

Mr. Luther H. Soules III
Soules and Wallace
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San Antonio, TX 78205-2230

Dear Luke:

Enclosed is a copy of an article that I received from Tarrant County Court at Law Judge R. Brent Keis.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

THE DISCOVERY PROCESS:

HAVE WE MISDIAGOSED THE DISEASE?

by R. Brent Keis

On July 1, 1953, then U.S. District Judge Joe Sheehy of Tyler spoke at a luncheon in Fort Worth sponsored by the Texas Association of Claimant's Attorneys. [1] The Texas Bar Journal recounted that the thrust of his talk was that Texas lawyers had not been making full use of the instruments of discovery. Noting that discovery rules existed under both Federal and State systems, Judge Sheehy reportedly emphasized that full utilization of all means of discovery would result in amicable settlements, simplification of issues, elimination of witnesses and reduction of trial time. Although such remarks were reasonable in 1953, if any trial judge made the same comments today, undoubtedly a bill of impeachment would soon follow. Judges and lawyers have heard on a too frequent basis from Rambo and non-Rambo lawyers that a case that was set for trial could not be settled because of the amount of attorneys fees incurred during discovery. What has brought us to this point?

History

During the 1980's the debate among litigators was how to stop or cure what some have classified as a disease. Former

Justice Kilgarlin defined the disease as being one of gamesmanship in discovery; in particular, Rambo litigators who engage in making overbroad discovery requests, exercising unreasonable delaying tactics and making meaningless responses; i.e. discovery abuse. [2] Practicing lawyers became schooled in CLE courses and in legal articles on how to handle "discovery demons." [3] The cure for the disease was believed to have been administered by the 1981 and 1984 amendments to Rule 215 T.R.C.P. Regrettably, it seems to be the consensus among lawyers and jurists that the cure is worse than the disease. [4]

Since 1984, barely a week, certainly not a month, has gone by without one or more state appellate courts in Texas issuing an opinion regarding Rule 215. The most common issue is the exclusion of evidence as a sanction for discovery abuse, error or misdeed. The result, as described by Judge Pat M. Baskin of Midland, has been not to prevent trial by ambush, but at times to "foster" such. [5] The easiest example is the one in which the witness has been deposed, his existence and opinions are known, but his testimony is excluded because he was not identified in answers to interrogatories. [6]

Thus, former Justice Kilgarlin has come full circle and believes that Rule 215 has not worked the way it was hoped. [7] The Texas Supreme Court Advisory Committee and the State Bar of Texas Administration of Justice Committee are looking at the

rules to find a new cure for the disease. [8] In the interim, the Supreme Court has been attempting to cool the fires of sanction orders by its 1990 amendment to Rule 215 and its holding in Transamerican Natural Gas vs. Powell, [9] that the punishment should fit the crime.

In 1953, the professional and technological environment for the practice of law was much different. Today, as the Eastern District of Texas has stated in its Expense and Delay Reduction Plan, a "significant factor that contributes to excessive discovery is the concern lawyers have that they may be criticized or held legally accountable if they fail to exhaust every means at their disposal." [10] Facilitating this professional environment has been technology. We began with copiers and word processors, and now use laser jet printers, fax machines and personal computers. Most recently we have added computer disks that replace hard-bound volumes of legal authority and, more significantly, legal forms. [11] Some would hope that such technology would reduce the cost of litigation, but some believe that "the fee practice of charging for 'billable hours' creates an economic conflict between lawyer and client." [12]

The Objectives of the Rules

Because of our professional and technological environment, we have lost sight of our objective, and we now must redouble

our efforts. To refresh our memories, the objective of our Rules of Procedure, as set out in Rule 1, is to obtain just and fair adjudication of the rights of litigants as quickly and at the least expense possible. [13] Does our current discovery process aid in this objective? Eric R. Galton, a member of the first State Bar Alternative Dispute Resolution Committee and a leading authority on mediation, tells us that discovery costs have become a factor in settlement and "worse, obstruct such discussion." [14]

What is the Disease?

If the cure is not working, perhaps it is because we have misdiagnosed the disease. We must come to the inevitable conclusion that discovery abuse is not the disease, it is the discovery process. The cure is eliminating or at least seriously limiting discovery. One need look no farther than Art. 39.02 of the Texas Code of Criminal Procedure to put such an idea into perspective. In this age of specialization, civil trial lawyers may not be fully aware that under Article 39.02 a criminal Defendant may take a deposition only upon the filing of an affidavit and application to the Court, and thereafter showing a good reason for the taking of such deposition. [15] The case law would seem to indicate that even perpetuation of testimony is not a good reason for taking a deposition. [16] As

a practical matter, depositions are rarely permitted by the Court in criminal cases and there is no discivery as we practice it in civil litigation; yet these cases involve a Defendant's liberty, property and, in capital murder cases, his or her very life. Nevertheless, we do not hear criminal lawyers saying that they are unable to get ready for trial because they could not conduct discovery in the same manner as civil litigators.

If we are able to get past the initial psychological hurdle that discovery should be eliminated or seriously limited, then what plan should be adopted by the state courts?

Alternative Cure No 1.

No Discovery

In an article entitled Discovery Reform in the December 1991 issue of the ABA Journal, Loren Kieve advocates that discovery should be eliminated. [17] In support of this contention, he espouses adoption of the European system, describing a system not too distant from our Texas Criminal Procedure. The Europeans are limited to exchanging names and statements of witnesses, and copies of trial exhibits. Depositions are permitted only when necessary to preserve testimony; i.e. if the witness is unavailable because he's outside the jurisdiction of the Court or is on his death bed. [18]

Barring discovery in all civil cases is simply too big a pill for us to swallow. Requests for exceptions would be rampant. Some would advocate that discovery is necessary in products liability cases because discovery helps promote safe products. [19] Likewise, even Mr. Kieve contends that there should be an exception for employment discrimination. [20] The withdrawal pains of no discovery would be too horrendous, and the economic impact too dramatic.

Alternative Cure No. 2.

Limiting Discovery by Judicial Discretion

Changes to the Federal rules of Procedure have prefaced changes in the State rules. In 1942 Rule 167 T.R.C.P., the discovery procedure rule, was first adopted. This Texas Rule was patterned after the then Rule 34 of the Federal Rules of Civil Procedure. In 1962 Rule 168 T.R.C.P., the written interrogatory rule, was adopted. It was patterned after Rule 33 of the Federal Rules of Civil Procedure. Now the Federal Courts may lead us in a new direction of limited discovery.

On December 1, 1990 the Judicial Improvements Act of 1990, which is applicable to Federal Courts, became law. [21] Pursuant thereto, effective December 31, 1991, the United States District Court for the Eastern District of Texas, as well as other Districts, adopted their Expense and Delay Reduction

Plan. Under the Plan, there are six tracts with ever-increasing amounts of discovery with each tract, beginning with Tract No. 1 and no discovery. Tract No. 2 provides for automatic disclosure. Tract No. 3 provides for depositions of custodians and of parties. Tract No. 4 permits other depositions.[22]

When the case is filed, the Court decides which tract to assign each case. When automatic disclosure is required the parties must exchange information pertaining to witnesses, documents and other significant information within 30 days of their pleading. A management conference would occur within 120 days.

The most vocal criticism from the Bar and Mr. Kieve in particular, has been that this is just another layer - another "monster" - and it will not effect an actual reduction in time or expense.[23] The discretionary aspect of the Plan, to the extent each Federal Judge has discretion, may be utilized to its fullest extent in a politically immune system of lifetime appointed judges rather than a system where judges are subjected to Bar polls and election campaigns.

If too much discretion over discovery is left in the hands of State Trial Judges, it is reasonable to assume that the current rate of applications for writs of mandamus will increase. Thus, will we not, as Mr. Kieve says, simply have

added another "monster"?

Of course, we should all assume that each State Judge will be immune from the pressures exerted by local lawyers who vote in Bar polls, contribute to campaigns and are possible opposing candidates in the next election. We would hope and expect that every State Trial Judge would exhibit that appropriate Profile in Courage [24] necessary to withstand requests for the wider and more open discovery tracts.

Alternative Cure No. 3.

Limited Discovery and Limited Court Discretion

To eliminate the discretion of Trial Judges in determining what tract of discovery to assign a case, the determination must be mandated in the Rules. If the objective of the Rules is to obtain fair and just adjudication of cases as quickly and inexpensively as possible, then there must be a correlation between the cost of discovery and the amount in controversy. If it should follow that cases are assigned to a particular discovery tract based on the amount in controversy, exclusive of statutory penalties and attorney's fees, then a change in the Rules of Procedure pertaining to damages pleadings would be necessary. The pleadings would determine the discovery tract.

In liquidated damages cases, the system would be fairly

simple. In unliquidated damages cases, the question of whether the Plaintiff or Counter-Plaintiff's allegation of the damage amount was groundless or brought in bad faith would be an issue. Do we create another monster of pre-trial procedure pertaining to whether or not the damage amount allegation was groundless? No. We must kill the monster, and it must be by its own hands. In particular, if the finder of fact at trial does not award damages within a certain percentage range of the allegations, the fact finder should be submitted a question that asks whether, based upon the evidence at trial, such allegation of damages was groundless or brought in bad faith. In the case of a jury trial, the appropriate definition would be submitted. A definition of groundless or bad faith could be drawn which could be akin to that applied in DTPA [24] or Rule 13 [26] cases. The definition of "groundless and in bad faith" has been addressed by the Texas Supreme Court on a limited basis in Donwerth vs. Preston II Chrysler-Dodge. [27] The definition should be one that "chills" the groundless or bad faith damage amount allegation and not the good faith allegation which is later not proven by a preponderance of the evidence. If the fact finder answers that such damage amount allegations were groundless or in bad faith, then the Plaintiff and his counsel would be liable for all costs of discovery, including attorney's fees. The Court in a subsequent hearing

could determine the reasonable and necessary amount of such costs and attorney's fees.

Quick Medicine

While changes and cures are being debated, there is one action the Courts and the Bar can take to diminish the disease. Attorneys should seek and Judges should assign cases to mediation prior to discovery. We know that a "significant percentage of the public and the Bar know about ADR." [28] It is in our hands to use it and perhaps fight the spread of the "disease."

1. 16 Tex. Bar J. 500 (1953)

2. William W. Kilgarlin and Don Jackson, Sanctions for Discovery Abuse Under Rule 215, 15 St. Mary's L. J. (1984)

3. Robert E. Shapiro, Wrestling with the Discovery Demons, Litigation (ABA), Fall 1991, at p. 14

4. William W. Kilgarlin, Sanctions for Discovery Abuse: Is the Cure Worse than the Disease? 54 Tex. Bar J. 658 (1991); Judge Pat M. Baskin, Eliminating Automatic Sanctions Under Rule 215.5, 10 The Advocate 3 (1991)

5. Baskin, supra, at 3

6. See Sharp v. Broadway National Bank, 748 S.W.2d 669 (Tex. 1990)

7. Kilgarlin, supra at p. 658

8. Editors Comments, 10 The Advocate 1 (1991)

9. 811 S.W.2d 913 (Tex. 1991)

10. United States District Court for the Eastern District of Texas Civil Justice Expense and Delay Reduction Plan, a/k/a The Plan, (eff. Dec. 31, 1991) Intro at p. 1

11. See, Tom Steinert - Threlkeld, The making of high-tech lawyers: 1992, Dallas Morning News, Jan. 28, 1992, at D1

12. The Plan, supra, Intro at p. 1

13. Rule 1, T.R.C.P.

14 Eric R. Galton, Mediation and Arbitration in DTPA Cases, Advanced DTPA - Consumer Law Course, 1991 at p. D-6

15. Tex. Code Crim. Proc., Art. 39.02

16. Beard v. State, 481 S.W.2d 875 (Tex. Crim. App. 1972)

17. Loren Kieve, Discovery Reform, ABA Journal, Dec. 1991, at p. 79

18. Kieve, supra, at p. 81

19. Charles T. Hvass, Jr. Letter to the Editor, ABA Journal, Feb. 1992, at p. 12

20. Kieve, supra, at p. 81

21. Public Law 101-650 [H.R. 5316]

22. The Plan, supra, at pgs. 1-6

23. Kieve, supra, at p. 81

24. John F. Kennedy, Profiles in Courage (1956)

25. Tex. Bus. & Com. Code, Sec. 17.41 et. seq.

26. Rule 13, T.R.C.P.

27. 775 S.W.2d 634 (Tex. 1989)

28. Concurrent Interests, Texas Bar Foundation, Dec. 1991, at p. 6

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March 18, 1992

Evelyn A. Avent
7201 Wood Hollow Drive, #414
Austin, Texas 78731

Dear Evelyn:

Since your letter of March 5 to the members of the Committee on Administration of Justice was received, I have received some very excellent suggestions for additional changes in Rule 215. I sincerely believe this is the last memo you will need to get out to the entire membership of the Committee concerning Rule 215. Everyone of the changes I have made in the revised rule are strictly for clarification sake to avoid misunderstanding. None is of substance.

In your memo, I would suggest that you advise that the changes made in the rule since your memo of March 5, 1992 are as follows:

In paragraph 1 the words "Any of" were added at the beginning of the sentence following the title and the word "or" was removed from each subdivision so that a court would clearly understand that it could find more than one abuse of discretion. In place of the "or" at the end of subdivision 1(e) the word "and" was inserted for additional grammatical clarity.

In paragraph 2 the word "person" was replaced in the second line with the word "non-party." At the end of the fourth line of that paragraph the word "persons" was replaced with "non-parties." Finally, in the next to the last line of that paragraph the word "person" was replaced with "non-party" and the word "subject" was changed to "subjected."

In paragraph 3(b) the language "are denied" was eliminated because it was totally inappropriate.

In paragraph 4 the word "or" was removed after subdivisions (a)-(d) to avoid the same confusion and misunderstanding that we eliminated out of paragraph 1. We do not want a court to think it can assess only one sanction. Additionally, at the end of paragraph 4(c), the semicolon following the word "evidence" was changed to a comma and

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language added "or both" followed by a semicolon. Subdivisions (e) and (f) are new to paragraph 4 and the old (e) is now (g) with the language "or staying further proceedings until the order is obeyed" eliminated.

In paragraph 7 at the end of the second sentence the language "which leaves a review of an order causing any of these problems by mandamus" has been added. This language was added for clarity because it is the holding in Walker v. Packer.

Evelyn, I appreciate all of your hard work.

Very truly yours,

J. SHELBY SHARPE

JSS:gma

Enclosure

cc: Larry York
Chief Justice Bob Thomas
O.C. Hamilton, Jr.

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording of existing Rule 215.

RULE 215. ABUSE OF DISCOVERY; SANCTIONS

1. Motion for Sanctions or Order Compelling Discovery. A party, upon reasonable notice to other parties and all other persons affected thereby, may apply for sanctions or an order compelling discovery as follows:

a. *Appropriate Court.* On matters relating to a deposition, an application for an order to a party may be made to the court in which the action is pending, or to any district court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken. As to all other discovery matters, an application for an order will be made to the court in which the action is pending.

b. *Motion.*

(1) If a party or other deponent which is a corporation or other entity fails to make a designation under Rules 200-2b, 201-4 or 208; or

(2) if a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails:

(a) to appear before the officer who is to take his deposition, after being served with a proper notice; or

(b) to answer a question propounded or submitted upon oral examination or upon written questions; or

(3) if a party fails:

(a) to serve answers or objections to interrogatories submitted under Rule 168, after proper service of the interrogatories; or

(b) to answer an interrogatory submitted under Rule 168; or

(c) to serve a written response to a request for inspection submitted under Rule 167, after proper service of the request; or

(d) to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection submitted under Rule 167;

the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or inspection or production in accordance with the request, or apply to the court in which the action is pending for the imposition of any sanction authorized by paragraph 2b herein without the necessity of first having obtained a court order compelling such discovery.

When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion pursuant to Rule 166b.

c. *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

d. *Disposition of Motion to Compel: Award of Expenses.* If the motion is granted, the court shall, after opportunity for hearing, require a party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay, at such time as ordered by the court, the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or attorney advising such motion to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

In determining the amount of reasonable expenses, including attorney fees, to be awarded in connection with a motion, the trial court shall award expenses which are reasonable in relation to the amount of work reasonably expended in obtaining an order compelling compliance or in opposing a motion which is denied.

e. *Providing Person's Own Statement.* If a party fails to comply with any person's written request for the person's own statement as provided in paragraph 2(g) of Rule 166b, the person who made the request may move for an order compelling compliance with paragraph 2(g) of Rule 166b. If the motion is granted, the movant may recover the expenses incurred in obtaining the order, including attorney fees, which are reasonable in relation to the amount of work reasonably expended in obtaining the order.

2. Failure to Comply With Order or With Discovery Request.

a. *Sanctions by Court in District Where Deposition is Taken.* If a deponent fails to appear or to be sworn or to answer a question after being directed to do so by a district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

b. *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rules 200–2b, 201–4 or 208 to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under paragraph 1 of this rule or Rule 167a, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:

(1) An order disallowing any further discovery of any kind or of a particular kind by the disobedient party;

(2) An order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;

(3) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(4) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(5) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(6) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(7) When a party has failed to comply with an order under Rule 167a(a) requiring him to appear or produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination.

(8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

c. *Sanction Against Nonparty for Violation of Rule 167.* If a nonparty fails to comply with an order under Rule 167, the court which made the order may treat the failure to obey as contempt of court.

3. Abuse of Discovery Process in Seeking, Making, or Resisting Discovery. If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may, after notice and hearing, impose any appropriate sanction authorized by paragraphs (1), (2), (3), (4), (5), and (8) of paragraph 2b of this rule. Such order of sanction shall be subject to review on appeal from the final judgment.

4. Failure to Comply With Rule 169.

a. *Deemed Admission.* Each matter of which an admission is requested shall be deemed admitted unless, within the time provided by Rule 169, the party to whom the request is directed serves upon the party requesting the admissions a sufficient written answer or objection in compliance with the requirements of Rule 169, addressed to each matter of which an admission is requested. For purposes of this subdivision an evasive or incomplete answer may be treated as a failure to answer.

b. *Motion.* The party who has requested the admission may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of Rule 169, it may order either that the matter is admitted or that an amended answer be served. The provisions of paragraph d of subdivision 1 of this rule apply to the award of expenses incurred in relation to the motion.

c. *Expenses on Failure to Admit.* If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 169 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 169(1), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

5. Failure to Respond to or Supplement Discovery. A party who fails to respond to or supplement his response to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in a response or supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter, unless the trial court finds that good cause sufficient to require admission exists. The burden of establishing good cause is upon the party offering the evidence and good cause must be shown in the record.

6. Exhibits to Motions and Responses. Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents.

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March 18, 1992

O.C. Hamilton, Jr.
Atlas & Hall
P.O. Drawer 3725
McAllen, Texas 78502

Re: COAJ meeting of March 27, 1992
Rule 215

Dear Carl:

Thank you for your letter of March 10. You will note that I have made all of the changes except I left the words "flagrant" and "callous" in paragraph 4 and I repositioned your new subdivisions for paragraph 4 because the intent is to have the most severe at the end, which would be the old paragraph (e) as renumbered (g). The reason I did not eliminate the words you questioned in paragraph 4 was this language came straight out of the TransAmerican opinion. I am merely repeating what the Supreme Court has said in that opinion on this rule.

I am sorry you will not be at the meeting on the 27th, but your help on this rule has been invaluable.

Very truly yours,

J. SHELBY SHARPE

JSS:gma

RULE 215. DISCOVERY DISPUTES; SANCTIONS

1. **Abuse of Discovery.** Any of the following may be considered an abuse of discovery:

(a) a party or other deponent which is a corporation or other entity fails to make a designation under Rule 200-2b, 201-4 or 208;

(b) a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails:

(1) to appear before the officer who is to take his deposition, after being served with a proper notice; or

(2) to answer a question properly propounded or submitted upon oral examination or upon written questions; or

(3) to produce a properly subpoenaed document, item or thing; or

(4) to complete a deposition without cause;

(c) a party fails:

(1) to serve answers or objections to interrogatories submitted under Rule 168, after proper service of the interrogatories; or

(2) to responsively answer an interrogatory submitted under Rule 168; or

(3) to serve a written response to a request for inspection or production submitted under Rule 167, after proper service of the request; or

(4) to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection submitted under Rule 167; or

(5) to comply with any persons written request for the persons own statement as provided in paragraph 2(g) of Rule 166b; or

(6) to respond to or supplement answers or responses to a request for discovery;

(7) to comply with an order under Rule 167a(a) requiring the party to appear or produce a person for examination, unless the person failing to comply shows the party is unable to appear or to produce such person for examination;

(d) a party or an officer, director or managing agent of a party or a person designated under Rules 200-2b, 201-4 or 208 to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order under Rule 167a;

(e) an attorney terminates a deposition prior to its completion without cause; and

(f) if the court finds that a party is resisting discovery or if the court finds that any discovery request or answers or responses thereto are frivolous, oppressive, harassing, non-responsive or made for purposes of delay.

For purposes of this rule, an evasive or incomplete answer or response is to be treated as a failure to answer or respond.

2. Motion and Proceedings Thereon. Following the commission of an abuse of discovery by any party or non-party, a party may file a motion seeking an order compelling discovery or for sanctions without the necessity of first having obtained a court order compelling such discovery which shall not be heard until all parties and all other non-parties affected thereby have received reasonable notice. A non-party who has been subjected to an abuse of discovery may also file a motion seeking sanctions.

(a) Motions or responses made under this rule may have exhibits attached including affidavits, discovery, pleadings, or any other documents.

(b) When a motion relates to the taking of a deposition on oral examination, the proponent of the motion may complete or adjourn the examination before he applies for an order.

(c) The party who has requested an admission under Rule 169 may move to determine the sufficiency of the answer or objection.

(d) On matters relating to a deposition, the motion for an order to a party may be made to the court in which the action is pending or to any court of competent jurisdiction in the district where the deposition is being taken. A motion for an order to a deponent who is not a party

shall be made to the court in the district where the deposition is being taken. As to all other discovery matters, the motion for an order will be made to the court in which the action is pending.

(e) Except on leave of court, the party or person against whom a motion has been filed under this rule may file a written response not later than seven (7) days prior to the date of hearing of the motion. Service of any response shall be accomplished on the movant not later than seven (7) days prior to the date of hearing, except on leave of court.

(f) No oral testimony shall be received at the hearing unless an issue of fact is raised by a timely filed response. An issue of fact is raised by an affidavit of a person with knowledge or other sworn testimony attached to the response. Oral testimony shall be received only regarding the fact or facts put in issue by an affidavit or other sworn testimony.

(g) The court shall place a motion filed pursuant to Section 1 (b), (d), (e), or (f) of this rule on an expedited docket for hearing.

3. Disposition of Motion.

(a) If the court finds that the discovery dispute is an honest difference of opinion reasonably grounded regardless of whether the motion is granted in whole or in part or denied, then the court shall enter an appropriate order on the motion without awarding any sanctions.

(b) If the court finds that there is clear and convincing proof establishing an abuse of discovery or a failure to obey an order regarding discovery regardless of whether the motion is granted in whole or in part, the court shall enter an appropriate order on the motion and shall impose such sanctions as are just and appropriate for the conduct to the sanctioned.

(c) If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion pursuant to Rule 166b.

(d) Any order entered under this rule requiring payment of money to movant or respondent shall be paid into the registry of the court for disposition in the final judgment which shall be subject to review by appeal following entry of the judgment.

(e) If the court overrules an objection to a matter requested to be admitted under Rule 169, the court may order that the matter is admitted or permit the party to file an amended answer within a reasonable time, but not more than 30 days from the date of hearing, whichever order is just under the circumstances. If the court enters an order that the matter is admitted, the court may assess such expenses and costs against the disobedient party or attorney advising him, or both, as the court deems just.

(f) If a nonparty fails to comply with an order under Rule 167, the court which made the order may treat the failure to obey as contempt of court.

(g) In lieu of any of the foregoing orders or in addition thereto, the court may enter an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.

4. **Sanctions for Pre-Trial Discovery Abuses.** The court should not assess sanctions which are so severe as to preclude presentation of the merits of the case absent a party's flagrant bad faith or counsel's callous disregard for the responsibilities of discovery under the rules. Sanctions for consideration are:

(a) an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him, or both;

(b) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(c) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence, or both;

(d) an order disallowing any further discovery of any kind or of a particular kind by the party committing the abuse of discovery; or

(e) an order compelling discovery or other order issued pursuant to any other rule relating to discovery;

(f) an order staying proceedings until any order entered by the court is

obeyed; and

(g) an order striking out pleadings or parts thereof, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party.

5. **Guidelines for Sanctions.** In determining the propriety and scope of sanctions, the court shall consider the following guidelines:

(a) the good faith or bad faith of the offender;
(b) the degree of willfulness, vindictiveness, negligence, or frivolousness involved in the offense;
(c) the knowledge, experience, and expertise of the offender;
(d) any prior history of sanctionable conduct on the part of the offender;
(e) the reasonableness and necessity of the out-of-pocket expenses incurred by the offended person as a result of the misconduct;
(f) the nature and extent of prejudice, apart from the out-of-pocket expenses suffered by the offended person as a result of the misconduct;
(g) the relative culpability of client and counsel, and the impact on their privileged relationship of an inquiry into that area;
(h) the risk of chilling the specific type of litigation involved;
(i) the impact of the sanction on the offender, including the offender's ability to pay a monetary sanction;
(j) the impact of the sanction on the offended party, including the offended person's need for compensation;
(k) the relative magnitude of sanction necessary to achieve the goal or goals of the sanction;
(l) burdens on the court system attributable to the misconduct, including consumption of judicial time and incurrence of juror fees and other court costs;
(m) the degree to which the offended person attempted to mitigate any prejudice suffered by him or her; and
(n) the degree to which the offended person's own behavior caused the expenses for which recovery is sought.

6. **Trial Sanctions for Discovery Abuses.**

(a) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 169 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the court may enter an order requiring the other party to pay him the reasonable expenses incurred in making that

proof, including reasonable attorney fees, unless the court finds that (1) the request was held objectionable pursuant to Rule 169(1), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(b) A party who fails to respond to or supplement his response or answer to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in a response or supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter, unless the trial court finds that good cause sufficient to require admission exists. The burden of establishing good cause is upon the party offering the evidence and good cause must be shown in the record. If the court determines the exclusion of evidence because of a lack of just cause in not timely responding to discovery will work an injustice, the court may postpone the trial and shall impose such appropriate sanctions so as not to prejudice the non-offending party, including but not limited to compensating the non-offending party for any wasted expense in preparing for trial.

7. Appeal. Any order of monetary sanction under this rule shall be subject to review on appeal from final judgment. Any other order of sanction shall be subject to review on appeal from final judgment unless review by appeal is inadequate to cure the trial court's discovery error or adversely affects a party's ability to present a viable claim or defense at trial or where disallowed discovery can not be a part of the appellate record, which leaves a review of an order causing any of these problems by mandamus. Upon written request by any attorney or party filed not later than 10 days after the signing of an order of sanction, the court shall file findings of fact and conclusions of law not later than 30 days after the signing of such order. If the court fails to file timely findings of fact and conclusions of law, the person making the request shall follow the procedure set forth in Rule 297. Notice of the filing of the request shall be served as provided by Rule 21a.

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

Rule 215 is poorly organized, lacks sufficient guidelines and instructions for the bench and bar to be justly implemented and to comply with due process. The changes should bring about better organization, clarification in dealing with discovery disputes, direction for determining when sanctions are appropriate, guidelines for sanctions in accordance with the latest Supreme Court of Texas opinions construing Rule 215, and a standard of review for an appeal of an order of sanctions. Because sanctions are so consequential, they should only be based upon a high standard of proof. Findings of fact and conclusions of law will also provide a better appellate review. Finally, the changes in the rule reflect the criteria for mandamus review set forth by the supreme court in Walker v. Packer on February 19, 1992, as such would apply to sanctions involving discovery and its decision in Alvarado v. Farah Manufacturing Co. handed down on March 11, 1992, addressing sanctions on evidence sought to be admitted which was not timely disclosed in response to discovery.

4543.001 WHS

2-3-92 LHS

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

January 30, 1992

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

Dear Luke:

Enclosed is a letter from James Bass regarding sanctions.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

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January 17, 1992

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SPECIALIZATION

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Charles F. Herring, Jr., Esquire
Attorney at Law
301 Congress Avenue, Suite 1200
Austin, Texas 78701

Re: Sanctions

Dear Mr. Herring:

I have witnessed the evolution of "Trial by Ambush" to "Ambush by Discovery".

When plaintiffs and defendants are excluded from testifying at their own trials because their attorneys failed to list them as witnesses, something is wrong with the system.

When attorneys representing either the plaintiff or the defendant are not allowed to testify because they weren't listed as an expert witness when the party had asked for attorney's fees, something is wrong with the system.

When the main purpose of the system seems to be utilization of sanctions to prevent fair trials, something is wrong with the system.

I know of a trial in Bexar County wherein a divorce trial the husband's attorney was successful in keeping the wife from testifying as to the value of their community home because her attorney had not listed her as an "EXPERT" witness and the husband's attorney successfully argued to the court that while a party could testify as to the value of property owned by them that she was testifying as an expert witness and since she hadn't been listed as an expert witness that she shouldn't be allowed to testify.

The trial judge agreed and refused to let the wife testify as to the value of the parties' community property home.

When this happens, something is wrong with the system.

There should be an amendment to the rules that if an individual is listed as an expert witness, the fact that the individual is listed as an expert should also have the effect of also listing that person as a fact witness without separately having to so list that "expert".

I have heard of an instance where the wife's attorney was listed as an expert witness and not as a fact witness and at the trial the attorney for the husband successfully argued that while the wife's attorney could be allowed to testify as to the value of attorney's fees in general that he should not be allowed to testify as to what he had done as regards his representation of the wife in the case because those were "facts" and he hadn't been listed as a fact witness.

When rulings like this are made, something is wrong with the system.

We attorneys are rapidly getting into the same "trap" that the physicians find themselves.

Physicians many times order what some might think are "unnecessary" tests to protect the physician. In other words, these physicians are, by the system, required to practice DEFENSIVE MEDICINE.

We attorneys, even in a simple divorce, find ourselves practicing DEFENSIVE LAW by sending out a set of interrogatories; a request for production; taking depositions; etc.; when in many instances this discovery is probably not required. But if the attorney's client comes back at a later date against the attorney and says that he or she was not adequately represented because all possible discovery was not done, the attorney's in the "trap".

As a result the middle class many times is being denied competent representation because the middle class cannot afford the competent representation.

The rules should be amended to provide, among other things:

1. that all witnesses must be named more than 30 days before the date of trial and if a witness is not named more than 30 days from the trial of the matter,

the witness may still be allowed to testify unless the other party can show "surprise" and if the other party can show "surprise", then the case will be continued by the Court for a reasonable time and all expenses associated with this "late designation" shall be borne by the party not timely designating the witness or witnesses.

2. that "death penalty" sanctions only be granted when they involve a direct violation of a direct order of the Court and then only if there is no other reasonable sanction that might be imposed.

Cases where a party knows of the existence of the other party's expert more than 30 days before the trial of the matter; knows that this expert will or probably will testify; takes the expert's deposition; and, objects to this expert testifying because the opposing party failed to list this expert in their answers to interrogatories and the objection is sustained, the system needs to be changed.

I am aware of an attorney in this area who prides himself on the fact that as soon as the other party answers (if the other party is the defendant) or as soon as he answers (if the other party is the plaintiff) the attorney sends over a set of interrogatories asking only two questions -- one as to any fact witnesses and one as to any expert witnesses.

Since these interrogatories are asked so early, the usual answer is "has not been determined" or "will supplement".

The attorney referred to above many times does not send a second set of interrogatories and/or if he does send a second set of interrogatories then he doesn't in any way refer to fact witnesses and/or expert witnesses but rather he asks other very complicated interrogatories and then concentrates all of his efforts on this set of interrogatories and never mentions his first set of interrogatories.

As a result, many times the opposing attorney forgets to supplement his answers to the "first set" of interrogatories.

Then, at the trial of the matter, when the opposing party attempts to put on his first witness, the attorney that sent this first set of interrogatories stands up and says that witness was not listed in the opposing party's answers to interrogatories and therefore should not be allowed to testify.

Therefore, in family law cases, sometimes this attorney is successful in keeping the other party from testifying; from keeping the other party's attorney from testifying either for attorney's fees and/or against attorney's fees; court appointed psychologists from testifying if the testimony is unfavorable to the sending attorney; etc.

When this happens, something is wrong with the system.

When things of this nature are pointed out to the attorneys doing these things, the usual response is either "this is an adversarial system and I need to protect my client" or "if I did go ahead and let him testify, I'd probably end up getting sued".

When this happens, something is wrong with the system.

The current system replaced a bad system with a worse system.

One of the prime examples of the problems with the present system are when an attorney receives interrogatories containing what he believes are objectionable interrogatories; the receiving attorney files objections to the interrogatories and asks for sanctions against the sending attorney for asking these objectionable questions; the sending attorney then files a motion asking for sanctions against the receiving attorney because of the receiving attorney's "frivolous" objections; and, then the receiving attorney files a motion asking for sanctions against the sending attorney for filing a "frivolous" motion for sanctions against the receiving attorney.

As a trial attorney who operated both under the prior "discovery" system and under the current "discovery" system, the "prior" system, for all of its defects, was better than the current system.

Many of the discovery rules seem to have been designed to combat "RAMBO" tactics in "MEGA-CASES" and are not appropriate to the 99+% of the other cases filed in this state.

There might be two sets of rules for cases in this state -- one for "non complex" cases and one for "complex" cases. To designate a case as a complex case, any party to the litigation could make application to the Court to designate the case as a "complex" case and the Court could then either designate the case as a "complex" case or refuse to designate the case as a "complex" case.

If the case were designated as a complex case, then one set of "very strict" rules would apply; while if the case was not designated as a "complex" case, then a much more liberal set of rules would apply.

The present discovery rules are the perfect example of what happens when one uses a sledge hammer to kill a mosquito.

Yours truly,

James R. Bass

JRB/pac
cc: Hon. Raul A. Gonzalez
Supreme Court Justice
Supreme Court Building
P. O. Box 12248
Capitol Station
Austin, Texas 78711

Hon. Oscar H. Mauzy
Supreme Court Justice
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Hon. Eugene A. Cook
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Hon. Jack Hightower
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Hon. Nathan L. Hecht
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Hon. Lloyd Doggett
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Hon. John Cornyn
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Hon. Robert A. Gammage
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HHD Xc Herring Task Force 4543.001 HHS
Kelton Task Force WHC
SCAC 215 Agenda

8-12-91
SB

Law Offices of

Stephen R. Marsh

Attorney and Counselor at Law

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August 9, 1991

Justice William W. Kilgarlin, Ret.
Powell, Popp & Ikard
707 West 10th Street
Austin, Texas 78701

RE: Sanctions

Dear Justice Kilgarlin:

Recently I filed a Motion for Sanctions, which concluded as follows:

There are many responses available to the Court when a party clearly and intentionally refuses to provide the full breadth of discovery allowed under the rules. The Court's response should take into account the following elements:

A) The extent of the non-judicial efforts to obtain the discovery. In this case there were multiple efforts made over a span of many months.

B) The delay that has occurred. In this case, by the time this has been heard and an Order entered, there will have been a delay of almost half a year.

C) The degree of notice to the resisting party as to the state of the law. In this case the controlling law and rules have been briefed and directly drawn to the attention of the resisting party.

D) The central nature of the obstructed discovery. In this case the obstructing party has blocked discovery directly related to the core issues.

In this case, all four factors weigh heavily against [Defendant]. At the very least, [Defendant] should be forced to live with the discovery they provided. Given that [Defendant] has failed to provide any basis to controvert [Plaintiff's] positions on the five core issues and has not made proper discovery, the Court should enter the rulings on the law of the case sought by [Plaintiff].

The Court refused any relief, including compelling answers. Basically, the parties were directed to serve the discovery again and to see the Court if the Defendant refused to answer the discovery after having it reserved.

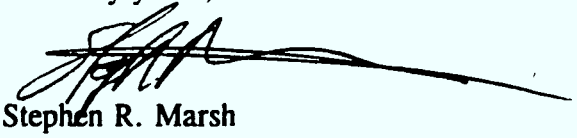
You may be seeing sanctions awarded too liberally and freely. In this end of the woods it is still generally impossible to even get a motion to compel granted.

Personally, I feel that the rules should provide guidelines that allow for serious sanctions without court order if the parties have taken serious non-judicial steps to obtain the discovery (e.g. in the above I had written three letter briefs and made three personal contacts concerning the discovery. If an order compelling is necessary for sanctions, there is no reason to attempt any polite or collegial steps other than the pro forma glosses so common to federal practice).

Your July, 1991 Texas Bar Journal article was interesting and the points on Mandamus especially apt. However, the problem does not seem so much to be sanctions as it does the irregular and unguided application (or nonapplication) of the rules. Especially as to non-judicial attempts to obtain discovery, the old system of obstruction, motion to compel as prerequisite, sanction, will only increase the obstruction of discovery without any increase in non-judicial attempts to obtain discovery.

Thank you for your consideration in this matter.

Sincerely yours,



Stephen R. Marsh

xc

Luther Soules
Soules & Wallace
175 East Houston Street
San Antonio, Texas 78205-2230

Encl.

PROFESSIONALISM AND MODERN LITIGATION TECHNIQUE

While reviewing a file for another attorney, I recently came across the following statement in a brief:

> "Counsel personally believes that the Courts of Texas would be well served by taking the general approach of liberal pleading, amendment and process as is shown in *Garcia v. Kastner Farms, Inc.*, 774 S.W.2d 668 (Tex. 1989). The current hodge podge of general liberality sprinkled with death traps (e.g. Rule 169 deadlines) does nothing to increase collegiality and makes every extension of professional courtesy grounds for a professional malpractice claim by a client.
>
> The aggressive advocacy required by the Code of Professional Responsibility should not be turned into a mandatory distasteful game of "gotcha" -- the law should resolve the legitimate conflicts and procedural and jurisdictional rules should be crafted to lead to such resolutions. However, until the Court changes the rules and the law, Counsel will be forced to fight cases every procedural step of the way."

As I reflected on that statement, three changes in the Rules came to mind that would improve the practice of law.

The first was changing the law so that the extension of professional courtesy is not legal malpractice. The second was allowing the Courts to impose professional courtesy -- i.e. giving the Courts the power to impose the same result that professional courtesy would have created. Finally, there should be clarification and formalization of the entire sanctions issue.

The current law often makes the extension of professional courtesy legal malpractice means. For example, if an opponent misses the 30 day deadline of Rule 169 there is no way that an attorney can grant an after-the-fact extension without harming her client. There are a number of similar situations in the rules where missing a deadline or a typo in pleading can destroy a case.

Most deadlines are missed in good faith. That is especially true in several lead cases discussing the draconian deadlines that apply in Requests for Admissions.

For example, *Dorchester Development Corp. v. Safeco Ins. Co.*, 737 S.W.2d 380, 383-384 (Tex.App. -- Dallas 1987).

as summarized in headnote 6 at 381 "Insured's failure to respond to insurer's request for an admission that insured's claim was not covered by policy constituted an admission that insured was not covered, even if insured's answer was **only a day late** and even though request involved application of law to facts."

In a normal world, no one could confuse being a day late with intentional bad faith sufficient to justify granting judgment on the pleadings against a party. However, the rules impose such a result and probably expose an attorney to liability if he or she fails to press home the advantage gained and instead acts out of professional courtesy.

After all, what else but malpractice can one call giving up a secure verdict in favor of extended litigation and the possibility of an adverse verdict? Until the rules change, counsel will be forced to extend professional discourtesy.

After making it safe to extend professional courtesy, the next change that is necessary is to allow the Courts to impose professional courtesy -- i.e. giving the Courts the power to impose the same result that professional courtesy would have created. Of necessity this means that sanctions should not be granted in cases where no other contact has occurred.

This change creates two results. First, it takes the profit out of not extending professional courtesy. If a court will impose professional courtesy, an attorney might as well act that way voluntarily. And if a motion that follows professional courtesy has bite when one made with no contact or courtesies is futile, lawyers will use courtesy.

Second, it allows an attorney to extend professional courtesy without having to justify it to the client. i.e. "Why did you let him up when he missed that deadline, allows the result: I had to, the Court would have done so and making a fuss about it would have only damaged your case's credibility." Currently, extending professional courtesy looks to many clients suspiciously like "if we win the case now, I don't get to bill you for any more fees."

Having practiced in a jurisdiction with this rule in effect, I know it works to the benefit of the courts and justice.

The last change that would increase professionalism is clarification and formalization of the entire sanctions issue. Currently the courts are reaching a slow consensus by looking at the sanctions cases that are appealed and at how the appellate review is proceeding.

As I look at the speed at which opinions are issuing, and with the assumption that there will be no changes in the rules, there should be a relatively uniform application of sanctions in about twelve to fifteen years -- a time span that seems too long to encourage professional courtesy now.

It would benefit both bench and bar to have formal guidelines for sanctions imposition. Such guidelines should cover prior abuse by the client, prior abuse by the attorney or law firms involved, length of abuse and whether or not steps have been taken to cure the problem prior to the hearing date. Every sanction issued and/or order compelling, including consent orders, should be registered on some sort of a central bulletin board (Westlaw/Lexis would do just fine if all sanctions orders were required to be sent to those services).

The first class of information, subsequent abuse by the client, is what the many judicial opinions seem to indicate needs to be stopped by means of the law. Some clients have problems complying with the law. Everyone has a client, who upon being called in to explain why he had just violated a settlement not even an hour old, states "I don't have to keep my promises -- that's why I hire attorneys." Keeping track of such individuals makes such activity less attractive to them.

Intentional abuse of the process by individuals deserves no consideration and abusers of the courts should be followed just as closely as those guilty of any other type of abuse. Registering sanctions and/or orders by the name of the clients involved would insure that intentional abusers of the system would be remembered and forced to comply.

Prior abuse by the attorney or law firm is the current definition of the trendy and uncourteous "Rambo" litigator. Sanctions are intended to deter future abuse as well as current abuse. Some firms are more likely to abuse the process than others. A formal factoring in of the prior abuses by a firm or an attorney is very useful in preventing future abuse -- especially as attorneys tend to control what really happens in litigation.

More, my personal experience has been that the majority of abuse is the product of a small portion of the bar. Those individuals need their wings clipped. Identifying them allows the Courts to impose sanctions with the least amount of untoward punishment of those not in the group of abusers.

Third, length or amount of abuse is important to equity. Some discovery "abuse" is short, simple and over long before any hearing. (e.g. sloppy answers that are cleaned up at the first complaint).

Some abuse occurs as a part of a long standing pattern. When a court is granting a seventh or eight motion for sanctions in a case, the penalties should be steeper than for an isolated set of interrogatories answers that arrived a week late. In addition, a sloppy set of answers to interrogatories is far different from a bad set of answers coupled with an outright refusal to expand or cure.

A crucial factor in determining the length and amount of intent in abuse is how the parties have acted prior to filing the judicial motion. In determining the amount of abuse, careful scrutiny should be given to the degree and number of non-judicial attempts to resolve the discovery (or other) problem.

The degree of cure is important as it reflects intent. The courts should treat a party who has "made good" or "cured" with greater leeway than a party who has failed to cure through the date of the hearing. I find it especially irritating to give opposing counsel twenty or thirty days between my motion and the hearing date -- still to find the Requests for Admission unanswered or the Interrogatories not responded to.

Finally, centralized recording is essential. Opposing counsel, the court and the parties are entitled to know whether or not the abuse they are suffering is part of a pattern or way of doing business or whether it is an isolated event. A centralized recording system would provide for all of these factors. In addition, centralized recording would be a great deterrent to future abuse.

All in all, changing the law so that the extension of professional courtesy is not legal malpractice, changing the rules so that the Courts can impose professional courtesy and clarification and formalization of the entire sanctions issue -- especially including centralized public records -- all of these would increase professionalism and reduce the amount of friction present in the practice of law by changing the rules so that friction and vicious litigation behavior are no longer rewarded by the rules.

We owe it to ourselves and our profession to take common sense steps to create a workable solution. Let's do it.

4543.001

nhd
LHS

6-7-91
SB

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6/7

June 5, 1991

HHD
Sanctions
Agenda
Costs (Amount)
J. Hedlet

Mr. Luther Soules
Chair, Supreme Court
Advisory Committee
Tenth Floor
175 E. Houston Street
San Antonio, Texas 78205-2230

Dear Luke:

I read with great interest the article by Judge Baskin in the March edition of the State Bar Litigation Section Report. The purpose of this letter is to state my concurrence with his opinion and to join his request that Rule 215.5 be amended to eliminate mandatory sanctions.

I offer for your consideration another example of the harsh and unfair results caused by the automatic sanction provision of Rule 215. Two weeks before trial, the parties determined that the defendant did not possess a copy of a document which had been generated subsequent to an applicable discovery request and which was responsive to that request. However, the information reflected on the non-produced document had been provided in depositions, and the same information was reflected on numerous other documents which had been produced in supplemental responses.

Nevertheless, the trial court, while sympathetic, apparently felt constrained to rule that the information requested on the non-produced document, although provided to the defendant in other forms, could not be used at trial. Were discretion allowed, I feel the ruling would have been different, particularly as no harm to the defendant was presented.

On another point, all of us are familiar with the common practice of combining interrogatories and requests for admission. I have encountered a situation where the opposing party, among the maximum number of interrogatories, included one interrogatory such as, "For each and every Request for Admission which is denied, please explain in all known detail, the reason for such denial," then served numerous sets of requests for admission with the demand that the above quoted interrogatory be supplemented. I, of course, objected to the requested discovery, on the basis it was an attempted circumvention of Rule 168(5); however, the issue was

never presented to the trial court. This is certainly not a pressing issue and may well be common practice in some areas, but I felt it to be a manipulation of the rules.

I appreciate your taking time to consider these remarks.

Best personal regards,

Sydney N. Floyd

SNF/gam
snf\soules.001

S: Copy to Lulu - current rules cc: 4543.001

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February 12, 1991

PLEASE REPLY TO
AUSTIN

The Honorable Tom Phillips
Chief Justice
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

RE: Eliminating Automatic Sanctions Under Rule 215.5

Dear Justice:

I have read and am in total agreement with the letter of Judge Pat M. Baskin addressed to you and dated January 23, 1991.

It has been most difficult for me to see consistency on the part of the Supreme Court in condemning "Rambo Tactics" in the legal profession, and at the same time, approving unjust and unreasonable results produced by hypertechnical decisions concerning discovery.

How is justice served when critical evidence contained in a deposition is denied admission into evidence soley because an attorney through oversight did not list the deponent as a fact or expert witness in answer to Interrogatories more than thirty days before trial? I can find no justification for the exclusion of otherwise admissible deposition testimony simply because the name of the witness was not included in answers to Interrogatories. Where is the surprise? Where is the ambush? What cards are not on the table?

Even a more horrible result has been obtained under the Rules. Plaintiffs and Defendants have also been denied the right to testify in their own case because they were not listed in answers to Interrogatories. What trial lawyer is not going to expect and be prepared for the testimony of the adverse party? It is impossible to justify the exclusion of the testimony of a named party in his own lawsuit. To allow this type of conduct is a major step in the total destruction of our system of justice.

TBW/1853/tlb/Supreme Court/01

Sometimes I fear that 38 years of law practice have made me so set in my ways that I oppose any change. Judge Baskin's letter gives me comfort in believing that my concerns expressed herein are not those of a crotchety, worn out trial lawyer.

I join Judge Baskin in requesting the Court to amend Rule 215.5 in such a manner as to afford fundamental fairness to all litigants and their attorney.

In addition, I feel that the Court should also provide by the Rules that a party might call as a witness anyone listed in answer to Interrogatories by any party, even though the party calling the witness did not list such name.

If a party knows enough about a person to list that person as one having knowledge of relevant facts concerning a case, it seems absurd to say that that party would be ambushed by the testimony of that witness as the trial.

Yours very truly,

BANKSTON, WRIGHT & GREENHILL
A Professional Corporation

By: _____
T. B. Wright

TBW/TLB

cc: Judge Pat M. Baskin
Mr. James V. Hammett

TBW/1853/tlb/Supreme Court/01

S: copy to Lake - current rules

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Sandra Sun for Letter / Note that I passed it on to Heckt

February 4, 1991

The Honorable Thomas R. Phillips
Chief Justice Texas Supreme Court
Supreme Court Building
P.O. Box 12248, Capitol Station
Austin, Texas 78711

RE: Private Process Servers/Eviction Cases

Dear Justice Phillips,

Our firm has the pleasure of representing a number of commercial and residential landlords in and around the Harris County area. We have learned that some groups may undertake an effort to try and convince the Texas Supreme Court that there is a need to expand the use of private process servers into the eviction area. Our firm opposes such a proposal.

Candidly, many private process firms appear to market fax machines and computer equipment while overlooking some of the ethical considerations of their particular task. We feel more comfortable with the Constables and the accountability that they have not only to the courts but to the electorate. In those rare instances where the question of service is raised, it is our experience that the methods of the Constable's organization are far more reliable, to say nothing of their greater creditability.

We understand that the effort to expand the use of private process servers into the eviction area may be due to isolated problems in certain communities. The last time I checked I believe that the sixteen Justice Courts in Harris County handle approximately 300,000 eviction annually. This process is and has been for some time a very smooth one. It operates efficiently. You seldom hear of any complaint regarding backlog. In fact, it operates so well that you simply do not hear about the eviction process very much. There is no need for private process servers in Harris County. Our local situation falls very much into that scenario that "if it isn't broke don't fix it".

I would respectfully suggest that the voters of those local communities that are experiencing problems are more than capable of addressing those deficiencies at the next election. In closing, we would think it entirely inappropriate to reward the

extraordinary effort of our local constables with a rule modification permitting the use of private process servers in eviction cases.

Sincerely,

HOOVER, BAX & SHEARER

Joe G. Bax

JGB:df

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Agenda
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February 6, 1991

The Honorable Tom Phillips
Chief Justice
Supreme Court of Texas
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The Honorable Raul A. Gonzalez
Associate Justice
Supreme Court of Texas
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The Honorable Oscar H. Mauzy
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The Honorable Eugene A. Cook
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The Honorable Jack Hightower
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The Honorable Nathan L. Hecht
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The Honorable Lloyd Doggett
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The Honorable John Cornyn
Associate Justice
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The Honorable Bob Gammage
Associate Justice
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Dear Justices Phillips, Gonzalez, Mauzy, Cook, Hightower, Hecht, Doggett, Cornyn and Gammage:

I have received a copy of Judge Pat Baskin's letter of January 23, 1991, addressed to the Court, concerning Rule 215, subdivision 5, and the interpretation of the rule in Sharp v. Broadway National Bank, 784 S.W.2d 669 (Tex. 1990). The purpose of this letter is to respectfully express my agreement with Judge Baskin's views.

As Judge Baskin notes concerning Rule 1, the "proper objective" of the rules is a just, fair and equitable adjudication of litigants' rights under substantive law. The rule continues that "(t)o the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction."

The results of the Sharp case are that as the result of the procedural rule or its interpretation, (1) a party has automatically lost its right to an adjudication of its rights under substantive law; (2) another party has gained substantively without being subject to a substantive adjudication of its obligations; and (3) a new lawsuit has been generated with attendant new expense to its guiltless party (the bank), its former lawyers and the state.

Is this the situation described by Judge Few Brewster in Alexander v. Hagedorn, 226 S.W.2d 996, 998 (Tex. 1950), where "the rules are not to be relaxed merely because it may appear in some particular case that an injustice has been done?" Or is this a reversion to the law's "primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal?", as expressed by Justice Cardozo in Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917).

I fear that as with Hagedorn, history will not look kindly upon Sharp. Far too much is wrong with its result and far too little is to be gained by strict adherence to the current rule. Like Judge Baskin, I urge that the rule be amended to allow the trial judge discretion to determine whether harm or surprise will result from a failure to timely designate an expert witness. Only in that way will Rule 215(5) conform to the overall objectives of the Rules of Civil Procedure.

Respectfully submitted,

Jim Hammett

James V. Hammett, Jr.

JVHJr:sks

jvha0291/42/ltr

PAT M. BASKIN
DISTRICT JUDGE
142ND DISTRICT COURT
P. O. BOX 1922
MIDLAND, TEXAS 79702
(915) 688-1134

January 23, 1991

Chief Justice Tom Phillips
Justice Raul A. Gonzalez
Justice Oscar H. Mauzy
Justice Eugene A. Cook
Justice Jack Hightower
Justice Nathan L. Hecht
Justice Lloyd Doggett
Justice John Cornyn
Justice Bob Gammage

The Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Re: Eliminating Automatic Sanctions Under Rule 215.5

Rule 1 of the Rules of Civil Procedure states that the objective of the rules is to "obtain a just, fair, . . . adjudication of the rights of litigants." Rule 215, subdivision 5, (Rule 215.5) sometimes runs counter to that objective, unnecessarily causing unjust and unfair disposition of the rights of litigants.

Rule 215.5 requires a trial court, on objection, to exclude the testimony of a witness who has not been timely identified in writing in response to an interrogatory, even when the objecting party is neither surprised nor harmed thereby. The Supreme Court says its reason for imposing automatic sanctions under Rule 215.5 is to avoid "the inevitable disputes over who said what when." Sharp v. Broadway National Bank, 784 S.W.2d 669, 671 (1990). The rule does that.

In its recent opinion in Alvarado v. Farah Manufacturing Company, Inc., 34 TX. Sup. Ct. J. 107, 109 (1990), the Court stated that the salutary purpose of the rule is to "prevent trial by ambush." The rule is certain to have accomplished that purpose in some cases, but it is equally certain that it has sometimes fostered, rather than prevented, trial by ambush.

That was the result in the Sharp case. A summary judgment disposed of all issues except the amount of attorney fees, which was to be determined at a bench trial. Twenty-six days before trial plaintiff's attorney served notice to defendant's attorney to take the deposition of the attorney fee expert. At the deposition, taken a week before trial, defendant's attorney cross-examined the witness.

Nothing in the Supreme Court's opinion suggests that defendant's attorney, after receiving the notice of deposition, did or said anything before trial date to indicate that he would oppose admission of the witness's testimony. On the day of trial defendant's attorney moved to exclude the testimony of the deposed witness, on the grounds that plaintiff's attorney had not identified the witness in writing more than thirty days before trial in response to an interrogatory. Defendant's attorney did not claim surprise, nor did he claim that he would have been better prepared to meet the witness's testimony if plaintiff had timely identified the witness in writing. He claimed only that he was entitled to have the evidence excluded.

It is difficult to imagine a more glaring case of ambush, with defendant's attorney "lying behind a log," expecting to entrap his opponent, and succeeding. Granted, if plaintiff's attorney had complied with the rule, he could not have been ambushed. However, that does not make the event any less an ambush, or the case result any less unfair.

But this is not to suggest that defendant's attorney did anything wrong. To the contrary, lawyers cannot rightly be faulted for not speaking out to save one another from the consequences of Rule 215.5, because the rule effectively requires them to deceive their brethren if they are to fully represent their clients. A lawyer cannot ethically warn his opponent that the trap is set and will soon be sprung, because doing so could violate his duty to his client, and constitute malpractice. The rigidity of the rule establishes in his client a valuable right, the voluntary relinquishment of which would contravene the client's interest.

Ambush-inducing rules are not new. Before 1941, the Rules of Civil Procedure harbored a number of hidden pitfalls, such as allowing lawyers to hide behind general demurrers. A major reason for adopting the new rules at that time was to attempt to eliminate ambush as a legitimate litigating tool. While it may not be possible to write a set of strong rules that will not permit ambushes, Rule 215.5 may be the first post-1941 rule that underwrites them. It encourages lawyers to hide the ball from opponents. Under the rule, as it is now written and interpreted, ambushes are inevitable.

By contrast, when lawyers deceive opponents by silence in other situations, they do not necessarily gain by it. There is an important difference between saving an opponent from losing his lawsuit because of Rule 215.5, on the one hand, and on the other hand, for example, reminding the opponent to amend his pleadings to comply with a court order. Rule 215.5 deprives the court of discretion to allow the testimony at trial if the notification

deadline passes without compliance, but the court does have the discretion to allow a forgetful lawyer to amend his pleadings. In the Rule 215.5 situation an attorney has absolute power to exclude testimony, and the court can't override him, but in the late-pleading situation the objecting attorney does not have that power, and the judge may allow repleading, without the objecting attorney's consent, if no unfair advantage will result to the offering attorney.

When an attorney waives his client's right to invoke Rule 215.5, he may be placing professional courtesy ahead of his duty to his client, because waiving that right may have the effect of "giving away" the whole lawsuit. When an unlisted witness's testimony is sine qua non to an entire cause of action or defense, the effect of excluding the testimony is to destroy the case of the attorney who offers the testimony, regardless of the merits of the case.

Although a lawyer may with impunity remain silent until the trial, then object to the testimony, some lawyers are nevertheless ambivalent about how to deal with the rule's implicit invitation to deceive. After years of accommodating opponents when they harmlessly slip up, many lawyers feel uncomfortable, if not downright sneaky, to sit by and watch an opposing lawyer "self-destruct" because of an oversight that doesn't injure anybody. They are offended to find themselves in the moral dilemma of having to choose between waiving important rights of their clients, and watching fellow lawyers publicly embarrass themselves.

But the consequence is worse than embarrassment. Failure to timely identify a witness in writing in response to an interrogatory constitutes negligence per se, for which the lawyer may be held liable, even if the offered testimony would no more harm the opponent than if a written designation had been timely provided.

Enforcing the present rule is destined to result in costly lawsuits against lawyers. Of course, it is not a proper function of the Supreme Court to shield lawyers from responsibility for their conduct, but neither should the Court maintain a rule that is nearly certain to entrap and punish lawyers, unless the rule is essential to the administration of justice. No lawyer should have to pay Rule 215.5-related damages in a case in which automatic sanctions were not necessary to a just result.

(The cost of lawyers' malpractice insurance affects the cost of legal services to the public, so it is perhaps appropriate to note that those premiums can be expected to increase if Rule 215.5 remains unchanged. Malpractice lawsuits will surely spring from its sanctions. And the injuries to clients, for which their lawyers will be liable, will often be monetarily substantial.)

There is another reason lawyers dislike remaining silent while watching opposing lawyers walk into traps. It is the feeling, common to all of us, that "there but for the grace of God go I." Private airplane pilots have a saying that there are only two kinds of pilots who fly planes with retractable landing gear, those who have landed with their wheels up, and those who will. Analagous fates await lawyers who run afoul of Rule 215.5, and it is statistically much more probable that an excellent lawyer will be trapped by his failure to identify a witness in writing, than that a mediocre pilot will have a wheels-up landing. (The air traffic controller in the tower, on noticing wheels up on final approach, has a duty to tell the pilot to put them down. Nobody has a duty to warn a Rule 215.5 victim that he is about to crash.)

It is nearly inconceivable that a litigating lawyer could practice law in Texas for, say, twenty years without forgetting to comply with Rule 215.5 at least once. Trial specialists may fall because their tickler systems fail, as they inevitably will, however meticulously maintained. Occasional litigators, knowing that the Rules of Civil Procedure are generally reasonable and forgiving, may forget the uniquely uncompromising threat of the rule.

Most of the preceding paragraphs contemplate that when an attorney offers testimony from a witness whom he has failed to timely identify in writing in response to an interrogatory, the trial court will proceed to trial and exclude the targeted testimony. But that is not necessarily so. Other avenues are open. The judge may postpone the trial, or if the violation is not brought to his attention until trial is underway or concluded, he may grant a new one. These options should be considered in light of the second part of Rule 1, which calls for attaining the rules' objectives "with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable . . ."

Postponing trials when the court and parties are ready for trial, and ordering new trials after they begin (or end,) undermine court efficiency and hinder efforts to proceed with dispatch. Postponements are costly to parties, witnesses, and courts. But it may be fairer to postpone a trial, or grant a new one, than to go to trial and exclude critical evidence because of one lawyer's failure to tell another lawyer in writing what both of them already knew.

Lawyers aren't the only ones who find it discomfitting to move to exclude evidence, when they have not been harmed by not receiving timely notice of it in writing. Trial judges feel the same way. After excluding evidence under Rule 215.5 a few times, and observing unfair results of whole cases because of my rulings, I have decided

that in the future I may postpone or terminate trials to avoid such harsh results. It is unsettling to see a meritorious case destroyed solely because of what laymen may call--with good reason--a "legal technicality."

While I do not presume to speak for the Justices of the 1984 Supreme Court, it is reasonable to suppose that they were aware that the automatic sanctions of Rule 215.5 might cause some undesirable results. If so, they probably anticipated that attorneys would soon recognize the rule's pitfalls and cease to make the mistake of failing to timely identify witnesses in response to interrogatories.

Whatever the rationale of the justices who adopted Rule 215.5, its six-year history is littered with unjust results flowing from automatic sanctions. A major reason that the problem persists is that it is extraordinarily easy for a lawyer to overlook this kind of default. I believe that Rule 215.5 cases will continue to occur in substantial numbers as long as the application of sanctions is automatic, with frequent unfair results of significant impact.

The following hypothetical facts illustrate just one of the many situations that make it easy to fall victim to Rule 215.5.

--Plaintiff's attorney prepares and investigates his case thoroughly before filing his petition.

--Defendant's attorney sends plaintiff's attorney a copy of his answer together with boilerplate interrogatories, including a request for a list of expert witnesses.

--Because plaintiff's attorney has worked up his case in advance, he immediately sends answers to interrogatories, listing all experts except his attorney fee witness.

--Plaintiff's attorney's reasons for not designating an attorney fee witness at that time may be many and varied.

(1) He knows there will be lots of lawyers available.

(2) He hopes to use a lawyer who is not otherwise occupied at the time of trial, possibly as a courtesy and without cost to his client, and there is no way to know who will be available many months later when the trial is expected to begin.

(3) Plaintiff's attorney cannot predict how much time will be required, and it is of little use to confer with the witness until the case is ready for trial.

(4) The attorney fee is so unrelated to the main case that it is not of any real concern to either lawyer in early stages of preparation, not only because the amount to be sought can't be known at that time, but also because, if the case settles early, the fee may never be a factor, so that neither lawyer needs early information about it to evaluate the case.

--Remembering to supplement answers many months later is difficult, especially if the lawyers have exchanged this kind of information orally.

(The above scenario deals with a plaintiff's witness, but both plaintiffs and defendants are falling victim to the rule. And all kinds of witnesses are being excluded, not just experts.)

The original purpose of Rule 215.5 must be served, i.e., no litigant should be permitted to ambush another. That purpose can be best served by a rule that requires, as now, timely identification of witnesses on request. The rule should, as now, place on each attorney the burden of his own compliance with the rules. And it is appropriate that the rule call for trial judges to require full revelation, rather than excusing failure to reveal. However, none of these criteria requires automatic sanctions.

No attorney should be made responsible for the opposing attorney's compliance with the rules. Nevertheless, the rules should not, as now, (1) reward an attorney (or his client) for standing silently by and watching his opponent commit an act of malpractice, (2) or place an attorney in a position of potential violation of his duty to his client if he reminds his opponent to amend his answer to interrogatories, or (3) endow one lawyer with the power to eliminate his opponent's case by the simple expedient of lying low.

Lawyers should be given strong incentives to work together in discovery. Without automatic sanctions, a lawyer seeking discovery will tend to persist in his efforts to get needed information, (1) because he will know that reminding his opponent to give him requested information will not breach a duty to his client, and (2) because, inasmuch as his discovery remains his own responsibility, he can't be sure that the judge will exclude the testimony despite the failure to supplement a response. He will be encouraged to ask again for the information, rather than to hope he won't get it so he can then exclude evidence. After all, a lawyer's goal in discovery is supposed to be to <u>get</u> information, not to <u>avoid</u> <u>getting</u> it.

If a lawyer wishes to work things out with an opposing lawyer,

he should be permitted to do so without subjecting himself to the charge of subverting the interests of his client. That is not now practical, and it will not be practical as long as the Rule 215.5 sanctions are automatic. It is enormously important to relieve conscientious lawyers of the concern that they may be doing their clients wrong when they cooperate with opposing counsel in an effort to see that everybody is ready for trial.

There is a gross fairness imbalance in a rule that allows a party to exclude a witness's testimony, when both parties know that the witness is expected to testify and what he will say. The rules should "let the punishment fit the crime." By analogy, it may be appropriate to send a defendant to prison for causing the death of a pedestrian by running a stop sign, but it is not appropriate to send a defendant to prison for a stop sign violation that causes neither personal injury nor property damage. When a lawyer breaches a discovery rule, but causes no injury, his client's case should not get the death penalty.

If a lawyer is of the sort who wants to ambush his opponent, and hopes his opponent will not designate the witness until after the deadline, he should be denied the tactic. It is important that the Rules of Civil Procedure not place a destructive weapon into his scheming hands. Furthermore, if a lawyer is not ready for trial, he should not be allowed the luxury of entering the courtroom knowing that either the trial will be postponed, thus enabling him to cover his own dilatory tracks, or the case will go to trial and his opponent will be deprived of the opportunity to present his case.

I suspect that every lawyer has at some time been negligent in the performance of a professional duty. Fortunately, most lawyers' negligent mistakes are corrected without harm to anybody. Not so, if the negligence falls under Rule 215.5. When a lawyer fails to identify a witness in response to an interrogatory at least thirty days before trial, he is not permitted to correct the oversight, even if his error is harmless. His negligence could conceivably cost him and/or his client millions of dollars, even when his opponent is not harmed by reason of not having received timely written notice.

Forgetfulness may not be good cause for a lawyer's failure to respond to an interrogatory, but the absence of harm to his opponent is--or should be--good cause for admitting the testimony. Fairness cries out for discretion to eliminate such unforgiving rigidity.

A couple of lawyers have told me about malpractice seminars they have attended. Both mentioned being told by instructors that when a defendant's attorney sends plaintiff's attorney a copy of defendant's answer, he should include with it a set of routine interrogatories,

including a request for lists of expert witnesses and other persons having knowledge of pertinent facts. One of the lawyers also mentioned that his instructor had noted that this would not only show diligence in preparing for trial, but it might also be the predicate for a serendipity, i.e., it might enable the defendant to exclude critical evidence if plaintiff's counsel should fail to identify a witness in response to the interrogatories. It thus appears that the trap of automatic sanctions under Rule 215.5 has become sufficiently notorious to gain a place in CLE programs.

Many laymen perceive court procedure as mischievously contrived, liberally sprinkled with hidden technicalities, and designed to trap the innocent. I believe that continuing the automatic application of sanctions under Rule 215.5 will reinforce the oftspoken lay belief that the law impedes justice as often as it promotes it.

Adopting The Texas Lawyer's Creed--A Mandate for Professionalism was a superb idea, and its wonderful effects are being seen in courts all over Texas. However, Rule 215.5 appears to clash with some of the clauses of the Creed. Lawyers who exercise their right to exclude opposing lawyers' evidence, (as in the Sharp case,) though unharmed by not getting timely written notice thereof, are often perceived by others as contemptuous of the Creed. That such a perception may not be fair does not prevent reasonable lawyers from feeling that way. The inescapable fact is that Rule 215.5 sanctions can and do engender antagonism among lawyers with long histories of mutual respect.

Some of the provisions of the Creed that are inharmonious with the rule are as follows:

"III. LAWYER TO LAWYER

"A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor cooperation, . . . (Emphasis added)

* * *

"2. I will not quarrel over matters of form or style, but I will concentrate on matters of substance.

* * *

"8. I will attempt to resolve by agreement my objections to matters contained in pleadings and discovery requests and responses."

Can a lawyer meet his obligation of "courtesy," "candor," and "cooperation," and at the same time remain silent, knowing that his opponent is unaware of having violated a discovery rule and will soon forfeit his right to introduce critical evidence? I suppose one can be silent and courteous at the same time. Perhaps saying nothing may not violate the duty of candor. And maybe the duty of cooperation is met by a lawyer as long as he is not actively obstructive. But can we really say that silence in such circumstances comports with high standards of courtesy, candor, and cooperation?

By item 2 of the list of Lawyer-to-Lawyer duties, a subscriber to the Creed promises not to "quarrel over matters of form," but "will concentrate on matters of substance." Is it accurate to say that the defendant's attorney in the Sharp case, in invoking his right to exclude the attorney fee testimony, was concentrating on matters of substance rather than form? Probably not. But Rule 215.5 invites disregard of substance in favor of form.

Item 8 urges lawyers to attempt to resolve by agreement "objections to matters contained in pleadings and discovery requests and responses." It is uncertain exactly what kinds of cases item 8 is intended to pertain to, and, specifically, whether it contemplates the kinds of cases being discussed in this letter. In any event the defendant's attorney in the Sharp case apparently did not attempt to resolve the matter in question "by agreement." (Again, it is not my intent to criticize Sharp's attorney for moving to exclude the testimony of the deposed expert, but rather to criticize the system that places attorneys in such awkward and dilemmatic positions.)

The Texas Lawyer's Creed is plainly intended to discourage some of the conduct that Rule 215.5 plainly encourages.

Most trial judges despise having to make decisions that require believing one lawyer and disbelieving another. Determining the truth in swearing matches between honorable lawyers ranks way up there among our most distasteful duties. So, when Rule 215.5 was adopted, it was welcome relief not to have to do that any more. However, it now appears that the remedy can be worse than the disease it sought to cure. We should be required to exercise discretion to prevent abuse of the discovery rules by either side. We should not permit lawyers to gain unfair advantage by hiding their witnesses, nor should we permit lawyers to gain unfair advantage by excluding timely discovered evidence, merely because the other lawyer failed to notify his opponent in writing.

As implied in the Sharp opinion, if you eliminate mandatory sanctions, there will undoubtedly be some "disputes over who said what when." And when we trial judges exercise discretion in these

matters, some of our decisions may cause bad results. But as long as we are forbidden to exercise discretion, some of our decisions will cause bad results.

This letter is intended as an appeal on behalf of two groups of people, to-wit: Group 1, those conscientious, courteous, efficient, ethical, hardworking lawyers who, like all of us, are sometimes negligent, and who sometimes make the honest, easy-to-make mistake of failing to supplement an interrogatory; Group 2, those conscientious, courteous, efficient, ethical, hardworking lawyers who deplore participating in the entrapment of the lawyers in Group 1. (Nearly every lawyer who is a member of one of these groups is, or eventually will be, a member of both, unless the rule is changed.)

It is also an appeal for denying ambush opportunities to the few less-than-scrupulous lawyers who long for an unfair edge.

I have discussed this topic with other trial judges and several lawyers on both sides of the docket. There is general agreement among them that the rules should be reformed to delete the requirement that sanctions be applied automatically.

I respectfully urge the Supreme Court to amend Rule 215.5, as soon as practicable, to eliminate mandatory sanctions.

Very truly yours,

Pat M. Baskin

cc: Members, State Bar Committee on Administration of Justice
Selected Judges and Lawyers

HJH

Agenda

M E M O R A N D U M

TO: Sub-Committee on Rules 166-216

FROM: Steve McConnico

IN RE: Report to Supreme Court Advisory Committee on February 9 and 10.

DATE: January 30, 1990

On Friday January 26, the subcommittee discussed the proposals for Rules 166-216. Bill Dorsaneo and Gilbert Adams attended the meeting in Dallas. Steve McConnico participated by telephone. Prior to the meeting, Anthony Sadberry provided written comments. Due to the small number of participants in this discussion, I encourage each of you to send comments you may have prior to the February 9 and 10 meeting. We plan to make the following recommendations concerning Rules 166-216 to the Supreme Court Advisory Committee. Our suggested additions are underlined twice, our suggested deletions are stricken through with a hyphen. The Rules cited are the proposals which appeared in the November, 1989, Texas Bar Journal.

As to TRCP 215, Phillip Gilbert of Dallas recommends specific limitations on those cases where extreme sanctions may be applied. Others have also suggested that there should be some limitation on the use of extreme sanctions. We believe this matter should be submitted to the COAJ for study.

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PATRICIA L. SESSA

September 15, 1989

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

RE: Proposed amendments, Texas Rules of Civil Procedure

Dear Mr. Chief Justice:

Several people have spoken to me about the proposed rules. Accordingly, I am taking this opportunity to furnish the court with my unsolicited advice. Perhaps this will elevate me to your "advisory" committee, for as our mutual friend, Tom Stovall, once said, "I am one of the Governor's advisors. He told me, 'Stovall, if I want your advice, I'll ask for it'." In any event, what follows are my comments on various proposals.

6. TRCP 215. I could find no proposed changes for this rule. I share the court's concern that there has been abuse of this rule, with people seeking sanctions on the slightest pretext. I think the court might consider going back to the rule that before sanctions can be assessed there must be a violation of a court order. Alternatively, there needs to be a strengthening of the rule in respect to frivolous initiating motions for sanctions.

Sincerely,

William W. Kilgarlin

DAN R. PRICE
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166
166a
166(b)
166(b)6
167a
168
169

November 28, 1989

Honorable Nathan L. Hecht
P.O. Box 12248
Austin, TX 78711

RE: Comment on Proposed Rules Changes Regarding Discovery

Dear Justice Hecht:

Rules 166b(6) and 215(5) = "Good Cause" Exception. With respect to the "good cause" exception to admit untimely disclosed evidence, Rule 166b(6) states that supplementation is required not less then 30 days before trial "unless the court finds that a good cause exists for permitting or requiring later supplementation," and Rule 215(5) states that late-supplemented evidence is excluded "unless the trial court finds that good cause sufficient to require admission exists." First, these two rules should be made to read exactly the same, or confusion will arise. I prefer the wording in Rule 215(5). Second, and more importantly, the wording in the present rules has caused several recent cases to expressly or impliedly hold that the "good cause" which must be shown only encompasses evidence related to whether the late-supplemented evidence should be or is required to be admitted into evidence. Most courts, including the Supreme Court, have expressly or impliedly held, and I believe correctly, that the "good cause" which must be shown must relate to why the discovery request was not timely supplemented. But, the rules are not clear on this point. I suggest clarifying the issue by the following amendments. Amend Rule 166b(6) to read as follows:

> A party. . . unless the court finds good cause exists for the late supplementation and that good cause exists for requiring late supplementation.

Then, amends Rule 215(5) to read as follows:

> A party . . . unless the court finds good cause exists for the failure to initially respond or for late supplementation and that good cause exists for requiring the admission of the undisclosed, improperly disclosed or untimely disclosed evidence.

Thus, the rules will read more like each other, and the "good cause" exception would expressly apply to (1) why the evidence was not properly/timely disclosed and (2) why such evidence is required to be admitted. This should settle any conflicting case law.

Riddle & Brown

Phillip W. Gilbert
Board Certified — Civil Trial Law
Texas Board of Legal Specialization

21b
166 a(d)
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November 22, 1989

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Justice Nathan L. Hecht
P. O. Box 12248
Austin, Texas 78711

Re: Proposed Amendments to Texas Court Rules

Dear Justice Hecht:

I am writing in connection with the proposed amendments to the Texas Court Rules. I have been practicing law in Texas since 1961. I am Board Certified in Civil Trial Law and in Civil Appellate Law by the Texas Board of Legal Specialization. As chairman of a litigation section in our law firm, I have become increasingly aware of a regressive tendency among Texas state courts to decide cases on the basis of "sanctions" rather than upon their merits.

As a victim of discovery delays and obstacles, I applaud the use of sanctions for discovery violations. However, use of the most extreme sanctions (stricken pleadings, default or dismissal) completely changes the course of an entire case and prevents the case from being decided on its merits. These extreme sanctions provide tremendous temptations to procure victory by a plaintiff or a defendant based upon the most inconsequential discovery mistakes by their opponent. At times, even when there was no violation, attorneys are able to convince trial courts that there was a violation, by the clever use of pure rhetoric combined with a measure of deception. Current review standards leave these miscarriages of justice largely unchecked.

The dangers to the judicial process in diverting a case from a trial on the merits are compounded by leaving the choice of sanctions completely in the hands of one person --the trial judge. The Federal system has recognized this jeopardy to the judicial system by requiring certain standards to be met before permitting these ultimate sanctions.

I would propose that Rule 215, Tex. R. Civ. P. be amended to provide, in a new paragraph 2d, as follows:

d. Standards for Extreme Sanctions. Before a trial court may make an order under paragraphs (3), (4) or (5) of paragraph 2b of this rule, the trial court must (1) base such sanctions on evidence of a contumacious refusal to provide discovery; (2) explain how lesser sanctions have been considered and why they are inadequate; (3) identify a nexus between the misconduct and any prejudice to the opponent; and (4) determine that the fault rests, at least partly, with the client rather than their attorney.

Unless corrected, the problem of improperly applied sanctions will act like a cancer on our state's jurisprudence. The federal courts have already recognized this problem and are dealing with it by court decision. It would be a great boon to our profession to have adequate standards appear in our rules of procedure. A system of cost awards and "fines" will police most discovery abuses without victimizing innocent plaintiffs and defendants. The ability to win cases by sanction has made our state trial courts battlegrounds for "Discovery Wars" and has diverted the trial courts from their primary task -- to try cases on their merits.

Some of the federal cases dealing with standards for extreme sanctions are as follows: John v. State of Louisiana, 828 F.2d 1129, 1132 (5th Cir. 1987); Marshall v. Segona, 821 F.2d 763, 768 (5th Cir. 1980); M.E.N. Co. v. Control Fluidics, Inc., 834 F.2d 869, 873 (10th Cir. 1987); Shea v. Donohoe Construction Co., 795 F.2d 1071, 1075 (D.C. Cir. 1986); Fjelstad v. American Honda Motor Co., 762 F.2d 1334, 1338 (9th Cir. 1985); Halaco Engineering v. Costle, 843 F.2d 376, 381 (9th Cir. 1988); Dove v. Codesco, 569 F.2d 807, 810 (4th Cir. 1978). The above proposal combines principles expressly set forth in Halaco and John, supra.

I understand that Justice Kilgarlin has proposed some similar moderation to the extreme sanctions itemized in Rule 215. Although he and I have virtually opposite views in many areas, we apparently agree that the current Texas sanctions system is seriously defective.

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April 9, 1991

Mr. Steve McConnico
Scott, Douglass & Keeton
12th Floor, First City Bank Bldg.
Austin, Texas 78701-2494

Re: Proposed Changes to TRCP 215a

Dear Steve:

Enclosed please find a proposed amendment to TRCP 215a. 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.

Sincerely,

LUTHER H. SOULES III

LHSIII/hhd
Enclosure
cc: Honorable Nathan L. Hecht
Honorable Bob L. Thomas

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[Proposed] Rule 215a. Abuse of Discovery; Sanctions

1. Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

a. Appropriate court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to any district court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

b. Motion.

(1) If a party or other deponent which is a corporation or other entity fails to make a designation under Rules 200(2)(b), 201(4) or 208; or

(2) if a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails:

(a) to appear before the officer who is to take his deposition, after being served with a proper notice; or

(b) to answer a question propounded or submitted upon oral examination or upon written questions; or

(3) if a party fails:

(a) to serve answers or objections to interrogatories submitted under Rule 168, after proper service of the interrogatories; or

(b) to answer an interrogatory submitted under Rule 168; or

(c) to serve a written response to a request submitted under Rule 167, after proper service of the request; or

(d) to respond that discovery will be permitted as requested or to permit discovery as requested in response to a request submitted under Rule 167; or

(e) to provide a statement requested under Rule 166b(2)(g) the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion pursuant to Rule 166b.

(c) Evasive or Incomplete Answer. For purposes of this subdivision an evasive of incomplete answer is to be treated as a failure to answer.

(d) Disposition of Motion: Award of Expenses. If the motion is granted, the court shall, after opportunity for hearing, require a party or deponent or attorney who necessitated the motion or any of them, to pay the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

In determining the amount of reasonable expenses, including attorney's fees, to be awarded in connection with a motion, the trial court shall award expenses which are reasonable in relation to the amount of work reasonably expended in obtaining an order compelling compliance or in opposing a motion which is denied.

2. Failure to Comply with Order.

a. Sanctions by court in district where deposition is taken. If a deponent fails to appear or to be sworn or to answer a question after being directed to do so by a district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

b. Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party of a person designated under Rules 200(2)(b), 201(4) or 208 to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under paragraph 1 of this rule or Rule 167a, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(1) An order disallowing any further discovery of any kind or of a particular kind by the disobedient party;

(2) An order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party of his attorney or both;

(3) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action

in accordance with the claim of the party obtaining the order;

(4) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(5) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(6) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(7) Where a party has failed to comply with an order under Rule 167a(1) requiring him to produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay at a time specified by the court, the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. An order of the court upon this matter shall be subject to appellate review on appeal from the trial judgment.

c. Sanction against nonparty for violation of Rule 167. If a nonparty fails to comply with an order under Rule 167 the court which made the order may treat the failure to obey as a contempt of court.

3. Failure to Comply with Rule 169.

a. Deemed Admission. Each matter of which an admission is requested shall be deemed admitted unless, within the time provided by Rule 169, the party to whom the request is directed serves upon the party requesting the admissions a sufficient written answer or objection in compliance with the requirements of Rule 169, addressed to each matter of which an admission is requested. For purposes of this subdivision an evasive or incomplete answer may be treated as a failure to answer.

b. Motion. The party who has requested the admission may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified it shall order than an answer be served. If the court determines that an answer does not comply with the requirements of Rule 169, it may order either that the matter is admitted or that an amended answer be served. The provisions of paragraph d of subdivision 1 of this rule apply to the award of expenses incurred in relation to the motion.

c. Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 169 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless if finds that (1) the request was held objectionable pursuant to Rule 169(1), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

4. Failure to make Supplementation of Discovery Response in Compliance with Rule 166b. A party who fails to seasonably supplement his response to a request for discovery in accordance

with paragraph 5 of Rule 166b shall not be entitled to present evidence which the party was under a duty to provide in a supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter when the information required by Rule 166b concerning the witness has not been disclosed, unless the trial court finds that good cause sufficient to require admission exists.

PLAYING BY THE RULES

Recent Amendments to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence Effective December 1, 1991

by John K. Chapin

On April 30, 1991, the Supreme Court transmitted to Congress a number of changes to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence. These changes are to take effect on December 1, 1991. Following is a discussion of the major changes. Other insubstantial changes were made to F.R.A.P. 6, 10, 26, and 26.1.

FEDERAL RULES OF CIVIL PROCEDURE

(TRCP 216-236)

Jurors—Rules 47 and 48

Under the amended Rules, the current Rule 47(b) authorizing alternate jurors is abolished. New Rule 47(b) provides for peremptory challenges as provided by 28 U.S.C. 1870 (three per party; court has discretion to consider several plaintiffs or several defendants as one party for purposes of making challenges).

New Rule 47(c) provides that the court may for good cause excuse a juror from service during trial or deliberation. According to the Advisory Committee, the court may thus excuse a juror during trial or deliberations without causing a mistrial. This rule must be read in conjunction with new Rule 48, which states that the court shall seat a jury of not fewer than six and not more than twelve, and that all jurors shall participate in the verdict unless excused from service under new Rule 47(c). Unless the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members. The current Rule 48 has been rendered obsolete by the adoption by many districts of local rules establishing six as the standard size for a civil jury. According to the Advisory Committee, because alternate jurors have been abolished by new Rule 47, it will ordinarily be necessary under the new rules to seat more than six jurors to provide for sickness or disability among jurors. An illness will then not result in a mistrial because all seated jurors will participate in the verdict and a sufficient number will remain to render a unanimous verdict of six or more.

RECOMMENDED NEW RULE
RELATIVE TO REQUEST AND FEE FOR A JURY TRIAL

Rule 216. Request and Fee for Jury Trial

1. **Request.** Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than thirty days after the service of the last pleading directed to such issue, or not less than thirty days in advance of the date set for trial of the cause on the non-jury docket, whichever is earlier. Such demand may be endorsed upon a pleading of the party. [~~No jury trial shall be had in any civil suit, unless a written request for a jury trial is filed with the clerk of the court a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than thirty days in advance.~~]

2. **Jury Fee.** A fee of ten dollars if in the district court and five dollars if in the county court must be deposited with the clerk of the court within the time for making a written request for a jury trial. The clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet.

3. **By the Court.** Issues not demanded for trial by jury as provided by paragraph 1 herein, shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the curt in its discretion, upon motion and payment of the proper fee, may order a trial by a jury of any or all issues.

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January 11, 1990

TO: SUPREME COURT ADVISORY COMMITTEE

FROM: Subcommittee on Rules 15 to 165

At our subcommittee meeting held on January 8, 1990, we considered (i) the various comments made at the public hearing held on November 30, 1989 addressing the proposed changes in the Texas Rules of Civil Procedure, (ii) the written suggestions and comments of attorneys forwarded to our subcommittee, and (iii) additional proposals for rule changes. The persons participating in the meeting were David Beck, Pat Beard, and Elaine Carlson. The conclusions reached at the meeting were as follows:

16. Rule 216. The proposed change here seeks to make the request for a jury trial consistent with the practice in federal court in which a party must make a demand for trial within a prescribed period of time after the filing of the first pleading. The subcommittee is of the view that the rule was only recently amended, effective January 1, 1988, and that there is *no* compelling reason for change at the present time.

4543.001

JUDGE B. F. (BILL) COKER
3823 Calculus Drive
Dallas, Texas 75244
(214) 247-8974

December 30, 1989

Mr. Luther H. Soules
Chairman, Rules Advisory Committee
175 E. Houston Street
San Antonio, Texas 78205-2230

Re: Suggested rule changes

Dear Mr. Soules:

Enclosed are recommended changes and additions to the Texas Rules of Civil Procedure. Additions to existing rules and new rules are designated by underlined text of the rule. Portions of existing rules which are deleted are enclosed in brackets and lined through. Please submit these suggestions to your committee for consideration.

Request and Fees for a Jury Trial:

I recommend that Texas adopt a modified version of Rules 38(b) and 39(b), Federal Rules of Civil Procedure.

Texas courts are being subjected to greater and greater scrutiny relative to their efficiency. Many people accept the idea that our judicial system was not intended to be efficient. I am on of those people. However, it is reasonable to incorporate efficiencies where those efficiencies do not detract from the judiciary's obligation to provide a proper forum for the resolution of disputes.

Frequently, the court's ability to schedule and manage its docket is hampered, if not frustrated, by late requests for cases to be decided by a jury. Many times these late requests are part of a trial strategy intended to frustrate the opposing party. Many times attorneys come to expect judges to overlook the attorneys' failure to make a timely request for a jury.

Better discipline in the timeliness of requesting a jury has the potential to help attorneys, clients, and courts.

My recommendation is to require jury requests to be made within thirty days after the service of the live trial pleadings, or not later than thirty days before trail date, whichever is earlier.

Such a requirement will permit court personnel to provide better management over the business aspects of the court without significantly reducing any party's right to a jury trial.

A copy of my proposed change to Rules 216 is attached to this letter.

4/25

HHD,
Sc Ct Agenda
re SubC
J. Hecht.

TRCP 226

MEMORANDUM

TO: MEMBERS OF THE ADMINISTRATION OF JUSTICE COMMITTEE

FROM: J. PATRICK HAZEL

DATE: APRIL 18, 1991

RE: PROPOSED AMENDMENTS TO TEXAS RULES OF CIVIL PROCEDURE
Rules 226, 226a, 236, and 271 - 279
AND ARTICLE FOR THE TEXAS BAR JOURNAL

Well, this is the way it has gone to the Texas Bar Journal. I have attempted making the changes as voted on in the last meeting. I hope I did them the way the committee indicated.

In my own estimation these proposals are far and away better than what we now have and what the Supreme Court Advisory Committee last proposed. Undoubtedly there are many things about this that are imperfect. I only wish we had more time to do it right, i.e. get more suggestions from practitioners, judges, and others of our committee. Unfortunately the time press that we are in prevents us doing that.

We shall see how it goes. Please let me know if you have any comments yourselves.

PRESENT RULE

Rule 226. Oath to Jury Panel

Before the parties or their attorneys begin the examination of the jurors whose names have thus been listed, the jurors shall be sworn by the court or under its direction, as follows: "You, and each of you, do solemnly swear that you will true answers give to all questions propounded to you concerning your qualifications as a juror, so help you God."

PROPOSED AMENDMENT

Rule 226. ~~Oath to~~ Jury Panel's Oath or Affirmation

Before the start of the ~~parties or their attorneys begin~~ voir dire examination of the jury panel, ~~jurors whose names have thus been listed,~~ the jury panel ~~jurors~~ shall be sworn by the court or under the court's ~~its~~ direction, as follows: "Do ~~Y~~you~~, and each of you, do~~ solemnly swear or affirm that you will give true answers ~~give~~ to all questions asked ~~propounded to~~ you concerning your qualifications as a juror, so help you God? Answer 'I do.'"

CLEAN VERSION OF PROPOSAL

Rule 226. Jury Panel's Oath or Affirmation

Before the start of the voir dire examination of the jury panel, the jury panel shall be sworn by the court or under the court's direction, as follows: "Do you solemnly swear or affirm that you will give true answers to all questions asked you concerning your qualifications as a juror, so help you God? Answer 'I do.'"

PROPOSED CHANGE TO RULE 226a
Adopted by the Committee on Court Rules February 20, 1993

Exact wording of existing Rule:

RULE 226a. ADMONITORY INSTRUCTIONS TO JURY PANEL AND JURY

The court shall give such admonitory instructions to the jury panel and to the jury as may be prescribed by the Supreme Court in an order or orders entered for that purpose.

(Added July 20, 1966, eff. Jan. 1, 1967; amended July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Note: This is a new rule, effective January 1, 1967.

Approved Instructions

Pursuant to the provisions of Rule 226a, Texas Rules of Civil Procedure, it is ordered [July 20, 1966] by the Supreme Court of Texas, effective January 1, 1967; January 1, 1971; February 1, 1973; December 5, 1983, effective April 1, 1984:

I.

That the following oral instructions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the jurors after they have been sworn as provided in Rule 226 and before the voir dire examination:

Ladies and Gentlemen of the Jury Panel:

The case that is now on trial is _____ vs. _____. This is a civil action which will be tried before a jury. Your duty as jurors will be to decide the disputed facts. It is the duty of the judge to see that the case is tried in accordance with the rules of law. In this case, as in all cases, the actions of the judge, parties, witnesses, attorneys and jurors must be according to law. The Texas law permits proof of any violation of the rules of proper jury conduct. By this I mean that jurors and others may be called upon to testify in open court about acts of jury misconduct. I instruct you, therefore, to follow carefully all instructions which I am now going to give you, as well as others which you will receive while this case is on trial. If you do not obey the instructions I am about to give you, it may become necessary for another jury to re-try this case with all of the attendant waste of your time here and the expense to the litigants and the taxpayers of this county for another trial. These instructions are as follows:

1. Do not mingle with nor talk to the lawyers, the witnesses, the parties, or any other person who might be connected with or interested in this case, except for casual greetings. They have to follow these same instructions and you will understand it when they do.

2. Do not accept from, nor give to, any of those persons any favors however slight, such as rides, food or refreshments.

3. Do not discuss anything about this case, or even mention it to anyone whomsoever, including your wife or husband, nor permit anyone to mention it in your hearing until you are discharged as jurors or excused from this case. If anyone attempts to discuss the case, report it to me at once.

4. The parties through their attorneys have the right to direct questions to each of you concerning your qualifications, background, experiences and attitudes. In questioning you, they are not meddling in your personal affairs, but are trying to select fair and impartial jurors who are free from any bias or prejudice in this particular case.

a. Do not conceal information or give answers which are not true. Listen to the questions and give full and complete answers.

b. If the attorneys ask some questions directed to you as a group which require an answer on your part individually, hold up your hand until you have answered the questions.

Do you understand these instructions? If not, please let me know now.

Whether you are selected as a juror for this case or not, you are performing a significant service which only free people can perform. We shall try the case as fast as possible consistent with justice, which requires a careful and correct trial. If selected on the jury, unless I instruct you differently, you will be permitted to separate at recesses and for meals, and at night.

The attorneys will now proceed with their examination.

II.

That the following oral and written instructions, with such modifications as the circumstances of the particular case may require shall be given by the court to the jury immediately after the jurors are selected for the case:

Oral Instructions

Ladies and Gentlemen:

By the oath which you take as jurors, you become officials of this court and active participants in the public administration of justice. I now give you further instructions which you must obey throughout this trial.

It is your duty to listen to and consider the evidence and to determine fact issues later submitted to you, but I, as judge, will decide matters of the law. You will now receive written instructions which you will observe during this trial, together

with such other instructions as I may hereafter give, or as heretofore I have given to you.

(A copy of the written instructions set out below in this Section II shall thereupon be handed to each juror.)

As you examine the instructions which have just been handed to you, we will go over them briefly together. The first three instructions have previously been stated, and you will continue to observe them throughout the trial. These and the other instructions just handed to you are as follows:

(The written instructions set out below in this Section II shall thereupon be read by the court to the jury.)

Counsel, you may proceed.

Written Instructions

1. Do not mingle with nor talk to the lawyers, the witnesses, the parties, or any other person who might be connected with or interested in this case, except for casual greetings. They have to follow these same instructions and you will understand it when they do.

2. Do not accept from, nor give to, any of those persons any favors however slight, such as rides, food or refreshments.

3. Do not discuss anything about this case, or even mention it to anyone whomsoever, including your wife or husband nor permit anyone to mention it in your hearing until you are discharged as jurors or excused from this case. If anyone attempts to discuss the case, report it to me at once.

4. Do not even discuss this case among yourselves until after you have heard all of the evidence, the court's charge, the attorneys' arguments and until I have sent you to the jury room to consider your verdict.

5. Do not make any investigation about the facts of this case. Occasionally we have a juror who privately seeks out information about a case on trial. This is improper. All evidence must be presented in open court so that each side may question the witnesses and make proper objection. This avoids a trial based upon secret evidence. These rules apply to jurors the same as they apply to the parties and to me. If you know of, or learn anything about, this case except from the evidence admitted during the course of this trial, you should tell me about it at once. You have just taken an oath that you will render a verdict on the evidence submitted to you under my rulings.

6. Do not make personal inspections, observations, investigations, or experiments nor personally view premises, things or articles not produced in court. Do not let anyone else do any of these things for you.

7. Do not tell other jurors your own personal experiences nor those of other persons, nor relate any special information. A juror may have special knowledge of matters such as business, technical or professional matters or he may have expert knowledge or opinions, or he may know what happened in this or some other lawsuit. To tell the other jurors any of this information is a violation of these instructions.

8. Do not discuss or consider attorney's fees unless evidence about attorney's fees is admitted.

9. Do not consider, discuss, nor speculate whether or not any party is or is not protected in whole or in part by insurance of any kind.

10. Do not seek information contained in law books, dictionaries, public or private records or elsewhere, which is not admitted in evidence.

At the conclusion of all the evidence, I may submit to you a written charge asking you some specific questions. You will not be asked, and you should not consider, whether one party or the other should win. Since you will need to consider all of the evidence admitted by me, it is important that you pay close attention to the evidence as it is presented.

The Texas law permits proof of any violation of the rules of proper jury conduct. By this I mean that jurors and others may be called upon to testify in open court about acts of jury misconduct. I instruct you, therefore, to follow carefully all instructions which I have given you, as well as others which you later receive while this case is on trial.

You may keep these instructions and review them as the case proceeds. A violation of these instructions should be reported to me.

III.

That the following written instructions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the jury as part of the charge:

Ladies and Gentlemen of the Jury:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

(Definitions, questions and special instructions given to the jury will be transcribed here.)

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

_____

Judge Presiding

CERTIFICATE

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

(To be signed by the presiding juror if unanimous.)

_____

Presiding Juror

(To be signed by those rendering the verdict if not unanimous.)

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	

IV.

That the following oral instructions shall be given by the court to the jury after the verdict has been accepted by the court and before the jurors are discharged:

The court has previously instructed you that you should observe strict secrecy during the trial and during your deliberations, and that you should not discuss this case with anyone except other jurors during your deliberations. I am now about to discharge you. After your discharge, you are released from your secrecy. You will then be free to discuss the case and your deliberations with anyone. However, you are also free to decline to discuss the case and your deliberations if you wish.

After you are discharged, it is lawful for the attorneys or other persons to question you to determine whether any of the standards for jury conduct which I have given you in the course of this trial were violated and to ask you to give an affidavit to that effect. You are free to discuss or not to discuss these matters and to give or not to give an affidavit.

(Instructions amended July 15, 1987, eff. Jan. 1, 1988; amended Dec. 16, 1987; corrected Jan. 28, 1988.)

Notes and Comments

Change by amendment effective April 1, 1984: The word "foreman" is changed to Presiding Juror.

Proposed Amendment: Rule 226a

Rule 226a. ~~Admonitory~~ Instructions to Jury Panel and Jury.

The ~~court~~ judge shall give ~~such admonitory~~ the following instructions to the jury panel and to the jury ~~as may be prescribed by the Supreme Court in an order or orders entered for that purpose~~. If the case is to tried to a six-person jury, the references to ten or eleven jurors in these instructions should be changed to read "five." New

Part 1 - Jury Panel

~~That the following oral instructions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the jurors.~~ After ~~they~~ the members of the panel have been sworn as provided in Rule 226 and before the voir dire examination, the judge shall read the following instructions, with such modifications as the circumstances of the particular case may require, to the jury panel.

The case that is now on trial is _____ v. _____. This is a civil lawsuit ~~action~~ that will be tried before a jury. Your duty as jurors will be to decide the disputed facts. It is the duty of the judge to see that the case is tried in accordance with the rules of law. ~~In this case, as in all cases, the actions of the judge, parties, witnesses, attorneys and jurors must be according to law. The Texas law permits proof of any violation of the rules of proper jury conduct. By this I mean that jurors and others may be called upon to testify in open court about acts of jury misconduct.~~ It is very important that you follow carefully all instructions that I give you now and later during the trial ~~which I am now going to give you, as well as others which you will receive while this case is on trial.~~ If you do not obey these instructions ~~the instructions I am about to give you~~, it may become necessary for another jury to retry this case with all of the attendant waste of your time here and the expense to the litigants and the taxpayers of this county for another trial.

1. Do not mingle with or talk with the parties, the lawyers, the witnesses, or any other person who might be connected with or interested in this case, except for casual greetings. You may not even have casual conversation about things completely unrelated to this lawsuit with any of those people. ~~They have to follow these same instructions and you will understand it when they do.~~

2. Do not accept ~~from, nor give to, any of those persons~~ any favors ~~however slight~~ from these people, and do not give them any favors. You must avoid even slight favors, such as rides, food, or refreshments.

3. Do not discuss ~~anything about~~ this case ~~, or even mention it to anyone whomsoever, including your wife or husband, nor permit anyone to mention it in your hearing until you are discharged as jurors or excused from this case~~ with anyone, including your spouse. Do not let anyone discuss the case in your presence. If anyone ~~attempts to discuss this case~~ tries to talk about the case with you or in your hearing, tell ~~report it to~~ me immediately ~~at once~~.

4. The attorneys will now have an opportunity to talk with you about the case and the people involved, and to ask you some questions about your backgrounds, experiences, attitudes, and opinions. ~~The parties through their attorneys have the right to direct questions to each of you concerning your qualifications, background, experiences, and attitudes. In questioning you, they are not meddling in your personal affairs, but are trying to select fair and impartial jurors who are free from any bias or prejudice in this particular case.~~ Listen to the questions and give true ~~full~~and complete answers. Do not conceal information ~~or give answers which are not true~~. If you cannot hear or understand the questions, please let me know.

5. ~~4b.~~ ~~If the attorneys ask some questions directed to you as a group which require an answer on your part individually, hold up your hand until you have answered the questions.~~ If a question is asked of the whole panel that requires an answer from you, please raise your hand, and keep it raised long enough for everyone to make a quick note of the people who responded.

~~Do you understand these instructions? If you, please let me know now.~~

~~Whether you are selected as a juror for this case or not, you are performing a significant service which only free people can perform. We shall try the case as fast as possible consistent with justice, which requires a careful and correct trial. If selected on the jury, unless I instruct you differently, you will be permitted to separate at recesses and for meals, and at night.~~

~~The attorneys will now proceed with their examination.~~

Part 2 - Jury

~~That the following oral and written instructions, with such modifications as the circumstances of the particular case may require shall be given by the court to the jury immediately after the jurors are selected for the case:~~
Immediately after the jurors are selected and have been sworn as provided in Rule 236, the judge shall give each juror a copy of the following written instructions and then read them to the jury.

Written Instructions

By ~~the~~ your oath ~~which you take as jurors~~, you ~~become~~ are now officials of this court, and active participants in the ~~public~~ administration of justice. ~~I now give you further instructions which you must obeet throughout this trial.~~

~~It is your duty to listen to and consider the evidence and to determine fact issues later submitted to you, but I, as judge, will decide matters of the law. You will now receive written instructions which you will observe during this trial, together with such other~~

See new paragraph 3

~~instructions as I may hereafter give, or as heretofore I have given to you. (A copy of the written instructions set out below in this Section II shall thereupon be handed to each juror.) As you examine the instructions which have just been handed to you, we will go over them briefly together. The first three instructions have previously been stated, and you will continue to observe them throughout the trial. These and the other instructions just handed to you are as follows:~~ It is essential to the administration of fair and impartial justice that you follow these instructions:

See paragraph 1

1. You must continue to obey the instructions I gave you earlier. Do not talk about the case with anyone, and do not have any contact with the parties, attorneys, witnesses, or other interested persons outside the courtroom. ~~Do not mingle with nor talk to the lawyers, the witnesses, the parties, or any other person who might be connected with or interested in this case, except for casual greetings. They have to follow these same instructions and you will understand it when they do.~~

~~2. Do not accept from, nor give to, any of those persons any favors however slight, such as rides, food or refreshments.~~

See paragraph 1

~~3. Do not discuss anything about this case, or even mention it to anyone whomsoever, including your wife or husband nor permit anyone to mention it in your hearing until you are discharged as jurors or excused from this case. If anyone attempts to discuss this case, report it to me at once.~~

See paragraph 1

2. Do not even discuss the case among yourselves until ~~after~~ you have heard all of the evidence, the court's charge, and the attorneys' arguments, and ~~until~~ I have sent you to the jury room to begin your deliberations ~~consider your verdict.~~

3. You are the judges of the facts of this case. It is your duty to listen to and consider carefully the evidence admitted under my rulings, and to answer the specific questions about the facts that I will submit to you in writing in the court's charge.

From second introductory paragraph

4. In arriving at your verdict, you can consider only the evidence admitted during the trial. Do not

make any investigation about the facts of this case. ~~Occasionally we have a juror who privately seeks out information about a case on trial. This is improper. All evidence must be presented in open court so that each side may question the witnesses and make proper objection. These rules apply to jurors the same as they apply to the parties and to me. If you know of, or learn anything about, this case except from the evidence admitted during the course of this trial, you should tell me about it at once. You have just taken an oath that you will render a verdict on the evidence submitted to you under my rulings.~~ Do not seek out any information contained in documents, books, or records that are not in evidence. Do not make personal inspections or observations outside the courtroom. Do not let anyone else do any of these things for you. This avoids a trial based upon secret evidence.

~~6. Do not make personal inspections, observations, investigations, or experiments nor personally view premises, things, or articles not produced in court. Do not let anyone else do any of these things for you.~~

See paragraph 4

~~7. Do not tell other jurors your own personal experiences nor those of other persons, nor relate any special information. A juror may have special knowledge of matters such as business, technical or professional matters or he may have expert knowledge or opinions, or he may know what happened in this or some other lawsuit. To tell the other jurors any of this information is a violation of these instructions.~~

Moved to Part 3 - Court's Charge

5. The law is determined by the legislature and courts of this state. You are obligated to follow my instructions about the law, regardless of whether you think the law is right or wrong.

New

6. During the presentation of evidence, the attorneys may make legal objections. If an objection to a question is sustained, disregard the question, and do not speculate as to why it was asked or what the answer would have been. If an objection to a witness's answer is sustained, disregard that answer. It is not in evidence, and should not be considered. Do not speculate about or consider for any reason the objections or my rulings themselves.

New

~~8. Do not discuss or consider attorneys' fees unless evidence about attorneys' fees is admitted.~~

Moved to Part 3 - Court's Charge

~~9. Do not consider, discuss, nor speculate whether or not any party is or is not protected in whole in part by insurance of any kind.~~

Moved to Part 3 - Court's Charge

~~10. Do not seek information in law books, dictionaries, public or private records or elsewhere, which is not admitted in evidence.~~

~~At the conclusion of all the evidence, I may submit to you a written charge asking you some specific questions. You will not be asked, and you should not consider, whether one party or the other should win. Since you will need to consider all of the evidence admitted by me, it is important that you pay close attention to the evidence as it is presented.~~

~~The Texas law permits proof of any violation of the rules of proper jury conduct. By this I mean that jurors and others may be called upon to testify in open court about acts of jury misconduct. I instruct you, therefore, to follow carefully all instructions which I have given you, as well as others which you later receive while this case is on trial.~~

~~You may keep these instructions and review them as the case proceeds. A violation of these instructions should be reported to me.~~

I stress again that it is imperative that you follow these instructions, as well as any others that I may later give you. If you do not obey these instructions, then it may become necessary for another jury to re-try this case with all of the attendant waste of your time here and the expense to the litigants and the taxpayers of this county for another trial. Keep your copy of these instructions, and refer to them should any question arise about the rules that govern your conduct during this trial. A violation of any instruction must be reported to me as soon as possible.

Part 3 - Court's Charge

~~That~~ The following written instructions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the jury as part of the charge:

1. This case is submitted to you by asking questions about the facts ~~which you must decide from the evidence you have heard in this trial~~. Your answers must be based only upon the evidence, including exhibits, admitted during the trial.

2. In considering the evidence, you are bound to follow the law set forth in this charge, as well as all instructions concerning jurors' conduct that you have been given. — New emphasis

3. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony ~~but in matters of law, you must be governed by the instructions in this charge~~.

~~In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.~~ — See paragraph 2

4. ~~1.~~ Do not let bias, prejudice, or sympathy play any part in your deliberations.

~~2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.~~ — See paragraph 1

5. Do not become a secret witness by telling other jurors about other incidents, experiences, or lawsuits. Do not tell other jurors about any special knowledge, information, or expertise you may have. — Moved from Part 2

You must confine your deliberations to the evidence presented in open court. This avoids a trial based upon secret evidence.

6. Do not discuss or consider attorneys' fees. [Omit when attorneys' fees are in issue.] Moved from Part 2

7. Do not discuss or consider whether insurance protects any party. [Omit when coverage is in issue.] Moved from Part 2

8. This charge includes all legal instructions and definitions that are necessary to assist you in reaching your verdict, so do not seek out any information in law books or dictionaries. Moved from Part 2

9. ~~3. Since~~ Every answer ~~that is~~ required by the charge is important, ~~no juror should state or consider that any required answer is not important~~.

10. ~~4. You must not~~ Do not decide who you think should win and then try to answer the questions accordingly. Simply answer the questions, and do not ~~discuss or~~ concern yourselves with the effect of your answers.

11. ~~5. You will not~~ Do not decide ~~the answer to~~ a question by ~~lot or by drawing straws or by~~ any ~~other~~ method of chance.

12. ~~5. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by~~ Do not answer a question that calls for a numerical answer by adding together each juror's figure and dividing by the number of jurors to get an average.

13. ~~5.~~ Do not do any trading on your answers. That is, one juror must not agree to answer ~~a certain~~ one question ~~one~~ a certain way if other jurors will agree to answer another question ~~another~~ a certain way.

14. After you retire to the jury room, you will select ~~your own~~ a presiding juror. ~~The first thing the presiding juror will do is to have this complete charge read aloud and then~~ You will then deliberate upon your answers ~~to the questions asked~~.

15. It is the duty of that presiding juror:

a. to preside during the deliberations to provide order and compliance with the charge;

b. to write, sign, and deliver to the bailiff any communication to me; New

c. to conduct the vote; and

d. to write your answers in the spaces provided.

16. ~~6.~~ You may render your verdict on the vote of ten or more members of the jury, but the same ten or more must agree upon each of the answers made, including subparts ~~and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less that ten jurors.~~

17. If the verdict ~~and all of the answers therein~~ is reached by unanimous agreement, the presiding juror ~~shall~~ will sign the verdict on the certificate page for the entire jury.

18. If the verdict is less than unanimous, the ten or eleven jurors who agree to each and every answer will sign the verdict individually on the certificate page. ~~If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.~~

19. If you observe a violation of my instructions outside the jury room, by either a juror or any other person, you must report that to me. New

20. During your deliberations, ~~the presiding juror or~~ any ~~other~~ juror who observes a violation of my ~~the court's~~ instructions shall ~~immediately warn the one who is violating the same~~ point out the violation and caution the offending juror not to violate the instruction ~~do so~~ again.

~~These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys, and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.~~

21. You must not discuss the case with anyone, not even with other members of the jury, unless all of the jurors are in the jury room. If anyone other than a juror tries to talk to you about the case before you reach a verdict, tell me immediately. New

22. When all required questions have been answered, the presiding juror has written your answers on the charge, and the verdict has been signed, you will summon the bailiff and be returned to court with your verdict. New

[Questions, definitions, and instructions to be placed here.]

Certificate

We, the jury, have answered the ~~above and foregoing~~ questions as shown ~~herein indicated~~, and ~~herewith~~ return these answers to ~~same into~~ court as our verdict.

Signature of presiding juror, if unanimous. [One signature line here] ~~(To be signed by the presiding juror if unanimous.)~~

Signatures of jurors voting for the verdict, if not unanimous: [11 signature lines here] ~~(To be signed by those rendering the verdict if not unanimous.)~~

Part 4 - Jury Release

The judge shall give the jury the following oral instructions after accepting the verdict and then release them. ~~That the following oral instructions shall be given by the court to the jury after the verdict has been accepted by the court and before the jurors are discharged.~~

I ~~The court has~~ earlier instructed you to ~~that you should~~ observe strict secrecy during the trial, not to ~~and that you should not~~ discuss this case with anyone except other jurors while you were

deliberating. I am ~~now~~ about to discharge you. Once I have done that ~~after your discharge~~, you are released from that and all of the other orders that I gave you ~~from your secrecy~~. You will ~~then~~ be absolutely free to discuss anything about the case ~~and your deliberations~~ with anyone. ~~However,~~ You will be just as ~~are also~~ free to decline to talk about ~~discuss~~ the case ~~and your deliberations~~ if that is your decision ~~you wish~~.

~~After you are discharged, it is lawful for the attorneys or other persons to question you to determine whether any of the standards for jury conduct which I have given you in the course of this trial were violated and to ask you to give an affidavit to that effect. You are free to discuss or not to discuss these matters and to give or not to give an affidavit.~~

[Judge's commendation of jurors and the important service they have performed may be added here.]

Rule 226. Oath to Jury Panel

Before the parties or their attorneys begin the examination of the jury panel ~~jurors whose names have thus been listed~~, the jurors shall be sworn by the court or under its direction as follows: "Do you~~, and each of you, do~~ solemnly swear or affirm that you will give true answers ~~true answers give~~ to all questions asked of ~~propounded to~~ you concerning your qualifications as a juror, so help you God?"

Rule 236. Jurors' Oath

The jury shall be sworn by the court or under its direction as follows: "Do you~~, and each of you, do~~ solemnly swear or affirm that ~~in all cases between parties which shall be to you submitted~~, you will return a true verdict ~~a true verdict render~~ according to the law stated in the court's charge ~~as it may be given you in charge by the court~~ and to the evidence submitted to you under the rulings of this court, so help you God?"

COMMENT to Rule 226a: The proposed changes are based upon recommendations made by the Supreme Court Task Force dealing with jury instructions. The changes are cosmetic and tend to improve the readability of the instructions.

3/23

HFP, SCAC Sub Co. Agenda ✓ J. Hecht.

March 11, 1993

Mr. Luther H. Soules, III
1st Republic Bank Plaza
Tenth Floor
175 East Houston Street
San Antonio, Texas 78205-2230

RE: Committee on Court Rules

Dear Luke:

I'm sure you'll be surprised to hear from me but I was asked to work for the committee one more year to just attend meetings and prepare the minutes. The new secretary to the committee is Emily Casstevens who is with the Services Department of the State Bar. Her number is 512/463-1515 in case you need to contact her.

At its meeting held February 20, 1993, the Court Rules Committee approved amendments to three Rules, these being Rule 174(b), Rule 226a and Rule 292.

The exact wording of the existing Rules, the proposed amendments as adopted and the comments relating thereto are enclosed.

With my very best wishes, I remain

Sincerely,

Evelyn A. Avent

Enclosures
Copies w/enclosures to:
J. Shelby Sharpe, Chair of the Court Rules Committee
Emily Casstevens, Secretary to the Committee

JIM PARKER
6118 MOUNTAIN VILLA COVE
AUSTIN, TEXAS 78731

June 11, 1991

Professor J. Patrick Hazel
University of Texas School of Law
727 East 26th Street
Austin, Texas 78705

Re: Proposed Rule Changes relating to Jury Charges published in the May 1991 Texas Bar Journal

Dear Professor Hazel:

I have no comments on proposed Rules 226, 236, 273, and 274, but I am writing regarding the other proposed Rules.

Proposed Rule 226a

Rule 226a has not been amended since Tex. R. Civ. Evid. 606(b) became effective. Are the new instructions regarding proof of jury misconduct correct and appropriate in light of Tex. R. Civ. Evid. 606(b)?

Why is "you are performing a significant service which only free people can perform" being replaced with language about doing a civic duty? This hardly shows pride in our jury system.

Proposed Rule 271

(1)(a)(vi) This is the only portion of the proposed Rule dealing with the specific wording of specific questions to be asked. Why is percentage causation singled out for specific attention in the proposed Rule instead of being addressed generally under (1)(a)(i)? Furthermore, by getting this specific in the proposed Rule, a future rule change will be required if this specific area is changed by statute or case law.

Proposed Rule 272

(5)(b)(ii) The need for a request when a question or an element thereof is omitted should be made clear in the proposed Rule instead of being only in an explanatory instruction (the first sentence of your footnote 19). Otherwise, there is a conflict in the wording of proposed Rule 272(5)(b)(ii) and proposed Rule 274(2).

F:\JPARKER\MISC\HAZEL.1

I know that there are many highly qualified people involved in this important process, but I offer my assistance if I can be of help.

Sincerely,

Jim Parker

Jim Parker
(H) 458-2909
(W) 322-8109

cc: Honorable Nathan Hecht
P.O. Box 12248
Capitol Station
Austin, Texas 78711

Luther Soules
Chair, Supreme Court Advisory Committee
175 East Houston Street
10th Floor
San Antonio, Texas 78205-2230

F:\JPARKER\MISC\HAZEL.1

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JIM PARKER
6118 MOUNTAIN VILLA COVE
AUSTIN, TEXAS 78731

June 11, 1991

HHD SCAC Agenda

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Luther Soules
Chair, Supreme Court Advisory Committee
175 East Houston Street
10th Floor
San Antonio, Texas 78205-2230

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4/25

HHD,
SCAC Agenda
✓ SubC
J. Hecht.

TRCP 226a

MEMORANDUM

TO: MEMBERS OF THE ADMINISTRATION OF JUSTICE COMMITTEE

FROM: J. PATRICK HAZEL

DATE: APRIL 18, 1991

RE: PROPOSED AMENDMENTS TO TEXAS RULES OF CIVIL PROCEDURE
Rules 226, 226a, 236, and 271 - 279
AND ARTICLE FOR THE TEXAS BAR JOURNAL

Well, this is the way it has gone to the Texas Bar Journal. I have attempted making the changes as voted on in the last meeting. I hope I did them the way the committee indicated.

In my own estimation these proposals are far and away better than what we now have and what the Supreme Court Advisory Committee last proposed. Undoubtedly there are many things about this that are imperfect. I only wish we had more time to do it right, i.e. get more suggestions from practitioners, judges, and others of our committee. Unfortunately the time press that we are in prevents us doing that.

We shall see how it goes. Please let me know if you have any comments yourselves.

PRESENT RULE

Rule 226a. Admonitory Instructions to Jury Panel and Jury

The court shall give such admonitory instructions to the jury panel and to the jury as may be prescribed by the Supreme Court in an order or orders entered for that purpose.

APPROVED INSTRUCTIONS

Pursuant to the provisions of Rule 226a, Texas Rules of Civil Procedure, it is ordered [July 20, 1966] by the Supreme Court of Texas, effective January 1, 1967; January 1, 1971; February 1, 1973; December 5, 1983, effective April 1, 1984:

I.

That the following oral instructions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the jurors after they have been sworn as provided in Rule 226 and before the voir dire examination:

Ladies and Gentlemen of the Jury Panel:

The case that is now on trial is____ vs. _____. This is a civil action which will be tried before a jury. Your duty as jurors will be to decide the disputed facts. It is the duty of the judge to see that the case is tried in accordance with the rules of law. In this case, as in all cases, the actions of the judge, parties, witnesses, attorneys and jurors must be according to law. The Texas law permits proof of any violation of the rules of proper jury conduct. By this I mean that jurors and others may be called upon to testify in open court about acts of jury misconduct. I instruct you, therefore, to follow carefully all instructions which I am now going to give you, as well as others which you will receive while this case is on trial. If you do not obey the instructions I am about to give you, it may become necessary for another jury to re-try this case with all of the attendant waste of your time here and the expense to the litigants and the taxpayers of this county for another trial. These instructions are as follows:

1. Do not mingle with nor talk to the lawyers, the witnesses, the parties, or any other person who might be connected with or interested in this case, except for casual greetings. They have to follow these same instructions and you will understand it when they do.
2. Do not accept from, nor give to, any of those persons any favors however slight, such as rides, food or refreshments.
3. Do not discuss anything about this case, or even mention it to anyone whomsoever, including your wife or husband, nor permit anyone to mention it in your

hearing until you are discharged as jurors or excused from this case. If anyone attempts to discuss the case, report it to me at once.

4. The parties through their attorneys have the right to direct questions to each of you concerning your qualifications, background, experiences and attitudes. In questioning you, they are not meddling in your personal affairs, but are trying to select fair and impartial jurors who are free from any bias or prejudice in this particular case.

a. Do not conceal information or give answers which are not true. Listen to the questions and give full and complete answers.

b. If the attorneys ask some questions directed to you as a group which require an answer on your part individually, hold up your hand until you have answered the questions.

Do you understand these instructions? If not, please let me know now.

Whether you are selected as a juror for this case or not, you are performing a significant service which only free people can perform. We shall try the case as fast as possible consistent with justice, which requires a careful and correct trial. If selected on the jury, unless I instruct you differently, you will be permitted to separate at recesses and for meals, and at night.

The attorneys will now proceed with their examination.

II.

That the following oral and written instructions, with such modifications as the circumstances of the particular case may require shall be given by the court to the jury immediately after the jurors are selected for the case:

ORAL INSTRUCTIONS

Ladies and Gentlemen:

By the oath which you take as jurors, you become officials of this court and active participants in the public administration of justice. I now give you further instructions which you must obey throughout this trial.

It is your duty to listen to and consider the evidence and to determine fact issues later submitted to you, but I, as judge, will decide matters of the law. You will now receive written instructions which you will observe during this trial, together with such other instructions as I may hereafter give, or as heretofore I have given to you.

(A copy of the written instructions set out below in this Section II shall thereupon be handed to each juror.)

As you examine the instructions which have just been handed to you, we will go over them briefly together. The first three instructions have previously been stated, and you will

continue to observe them throughout the trial. These and the other instructions just handed to you are as follows:

(The written instructions set out below in this Section II shall thereupon be read by the court to the jury.)

Counsel, you may proceed.

WRITTEN INSTRUCTIONS

1. Do not mingle with nor talk to the lawyers, the witnesses, the parties, or any other person who might be connected with or interested in this case, except for casual greetings. They have to follow these same instructions and you will understand it when they do.

2. Do not accept from, nor give to, any of those persons any favors however slight, such as rides, food or refreshments.

3. Do not discuss anything about this case, or even mention it to anyone whomsoever, including your wife or husband nor permit anyone to mention it in your hearing until you are discharged as jurors or excused from this case. If anyone attempts to discuss the case, report it to me at once.

4. Do not even discuss this case among yourselves until after you have heard all of the evidence, the court's charge, the attorneys' arguments and until I have sent you to the jury room to consider your verdict.

5. Do not make any investigation about the facts of this case. Occasionally we have a juror who privately seeks out information about a case on trial. This is improper. All evidence must be presented in open court so that each side may question the witnesses and make proper objection. This avoids a trial based upon secret evidence. These rules apply to jurors the same as they apply to the parties and to me. If you know of, or learn anything about, this case except from the evidence admitted during the course of this trial, you should tell me about it at once. You have just taken an oath that you will render a verdict on the evidence submitted to you under my rulings.

6. Do not make personal inspections, observations, investigations, or experiments nor personally view premises, things or articles not produced in court. Do not let anyone else do any of these things for you.

7. Do not tell other jurors your own personal experiences nor those of other persons, nor relate any special information. A juror may have special knowledge of matters such as business, technical or professional matters or he may have expert knowledge or opinions, or he may know what happened in this or some other lawsuit. To tell the other jurors any of this information is a violation of these instructions.

8. Do not discuss or consider attorney's fees unless evidence about attorney's fees is admitted.

9. Do not consider, discuss, nor speculate whether or not any party is or is not protected in whole or in part by insurance of any kind.

10. Do not seek information contained in law books, dictionaries, public or private records or elsewhere, which is not admitted in evidence.

At the conclusion of all the evidence, I may submit to you a written charge asking you some specific questions. You will not be asked, and you should not consider, whether one party or the other should win. Since you will need to consider all of the evidence admitted by me, it is important that you pay close attention to the evidence as it is presented.

The Texas law permits proof of any violation of the rules of proper jury conduct. By this I mean that jurors and others may be called upon to testify in open court about acts or jury misconduct. I instruct you, therefore, to follow carefully all instructions which I have given you, as well as others which you later receive while this case is on trial.

You may keep these instructions and review them as the case proceeds. A violation of these instructions should be reported to me.

III.

That the following written instructions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the jury as part of the charge:

Ladies and Gentlemen of the Jury:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any

trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten* or more members of the jury. The same ten* or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten* jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

(Definitions, questions and special instructions given to the jury will be transcribed here.)

*"five" in the case of a jury of six members.

IV.

That the following oral instructions shall be given by the court to the jury after the verdict has been accepted by the court and before the jurors are discharged:

The court has previously instructed you that you should observe strict secrecy during the trial and during your deliberations, and that you should not discuss this case with anyone except other jurors during your deliberations. I am now about to discharge you. After your discharge, you are released from your secrecy. You will then be free to discuss the case and your deliberations with anyone. However, you are also free to decline to discuss the case and your deliberations if you wish.

After you are discharged, it is lawful for the attorneys or other persons to question you to determine whether any of the standards for jury conduct which I have given you in the course of this trial were violated and to ask you to give an affidavit to that effect. You are free to discuss or not to discuss these matters and to give or not to give an affidavit.

PROPOSED AMENDMENT - CLEAN VERSION

Rule 226a. Instructions to Jury Panel and Jury

The judge shall give such instructions to the jury panel and to the jury as set forth in this rule.

Part 1 - Jury Panel

After the members of the panel have been sworn or affirmed as provided in Rule 226 and before the voir dire examination, the judge shall read the following oral instructions to the jury panel.

JURY PANEL MEMBERS:

This lawsuit is _____ vs. _____. It is a civil case before a jury. My duty, as a judge, is to conduct a trial under rules of law. Therefore, you must carefully follow my instructions during the trial. These instructions are as follows:

1. Do not talk with the parties, the lawyers, the witnesses, or other interested persons about the case, except for casual greetings. These people have the same instructions.

2. Do not accept any favors from these people, and do not give them favors. You must avoid even slight favors, such as rides, food, or refreshments.

3. Do not discuss this case with anyone, including your spouse, and do not permit anyone to discuss it in your hearing until I release you to do so. If anyone tries to talk to you about the case, tell me immediately.

4. The parties or their lawyers have the right to ask you about your qualifications, background, experiences, and attitudes. These questions are intended to help in selecting impartial jurors and eliminating persons with any bias or prejudice about the case.

5. Listen to the questions and give true and complete answers. Do not conceal information. If you cannot hear or understand the questions, please let me know.

6. If the panel is asked a question that requires an answer from you, raise your hand.

7. If you see another person violating my instructions, immediately caution that person not to do so again.

8. I may be asked to review your conduct. Disregarding these instructions will be jury misconduct and may require another trial by another jury.

9. If you do not understand these instructions, inform me now.

10. Whether you are chosen as a juror or not, you are performing an important civic duty, and you are to be commended.

The parties will now proceed with their questions.

Part 2 - Jury

Immediately after the jurors are selected and have been sworn or affirmed as provided in Rule 226, the judge shall give each juror a copy of the following written instructions. The judge shall then read to the jury the written instructions.

Written Instructions

JURY MEMBERS:

Your juror's oath or affirmation makes you an officer of the Court and a participant in this trial. You must carefully follow all earlier instructions as well as these written instructions.

As you examine the instructions just handed you, we will review them together. The first three instructions were stated earlier and you will continue to observe them during this trial.

1. Do not talk with the parties, the lawyers, the witnesses, or other interested persons about the case, except for casual greetings. These people have the same instructions.

2. Do not accept any favors from these people, and do not give them favors. You must avoid even slight favors, such as rides, food, or refreshments.

3. Do not discuss this case with anyone, including your spouse, and do not permit anyone to discuss it in your hearing until I release you to do so. If anyone tries to talk to you about the case, tell me immediately.

4. You have just taken an oath that you will return a verdict based on the evidence. Consider only evidence admitted in open court. If you learn anything about the case except from the evidence admitted in open court, tell me immediately.

5. Do not make personal inspections, observations, investigations, or experiments about the case. Do not personally view premises or articles not produced in court. Do not let anyone else do any of these things for you.

6. Do not seek information in law books, dictionaries, public or private records, or elsewhere that is not admitted in evidence.

7. When the evidence is completed, I will submit the Court's Charge with written questions for you to answer. Since you are to consider all the evidence I admit, you must pay careful attention to that evidence.

8. Do not discuss the case among yourselves until after you have heard all the evidence, the Court's charge, and the attorney's arguments and have retired to the jury room.

9. If you see another juror violating my instructions, immediately caution that juror not to do so again.

10. I may be asked to review your conduct. Disregarding these instructions will be jury misconduct and may require another trial by another jury.

11. Keep these instructions and review them as the case proceeds. Tell me at once about any violation of these rules.

The parties will now proceed with their opening statements.

Part 3 - Court's Charge

The judge shall give the jury the following written instructions, modified as required by the circumstances of the particular case, as part of the charge.

COURTS CHARGE

JURY MEMBERS:

I submit this case to you for answers to questions. In discharging this responsibility, follow all previous instructions as well as these additional ones:

1. In answering a question, consider only the testimony and exhibits admitted by me and any instructions I give you. You are entitled to have all admitted exhibits with you in the jury room.

2. You alone decide whether to believe the testimony of any witness and any admitted exhibit and how much weight to give them. My instructions govern in matters of law.

3. Do not let bias, prejudice, or sympathy affect your answers.

4. Every question is important. It is improper to state or consider that any required answer is not important.

5. Do not consider attorney's fees. [Omit when attorney's fees are an issue.]

6. Do not consider whether insurance protects any party. [Omit when coverage is an issue.]

7. Do not tell other jurors about any special knowledge, information, opinions, or experiences of a business, technical, or professional nature that you or anyone else has. Do not tell what happened in other lawsuits.

8. Do not discuss the case with anyone but other jurors; only do so when all jurors are present and assembled in the jury room. If anyone other than a juror tries to talk to you about the case before you reach a verdict, whether at the courthouse, your home, or elsewhere, inform me immediately.

9. Your conduct is reviewable. Disregarding these instructions will be jury misconduct and may require another trial by another jury.

10. If you see another juror violating my instructions, immediately caution that juror not to do so again.

11. After you retire to the jury room, first select a presiding juror. The presiding juror will then read aloud the complete Court's Charge. Then deliberate on your answers to the questions asked.

12. You may reach your verdict on a vote of ten or more jurors. The same ten or more jurors must agree on all answers. [Use "five" instead of "ten" in cases of six-person juries.][7]

13. The presiding juror's duties are:

a. to preside during the deliberations;

b. to conduct the deliberations in an orderly manner, following the instructions in the Court's Charge;

c. to write and hand to the bailiff any communications about the case that you wish to have delivered to me;

d. to vote on the questions;

e. to write the answer to each question in the space provided;

f. if the verdict is unanimous, to sign the verdict in the space provided for the presiding juror's signature, or, if the verdict is less than unanimous, to get the signatures of all the jurors who agree with the verdict.

14. The court will assist you in determining your schedule for deliberations, breaks, and meals.

15. When you have answered all questions and properly signed the verdict, inform the bailiff. When you return to the courtroom with your verdict, the presiding juror will hand me the verdict.

[Definitions, questions, and special instructions given to the jury will be transcribed here.]

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7. Note that #'s 12 - 15 are presently not in Rule 226a. They are contained in Texas Pattern Jury Charges. It seems appropriate to include them here.

JUDGE PRESIDING

JURY'S VERDICT

We, the jury, have answered the questions as shown and return these answers to Court as our Verdict.

Signature of presiding juror, if unanimous.

Presiding Juror

Signatures of jurors voting for the verdict, if not unanimous.

Part 4 - Jury Release

The judge shall give the jury the following oral instructions after accepting the verdict and, thereby, release them.

JURY MEMBERS:

Earlier I instructed you to observe strict secrecy during the trial and your deliberations and not to discuss this case with anyone except other jurors during your deliberations. I am now about to release you.

When you are released, you may then discuss the case and your deliberations with anyone, although you are free to decline to do so. After you are released, it will be lawful for the attorneys or anyone else to question you to determine whether any of the instructions I have given you about jury conduct were violated and to ask you to give an affidavit to that effect. You are free to discuss these matters or not and to give an affidavit or not.

Thank you for your service as jurors in this case. You have performed an important civic duty.

You are now released.

MEMORANDUM

TO: Justice Nathan L. Hecht
FROM: Steve Tyler
RE: Proposal to Amend TRCP 232 to Include Procedures for Compliance with Batson and the Cases Following It.
DATE: December 1, 1992

I have recently written a paper on the future of peremptory challenges following Batson v. Georgia and its progeny, including Edmonson v. Leesville Concrete which applied Batson to civil cases. One of my primary conclusions in that paper was that Batson needs to be codified to establish the procedures for its application in Texas trial courts. The United States Supreme Court in Batson expressly left it to the states to fashion their own methods of compliance with the ruling and their own remedies for its violation as well.

The Legislature has already moved in this direction, enacting article 35.261 of the Code of Criminal Procedure in 1987. This provision, which sets forth the time period for Batson objections, the burden of proof and the remedy, serves as a model for modifying the civil rules to provide in rule form what is now established only in case law.

The best reason for these changes is the need to move the basic procedures for Batson challenges out of the case law and into the rules to achieve clarity and uniformity of practice. This will prevent time being wasted arguing and deciding such basic points such as when a Batson objection should have been raised or what the remedy is for a violation.

While it is true that there have been very few civil cases reaching the Texas Supreme Court alleging Batson violations, it is impossible to predict how many might appear as trial attorneys become increasingly aware of the availability of Batson challenges through Edmonson. These two cases provide a ready vehicle for the reversal of civil cases based only on the race-based exclusion of one member of a particular racial group from a venire through the peremptory challenge. Even if there continue to be very few cases appealed to this Court, it certainly does not hurt to have these procedures and remedies set down in the rules for ready reference by trial attorneys and judges alike.

Batson is now six years old, and through several cases the Supreme Court has not wavered in its support of Batson and has, in fact, expanded it. It does not seem likely therefore that Batson will be overruled, though it may perhaps be further clarified, expanded or streamlined. In any case, there are not likely to be any changes in the Supreme Court's stance on peremptory challenges any time soon that would require frequent amendment of a basic rule outlining procedures and remedies for handling

92-00717

Batson objections. Considering that the laws from which the current TRCP 232 was drawn was passed in 1876, it would seem that it is about time to bring the peremptory challenge in line with 20th century practice.

My recommendation is to adapt CCP 35.261 to civil use. Not only is this easier than drawing up a new rule from scratch, it will help to do away with many of the cases that are often required to define and settle a new rule for everyday use. This is because CCP 35.261 has already been extensively litigated and its terms and procedures defined by the Court of Criminal Appeals. The statute seems to have served its purpose well in criminal cases, where Batson objections are used much more often. It provides for when a Batson objection should be made, the burden of proof and the remedy that is available. It need do no more than that. Of course, it is possible to write out more complex and detailed procedures, but that is not really necessary.

Making this change is not difficult in itself, as it does not require changes to any other rules. It is also not doing anything new or creating new rights. The rights contained in the rule already exist through Batson and later cases. All this rule does is define that which the Supreme Court expressly left it to the states to define and settle two of the most common questions that arise with Batson objections, namely, when they should be made and the appropriate remedy. The rule contains a burden of proof already set out in Batson, as modified by Powers and Edmonson. There is nothing new or controversial here; it is just a logical, clarifying codification of existing law for easier reference by Texas courts and practitioners.

In the following pages, I have set out Rule 232 as it now exists, in edited form to show the changes proposed and as it will look following its amendment. For your convenience, I have also provided a copy of CCP 35.261.

Thank you for your consideration.

RULE 232

Present Form

RULE 232. MAKING PEREMPTORY CHALLENGES

If there remain on such lists not subject to challenge for cause, twenty-four names, if in the district court, or twelve names, if in the county court, the parties shall proceed to make their peremptory challenges. A peremptory challenge is made to a juror without assigning any reason therefor.

RULE 232

Proposal

RULE 232. MAKING PEREMPTORY CHALLENGES

(a) If there remain on such lists not subject to challenge for cause, twenty-four names, if in the district court, or twelve names, if in the county court, the parties shall proceed to make their peremptory challenges. A peremptory challenge is made to a juror without assigning any reason therefor, except as provided in paragraph (b) of this rule.

(b) After the parties have delivered their lists to the clerk under Rule 234 and before the court has impanelled the jury, a party may request the court to dismiss the array and call a new array in the case. The court shall grant the request if the court determines: (1) that the party making the request for dismissal of the array is a member of an identifiable racial group; (2) that the attorney representing the other party exercised one or more peremptory challenges for the purpose of excluding persons from the jury on the basis of their race; (3) that the party requesting dismissal of the array has offered evidence of relevant facts that tend to show that discretionary challenges made by the attorney representing the other party were made for reasons based on race. If the party making the request for dismissal of the array meets these requirements, then he has established a prima facie case and the burden then shifts to the attorney representing the other party to give a racially neutral explanation for the challenges. The burden of persuasion remains with the party requesting dismissal of the array to establish purposeful discrimination.

(c) If the court determines that the attorney representing the other party challenged prospective jurors on the basis of race, the court shall call a new array in the case.

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RULE 232

Clean Proposal

RULE 232. MAKING PEREMPTORY CHALLENGES

(a) If there remain on such lists not subject to challenge for cause, twenty-four names, if in the district court, or twelve names, if in the county court, the parties shall proceed to make their peremptory challenges. A peremptory challenge is made to a juror without assigning any reason therefor, except as provided in paragraph (b) of this rule.

(b) After the parties have delivered their lists to the clerk under Rule 234 and before the court has impanelled the jury, a party may request the court to dismiss the array and call a new array in the case. The court shall grant the request if the court determines; (1) that the party making the request for dismissal of the array is a member of an identifiable racial group; (2) that the attorney representing the other party exercised one or more peremptory challenges for the purpose of excluding persons from the jury on the basis of their race; (3) that the party requesting dismissal of the array has offered evidence of relevant facts that tend to show that peremptory challenges made by the attorney representing the other party were made for reasons based on race. If the party making the request for dismissal of the array meets these requirements, then he has established a prima facie case and the burden then shifts to the attorney representing the other party to give a racially neutral explanation for the challenges. The burden of persuasion remains with the party requesting dismissal of the array to establish purposeful discrimination.

(c) If the court determines that the attorney representing the other party challenged prospective jurors on the basis of race, the court shall call a new array in the case.

12.01-21

Texas Code of Criminal Procedure art. 35.261

Peremptory Challenges Based on Race Prohibited

(a) After the parties have delivered their lists to the clerk under Article 35.26 of this code and before the court has impanelled the jury, the defendant may request the court to dismiss the array and call a new array in the case. The court shall grant the motion of a defendant for dismissal of the array if the court determines that the defendant is a member of an identifiable racial group, that the attorney representing the state exercised peremptory challenges for the purpose of excluding persons from the jury on the basis of their race, and that the defendant has offered evidence of relevant facts that tend to show that challenges made by the attorney representing the state were made for reasons based on race. If the defendant establishes a prima facie case, the burden then shifts to the attorney representing the state to give a racially neutral explanation for the challenges. The burden of persuasion remains with the defendant to establish purposeful discrimination.

(b) If the court determines that the attorney representing the state challenged prospective jurors on the basis of race, the court shall call a new array in the case.

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HHD,
SCAC Agenda
✓ SubC
J. Hecht.

TRCP 236

MEMORANDUM

TO: MEMBERS OF THE ADMINISTRATION OF JUSTICE COMMITTEE

FROM: J. PATRICK HAZEL

DATE: APRIL 18, 1991

RE: PROPOSED AMENDMENTS TO TEXAS RULES OF CIVIL PROCEDURE
Rules 226, 226a, 236, and 271 - 279
AND ARTICLE FOR THE TEXAS BAR JOURNAL

Well, this is the way it has gone to the Texas Bar Journal. I have attempted making the changes as voted on in the last meeting. I hope I did them the way the committee indicated.

In my own estimation these proposals are far and away better than what we now have and what the Supreme Court Advisory Committee last proposed. Undoubtedly there are many things about this that are imperfect. I only wish we had more time to do it right, i.e. get more suggestions from practitioners, judges, and others of our committee. Unfortunately the time press that we are in prevents us doing that.

We shall see how it goes. Please let me know if you have any comments yourselves.

PRESENT RULE

Rule 236. Oath to Jury

The jury shall be sworn by the court or under its direction, in substance as follows: "You, and each of you, do solemnly swear or affirm that in all cases between parties which shall be to you submitted, you will a true verdict render, according to the law stated, as it may be given you in charge by the court, and to the evidence submitted to you under the rulings of the Court? So help you God."

PROPOSED AMENDED RULE

Rule 236. ~~Oath to Jury~~ Jurors' Oath or Affirmation.

The jury shall be sworn by the court or under the court's ~~its~~ direction~~, in substance~~ as follows: "Do y~~Y~~ou~~, and each of you, do~~ solemnly swear or affirm that in the ~~all~~ cases ~~between parties~~ that ~~which~~ will ~~shall~~ be ~~to you~~ submitted to you, you will ~~a true verdict~~ render~~,~~ a verdict according to the law stated in the Court's Charge~~, as it may be given you in charge by the court,~~ and ~~to~~ the evidence submitted to you under the rulings of this ~~the~~ Court, so help you God? ~~So help you God.~~ Answer 'I do.'"

CLEAN VERSION OF AMENDED RULE

Rule 236. Jurors' Oath or Affirmation

The jury shall be sworn by the court or under the court's direction as follows: "Do you solemnly swear or affirm that in the case that will be submitted to you, you will render a verdict according to the law stated in the Court's Charge and the evidence submitted to you under the rulings of this Court, so help you God? Answer 'I do.'"

Rule 241 [Repealed].

Rule 242. Evidence needed for Default Judgment

(a) Discretion of the Court. Where the plaintiff has given notice of the amount, or the amounts, to be requested against the defendant, or all of several defendants, the court in its discretion, may require evidence as to plaintiff's claim, or claims, or any part thereof.

(b) Where Evidence is Required by the Court. As to any portion of plaintiff's claim for which the court has elected to require evidence pursuant to sub-paragraph (a), the court shall hear evidence as to damages and shall render judgment therefore.

(c) Where Evidence not Required by the Court. As to every portion of plaintiff's claim for which the court has not elected to require evidence pursuant to sub-paragraph (a), the court shall enter judgment in the amount, or the amounts, requested pursuant to Rule 47a.

Rule 243. [Repealed].

4543.001

JUDGE B. F. (BILL) COKER
3823 Calculus Drive
Dallas, Texas 75244
(214) 247-8974

December 30, 1989

Mr. Luther H. Soules
Chairman, Rules Advisory Committee
175 E. Houston Street
San Antonio, Texas 78205-2230

Re: Suggested rule changes

Dear Mr. Soules:

Enclosed are recommended changes and additions to the Texas Rules of Civil Procedure. Additions to existing rules and new rules are designated by underlined text of the rule. Portions of existing rules which are deleted are enclosed in brackets and lined through. Please submit these suggestions to your committee for consideration.

My recommendations relate to changes in the rules relative to:

1. claims for damages;

2. reading and signing minutes;

3. assessment of costs associated with service of process and other notices; and

4. requests and fees for a jury trial.

Each area of recommended change is addressed separately.

Claims for Damages:

My recommended changes which are associated with claims for damages relate to pleading jurisdictional amounts and granting judgments on default.

Rule 47, Texas Rules of Civil Procedure, as it now exists, significantly increases the cost of litigation and wastes

valuable judicial resources. This rule makes it impossible to plead a claim for unliquidated damages without being required to re-plead the same claim. The rule requires a statement that only advises the opposing party that the claim exceeds the jurisdictional limits of the court. Further, the rule invites the opposing party to except to the lack of a specific amount claimed, and follows that with a mandate that the trial court sustain the special exception and require the pleader to re-plead with more specifics. On the other hand, if the pleader anticipates the special exception and pleads a specific, a trial would be required to sustain a special exception that claimed the pleader failed to follow Rule 47. Basically, this creates a "Catch 22" because a litigant seeking damages cannot plead in such a way as to avoid the necessity of re-pleading.

As a housekeeping matter, I also recommend sub-part (b) of Rule 47 be amended to require the assertion that the claim is within the jurisdictional limits rather than above the minimum limit. The rule, as now written, prevents affirmatively stating a claim within the limits of a limited-jurisdiction court.

In addition to the above recommendations relative to Rule 47, I recommend repealing Rules 241 and 243, enacting two new rules (which will be referred to as Rules 47a and 242).

Rule 47a requires each damages claimant to advise the person from whom damages is sought the amount of damages which will be requested from the court in the event no answer is filed in response to the suit. Such a rule provides information from which a defendant can assess maximum risk and make a business decision relative to the desirability of contesting the claim.

Rule 242 replaces the current Rules 241 and 243.

Rules 241 and 243 speak to a dichotomy the law has created relative to liquidated and unliquidated claims. This dichotomy serves very little, if any, purpose. In limited circumstances, it permits the law to indulge in a presumption upon default. However, in my view, that presumption is not consistent with reality.

In suits involving unliquidated claims, we presume that a defaulting party admits liability due to fault, but that same defaulting party does not admit the amount of damages caused by the admitted fault.

I believe my experiences would be similar to those of other judges across the state. Letters I have received from defendants frequently admit they had no money to pay damages, but they deny they did anything wrong. Human nature is such that people

cannot admit failure, but they can and do admit a debt. People will admit a debt, even an unliquidated debt. Our presumption is wrong.

It is also my belief that defaulting defendants do not rely on the Court to conduct hearings for the presentment of evidence of unliquidated debts.

With those basic beliefs, I recommend that the rules be amended to provide trial courts with an option of hearing evidence or granting judgment without hearing evidence in those cases where the claimant has advised the opposing party of the amount to be sought on default.

These proposed new Rules 241 and 243 will permit trial courts which have computer support to automatically process default judgments if the Court is satisfied with the reasonableness of the amounts claimed. The Court will also have the option of requiring evidence if a claim appears to be out of the ordinary.

By changing these rules to permit automated judgments, valuable Court resources and time can be devoted to contested issues.

A copy of my proposed changes to Rules 47, 47a, 241, 242, and 243 is attached to this letter.

Rule 241 [Repealed].

Rule 242. Evidence needed for Default Judgment

(a) **Discretion of the Court.** Where the plaintiff has given notice of the amount, or the amounts, to be requested against the defendant, or all of several defendants, the court in its discretion, may require evidence as to plaintiff's claim, or claims, or any part thereof.

(b) Where Evidence is Required by the Court. As to any portion of plaintiff's claim for which the court has elected to require evidence pursuant to sub-paragraph (a), the court shall hear evidence as to damages and shall render judgment therefore.

(c) Where Evidence not Required by the Court. As to every portion of plaintiff's claim for which the court has not elected to require evidence pursuant to sub-paragraph (a), the court shall enter judgment in the amount, or the amounts, requested pursuant to Rule 47a.

Rule 243. [Repealed].

4543.001

TRCP 242

JUDGE B. F. (BILL) COKER
3823 Calculus Drive
Dallas, Texas 75244
(214) 247-8974

December 30, 1989

Mr. Luther H. Soules
Chairman, Rules Advisory Committee
175 E. Houston Street
San Antonio, Texas 78205-2230

Re: Suggested rule changes

Dear Mr. Soules:

Enclosed are recommended changes and additions to the Texas Rules of Civil Procedure. Additions to existing rules and new rules are designated by underlined text of the rule. Portions of existing rules which are deleted are enclosed in brackets and lined through. Please submit these suggestions to your committee for consideration.

My recommendations relate to changes in the rules relative to:

1. claims for damages;

2. reading and signing minutes;

3. assessment of costs associated with service of process and other notices; and

4. requests and fees for a jury trial.

Each area of recommended change is addressed separately.

Claims for Damages:

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4543.001

hhd
10-22-90
cbs

THE LAW OFFICES OF
TINSMAN & HOUSER
INCORPORATED

FRANKLIN D. HOUSER
MARGARET M. MAISEL
BRUCE M. MILLER
DANIEL J. T. SCIANO
ROBERT SCOTT
RICHARD TINSMAN
JOHN F. YOUNGER, JR.

SHARON COOK
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REY PEREZ
MICHELE PETTY
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ONE RIVERWALK PLACE, 14TH FLOOR
700 NORTH ST. MARY'S STREET
SAN ANTONIO, TEXAS 78205
(512) 225-3121

October 12, 1990

Mr. Luther H. Soules, III
Two Republic Bank Plaza
175 E. Houston, 10th Floor
San Antonio, Texas 78205-2230

Dear Luke:

Recognizing that it is not a matter of great import, nevertheless represents confusing anachronism, I would commend to the consideration of the Rules Committee a revision to Rule 243 to eliminate the reference to writ of inquiry since the latest case locatable in the Texas Digest dealt with the writ of inquiry was the case of Barton vs. Nix 20 Texas 39 which was decided in 1857. As far as I can tell the term "writ of inquiry" appears in the rules only once and that is in Rule 243. The definition of "writ of inquiry" according to Black's Law Dictionary is enclosed at Enclosure 2.

I am unaware of the intellectual prowess and scholarly diligence of all of the 354 sheriffs in the State of Texas but I would submit that it is my considered opinion that the incumbent sheriff of Bexar County doesn't have a clue as to his duties on the award of a writ of inquiry. I would be neither shocked nor dismayed at the other 353 of his brethren no better informed than Sheriff Copeland in this matter. It would therefore seem appropriate to delete the words "a writ of inquiry awarded" together with the isolating commas, otherwise leave the rule in in tact.

Very truly yours,

TINSMAN & HOUSER, INC.

Bruce M. Miller

BMM:sb
Enclosure

193 N.W. 978; or was unknown to the court when judgment was pronounced, and which, if known, would have prevented the judgment, and which was unknown, and could not have been known to the party by the exercise of reasonable diligence in time to have been otherwise presented to the court, unless he was prevented from so presenting them by duress, fear, or other sufficient cause, Nickels v. State, 86 Fla. 208, 98 So. 502, 504; Smulski v. H. Feinberg Furniture Co., Del.Super., 193 A. 585, 587; as where judgment is rendered against a party after his death, or an infant not properly represented by guardian, or a feme covert where common-law disability still exists, or where some defect exists in the process or the execution thereof. Schneider v. Schneider, Mo.App., 273 S.W. 1081, 1083; 1 Saund. 101; Steph.Pl. *119; Day v. Hamburgh, 1 Browne, Pa. 75.

An ordinary "writ of error" is brought for a supposed error in law apparent on the record, and takes the case to a higher tribunal where the question is to be decided and the judgment, sentence or decree is to be affirmed or reversed, while the "writ of error coram nobis" is brought for an alleged error in fact not appearing on the record and lies to the same court in order that it may correct the error, which it is presumed would not have been committed had the fact been brought to the court's notice in the first instance. State v. Wagner, 232 Wis. 138, 286 N.W. 544, 545.

At common law in England, it issued from the Court of King's Bench to a judgment of that court. Its principal aim is to afford the court in which an action was tried an opportunity to correct its own record with reference to a vital fact not known when the judgment was rendered. Lamb v. State, 91 Fla. 396, 107 So. 535, 537, 538; Rhodes v. State, 199 Ind. 183, 156 N.E. 389, 392. It is also said that at common law it lay to correct purely ministerial errors of the officers of the court. Cramer v. Illinois Commercial Men's Ass'n, 260 Ill. 516, 103 N.E. 459, 461.

WRIT OF ERROR CORAM VOBIS. This writ, at the English common law, is distinguished from "writ of error coram nobis," in that the former issued from the Court of King's Bench to a judgment of the Court of Common Pleas, whereas the latter issued from the Court of King's Bench to a judgment of that court. Lamb v. State, 107 So. 535, 537, 91 Fla. 396.

WRIT OF EXECUTION. A writ to put in force the judgment or decree of a court.

WRIT OF EXIGI FACIAS. See Exigent.

WRIT OF FALSE JUDGMENT. A writ which appears to be still in use to bring appeals to the English high court from inferior courts not of record proceeding according to the course of the common law. Archb.Pr. 1427.

WRIT OF FORMEDON. A writ which lies for the recovery of an estate by a person claiming as issue in tail, or by the remainder-man or reversioner after the termination of the entail. See Formedon.

WRIT OF INQUIRY. In common-law practice. A writ which issues after the plaintiff in an action has obtained a judgment by default, on an unliquidated claim, directing the sheriff, with the aid of a jury, to inquire into the amount of the plaintiff's demand and assess his damages. Lennon v. Rawitzer, 57 Conn. 583, 19 A. 334; Havens v. Hartford & N. R. Co., 28 Conn. 70; McGowin v. Dickson, 182 Ala. 161, 62 So. 685, 688.

WRIT OF MAINPRIZE, or MAINPRISE. In English law. A writ directed to the sheriff, (either generally, when any man is imprisoned for a bailable offense and bail has been refused, or specially, when the offense or cause of commitment is not properly bailable below,) commanding him to take sureties for the prisoner's appearance, commonly called "mainpernors," and to set him at large. 3 Bl.Comm. 128. See, also, Mainprise.

WRIT OF MANDAMUS. See Mandamus.

WRIT OF MESNE. In old English law. A writ which was so called by reason of the words used in the writ, namely, *"Unde idem A. qui medius est inter C. et præfatum B."*; that is, A., who is mesne between C., the lord paramount, and B., the tenant paravail. Co.Litt. 100a.

WRIT OF POSSESSION. This is the writ of execution employed to enforce a judgment to recover the possession of land. It commands the sheriff to enter the land and give possession of it to the person entitled under the judgment. Smith, Act. 175. For a distinction between this writ and the "Writ of Assistance," see that title.

WRIT OF PRÆCIPE. This writ is also called a "writ of covenant," and is sued out by the party to whom lands are to be conveyed by fine, the foundation of which is a supposed agreement or covenant that the one shall convey the land to the other. 2 Bl.Comm. 349.

WRIT OF PREVENTION. This name is given to certain writs which may be issued in anticipation of suits which may arise. Co.Litt. 100. See Quia Timet.

WRIT OF PROBABLE CAUSE. An auxiliary process designed to supersede enforcement of judgment of trial court brought up for review. Martin v. Rosen, 2 Cal.App.2d 450, 38 P.2d 855, 857.

WRIT OF PROCESS. See Process; Action.

WRIT OF PROCLAMATION. In English law. By the statute 31 Eliz. c. 3, § 1, when an *exigent* is sued out, a writ of proclamation shall issue at the same time, commanding the sheriff of the county where the defendant dwells to make three proclamations thereof, in places the most notorious, and most likely to come to his knowledge, a month before the outlawry shall take place. 3 Bl.Comm. 284.

When it is not directed to the same sheriff as the *exigent* is, it is called a foreign writ of proclamation. 4 Reeve, Hist. Eng. Law 261.

WRIT OF PROHIBITION. See Prohibition.

WRIT OF PROTECTION. In England, the king may, by his writ of protection, privilege any person in his service from arrest in civil proceedings

Rule 241 [Repealed].

Rule 242. Evidence needed for Default Judgment

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Rule 243. [Repealed].

4543.001

JUDGE B. F. (BILL) COKER
3823 Calculus Drive
Dallas, Texas 75244
(214) 247-8974

December 30, 1989

Mr. Luther H. Soules
Chairman, Rules Advisory Committee
175 E. Houston Street
San Antonio, Texas 78205-2230

Re: Suggested rule changes

Dear Mr. Soules:

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A copy of my proposed changes to Rules 47, 47a, 241, 242, and 243 is attached to this letter.

GRAVES, DOUGHERTY, HEARON & MOODY
2300 NCNB TOWER
POST OFFICE BOX 98
AUSTIN, TEXAS 78767
TELEPHONE: (512) 480-5600

IRELAND GRAVES (1885-1969)
BEN F. VAUGHAN, III, P.C.
OF COUNSEL

TELECOPY NUMBER:
(512) 478-1976

CHARLES A. SPAIN, JR.
(512) 480-5609

November 26, 1989

The Honorable Nathan L. Hecht, Justice
The Supreme Court of Texas
Post Office Box 12248
Capitol Station
Austin, Texas 78711

Dear Judge Hecht:

6. The following proposed amendments use the word "nonjury": Texas Rules of Appellate Procedure 41(a)(1) and 54(a). The following proposed amendments use the word "non-jury": Texas Rules of Appellate Procedure 41 comment, 52(d), 52 comment, and 54 comment. The court may wish to standardize the terminology. The term "non-jury" currently appears in Texas Rules of Civil Procedure 90, 156, 216(1), 249, 307, and 542. The term "nonjury" currently appears in Texas Rule of Civil Procedure 324(a) and Texas Rule of Judicial Administration 6(b)(2).

I appreciate the opportunity to comment on the proposed rules amendments and hope that my comments are helpful.

Respectfully,

Charles A. Spain, Jr.

4543.001

hhd
chs

✓10-3-90
BB

Texas Tech University

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

September 28, 1990

HHD
Copy
Sec

TRCP 257

Mr. David Beck
Fulbright and Jaworski
1301 McKinney Street
Houston, Texas 77010

Re: Tex.R.Civ.P. 90, 86, 257 and C.P.R.C. § 15.063(2)

Dear David:

I suggest consideration of the following:

(1) Rule 90 should be changed to conform to the existing practice that a special exception needs to be called to the attention of the trial court prior to trial to avoid waiver.

(2) C.P.R.C. § 15.063(2) requires that a motion to transfer venue based upon the inability to obtain an impartial trial must be filed with or before the filing of the answer. The only reference to the time for filing such a motion in the Rules of Civil Procedure is Rule 86.1 which refers to Rule 257. Rule 257 contains no time reference at all. As you will recall the case law has previously provided that such a motion may be filed on the day of trial. See City of Abilene v. Downs, 367 S.W.2d 153 (Tex. 1963). Suffice to say that we need to get our act together or convince the legislature to amend the statute or both. Seriously, this requires some coordination between your subcommittee and my mine. Do you have any suggestions?

I would appreciate hearing from you at your convenience.

Sincerely yours,

Hadley

J. Hadley Edgar
Robert H. Bean Professor of Law

JHE/nt

cc: Luke Soules ✓

4543.001
cc: LHS
Orig: HHD
1-29-93

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL. (512) 463-1312
FAX: (512) 463-1365

HHD
SCAC Subc
SCAC Agenda
COAS Staff

January 28, 1993

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

Dear Luke:

Enclosed is a letter from Judge William Baskette regarding civil jury instructions and oaths.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

January 28, 1993

Honorable William L. Baskette, Jr.
Sixth Administrative Region
El Paso County Courthouse
500 East San Antonio Avenue
El Paso TX 79901

Dear Judge Baskette:

Thank you for your letter and suggestions regarding revisions of the civil jury instructions and oaths. I have sent a copy of both to the chairman of the Rules Advisory Committee with the request that your comments be considered fully in making additional revisions in the rules.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

c: Mr. Luther H. Soules III

Judge William L. Baskette, Jr.

SERVING THE DISTRICT AND COUNTY COURTS OF TEXAS
ASSIGNED TO THE SIXTH ADMINISTRATIVE REGION

EL PASO COUNTY COURTHOUSE
(915) 546-8138

500 E. SAN ANTONIO AVE.
EL PASO, TEXAS 79901

Honorable Thomas R. Phillips
Chief Justice
Texas Supreme Court
P.O. Box 12248, Capitol Station
Austin, Texas 78711

January 21, 1992

Dear Chief Justice:

While I have been a judge I have found certain portions of the civil jury instructions and oaths to be cumbersome. Though I am no expert in legal writing, I have attempted to descipher those code sections and re-write some suggested renderings for your consideration.

I am enclosing three pages (one is for the jury to receive, two for the judge) of revisions to be considered by your rule-making committee. To let you know that I am not singling out the civil code, I have also sent some revisions of oaths in criminal cases to Judge McCormick.

I hope that you will consider these changes that I have put forth, and send me some acknowledgment.

Respectfully,

William L. Baskette, Jr.

OATH TO JURY PANEL

Do you, and each of you, solemnly swear or affirm that you will answer truthfully all questions asked of you concerning your qualifications and service as a juror, so help you, God?

OATH TO THE JURY

Do you, and each of you, solemnly swear or affirm that you will render a true verdict in the case before you based upon the law and the evidence submitted to you in Court, and that you will truthfully answer all of the questions asked of you in the Charge of the Court, so help you, God?

JURY INSTRUCTIONS

1. Do not mingle with or talk to any of the lawyers, the parties, the witnesses or any other person who might be connected with or interested in this case. Please understand that they also have to follow these same instructions.
2. Do not accept or give to any of these persons any gifts or favors, however slight.
3. Do not discuss anything about this case or mention it to anyone, including your family and friends, and the persons mentioned above until you are excused as a juror from this case.
4. Do not discuss this case with your fellow jurors until you are excused as jurors in this case, except that you may discuss the case with the rest of the jurors in the jury room after the case is concluded and you have been instructed to consider your verdict.
5. Do not make any investigation about the facts of this case on your own. All evidence must be presented in open court so that each side may question the witnesses and make proper objections. In addition, you may only consider evidence that I have admitted during the trial. This avoids a trial based on secret evidence. If you know of or learn anything about this case from anyone outside of what you learn in the courtroom, explain to the offending party that the evidence is improper and report it at once.
6. Do not make personal inspections, observations, investigations or experiments of anything, any premises or any evidence not admitted in court. Do not allow anyone else do any of these things for you.
7. Do not seek information contained in law books, dictionaries, newspapers, or in any public or private records not admitted in evidence.
8. Do not relate to the other jurors your own personal experiences or those of other persons. A juror may have special knowledge or special information of a business, technical, professional nature, possess a certain expertise or know what happened in this case or in another case. To tell the other jurors of this knowledge makes you a witness in this case, not under oath and not subject to cross-examination.
9. Do not discuss or consider anything about attorney's fees unless specific evidence about attorney's fees is admitted into evidence.
10. Do not consider, discuss or speculate whether or not a party is protected by, or has benefitted from, insurance of any kind unless specific evidence about insurance is admitted into evidence.

At the conclusion of the trial I will submit to you the Charge of the Court which contains written questions for the jury to answer in rendering your verdict. You will not be asked, nor are you to consider, who should win and then answer the questions accordingly. You are to follow the directions in the charge and answer each and every question without regard for the other answers you have given, unless instructed specifically to do otherwise. Since you will need to consider all of the testimony and evidence admitted at trial, it is necessary for you to pay close attention to the evidence as it is presented.

Texas law permits proof of any violation of proper jury conduct, and you may be called to testify in open court if misconduct occurs. I instruct you, therefore, to carefully follow all of the instructions given you by me, and report to the baliff any violation of these instructions. You may keep these instructions and review them as the case proceeds.

Judge William L. Baskette, Jr.

OATH TO JURY PANEL

Do you, and each of you, solemnly swear or affirm that you will answer truthfully all questions asked of you concerning your qualifications and service as a juror, so help you, God?

ORAL INSTRUCTIONS TO JURY BEFORE VOIR DIRE

Ladies and Gentlemen:

The case that is now on trial is _____.

This is a civil action which will be tried before a jury. Your duty as jurors will be to decide the disputed facts. It is the duty of the judge to see that the case is tried in accordance with the rules of law. In this case, as in all cases, the actions of the judge, parties, witnesses, attorneys and jurors must be according to law. The Texas law permits proof of any violation of the rules of proper jury conduct. By this I mean that jurors and others may be called upon to testify in open court about acts of jury misconduct. I instruct you, therefore, to follow carefully all instructions which I am now going to give you, as well as others which you will receive while this case is on trial. If you do not obey the instructions I am about to give you, it may become necessary for another jury to re-try this case with all the attendant waste of your time here and the expense to the litigants and the taxpayers of this county for another trial. These instructions are as follows:

1. Do not mingle with or talk to any of the lawyers, the parties, the witnesses or any other person who might be connected with or interested in this case. Please understand that they also have to follow these instructions.
2. Do not accept or give to any of these persons any gifts or favors, however slight.
3. Do not discuss anything about this case or mention it to anyone, including your family and friends, and the persons mentioned above until you are excused as a juror from this case.
4. The parties through their attorneys have the right to direct questions to each of you concerning your qualifications, background, experiences and attitudes. In questioning you, they are not meddling in your personal affairs, but are trying to select fair and impartial jurors who are free from any bias or prejudice in this particular case.
5. Do not conceal information or give answers which are not true. Listen to the questions and give full and complete answers. Please identify yourself by name or jury number so that the court reporter may make a proper record.
6. If the attorneys ask some questions directed to you as a group which require an answer on your part individually, hold up your hand until you have answered the questions.
7. After general questions are asked, you will be recessed outside of the courtroom and several of you will be asked to give answers individually outside the presence of the rest of the panel. Please indicate to counsel whether you desire to speak to the court in this manner instead of along with the other panel members.

Do you understand these instructions? If not, please let me know now.

Whether or not you are selected as a juror in this case, you are performing a significant service which only a free people can perform. We shall try the case as fast as possible consistent with justice, which requires a careful and correct trial. If selected on the jury, unless I instruct you differently, you will be permitted to separate during lunch recesses and at the end of the day.

The attorneys will now proceed with their voir dire examination.

OATH TO THE JURY

Do you, and each of you, solemnly swear or affirm that you will render a true verdict in the case before you based upon the law and the evidence submitted to you in Court, and that you will truthfully answer all of the questions asked of you in the Charge of the Court, so help you, God?

INSTRUCTIONS GIVEN AFTER JURY IS SELECTED

Ladies and Gentlemen:

By the oath which you take as jurors, you become officials of this court and active participants in the public administration of justice. I now give you further instructions which you must obey throughout this trial.

It is your duty to listen to and consider the evidence and to determine fact issues later submitted to you, but I, as Judge, will decide matters of law. You will now review with me the written instructions which you will observe during this trial, together with such other instructions that I may give you later during this trial.

As you examine these instructions we will go over them together. The first three instructions were given to you earlier, and will continue to be observed throughout this trial. The written instructions are as follows:

JURY INSTRUCTIONS

1. Do not mingle with or talk to any of the lawyers, the parties, the witnesses or any other person who might be connected with or interested in this case. Please understand that they also have to follow these same instructions.
2. Do not accept or give to any of these persons any gifts or favors, however slight.
3. Do not discuss anything about this case or mention it to anyone, including your family and friends, and the persons mentioned above until you are excused as a juror from this case.
4. Do not discuss this case with your fellow jurors until you are excused as jurors in this case, except that you may discuss the case with the rest of the jurors in the jury room after the case is concluded and you have been instructed to consider your verdict.
5. Do not make any investigation about the facts of this case on your own. All evidence must be presented in open court so that each side may question the witnesses and make proper objections. In addition, you may only consider evidence that I have admitted during the trial. This avoids a trial based on secret evidence. If you know of or learn anything about this case from anyone outside of what you learn in the courtroom, explain to the offending party that the evidence is improper and report it at once.
6. Do not make personal inspections observations, investigations or experiments of anything, any premises or any evidence not admitted in court. Do not allow anyone else do any of these things for you.
7. Do not seek information contained in law books, dictionaries, newspapers, or in any public or private records not admitted in evidence.
8. Do not relate to the other jurors your own personal experiences or those of other persons. A juror may have special knowledge or special information of a business, technical professional nature, possess a certain expertise or know what happened in this case or in another case. To tell the other jurors of this knowledge makes you a witness in this case, not under oath and not subject to cross-examination.
9. Do not discuss or consider anything about attorney's fees unless specific evidence about attorney's fees is admitted into evidence.
10. Do not consider, discuss or speculate whether or not a party is protected by, or has benefitted from insurance of any kind unless specific evidence about insurance is admitted into evidence.

At the conclusion of the trial I will submit to you the Charge of the Court which contains written questions for the jury to answer in rendering your verdict. You will not be asked, nor are you to consider, who should win and then answer the questions accordingly. You are to follow the directions in the charge and answer each and every question without regard for the other answers you have given, unless instructed specifically to do otherwise. Since you will need to consider all of the testimony and evidence admitted at trial, it is necessary for you to pay close attention to the evidence as it is presented.

Texas law permits proof of any violation of proper jury conduct, and you may be called to testify in open court if misconduct occurs. I instruct you, therefore, to carefully follow all of the instructions given you by me, and report to the bailiff any violation of these instructions. You may keep these instructions and review them as the case proceeds.

re: LPS

JIM PARKER
6118 MOUNTAIN VILLA COVE
AUSTIN, TEXAS 78731

June 11, 1991

TRCP 271-279

Professor J. Patrick Hazel
University of Texas School of Law
727 East 26th Street
Austin, Texas 78705

Re: Proposed Rule Changes relating to Jury Charges published in the May 1991 Texas Bar Journal

Dear Professor Hazel:

I have no comments on proposed Rules 226, 236, 273, and 274, but I am writing regarding the other proposed Rules.

Proposed Rule 226a

Rule 226a has not been amended since Tex. R. Civ. Evid. 606(b) became effective. Are the new instructions regarding proof of jury misconduct correct and appropriate in light of Tex. R. Civ. Evid. 606(b)?

Why is "you are performing a significant service which only free people can perform" being replaced with language about doing a civic duty? This hardly shows pride in our jury system.

Proposed Rule 271

(1)(a)(vi) This is the only portion of the proposed Rule dealing with the specific wording of specific questions to be asked. Why is percentage causation singled out for specific attention in the proposed Rule instead of being addressed generally under (1)(a)(i)? Furthermore, by getting this specific in the proposed Rule, a future rule change will be required if this specific area is changed by statute or case law.

Proposed Rule 272

(5)(b)(ii) The need for a request when a question or an element thereof is omitted should be made clear in the proposed Rule instead of being only in an explanatory instruction (the first sentence of your footnote 19). Otherwise, there is a conflict in the wording of proposed Rule 272(5)(b)(ii) and proposed Rule 274(2).

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I know that there are many highly qualified people involved in this important process, but I offer my assistance if I can be of help.

Sincerely,

Jim Parker

Jim Parker
(H) 458-2909
(W) 322-8109

cc: Honorable Nathan Hecht
P.O. Box 12248
Capitol Station
Austin, Texas 78711

Luther Soules
Chair, Supreme Court Advisory Committee
175 East Houston Street
10th Floor
San Antonio, Texas 78205-2230

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copy to LHS

E.J. WOHLT

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PHONE (713) 464-1492
FAX (713) 464-3821

May 23, 1991

TRCP 271-279

Justice Nathan Hecht
Texas Supreme Court
Supreme Court Building
Austin, Texas 78701

Re: The VIDEO deposition rules, and
Proposed New Rules regarding Court's Charge

Dear Justice Hecht:

At the Evidence seminar, you asked if any attendee desires to have a comment on the proposed rules, to write, so here goes:

Video Rule (202): My interest is to reduce costs of litigation. Therefore, I like to use VIDEO to depose, but Rule 202 seems to say at the beginning that no transcript is needed, but then ends with the requirement of a transcript. Why? **Why must we also have a stenographic record?**

I believe the better practice is to allow a party to notice depositions straight VIDEO without a written transcript, and if anyone wants a written transcript, let them arrange for a reporter to be there also and make one. Reporter charges are often unnecessary, especially for collateral or pure discovery witnesses, and they are very, very expensive.

Court's Charge: As to the New Rules proposed regarding the Court's Charge (published in the May Bar Journal), generally I like them, but I have a few suggestions (additions):

Part 3 (page 442, May Bar Journal). After "JURY MEMBERS" begin with the following:

> "Your function now is to resolve certain questions raised by the evidence about which the parties do not totally agree. By your answers to the following questions, you will resolve these disputed matters.
>
> "In discharging this responsibility, follow ..."
>
> Why? Lets the jury know their role, and that they are not necessarily deciding every facet of the case.

Proposed Rule 271 (page 445, May Bar Journal).

Part (2)(d) Hearing, change to read:

"Before submission to the jury, the court shall conduct a hearing outside the presence of the jury for the parties to present their complaints pursuant to Rule 272."

Why? Because we still have Judges saying "Lets do that while the jury is out." The present rule would allow that to continue, even though it would be a waste. Why not just spell it out.

Proposed Rule 272 (page 446)

Part (5)(b)(i), change to read:

"when an entire ground of recovery or defense of the complaining party is omitted from the charge; or"

Why? To be clear that you do not have to submit your opponent's case; i.e., you do not have to say: "Judge, it is not raised by the evidence, but if you are hell bent on submitting it, here is the proper way."

Proposed Rule 272 (page 446)

Part (5)(c), change by adding the following sentence:

"The omission of these 'improper complaints' shall not preclude a party from asserting these points on appeal."

Why? To be clear that if they are "improper" but valid, you have not waived them.

Proposed Rule 273 (page 446)

Change by adding the following sentence:

"The court shall not give additional oral instructions."

Why? Usually the court reporter is not taking down this reading, and some Judges feel free to "explain" to the jury what the question means. I know the proposed rule uses the phrase "precise words" in the rule, but Racehorse Haynes points out that for some courts, you need to write the instructions in crayon.

Proposed Rule 274 (page 446)

Part (1), change by adding the following:

", except no evidence and against great weight points."

Proposed Rule 274 (page 446)

Part (2), change by correcting a typo error:

"recovery of defense" to "recovery or defense."

", except no evidence and against great weight points."

I hope you will at least review my suggestions.

Very sincerely yours,

E. J. Wohlt, Jr.
EJW/ew

4/25

HHD,
SCAC Agenda
✓ SubC
J. Hecht.

TRCP 271-279

MEMORANDUM

TO: MEMBERS OF THE ADMINISTRATION OF JUSTICE COMMITTEE

FROM: J. PATRICK HAZEL

DATE: APRIL 18, 1991

RE: PROPOSED AMENDMENTS TO TEXAS RULES OF CIVIL PROCEDURE
Rules 226, 226a, 236, and 271 - 279
AND ARTICLE FOR THE TEXAS BAR JOURNAL

Well, this is the way it has gone to the Texas Bar Journal. I have attempted making the changes as voted on in the last meeting. I hope I did them the way the committee indicated.

In my own estimation these proposals are far and away better than what we now have and what the Supreme Court Advisory Committee last proposed. Undoubtedly there are many things about this that are imperfect. I only wish we had more time to do it right, i.e. get more suggestions from practitioners, judges, and others of our committee. Unfortunately the time press that we are in prevents us doing that.

We shall see how it goes. Please let me know if you have any comments yourselves.

THE COURT'S CHARGE AND PROPOSED CHANGES

Prof. J. Patrick Hazel
Austin, Texas

The following proposed changes to the rules with respect to the court's charge are the product of a number of recent proposals. The first of these (Proposal 1) came from the Supreme Court Advisory Committee. That proposal, along with a number of other proposed rule changes, was published in the Texas Bar Journal of November 1989. The basic thrust was to cut down the number of rules regarding the court's charge and to make an objection to the charge a sufficient complaint for appeal. This second part would have done away with the need for a "request" or "tender" in writing of a question, instruction, or definition in substantially correct wording by anyone. This was opposed by the State Bar's Administration of Justice Committee. This committee attempted to consolidate the existing rules for complaining about the court's charge into one rule. That proposed rule (Proposal 2) left intact the need for the relying party to request in writing a question or questions regarding any wholly omitted ground of recovery or defense as well as the need to request in writing any instruction or definition which a party desired but was omitted in the charge. The written request had to be in substantially correct wording. An open meeting before the Supreme Court in October 1989 showed that trial court judges were opposed to the Advisory Committee's proposal (Proposal 1) not requiring a written request. Their fear was "sandbagging." Under the Advisory Committee's proposal a relying party's objection to a wholly omitted ground of recovery or defense would suffice, and the judge had to fashion a properly worded question to avoid reversal. On the other hand several trial lawyers were opposed to the present rule forcing them to request in writing an instruction or definition which was omitted but which applied to their opponent's claim or defense. It was obvious that some rethinking needed to be done.

The Supreme Court Advisory Committee considered another proposal (Proposal 3) to the Supreme Court. Their new proposal was that an objection would suffice unless an entire ground of recovery or defense was omitted. In that instance a written request was necessary. There was nothing about "reliance," because only the relying party would be interested in having the ground submitted. The nonrelying party would not want either to object or request. That party should be happy with the omission.

Some members of the Administration of Justice Committee were not satisfied with this proposal and continued to work on rule changes. That proposal (Proposal 4) was never voted on by the committee, but these individuals submitted the proposal to the Supreme Court and to the Supreme Court Advisory Committee.[1]

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1. This proposal was published in the State Bar Litigation Section Report, "The Advocate," Volume 9, No. 2, at page 158-60 (June 1990). Harry Tindall of Houston was a tireless worker on this proposal.

The result of all this was that the Supreme Court determined at that time not to make any changes to the rules regarding the court's charge and complaints to the charge. Hence, the work has gone on.

This article presents Proposal 5. This proposal has been approved by the Administration of Justice Committee but not, as yet, by the State Bar Board of Directors or Executive Committee.[2] Rather than simply proposing a rule for complaining to the court's charge, the Administration of Justice Committee determined to do a major overhaul of all the rules and orders respecting the court's charge. Under this scheme the following rules would govern the court's charge:

Rule 226a.	Instructions to Jury and Jury Panel
Rule 271.	Court's Charge
Rule 272.	Complaints to the Court's Charge
Rule 273.	Reading Court's Charge to Jury
Rule 274.	Questions Omitted from Court's Charge

Proposal 5 includes much of what was in the old rules but also much which was not. Old Rules 226a, 271, 272, 273, 274, 275, 276, 277, 278, and 279 would be repealed and replaced with these new rules. Five proposed rules would replace ten old rules. The point is that a lawyer can go to a rule which should tell that lawyer what it is about and, hopefully, understand it without reference to a lot of other rules. Rule 226a is simply the "boilerplate" instructions which the jury panel is given before voir dire (Part 1), the written instructions given to the juror after they are sworn or affirmed (Part 2), and the instructions which are given to the jury in every court's charge (Part 3). Proposed Rule 271 refers to proposed Rule 226a, Part 3, which the present rules do not do.[3] Hence, two proposed rules (226a and 271) would contain everything about the contents, preparation, and time for complaints to the court's charge; one proposed rule (272) would contain the method of complaining to that charge; one proposed rule (273) would contain the instruction to read the court's charge to the jury before argument; and one proposed rule (274) would contain the provisions about what happens when questions are omitted from the court's charge and no complaints have been made.

We also proposed some revisions to two other rules: Rules 226 (oath to the jury panel)and 236 (oath to the jury). Article I, §5 of the Texas Constitution[4] only requires that

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2. In the past it has never been required that either of these groups need to approve what the Administration of Justice Committee sends to the Supreme Court Advisory Committee. There is some indication at present that this may be required in the future.

3. Interestingly present Rule 226a is only one short sentence. The remainder of that "rule," as it appears in the rule books, is a 1984 order of the Supreme Court. We thought it would be better to include the "order" in the rule itself.

4. The 1876 version!

"all oaths or affirmations shall be administered in the mode most binding upon the conscience, and shall be taken subject to the pains and penalties of perjury." The proposals are better worded and include "or affirm."

Because of the import these rules and any changes to them have to the members of the bench and bar of this state, the Administration of Justice Committee did not believe these changes should be made without the advice and consent (or at least consultation) of the entire membership of the Texas Bar. For this reason we have forwarded them to the State Bar Board of Directors, the Executive Committee of the State Bar, and I was requested to get them published along with some comments in this issue of the Texas Bar Journal. The Supreme Court Advisory Committee will meet again sometime this summer to consider these and many other rule changes. They will also be meeting to see if any new legislation requires new or revised rules. The Administration of Justice Committee will not meet again until the Fall. Hence, if you have any gripes, suggestions, or whatever to these proposals, let this be known to either (or both) Justice Nathan Hecht of the Texas Supreme Court[5] or Luther Soules,[6] Chair of the Supreme Court Advisory Committee. I also would appreciate your comments on the attached form.

The overall purpose of these changes boils down to two words: simplicity and clarity. Such words from the mouths of lawyers bespeak mendacity. Truth would force me to say that the words "simplicity and clarity" must be put in the context of the present rules. We hope that in comparison with what now exists, our purpose is accomplished.

The way the old and new rules are written in this article are that Rules 226 and 236 have three versions: (1) the old rule, (2) the proposed amendment with the new parts underlined and the deleted parts marked through, and (3) a clean version of the proposed rule. We could not do this with proposed Rules 226a, 271, 272, 273, and 274. For these we resorted to giving you the old rule or rules followed by the proposals. In the proposals there are a number of footnotes and underlinings. These are designed to explain what we believe to be the most important changes. We hope that the simpler look of the rules needs no apology or explanation. We hope everyone wants this sort of clarity.

At the end of the proposal there is a short questionaire which we ask that you either cut out or copy, fill out, and send to me. Please do this ASAP, so that we can give the Supreme Court Advisory Commettee and the Supreme Court your feelings about this matter.

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5. P.O. Box 12248, Capitol Station, Austin, Texas 78711.

6. 10th Floor, 175 E. Houston St., San Antonio, Texas 78205-2230.

PRESENT RULES

Rule 271. Charge to the Jury

Unless expressly waived by the parties, the trial court shall prepare and in open court deliver a written charge to the jury.

Rule 272. Requisites

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.

Rule 273. Jury Submissions

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 separate and apart from such party's objections to the court's charge.

Rule 274. Objections and Requests

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 or concealed by voluminous unfounded objections, minute differentiations or numerous unnecessary requests, such objection or request shall be untenable. No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only.

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.

Rule 276. Refusal or Modification

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.

Rule 277. Submission to the Jury

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.

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.

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 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 predicate the damage question or questions upon affirmative findings of liability.

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.

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.

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

Rule 279. Omissions 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.

PROPOSED RULES

Rule 271. Court's Charge

At the conclusion of the evidence in all jury cases, unless expressly waived by the parties, the court shall submit the case to the jury in a written court's charge asking the jury questions about the facts.

(1) Contents

The court's charge shall contain those applicable parts of Rule 226a, Part 3,[8] and be subject to the following requirements:

(a) Jury Questions

The court's charge:

(i) shall submit questions controlling the disposition of the case[9] which are raised by affirmative written pleadings and evidence. No question shall be submitted when raised only by a general denial unless specifically allowed by statute or other rules of procedure;

(ii) shall submit the questions in broad form, whenever feasible;

(iii) shall not submit various phases or shades of questions already submitted;

(iv) shall not submit evidentiary or inferential rebuttal questions except as allowed by statute;

(v) shall not submit advisory questions;[10]

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8. Nothing in our present rules mentions the existence and importance of Rule 226a to the court's charge. Since that is the bulk of the charge, it is mentioned here for clarity.

9. This language was dropped from the rules in 1988. It primarily points out that merely evidentiary (and advisory?) questions which, when answered, could have no possible effect on the judgment are not to be asked. There is an abundance of case law about the phrase "controlling the disposition of the case." Because of the Family Code's allowing advisory questions, we dropped the word "only," so that the courts are mandated to submit questions controlling the disposition of the case but still may submit others where allowed by statute.

10. In so far as I know only family law has "advisory questions" to the jury. I understand the Pattern Jury Charge folks dealing with Volume 5 are trying to discourage these questions going to the jury. I am a strong advocate of the jury trial in civil cases. Where, however, others have decided not to allow a jury to determine a matter, it strikes me as illogical, unnecessary, and

(vi) shall, in any case in which the jury is required to apportion the loss among the parties, submit questions inquiring what percentage, if any, of the causation, responsibility, or negligence, as the case may be, that caused the occurrence or injury in question is attributable to each of the parties found to have been responsible. In such instances the court shall instruct the jury that the percentage must total 100%[11] and to answer the damage questions without any reduction because of the percentage, if any, attributed to the injured party; and

(vii) may submit questions disjunctively when it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists.

(b) Instructions and Definitions

The court's charge:

(i) shall submit only those instructions and definitions as are proper to enable the jury to render a verdict;

(ii) shall submit instructions regarding inferential rebuttal matters raised by the written pleadings and evidence;[12] and

(iii) may place the burden of proof by instruction rather than by inclusion in a question.

(c) Other Requirements

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expensive to ask a jury for its advice. One may question whether the legislature has taken this matter out of the hands of the Texas Supreme Court by enacting §11.13 of the Texas Family Code. That provision states that the court "may submit or refuse to submit" certain questions to the jury, and, if they are submitted, the jury verdict on them is "advisory only." Since the "court" is given discretion in this matter, I suppose the Texas Supreme Court could make that discretionary determination for all the trial courts and say that these questions shall not be submitted. Of course, where one of those questions is before the court, a party has a right to a jury. That right has been found, however, not to be an absolute right to a jury on those matters because the findings are not binding. Martin v. Martin, 776 S.W.2d 572 (Tex. 1989). However, because of the statute, we have decided to mandate not submitting these questions except as allowed by statute.

11. This is usually done, and it seems appropriate to include it. It is especially important where the jury has more than one such percentage question in the court's charge, e.g. TEX. CIV. PRAC. & REM. CODE, §§ 33.004 and 33.016(c).

12. This is presently stated only in case law, e.g. Scott v. Atchison Topeka and Santa Fe Ry. Co., 572 S.W.2d 273 (Tex. 1978). Our present rules prohibit questions on inferential rebuttal matters, but they fail to advise of the right to an instruction.

The court's charge:

(i) shall not comment directly on the weight of the evidence or advise the jury of the effect of their answers, except that the court's charge may comment incidentally on these matters when it is properly a part of a question,[13] instruction, or definition; and

(ii) may predicate the damage questions upon affirmative findings of liability.

(2) Preparation and Time for Complaints

(a) Requiring Written Suggestions

At any reasonable time the court may require[14] the parties to present to the court written, suggested jury questions, instructions, and definitions. These suggestions shall not be necessary to preserve error for appeal or entitle any party to the right to a jury finding. They are solely to assist the court in preparing the court's charge.

(b) Charge Conference

Before preparing and delivering a proposed written charge, the court may conduct a charge conference with the parties. At the charge conference any party may present suggested questions, instructions, and definitions for inclusion in the court's charge.[15]

(c) Proposed Charge

The court shall prepare and deliver its proposed written charge to the parties for their examination and shall allow them a reasonable time in which to examine and prepare complaints to the proposed court's charge.

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13. There may be a reason, but I am not aware of it, why such is proper in an instruction or definition but not in a question (so long as it is properly a part of the question for another or other reasons). Hence, unless someone knows of a reason, we ought to include questions.

14. The Supreme Court Advisory Committee's recommendation suggested the word "order" rather than "require." But the "order" would be meaningless since it has nothing to do with preserving error for appeal. Further, it might only lead to confusion and, possibly, other types of sanctions. Note, however, that Rule 166(k) allows the court in a pretrial conference to "order" "[p]roposed jury charge questions, instructions, and definitions for a jury case***."

15. This provision simply gives the customary charge conference rule status, albeit discretionary with the trial judge.

(d) Hearing

The court shall conduct a hearing outside the presence of the jury for the parties to present their complaints pursuant to Rule 272.

(e) Modifying the Court's Charge

The court may modify the proposed charge at any time before it is read to the jury. When modified, the court shall deliver the modified charge to the parties and proceed as provided in (c) and (d) above.[16]

(f) Ruling on, Signing, and Filing Court's Charge

When the court has completed any modifications, heard and ruled on all complaints, the court shall sign the court's charge and have it filed. The court's charge so filed shall be a part of the record in the case.

(g) Further Instructions

Nothing in this rule prohibits the court from further instructing the jury as provided in Rule 286.

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16. This simply means that when the trial court accepts some objection or request as valid and incorporates it into the court's charge, other parties must now be given their opportunity to complain.

Rule 272. Complaints[17] to the Court's Charge

(1) Time

All complaints to the court's charge must be made before the charge is read to the jury. It shall be presumed, unless otherwise shown in the record, that all complaints were presented at the proper time.

(2) Type of Complaint

A complaint to the court's charge is made by an objection or a request.

(3) An Objection must:

(a) be made either in writing or dictated to the court reporter in the presence of the court and opposing counsel;

(b) point out distinctly the portion of the charge to which objection is made and the matter specifically objected to;

(c) state specific grounds;

(d) be complete in itself and not adopt any other complaints by reference; and

(e) not be obscured or concealed by numerous unfounded objections or minute differentiations.

(4) A Request must:

(a) be in writing and in substantially correct wording; and

(b) not be obscured or concealed by numerous unfounded requests or minute differentiations.

(5) Preserving Error for Appeal and Right to Jury Finding

(a) An objection is a sufficient complaint except when a request is required.

(b) A request by a complaining party is required:

---

17. The word "complaint" is used to include both an objection and a request.

(i) when an entire ground of recovery or defense upon which that party relies is omitted from the charge;[18] or

(ii) when a question, instruction, or definition which applies to that party's claim or defense is omitted from the charge.[19]

(c) Improper Complaints

An objection to a submitted question either (1) that the evidence is factually insufficient to support a given answer to that question or (2) that a given answer to that submitted question would be against the overwhelming weight of the evidence are improper complaints. Where there is some evidence to support a given answer, the question must be submitted.[20]

---

18. This is required by present law and is the compromise accepted by the Supreme Court Advisory Committee.

19. This would apply when a question (usually an element), an instruction, or a definition is omitted. The only change in present law is to an omitted instruction or definition. Presently when one of these is omitted, even the party to whose ground of recovery or defense the omitted instruction or definition does not apply must request it. Under the proposal, that party simply would need to object; the party to whose ground of recovery or defense the instruction or definition applies would be required to make the request.

20. This provision is apparently now included in the last sentence of Rule 279. However, the wording of the present rule is that such complaints "may be made for the first time after verdict." It does not advise that they are improper when made to the court's charge. Remember, the trial court must submit the question when there is some evidence to support it even though an answer would have factually insufficient support or be against the overwhelming support of the evidence.

Legal insufficiency (no evidence) or conclusive evidence are proper objections to the court's charge. However, these may be made after the verdict as well, e.g. in a motion for new trial or (better) a motion to set aside the judgment and render a judgment n.o.v.

Further, the present placement of this provision seems improper.

(6) Court's Ruling on Complaints

(a) Express Ruling

The court shall rule on complaints before reading the charge to the jury either by endorsing the rulings on written complaints or, when the complaints are not in writing, by dictating the rulings to the court reporter in the presence of counsel. All rulings may be made a part of the record for appeal.

(b) Implied Ruling

Any complaint not expressly ruled on by the court, but which the record reflects was brought to the court's attention, shall be deemed overruled when the court's charge is not modified to comply with the complaint.[21]

Rule 273. Reading Court's Charge to the Jury

After ruling on all complaints to the court's charge and before argument is begun, the trial court shall read the entire charge to the jury in the precise words in which it is finally written, signed, and filed.

---

21. This puts the law regarding "requests," see Acord v. General Motors Corp., 669 S.W.2d 111 (Tex. 1984), into the rule and expands the law to "objections." A similar provision is included in the Supreme Court Advisory Committee's recommended Rule 273-7.

Rule 274. Questions Omitted from the Court's Charge[22]

(1) Waiver of Grounds

All independent grounds of recovery or of defense not conclusively established under the evidence and no element of which is submitted are waived unless complained of in compliance with Rule 272.

(2) Waiver of Jury Finding

A jury finding is waived on any omitted element of a ground of recovery or defense when:

(a) Any other element necessarily referable to that ground of recovery or defense is submitted to and answered by the jury, and

(b) No complaint to the omission is made in compliance with Rule 272.

(3) Trial Court Finding

The trial court may make an explicit finding or the appellate court shall deem the trial court made a finding when a jury finding is waived as in "(2)" above, and such explicit or deemed finding is proper under the evidence.

(a) Explicit Finding by Court

The trial court, at the request of either party may, after notice and hearing, make and file written findings on the omitted element or elements and render an appropriate judgment on all material findings.

(b) Deemed Finding of Court

If no explicit written findings are made, the omitted element or elements shall be deemed by an appellate court to be found by the trial court in such manner as to support the judgment.[23]

---

22. This rule is rewritten with headings to make clear what it means.

23. This is present Rule 279 and proposed Rule 275 with the last sentence moved to suggested Rule 272(5)(c). See note 20 above. The rule is rewritten and organized to make clear what it involves.

Prof. J. Patrick Hazel
University of Texas
School of Law
727 E. 26th Street
Austin, Texas 78705

I favor the proposal as is:_____

I am opposed to any changes:_____

I favor some change, but not the proposal as is:_____

(In the latter event, please take time to let us know your objections to the proposal and what you suggest.)

Name:_____

Address:_____

City, State and Zip Code:_____

Telephone: (_____) _____-_____

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4543.cc1

JIM PARKER
6118 MOUNTAIN VILLA COVE
AUSTIN, TEXAS 78731

June 11, 1991

Professor J. Patrick Hazel
University of Texas School of Law
727 East 26th Street
Austin, Texas 78705

Re: Proposed Rule Changes relating to Jury Charges published in the May 1991 Texas Bar Journal

Dear Professor Hazel:

I have no comments on proposed Rules 226, 236, 273, and 274, but I am writing regarding the other proposed Rules.

Proposed Rule 226a

Rule 226a has not been amended since Tex. R. Civ. Evid. 606(b) became effective. Are the new instructions regarding proof of jury misconduct correct and appropriate in light of Tex. R. Civ. Evid. 606(b)?

Why is "you are performing a significant service which only free people can perform" being replaced with language about doing a civic duty? This hardly shows pride in our jury system.

Proposed Rule 271

(1)(a)(vi) This is the only portion of the proposed Rule dealing with the specific wording of specific questions to be asked. Why is percentage causation singled out for specific attention in the proposed Rule instead of being addressed generally under (1)(a)(i)? Furthermore, by getting this specific in the proposed Rule, a future rule change will be required if this specific area is changed by statute or case law.

Proposed Rule 272

(5)(b)(ii) The need for a request when a question or an element thereof is omitted should be made clear in the proposed Rule instead of being only in an explanatory instruction (the first sentence of your footnote 19). Otherwise, there is a conflict in the wording of proposed Rule 272(5)(b)(ii) and proposed Rule 274(2).

F:\JPARKER\MISC\HAZEL.1

I know that there are many highly qualified people involved in this important process, but I offer my assistance if I can be of help.

Sincerely,

Jim Parker

Jim Parker
(H) 458-2909
(W) 322-8109

cc: Honorable Nathan Hecht
P.O. Box 12248
Capitol Station
Austin, Texas 78711

Luther Soules
Chair, Supreme Court Advisory Committee
175 East Houston Street
10th Floor
San Antonio, Texas 78205-2230

F:\JPARKER\MISC\HAZEL.1

SCHOOL OF LAW
THE UNIVERSITY OF TEXAS AT AUSTIN

727 East 26th Street · Austin, Texas 78705-3299 · (512) 471-5151
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543.001

March 1, 1990

Justice Nathan Hecht
Supreme Court of Texas
P.O. Box 12248, Capitol Station
Austin, Texas 78711

Re: Revised Proposals

Dear Justice Hecht,

Not another one! I can just hear you saying that, and I don't blame you. However, I am very concerned about the proposed changes to these rules. I am NOT against changes; I am simply concerned that we do it right (I should say that the Court does it right). This latest proposal has been worked on long and hard by Mr. Harry Tindall and myself. We have kept the FAX lines hot between Houston and Austin. I can honestly say that I believe we have a greatly superior product to that proposed by the SCAC. We have kept to their basic proposal which is to make Requests only necessary when a party relies on an omitted ground of recovery or defense and when the court orders a Request by an objecting party who either relies on the question or when the instruction or definition is properly a part of that party's claim or defense.

We have reorganized the rules (271 and 272) again to make them even clearer. There are some changes from what the SCAC has recommended. I have underlined and numbered those changes and will list our basic reasons for them.

(1) Nothing in our present rules lets anyone know of (unless they are already aware of it) the existence and importance of Rule 226a to the court's charge.

(2) This is reinserted after being dropped in 1988. Without this, or some similar statement, there really is nothing - except case law - to prevent evidentiary questions, curiosity questions, and the like. Probably the reason for dropping the phrase from Rules 277 and 279 was to emphasize submitting broad form questions. This should no longer be a problem, and I think some guidance is necessary for the bench and bar to know WHAT you do submit.

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(4) This is usually done, and it seems appropriate to include it. It is especially important where the jury has more than one such percentage question in the court's charge, e.g. TEX. CIV. PRAC. & REM. CODE, sections 33.004 and 33.016(c).

(5) This is presently only stated in case law, e.g. Scott v. Atchison Topeka and Santa Fe Ry. Co., 572 S.W.2d 273 (Tex. 1978).

(6) There may be a reason, but I am not aware of it, why such is proper in an instruction or definition but not in a question (so long as it is properly a part of the question for another or other reasons).

(7) The SCAC recommends "order." But the order would be meaningless since it has nothing to do with preserving error for appeal. Further, it might encourage a local rule ordering that this be done in all cases.

(8) The "charge conference" is a regular part of present practice. It is discussed by all who write on the subject of the court's charge. This would give it status while leaving it in the discretion of the court.

Judge Hecht, I want you to know how much I appreciate your looking at these proposals. I further want you to know that I shall try to make myself (as I am sure Harry will do) to discuss this with the Court, members of the SCAC, or anyone else who is interested.

Sincerely,

J. Patrick Hazel

cc: Chair and Members, Supreme Court Advisory Committee
Judge Sam Houston Clinton
Chief Justice Austin McCloud
Judge David Peeples
R. Doak Bishop

RULE 271. COURT'S CHARGE

(1) Contents

The court's charge shall contain those applicable parts of Rule 226a and be subject to the following requirements: (1)

(a) Jury Questions

The court's charge:

(i) shall submit only questions controlling the disposition of the case which are raised by affirmative written pleadings and evidence. No question shall be submitted when raised only by a general denial unless specifically defined by statute or other rules of procedure; (2)

(ii) shall submit the questions in broad form, whenever feasible;

(iii) shall not submit various phases or shades of questions already submitted;

(iv) shall not submit inferential rebuttal questions;

(v) shall not submit advisory questions; (3)

(vi) shall, in any case in which the jury is required to apportion the loss among the parties, submit questions inquiring what percentage, if any, of the causation, responsibility, or negligence, as the case may be, that caused the occurrence or injury in question is attributable to each of the parties found to have been responsible. In such instances the court shall instruct the jury that the percentage must total 100% and to answer the damage questions without any reduction because of the percentage, if any, attributed to the injured party; and (4)

(vii) may submit questions disjunctively when it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists.

(b) Instructions and Definitions

The court's charge:

(i) shall submit only those instructions and definitions as are proper to enable the jury to render a verdict;

(ii) shall submit inferential rebuttal instructions raised by the written pleadings and evidence; and (5)

(iii) may place the burden of proof by instruction rather than by inclusion in a question.

(c) Other Requirements

The court's charge:

(i) shall not comment directly on the weight of the evidence or advise the jury of the effect of their answers, except that the court's charge may comment incidentally on these matters when it is properly a part of a question, instruction, or definition; and (6)

(ii) may predicate the damage questions upon affirmative findings of liability.

(2) Preparation and Time for Complaints

(a) At any reasonable time the court may request the parties to present the court with written, suggested jury questions, instructions, and definitions. These suggestions shall not be required to preserve error for appeal or entitle any party to the right to a jury finding. (7)

(b) At the conclusion of the evidence in all jury cases, unless expressly waived by the parties, the court shall prepare and deliver a proposed written charge to the parties. Before preparing and delivering a proposed written charge, the court may conduct a charge conference with the parties. At the charge conference any party may present suggested questions, instructions, and definitions for inclusion in the court's charge. (8)

(c) The court shall allow the parties a reasonable time in which to examine the proposed court's charge and prepare complaints.

(d) The court shall conduct a hearing for the parties to present their complaints pursuant to Rule 272 and outside the presence of the jury.

(e) The court may modify the proposed charge at any time before it is read to the jury. When modified, the court shall deliver the modified charge to the parties and proceed as provided in (c) and (d) above.

(f) When the court has completed any modifications, heard and ruled on all complaints, the court shall sign the court's charge and have it filed. The court's charge so filed shall be a part of the record in the case.

(g) Nothing in this rule prohibits the court from modifying the charge as provided in Rule 286.

4543.cc1

JIM PARKER
6118 MOUNTAIN VILLA COVE
AUSTIN, TEXAS 78731

June 11, 1991

Professor J. Patrick Hazel
University of Texas School of Law
727 East 26th Street
Austin, Texas 78705

Re: Proposed Rule Changes relating to Jury Charges published in the May 1991 Texas Bar Journal

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I know that there are many highly qualified people involved in this important process, but I offer my assistance if I can be of help.

Sincerely,

Jim Parker

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cc: Honorable Nathan Hecht
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Luther Soules
Chair, Supreme Court Advisory Committee
175 East Houston Street
10th Floor
San Antonio, Texas 78205-2230

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May 7, 1991

Mr. Luke Soules
Republic of Texas Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Dear Luke,

First, I talked with Ms. Ann Bowman of Bancroft-Whitney this morning about the revised Modern Texas Discovery, potential for new rules of procedure and discovery, and potential for a co-author. She was delighted with the idea that you might join me in co-authoring this book, and she was going to see if some delay in getting it done could not be obtained. She should call you sometime in the near future.

Secondly, I am sending you a version of my proposal (which is not in conformity with the Administration of Justice Committee's proposal) for making complaints to the court's charge. Basically it provides that an objection is required and suffices in most instances. However, when a party relies on a question or omitted ground of recovery or defense, the trial court can order a request be tendered by that party. Also, an objection to an omitted instruction or definition would suffice, except that the trial court can order an objecting party to tender a request when the instruction or definition is a part of that party's claim or defense. It seems to me that this takes care of several problems:

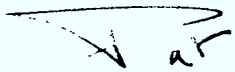
1. It simplifies the complaint process generally by making an objection the proper initial complaint;

2. It protects trial judges from being sandbagged, because the judge can order an objecting party to request under proper circumstances; and

3. It protects those who object to the omission of an instruction or definition from having to tender a request (or being ordered to do so) when the instruction or definition is not a part of the objecting party's claim or defense.

Hope to hear from you soon about the "book."

Sincerely,



J. Patrick Hazel

Rule 272 Complaints to the Court's Charge

(1) Time

All complaints to the court's charge must be made before the charge is read to the jury. It shall be presumed, unless otherwise shown in the record, that all complaints were presented at the proper time.

(2) Type of Complaint

A complaint to the court's charge is made by an objection or, when ordered, by a request.[1]

(3) An objection must:

(a) be made either in writing or dictated to the court reporter in the presence of the court and opposing counsel;

(b) point out distinctly the portion of the charge to which objection is made and the matter specifically objected to;

(c) state specific grounds;

(d) be complete in itself and not adopt any other complaints by reference; and

(e) not be obscured or concealed by numerous unfounded objections or minute differentiations.

(4) A request must be in writing and in substantially correct wording.[2]

(5) Preserving Error for Appeal and Right to Jury Finding

(a) An objection is a sufficient complaint except when a request is ordered.[3]

---

1. No request would ever be required unless ordered by the trial court.

2. There is no need to include "minute differentiation" or "numerous" requests, since only those ordered should be considered by the court.

3. While an objection would be the basic and only way to preserve error under most circumstances, a trial judge can order a party to submit a request under certain circumstances which are explained in the rule. This will prevent a judge from being "sandbagged" as so many feared when only an objection was the suggested requirement.

(b) A trial court may order an objecting party to tender a request when:

(A) a question, which is a part of a ground of recovery or defense, or an entire ground of recovery or defense is omitted and the ordered party relies on that question or ground for its claim or defense;[4] or

(B) an instruction or definition is omitted and the instruction or definition is properly a part of the ordered party's claim or defense.[5]

(c) Improper Complaints

An objection to a submitted question either (1) that the evidence is factually insufficient to support a given answer to that question or (2) that a given answer to that submitted question would be against the overwhelming weight of the evidence are improper complaints. Where there is some evidence to support a given answer, the question must be submitted.[6]

(6) Court's Ruling on Complaints

(a) Express Ruling

The court shall rule on complaints before reading the charge to the jury either by endorsing the rulings on written complaints or by dictating the rulings to the court reporter in the presence of counsel. All rulings may be made a part of the record for appeal.

---

4. This would apply when a question (usually an element) is omitted and an objection is made to the omission. If the objecting party relies on the question, the court may order that party to tender a request. If an objection is made by the nonrelying party, the court cannot order that party to tender a request. If the relying party does not object, he/she fails to preserve error.

5. This provision applies when a party objects to the omission of an instruction or definition which is a part of that party's claim or defense. If an objection is made by a party for whom the instruction or definition is not a part of that party's claim or defense, that objecting party cannot be ordered to tender a request of either an instruction or definition. This is a change in present law which requires that any party complaining about the omission of an instruction or definition, even though not a part of that party's claim or defense, must request the instruction or definition. As with a question, if the party for whom the instruction or definition is a part of that party's claim or defense does not object, he/she fails to preserve error.

6. This provision is apparently now included in the last sentence of Rule 279 and the Supreme Court Advisory Committee's proposed Rule 275. However, the wording of the present and proposed rules is that such complaints "may be made for the first time after verdict." It does not advise that they are improper when made to the court's charge. Remember, the trial court must submit the question when there is some evidence to support it even though an answer would have factually insufficient support or be against the overwhelming support of the evidence.

Legal insufficiency (no evidence) or conclusive evidence are proper objections to the court's charge. However, these may be made after the verdict as well, e.g. in a motion for new trial or (better) a motion to set aside the judgment and render a judgment n.o.v.

Further, the present and proposed placement of this seems improper.

(b) Implied Ruling

Any complaint not expressly ruled on by the court shall be deemed overruled when the court's charge is not modified to comply with the complaint.[7]

7. This puts the law regarding "requests," see Acord v. General Motors Corp., 669 S.W.2d 111 (Tex. 1984), into the rule and expands the law to "objections." A similar provision is included in the Supreme Court Advisory Committee's recommended Rule 273-7.

RULE 272 COMPLAINTS TO THE COURT'S CHARGE

(1) Time

All complaints to the court's charge must be made before the charge is read to the jury. It shall be presumed, unless otherwise shown in the record, that all complaints were presented at the proper time.

(2) Type of Complaint

A complaint to the court's charge is made by an objection or a request.

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(a) be made either in writing or dictated to the court reporter in the presence of the court and opposing counsel;

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(4) A Request must:

(a) be in writing and in substantially correct wording; and

(b) not be obscured or concealed by numerous unfounded requests or minute differentiations.

(5) Preserving Error for Appeal and Right to Jury Finding

(a) An objection is sufficient to complain about the court's charge except when a request is required.

(b) A request is required:

(i) when an entire ground of recovery or defense is omitted from the charge; and

(ii) when the trial court orders an objecting party to submit a request regarding:

(A) a question upon which that party relies for its claim or defense; or

(B) an instruction or definition which is properly a part of that party's claim or defense.

(c) A complaint to a submitted question that the evidence is factually insufficient to support a finding or that a finding would be against the overwhelming weight of the evidence is an improper complaint to the court's charge.

(6) Court's Ruling on Complaints

(a) The court shall rule on complaints before reading the charge to the jury either by endorsing the rulings on written complaints or by dictating the rulings to the court reporter in the presence of counsel. All rulings may be made a part of the record for appeal.

(b) Any complaint not expressly ruled on by the court shall be deemed overruled when the court's charge is not modified to comply with the complaint.

4543.001

SCHOOL OF LAW
THE UNIVERSITY OF TEXAS AT AUSTIN

727 East 26th Street · Austin, Texas 78705-3299 · (512) 471-5151
Telecopier Number (512) 471-6988

March 1, 1990

Justice Nathan Hecht
Supreme Court of Texas
P.O. Box 12248, Capitol Station
Austin, Texas 78711

Re: Revised Proposals

Dear Justice Hecht,

Not another one! I can just hear you saying that, and I don't blame you. However, I am very concerned about the proposed changes to these rules. I am NOT against changes; I am simply concerned that we do it right (I should say that the Court does it right). This latest proposal has been worked on long and hard by Mr. Harry Tindall and myself. We have kept the FAX lines hot between Houston and Austin. I can honestly say that I believe we have a greatly superior product to that proposed by the SCAC. We have kept to their basic proposal which is to make Requests only necessary when a party relies on an omitted ground of recovery or defense and when the court orders a Request by an objecting party who either relies on the question or when the instruction or definition is properly a part of that party's claim or defense.

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Judge Hecht, I want you to know how much I appreciate your looking at these proposals. I further want you to know that I shall try to make myself (as I am sure Harry will do) to discuss this with the Court, members of the SCAC, or anyone else who is interested.

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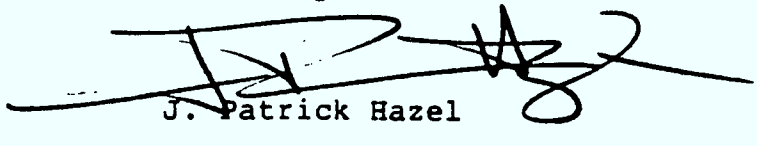

J. Patrick Hazel

cc: Chair and Members, Supreme Court Advisory Committee
Judge Sam Houston Clinton
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RULE 273 READING COURT'S CHARGE TO THE JURY

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We have reorganized the rules (271 and 272) again to make them even clearer. There are some changes from what the SCAC has recommended. I have underlined and numbered those changes and will list our basic reasons for them.

(1) Nothing in our present rules lets anyone know of (unless they are already aware of it) the existence and importance of Rule 226a to the court's charge.

(2) This is reinserted after being dropped in 1988. Without this, or some similar statement, there really is nothing - except case law - to prevent evidentiary questions, curiosity questions, and the like. Probably the reason for dropping the phrase from Rules 277 and 279 was to emphasize submitting broad form questions. This should no longer be a problem, and I think some guidance is necessary for the bench and bar to know WHAT you do submit.

(3) This one may be controversial. In so far as I know only family law has "advisory questions" to the jury. I understand the Pattern Jury Charge folks dealing with Volume 5 are also trying to discourage these questions going to the jury. I am a strong advocate of the jury trial in civil cases. Where, however, others have decided not to allow a jury to determine a matter, it strikes me as illogical, unnecessary, and expensive to ask a jury for its advice.

(4) This is usually done, and it seems appropriate to include it. It is especially important where the jury has more than one such percentage question in the court's charge, e.g. TEX. CIV. PRAC. & REM. CODE, sections 33.004 and 33.016(c).

(5) This is presently only stated in case law, e.g. Scott v. Atchison Topeka and Santa Fe Ry. Co., 572 S.W.2d 273 (Tex. 1978).

(6) There may be a reason, but I am not aware of it, why such is proper in an instruction or definition but not in a question (so long as it is properly a part of the question for another or other reasons).

(7) The SCAC recommends "order." But the order would be meaningless since it has nothing to do with preserving error for appeal. Further, it might encourage a local rule ordering that this be done in all cases.

(8) The "charge conference" is a regular part of present practice. It is discussed by all who write on the subject of the court's charge. This would give it status while leaving it in the discretion of the court.

Judge Hecht, I want you to know how much I appreciate your looking at these proposals. I further want you to know that I shall try to make myself (as I am sure Harry will do) to discuss this with the Court, members of the SCAC, or anyone else who is interested.

Sincerely,

J. Patrick Hazel

cc: Chair and Members, Supreme Court Advisory Committee
Judge Sam Houston Clinton
Chief Justice Austin McCloud
Judge David Peeples
R. Doak Bishop

RULE 274 QUESTIONS OMITTED FROM CHARGE OF THE COURT

(1) Waiver of Grounds

All independent grounds of recovery or of defense not conclusively established under the evidence and no element of which is submitted are waived unless complained of in compliance with Rule 272.

(2) Waiver of Jury Finding

When a ground of recovery or defense consists of more than one element, if one or more of those elements necessary to sustain that ground of recovery or defense, and necessarily referable to it, are submitted to and found by the jury, and one or more of those elements are omitted from the charge, without complaint in compliance with Rule 272, and there is factually sufficient evidence to support a finding thereon:

(a) Explicit Finding by Court

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 the omitted element or elements in support of the judgment.

(b) Deemed Finding by Court

If no written findings are made, the omitted element or elements shall be deemed found by the court in such manner as to support the judgment.

4543.001

SCHOOL OF LAW
THE UNIVERSITY OF TEXAS AT AUSTIN

727 East 26th Street · Austin, Texas 78705-3299 · (512) 471-5151
Telecopier Number (512) 471-6988

March 1, 1990

Justice Nathan Hecht
Supreme Court of Texas
P.O. Box 12248, Capitol Station
Austin, Texas 78711

Re: Revised Proposals

Dear Justice Hecht,

Not another one! I can just hear you saying that, and I don't blame you. However, I am very concerned about the proposed changes to these rules. I am NOT against changes; I am simply concerned that we do it right (I should say that the Court does it right). This latest proposal has been worked on long and hard by Mr. Harry Tindall and myself. We have kept the FAX lines hot between Houston and Austin. I can honestly say that I believe we have a greatly superior product to that proposed by the SCAC. We have kept to their basic proposal which is to make Requests only necessary when a party relies on an omitted ground of recovery or defense and when the court orders a Request by an objecting party who either relies on the question or when the instruction or definition is properly a part of that party's claim or defense.

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(3) This one may be controversial. In so far as I know only family law has "advisory questions" to the jury. I understand the Pattern Jury Charge folks dealing with Volume 5 are also trying to discourage these questions going to the jury. I am a strong advocate of the jury trial in civil cases. Where, however, others have decided not to allow a jury to determine a matter, it strikes me as illogical, unnecessary, and expensive to ask a jury for its advice.

(4) This is usually done, and it seems appropriate to include it. It is especially important where the jury has more than one such percentage question in the court's charge, e.g. TEX. CIV. PRAC. & REM. CODE, sections 33.004 and 33.016(c).

(5) This is presently only stated in case law, e.g. Scott v. Atchison Topeka and Santa Fe Ry. Co., 572 S.W.2d 273 (Tex. 1978).

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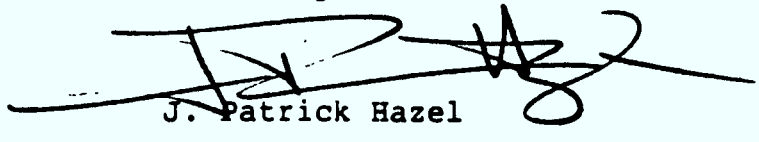
(7) The SCAC recommends "order." But the order would be meaningless since it has nothing to do with preserving error for appeal. Further, it might encourage a local rule ordering that this be done in all cases.

(8) The "charge conference" is a regular part of present practice. It is discussed by all who write on the subject of the court's charge. This would give it status while leaving it in the discretion of the court.

Judge Hecht, I want you to know how much I appreciate your looking at these proposals. I further want you to know that I shall try to make myself (as I am sure Harry will do) to discuss this with the Court, members of the SCAC, or anyone else who is interested.

Sincerely,



J. Patrick Hazel

cc: Chair and Members, Supreme Court Advisory Committee
Judge Sam Houston Clinton
Chief Justice Austin McCloud
Judge David Peeples
R. Doak Bishop

PLAYING BY THE RULES

Recent Amendments to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence Effective December 1, 1991

by John K. Chapin

On April 30, 1991, the Supreme Court transmitted to Congress a number of changes to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence. These changes are to take effect on December 1, 1991. Following is a discussion of the major changes. Other insubstantial changes were made to F.R.A.P. 6, 10, 26, and 26.1.

FEDERAL RULES OF CIVIL PROCEDURE

(TRCP 290-295) *Judgment as a Matter of Law in Actions Tried by Jury; Alternative Motion for New Trial; Conditional Rulings—Rule 50*

Rule 50 is revised to replace the terminology of directed verdict and judgment notwithstanding the verdict with that of judgment as a matter of law. In addition, the new rule authorizes the court to enter judgment as a matter of law at any time during the trial whenever a party has been fully heard with respect to an issue and it is apparent that the party is unable to carry a burden of proof that is essential to that party's case. The new rule otherwise effects no change in the existing standard for the granting of a motion for directed verdict or judgment notwithstanding a verdict. Under the new rule, such motions will be replaced by motions for judgment as a matter of law.

PROPOSED CHANGE TO RULE 292
Adopted by the Committee on Court Rules February 20, 1993

Exact wording of existing Rule:

Rule 292. Verdict by Portion of Original Jury. A verdict may be rendered in any cause by the concurrence, as to each and all answers made, of the same ten members of an original jury of twelve or of the same five members of an original jury of six. However, where as many as three jurors die or be disabled from sitting and there are only nine of the jurors remaining of an original jury of twelve, those remaining may render and return a verdict. If less than the original twelve or six jurors render a verdict, the verdict must be signed by each juror concurring therein.

PROPOSED CHANGE:

Rule 292. Verdict by Portion of Original Jury. A verdict may be rendered in any cause by the concurrence, as to each and all answers made, of the same ten members of an original jury of twelve or of the same five members of an original jury of six. However, there as many as three jurors die or be disabled from sitting or be discharged from further service for any reason and there are only nine of the jurors remaining of an original jury of twelve, those remaining may render and return a verdict. If less than the original twelve or six jurors render a verdict, the verdict must be signed by each juror concurring therein.

COMMENT: The reason for the change is sp that Rule 292 would clearly be understood to include not only jurors who have been discharged from service due to illness or other physical or mental inability, but also those who were determined to have a legal disability not discovered until after the jury selection and discharge of the panel.

3/23
HTP, SCAC Sub Co. Agenda
J. Hecht.

March 11, 1993

Mr. Luther H. Soules, III
1st Republic Bank Plaza
Tenth Floor
175 East Houston Street
San Antonio, Texas 78205-2230

RE: Committee on Court Rules

Dear Luke:

I'm sure you'll be surprised to hear from me but I was asked to work for the committee one more year to just attend meetings and prepare the minutes. The new secretary to the committee is Emily Casstevens who is with the Services Department of the State Bar. Her number is 512/463-1515 in case you need to contact her.

At its meeting held February 20, 1993, the Court Rules Committee approved amendments to three Rules, these being Rule 174(b), Rule 226a and Rule 292.

The exact wording of the existing Rules, the proposed amendments as adopted and the comments relating thereto are enclosed.

With my very best wishes, I remain

Sincerely,

Evelyn A. Avent

Enclosures
Copies w/enclosures to:
J. Shelby Sharpe, Chair of the Court Rules Committee
Emily Casstevens, Secretary to the Committee

W. JAMES KRONZER

9-17-90
SMS

9/21/90
HJH

TRCP 292 Sent SCAC agenda COAJ J. Healy.

9/14

Luke Soules

Can you tell me how one can reconcile TRCP 292 with the extra jurors statute or, for that matter, internally? Under 292 a verdict must ~~be~~ include 10 of the original jurors. So

(1) Suppose an extra juror fills in for a disqualified juror, doesn't 292 require that at least 10 of the original jurors must join in the ~~verdict~~?

(2) If 292 is primary, does it not make the extra juror statute meaningless and confusing?

(3) What if 3 original jurors disqualified, and no extras, can the remaining 9 reach a verdict?

Jim K

CC-LCT

PLAYING BY THE RULES

Recent Amendments to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence Effective December 1, 1991

by John K. Chapin

On April 30, 1991, the Supreme Court transmitted to Congress a number of changes to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence. These changes are to take effect on December 1, 1991. Following is a discussion of the major changes. Other insubstantial changes were made to F.R.A.P. 6, 10, 26, and 26.1.

FEDERAL RULES OF CIVIL PROCEDURE

(TRCP 296)

Findings by the Court; Judgment on Partial Findings—Rule 52

Rule 52 is amended by adding Rule 52(c), which replaces that part of the current Rule 41(b) which authorizes a dismissal at the close of the plaintiff's case if the plaintiff has failed to carry an essential burden of proof. New Rule 52(c) parallels the revised Rule 50(a) (judgments as matter of law, discussed above), but applies to nonjury trials rather than jury trials. It authorizes the court to enter judgment at any time that it can appropriately make a dispositive finding of fact on the evidence.

4543.001

PUTNAM KAYE REITER
FORMER DISTRICT JUDGE
POST OFFICE BOX 953
MEXIA, TEXAS 76667
817/562-5303

October 15, 1990

Honorable Luka Soleas
175 East Houston, 10th Floor
San Antonio, Texas 78205

Re: Proposed TRCP revision:
fact finding in bench trials

Dear Mr. Soleas,

In the trial of civil cases two different approaches are taken to determine the "Facts". The approach depends on whether the jury or the judge is the Fact Finder. Such a distinction seems not to be driven by logic. It is proposed that the same fact finding process be followed irrespective of who determines the facts.

That is whether it be jury or judge who finds the facts, at the conclusion of the evidence, a charge conference be conducted. The parties would each propose the fact questions to be answered by the fact finder. The judge would follow the accepted procedure for jury trials, ruling on the ultimate fact questions to be answered, take and rule on objections and then submit them to the fact finder. The fact finder, jury or judge, then would answer the questions and direct the prevailing attorney to draft a proposed judgment (i.e. the conclusions of law) submitting it to the court for signature. No further Findings of Facts and Conclusions of Law would be needed or appropriate.

Thusly, fact finding, irrespective of the finder would be done while the evidence is fresh on the finders' minds (or mind), and without delay. This would bring uniformity to the record in civil cases, and permit the appellate court to follow in bench trials the settled case law for review of jury decisions without the necessity of Findings of Facts and Conclusions of Law. This revised procedure would also provide greater fairness to losing parties in non-jury cases where it is informally but uniformly recognized than an appeal on evidenciary matters after a bench trial is likely unavailing.

It has been suggested that this revision would prompt additional jury trials, but whether to go to the jury or judge is always up to the parties. It should not be the function of the rules of civil procedure to discourage access to a jury. Also, it is said that this change would require additional labor by trial counsel. Frankly, it is my experience that jury decisions tend to resolve issues at the trial level subject to motions for new trials. Bench trials on the other hand seem to be a "never ending story". The losing party has to prepare a written request for findings of facts and conclusions of law, serve it on the judge, remind the judge in writing when it is not done, and request additional findings when it is. This process has been followed in virtually every bench trial I have conducted in the last several years. All long after memories have clouded and interests waned with the press of subsequent matters.

Please present this suggestion for consideration by the Rules Committee. If they have any questions about this suggestion, please let me know and I will endeavor to answer them.

Sincerely yours,

Putnam Kaye Reiter

Putnam Kaye Reiter

PKR:fjk
cc: The Honorable Thomas R. Phillips

4543.001

hhd
LHS

9-27-90
SB

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711
(512) 463-1312

September 26, 1990

HHD / SCAC Agenda / SubC

Mr. M. Lewis Kinard
Busch, Ryan & Seib
1330 St. Paul Place, L.B. 3
750 N. St. Paul
Dallas TX 75201

Dear Mr. Kinard:

Thank you for your comments regarding Texas Rule of Civil Procedure 299a. I have sent a copy of your letter to the Court's Rules Advisory Committee, and I assure you that your concerns will be fully addressed by that committee and the Court in the course of future rules revisions.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

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

BUSCH, RYAN & SEIB
ATTORNEYS AND COUNSELORS AT LAW
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS

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FAX: (214) 871-4932

BEVERLY BROWN *
FAITH WINSBOROUGH BRUNER
JOHN J. GALLAGHER **
M. LEWIS KINARD ***
PAMELA REDD
E.O. RICK ROMERO
ROBERT RUOTOLO
VALERIE S. VICK

*ALSO LICENSED IN TENNESSEE
**ALSO LICENSED IN LOUISIANA
***ALSO LICENSED IN ARKANSAS

September 24, 1990

Honorable Nathan L. Hecht
Texas Supreme Court Justice
Supreme Court Building
P.O. Box 12248
Austin, TX 78711

RE: New Texas Rule of Civil Procedure 299a

Dear Justice Hecht:

It has been quite a while since we have spoken. Unfortunately, I am not able to so easily stop by to say hello as when you were here in Dallas and have not been to Austin in order to take up your invitation to visit your office there.

I am writing about one of the new Rules of Civil Procedure which is causing some confusion. Perhaps the next Rules Revision Committee can recommend a means of clarifying the issue. New Rule 299a states that findings of fact "shall not be recited in a judgment." The ambiguity centers on the difference in practice between those findings made upon request (Tex. R. Civ. P. 296-299a) and those merely made incident to entry of a judgment. The former are generally relied upon for appellate purposes while the latter are viewed as recitals.

In the case of a default judgment, certain "findings" on important prerequisites to the entry of the default judgment are traditionally included (such as that the citation has been duly served and the return on file for at least 10 days). There is an advantage to the party obtaining a judgment to not get specific findings other than those necessary to the judgment. Tex. R. Civ. P. 299. Is the rule calling for a change in such incidental findings? The revisor's comments are of little help.

Please refer this to the Rules Committee for review. A simple additional phrase such as would expressly limit the application of Rule 299a to the findings actually requested pursuant to Rule 296 would probably resolve the issue. Until then, it appears that a separate list of Findings Incident to Default Judgment can be required by the trial court, taking certain presumptions away from the Plaintiff's usual default judgment.

Thank you for your time. Should the Court ever need attorneys for its Rules Committee, I would certainly like to be considered. I enjoy working with the Rules and like to see them drafted carefully to avoid unnecessary technical disputes in mid-trial due to ambiguities.

I still keep in touch with Kathy Wilcher who keeps me up-to-date on what she hears from you. I hope we can visit sometime soon.

Sincerely,

BUSCH, RYAN & SEIB

BY: M. Lewis Kinard

MLK/dm

Xc J. Hackl
Hum back to LHS
4-20-90

4543.001

high
Urs

TINDALL & FOSTER
Attorneys at Law
2800 Texas Commerce Tower
600 Travis St.
Houston, Texas 77002
(713) 229-8733
Fax (713) 228-1303

S/C 4-20-90
HJH
SCAC Sent @
Agenda
✓

TELEFAX COVER LETTER

TO: Luke Soules

TELEFAX NUMBER: 512 224 7073

FROM: HARRY L. TINDALL

DATE: 4-20-90

RE: Rule 301

_____ PAGES SENT INCLUDING TELEFAX COVER LETTER.

Attention: If you do not receive the total number of pages sent, please call Myra Smith or Karen Howard, legal assistants, immediately.

COMMENTS: Luke,
The attached Rule was adopted by the Court on 4-16-90. Obviously it did not come from the Advisory Comm. Hee. I think it is a disaster

TELEFAX REPLY:
-Harry

Rule 301. Judgments

The judge of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity. Provided, that upon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any jury finding on a question that has no support in the evidence. Only one final judgment shall be rendered in any cause except where it is otherwise specially provided by law. Judgment may, in a proper case, be given for or against one or more of several plaintiffs, and for or against one or more of several defendants or intervenors. Every judgment shall be in writing, set forth on a separate document, and signed by the judge. Judgment is not rendered until it is signed by the judge.

Rule 305. ~~Draft~~ Proposed Judgment

~~Counsel of the party for whom a judgment is rendered shall prepare the form of the judgment to be entered and submit it to the court.~~

Any party may prepare and submit a proposed judgment to the court for signature.

Each party who submits a proposed judgment for signature shall serve the proposed judgment on all other parties to the suit who have appeared and request in the same manner as provided for service of notice of the judgment.

Failure to comply with this rule shall not affect the finality of the judgment.

Comment to 1990 change: to clarify the procedure for preparing judgments and notice to other parties.

Rule 306c. Prematurely Filed Documents.

No motion for new trial or request for findings of fact and conclusions of law shall be held ineffective because prematurely filed; but every such motion shall be deemed to have been filed on the date of but subsequent to the ~~date~~ time of signing of the judgment the motion assails, and every such request for findings of fact and conclusions of law shall be deemed to have been filed on the ~~date~~ time of but subsequent to the date of signing of the judgment.

4543.001

high
Urs
5-31-90
SM

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711
(512) 463-1312

May 30, 1990

John W. Harris, Esq.
Twin Oaks Shopping Center
312 East Oltorf
Austin, TX 78704

Dear Mr. Harris:

Thank you for your comments regarding Texas Rule of Civil Procedure 301. I have sent a copy of your letter to the Court's Rules Advisory Committee, and I assure you that your concerns will be fully addressed by that committee and the Court in the course of future rules revisions.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

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

TRCP 301

JOHN W. HARRIS
ATTORNEY AND COUNSELOR AT LAW

TWIN OAKS SHOPPING CENTER
312 EAST OLTORF
AUSTIN, TEXAS 78704

OFFICE 444-6689
HOME 282-1377
AREA CODE 512

May 29, 1990

The Honorable Nathan Hecht
Associate Justice/Chairperson
Supreme Court Rules Advisory Committee
PO Box 12248
Austin, Texas 78711

Dear Justice Hecht and Committee Members:

Please note my opposition to the Proposed Rule Change which would alleviate the present effect of RENDITION OF JUDGEMENT until a written instrument is signed by the Court.

The nature and character of Family Law Matters alone (not to mention that of the Litigants) necessitates that the effect and force of an Order or Judgment in Family Law Matters and SAPCR suits occur at the time of RENDITION.

Personally, I also feel that the subject change will result in the public feeling that those in charge of the legal system have operated once again to "delay" matters to their (the public's) inconvenience, at ADDITIONAL COST AND DELAY.

I respectfully request that you please consider taking the appropriate action to amend your Proposed Rule Changes with regards to Family Law Matters.

Very truly yours,

JOHN W. HARRIS

DOWLING & WILSON, P.C.
LAWYERS
2003 NORTH LAMAR
AUSTIN, TEXAS 78705

DUNCAN F. WILSON
BOARD CERTIFIED: CIVIL TRIAL LAW & FAMILY LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

TELEPHONE
(512) 476-8885
FAX (512) 476-9027

June 11, 1990

Hon. Nathan Hecht
Supreme Court of Texas
Supreme Court Building
Austin, Texas 78701

Re: Proposed Rule Change
Rule 306 TRCP

Dear Justice Hecht:

It is my understanding that the Supreme Court is considering a change in Rule 306 TRCP to have the effect that an oral judgment of the Court will have no effect until a written judgment is signed.

I would strongly urge you to make an exception to this general rule in family law judgments.

Many times child support orders are entered that need to have immediate effect. Often, the parties (or, more to the point, the recipient of support) simply could not afford to have temporary orders in place. Because of the emotionally charged nature of divorces, each case even after "conclusion" has a tendency to drag on and on while the written judgment is being haggled over by the attorneys. If the Rule is changed, an area that is already rife with acrimonious disputes will result in an explosion of hearings in the trial court.

To be quite blunt, in these situations the "loser" will have a great deal to gain simply by digging in his or her heels. I think that an exception would avoid this.

Sincerely yours,

Duncan F. Wilson

PLAYING BY THE RULES

Recent Amendments to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence Effective December 1, 1991

by John K. Chapin

On April 30, 1991, the Supreme Court transmitted to Congress a number of changes to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence. These changes are to take effect on December 1, 1991. Following is a discussion of the major changes. Other insubstantial changes were made to F.R.A.P. 6, 10, 26, and 26.1.

FEDERAL RULES OF CIVIL PROCEDURE

(TRCP 306a) *District Court and Clerks: Notice of Orders or Judgments—Rule 77(d)*

Rule 77(d) is amended to conform to a concurrent amendment to F.R.A.P. 4(a), discussed below. The amendment to Rule 77(d) deletes the language that the clerk's mailing of notice of entry under Rule 5 (service and filing of pleadings and other papers) is sufficient notice for all purposes for which notice of entry is required by the rules. According to the Advisory Committee, the effect of the revisions is to place a burden on prevailing parties who desire certainty that the time for appeal is running. An appropriate procedure for such notice is provided in Rule 5.

GRAVES, DOUGHERTY, HEARON & MOODY
2300 NCNB TOWER
POST OFFICE BOX 98
AUSTIN, TEXAS 78767
TELEPHONE: (512) 480-5600

IRELAND GRAVES (1885-1969)
BEN F. VAUGHAN, III, P.C.
OF COUNSEL

TELECOPY NUMBER:
(512) 478-1976

CHARLES A. SPAIN, JR.
(512) 480-5609

November 26, 1989

The Honorable Nathan L. Hecht, Justice
The Supreme Court of Texas
Post Office Box 12248
Capitol Station
Austin, Texas 78711

Dear Judge Hecht:

6. The following proposed amendments use the word "nonjury": Texas Rules of Appellate Procedure 41(a)(1) and 54(a). The following proposed amendments use the word "non-jury": Texas Rules of Appellate Procedure 41 comment, 52(d), 52 comment, and 54 comment. The court may wish to standardize the terminology. The term "non-jury" currently appears in Texas Rules of Civil Procedure 90, 156, 216(1), 249, 307, and 542. The term "nonjury" currently appears in Texas Rule of Civil Procedure 324(a) and Texas Rule of Judicial Administration 6(b)(2).

I appreciate the opportunity to comment on the proposed rules amendments and hope that my comments are helpful.

Respectfully,

Charles A. Spain, Jr.

4543.001

njh
Ltr

✓ 1-11-90

Court of Appeals
Eighth Judicial District

500 CITY-COUNTY BUILDING
EL PASO, TEXAS
79901 - 2490
915 546-2240

January 9, 1990

1/10
HJH.
RCP 324 Subc
Agenda
COAS

Mr. Luther H. Soules III
Soules & Wallace
10th Floor, Republic of Texas Plaza
175 East Houston Street
San Antonio, Texas, 78205

Re: Amendments to TRAP & TRCP

Dear Mr. Soules:

For some time I have been concerned about consideration of "no evidence" points of error when that issue had not been raised in an objection or motion in the trial court. As I read Tex. R. Civ. P. 324 a "no evidence" point need not be raised in a motion for new trial. We have know since the holdings in J. Weingarten, Inc. v. Razey, 426 S.W.2d 538 (Tex. 1968) that a no evidence point could get a reversal, if not a rendition, where the proper complaint had not been made for a rendition.

In the enclosed opinion in First American Title Company v. Prata I have attempted to raise the issue in a footnote. It seems to me the courts holding in Aero Energy clearly conflicts with the present language in Rule 324. I also realize that at the time that opinion was written it was consistent with the language then in the rule. But it seems the Courts of Appeals and perhaps the Supreme Court also are still following the Aero Enery holding after the rule change removed the language about "a complaint which had not otherwise been ruled upon."

Of course if a "no evidence" point is not required to be raised by Rule 324, and was not raised by the four procedures Justice Calvert wrote about in Texas Law Review, then are we not back to "resurrecting the rejected fundamental error rule" Justice Pope mentioned in Litton Industrial Products, Inc. v. Gammage, 668 S.W.2d 319 at 324 (Tex. 1984)?

I have no idea who on your committee reviews screwball issues an appellate judges raise for the first time in dictum in a footnote. A copy goes forward to a couple of people who may review these nutty questions.

Sincerely,

Max N. Osborn

cc: Justice Nathan Hecht
Prof. Wm. Dorsaneo III

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

FIRST AMERICAN TITLE COMPANY OF EL PASO AND CORONADO STATE BANK, Appellants,	)	No. 08-88-00235-CV
v.	)	Appeal from 243rd District Court of
SYLVIA V. PRATA, Appellee.	)	El Paso County, Texas. (TC# 86-4066)

O P I N I O N

This suit was filed by the owner of a house who lost a possible sale when the prospective buyer learned of pending condemnation proceedings which had been filed prior to the owner's purchase of the property from the Bank. The owner sued the Bank for damages under the Deceptive Trade Practices Act and the company which issued the title policy under the Texas Insurance Code. Based upon a favorable jury verdict, judgment was entered for the owner of the house. We reverse and remand the judgment against the Title Company and reverse and render judgment for the Bank.

On February 7, 1984, Coronado State Bank purchased a house which had been owned by Sylvia Prata's mother and stepfather at a sheriff's sale. The day before the foreclosure sale, El Paso Community College had filed a condemnation statement to obtain the same property. No lis pendens notice was filed and notice of the proceedings was not served upon the owner. Without any notice of the condemnation proceedings, the Bank sold the house to Sylvia Prata for $56,000.00 on May 18, 1984, and conveyed title to her by a special

warranty deed. The closing was handled by First American Title Company of El Paso which issued a title commitment and a title insurance policy. The title commitment made no reference to condemnation proceedings, but the title insurance policy had an exclusion as to condemnation proceedings. The College did not serve anyone as owner of the property until Sylvia Prata was served on May 21, 1987, more than three years after the condemnation statement had been filed.

Sylvia Prata testified that the attorney for the Bank represented to her that she would receive "free and clear title" or "clear title" to the house. She said, at the closing, representatives of the Title Company represented that she was getting free and clear title to the property.

In November 1984, Prata entered into a contract to sell the house to Tito Gonzalez, a realtor who was acting as trustee for William Abraham, for $250,000.00. That contract had a proviso that it was "subject to inspection and approval of property within 20 working days." The property was never inspected for any type of approval and no sale was consummated because of the pending condemnation proceedings.

In answer to questions submitted, the jury found: (1) that the Title Company engaged in a false, misleading or deceptive act or practice or made misrepresentations in connection with the purchase of the property or in the issuance of the title policy on the property, (2) that such conduct was a producing cause of damages to Prata, (3) that the Title Company and Prata entered into an agreement based upon the title commitment instrument, (4) that the Title Company breached that agreement, (4A) that such breach was a proximate cause

of damages to Prata, (5) that Prata sustained damages of $39,000.00 for loss of a sale, $5,850.00 for loss of rental value, $2,000.00 for loss of credit reputation in the past, $9,500,00 attorney's fees in the condemnation proceeding, $2,000.00 for travel expenses and that $39,000.00 was the difference in the value of the property as received and the value it would have had if it had been as represented, $2,000.00 for inconvenience, $1,000.00 for physical pain in the past and $2,500.00 for mental anguish in the past.

With regard to the Bank, the jury found: (6) that the Bank engaged in a false, misleading or deceptive act or practice in the sale of the house, (7) that such conduct was a producing cause of any damages of Prata, (8) damages identical to those found as to the Title Company except they increased the attorney's fees for condemnation proceeding to $9,713.75, and (9) failed to find that the Bank knowingly committed the false, misleading acts or practices. The jury found Prata's reasonable attorney's fees for trial to be $19,213.75, with additional attorney's fees of $16,750.00 depending on appellate proceedings. They failed to find Prata's suit against the Bank and against the Title Company was groundless and brought in bad faith or for harassment.

Under the statute then in effect, the court trebled the damages against the Title Company and with prejudgment interest awarded a recovery of $192,685.63, and awarded a recovery of $79,735.63 against the Bank. In addition, the judgment awarded attorney's fees as found by the jury, plus interest and costs.

Initially, a contention is made that the trial court lacked subject matter jurisdiction and that it erred in overruling a plea in abatement. The argument presented is that there was no justiciable

issue ripe for adjudication because all issues were contingent upon the condemnation case which had not been decided at the time this case was tried. The assertion is made that only an advisory judgment could be entered prior to disposition of the exercise of any right of condemnation. Appellants rely upon **City of Garland v. Louton**, 691 S.W.2d 603 (Tex. 1985) and **California Products, Inc. v. Puretex Lemon Juice, Inc.**, 160 Tex. 586, 334 S.W.2d 780 (1960). To be an advisory decision, the judicial determination must be based upon some hypothetical or contingent situation. **Freeport Operators, Inc. v. Home Insurance Company**, 666 S.W.2d 566 (Tex.App.--Houston [14th Dist.] 1984, no writ). The facts in this case were established at the time of trial and the pleadings were based upon prior conduct involving these parties and a third party condemnor. Whether the condemnation case proceeded to its final disposition would not affect the claims asserted in this case since the condemnor had not been joined as a party defendant. The Bank's Points of Error Nos. One and Two and the Title Company's Point of Error No. Fifteen are all overruled.

Turning to the merits of the case, the controlling issue is not whether the Title Company or the Bank committed the acts found by the jury, but whether such conduct was a producing cause of the damages found by the jury. For the sake of discussion only, we assume that both Appellants committed the various acts found by the jury. With that assumption, did the Title Company's acts or misrepresentations in connection with the purchase of the property by Sylvia Prata or the issuance of the title insurance policy produce damages to her, all of which arose out of her failure to sell such property to William Abraham?

The Title Company asserts, in its third point of error, that

there was no evidence or insufficient evidence to support the jury finding of causation. The argument is made that the filing of the condemnation suit was the only producing cause of any damages sustained by Sylvia Prata. The Title Company argues that even assuming that there was a misrepresentation about the title at the time of the loan closing, the title which Prata received had absolutely nothing to do with her failure to complete the sale to William Abraham. We agree and note that the contention in this point of error perhaps should have been directed to the jury's answer to question number two as well as number five particularly since the reference to the motion for new trial relates to the answer to issue two as well as five. In any event, it is the contentions under the points and not the points themselves which are controlling. O'Neil v. Mack Trucks, Inc., 542 S.W.2d 112 (Tex. 1976).

The testimony with regard to the question of causation is set out verbatim from those persons who were involved in the sale. First, Sylvia Prata, the owner and prospective vendor, testified as follows:

> Q (BY MR. STEWART) Did you actually, yourself, attend at some point in December, any kind of meeting concerning this property?
>
> A Yes; I did.
>
> . . .
>
> Q And what was your understanding of that meeting?
>
> . . .
>
> THE WITNESS: They showed us the condemnation paper and said that the house had been condemned and I had to tell Mr. Gonzalez and I lost the sale.
>
> Q (BY MR. STEWART) Did you -- were you aware of

any other reason the sale was lost?

A Because of the condemnation.

Q Were you aware of any other reason?

A No.

Next, Mr. William Abraham, the prospective purchaser, testified as follows:

Q Okay. Did those problems have anything to do with the house or solely to do with this proceeding that came to your attention?

A Well, to be honest with you I didn't. I don't think we ever got to the -- to the inspection and approval stage. I think that shortly after submittal it had come to our attention or come not to my attention but to Mr. Gonzalez' attention in that there was some problem as far as condemnation that was down the road.

Q Were you interested in buying a property or was this condemnation proceeding it?

A No, sir.

Finally, Tito Gonzalez, the realtor who represented Mr. Abraham and had signed the purchase agreement in his capacity as trustee testified as follows:

Q And what happened with the contract?

A Well, the contract -- one thing that I asked Sylvia was to make sure it wasn't, you know, being condemned and she made sure and found out the opposite. It was being condemned. So that killed the contract.

There is no evidence the sale was not completed because Sylvia Prata had a defective title to the property, or her title insurance policy was not as represented to her or that she could not deliver clear title to the property. The only reason the sale fell

through was because a condemnation suit had been filed, a matter totally unrelated to any representations or misrepresentations made by the Title Company at the time of the closing of the sale by the Bank to Sylvia Prata.

In order to recover damages for any deceptive acts under Tex.Ins.Code Ann. art. 21.21 (Vernon 1981), it was necessary to prove that the conduct inquired about in question number one was a producing cause of any damages sustained by Sylvia Prata. **Weitzel v. Barnes**, 691 S.W.2d 598 (Tex. 1985); **Chambless v. Barry Robinson Farm Supply, Inc.** 667 S.W.2d 598 (Tex.App.--Dallas 1984, writ ref'd n.r.e.). A producing cause is "an efficient, exciting or contributing cause, ..." **Rourke v. Garza**, 530 S.W.2d 794 (Tex. 1975); **Dubow v. Dragon**, 746 S.W.2d 857 (Tex.App.-- Dallas 1988, no writ). Neither reliance nor forseeability are necessary elements of recovery. **Weitzel v. Barnes; Hycel, Inc. v. Wittstruck**, 690 S.W.2d 914 (Tex.App.--Waco 1985, writ dism'd). But, the proof must establish that the damages alleged were factually caused by the defendant's conduct. **Dubow v. Dragon; Rotello v. Ring Around Products, Inc.**, 614 S.W.2d 455 (Tex.Civ.App.--Houston [14th Dist.] 1981, writ ref'd n.r.e.). Where the evidence does not establish that the alleged false, misleading or deceptive act or practice was a producing cause of the plaintiff's actual damages, there is no cause of action. **MacDonald v. Texaco, Inc.**, 713 S.W.2d 203 (Tex.App.--Corpus Christi 1986, no writ).

In passing on a no evidence point, the reviewing court considers only that evidence and reasonable inferences therefrom viewed in its most favorable light and reject all evidence and reasonable inferences to the contrary. **Glover v. Texas General**

Indemnity Company, 619 S.W.2d 400 (Tex. 1981). We have found no evidence which suggests that the lost sale resulted from anything other than the condemnation suit. That conclusion is supported by the acknowledgment in Appellee's brief which, when analyzing the testimony of Mr. William Abraham, says "[h]e testified the reason he did not proceed further with the contract was that a pending condemnation came up." The loss of the proposed sale was not factually caused by any conduct of the Title Company and there is no evidence to support the jury finding of producing cause of any damages.

In passing on the insufficient evidence point, we consider all of the evidence, including that which is contrary to the verdict. **In re King's Estate**, 150 Tex. 662, 244 S.W.2d 660 (1951). In this case, there is no testimony from either of the parties to the proposed sale that the sale was not completed because Sylvia Prata did not have a good, merchantable title to the house in question. All of the evidence is that the sale could not be completed because the Community College had pending a condemnation suit. That controlling evidence which we consider on this point has been set out verbatim. We sustain the insufficient evidence argument also. Point of Error No. Three is sustained.

Since this point is directed only to the overruling of a motion for new trial, may we reverse and render when we sustain a no evidence contention? Under the holding in **J. Weingarten, Inc. v. Razey**, 426 S.W.2d 538 (Tex. 1968), we could not. In **Bluebonnet Express, Inc. v. Employers Insurance of Wausau**, 651 S.W.2d 345 (Tex.App.--Houston [14th Dist.] 1983, no writ), the Court, on motion for rehearing, 655 S.W.2d 327 (1983), with one judge dissenting, concluded that the holding in **Razey** was no longer applicable. That

case was tried to the court without a jury. More recently, in **City of Garland v. Vasquez**, 734 S.W.2d 92 (Tex.App.--Dallas 1987, writ ref'd n.r.e.), the Court concluded that where a no evidence point is first raised by assignment in a motion for new trial, the assignment is sufficient to obtain a remand for a new trial, but is not sufficient to obtain a rendition of judgment. That case was tried to a jury. **See also Commercial Insurance Company of Newark, New Jersey v. Puente**, 535 S.W.2d 948 (Tex.Civ.App.--Corpus Christi 1976, writ ref'd n.r.e.). We conclude, as did Justice Calvert, when he wrote on this issue nearly thirty years ago and said:

> The controlling consideration with an appellate court in passing on a point of error directed at the state of the evidence is not whether the point uses the preferable, or even the proper, terminology, but is whether the point is based upon and related to a particular procedural step in the trial and appellate process and is a proper predicate for the relief sought.

Robert W. Calvert, "No Evidence" and "Insufficient Evidence" Points of Error, 38 Texas L.Rev. 361 at 361-62 (1960). **See also** Robert W. Calvert, How an Errorless Judgment Can Become Erroneous, 20 St. Mary's L.J. 229 (1989). Having raised the sufficiency issue in only a motion for new trial and having raised a point of error complaining of the trial court's action on the motion for new trial, we can only grant a new trial when we sustain that particular point of error.[1]

---

1. A somewhat related problem arises from any current application of the holding in **Aero Energy, Inc. v. Circle C Drilling Company**, 699 S.W.2d 821 (Tex. 1985), that a no evidence point must be raised through one of five procedural steps, the last one of the five being a motion for new trial. We assume that case was tried under the 1978 language in Rule 324 which required a motion for new trial in order to present a complaint which had not otherwise been ruled upon. **See Litton Industrial Products, Inc. v. Gammage**, 668 S.W.2d 319 (Tex.

In a motion for judgment non obstante veredicto, the Bank asserted that it was entitled to judgment because there was no evidence that it had engaged in any false, misleading or deceptive act and it had not violated the Deceptive Trade Practices Act. The controlling issue revolves around the testimony of Sylvia Prata that the Bank's attorney represented to her that following the foreclosure sale, the Bank would transfer to her clear title to the property in question. She testified he told her "the reason he was doing it this way was to guarantee us we would have clear title to whatever we were purchasing." She also said "after Coronado Bank already owned the property that was going to get free and clear title."

The Bank in fact transferred the property by a special warranty deed. There has been no breach of warranty and it was undisputed at the time of oral argument that Sylvia Prata owned fee title to the property in question. Accepting Sylvia Prata's testimony as true, we find no misrepresentation as to what she said she was told. The terms "good title" and "clear title" are synonymous, and mean that the land should be free from litigation, palatable defects and grave doubts and should consist of both legal and equitable title.

1984). The court restated its holding in **Steves Sash & Door Company, Inc. v. Ceco Corporation**, 751 S.W.2d 473 (Tex. 1988), in a case apparently tried several months after the April 1, 1984 amendment to Rule 324 which deleted the language about presenting a complaint which had not otherwise been ruled upon. We find nothing in Rule 324 which requires a complaint about "no evidence" in a motion for new trial as a prerequisite to a complaint on appeal. We are unable to determine if **Security Savings Association v. Clifton**, 755 S.W.2d 925 (Tex.App.--Dallas 1988, no writ) and **Tribble & Stephens Co. v. Consolidated Services, Inc.**, 744 S.W.2d 945 (Tex.App.--San Antonio 1987, writ denied), were tried before or after April 1, 1984. If Tex.R.App.P. 52(a) is the basis for such requirement, and no court has said so, does that rule conflict with Tex.R.Civ.P. 324(a)?

Veselka v. Forres, 283 S.W. 303 (Tex.Civ.App.--Austin 1926, no writ). Likewise, merchantable, marketable title means a title free and clear from reasonable doubt as to matters of law and fact and is one not clouded by any outstanding contract, covenant, interest, lien or mortgage sufficient to form a basis of litigation. **Lieb v. Roman Development Company**, 716 S.W.2d 653 (Tex.App.--Corpus Christi 1986, writ ref'd n.r.e.). In this connection, it should be noted that condemnation does not involve the question of title to land. **Thompson v. Janes**, 245 S.W.2d 718 (Tex.Civ.App.--Austin), aff'd, 251 S.W.2d 953 (Tex. 1952); 32 Tex.Jur. 3d, Eminent Domain, sec. 177).

In **Lansburgh v. Market St. Ry. Co.**, 220 P.2d 423 (Cal.App.Div. 1950), 21 A.L.R. 2d 785, the Court considered an issue involving a proposed condemnation and an agreement to sell land in San Francisco. In that case, there was a recision after the purchaser learned of the proposed condemnation, but prior to the proceedings actually being commenced. Suit was filed to recover a deposit paid on the contract to purchase. Recovery was denied. The Court noted that at the time for performance, no right existed because of the contemplated future condemnation. It noted the condemning authority had no more than the same inchoate right of eminent domain which they had in all other properties within their boundaries, "a right which clearly is not an encumbrance or defect of title." The Court went on to note that in California, the first step with regard to condemnation "is the issuance of summons, ..." A similar rule applies in Texas. In Rayburn on Condemnation, sec. 13.08 (1989), the author states:

> It is now settled law in Texas, that until the statutory provisions as to service and return of notice have been complied with, that there is no jurisdiction that can be exercised over the land, or real estate in question, ...

This is the clear holding in **City of Houston v. Kunze**, 153 Tex. 42, 262 S.W.2d 947 (1953); **Parker v. Ft. Worth & D. C. Ry. Co.**, 84 Tex. 333, 19 S.W. 518 (1892); **Rotello v. Brazos County Water Control & Improvement District**, 574 S.W.2d 208 (Tex.Civ.App.--Houston [1st Dist.] 1978, no writ). In the latter case, Chief Justice Coleman noted that condemnation proceedings must be conducted in strict compliance with the statute authorizing the procedure. The Court concluded that where the condemnation proceedings which are pending in the county court are void for want of power or jurisdiction, such proceedings may be enjoined. **See also** 32 Tex.Jur.3d, Eminent Domain, sec. 216. We can only conclude that where the proceedings are void and the court has no jurisdiction, the petition for condemnation could just as well have been posted on the public square or the back of a cow barn for all the effect it would have. The Bank, having delivered to Sylvia Prata good, clear title to the land in question, was not guilty of any false, misleading or deceptive practice and did not violate the Deceptive Trade Practices Act. If the filing of a condemnation proceeding without proper notice to Sylvia Prata resulted in a loss of sale, the resulting damages arose from the conduct of the Community College and not the Bank. Points of Error Nos. Four and Five are sustained.

That part of the judgment of the trial court awarding damages against First American Title Company of El Paso is reversed and the cause remanded for a new trial and that part of the judgment

awarding damages against Coronado State Bank is reversed and rendered that plaintiff have and recover nothing from the Bank, and the suit as against the two defendants is severed.

/s/Max N. Osborn
MAX N. OSBORN, Chief Justice

December 27, 1989

Before Panel No. 3
Osborn, C.J., Fuller and Woodard, JJ.

(Publish)

324
TRAP 5
90(h)

Court of Appeals
Eighth Judicial District

500 CITY-COUNTY BUILDING
EL PASO, TEXAS
79901 - 2490
915 546-2240

November 22, 1989

Justice Nathan L. Hecht
P. O. Box 12248
Austin, Texas, 78711

Dear Justice Hecht:

I take this opportunity to write concerning the proposed changes in the Texas Appellate Practice Rules as set forth in the November issue of the Texas Bar Journal.

With the present Rule 324 a motion for new trial is required in only limited instances and most often is filed to assert insufficency of the evidence. Even in a complicated case with numerous issues, that can be done in 10 days. In about 90% of the cases where a motion for new trial is filed it is overruled by operation of law and there is no hearing and no order entered by the trial judge. Yet, we allow 75 days for this to happen. That is a waste of time in the appellate procedure and one which can be reduced without adversely affecting substantial appellate rights. If the Court is interested in reducing delay I would urge that all motions for new trial be filed and amended within 20 days after the signing of the judgment and acted upon or overruled 30 days later. That would reduce the time table by 25 days from the current standards. Requiring the filing of a bond within another 10 days would mean the show would be on the road 60 days after judgment and not 90 days under the present rules. This saving of 30 days on the 8,905 appeals filed last fiscal year would have reduced the appellate time table for disposition of those cases by a time equal to 742 years. That is not a small item.

Having spent 18 years as an appellate lawyer I would not want to see changes that would adversely affect the appellate rights of any litigant. But, after 16 years as an appellate judge, I believe we are wasting lots of time on motions for new trial that will never be heard and the proposal will still allow for motions that should be heard and duly considered by a trial judge.

For the sake of argument I must agree that conformity is good, but for the sake of appellate review I cannot agree that more delay is good.

Sincerely,

Max N. Osborn

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00714

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November 26, 1989

The Honorable Nathan L. Hecht, Justice
The Supreme Court of Texas
Post Office Box 12248
Capitol Station
Austin, Texas 78711

Dear Judge Hecht:

6. The following proposed amendments use the word "nonjury": Texas Rules of Appellate Procedure 41(a)(1) and 54(a). The following proposed amendments use the word "non-jury": Texas Rules of Appellate Procedure 41 comment, 52(d), 52 comment, and 54 comment. The court may wish to standardize the terminology. The term "non-jury" currently appears in Texas Rules of Civil Procedure 90, 156, 216(1), 249, 307, and 542. The term "nonjury" currently appears in Texas Rule of Civil Procedure 324(a) and Texas Rule of Judicial Administration 6(b)(2).

I appreciate the opportunity to comment on the proposed rules amendments and hope that my comments are helpful.

Respectfully,

Charles A. Spain, Jr.

MARTIN L. PETERSON
Attorney at Law
105 W. WASHINGTON ST.
STEPHENVILLE, TEXAS 76401

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August 21, 1992

Mr. Luther H. Soules, III
Chairman, Supreme Court (Rules) Advisory Committee
175 E. Houston, 10th Floor
San Antonio, Texas 78205-2230

Re: Ambiguities in Rule 329b

Dear Luke:

In connection with the preparation of the enclosed motion, I discovered that there is some unnecessary weakness in the current wording of Tex.R.Civ.P. 329b. Obviously, this is a "motion to vacate judgment". Under Rule 329b (d), it appears the court could grant the relief requested therein prior to September 3, 1992, even if I had not filed the motion. A question arises, however, if the motion is not granted by written order on or before September 2. Rule 329b (e) speaks about the continuing authority of the trial court to grant a timely filed motion "to vacate, modify, correct, or reform", but apparently only in the situation where a motion for new trial has (also) been filed. In this particular situation there would appear to be no reason for me to file a motion for new trial (because there has not yet been a trial), other than this quirk in the rule. Furthermore, I have been unable to conceive of any situation where one would file both a motion for new trial and a motion to vacate, although I suppose it could be argued that an eternal optimist might do this so as to extend the plenary power time period of the court if it should overrule a timely filed motion for new trial by written order prior to the 45th day, but not the motion to vacate filed 1 to 15 days earlier). In other words, I believe that where there has been a trial, a motion to vacate is a motion for new trial and vice versa.

Rule 329b (g) appears to solve this problem with respect to motions "to modify, correct, or reform", but noticeably absent therefrom is any mention of a motion to vacate. I would also note that the rules nowhere specify the form for a motion to vacate. While I suppose my motion could be construed as a motion to modify or correct, and thereby brought within the ambit of Rule 329b (g), the language of the rule seems to imply that vacation of a judgment is distinct from correction or modification (and, indeed, logic seems to so dictate, since an appealable judgment results from the court's ruling on a motion to correct or modify, whereas I presume the court's ruling granting a motion to vacate is not immediately, if ever, subject to appellate review).

Please propose to your committee (and the Supreme Court) the following new wording for Rule 329b:

"The following rules shall be applicable to motions for new trial and motions to vacate, modify, correct, or reform judgments (except as provided by Rule 316) in all district and county courts:

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TEXAS BOARD OF LEGAL SPECIALIZATION

(a) Any such motion shall be filed prior to, or within thirty days after, the judgment or other order complained of is signed.

(b) Any such motion may be amended without leave of court if the amendment is filed within thirty days after the judgment or other order complained of was signed and before the preceding motion has been overruled.

(c) If a motion filed under this rule is not determined by written order signed within seventy-five days after the judgment was signed, it shall be considered overruled by operation of law upon expiration of that period.

(d) The trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial, or to vacate, modify, correct, or reform a judgment or other order within the thirty day time period after it is signed or within the thirty day time period after any timely-filed motion for new trial filed under this rule has been overruled.

(e) On expiration of the time within which the trial court has plenary power, a judgment cannot be altered by it except by equitable bill of review or in accordance with Rule 316; provided the court may at any time set aside a previous judgment or order that is void on its face.

(f) The overruling of a motion for new trial shall not preclude the timely filing of a motion to modify, correct, or reform the judgment, nor shall the overruling of such a motion preclude the timely filing of a motion for new trial.

(h) to be redesignated as (g)".

Such wording would seem to me to clarify the true meaning and application of the existing language in more concise form, and treat motions to vacate (which are the equivalent of a motion for new trial) in the same way as other motions filed under this rule.

By the way, although I fully expect Judge Hailey to grant my motion, I would certainly appreciate any advice you could give me as to when I should perfect an appeal, if that becomes necessary. My reading of Tex.R.Civ.P. 329b (g) and Tex.R.App.P. 41 (a)(1) has convinced me that unless I ask for a new trial (an apparent anomaly), any appeal bond must be filed on or before September 2, that is within the same period that the court has the power to grant the requested relief.

I appreciate your attention to and assistance with these matters.

Sincerely,

Martin L. Peterson

Martin L. Peterson

No. 4365

RONNIE FROST and KANDICE FROST	*	IN THE COUNTY COURT
	*	
VS.	*	OF
	*	
BOBBY TATE	*	ERATH COUNTY, TEXAS

MOTION FOR RECONSIDERATION OF MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

Bobby Tate, Appellant, moves the court to reconsider its ruling upon the Plaintiffs' "Motion to Dismiss Writ of Certiorari" which was filed and determined by the court on August 3, 1992, and as a basis shows:

I.

The Court erred in determining that the facts stated in the affidavit filed with the application for a writ of certiorari failed to show that injustice was done which was not caused by the applicant's own inexcusable neglect. To the contrary, the facts alleged show that the Appellant's failure to timely appear before the Justice Court was both excusable and not the cause of all of the injustice done. Such allegations were sufficient to invoke the jurisdiction of this court under Section 51.002 of the Civil Practice & Remedies Code.

II.

In any event, the judgment of the Court dismissing this cause is void or erroneous because same was entered without according any opportunity to Appellant to be heard and to present his defense to the motion. Rather, the motion was heard and determined by the Court prior to the time Appellant had notice even of the filing of the motion, much less of the time and place at which the court would determine the merits of such motion. Cf. Langdale v. Villamil, 813 S.W.2d 187, 189 (Tex.App.- Houston [14th Dist.] 1991); Anderson v. Anderson, 698 S.W.2d 397, 399 (Tex.App.- Houston [14th Dist.] 1985, writ

dism'd); Tramco Enterprises v. Independent American Savings, 739 S.W.2d 944, 948 (Tex.App.- Fort Worth 1987, no writ) ("Due process requires adequate notice be given of a hearing on a motion to dismiss a suit before judgment is rendered . . .").

Wherefore, Movant prays that the court will set aside its ruling of August 3, 1992 upon the Plaintiffs' motion and reconsider the merits of said motion at a hearing at which all parties are accorded due process or due course of law.

Respectfully submitted,

Martin L Peterson

Martin L. Peterson
Bar No. 15838600
105 W. Washington St.
Stephenville, Texas 76401
(817) 965-5050
ATTORNEY FOR APPELLANT

Certificate of Service

I hereby certify that a true copy of the foregoing motion was served by mail upon Mr. David Stokes, Attorney for Plaintiffs, this 21st day of August, 1992.

Martin L Peterson

FILED FOR RECORD
At _____ O'Clock _____ M
AUG 21 1992
NELDA CROCKETT, COUNTY CLERK
ERATH COUNTY, TEXAS
BY _____ DEPUTY

December 17, 1992

TRCP
523-591

Honorable Tom Lawrence
Harris County Justice of the Peace
Precinct Four, Position Two
121 West Main Street
Humble TX 77338-4306

Dear Judge Lawrence:

Thank you for your letter regarding revisions to the Rules of Civil Procedure. I have sent a copy to the chairman of the Rules Advisory Committee with the request that your comments be considered fully in making additional revisions in the rules.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

c: Mr. Luther H. Soules III

JUDGE TOM LAWRENCE
JUSTICE OF THE PEACE
HARRIS COUNTY
PRECINCT FOUR, POSITION TWO

121 WEST MAIN STREET
HUMBLE, TEXAS 77338-4306

TELEPHONE
(713) 446-7191

December 10, 1992

Justice Nathan L. Hecht
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

Enclosed is a copy of my letter to Chief Justice Phillips concerning the preliminary draft of Professor Dorsaneo's task force.

Since the preliminary report discussed the possibility of merging the justice court rules with the general rules for county and district court, much of my letter deals with the concept. It is apparent that Professor Dorsaneo's task force abandoned that concept in their October 22, 1992 report.

One other problem, not identified in my letter to Justice Phillips, concerns the problem of a counterclaim to a justice court lawsuit where the counterclaim is over $5,000.00 and thus in excess of the justice courts jurisdiction. Because there is not a mechanism to allow the justice court to either accept the counterclaim or transfer the original claim to county or district court, the result is that you must have two separate trials, one in the justice court and one in county or district court.

There are many other suggestions I would like to offer when the Supreme Court Advisory Committee addresses changes to the justice court rules.

If I can be of any additional help please let me know.

Sincerely yours,

Tom Lawrence
Judge

TL:mt

Enclosure

MEMORANDUM

DATE: July 13, 1992

TO: Honorable John C. Hawkins
Honorable Faye Murphree
Honorable Thomas E. Lawrence
Honorable Paul Heath Till
Honorable David Patronella

FROM: Chief Justice Thomas R. Phillips

SUBJECT: Report of the Task Force on the Revision of the Texas Rules of Civil Procedure

==========

Enclosed is a copy of the preliminary draft of the report of the Task Force from Professor William Dorsaneo, Chairperson. I would appreciate any comments you might have on the draft. Please drop me a line with your suggestions.

Enclosure

JUDGE TOM LAWRENCE
JUSTICE OF THE PEACE
HARRIS COUNTY
PRECINCT FOUR, POSITION TWO

121 WEST MAIN STREET
HUMBLE, TEXAS 77338-4306

TELEPHONE
(713) 446-7191

August 10, 1992

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

Dear Chief Justice Phillips:

Thank you for giving me the opportunity to comment on the report from the Rules Revision Task Force. It is apparent that the Task Force has given the matter much study and has a good plan to revise the rules. The report is general in nature, but I have few quarrels with its philosophy. I would like to have the opportunity to comment again when a working draft of its changes has been formulated.

I'm sure you sent me this report for comments on specific rules and issues involving the justice courts and for comment on the proposal to make the rules for justice courts the same as the rules for district and county courts.

Please allow me first to respond to issues relating to the latter proposal. Rules 523-591 apply to civil suits in justice court, and Rules 738-755 apply to forcible entry and detainer suits in justice court. I recommend leaving Rules 738-755 alone, except for some specific minor changes I'll mention later. I believe you can rescind Rules 523-591 as separate rules for justice courts and relocate the justice court rules to the "general rules section".

There are several reasons why I feel this is both possible and desirable. It is an unnecessary burden on attorneys to have different timetables in justice court which are shorter than the general rules and which set traps for the unwary lawyer to no good purpose. Many of the current rules for justice court are already similar to the general rules. The rules which differ can either be deleted as unnecessary, or can be easily incorporated into existing general rules with either an additional sentence or two, or a subsection. A lawsuit for $5,000.00, resulting from a "fender bender", may be filed either in justice court or in county or district court. Does it make sense to try the same case under different rules depending on in which court the plaintiff filed the suit?

One of the problems with leaving Rules 523-591 unchanged is Rule 523. Rule 523 defies precise interpretation, and is so vague that it is almost impossible to apply to specific conflicts which arise. If you leave the existing rules for justice courts unchanged, then you must amend Rule 523 so that it provides practical guidance with specific provisions. I think

it could be done, but it would be lengthy and cumbersome and probably still not resolve all of the questions. In my opinion, the best solution is to simply merge the rules as proposed by the Task Force.

There are one or two considerations in merging the rules. The drafters should keep in mind that justice court clerks are not separately elected officials, but are employees of the justice court. The only legal authority of a justice court clerk is found in Sec. 27.056 of the Texas Government Code, and although I believe the language is sufficiently global in scope, revisors should keep the difference in mind.

Another consideration is Rule 524, which is a requirement that justice courts keep a civil docket book. There is no corresponding general rule, so this may have to be retained in the general rules.

The appeal of a justice court suit is to county court, so there will have to be a separate section in the general rules to cover this procedure. Rules 528 and 529 are offensive and should be repealed and replaced with specific recusal procedures for justice court.

I have enclosed as Attachment 1 a parallel reference of Justice vs District and County rules which will be helpful to the Task Force, and which will facilitate the merger.

I also have some suggested changes to existing rules if the merger proposal is scrapped.

1. I suggest Rule 569 be exempted from the Rule 4 requirement that Saturdays, Sundays and holidays not be counted in 5 day periods. If a judgment is signed on the Tuesday before Thanksgiving, the 5th day deadline to file a motion for new trial is the Thursday of the following week, but the 10th day in which the justice still has plenary jurisdiction is the following day, which does not give the court much time to schedule a hearing or provide notice to the other party.

2. I suggest that we rename Part VII, Section 2, "Forcible Detainer and Forcible Entry and Detainer" since 95% of the cases filed under this section are, in fact, Forcible Detainer cases.

3. Another question which should be addressed is to what extent Rules 523-591 and the general rules apply to cases filed under this section. Triple T Inns of Texas, Inc. v Cliff Robert, 800 SW 2nd 68, is the only case on point and although I agree with Justice Boyd, the decision is narrowly written.

4. The application of Rule 4 to Rules 739 and 744 creates an interesting situation where 5 days is longer than 6 days. A defendant in a forcible must request a jury trial within 5 days of being served. Rule 4 means that the 5 day period excludes Saturdays, Sundays and holidays. The court may set the trial date between 6 and 10 days from date of service, but this period would include Saturdays, Sundays and holidays. If a defendant were served on Wednesday, he could request a jury trial at any time through the following Wednesday, but the court could set the case for trial on Tuesday thus creating a situation where the defendant could be given a bench trial

one day before his limit on requesting a jury trial. My solution would be to exempt Rule 744 from Rule 4.

There are several other minor changes which should be made in the forcible rules and I would appreciate the opportunity to discuss this in more detail when the Task Force is ready to formulate a draft.

Thank you again for the opportunity to comment. I appreciate your efforts to improve the administration of justice and hope you will keep working for improvement.

Sincerely yours,

Tom Lawrence
Judge

TL:mt

JUDGE TOM LAWRENCE
JUSTICE OF THE PEACE
HARRIS COUNTY
PRECINCT FOUR, POSITION TWO

121 WEST MAIN STREET
HUMBLE, TEXAS 77338-4306

TELEPHONE
(713) 446-7191

ATTACHMENT A

PARALLEL REFERENCE OF JUSTICE/DISTRICT
AND COUNTY COURT RULES OF CIVIL PROCEDURE

JUSTICE COURT RULE	DISTRICT & COUNTY RULE
RULE 523 - DISTRICT COURT RULES GOVERN	NO RULE

COMMENT: This rule will not be necessary if rules are combined.

RULE 524 DOCKET	RULE 25 - CLERK'S FILE DOCKET RULE 26 - CLERK'S COURT DOCKET

COMMENT: Rules are similar - Justice Court rule is more detailed as to what information must be recorded in the docket. There is no apparent reason to have rules of Justice Court different from that of the District and County Courts. The major difference in the rules is that the Justice Court rule makes the justice responsible for keeping the records instead of the clerk of the court in District and County courts.

RULE 525 - ORAL PLEADINGS	RULE 46 - PETITION AND ANSWER; EACH ONE INSTRUMENT OF WRITING

COMMENT: No real need to have oral pleadings - suggestion is to delete the rule.

RULE 526 - SWORN PLEADINGS	RULE 93 - CERTAIN PLEAS TO BE VERIFIED

COMMENT: Justice Court rule is to require any answer or other pleading pursuant to Rule 93 to be in writing and verified by affidavit. This rule may be deleted because Rule 93 requires a written pleading verified by affidavit. Rule 526 only exists because of Rule 525 - ORAL PLEADINGS. If Rule 525 is deleted, Rule 526 would not be necessary.

RULE 527 - MOTION TO TRANSFER

RULE 86 - MOTION TO TRANSFER VENUE

COMMENT: Rule 527 may be deleted. The Rule requires compliance with Rule 86, except that it also requires the motion to include the precinct to which the transfer is sought. Rule 86(3) may be amended as follows: "The motion, and any amendments to it, shall state that the action should be transferred to another specified county of proper venue, if filed in the County or District Court, or if filed in the Justice Court, the motion, and any amendments to it, shall state that the action should be transferred to another specified county or precinct of the county of proper venue.

RULE 528 - VENUE CHANGED ON AFFIDAVIT

RULE 257 - GRANTED ON MOTION
RULE 259 - TO WHAT COUNTY
RULE 261 - TRANSCRIPT ON CHANGE

COMMENT: The Justice Court rule allows for a case to be transferred upon affidavit by a party to a suit supported by affidavits of 2 credible persons of the county that a fair and impartial trial cannot be had before the justice or in the justice's precinct. The District court rule allows for more reasons to transfer on the affidavit of a party supported by affidavits of 3 credible persons of the county: (1) there exists in the county a prejudice so great that the party cannot obtain a fair and impartial trial; (2) there is a "combination" against him instigated by influential persons so that a fair and impartial trial cannot be had; (3) that an impartial trial cannot be had in the county; and (4) for other sufficient cause determined by the court. I see no reason not to incorporate the justice court rules into the district court rules. Rule 259 may be changed to reflect: Rule 259(e) If from a justice court, to the court of the nearest justice within the county not subject to the same or some other disqualification. "Nearest Justice" means the justice whose place of holding his court is nearest to that of the justice before whom the proceeding is pending or should have been brought.

RULE 529 - "NEAREST JUSTICE DEFINED"

NO RULE

COMMENT: This rule may be deleted if "nearest justice" is defined in Rule 259(e) (or as renumbered).

RULE 530 - BY CONSENT

RULE 255 - CHANGE OF VENUE BY CONSENT

COMMENT: Rules are easily adjusted to accomodate all courts.

RULE 531 - ORDER OF TRANSFER

RULE 259 - TO WHAT COUNTY

COMMENT: Rule 531 may be deleted as the order is included in Rule 259.

RULE 532 - TRANSCRIPT

RULE 261 - TRANSCRIPT ON CHANGE

COMMENT: Rule 532 may be deleted - Rule 261 includes all information for a transcript of judgment.

RULE 533 - REQUISITES OF PROCESS

NO RULE

COMMENT: Rule may be deleted as information is included in Rule 534

RULE - 534 ISSUANCE AND FORM OF CITATION

RULE 99 - ISSUANCE AND FORM OF CITATION

COMMENT: Rules mirror each other, with the exception of the time for filing an answer. Rule 99(c) is easily amended to include the time for filing an answer in justice court, although it may be justifiable to make the answer date in justice court the same as for district and county courts.

RULE 535 - ANSWER FILED

RULE 99(c) - ISSUANCE AND FORM OF CITATION

RULE 114 - CITATION BY PUBLICATION; REQUISITES

COMMENT: Rule 535 may be deleted. Information is included in Rule 99(c) and Rule 114. (As in the above rule, the time limits for filing an answer are different.)

RULE 536 - WHO MAY SERVE AND METHOD OF SERVICE

RULE 103 - WHO MAY SERVE
RULE 106 - METHOD OF SERVICE

COMMENT: Rules mirror each other. The problem with this rule for justice court is that we do not have the authority to charge for citation by publication and citation by certified and registered mail. The District and County Clerks have a provision for collecting the fees in the Government Code. (The Rules say: "Service by registered or certified mail and citatiion by publication SHALL if requested be made by the clerk of the Court in which the case is pending."...)

RULE 536a - DUTY OF OFFICER OR PERSON RECEIVING AND RETURN OF CITATION

RULE 105 - DUTY OF OFFICER OR PERSON RECEIVING
RULE 107 - RETURN OF SERVICE

COMMENT: The rules are the same with the exception of the time limits that a citation must be on file with the clerk before a default judgment is taken. In District and County Court, the citation must be on file for 10 days and in Justice Court, the citation must be on file for 3 days.

RULE 537 - APPEARANCE DAY

COMMENT: Delete rule - information is covered in Rule 535 and would be covered in Rule 99 and Rule 114.

RULE 538 - IF DEFENDANT FAILS TO APPEAR

RULE 241 - ASSESSING DAMAGES ON LIQUIDATED DEMANDS
RULE 243 - UNLIQUIDATED DEMANDS

COMMENT: Rule 538 may be deleted with Rules 241 and 243 controlling.

RULE 539 - APPEARANCE NOTED

RULE 238 - CALL OF APPEARANCE DOCKET

COMMENT: Rule 539 may be delted with Rule 238 controlling.

RULE 540 - IF NO DEMAND FOR JURY

NO RULE

COMMENT: Delete Rule

RULE 541 - CONTINUANCE

RULE 251 - CONTINUANCE

COMMENT: Rule 251 requires that before a continuance be heard or granted that a defendant must file his defense. Justice Court rule doesn't have the requirement. Suggestion is to delete Rule 541.

RULE 542 - CALL OF NON-JURY DOCKET

RULE 247 - TRIED WHEN SET

COMMENT: Rule 542 may be deleted with Rule 247 controlling.

RULE 543 - DISMISSAL

RULE 162 - DISMISSAL OR NON-SUIT
RULE 163 - DISMISSAL AS TO PARTIES SERVED, ETC.
RULE 165 - ABANDONMENT
RULE 165a - DISMISSAL FOR WANT OF PROSECUTION

COMMENT: Rules 162,162,165, & 165a may replace Rule 543.

RULE 544 - JURY TRIAL DEMANDED

RULE 216 - REQUEST AND FEE FOR JURY TRIAL

COMMENT: Time requirements for paying a jury fee are different. Justice Court rule requires the demand be made and the fee be paid at least one day prior to a trial setting. Also, the rule provides for the $5.00 fee. The time requirement for requesting a jury trial in District and County Court is at least 30 days prior to a trial setting. The jury fee is $5.00 in county court and $10.00 in district court. My suggestion is to make time limits for demanding and paying a jury fee the same for all courts. If a case must be set at least 45 days in advance of the trial setting date, there is ample time to request a jury trial.

RULE 545 - RULE 556 - ALL RULES DEAL WITH JURY TRIALS

RULES 271 - 295 - ALL RULES DEAL WITH JURY TRIALS

COMMENT: Decision to be determined whether jury trial rules in the justice court are going to be the same as the district and county courts.

RULE 557 - CASE TRIED BY JUSTICE

NO RULE

COMMENT: In justice court, the judge is supposed to announce the judgment in open court and note the same on the docket. The rule should not be necessary if district and county court rules for judgments are followed.

RULE 558 - JUDGMENT	RULE 305 - PROPOSED JUDGMENT RULE 306 - RECITATION OF JUDGMENT

COMMENT: This rule should not be necessary if district and county court rules for judgments are adopted for justice court.

RULE 559 - COSTS	RULE 125 - 149 - COSTS AND SECURITIES THEREFOR

COMMENT: Rules of district and county courts should be adopted for justice courts.

RULE 560 - JUDGMENT FOR SPECIFIC ARTICLES RULE 561 - TO ENFORCE JUDGMENT	RULE 308 - COURT SHALL ENFORCE ITS DECREES

COMMENT: Rule 561 and 308 are the same. Rule 560 allows for 6% interest on the value of the property awarded.

RULE 562 - NO JUDGMENT WITHOUT CITATION	RULE 119 - ACCEPTANCE OF SERVICE RULE 124 - NO JUDGMENT WITHOUT SERVICE

COMMENT: Rules are the same. Rule 562 may be deleted.

RULE 563 - CONFESSION OF JUDGMENT RULE 564 - WARRANT OF ATTORNEY RULE 565 - RULES GOVERNING	RULE 314 - CONFESSION OF JUDGMENT

COMMENT: Justice Court rules are not in conflict with Rule 314. Rules 563, 564 & 565 may be deleted.

RULES 566 - 570 - NEW TRIALS	RULES 320 - 329b - NEW TRIALS

COMMENT: Rules are completely different because of the appeal process. Separate justice court rules for new trials & motions to set aside default judgments need to be maintained

---

RULES 571 - 574b - APPEAL

COMMENT: All rules need to be retained in it's own section because of the nature and scope of appeals from justice court.

RULES 575 - 591 - CERTIORARI

COMMENT: This section needs to be maintained separately.

4543.001

hhd

LHS

8-17-92

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

8/17 HHD, SCAC Subc COAJ SCAC Agenda

August 12, 1992

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

TRCP 525

Dear Luke:

Enclosed is a copy of a letter Chief Justice Phillips received from Justice of the Peace John C. Hawkins, Jr. regarding rules revisions.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

Justice Hecht
S: copy to LHS
current rules

JOHN C. HAWKINS, JR.
JUSTICE OF THE PEACE
PRECINCT 1, PLACE 1
BOWIE COUNTY, TEXAS

July 19, 1992

BI-STATE JUSTICE CENTER
TEXARKANA, TEXAS 75501
(903) 798-3006

Honorable Thomas R. Phillips
Chief Justice
Texas Supreme Court
P O Bx 12248
Austin, TX 78711

re: Rules Revision Task Force

Dear Chief Justice Phillips:

Thank you for your confidence in sharing the task force recommendations with me. Agreeing generally with the need for rules revision, in the direction of simplicity, any disagreement I might have would be a mere difference in opinion.

The fact that so many appealed cases turn on errors in interpretation of the rules, instead of substantive law or facts, indicate a need for change.

With minor exception, Justice Court rules should be the same as County/District Court rules. The same is true of the statutes on venue, etc.

Please ask the committee to decide whether Justice Court pleadings should be oral (R 525) or written (R 534) [b] last paragraph - "The citation shall direct the defendant to file a written answer...." [c] "... If you or your attorney do not file a written answer...."

Does Rule 534 provide for what is printed on the citation, and does the citation establish a legal requirement of written pleadings if there is not a specific rule and a rule to the contrary?

Will we maintain the small claims court (Govt Code Cp 28) that operates virtually without rules, and a civil court that is subject to the rules? When do we utilize small claims court vs civil court? There is no consensus among Justices of the Peace. Should we have mandatory small claims under amount X and mandatory civil (rules of procedure and evidence) court over amount X? Arkansas uses "rules" if either side has an attorney and none if either does not.

Assembling a jury by constable is easier than utilizing a jury wheel, however the random nature of the clerk's sample probably reduces unintentional bias. I prefer a random method of jury selection, provided all jurors must live in the Justice Court's precinct.

Is there a good reason that the justice of the peace not "charge the jury" [R 554]? Without some notion of the law, on what basis does the jury make its decision? Why not let the Judge charge the jury if requested by either party, if not every time?

Thanks again, see you in September.

Sincerely,

John C. Hawkins, Jr.

JOHN C. HAWKINS, JR.
JUSTICE OF THE PEACE
PRECINCT 1, PLACE 1
BOWIE COUNTY, TEXAS

BI-STATE JUSTICE CENTER
TEXARKANA, TEXAS 75501
(903) 798-3006

September 30, 1992

Honorable Tom Phillips
Chief Justice
Supreme Court of Texas
P O Bx 12248
Austin, TX 78711

re: Rule 528 - Automatic Recusal on Affidavit

Dear Chief Justice Phillips:

It has become the practice of a local attorney to automatically file affidavits under Rule 528 whenever he is hired to defend a case in my Court. Under the case law, the case must be transferred without testing the affidavit, facts alleged, required citizenship of the affiants, etc.

The affiants are allegedly the boy friend of the attorney's daughter and law office employees, none of whom have ever appeared before my Court.

The affidavit allows the attorney to transfer the case to another local Court in which it is well known that he does not lose a case. The effect is the the attorney is allowed to place all of his cases in a friendly court.

I willingly recuse myself for cases in which I am acquainted with a party and in fact did so yesterday. I disagree with a rule that requires unquestioned recusal for the whims of an attorney, without proof.

I would request that you submit the rule to the rules committee for their consideration.

Sincerely,

John C. Hawkins, Jr.

4543.001 LHS hna

✓10-15-92 SB

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL. (512) 463-1312
FAX: (512) 463-1365

10/16

HHD, SC Subcs, SC Rules Committee, COAs Staffs

October 12, 1992

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

Dear Luke:

Enclosed are copies of the following letters:

1. Justice of the Peace John Hawkins regarding Rule 528.

2. Michael Weston regarding summary judgment procedures.

3. Charles Spain regarding the Texas Rules of Appellate Procedure.

I would appreciate your bringing these to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

October 12, 1992

Honorable John C. Hawkins, Jr.
Justice of the Peace
Precinct 1, Place 1
Bowie County, Texas
Bi-State Justice Center
Texarkana TX 75501

Dear Judge Hawkins:

Thank you for your letter regarding Rule 528. I have sent a copy to the chairman of the Rules Advisory Committee with the request that your comments be considered fully in making additional revisions in the rules.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

xc: Mr. Luther H. Soules III

4543.001

hhd

LHS

8-17-92

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

8/17 HHD, SCAC Subc COAJ SCAC Agenda

August 12, 1992

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

TRCP 534

Dear Luke:

Enclosed is a copy of a letter Chief Justice Phillips received from Justice of the Peace John C. Hawkins, Jr. regarding rules revisions.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

Justice Hecht
S: copy to LHS
current rules

JOHN C. HAWKINS, JR.
JUSTICE OF THE PEACE
PRECINCT 1, PLACE 1
BOWIE COUNTY, TEXAS

July 19, 1992

BI-STATE JUSTICE CENTER
TEXARKANA, TEXAS 75501
(903) 798-3006

Honorable Thomas R. Phillips
Chief Justice
Texas Supreme Court
P O Bx 12248
Austin, TX 78711

re: Rules Revision Task Force

Dear Chief Justice Phillips:

Thank you for your confidence in sharing the task force recommendations with me. Agreeing generally with the need for rules revision, in the direction of simplicity, any disagreement I might have would be a mere difference in opinion.

The fact that so many appealed cases turn on errors in interpretation of the rules, instead of substantive law or facts, indicate a need for change.

With minor exception, Justice Court rules should be the same as County/District Court rules. The same is true of the statutes on venue, etc.

Please ask the committee to decide whether Justice Court pleadings should be oral (R 525) or written (R 534) [b] last paragraph - "The citation shall direct the defendant to file a written answer...." [c] "... If you or your attorney do not file a written answer...."

Does Rule 534 provide for what is printed on the citation, and does the citation establish a legal requirement of written pleadings if there is not a specific rule and a rule to the contrary?

Will we maintain the small claims court (Govt Code Cp 28) that operates virtually without rules, and a civil court that is subject to the rules? When do we utilize small claims court vs civil court? There is no consensus among Justices of the Peace. Should we have mandatory small claims under amount X and mandatory civil (rules of procedure and evidence) court over amount X? Arkansas uses "rules" if either side has an attorney and none if either does not.

Assembling a jury by constable is easier than utilizing a jury wheel, however the random nature of the clerk's sample probably reduces unintentional bias. I prefer a random method of jury selection, provided all jurors must live in the Justice Court's precinct.

Is there a good reason that the justice of the peace not "charge the jury" [R 554]? Without some notion of the law, on what basis does the jury make its decision? Why not let the Judge charge the jury if requested by either party, if not every time?

Thanks again, see you in September.

Sincerely,

John C. Hawkins, Jr.

TRCP 534

TO: Judge Hecht August 22, 1990

FROM: Bill Willis

RE: Forcible Detainer Rules

Judge Sandy Prindle called me this afternoon before I had a chance to call him back. He had some additional matters as well as the one he called about last week.

I

He has comments about two new paragraphs in Rule 534: Paragraph b. requires the citation in J.P. court to be signed by the clerk UNDER SEAL OF THE COURT or by the J.P. Judge Prindle says J.P. courts don't have seals.

Paragraph c. directs that the citation tell the defendant "If you or your attorney do not file a written answer..." but Judge Prindle points out that you can plead orally in J.P. court, absent a special requirement to plead in writing. E.g. Rule 525:

"The pleadings shall be oral except where otherwise specially provided, but a brief statement thereof may be noted on the docket, provided that after a case has been appealed and is docketed in a county (or district) court all pleadings shall be reduced to writing."

II

Back to our original problem of Rules 749a, 749b, 749c & 751.

I expressed the notion, as set out in my memo of the 17th, that there was no intent to mess with the requirement of 749b that, in order to stay in possession pending appeal, a tenant must pay one rental period's rent into the registry within 5 days of filing his pauper's affidavit (and thereby perfecting his appeal). The pauper's affidavit must be filed within 5 days after judgment is signed. Unless there is contest, that perfects the appeal and, under 751, "When an appeal has been perfected, the justice shall stay all further proceedings on the judgment,..." This would surely include stay of any grant of a writ of possession, which may not be issued before the 6th day after the date on which the judgment of possession is rendered. Property Code 24.0061(b).

Judge Prindle is pleased that we really didn't create a conflict, but he earnestly pleads that the Court say so in writing ASAP to save confusion in FE&D cases. If you were to add a comment, would it be a sentence added to the present comment to Rule 749c? E.g. "To dispense with the appellate requirement of payment of any rent into the court registry. The requirement of Rule 749b(1) to retain possession is unchanged."

ney'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.

RULE 534. ISSUANCE AND FORM OF CITATION

a. Issuance. When a claim or demand is lodged with a justice for suit, ~~he~~ the clerk when requested shall forthwith issue ~~forthwith~~ a citations ~~for the defendant or defendants.~~ 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. ~~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. The citation shall further direct that if it is not served within 90 days after date of its issuance, it shall be returned unserved.~~ 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 or by the Justice of the Peace, (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 and names of parties, (7) state the nature of plaintiff's demand, (8) be directed to the defendant, (9) show name and address of attorney for plaintiff, otherwise the address of plaintiff, (10) contain the time within which these rules require defendant to file a written answer with the clerk who issued citation, (11) contain address of the clerk, and (12) shall notify 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 defendant to file a written answer to 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 rule shall be in the form set forth in section c of this rule.

c. Notice. The citation shall include the following notice to 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.

Comment to 1990 change: To conform justice court service of citation to the extent practicable to service of citation for other trial courts.

RULE 536. ~~SPECIAL PROCESS SERVER~~ WHO MAY SERVE AND METHOD OF SERVICE

~~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 such 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 to the best of his ability execute the same according to the law and these rules.~~

(a) Citation and other notices may be served anywhere by (1) any sheriff or constable or other person authorized by law or, (2) 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.

(f) (No change.)

RULE 749a. PAUPER'S AFFIDAVIT

If appellant is unable to pay the costs of appeal, or file a bond as required by Rule 749, he shall nevertheless be entitled to appeal by making strict proof of such inability within five days after the judgment is signed, which shall consist of his affidavit filed with the justice of the peace stating his inability to pay such costs, or any part thereof, or to give security, which may be contested within five days after the filing of such affidavit and notice thereof to the opposite party or his attorney of record by any officer of the court or party to the suit, whereupon it shall be the duty of the justice of the peace in whose court the suit is pending to hear evidence and determine the right of the party to appeal, and he shall enter his finding on the docket as part of the record. Upon the filing of a pauper's affidavit the justice of the peace or clerk of the court shall notice the opposing party of the filing of the affidavit of inability within one working day of its filing by written notification accomplished through first class mail. It will be presumed prima facie that the affidavit speaks the truth, and, unless contested within five days after the filing and notice thereof, the presumption shall be deemed conclusive; but if a contest is filed, the burden shall then be on the appellant to prove his alleged inability by competent evidence other than by the affidavit above referred to. When a pauper's affidavit is timely contested by the appellant, the justice shall hold a hearing and rule on the matter within five days.

If the justice of the peace disapproves the pauper's affidavit, appellant may, within five days thereafter bring the matter before the county judge for a final decision, and, on request, the justice shall certify to the county judge appellant's affidavit, the contest thereof, and all documents, and papers thereto. The county judge shall set a day for hearing, not later then ten five days, and shall hear the contest de novo. If the pauper's affidavit is approved by the county judge, he shall direct the justice to transmit to the clerk of the county court, the transcript, records and papers of the case.

A pauper's affidavit will be considered approved upon one of the following occurrences: (1) the pauper's affidavit is not contested by the other party; (2) the pauper's affidavit is contested by the other party and upon a hearing the justice determines that the pauper's affidavit is approved; or (3) upon a hearing by the justice disapproving of the pauper's affidavit the appellant appeals to the county judge [illegible] then, after a hearing, approves the pauper's [illegible]avit.

No writ of ~~restitution~~ possession may issue pending the hearing by the county judge of the appellant's right to appeal on a pauper's affidavit. If the county judge disapproves the pauper's affidavit, appellant may perfect his appeal by filing an appeal bond in the amount as required by Rule 749 within five days thereafter. If no appeal bond is filed within five days, a writ of ~~restitution~~ possession may issue.

Comment to 1990 change: Proceedings on pauper affidavits are revised. The term writ of restitution is corrected to writ of possession.

RULE 749b. PAUPER'S AFFIDAVIT IN NONPAYMENT OF RENT APPEALS

In a nonpayment of rent forcible detainer case a tenant/appellant who has appealed by filing a pauper's affidavit under these rules shall be entitled to stay in possession of the premises during the pendency of the appeal, by complying with the following procedure:

(1) Within five days of the date that the tenant/appellant files his pauper's affidavit, he must pay into the justice court registry one rental period's rent under the terms of the rental agreement.

(2) During the appeal process as rent becomes due under the rental agreement, the tenant/appellant shall pay the rent into the county court registry within five days of the due date under the terms of the rental agreement.

(3) If the tenant/appellant fails to pay the rent into the court registry within the time limits prescribed by these rules, the appellee may file a notice of default in county court. Upon sworn motion by the appellee and a showing of default to the judge, the court shall issue a writ of restitution.

(4) Landlord/appellee may withdraw any or all rent in the county court registry upon a) sworn motion and hearing, prior to final determination of the case, showing just cause, b) dismissal of the appeal, or c) order of the court upon final hearing.

(5) All hearings and motions under this rule shall be entitled to precedence in the county court.

(Added May 9, 1977, eff. Sept. 1, 1977.)

Notes and Comments

This is a new rule.

RULE 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.~~

When an appeal bond has been timely filed in conformity with Rule 749 or a pauper's affidavit approved in conformity with Rule 749a, the appeal shall be perfected.

Comment to 1990 change: To dispense with the appellate requirement of payment of any rent into the court registry.

RULE 751. TRANSCRIPT

When an appeal has been perfected, the justice shall stay all further proceedings on the judgment, and immediately make out a transcript of all the entries made on his docket of the proceedings had in the case; and he shall immediately file the same, together with the original papers and any money in the court registry, including sums tendered pursuant to Rule 749b(1), with the clerk of the county court of the county in which the trial was had, or other court having jurisdiction of such appeal. The clerk shall docket the cause, and the trial shall be de novo.

The clerk shall immediately notify both appellant and the adverse party of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court.

The trial, as well as all hearings and motions, shall be entitled to precedence in the county court.

Comment to 1990 change: To provide for transfer of subject funds.

CURRENT RULE

RULE 536. 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) 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 of 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 reasonably effective to give the defendant notice of the suit.

Comment to 1990 change: To conform justice court service of citation to the extent practicable to service of citation for other trial courts.

PROPOSED CHANGE TO RULE 536.

RULE 536. WHO MAY SERVE

a. Citation and other notices may be served anywhere by (1) any sheriff or constable or other person authorized by law or, (2) any person authorized by law or, (3) by any person registered with the Secretary of State as an authorized Process Server. No person who is a party to or interested in the outcome of a suit or who is less than eighteen years of age 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, or by delivering to an occupant over age sixteen years at the defendants place of abode, 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 of 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 reasonably effective to give the defendant notice of the suit.

Comment to 1990 change: To conform justice court service of citation to the extent practicable to service of citation for other trial courts.

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CHARLES A. SPAIN, JR.
(512) 480-5679

November 26, 1989

The Honorable Nathan L. Hecht, Justice
The Supreme Court of Texas
Post Office Box 12248
Capitol Station
Austin, Texas 78711

Dear Judge Hecht:

6. The following proposed amendments use the word "nonjury": Texas Rules of Appellate Procedure 41(a)(1) and 54(a). The following proposed amendments use the word "non-jury": Texas Rules of Appellate Procedure 41 comment, 52(d), 52 comment, and 54 comment. The court may wish to standardize the terminology. The term "non-jury" currently appears in Texas Rules of Civil Procedure 90, 156, 216(1), 249, 307, and 542. The term "nonjury" currently appears in Texas Rule of Civil Procedure 324(a) and Texas Rule of Judicial Administration 6(b)(2).

I appreciate the opportunity to comment on the proposed rules amendments and hope that my comments are helpful.

Respectfully,

Charles A. Spain, Jr.

4543.001

hhd

LHS

8-17-92

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

8/17 HHD, SCAC Subc COAJ SCAC Agenda

August 12, 1992

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

TRCP 554

Dear Luke:

Enclosed is a copy of a letter Chief Justice Phillips received from Justice of the Peace John C. Hawkins, Jr. regarding rules revisions.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

Justice Hecht
S: copy to LHS
current rules

JOHN C. HAWKINS, JR.
JUSTICE OF THE PEACE
PRECINCT 1, PLACE 1
BOWIE COUNTY, TEXAS

July 19, 1992

BI-STATE JUSTICE CENTER
TEXARKANA, TEXAS 75501
(903) 798-3006

Honorable Thomas R. Phillips
Chief Justice
Texas Supreme Court
P O Bx 12248
Austin, TX 78711

re: Rules Revision Task Force

Dear Chief Justice Phillips:

Thank you for your confidence in sharing the task force recommendations with me. Agreeing generally with the need for rules revision, in the direction of simplicity, any disagreement I might have would be a mere difference in opinion.

The fact that so many appealed cases turn on errors in interpretation of the rules, instead of substantive law or facts, indicate a need for change.

With minor exception, Justice Court rules should be the same as County/District Court rules. The same is true of the statutes on venue, etc.

Please ask the committee to decide whether Justice Court pleadings should be oral (R 525) or written (R 534) [b] last paragraph - "The citation shall direct the defendant to file a written answer...." [c] "... If you or your attorney do not file a written answer...."

Does Rule 534 provide for what is printed on the citation, and does the citation establish a legal requirement of written pleadings if there is not a specific rule and a rule to the contrary?

Will we maintain the small claims court (Govt Code Cp 28) that operates virtually without rules, and a civil court that is subject to the rules? When do we utilize small claims court vs civil court? There is no consensus among Justices of the Peace. Should we have mandatory small claims under amount X and mandatory civil (rules of procedure and evidence) court over amount X? Arkansas uses "rules" if either side has an attorney and none if either does not.

Assembling a jury by constable is easier than utilizing a jury wheel, however the random nature of the clerk's sample probably reduces unintentional bias. I prefer a random method of jury selection, provided all jurors must live in the Justice Court's precinct.

Is there a good reason that the justice of the peace not "charge the jury" [R 554]? Without some notion of the law, on what basis does the ~~jury~~ make its decision? Why not let the Judge charge the jury if requested by either party, if not every time?

Thanks again, see you in September.

~~Sincerely~~,

John C. Hawkins, Jr.

cc: LHS
Orig: HHD
4543.001

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

June 4, 1992

6/6
HHD.
SCAC Sub
Agenda
✓
Cc HD staff
Hlf

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

Dear Luke:

Enclosed is a letter from Jeff Branick regarding TRCP 574a.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

PROVOST
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STEELE
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&
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Scot E. Sheldon · Glenn H. Steele, Jr. · Richard D. Hughes
Robert J. Giblin* · Jeff R. Branick* · James E. Wimberley

David A. Provost (1935-1990) · Thomas G. King (1944-1987)

Michael A. Havard · Ken N. Whitlow · Teresa Beets Winter
Jesse E. Branick

* Board Certified - Personal Injury Trial Law · Texas Board of Legal Specialization

May 27, 1992

Honorable Nathan Hecht
Justice of the Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

I congratulate the legislature on the expansion of justice court jurisdiction to include matters where the amount in controversy does not exceed $5,000.00. Unfortunately, there exists an impediment in the Rules of Civil Procedure to the full utilization of the justice court's expanded jurisdiction.

Rule 574a, Texas Rules of Civil Procedure, provides that "either party may plead any new matter in the county or district which was not presented in the court below, but no new ground of recovery shall be set up by the plaintiff, nor shall any setoff or counterclaim be set up by the defendant which was not pleaded in the court below..." The effect of this Rule is severalfold.

First, lawyers will not urge clients to engage in self-help by attempting to resolve their disputes before a Justice of the Peace because, in the event the case were appealed to the County Court at Law, additional damages could not be sought. Further, lawyers are hesitant to handle cases in the Justice Courts and go directly to the County Court at Law or to the District Courts because, in those courts, there exists no impediment to the recovery of attorney's fees which increase over time.

I have done a considerable amount of small case work during the past several years. Some of these cases were consumer law cases where there existed the opportunity for the recovery of attorney's fees under either the Deceptive Trade Practices Act or the Civil Practice and Remedies Code. Many of these could have been filed in Justice Courts and resolved in an expedited fashion. However, because of the potential for an appeal to the County Court at Law, I have been forced to file these cases in either the County Court at Law of Jefferson County, Texas, or in one of the District

Courts. Had it not been for Rule 574a, I could have let the individual clients handle their claims on their own in the Justice Court, and many of these disputes may have been resolved without lawyers becoming involved.

Whenever an individual attempts to utilize the justice courts and an appeal results, the individual is often hard pressed because of the amount in controversy to obtain legal representation because no new ground of recovery may be set up. I send this letter to urge the Justices and the Rules Committee to amend Rule 574a to allow both plaintiffs and defendants to set up new grounds of recovery and of defense in the event of an appeal. The present wording of the Rule oftentimes results in injustices and prevents individuals with bonafide claims from retaining proper legal representation. I would appreciate the Court's consideration of this suggestion.

Faithfully yours,

Jeff Branick

JB/ed

RULE 662. DELIVERY OF WRIT

The writ of garnishment shall be dated and tested as other writs, and may be delivered to the sheriff, or constable by the officer who issued it, or he may deliver it to the plaintiff, his agent or attorney, for that purpose.

RULE 662. DELIVERY OF WRIT

PROPOSED CHANGE:

The writ of garnishment shall be dated and tested as other writs, and may be delivered to the sheriff, constable or authorized person by the officer who issued it, or he may deliver it to the plaintiff, his agent or attorney, for that purpose.

RULE 622 AFTER CHANGE:

The writ of garnishment shall be dated and tested as other writs, and may be delivered to the sheriff, constable or authorized person by the officer who issued it, or he may deliver it to the plaintiff, his agent or attorney, for that purpose.

RULE 663. EXECUTION AND RETURN OF WRIT.

The sheriff or constable receiving the writ of garnishment shall immediately proceed to execute the same by delivering a copy thereof to the garnishee, and shall make return thereof as of other citations.

PROPOSED CHANGE:

The sheriff,constable or authorized person receiving the writ of garnishment shall immediately proceed to execute the same by delivering a copy thereof to the garnishee, and shall make return thereof as of other citations.

RULE AFTER PROPOSED CHANGE:

The sheriff, constable or authorized person receiving the writ of garnishment shall immediately proceed to execute the same by delivering a copy thereof to the garnishee, and shall make return thereof as of other citations.

4543.001

10-17-93

BROWN & LACALLADE, P.C.
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1620 Franklin Plaza
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Dick Terrell Brown
Charles L. Lacallade
Hector R. Rodriguez

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August 13, 1993

Thomas S. Leatherbury, Esq.
Vinson & Elkins
Suite 3700
2001 Ross Avenue
Dallas, Texas 75201-2916

Re: Your Appointment to the Texas Supreme Court Rules Advisory Committee

Dear Tom:

Congratulations on your recent appointment to the Texas Supreme Court Rules Advisory Committee. I know that you will be of great help to the court and my long-ago former partner Luke Soules as the committee undertakes the monumental task of re-writing the rules.

I imagine that you are being deluged with ideas about how the rules should be changed, so I decided to throw my idea into the hopper, too. It is something about which I have not understood the logic for twenty years now.

TEX. R. APP. P. 46 and 47 permit a litigant to deposit cash with the clerk to secure his appeal and supersedeas (when he has had warning about what is coming and urgency of action is generally not a requirement). On the other hand, TEX. R. CIV. P. 684 requires him to have two good and sufficient sureties to get a TRO or temporary injunction (when time is often extremely critical). It has always seemed to me that a beginning litigant's prospects are better than a losing one's, so his cash ought to be at least as good.

Perhaps in the course of your work you can come to understand the logic (and educate me when next we meet) or if the logic is absent, get the rules fixed.

Very sincerely,

ORIGINAL SIGNED BY
DICK TERRELL BROWN
Dick Terrell Brown

cc: Luther H. Soules III, Esq.

RULE 688. CLERK TO ISSUE WRIT.

When the petition, order or the judge and bond have been filed, the clerk shall issue the temporary restraining order or temporary injunction, as the case may be, in conformity with the terms of the order, and deliver the same to the sheriff or any constable of the county of the residence of the person enjoined, or to the applicant, as the latter shall direct. If several persons are enjoined, residing in different counties, the clerk shall issue such additional copies of the writ as shall be requested by the applicant.

PROPOSED CHANGE:

When the petition, order or the judge and bond have been filed, the clerk shall issue the temporary restraining order or temporary injunction, as the case may be, in conformity with the terms of the order, and deliver the same to the sheriff ~~of~~ any constable of the county of the residence of the person enjoined, or shall deliver such writ to an authorized person, or to the applicant, as the latter shall direct. If several persons are enjoined, residing in different counties, the clerk shall issue such additional copies of the writ as shall be requested by the applicant.

RULE AFTER PROPOSED CHANGE:

When the petition, order or the judge and bond have been filed, the clerk shall issue the temporary restraining order or temporary injunction, as the case may be, in conformity with the terms of the order, and deliver the same to the sheriff or any constable of the county of the residence of the person enjoined, or shall deliver such writ to an authorized person, or to the applicant, as the latter shall direct. If several persons are enjoined, residing in different counties, the clerk shall issue such additional copies of the writ as shall be requested by the applicant.

RULE 689. SERVICE AND RETURN

The officer receiving a writ of injunction shall indorse thereon the date of its receipt by him, and shall forthwith execute the same by delivering to the party enjoined a true copy thereof. The original shall be returned to the court from which it issued on or before the return day named therein with the action of the officer indorsed thereon or annexed thereto showing how and when he executed the same.

PROPOSED CHANGE:

The ~~officer~~ sheriff, constable or authorized person receiving a writ of injunction shall indorse thereon the date of its receipt by him, and shall forthwith execute the same by delivering to the party enjoined a true copy thereof. The original shall be returned to the court from which it issued on or before the return day named therein with the action of the ~~officer~~ process server indorsed thereon or annexed thereto showing how and when he executed the same.

RULE AFTER PROPOSED CHANGE:

The sheriff, constable or authorized person receiving a writ of injunction shall indorse thereon the date of its receipt by him, and shall forthwith execute the same by delivering to the party enjoined a true copy thereof. The original shall be returned to the court from which it issued on or before the return day named therein with the action of the process server indorsed thereon or annexed thereto showing how and when he executed the same.

TRCP 696

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W.F. MOORE (1868-1956)
HARDY MOORE
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BOARD CERTIFIED
*RESIDENTIAL REAL ESTATE LAW

April 10, 1989

Chairman of the Committee
on Administration of Justice
State Bar of Texas
P.O. Box 12487
Capitol Station
Austin, Texas 78711

Dear Sir:

It seems to me our sequestration procedure should be clarified.

The amount of the bond for sequestration is set by the court and also, in the same order, the amount of defendant's replevy bond, "...which shall be in an amount equivalent to the value of the property sequestered or to the amount of plaintiff's claim and one year's accrual of interest if allowed by law on the claim, whichever is the lesser amount, and the esti mated costs of court." (Rule 696). If the plaintiff replevies his replevy bond is to be "...in a sum of money not less than the amount fixed by the court's order." (Rule 708). The plaintiff's sequestration bond may also serve as a replevy bond, if properly conditioned, "...in the amount fixed by the court's order." (Rule 698).

The bond for sequestration is not infrequently fairly nominal. What should be the amount of its penalty if combined with a replevy bond? For example, you sue in trespass to try title to a ranch worth $1,000,000.00. The rule says the defendant's replevy bond must be in the amount of the value of the property. The plaintiff does not need a $1,000,000.00 bond for his protection and it would not be unusual if the defendant could not afford the bond premium, probably about $10,000.00, if he could arrange to be bonded. Will the plaintiff's replevy bond also be $1,000,000.00? If so, he is faced with the same problems as the defendant. And if the amount of plaintiff's replevy bond is in the court's discretion , it would appear the defendant is being denied equal protection of the law. (So what does the rule refer when it says "...not less than the amount fixed by the court's order")?

Perhaps I am missing something, and if so, I would like to know what it is. If not, I think the Rules should be changed to specify the replevy bonds are to be in the amount the court estimates will fairly protect the adverse party's interests and likewise if a combination sequestration and replevy bond is tendered by the plaintiff.

Yours very truly,

Pg000945

HARDY MOORE

HM:orc

00722

TRCP 698

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BOARD CERTIFIED
*RESIDENTIAL REAL ESTATE LAW

April 10, 1989

Chairman of the Committee
on Administration of Justice
State Bar of Texas
P.O. Box 12487
Capitol Station
Austin, Texas 78711

Dear Sir:

It seems to me our sequestration procedure should be clarified.

The amount of the bond for sequestration is set by the court and also, in the same order, the amount of defendant's replevy bond, "...which shall be in an amount equivalent to the value of the property sequestered or to the amount of plaintiff's claim and one year's accrual of interest if allowed by law on the claim, whichever is the lesser amount, and the esti mated costs of court." (Rule 696). If the plaintiff replevies his replevy bond is to be "...in a sum of money not less than the amount fixed by the court's order." (Rule 708). The plaintiff's sequestration bond may also serve as a replevy bond, if properly conditioned, "...in the amount fixed by the court's order." (Rule 698).

The bond for sequestration is not infrequently fairly nominal. What should be the amount of its penalty if combined with a replevy bond? For example, you sue in trespass to try title to a ranch worth $1,000,000.00. The rule says the defendant's replevy bond must be in the amount of the value of the property. The plaintiff does not need a $1,000,000.00 bond for his protection and it would not be unusual if the defendant could not afford the bond premium, probably about $10,000.00, if he could arrange to be bonded. Will the plaintiff's replevy bond also be $1,000,000.00? If so, he is faced with the same problems as the defendant. And if the amount of plaintiff's replevy bond is in the court's discretion , it would appear the defendant is being denied equal protection of the law. (So what does the rule refer when it says "...not less than the amount fixed by the court's order")?

Perhaps I am missing something, and if so, I would like to know what it is. If not, I think the Rules should be changed to specify the replevy bonds are to be in the amount the court estimates will fairly protect the adverse party's interests and likewise if a combination sequestration and replevy bond is tendered by the plaintiff.

Yours very truly,

HARDY MOORE

HM:orc

TRCP 708

MOORE, PAYNE & CLEM
ATTORNEYS AT LAW
FIRST NATIONAL BANK BUILDING
SUITE 300
PARIS, TEXAS 75460
(214) 784-4393

W.F. MOORE (1868-1956)
HARDY MOORE
BILL PAYNE
A. W. CLEM*

BOARD CERTIFIED
*RESIDENTIAL REAL ESTATE LAW

April 10, 1989

Chairman of the Committee
on Administration of Justice
State Bar of Texas
P.O. Box 12487
Capitol Station
Austin, Texas 78711

Dear Sir:

It seems to me our sequestration procedure should be clarified.

The amount of the bond for sequestration is set by the court and also, in the same order, the amount of defendant's replevy bond, "...which shall be in an amount equivalent to the value of the property sequestered or to the amount of plaintiff's claim and one year's accrual of interest if allowed by law on the claim, whichever is the lesser amount, and the esti mated costs of court." (Rule 696). If the plaintiff replevies his replevy bond is to be "...in a sum of money not less than the amount fixed by the court's order." (Rule 708). The plaintiff's sequestration bond may also serve as a replevy bond, if properly conditioned, "...in the amount fixed by the court's order." (Rule 698).

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Perhaps I am missing something, and if so, I would like to know what it is. If not, I think the Rules should be changed to specify the replevy bonds are to be in the amount the court estimates will fairly protect the adverse party's interests and likewise if a combination sequestration and replevy bond is tendered by the plaintiff.

Yours very truly,

Pg000947

HARDY MOORE

00724

HM:orc

December 17, 1992

TRCP 738-755

Honorable Tom Lawrence
Harris County Justice of the Peace
Precinct Four, Position Two
121 West Main Street
Humble TX 77338-4306

Dear Judge Lawrence:

Thank you for your letter regarding revisions to the Rules of Civil Procedure. I have sent a copy to the chairman of the Rules Advisory Committee with the request that your comments be considered fully in making additional revisions in the rules.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

c: Mr. Luther H. Soules III

JUDGE TOM LAWRENCE
JUSTICE OF THE PEACE
HARRIS COUNTY
PRECINCT FOUR, POSITION TWO

121 WEST MAIN STREET
HUMBLE, TEXAS 77338-4306

TELEPHONE
(713) 446-7191

December 10, 1992

Justice Nathan L. Hecht
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

Enclosed is a copy of my letter to Chief Justice Phillips concerning the preliminary draft of Professor Dorsaneo's task force.

Since the preliminary report discussed the possibility of merging the justice court rules with the general rules for county and district court, much of my letter deals with the concept. It is apparent that Professor Dorsaneo's task force abandoned that concept in their October 22, 1992 report.

One other problem, not identified in my letter to Justice Phillips, concerns the problem of a counterclaim to a justice court lawsuit where the counterclaim is over $5,000.00 and thus in excess of the justice courts jurisdiction. Because there is not a mechanism to allow the justice court to either accept the counterclaim or transfer the original claim to county or district court, the result is that you must have two separate trials, one in the justice court and one in county or district court.

There are many other suggestions I would like to offer when the Supreme Court Advisory Committee addresses changes to the justice court rules.

If I can be of any additional help please let me know.

Sincerely yours,

Tom Lawrence
Judge

TL:mt

Enclosure

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711

TEL. (512) 463-1312

FAX (512) 463-1365

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
RAUL A. GONZALEZ
OSCAR H. MAUZY
EUGENE A. COOK
JACK HIGHTOWER
NATHAN L. HECHT
LLOYD DOGGETT
JOHN CORNYN
ROBERT A. "BOB" GAMMAGE

CLERK
JOHN T. ADAMS

EXECUTIVE ASS'T
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T
MARY ANN DEFIBAUGH

MEMORANDUM

DATE: July 13, 1992

TO: Honorable John C. Hawkins
Honorable Faye Murphree
Honorable Thomas E. Lawrence
Honorable Paul Heath Till
Honorable David Patronella

FROM: Chief Justice Thomas R. Phillips

SUBJECT: Report of the Task Force on the Revision of the Texas Rules of Civil Procedure

==========

Enclosed is a copy of the preliminary draft of the report of the Task Force from Professor William Dorsaneo, Chairperson. I would appreciate any comments you might have on the draft. Please drop me a line with your suggestions.

Enclosure

JUDGE TOM LAWRENCE
JUSTICE OF THE PEACE
HARRIS COUNTY
PRECINCT FOUR, POSITION TWO

121 WEST MAIN STREET
HUMBLE, TEXAS 77338-4306

TELEPHONE
(713) 446-7191

August 10, 1992

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

Dear Chief Justice Phillips:

Thank you for giving me the opportunity to comment on the report from the Rules Revision Task Force. It is apparent that the Task Force has given the matter much study and has a good plan to revise the rules. The report is general in nature, but I have few quarrels with its philosophy. I would like to have the opportunity to comment again when a working draft of its changes has been formulated.

I'm sure you sent me this report for comments on specific rules and issues involving the justice courts and for comment on the proposal to make the rules for justice courts the same as the rules for district and county courts.

Please allow me first to respond to issues relating to the latter proposal. Rules 523-591 apply to civil suits in justice court, and Rules 738-755 apply to forcible entry and detainer suits in justice court. I recommend leaving Rules 738-755 alone, except for some specific minor changes I'll mention later. I believe you can rescind Rules 523-591 as separate rules for justice courts and relocate the justice court rules to the "general rules section".

There are several reasons why I feel this is both possible and desirable. It is an unnecessary burden on attorneys to have different timetables in justice court which are shorter than the general rules and which set traps for the unwary lawyer to no good purpose. Many of the current rules for justice court are already similar to the general rules. The rules which differ can either be deleted as unnecessary, or can be easily incorporated into existing general rules with either an additional sentence or two, or a subsection. A lawsuit for $5,000.00, resulting from a "fender bender", may be filed either in justice court or in county or district court. Does it make sense to try the same case under different rules depending on in which court the plaintiff filed the suit?

One of the problems with leaving Rules 523-591 unchanged is Rule 523. Rule 523 defies precise interpretation, and is so vague that it is almost impossible to apply to specific conflicts which arise. If you leave the existing rules for justice courts unchanged, then you must amend Rule 523 so that it provides practical guidance with specific provisions. I think

it could be done, but it would be lengthy and cumbersome and probably sti not resolve all of the questions. In my opinion, the best solution is to simply merge the rules as proposed by the Task Force.

There are one or two considerations in merging the rules. The drafters should keep in mind that justice court clerks are not separately elected officials, but are employees of the justice court. The only legal authority of a justice court clerk is found in Sec. 27.056 of the Texas Government Code, and although I believe the language is sufficiently global in scope, revisors should keep the difference in mind.

Another consideration is Rule 524, which is a requirement that justice courts keep a civil docket book. There is no corresponding general rule, so this may have to be retained in the general rules.

The appeal of a justice court suit is to county court, so there will have to be a separate section in the general rules to cover this procedure. Rules 528 and 529 are offensive and should be repealed and replaced with specific recusal procedures for justice court.

I have enclosed as Attachment 1 a parallel reference of Justice vs District and County rules which will be helpful to the Task Force, and which will facilitate the merger.

I also have some suggested changes to existing rules if the merger proposal is scrapped.

1. I suggest Rule 569 be exempted from the Rule 4 requirement that Saturdays, Sundays and holidays not be counted in 5 day periods. If a judgment is signed on the Tuesday before Thanksgiving, the 5th day deadline to file a motion for new trial is the Thursday of the following week, but the 10th day in which the justice still has plenary jurisdiction is the following day, which does not give the court much time to schedule a hearing or provide notice to the other party.

2. I suggest that we rename Part VII, Section 2, "Forcible Detainer and Forcible Entry and Detainer" since 95% of the cases filed under this section are, in fact, Forcible Detainer cases.

3. Another question which should be addressed is to what extent Rules 523-591 and the general rules apply to cases filed under this section. Triple T Inns of Texas, Inc. v Cliff Robert, 800 SW 2nd 68, is the only case on point and although I agree with Justice Boyd, the decision is narrowly written.

4. The application of Rule 4 to Rules 739 and 744 creates an interesting situation where 5 days is longer than 6 days. A defendant in a forcible must request a jury trial within 5 days of being served. Rule 4 means that the 5 day period excludes Saturdays, Sundays and holidays. The court may set the trial date between 6 and 10 days from date of service, but this period would include Saturdays, Sundays and holidays. If a defendant were served on Wednesday, he could request a jury trial at any time through the following Wednesday, but the court could set the case for trial on Tuesda thus creating a situation where the defendant could be given a bench trial

one day before his limit on requesting a jury trial. My solution would be to exempt Rule 744 from Rule 4.

There are several other minor changes which should be made in the forcible rules and I would appreciate the opportunity to discuss this in more detail when the Task Force is ready to formulate a draft.

Thank you again for the opportunity to comment. I appreciate your efforts to improve the administration of justice and hope you will keep working for improvement.

Sincerely yours,

Tom Lawrence
Judge

TL:mt

JUDGE TOM LAWRENCE
JUSTICE OF THE PEACE
HARRIS COUNTY
PRECINCT FOUR, POSITION TWO

121 WEST MAIN STREET
HUMBLE, TEXAS 77338-4306

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(713) 446-7191

ATTACHMENT A

PARALLEL REFERENCE OF JUSTICE/DISTRICT
AND COUNTY COURT RULES OF CIVIL PROCEDURE

JUSTICE COURT RULE	DISTRICT & COUNTY RULE
RULE 523 - DISTRICT COURT RULES GOVERN	NO RULE

COMMENT: This rule will not be necessary if rules are combined.

RULE 524 DOCKET	RULE 25 - CLERK'S FILE DOCKET RULE 26 - CLERK'S COURT DOCKET

COMMENT: Rules are similar - Justice Court rule is more detailed as to what information must be recorded in the docket. There is no apparent reason to have rules of Justice Court different from that of the District and County Courts. The major difference in the rules is that the Justice Court rule makes the justice responsible for keeping the records instead of the clerk of the court in District and County courts.

RULE 525 - ORAL PLEADINGS	RULE 46 - PETITION AND ANSWER; EACH ONE INSTRUMENT OF WRITING

COMMENT: No real need to have oral pleadings - suggestion is to delete the rule.

RULE 526 - SWORN PLEADINGS	RULE 93 - CERTAIN PLEAS TO BE VERIFIED

COMMENT: Justice Court rule is to require any answer or other pleading pursuant to Rule 93 to be in writing and verified by affidavit. This rule may be deleted because Rule 93 requires a written pleading verified by affidavit. Rule 526 only exists because of Rule 525 - ORAL PLEADINGS. If Rule 525 is deleted, Rule 526 would not be necessary.

RULE 527 - MOTION TO TRANSFER

RULE 86 - MOTION TO TRANSFER VENUE

COMMENT: Rule 527 may be deleted. The Rule requires compliance with Rule 86, except that it also requires the motion to include the precinct to which the transfer is sought. Rule 86(3) may be amended as follows: "The motion, and any amendments to it, shall state that the action should be transferred to another specified county of proper venue, if filed in the County or District Court, or if filed in the Justice Court, the motion, and any amendments to it, shall state that the action should be transferred to another specified county or precinct of the county of proper venue.

RULE 528 - VENUE CHANGED ON AFFIDAVIT

RULE 257 - GRANTED ON MOTION
RULE 259 - TO WHAT COUNTY
RULE 261 - TRANSCRIPT ON CHANGE

COMMENT: The Justice Court rule allows for a case to be transferred upon affidavit by a party to a suit supported by affidavits of 2 credible persons of the county that a fair and impartial trial cannot be had before the justice or in the justice's precinct. The District court rule allows for more reasons to transfer on the affidavit of a party supported by affidavits of 3 credible persons of the county: (1) there exists in the county a prejudice so great that the party cannot obtain a fair and impartial trial; (2) there is a "combination" against him instigated by influential persons so that a fair and impartial trial cannot be had; (3) that an impartial trial cannot be had in the county; and (4) for other sufficient cause determined by the court. I see no reason not to incorporate the justice court rules into the district court rules. Rule 259 may be changed to reflect: Rule 259(e) If from a justice court, to the court of the nearest justice within the county not subject to the same or some other disqualification. "Nearest Justice" means the justice whose place of holding his court is nearest to that of the justice before whom the proceeding is pending or should have been brought.

RULE 529 - "NEAREST JUSTICE DEFINED"

NO RULE

COMMENT: This rule may be deleted if "nearest justice" is defined in Rule 259(e) (or as renumbered).

RULE 530 - BY CONSENT

RULE 255 - CHANGE OF VENUE BY CONSENT

COMMENT: Rules are easily adjusted to accomodate all courts.

RULE 531 - ORDER OF TRANSFER

RULE 259 - TO WHAT COUNTY

COMMENT: Rule 531 may be deleted as the order is included in Rule 259.

RULE 532 - TRANSCRIPT

RULE 261 - TRANSCRIPT ON CHANGE

COMMENT: Rule 532 may be deleted - Rule 261 includes all information for a transcript of judgment.

RULE 533 - REQUISITES OF PROCESS

NO RULE

COMMENT: Rule may be deleted as information is included in Rule 534

RULE - 534 ISSUANCE AND FORM OF CITATION

RULE 99 - ISSUANCE AND FORM OF CITATION

COMMENT: Rules mirror each other, with the exception of the time for filing an answer. Rule 99(c) is easily amended to include the time for filing an answer in justice court, although it may be justifiable to make the answer date in justice court the same as for district and county courts.

RULE 535 - ANSWER FILED

RULE 99(c) - ISSUANCE AND FORM OF CITATION

RULE 114 - CITATION BY PUBLICATION; REQUISITES

COMMENT: Rule 535 may be deleted. Information is included in Rule 99(c) and Rule 114. (As in the above rule, the time limits for filing an answer are different.)

RULE 536 - WHO MAY SERVE AND METHOD OF SERVICE

RULE 103 - WHO MAY SERVE
RULE 106 - METHOD OF SERVICE

COMMENT: Rules mirror each other. The problem with this rule for justice court is that we do not have the authority to charge for citation by publication and citation by certified and registered mail. The District and County Clerks have a provision for collecting the fees in the Government Code. (The Rules say: "Service by registered or certified mail and citatiion by publication SHALL if requested be made by the clerk of the Court in which the case is pending."...)

RULE 536a - DUTY OF OFFICER OR PERSON RECEIVING AND RETURN OF CITATION

RULE 105 - DUTY OF OFFICER OR PERSON RECEIVING
RULE 107 - RETURN OF SERVICE

COMMENT: The rules are the same with the exception of the time limits that a citation must be on file with the clerk before a default judgment is taken. In District and County Court, the citation must be on file for 10 days and in Justice Court, the citation must be on file for 3 days.

RULE 537 - APPEARANCE DAY

COMMENT: Delete rule - information is covered in Rule 535 and would be covered in Rule 99 and Rule 114.

RULE 538 - IF DEFENDANT FAILS TO APPEAR

RULE 241 - ASSESSING DAMAGES ON LIQUIDATED DEMANDS
RULE 243 - UNLIQUIDATED DEMANDS

COMMENT: Rule 538 may be deleted with Rules 241 and 243 controlling.

RULE 539 - APPEARANCE NOTED

RULE 238 - CALL OF APPEARANCE DOCKET

COMMENT: Rule 539 may be delted with Rule 238 controlling.

RULE 540 - IF NO DEMAND FOR JURY

NO RULE

COMMENT: Delete Rule

RULE 541 - CONTINUANCE

RULE 251 - CONTINUANCE

COMMENT: Rule 251 requires that before a continuance be heard or granted that a defendant must file his defense. Justice Court rule doesn't have the requirement. Suggestion is to delete Rule 541.

RULE 542 - CALL OF NON-JURY DOCKET

RULE 247 - TRIED WHEN SET

COMMENT: Rule 542 may be deleted with Rule 247 controlling.

RULE 543 - DISMISSAL

RULE 162 - DISMISSAL OR NON-SUIT
RULE 163 - DISMISSAL AS TO PARTIES SERVED, ETC.
RULE 165 - ABANDONMENT
RULE 165a - DISMISSAL FOR WANT OF PROSECUTION

COMMENT: Rules 162,162,165, & 165a may replace Rule 543.

RULE 544 - JURY TRIAL DEMANDED

RULE 216 - REQUEST AND FEE FOR JURY TRIAL

COMMENT: Time requirements for paying a jury fee are different. Justice Court rule requires the demand be made and the fee be paid at least one day prior to a trial setting. Also, the rule provides for the $5.00 fee. The time requirement for requesting a jury trial in District and County Court is at least 30 days prior to a trial setting. The jury fee is $5.00 in county court and $10.00 in district court. My suggestion is to make time limits for demanding and paying a jury fee the same for all courts. If a case must be set at least 45 days in advance of the trial setting date, there is ample time to request a jury trial.

RULE 545 - RULE 556 - ALL RULES DEAL WITH JURY TRIALS

RULES 271 - 295 - ALL RULES DEAL WITH JURY TRIALS

COMMENT: Decision to be determined whether jury trial rules in the justice court are going to be the same as the district and county courts.

RULE 557 - CASE TRIED BY JUSTICE

NO RULE

COMMENT: In justice court, the judge is supposed to announce the judgment in open court and note the same on the docket. The rule should not be necessary if district and county court rules for judgments are followed.

RULE 558 - JUDGMENT

RULE 305 - PROPOSED JUDGMENT
RULE 306 - RECITATION OF JUDGMENT

COMMENT: This rule should not be necessary if district and county court rules for judgments are adopted for justice court.

RULE 559 - COSTS

RULE 125 - 149 - COSTS AND SECURITIES THEREFOR

COMMENT: Rules of district and county courts should be adopted for justice courts.

RULE 560 - JUDGMENT FOR SPECIFIC ARTICLES
RULE 561 - TO ENFORCE JUDGMENT

RULE 308 - COURT SHALL ENFORCE ITS DECREES

COMMENT: Rule 561 and 308 are the same. Rule 560 allows for 6% interest on the value of the property awarded.

RULE 562 - NO JUDGMENT WITHOUT CITATION

RULE 119 - ACCEPTANCE OF SERVICE
RULE 124 - NO JUDGMENT WITHOUT SERVICE

COMMENT: Rules are the same. Rule 562 may be deleted.

RULE 563 - CONFESSION OF JUDGMENT
RULE 564 - WARRANT OF ATTORNEY
RULE 565 - RULES GOVERNING

RULE 314 - CONFESSION OF JUDGMENT

COMMENT: Justice Court rules are not in conflict with Rule 314. Rules 563, 564 & 565 may be deleted.

RULES 566 - 570 - NEW TRIALS

RULES 320 - 329b - NEW TRIALS

COMMENT: Rules are completely different because of the appeal process. Separate justice court rules for new trials & motions to set aside default judgments need to be maintained

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RULES 571 - 574b - APPEAL

COMMENT: All rules need to be retained in it's own section because of the nature and scope of appeals from justice court.

RULES 575 - 591 - CERTIORARI

COMMENT: This section needs to be maintained separately.

PRECINCT NO. 3
8918 TESORO DRIVE
SUITE 300
SAN ANTONIO, TEXAS 78217

TELEPHONE (210) 829-1900
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KEITH BAKER
JUSTICE OF THE PEACE

HHD
SCAs agenda
TRCP 747a Letter
CoAs Staff
J. Heilet

October 7, 1993

Mr. Brendan Gill
Executive Director
Bexar County Legal Aid Association
434 South Main Avenue, Suite 300
San Antonio, Texas 78204

RE: Non-Attorney Representation
In FE&D Hearings

Dear Mr. Gill,

Thank you for your letter dated October 5, 1993, a copy of which is enclosed.

I do not believe that the Texas Legislature, in enacting Section 24.011 of the Texas Property Code, or the Texas Supreme Court in promulgating Rule 747a, ever contemplated paralegals trying forcible detainer cases in Justice Court. I believe that the Legislature and the Texas Supreme Court simply gave landlords and tenants the equal right to be represented by agents in Justice Court when they do not choose to appear in person.

In the case where Ms. Jaimes-Calderon represented a defendant, she appeared in open court and announced ready for trial on behalf of her client. It rapidly became apparent to me that she had no idea of what to do. I assumed she was an attorney until she let her client cross-examine the plaintiff. Upon inquiry, Ms. Jaimes-Calderon stated she was a paralegal. She appeared unable to present any defense and her client was in complete control of her defense to the forcible detainer action.

I do not believe that paralegals are competent to represent litigants in trials. Forcible detainer suits are very serious civil trials. The Texas Rules of Evidence apply to these proceedings and Justices of the Peace can adjudicate non-payment of rent claims up to $5,000.00.

As a compromise, I am forwarding a copy of this letter to the Honorable Jeff Wentworth, and I am requesting by this letter that he seek an Attorney General's opinion on Section 24.011 of the

Property Code. I agree to be bound by the Attorney General's Opinion even though such opinion would only be advisory. In the meantime, I will raise no obstacle to paralegals appearing as "agents" of tenants in my court. This letter, however, cannot insulate said paralegals from complaints that might be filed by any other parties.

I always refer correspondence of this type to the Honorable Robert Flowers, Executive Director of the Texas Commission On Judicial Conduct for review by the Commission, and I will do so in this matter.

I refer a copy of this letter to the Honorable Tom Phillips, Chief Justice of the Texas Supreme Court, and to the Honorable Luther H. Soules, III, who is a member of the Texas Supreme Court Advisory Board.

Since this matter does not concern Soules & Wallace, I would appreciate it if you would refrain from sending any more correspondence to that law firm.

Sincerely,

Keith Baker
Justice of the Peace
Precinct 3, Bexar County

KB/jm
enclosure

cc: The Honorable Jeff Wentworth
The Honorable Robert Flowers
The Honorable Tom Phillips
The Honorable Luther H. Soules, III

LEGAL AID
BEXAR COUNTY LEGAL AID ASSOCIATION
434 SOUTH MAIN AVENUE, SUITE 300
SAN ANTONIO, TEXAS 78204 (210) 227-0111
FAX NO. (210) 223-4728

October 5, 1993

Keith Baker
Justice of the Peace
8918 Tesoro, Suite 300
San Antonio, Texas 78217

Soules & Wallace
Attn: Keith Baker
175 East Houston Street
Suite 1000
San Antonio, Texas 78205

RE: Non-attorney representation in F.E.D. Hearings

Dear Judge Baker:

Belinda Jaimes-Calderon, a paralegal with this association, has reported to me what she believes to be your objection to paralegals providing representation to clients of the association in your court in non-payment of rent and holdover cases. She indicated to me that you asked her to bring your concerns to my attention.

I am enclosing with this letter, a copy of Section 24.011 of the Texas Property Code which permits non-lawyer representation in the J.P. Court. I am also enclosing a copy of Rule 747a, promulgated by the Supreme Court which also permits non-attorney representation in non-payment of rent and hold over cases. It is my understanding from Ms. Jaimes-Calderon that if she were to appear in your court again, that you would refer the matter to the Unauthorized Practice of Law Committee of the San Antonio Bar Association. After you have had an opportunity to read the applicable section of the Property Code and the Rule, I would welcome an opportunity to discuss your concerns with you. Our paralegals appear on a routine bases in all the J.P. courts in Bexar County on non-payment and holdover cases. Ms. Jaimes-Calderon has previously appeared in your court on numerous other occasions. To her and my knowlege, this is the first time either you or any other judge has challenged their authorization to represent.

Mr. Keith Baker
Justice of the Peace
October 5, 1993

I will call you later in the week to discuss your concerns with you. Hopefully we will be able to reach a mutual interpretation of the Statute and the Rule.

Thank you for bringing your concerns to me first prior to seeking a ruling from the Unauthorized Practice of Law Committee. Quite frankly, if we cannot reach a mutual understanding, I would be more inclined to seek appropriate declaratory and injunctive relief in either the county or district court. The Unauthorized Practice of Law Committee is swamped with complaints and it could take months prior for them to address our inquiry. Ms. Jaimes-Calderon does not want to appear in your court again until this matter is resolved.

Thank you for your attention to our request.

Yours truly,

Brendan E. Gill

BRENDAN E. GILL
Executive Director, Bexar
County Legal Aid Association
Attorney at Law

BEG:cs
xc: Ms. Belinda Jaimes-Calderon

Change by amendment effective January 1, 1981: The last sentence of the former rule is deleted because it is the same provision as the second sentence of Rule 743.

RULE 747a. REPRESENTATION BY AGENTS

In forcible entry and detainer cases for non-payment of rent or holding over beyond the rental term, the parties may represent themselves or be represented by their authorized agents in justice court.

(Added April 15, 1982, eff. Aug. 15, 1982.)

Notes and Comments

This is a new rule.

RULE 748. JUDGMENT AND WRIT

If the judgment or verdict be in favor of the plaintiff, the justice shall give judgment for plaintiff for possession of the premises, costs, and damages; and he shall award his writ of possession. If the judgment or verdict be in favor of the defendant, the justice shall give judgment for defendant against the plaintiff for costs and any damages. No writ of possession shall issue until the expiration of five days from the time the judgment is signed.

(Amended July 26, 1960, eff. Jan. 1, 1961; July 22, 1975, eff. Jan. 1, 1976; June 10, 1980, eff. Jan. 1, 1981; July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art. 3986.

Change: Elimination of verdict of "guilty" or "not guilty."

Change by amendment effective January 1, 1961: The time within which writ of restitution to issue changed from two days to five days.

Changes by amendment effective January 1, 1976: The amendments authorize judgments for costs and damages which Rule 740 protects.

Change by amendment effective January 1, 1981: Changed so that time runs from the date judgment is signed.

RULE 749. MAY APPEAL

In appeals in forcible entry and detainer cases, no motion for new trial shall be filed.

Either party may appeal from a final judgment in such case, to the county court of the county in which the judgment is rendered by filing with the justice within five days after the judgment is signed, a bond to be approved by said justice, and payable to the adverse party, conditioned that he will prosecute his appeal with effect, or pay all costs and damages which may be adjudged against him. The justice shall set the amount of the bond to include the items enumerated in Rule 752.

Within five days following the filing of such bond, the party appealing shall give notice as provided in Rule 21a of the filing of such bond to the adverse party. No judgment shall be taken by default against the adverse party in the court to which the cause has been appealed without first showing substantial compliance with this rule.

(Amended Aug. 18, 1947, eff. Dec. 31, 1947; July 22, 1975, eff. Jan. 1, 1976; June 10, 1980, eff. Jan. 1, 1981; July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art. 3987, unchanged.

Changes by amendment effective January 1, 1976: The first sentence has been moved to that place from within the rule as previously written. The amount of the appeal bond is fixed by the justice as prescribed by Rule 752.

Change by amendment effective January 1, 1981: Changed so that time runs from the date judgment is signed.

Comment on 1988 Change: The purpose of this amendment is to give notice to the appellee that an appeal of the case from the justice court has been perfected in the county court.

RULE 749a. PAUPER'S AFFIDAVIT

If appellant is unable to pay the costs of appeal, or file a bond as required by Rule 749, he shall nevertheless be entitled to appeal by making strict proof of such inability within five days after the judgment is signed, which shall consist of his affidavit filed with the justice of the peace stating his inability to pay such costs, or any part thereof, or to give security, which may be contested within five days after the filing of such affidavit and notice thereof to the opposite party or his attorney of record by any officer of the court or party to the suit, whereupon it shall be the duty of the justice of the peace in whose court the suit is pending to hear evidence and determine the right of the party to appeal, and he shall enter his finding on the docket as a part of the record. Upon the filing of a pauper's affidavit the justice of the peace or clerk of the court shall notice the opposing party of the filing of the affidavit of inability within one working day of its filing by written notification accomplished through first class mail. It will be presumed prima facie that the affidavit speaks the truth, and, unless contested within five days after the filing and notice thereof, the presumption shall be deemed conclusive; but if a contest is filed, the burden shall then be on the appellant to prove his alleged inability by competent evidence other than by the affidavit above referred to. When a pauper's affidavit is timely contested by the appellee, the justice shall

payment by the tenant of all unpaid moving and storage charges on all the property, the warehouseman shall return all the previously unredeemed property to the tenant at the warehouse.

(h) A warehouseman may not recover any moving or storage charges if the court determines under Subsection (i) that the warehouseman's moving or storage charges are not reasonable.

(i) Before the sale of the property by the warehouseman, the tenant may file suit in the justice court in which the eviction judgment was rendered, or in another court of competent jurisdiction in the county in which the rental premises are located, to recover the property described by Subsection (e) on the ground that the landlord failed to return the property after timely demand and payment by the tenant, as provided by this section. Before sale, the tenant may also file suit to recover all property moved or stored by the warehouseman on the ground that the amount of the warehouseman's moving or storage charges is not reasonable. All proceedings under this subsection have precedence over other matters on the court's docket. The justice court that issued the writ of possession has jurisdiction under this section regardless of the amount in controversy.

(j) Any sale of property that is subject to a lien under this section shall be conducted in accordance with Sections 7.210, 9.301–9.318, and 9.501–9.507 of the Business & Commerce Code.

(k) In a proceeding under this section, the prevailing party is entitled to recover actual damages, reasonable attorney's fees, court costs, and, if appropriate, any property withheld in violation of this section or the value of that property if it has been sold.

Acts 1985, 69th Leg., ch. 747, § 1, eff. Sept. 1, 1985. Renumbered from § 24.009 and amended by Acts 1987, 70th Leg., ch. 314, § 2, eff. Sept. 1, 1987; Acts 1987, 70th Leg., ch. 745, § 7, eff. June 20, 1987.

Section 2 of Acts 1985, 69th Leg., ch. 747, provides:

"The change in law made by this Act applies only to property removed in a forcible entry and detainer action on or after the effective date of this Act. Property removed before the effective date of this Act is covered by the law in effect when the property was removed, and the former law is continued in effect for this purpose."

Section 3 of Acts 1987, 70th Leg., ch. 314, provides:

"This Act applies only to property removed on or after the effective date of this Act pursuant to a forcible entry and detainer or forcible detainer action."

Section 8 of Acts 1987, 70th Leg., ch. 745, provides:

"The provisions of Sections 6 and 7 of this Act apply only to property removed on or after the effective date of these sections pursuant to a forcible entry and detainer or forcible detainer action."

§ 24.007. Appeal

A final judgment of a county court in a forcible entry and detainer suit or a forcible detainer suit may not be appealed on the issue of possession unless the premises in question are being used for residential purposes only. A judgment of a county court may not under any circumstances be stayed pending appeal unless, within 10 days of the signing of the judgment, the appellant files a supersedeas bond in an amount set by the county court. In setting the supersedeas bond the county court shall provide protection for the appellee to the same extent as in any other appeal, taking into consideration the value of rents likely to accrue during appeal, damages which may occur as a result of the stay during appeal, and other damages or amounts as the court may deem appropriate.

Acts 1983, 68th Leg., p. 3516, ch. 576, § 1, eff. Jan. 1, 1984. Amended by Acts 1985, 69th Leg., ch. 891, § 1, eff Aug. 26, 1985.

Section 2 of the 1985 amendatory act provides:

"This Act takes effect immediately except that Sections 24.00! 24.006, and 24.007, Property Code, as amended by this Act, tak effect September 1, 1985, and apply only to notices to vacate giv and suits filed on or after September 1, 1985, and to appeals judgments that become final on or after September 1, 1985. N tices to vacate given and suits for forcible entry and detainer for forcible detainer filed before September 1, 1985, and appeals judgments in suits for forcible entry and detainer or for forci detainer that become final before September 1, 1985, are goverr by the law in effect at the time notice was given, suit was filed, judgment became final, and the former law is continued in eff for this purpose."

§ 24.008. Effect on Other Actions

A forcible entry and detainer suit or a forcible detainer suit does not bar a suit for trespass, damages, waste, rent, or mesne profits.

Acts 1983, 68th Leg., p. 3516, ch. 576, § 1, eff. Jan. 1, 1984. Amended by Acts 1985, 69th Leg., ch. 891, § 1, eff. Aug. 26, 1985.

§ 24.009. Renumbered

Former § 24.009, as added by Acts 1985, 69th Leg., ch. 747, § 1, was renumbered as § 24.0062 and amended by Acts 1987, 70th Leg., ch. 314, § 2, and Acts 1987, 70th Leg., ch. 745, § 7.

Former § 24.009, as added by Acts 1985, 69th Leg., ch. 891, § 1, was renumbered as § 24.011 by Acts 1987, 70th Leg., ch. 167, § 5.01(a)(49).

§ 24.010. [Blank]

§ 24.011. Nonlawyer Representation

In forcible detainer suits in justice court for nonpayment of rent or holding over beyond a rental term, the parties may represent themselves or be represented by their authorized agents, who need not be attorneys. In any forcible detainer or forcible entry and detainer suit in justice court, an

authorized agent requesting or obtaining a default judgment need not be an attorney.

Acts 1985, 69th Leg., ch. 891, § 1, eff. Aug. 26, 1985. Renumbered from § 24.009 by Acts 1987, 70th Leg., ch. 167, § 5.01(a)(49), eff. Sept. 1, 1987.

CHAPTER 25. TRIAL OF RIGHT OF PROPERTY

Section
25.001. Jurisdiction.
25.002. Damages.

§ 25.001. Jurisdiction

A trial of the right of property is an action that applies only to personal property. A trial of the right of property must be tried in a court with jurisdiction of the amount in controversy.

Acts 1983, 68th Leg., p. 3516, ch. 576, § 1, eff. Jan. 1, 1984.

§ 25.002. Damages

If a claimant in a trial of the right of property does not establish a right to the property, the court shall adjudge damages against the obligors in the claimant's bond equal to 10 percent of the lesser of:

(1) the property's value; or

(2) the amount claimed under the writ levied against the property.

Acts 1983, 68th Leg., p. 3517, ch. 576, § 1, eff. Jan. 1, 1984.

CHAPTER 26. USE OF A DECEASED INDIVIDUAL'S NAME, VOICE, SIGNATURE, PHOTOGRAPH, OR LIKENESS

Section
26.001. Definitions.
26.002. Property Right Established.
26.003. Applicability.
26.004. Transferability.
26.005. Ownership After Death of Individual.
26.006. Registration of Claim.
26.007. Effect of Registration.
26.008. Exercise of Ownership for First Year Following Death of Individual.
26.009. Exercise of Ownership After First Year Following Death of Individual.
26.010. Termination.
26.011. Unauthorized Uses.
26.012. Permitted Uses.
26.013. Liability for Unauthorized Use.
26.014. Other Rights not Affected.
26.015. Defenses to Liability.

§ 26.001. Definitions

In this chapter:

(1) "Photograph" means a photograph or photographic reproduction, still or moving, videotape, or live television transmission of an individual in a manner that allows a person viewing the photograph with the naked eye to reasonably determine the identity of the individual.

(2) "Property right" means the property right created by this chapter.

(3) "Name" means the actual or assumed name used by an individual which, when used in conjunction with other information, is intended to identify a particular person.

(4) "Media enterprise" means a newspaper, magazine, radio station or network, television station or network, or cable television system.

Acts 1987, 70th Leg., ch. 152, § 1, eff. Sept. 1, 1987.

§ 26.002. Property Right Established

An individual has a property right in the use of the individual's name, voice, signature, photograph, or likeness after the death of the individual.

Acts 1987, 70th Leg., ch. 152, § 1, eff. Sept. 1, 1987.

§ 26.003. Applicability

This chapter applies to an individual:

(1) alive on or after September 1, 1987, or who died before September 1, 1987, but on or after January 1, 1937; and

(2) whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death or comes to have commercial value after that time.

Acts 1987, 70th Leg., ch. 152, § 1, eff. Sept. 1, 1987.

§ 26.004. Transferability

(a) The property right is freely transferable, in whole or in part, by contract or by means of trust or testamentary documents.

(b) The property right may be transferred before or after the death of the individual.

Acts 1987, 70th Leg., ch. 152, § 1, eff. Sept. 1, 1987.

§ 26.005. Ownership After Death of Individual

(a) If the ownership of the property right of an individual has not been transferred at or before the death of the individual, the property right vests as follows:

(1) if there is a surviving spouse but there are no surviving children or grandchildren, the entire interest vests in the surviving spouse;

FORCIBLE ENTRY AND DETAINER

RULE 742. SERVICE OF CITATION

The officer receiving such citation shall execute the same by delivering a copy of it to the defendant, or by leaving a copy thereof with some person over the age of sixteen years, at his usual place of abode, at least six days before the return day thereof; and on or before the day assigned for trial he shall return such citation, with his action written thereon, to the justice who issued same.

(Amended Aug. 18, 1947, eff. Dec. 31, 1947)

PROPOSED CHANGE:

RULE 742. SERVICE OF CITATION

The ~~officer~~ sheriff, constable or authorized person receiving such citation shall execute the same by delivering a copy of it to the defendant, or by leaving a copy thereof with some person over the age of sixteen years, at his usual place of abode, at least six days before the return day thereof; and on or before the day assigned for trial he shall return such citation, with his action written thereon, to the justice who issued same.

(Amended Aug. 18, 1947, eff. Dec. 31, 1947)

RULE AFTER CHANGE:

The sheriff, constable or authorized person receiving such citation shall execute the same by delivering a copy of it to the defendant, or by leaving a copy thereof with some person over the age of sixteen years, at his usual place of abode, at least six days before the return day thereof; and on or before the day assigned for trial he shall return such citation, with his action written thereon, to the justice who issued same.

(Amended Aug. 18, 1947, eff. Dec. 31, 1947)

FORCIBLE ENTRY AND DETAINER

RULE 742a

If the sworn complaint lists all home and work addresses of the defendant which are known to the person filing the sworn complaint and if it states that such person knows of no other home or work addresses of the defendant in the county where the premises are located, service of citation may be by delivery to the premises in question as follows:

If the officer receiving such citation in unsuccessful in serving such citation under Rule 742, the officer shall no later than five days after receiving such citation execute a sworn statement that the officer has made diligent effort to serve such citation on at least two occasions at all addresses of the defendant in the county where the premises are located as may be shown on the sworn complaint, stating the times and places of attempted service. Such sworn statement shall be filed by the officer with the justice who shall promptly consider the sworn statement of the officer. The justice may then authorize service according to the following:

(a) The officer shall place the citation inside the premises by placing it through a door mail chute or by slipping it under the front door; and if neither method is possible or practical, the officer shall securely affix the citation to the front door or main entry to the premises.

(b) The officer shall that same day or the next day deposit in the mail a true copy of such citation with a copy of the sworn complaint attached thereto, addressed to the defendant at the premises in question and sent by first class mail;

(c) The officer shall note on the return of such citation the date of delivery under (a) above and the date of mailing under (b) above; and

(d) Such delivery and mailing to the premises shall occur at least six days before the return day of the citation; and on or before the day assigned for trial he shall return such citation with his actions written thereon, to the justice who issued the same.

It shall not be necessary for the aggrieved party or his authorized agent to make request for or motion for alternative service pursuant to this rule. (Added April 15, 1982, eff. Aug. 15, 1982)

This is a new rule.

PROPOSED CHANGES TO RULE 742-A

If the sworn complaint lists all home and work addresses of the defendant which are known to the person filing the sworn complaint and if it states that such person knows of no other home or work addresses of the defendant in the county where the premises are located, service of citation may be by delivery to the premises in question as follows:

If the ~~officer~~ sheriff, constable or authorized person receiving such citation in unsuccessful in serving such citation under Rule 742, the ~~officer~~ sheriff, constable or authorized person shall no later than five days after receiving such citation execute a sworn statement that the officer has made diligent effort to serve such citation on at least two occasions at all addresses of the defendant in the county where the premises are located as may be shown on the sworn complaint, stating the times and places of attempted service. Such sworn statement shall be filed by the officer with the justice who shall promptly consider the sworn statement of the officer. The justice may then authorize service according to the following:

(a) The ~~officer~~ sheriff, constable or authorized person shall place the citation inside the premises by placing it through a door mail chute or by slipping it under the front door; and if neither method is possible or practical, the officer shall securely affix the citation to the front door or main entry to the premises.

(b) The ~~officer~~ sheriff, constable or authorized person shall that same day or the next day deposit in the mail a true copy of such citation with a copy of the sworn complaint attached thereto, addressed to the defendant at the premises in question and sent by first class mail;

(c) The ~~officer~~ sheriff, constable or authorized person shall note on the return of such citation the date of delivery under (a) above and the date of mailing under (b) above; and

(d) Such delivery and mailing to the premises shall occur at least six days before the return day of the citation; and on or before the day assigned for trial he shall return such citation with his actions written thereon, to the justice who issued the same.

It shall not be necessary for the aggrieved party or his authorized agent to make request for or motion for alternative service pursuant to this rule. (Added April 15, 1982, eff. Aug. 15, 1982)

This is a new rule.

RULE 742-A AFTER PROPOSED CHANGES:

RULE 742-A AFTER PROPOSED CHANGES:

If the sworn complaint lists all home and work addresses of the defendant which are known to the person filing the sworn complaint and if it states that such person knows of no other home or work addresses of the defendant in the county where the premises are located, service of citation may be by delivery to the premises in question as follows:

If the sheriff, constable or authorized person receiving such citation in unsuccessful in serving such citation under Rule 742, the sheriff, constable or authorized person shall no later than five days after receiving such citation execute a sworn statement that the officer has made diligent effort to serve such citation on at least two occasions at all addresses of the defendant in the county where the premises are located as may be shown on the sworn complaint, stating the times and places of attempted service. Such sworn statement shall be filed by the officer with the justice who shall promptly consider the sworn statement of the officer. The justice may then authorize service according to the following:

(a) The sheriff, constable or authorized person shall place the citation inside the premises by placing it through a door mail chute or by slipping it under the front door; and if neither method is possible or practical, the officer shall securely affix the citation to the front door or main entry to the premises.

(b) The sheriff, constable or authorized person shall that same day or the next day deposit in the mail a true copy of such citation with a copy of the sworn complaint attached thereto, addressed to the defendant at the premises in question and sent by first class mail;

(c) The sheriff, constable or authorized person shall note on the return of such citation the date of delivery under (a) above and the date of mailing under (b) above; and

(d) Such delivery and mailing to the premises shall occur at least six days before the return day of the citation; and on or before the day assigned for trial he shall return such citation with his actions written thereon, to the justice who issued the same.

It shall not be necessary for the aggrieved party or his authorized agent to make request for or motion for alternative service pursuant to this rule. (Added April 15, 1982, eff. Aug. 15, 1982)

This is a new rule.

4543.001 LHS hhd

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D NIEMANN
RY NIEMANN
FRED NIEMANN, JR.

2-15-91 SB

2/15 HHD SCAC SubC Agenda COAS

February 13, 1991

Justice Nathan L. Hecht
Texas Supreme Court
P. O. Box 12248
Austin, Texas 78711

Re: Requested changes in TRCP 742 and 742a regarding service of citation in eviction cases

Dear Judge Hecht:

I am writing this letter as attorney for Texas Apartment Association. TAA respectfully requests that the Texas Rules of Civil Procedure Rules 742 and 742a be changed so that service of citation in forcible detainer cases may be done by private process servers as well as sheriffs and constables.

The Court recently modified the Rule 536 to allow service by private process servers in JP court; but such modifications appear to have been inadvertently omitted in Rules 742 and 742a. The latter rules now seem to conflict with Rule 536. Our suggestion for additional changes in TRCP 746 and 746a is to merely make them consistent with the changes made by the Court in TRCP 536 last year.

For the Court's convenience, I am enclosing (1) a copy of present Rule 536, reflecting the rule's language before and after the Court's changes in 1990, (2) a copy of the proposed changes for Rules 742 and 742a, and (3) a list of reasons supporting the requested changes.

I am also enclosing a copy of HB 282 which attempts to preempt Rules 103 and 536 in all courts. Those rules currently authorize private process servers in all cases (except for the glitch in Rules 742 and 742a).

Sincerely,

NIEMANN & NIEMANN

By _____
Larry Niemann

txsc.27m
Enclosures

xc: Mr. Luke Soules, Chairman
Supreme Court Advisory Committee

Mr. George Allen, Executive Vice-President
Texas Apartment Association

February 12, 1991

TRCP 536 as Changed in 1990

TRCP 536. ~~Special Process Server~~ Who May Serve and Method of Service. ~~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 such 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 to the best of his ability execute the same according to the law and these rules.~~

(a) Citation and other notices may be served anywhere by (1) any sheriff or constable or other person authorized by law or, (2) by a 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 of 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 reasonably effective to give the defendant notice of the suit.

txsc.27m

February 12, 1991

Recommended Changes in Rules 742 and 742a

Rule 742. SERVICE OF CITATION. Citation and other notices may be served by any sheriff or constable or other person authorized by law, as provided in Rule 536. The ~~officer~~ person receiving such citation shall execute the same by delivering a copy of it to the defendant, or by leaving a copy thereof with some person over the age of 16 years, at his usual place of abode, at least six days before the return day thereof; and on or before the day assigned for trial he shall return such citation, with his action written thereon, to the justice who issued the same.

Rule 742a. SERVICE BY DELIVERY TO PREMISES. If the sworn complaint lists all home and work addresses of the defendant which are known to the person filing the sworn complaint and if it states that such person knows of no other home or work addresses of the defendant in the county where the premises are located, service of citation may be by delivery to the premises in question as follows:

If the ~~officer~~ person receiving such citation is unsuccessful in serving such citation under Rule 742, ~~the officer~~ such person shall no later than five days after receiving such citation execute a sworn statement that ~~the officer~~ such person has made diligent efforts to serve such citation on at least two occasions at all addresses of the defendant in the county where the premises are located as may be shown on the sworn complaint, stating the times and places of attempted service. Such sworn statement shall be filed by ~~the officer~~ such person with the justice who shall promptly consider the sworn statement of ~~the officer~~ such person The justice may then authorize service according to the following:

(a) The ~~officer~~ person serving the citation shall place ~~the citation~~ it inside the premises by placing it through a door mail chute or by slipping it under the front door; and if neither method is possible or practical, ~~the officer~~ such person shall securely affix the citation to the front door or main entry to the premises;

(b) The ~~officer~~ person serving the citation shall that same day or the next day deposit in the mail a true copy of such citation with a copy of the sworn complaint attached thereto, addressed to defendant at the premises in question and sent by first class mail;

(c) The ~~officer~~ person serving the citation shall note on the return of such citation the date of delivery under (a) above and the date of mailing under (b) above; and

(d) Such delivery and mailing to the premises shall occur at least six days before the return day of the citation; and on or before the day assigned for trial he shall return such citation with his action written thereon, to the justice who issued the same.

It shall not be necessary for the aggrieved party or his authorized agent to make request for or motion for alternative service pursuant to this rule.

txsc.27m

February 12, 1991

Several Reasons for Allowing Private Process Servers
to Serve Eviction Suit Citations

1. Some areas of the state have had difficulty in getting some of their constables to promptly serve eviction lawsuit citations. Favoritism or prejudice has sometimes made it difficult to get constable cooperation.

2. For years, service of lawsuit citations by private process servers has been allowed in county court, district court, small claims court, and justice court (except for the eviction glitch). It has been allowed in federal courts longer than in Texas courts.

3. Competition by private process servers will provide relief where the constables might be overburdened, uncooperative, or slow.

4. With competition from private process servers, the constables do not have a monopoly; and their service fees (which are set by the county commissioners courts) are more likely to be kept within reason. The constables in many counties exert considerable influence in county commissioner court politics.

5. Service by private process servers is often faster than service by constables. Also, competition by private process servers may speed up service by constables, even when constable service is already good.

6. Private process servers are often cheaper than constable fees for the same service.

7. Private process servers are extensively used by both large and small law firms across Texas.

8. A number of state government agencies successfully utilize private process service to serve official papers. For example, the Attorney General's Office and Texas Employment Commission serve more than 40,000 instruments per year via private process servers.

9. The more advanced private process service firms utilize high-tech equipment such as (1) radio phones, (2) beepers, (3) fax machines, (4) word processors, and (5) computer tracking by cause number, plaintiff's name, defendant's name, etc. . . . similar to the more well-equipped constables offices.

10. Many private process service firms will pick up a lawsuit pleading or complaint at the office of the attorney or complainant, handcarry it to the court, file it, get the citation from the court clerk, and serve it -- all within a span of one or two days.

11. Many private process firms offer additional services that constables do not, such as "stake-outs" or "skip-traces" in hard-to-serve cases.

12. The private process servers tried to become licensed several years ago. Their licensing bill passed the legislature; but it was vetoed by Governor White.

13. There appears to be an effort in the 1991 legislature to make it difficult and more expensive for private process servers to be used for serving citations in any kind of lawsuit. Under proposed HB 282, any person wanting service via a private process server would have to "show good cause" to the court why a sheriff or constable could not do an adequate job of service.

txsc.27m

1/2/91
Filed by Stiles

8-9-28--305

A BILL TO BE ENTITLED

AN ACT

relating to persons authorized to serve citation.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subchapter B, Chapter 17, Civil Practice and Remedies Code, is amended by adding Section 17.028 to read as follows:

Sec. 17.028. PERSONS AUTHORIZED TO SERVE CITATION. (a) Except as provided by Subsection (b), citation issued by a district court, county court, or justice court may be served personally only by a sheriff, deputy sheriff, constable, deputy constable, or other person authorized by statute to serve citation.

(b) On written motion to the court showing good cause why service cannot be made personally as provided by Subsection (a), the court may issue a written order authorizing personal service by any individual who is at least 18 years of age. The court shall issue a separate written order in each case in which the court authorizes a person other than a sheriff, deputy sheriff, constable, or deputy constable to serve citation under this section. A fee may not be imposed for issuance of the order.

(c) A person who is a party to or interested in the outcome of a suit may not serve any process.

(d) The clerk of the court in which the case is pending shall, if requested, serve citation by registered or certified mail or make citation by publication. A sheriff, deputy sheriff, constable, or deputy constable may serve citation by registered or certified mail, or make citation by publication.

(e) To the extent that this section conflicts with the Texas Rules of Civil Procedure, this section controls.

(f) Notwithstanding Section 22.004, Government Code, the supreme court may not adopt rules in conflict with this section.

SECTION 2. This Act takes effect September 1, 1991, and applies only to service of citation made on or after that date.

SECTION 3. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

Pg000969

PAUL HEATH TILL
JUSTICE OF THE PEACE
PRECINCT 5, POSITION 1
6000 CHIMNEY ROCK, SUITE 102
HOUSTON, HARRIS COUNTY, TEXAS 77081
TELEPHONE: 713/661-2276

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November 28, 1989

The Honorable Justice Nathan L. Hecht
Texas Supreme Court
Rules Advisory Committee
P. O. Box 12248
Austin, Texas 78711

RE: PROPOSED AMENDMENTS TO TEXAS COURT RULES

Dear Justice Hecht:

In response to the proposed changes in the Texas Rules of Civil Procedure, as published in the November issue of the State Bar Journal, I respectfully request that the Rules Advisory Committee consider the following comments.

In the Forcible Entry and Detainer section of the rules, in Rule 744 the defendant has five days to request a jury trial from the date of service. This would be changed under the proposed revision of Rule 4. Under Rule 739, court is instructed to have the defendant appear not more than 10 days nor less than six days from date of service. This would not be effected by the proposed change in Rule 4, but would place the court in the dilemma of the defendant being able to request a jury trial on the day of trial and negate purpose and effect of the revision of Rule 744, effective January 1, 1988.

4543.001

nhd w/ltr
LHS

10-21-91
SB

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

October 17, 1991

Mr. Lynn Sanders
211 Stewart Title Building
812 San Antonio Street
Austin TX 78701

Dear Mr. Sanders:

Thank you for your recent letter regarding revision of Rule 749b, which I am passing along to our Advisory Committee for further review.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

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

LYNN SANDERS
ATTORNEY AT LAW

211 STEWART TITLE BUILDING
812 SAN ANTONIO STREET
AUSTIN, TEXAS 78701

TEL. (512) 474-5791
FAX (512) 474-4169

October 15, 1991

Rules Committee
Texas Supreme Court
Supreme Court Building
P.O. Box 12248
Capitol Station
Austin, Texas 78711

Re: Revisions needed to Rule 749b, T.R.C.P.

Dear Members of the Rules Committee:

Here are two suggestions for needed revisions to Rule 749b:

1. Section 1 or 3 should allow the appellee-landlord to request a writ of restitution in the Justice Court rather than County Court where one rental period's rent is not filed within five days of filing a pauper's affidavit;

2. The rule needs to make clear that the appeal may continue despite failure to deposit rent but the tenant's right of possession is lost during the appeal if rent is not deposited.

Thank you.

Sincerely,

Lynn Sanders

LS:df
xc: Fred Fuchs
Travis County Legal Aid

4543.001

4-19-91

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
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CHIEF JUSTICE
THOMAS R. PHILLIPS

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EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEERMAN

April 17, 1991

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

Dear Luke:

Enclosed is a copy of a letter the Court's clerk received from John Holloway, along with comments from two attorneys communicated to my staff attorney by telephone.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

Suggestion for TRCP

Clarify definition of notice for purposes of TRCP 751.

[If I get the picture, the clerks are apparently taking this to mean service of process, and charging a $40 service of process fee for an appeal de novo to county court, and some frequent litigants are balking.]

Leslie Sachanowicz
Bexar County DA

4543.001 ✓10-29-96 SB

hhd UHS

October 24, 1990

10/31

HHD, SCAC Subc Agenda ✓ J. Hecht Cel Ad.

Luther H. Soules, III
Soules and Wallace
Tenth Floor
Rep of Texas Plaza
175 East Houston St.
San Antonio, Texas 78205-2230

Re: **Texas Rules of Civil Procedure Related to Forcible Entry and Detainer**

Dear Luke:

I received the enclosed letter from Brian Sanford concerning the rules referenced above. I assume that it will be directed to the right subcommittee chairperson for appropriate action.

Best personal regards,

Bill

William V. Dorsaneo, III

WVD/sn

SCHOOL OF LAW / 214 • 692-3249 214 • 692-4330-FAX
SOUTHERN METHODIST UNIVERSITY / DALLAS, TEXAS 75275-0116

BRIAN P. SANFORD, P.C.
ATTORNEY AND COUNSELOR
THE FORUM
4006 BELTLINE ROAD
SUITE 248
DALLAS, TEXAS 75244
TELEPHONE: 214/233-3200 TELECOPY: 214/716-1660

October 22, 1990

William V. Dorsaneo
SMU Law School
3315 Daniel
Dallas, Texas 75275

RE: Texas Rules of Civil Procedure Related to Forcible Entry and Detainer

Dear Mr. Dorsaneo:

Rule 749b was left unchanged in the recent amendments to the Texas Rules of Civil Procedure. The rule continues to refer to a writ of restitution rather than a writ of possession as reflected in related rules.

As a further note, I would like to suggest a change to paragraph (1) of rule 749b. The paragraph requires payment into the justice court registry one rental period's rent under the terms of the rental agreement. In a good many of the cases where a pauper's affidavit is filed in an appeal from a forcible entry and detainer, the tenant is receiving assistance from a government housing authority. The housing authorities will enter into a lease with the landlord under the Section 8 existing house program of the U.S. Department of Housing and Urban Development. The housing authority is not a party to the lease, but has a contract with the landlord to assist the tenant by making a portion or all of the rent payments directly to the landlord.

When the lease is terminated, at least one county court has interpreted Rule 749b(1) to require the tenant to pay only his portion of the rent, if any, under the lease. As an example, I represented a client who entered into a Section 8 lease with a tenant and an assistance contract with the Dallas Housing Authority. The tenant requested termination of the lease, my client signed a release, and the housing authority discontinued payment of the rent. However, the tenant remained on the premises. The tenant appealed a forcible entry and detainer judgment obtained against him in the Justice Court by filing a pauper's affidavit.

The County Court found that the tenant was only required to pay his portion into the registry of the court, which in this case was zero. The result was that the tenant was allowed to stay on the premises without my client receiving any rent during the pendency of the appeal. I cannot believe that this outcome was intended by the rulemakers.

I would suggest that the rule be changed to require the payment of the fair market value of the rent into the registry of

the court, with the terms of the rental agreement being merely prima facie evidence of fair market value. I would appreciate your consideration of these comments in your efforts to improve and correct the rules.

Sincerely,

Brian P. Sanford

TRCP 749a - 751

TO: Judge Hecht August 22, 1990

FROM: Bill Willis

RE: Forcible Detainer Rules

Judge Sandy Prindle called me this afternoon before I had a chance to call him back. He had some additional matters as well as the one he called about last week.

I

He has comments about two new paragraphs in Rule 534: Paragraph b. requires the citation in J.P. court to be signed by the clerk UNDER SEAL OF THE COURT or by the J.P. Judge Prindle says J.P. courts don't have seals.

Paragraph c. directs that the citation tell the defendant "If you or your attorney do not file a written answer..." but Judge Prindle points out that you can plead orally in J.P. court, absent a special requirement to plead in writing. E.g. Rule 525:

"The pleadings shall be oral except where otherwise specially provided, but a brief statement thereof may be noted on the docket, provided that after a case has been appealed and is docketed in a county (or district) court all pleadings shall be reduced to writing."

II

Back to our original problem of Rules 749a, 749b, 749c & 751.

I expressed the notion, as set out in my memo of the 17th, that there was no intent to mess with the requirement of 749b that, in order to stay in possession pending appeal, a tenant must pay one rental period's rent into the registry within 5 days of filing his pauper's affidavit (and thereby perfecting his appeal). The pauper's affidavit must be filed within 5 days after judgment is signed. Unless there is contest, that perfects the appeal and, under 751, "When an appeal has been perfected, the justice shall stay all further proceedings on the judgment,..." This would surely include stay of any grant of a writ of possession, which may not be issued before the 6th day after the date on which the judgment of possession is rendered. Property Code 24.0061(b).

Judge Prindle is pleased that we really didn't create a conflict, but he earnestly pleads that the Court say so in writing ASAP to save confusion in FE&D cases. If you were to add a comment, would it be a sentence added to the present comment to Rule 749c? E.g. "To dispense with the appellate requirement of payment of any rent into the court registry. The requirement of Rule 749b(1) to retain possession is unchanged."

ney'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.

RULE 534. ISSUANCE AND FORM OF CITATION

a. Issuance. When a claim or demand is lodged with a justice for suit, ~~he~~ the clerk when requested shall forthwith issue ~~forthwith~~ a citations ~~for the defendant or defendants.~~ 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. ~~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. The citation shall further direct that if it is not served within 90 days after date of its issuance, it shall be returned unserved.~~ 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 or by the Justice of the Peace, (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 and names of parties, (7) state the nature of plaintiff's demand, (8) be directed to the defendant, (9) show name and address of attorney for plaintiff, otherwise the address of plaintiff, (10) contain the time within which these rules require defendant to file a written answer with the clerk who issued citation, (11) contain address of the clerk, and (12) shall notify 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 defendant to file a written answer to 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 rule shall be in the form set forth in section c of this rule.

c. Notice. The citation shall include the following notice to 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.

Comment to 1990 change: To conform justice court service of citation to the extent practicable to service of citation for other trial courts.

RULE 536. ~~SPECIAL PROCESS SERVER~~ WHO MAY SERVE AND METHOD OF SERVICE

~~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 such 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 to the best of his ability execute the same according to the law and these rules.~~

(a) Citation and other notices may be served anywhere by (1) any sheriff or constable or other person authorized by law or, (2) 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.

(f) (No change.)

RULE 749a. PAUPER'S AFFIDAVIT

If appellant is unable to pay the costs of appeal, or file a bond as required by Rule 749, he shall nevertheless be entitled to appeal by making strict proof of such inability within five days after the judgment is signed, which shall consist of his affidavit filed with the justice of the peace stating his inability to pay such costs, or any part thereof, or to give security, which may be contested within five days after the filing of such affidavit and notice thereof to the opposite party or his attorney of record by any officer of the court or party to the suit, whereupon it shall be the duty of the justice of the peace in whose court the suit is pending to hear evidence and determine the right of the party to appeal, and he shall enter his finding on the docket as part of the record. Upon the filing of a pauper's affidavit the justice of the peace or clerk of the court shall notice the opposing party of the filing of the affidavit of inability within one working day of its filing by written notification accomplished through first class mail. It will be presumed prima facie that the affidavit speaks the truth, and, unless contested within five days after the filing and notice thereof, the presumption shall be deemed conclusive; but if a contest is filed, the burden shall then be on the appellant to prove his alleged inability by competent evidence other than by the affidavit above referred to. When a pauper's affidavit is timely contested by the appellant, the justice shall hold a hearing and rule on the matter within five days.

If the justice of the peace disapproves the pauper's affidavit, appellant may, within five days thereafter bring the matter before the county judge for a final decision, and, on request, the justice shall certify to the county judge appellant's affidavit, the contest thereof, and all documents, and papers thereto. The county judge shall set a day for hearing, not later then ~~ten~~ five days, and shall hear the contest de novo. If the pauper's affidavit is approved by the county judge, he shall direct the justice to transmit to the clerk of the county court, the transcript, records and papers of the case.

A pauper's affidavit will be considered approved upon one of the following occurrences: (1) the pauper's affidavit is not contested by the other party; (2) the pauper's affidavit is contested by the other party and upon a hearing the justice determines that the pauper's affidavit is approved; or (3) upon a hearing by the justice disapproving of the pauper's affidavit the appellant appeals to the county judge who then, after a hearing, approves the pauper's affidavit.

No writ of ~~restitution~~ p. ssion may issue pending the hearing by the county judge of the appellant's right to appeal on a pauper's affidavit. If the county judge disapproves the pauper's affidavit, appellant may perfect his appeal by filing an appeal bond in the amount as required by Rule 749 within five days thereafter. If no appeal bond is filed within five days, a writ of ~~restitution~~ possession may issue.

Comment to 1990 change: Proceedings on pauper affidavits are revised. The term writ of restitution is corrected to writ of possession.

RULE 749b. PAUPER'S AFFIDAVIT IN NONPAYMENT OF RENT APPEALS

In a nonpayment of rent forcible detainer case a tenant/appellant who has appealed by filing a pauper's affidavit under these rules shall be entitled to stay in possession of the premises during the pendency of the appeal, by complying with the following procedure:

(1) Within five days of the date that the tenant/appellant files his pauper's affidavit, he must pay into the justice court registry one rental period's rent under the terms of the rental agreement.

(2) During the appeal process as rent becomes due under the rental agreement, the tenant/appellant shall pay the rent into the county court registry within five days of the due date under the terms of the rental agreement.

(3) If the tenant/appellant fails to pay the rent into the court registry within the time limits prescribed by these rules, the appellee may file a notice of default in county court. Upon sworn motion by the appellee and a showing of default to the judge, the court shall issue a writ of restitution.

(4) Landlord/appellee may withdraw any or all rent in the county court registry upon a) sworn motion and hearing, prior to final determination of the case, showing just cause, b) dismissal of the appeal, or c) order of the court upon final hearing.

(5) All hearings and motions under this rule shall be entitled to precedence in the county court.

(Added May 9, 1977, eff. Sept. 1, 1977.)

Notes and Comments

This is a new rule.

RULE 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.~~

When an appeal bond has been timely filed in conformity with Rule 749 or a pauper's affidavit approved in conformity with Rule 749a, the appeal shall be perfected.

Comment to 1990 change: To dispense with the appellate requirement of payment of any rent into the court registry.

RULE 751. TRANSCRIPT

When an appeal has been perfected, the justice shall stay all further proceedings on the judgment, and immediately make out a transcript of all the entries made on his docket of the proceedings had in the case; and he shall immediately file the same, together with the original papers and any money in the court registry, including sums tendered pursuant to Rule 749b(1), with the clerk of the county court of the county in which the trial was had, or other court having jurisdiction of such appeal. The clerk shall docket the cause, and the trial shall be de novo.

The clerk shall immediately notify both appellant and the adverse party of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court.

The trial, as well as all hearings and motions, shall be entitled to precedence in the county court.

Comment to 1990 change: To provide for transfer of subject funds.

MEMORANDUM

TO: Judge Hecht

FROM: Bill Willis

DATE: August 17, 1990

RE: Revised Rules 749a, 749c and 751 -- Appeal of Forcible Entry and Detainer Cases by a Pauper

I received a call from Judge Sandy Prindle, a J.P. in Tarrant County and chair of the J.P. legislative committee yesterday.

I.

He is concerned that there is a conflict in these amended rules between the requirement that a pauper tenant who is appealing must, within 5 days of the date the tenant/appellant files his pauper's affidavit, pay into the justice court registry one rental period's rent [R. 749b(1)] and the new Rule 749c: "When an appeal bond has been timely filed in conformity with Rule 749 or a pauper's affidavit approved in conformity with Rule 749a, the appeal shall be perfected," together with the language of the Comment to 1990 change: "To dispense with the appellate requirement of payment of any rent into the court registry." It does not seem so to me. It seems to me that the change does eliminate the rental payment as an element of perfecting the appeal, but keeps the requirement of 749b that a stay in possession pending appeal can be obtained only if the rental payment is made within 5 days and is continued as due. Rule 751 pertains to transfer of fund to county court on appeal and nothing more. Have I correctly interpreted it?

II.

Note the next to the last line of the first paragraph of Rule 749a. Shouldn't it be "When a pauper's affidavit is timely contested by the appellee, the justice shall hold a hearing and rule on the matter within five days."? Only the appellee would be contesting the affidavit.

(f) (No change.)

RULE 749a. PAUPER'S AFFIDAVIT

If appellant is unable to pay the costs of appeal, or file a bond as required by Rule 749, he shall nevertheless be entitled to appeal by making strict proof of such inability within five days after the judgment is signed, which shall consist of his affidavit filed with the justice of the peace stating his inability to pay such costs, or any part thereof, or to give security, which may be contested within five days after the filing of such affidavit and notice thereof to the opposite party or his attorney of record by any officer of the court or party to the suit, whereupon it shall be the duty of the justice of the peace in whose court the suit is pending to hear evidence and determine the right of the party to appeal, and he shall enter his finding on the docket as part of the record. Upon the filing of a pauper's affidavit the justice of the peace or clerk of the court shall notice the opposing party of the filing of the affidavit of inability within one working day of its filing by written notification accomplished through first class mail. It will be presumed prima facie that the affidavit speaks the truth, and, unless contested within five days after the filing and notice thereof, the presumption shall be deemed conclusive; but if a contest is filed, the burden shall then be on the appellant to prove his alleged inability by competent evidence other than by the affidavit above referred to. When a pauper's affidavit is timely contested by the appellant, the justice shall hold a hearing and rule on the matter within five days.

If the justice of the peace disapproves the pauper's affidavit, appellant may, within five days thereafter bring the matter before the county judge for a final decision, and, on request, the justice shall certify to the county judge appellant's affidavit, the contest thereof, and all documents, and papers thereto. The county judge shall set a day for hearing, not later then ~~ten~~ five days, and shall hear the contest de novo. If the pauper's affidavit is approved by the county judge, he shall direct the justice to transmit to the clerk of the county court, the transcript, records and papers of the case.

A pauper's affidavit will be considered approved upon one of the following occurrences: (1) the pauper's affidavit is not contested by the other party; (2) the pauper's affidavit is contested by the other party and upon a hearing the justice determines that the pauper's affidavit is approved; or (3) upon a hearing by the justice disapproving of the pauper's affidavit the appellant appeals to the county judge who after a hearing, approves the pauper's affidavit.

No writ of ~~restitution~~ possession may issue pending the hearing by the county judge of the appellant's right to appeal on a pauper's affidavit. If the county judge disapproves the pauper's affidavit, appellant may perfect his appeal by filing an appeal bond in the amount as required by Rule 749 within five days thereafter. If no appeal bond is filed within five days, a writ of ~~restitution~~ possession may issue.

Comment to 1990 change: Proceedings on pauper affidavits are revised. The term writ of restitution is corrected to writ of possession.

RULE 749b. PAUPER'S AFFIDAVIT IN NONPAYMENT OF RENT APPEALS

In a nonpayment of rent forcible detainer case a tenant/appellant who has appealed by filing a pauper's affidavit under these rules shall be entitled to stay in possession of the premises during the pendency of the appeal, by complying with the following procedure:

(1) Within five days of the date that the tenant/appellant files his pauper's affidavit, he must pay into the justice court registry one rental period's rent under the terms of the rental agreement.

(2) During the appeal process as rent becomes due under the rental agreement, the tenant/appellant shall pay the rent into the county court registry within five days of the due date under the terms of the rental agreement.

(3) If the tenant/appellant fails to pay the rent into the court registry within the time limits prescribed by these rules, the appellee may file a notice of default in county court. Upon sworn motion by the appellee and a showing of default to the judge, the court shall issue a writ of restitution.

(4) Landlord/appellee may withdraw any or all rent in the county court registry upon a) sworn motion and hearing, prior to final determination of the case, showing just cause, b) dismissal of the appeal, or c) order of the court upon final hearing.

(5) All hearings and motions under this rule shall be entitled to precedence in the county court.

(Added May 9, 1977, eff. Sept. 1, 1977.)

Notes and Comments

This is a new rule.

RULE 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.~~

When an appeal bond has been timely filed in conformity with Rule 749 or a pauper's affidavit approved in conformity with Rule 749a, the appeal shall be perfected.

Comment to 1990 change: To dispense with the appellate requirement of payment of any rent into the court registry.

RULE 751. TRANSCRIPT

When an appeal has been perfected, the justice shall stay all further proceedings on the judgment, and immediately make out a transcript of all the entries made on his docket of the proceedings had in the case; and he shall immediately file the same, together with the original papers and any money in the court registry, including sums tendered pursuant to Rule 749b(1), with the clerk of the county court of the county in which the trial was had, or other court having jurisdiction of such appeal. The clerk shall docket the cause, and the trial shall be de novo.

The clerk shall immediately notify both appellant and the adverse party of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court.

The trial, as well as all hearings and motions, shall be entitled to precedence in the county court.

Comment to 1990 change: To provide for transfer of subject funds.

THE SUPREME COURT OF TEXAS
P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

March 25, 1992

Mr. Michael Northrup
2120 Pacific Avenue #305
San Francisco CA 94115

Dear Mike:

Thank you for your letter regarding discrepancies in the Texas Rules of Civil and Appellate Procedure. I am referring your comments to the Court's Rules Advisory Committee. I assure you that the thoughts you have expressed will receive full consideration by that Committee and by this Court.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

xc: Mr. Luther H. Soules III

March 16, 1992

R. Michael Northrup
2120 Pacific Ave, Apt. 305
San Francisco, Ca. 94115

The Honorable Nathan L. Hecht
The Supreme Court of Texas
P.O. Box 12248
Austin, Tx. 78711

Re: Texas Rules of Civil and Appellate Procedure

Justice Hecht,

I recently started working for Matthew Bender in Oakland. In connection with my job, I discovered some discrepancies in the Texas Rules of Civil and Appellate Procedure. I am writing to you since the rules fall within your purview. I understand that the last set of amendments was supposed to eliminate references to the old rules of civil procedure that are now incorporated into the rules of appellate procedure. However, Tex. R. Civ. P. 75b refers to Rule 379. Rule 379, however, is now Tex. R. App. P. 51(d).

I understand that the last set of amendments were intended to make the rules gender-neutral. However, I noticed that Tex. R. App. P. 10 provides in part, "... if the judgment has been reversed and remanded he shall continue the cause on the docket with its original file number for trial." It appears that, for whatever reason, this rule was overlooked. Also Tex. R. App. P 13(k) provides in part: "... he shall be entitled to file the record in the court of appeals, and, if the decision of the court of appeals is adverse to him, an application for writ of error, without making any deposit for costs. In all other proceedings in which a cost deposit is required by this rule, a party unable to pay such costs may make affidavit of his inability to do so..."

In addition, I have discovered some apparent inconsistencies in the appellate timetables. Tex. R. App. P. 41(a)(1) extends the time for perfecting the appeal 1) if a timely motion for new trial is filed in a jury trial or 2) if a request for findings of fact and conclusions of law is filed in a nonjury trial. Of course the time for requesting the transcript and statement of facts is dependent on the time of perfection. However, the time

for filing the transcript and statement of facts may be extended 1) if a timely motion for new trial is filed, or 2) if a timely motion to modify the judgment is filed, in a case tried with a jury or 3) if a request for findings of fact and conclusions of law is filed in a case tried without a jury. Clearly, the difference is that in one case the filing of a motion to modify extends the time while in the other case it apparently does not.

I would also note that Tex. R. App. P. 52(c)(11) suffers from a similar problem. The time for filing a bill of exception is unaffected by the filing of a motion to modify. Furthermore, the time for filing a bill of exception is unaffected by the filing of a request for findings of fact and conclusions of law in a case tried without a jury.

On a substantive level, I would comment that it is rather odd that the rules provide that exhibits in the trial court must be filed with the trial court clerk, see Tex. R. Civ. P. 75a, and further that the trial court clerk is charged with preparing the transcript, see Tex. R. App. P. 51(c). It is odd because in the case of original exhibits, the court reporter is charged with transmitting them to the court of appeals, see Tex. R. Civ. P. 75b, even though such exhibits are part of the transcript, see Tex. R. App. P. 51(d). From a practical standpoint, I have no objections, but from a theoretical standpoint, making original exhibits part of the transcript while putting the court reporter in charge of the exhibits, is incongruous with other rules relating to the record.

I have noted a few other similar discrepancies, and I am compiling them to send in a later latter. I will send those along when I have had more time to put them together. I hope this information has been of some assistance.

Sincerely,

R. Michael Northrup

R. Michael Northrup

454-501

WILLIAM V. DORSANEO III
ATTORNEY AT LAW
3315 DANIELS
DALLAS, TEXAS 75275
(214) 692-2626

HHD
SCAC agenda
No Sale

May 16, 1991

Mr. Richard A. Henderson
Attorney at Law
514 East Belknap
Fort Worth, Texas 76102

Dear Mr. Henderson,

This letter is a belated response to your troublesome letters to me and to the Texas Supreme Court. I appreciate your frustration about the pace of change and the expense of keeping your library maintained. But I do not appreciate your suggestion that there is some combination of influential persons who are responsible. Perhaps the best way for me to respond is to briefly and generally describe my role in rulemaking over the past fifteen years.

The first occasion on which I became involved in the rule-making process in Texas occurred in the mid-1970s. At that time, due to several recent Supreme Court decisions, the special remedies provisions of the Texas Rules of Civil Procedure concerning attachment, garnishment and sequestration were completely redone. This project was completed within a period of months. It was necessary.

The next major project was in the field of discovery. Under the direction and leadership of the then chairperson of the Committee on the Administration of Justice, Luke Soules, the Texas discovery rules, especially the rules concerning the scope of discovery and sanctions were rewritten. This project occurred over a period of approximately two years and involved the large scale participation of many Texas lawyers at approximately twelve meetings in Austin. I served as the unofficial reporter charged with drafting responsibilities. At the time when this project was begun, the Texas discovery rules were in sad shape. Despite major revisions in 1958, 1970, 1973 and 1978, our rules were both inscrutable, inconsistent, incoherent and uninformative. Change was needed, as most everyone agreed.

The third major project entailed the redrafting of the procedural rules concerning venue. As you may recall, the Texas General Venue statute was redrawn completely in May, 1983. Since the new statute contained virtually no clear procedural information, it became necessary to fill in gaps in the statute while redrafting the companion procedural rules. This was done by a subcommittee of the COAJ under the leadership of Jack Eisenberg, then chair of the committee. This project took about two weeks because time limitations were pressing, given the effective date of the new venue statute. Quite frankly, the venue rules were promulgated by the Court before we were completely finished drafting them. But change was needed and, with some minor adjustments, the rules have held up fairly well despite some current uncertainties. In this connection, anyone familiar with prior venue law knows that there are fewer, not more, uncertainties.

The next major project in which I played a central role was in developing the Texas Rules of Appellate Procedure. I was appointed as the reporter on this project by the Texas Supreme Court, the Court of Criminal Appeals, and various committees of the Texas Legislature. A special committee chaired by Chief Justice Clarence Guittard was formed to develop a body of rules for both civil and criminal cases. This project took many more meetings in Austin over approximately a one year period. As you may imagine, it also required hundreds of hours of uncompensated work. Fortunately, the project's end product was well-received by both the bench and bar. Again, a good job was done, minimizing problems and erasing much unfairness and many uncertainties.

As far as the overall rule making process is concerned, in 1987 the Court also decided to redraft the rules concerning the court's charge to mandate broad-form submission. This project was chaired by Professor J. Hadley Edgar, although he cannot be held solely accountable for any shortcomings. Although we are clearly not finished in our transition from one form of jury charge to another, the work that has been done has been necessary and salutary. If it troubles you that there are new uncertainties, you should recognize that interpretive problems are inherent when a major shift in practice and policy occurs. The rules cannot be perfected until change is complete, but this does not mean that we should have no rules until then. In some respects, rule making aids development.

As you can see, virtually all of these major projects were spawned by new legal developments or law changes from the Legislature or from elsewhere. Certainly, I had no significant part in causing others to decide that these changes were needed. I did attempt to lend my drafting expertise to each project and I believe that the rules are better for it.

As you also know, a number of other changes have been made in the rules of procedure during the past fifteen years. Virtually all of these changes had their genesis in court decisions and the suggestions of members of the bench and bar, including some suggestions, made by me. A cursory review of the Supreme Court Advisory Committee's "agendas" will show that the Court receives hundreds of suggestions annually. These are processed by the Court's committee and the Administration of Justice Committee of the State Bar of Texas. Virtually all of these changes have been warranted and have improved the practice. Some have not been needed or wise or well drawn. But that is inevitable.

Much more could be said about rulemaking in Texas from 1940 to the present day, but not in this epistle. I will say, however, that many leading legal citizens have contributed a great deal of time, effort and money in a largely selfless and highly professional manner. There are many heroes and virtually no villains. I have been privileged to work along side my personal heroes in these endeavors. I have some pride in our accomplishments and a very clear conscience. I hope you can now appreciate why I consider that your assumptions about my influence are misguided as well as insulting.

Sincerely,

William V. Dorsaneo, III

WVD/sn

cc: Luther H. Soules, III

Honorable Nathan L. Hecht

10/11
HHD.
SCAC Sept Agenda
COAJ (Quorum)
J. Hecht

4543.001

HHD
LHS

10-7-91
43

SOUTH TEXAS
COLLEGE OF LAW

1303 San Jacinto Street • Houston, Texas 77002-7000 • 713-659-8040 • FAX 713-659-2217

September 24, 1991

Mr. William V. Dorsaneo III
3315 Daniels
Dallas, Texas 75275-0116

RE: Committee on State Appellate Rules
Procedural Problems with Non-Jury Practice/
Findings of Fact & Conclusions of Law

Dear Bill:

Your letter of September 17, 1991 jogged my memory that you had requested a summarization of procedural problems resulting from the 1990 rule amendments concerning the mechanics of post-judgment steps concerning findings of facts and conclusions of law. I offer the following observations:

1. The time frame to take steps in connection with obtaining finding of facts and conclusions of law now necessarily varies from case to case under the 1990 rule amendments. Only the initial time period to make the original request for findings/conclusions runs from the date the judgment is signed. (See attached flowsheet I have prepared to graphically illustrate the current timeframes.) Subsequent steps, such as filing a reminder or a request for additional or amended filings, is calculated from the date of the prior "triggering act". For example, a party might make a request for findings of fact and conclusions of law the day following the signing of the final judgment, even though the party could have timely made that request up to twenty days following the signing of the final judgment. While the trial judge is allowed twenty days from the date of the original request to make the findings, assume the trial judge makes the findings the next day, i.e. day two following the signing of the original judgment. The party who wishes to request any amended or additional findings must do so no later than 10 days of the trial judge's filing of the original findings. In this example, the request for additional/amended findings would be due by day 12 following the signing of the original judgment! I believe this is a needless trap for the practicing bar. In other instances where appellate steps are required post-judgment, i.e. the filing of a motion for new trial, a motion to modify judgment, a cost bond, the filing of the record, etc., all the governing deadlines run from the date the judgment is signed. I believe the better practice would be to amend civil rules 296-298 so that the deadlines contained therein each run from the date the judgment is signed.

2. The rules now provide that a timely (and I assume proper) request for findings of fact and conclusions of law in a bench trial will operate to extend the appellate timetable for perfecting the appeal and filing the record, in the same manner as a timely motion for new trial would in a jury case, (i.e. cost bond or its equivalent is not due until 90 days following the signing of a final judgment, the record 120 days). However, there is no rule provision that the timely filing of a request for findings of fact and conclusions of law extends the plenary authority of the trial court. As you know rule 329b provides for an extension of the trial court's plenary power if a timely motion for new trial is filed. While I conceptually agree that there is a distinction which would support extending plenary power when a motion for new trial is timely filed but not extending it when only a timely request for findings of fact and conclusions of law is filed, I wonder if this isn't also an unnecessary trap. It is my opinion that either civil rule 329b should be changed to extend plenary power by a timely filing of a request for findings/conclusions or make clear in the comments to rule 329b that it does not.

3. Neither civil rule 306a or appellate rule 5 envision a time period of less than 20 days to support necessary extensions that may arise concerning the obtaining of findings of fact so vital to the success of the appeal. Assume out of town counsel representing the unsuccessful defendant, files a proposed judgment and proposed findings of fact/conclusions of law following the court's oral pronouncement of judgment. Thereafter, counsel makes repeated requests via the phone as to whether the trial court has signed the proposed judgment and/or findings. After obtaining repeated assurances from the clerk that these had not been signed, counsel discovers the trial judge had in fact signed both nineteen days ago. Because twenty days had not expired from the date the judgment had been signed, rule 306a does not apply. Nevertheless, the ten day period which runs from the date the judgment was signed to seek additional or amended findings/conclusions has run. If there is no change in rule 298 that would allow computation of time to file amended filings/conclusions from the date the judgment is signed (ex. "up to forty days after the judgment is signed"), then rule 306a should be amended to extend the time to begin computation of the time to file additional or amended findings/conclusions, in the situation where a party does not receive notice or knowledge that the original findings have been filed by the court.

4. As noted in comment two above, the rules now provide that a timely request for findings of fact and conclusions of law in a bench trial will operate to extend the appellate timetable in the same manner as a timely motion for new trial filed in a jury trial would. I assume that to benefit from this provision, the matter must be such that a request for findings of fact/conclusions is proper at all! The caselaw seems to generally suggest that findings are proper only following an evidentiary proceeding. (Even then in the case of interlocutory

appeals, findings are discretionary with the court.) If a litigant following the entry of summary judgment were to timely request findings of fact and conclusions of law, and then file a reminder timely, nevertheless it would seem there would be no extension of the appellate timetable, (i.e. time to perfect by filing a bond, etc.) as this is not a proper instance to seek findings from the court. If this is the case, the comment to appellate rule 41 (bond) as well as appellate rule 54 (record) should state that only a proper request for findings/conclusions will operate to extend the timeframe for taking each of these steps.

5. Appellate rule 40(a)(4), which provides the time period for a litigant to file a notice of limitation of appeal in an attempt to narrow the scope of appeal or force an opponent to file a cross-appeal, has no provision for extension when a litigant has timely and properly requested findings of fact/conclusions from the trial curt. Logically, a party wold review the court's findings/conclusions to determine the basis on which they might appeal. Accordingly, I suggest that 40(a)(6) be amended to include a provision to extend the time to file a notice of limitation on appeal if a timely request for findings/conclusions is filed.

I hope that these comments will be helpful to the ongoing efforts of the committee. If it would be useful to draft proposed amendments, please let me know and I would be happy to do so. In the interim, should you have any questions or wish to further discuss these concerns, please give me a call.

Regards,

Elaine A. Carlson
Professor of Law

EAC:cs

Attachment

cc: Honorable Nathan Hecht
Honorable Clarence A. Guittard
Ms. Sarah B. Duncan
Mr. R. Brent Cooper
Ms. Ruth Kollman
Prof. Elizabeth Thornberg
Mr. Ron Goronson

TIMETABLE - REGULAR APPEAL TO COURT OF APPEALS

Timely and Proper Request for
Findings of Fact and Conclusions of Law

Date Judgment Signed

Original Request Findings of Fact and Conclusions of Law
Within Twenty Days of Date Judgment Signed

Trial Judge to Make Original Findings/Conclusions
Within Twenty Days of Orignal Request

Trial Judge Acts

Request Any Desired
Amended or Additional
Findings/Conclusions
Within Ten Days of Judge
Filing Original Findings/
Conclusions

Court to File Any
Amended or Additional
Findings/Conclusions
Within Ten Days of
Request for Them

Trial Judge Fails To Act

File Reminder to Court
to Make Findings/
Conclusions
Within Thirty Days of
Original Request

Court to File
"Late" Original
Findings/Conclusions
Within Forty Days of
Original Request

Request Any Desired
Amended or Additional
Findings/Conclusions
Within Ten Days of Judge
Filing Original Findings
/Conclusions

Court to File Any
Amended or Additional
Findings/Conclusions
Within Ten Days of
Request for Them

Bond

90 Days After
Judgment
Signed

Extension

15

RECORD

120 Days After
Judgment
Signed

Extension

15

FULBRIGHT & JAWORSKI
1301 McKINNEY
HOUSTON, TEXAS 77010

TELEPHONE: 713/651-5151
TELEX: 76-2829
TELECOPIER: 713/651-5246

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WASHINGTON, D.C.
AUSTIN
SAN ANTONIO
DALLAS
LONDON
ZURICH
FULBRIGHT JAWORSKI & REAVIS McGRATH
NEW YORK
LOS ANGELES

January 11, 1990

TO: SUPREME COURT ADVISORY COMMITTEE

FROM: Subcommittee on Rules 15 to 165

At our subcommittee meeting held on January 8, 1990, we considered (i) the various comments made at the public hearing held on November 30, 1989 addressing the proposed changes in the Texas Rules of Civil Procedure, (ii) the written suggestions and comments of attorneys forwarded to our subcommittee, and (iii) additional proposals for rule changes. The persons participating in the meeting were David Beck, Pat Beard, and Elaine Carlson. The conclusions reached at the meeting were as follows:

17. Section 51.803(a) of the Government Code. This rule says that the "Supreme Court shall adopt rules and regulations to regulate the use of electronic copying devices for filing in the courts." The subcommittee is of the unanimous view that filing with courts by electronic means should *not* be adopted at the present time. The rationale is that we should wait to determine the experience of electronic filings between lawyers to determine the extent, if any, of the problems. Also, courts are not yet presently equipped to handle such filings.

Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

MISC. TRAP

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

In addition to the above rules, we would like to suggest that the higher Courts adopt a rule regarding filings made by fax machine. For your reference, we have enclosed our internal rule regarding this Court's policy on fax filings.

Also, what about bankruptcy cases? A rule requiring the Court of Appeals to abate the appeal if <u>any</u> party to the appeal files a petition for bankruptcy might be helpful. Our present procedure is to abate the entire appeal for administrative purposes and allow reinstatement of the whole appeal when the stay has been lifted. We find that abating the entire case has worked much better than a piecemeal abatement as to one or two parties only.

In addition, we would like to see the Court of Criminal Appeals adopt rules regarding appeals by the State. I.e., timetables, etc.

pg000994

Also any procedural rules presently contained in the Code of Criminal Procedure should be written as rules in the Rules of Appellate Procedure. I.e. 44.45(d)9.

00734

4543.001

Webb, Kinser & Luce

A Professional Corporation

Attorneys and Counselors at Law

Brian L. Webb
Board Certified - Family Law
Texas Board of Legal Specialization
Katherine A. Kinser
Buddy Luce

4620 RENAISSANCE TOWER
1201 ELM STREET
DALLAS, TEXAS 75270
TELEPHONE (214) 744-4620

October 2, 1989

Mr. Luther H. Soules
Chairman, Supreme Court Advisory
Committee
10th Floor, NCNB Texas Plaza
175 East Houston
San Antonio, Texas 78205

Dear Mr. Soules:

Over the last few months, I have had several discussions with Justice Linda Thomas concerning the need for Rules of Civil Procedure which address sanctionable behavior at the Court of Appeals and Supreme Court level. Specifically, I believe there is a need for Rules with would permit motions for sanctions to be filed either at the Court of Appeals and Supreme Court level or at the trial court level while appeals are pending to address behavior such as parties and/or attorneys communicating directly with the Courts without notice to the opposing side. It is my understanding that, at this point, there are no rules which permit motions for sanctions to be filed in the appellate courts, nor does this trial court have the power to hear such a motion while an appeal is pending. Speaking from personal experience, this situation is not only frustrating, but certainly is difficult to explain to a client who believes their case is being harmed by behavior of an opposing party, which simply would not be tolerated at the trial court level.

I have spoken with several attorneys who practice family law in the Dallas County area and everyone I have spoken to believes that this is a problem that needs to be addressed. I would appreciate any consideration you and your Committee may be able to give to this matter and am certainly willing to volunteer my time to work on Rule amendments directed towards this issue.

Thank you very much for your cooperation.

Very truly yours,

Katherine A. Kinser

KAK/sa

cc: Honorable Linda Thomas
Mr. Kenneth Fuller
Mr. Harry Tindall

9/12 HJH.
COAJ
SCAC Subcom
SCAC Agenda.

FRANK G. EVANS
Chief Justice
First Court of Appeals
1307 San Jacinto
Houston, Texas 77002

September 8, 1989

Xc Justice Hecht
C.J. Evans

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

Dear Chief Justice Phillips:

I have discussed with Justice Murry Cohen several subjects that might be considered by the panels at the meeting of the appellate section at the Judicial Conference.

1. I feel sure that you and the members of your court are as concerned as the justices on the intermediate appellate courts about the impact of mandamus and other extraordinary proceedings. I respectfully suggest, therefore, that this subject be considered as an item for discussion by the panels at our section meeting. Mr. Roger Townsend, the current President of the Appellate Section of the State Bar, has indicated that his section would be glad to assist you and the judiciary in trying to find some solutions for this growing problem.

2. Another problem of less magnitude, but one which continues to plague us, is the publication (or non-publication) of opinions. I know that many justices feel we should be able to develop a better system for Texas, so that unpublished opinions might be of greater benefit to the bar and the judiciary.

Third, but certainly not last in importance, is the matter of compensating our permanent legal staff. Thanks to you and your leadership, the legislature provided substantial increases in the salaries of the judges and the briefing attorneys. Our permanent staff did not, however, receive similar benefits. Particularly, our research attorneys are sorely underpaid, and our entire permanent legal staff are entitled to some increase in their salaries. I would hope that this could be a high item of priority in the 1991 Legislative Session.

I would appreciate your panel's consideration of these matters, if time permits.

Yours sincerely,

Frank G. Evans

Pg000997

FGE:cc

00737

Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

APPENDIX FOR CRIMINAL CASES

Rule 2. This section of the appendix should be completely deleted. The rule should be that a supplemental transcript shall conform to the rules governing the original transcript. If this rule is kept, then a proper reference to the correct rule should be modified. It now refers to rule 45.

TRAP 4

CHARLES ADKIN SPAIN, JR.
Court of Appeals for the Third District of Texas
Post Office Box 12547
Capitol Station
Austin, Texas 78711-2547

Staff Attorney
Telephone: (512) 463-1733

July 20, 1993

The Honorable Nathan Hecht
Justice
The Supreme Court of Texas
Supreme Court Building Room 104
201 West 14th Street
Austin, Texas 78701

Re: Texas Rules of Appellate Procedure

Dear Justice Hecht:

Here are additional random comments on the Rules. I apologize for not rounding them all up earlier.

(1) Texas Rule of Appellate Procedure 4(b): Does the Court intend that the term "certificate of mailing" refer to Form 3817 described in sections 931.1-.522 of the U.S. Postal Service's *Domestic Mail Manual*, or does the term "certificate of mailing" have a more general meaning that would include a receipt for certified mail (Form 3800) described in sections 912.1-.8?

(2) Texas Rule of Appellate Procedure 19: It would expedite motion practice in the courts of appeals to require a certificate of conference. Motions without opposition would bear the word "unopposed" in their caption and contain a statement that movant has conferred with all parties and no one opposes the motion. The appellate court could then consider such an unopposed motion without waiting the usual ten days. Motions with opposition would contain a statement that movant has conferred with all parties and counsel cannot agree about the disposition of the motion. Agreed or joint motions would be signed by all parties or their counsel similar to Texas Rule of Appellate Procedure 8.

(3) Texas Rules of Appellate Procedure 79(d), (e) and 100(f): Is it a "motion for rehearing en banc" or a "motion for reconsideration en banc"?

(4) Texas Rules of Appellate Procedure 90(c): In theory the rule allows the court of

appeals to order an opinion published after the court rules on the last timely filed motion for rehearing if the parties do not seek relief from the supreme court (no motion for rehearing is required, of course, in a criminal case). This may be a loophole.

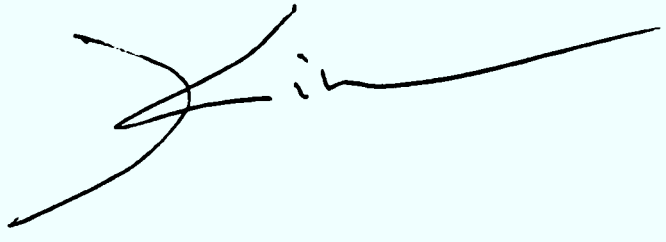
(5) Texas Rule of Civil Procedure 5: Why is there no provision regarding prima facie evidence of the date of mailing by means of a certificate of mailing?

(6) Texas Rule of Civil Evidence 204: Do we really need the provisions that refer to taking judicial notice of the contents of the *Texas Register* and the *Texas Administrative Code* in light of the Administrative Procedure and Texas Register Act and the Texas Administrative Code Act? Tex. Rev. Civ. Stat. Ann. art. 6252-13a, § 4(c), art. 6252-13b, § 4 (West Supp. 1993); *Metro Fuels, Inc. v. City of Austin*, 827 S.W.2d 531, 532 n.3 (Tex. App.—Austin 1992, no writ).

(7) When does true plenary jurisdiction of the appellate court expire—after ruling on the last timely filed motion for rehearing, issuance of the mandate, or expiration of the term of court? Theoretically it's probably the expiration of the term of court, but I believe the supreme court would frown if a court of appeals in December sua sponte vacated a judgment the court of appeals originally rendered in January of the same year and rendered a new and different judgment, especially if the mandate issued in April. Perhaps it would be good to have an appellate rule similar to Texas Rule of Civil Procedure 329b that defines the plenary jurisdiction of the appellate court without reference to the term of court.

Once again, thank you for your receptiveness to comments on the Rules. My theory is not to gripe about the Rules, but rather try to correct the perceived flaws. I trust I'm not merely being a pest!

Respectfully,



CHARLES ADKIN SPAIN, JR.
Court of Appeals for the Third District of Texas
Post Office Box 12547
Capitol Station
Austin, Texas 78711-2547

Staff Attorney
Telephone: (512) 463-1733

July 13, 1993

The Honorable Nathan Hecht
Justice
The Supreme Court of Texas
Supreme Court Building Room 104
201 West 14th Street
Austin, Texas 78701

Re: Texas Rules of Appellate Procedure

Dear Justice Hecht:

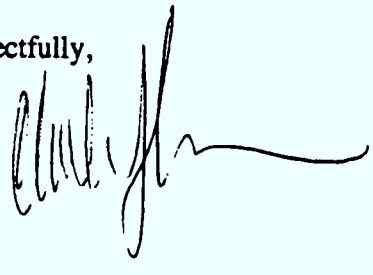
Here are some random comments on the Rules:

(1) Texas Rule of Appellate Procedure 4(b): I don't understand why the appellate mailbox rule applies only to "a motion for rehearing, any matter relating to taking an appeal or writ of error from the trial court to any higher court, or application for writ of error or petition for discretionary review." Texas Rule of Civil Procedure 5 applies to "any document." Is Rule 4(b) really more restrictive, and if so, is there a good reason why it is more restrictive? I recommend amending Rule 4(b) so it applies to "any document," which is certainly what the bar thinks (and perhaps prays) it means.

(2) Texas Rule of Appellate Procedure 86: Perhaps the mandate should issue fifty days after the last timely filed motion for rehearing has been overruled, instead of forty-five days, to avoid the clerk issuing the mandate before receipt through the U.S. mail of a copy of a motion for extension of time to file an application for writ of error that was put in the mail on the forty-fifth day pursuant to Texas Rule of Appellate Procedure 130(d). Query—Is the motion for extension timely filed by mail? (see comment one above)

Thank you for your receptiveness to comments on the Rules.

Respectfully,



Pg001001

July 14, 1993

Mr. Charles Adkin Spain, Jr.
Third Court of Appeals
P. O. Box 12547
Austin TX 78711-2547

Dear Charles:

Thank you for your letter and comments regarding Texas Rules of Appellate Procedure 4(b) and 86. I have sent a copy to the chairman of the Rules Advisory Committee with the request that your comments be considered fully in making additional revisions in the rules.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

c: Mr. Luther H. Soules III

PLAYING BY THE RULES

Recent Amendments to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence Effective December 1, 1991

by John K. Chapin

On April 30, 1991, the Supreme Court transmitted to Congress a number of changes to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence. These changes are to take effect on December 1, 1991. Following is a discussion of the major changes. Other insubstantial changes were made to F.R.A.P. 6, 10, 26, and 26.1.

FEDERAL RULES OF APPELLATE PROCEDURE

(TRAP 4) *Filing and Service—Rule 25*

A provision to Rule 25 has been added to authorize courts of appeal by local rule to permit papers to be filed by facsimile or other electronic means, when such means are authorized by the Judicial Conference of the United States.

4543.001

2-26-90

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WRITER'S DIRECT DIAL NUMBER

740-8535

February 22, 1990

Mr. Luther H. Soules, III
Soules & Wallace (P.C.)
Republic of Texas Plaza, 10th Floor
175 East Houston Street
San Antonio, Texas 78205-2230

Re: Proposed Texas Rule of Appellate Procedure on Sealing Court Records

Dear Luke:

The following is a draft of a proposed Texas Rule of Appellate Procedure on sealing court records:

PROPOSED TEXAS RULE OF APPELLATE PROCEDURE 4(h)

All final opinions, including concurring and dissenting opinions, as well as all orders made during the pendency of cases are specifically made public information, subject to public access and inspection, and shall never be sealed. All other records, including applications, motions, briefs, and exhibits, filed with any Texas Court of Appeals, the Texas Court of Criminal Appeals, or the Supreme Court of Texas are subject to Texas Rule of Civil Procedure 76a, provided, however, that all evidence offered in connection with a sealing motion shall be by affidavit.

In accordance with your request, I am forwarding a copy of this proposal to each member of the Texas Supreme Court Rules Advisory Committee. Please let me know if I may be of any further assistance.

Best regards,

Tom

Thomas S. Leatherbury

TSL/dj

cc: Members of the Texas Supreme
Court Rules Advisory Committee

TRAP 5

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

11/17

HHD
Sctc subC
Agenda
✓
Cts J - Quast

January 16, 1992

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

Dear Luke:

Enclosed is a letter from Judge Michol O'Connor suggesting proposed amendments to Tex. R. Civ. P. 4 and Tex. R. App. P. 5.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

MICHOL O'CONNOR
JUSTICE
First Court of Appeals
1307 San Jacinto
Houston, Texas 77002
(713) 655-2716

December 5, 1991

Hon. Nathan L. Hecht
The Texas Supreme Court
The Texas Supreme Court Building
P.O. Box 12248
Austin, TX 78711

RE: The Supreme Court Advisory Committee

Dear Justice Hecht,

I believe we have a serious due process problem with the rules and statutes that govern legal holidays and filing documents.

Most opinions assume that the holidays listed in TEX.REV.CIV.STAT. ANN. art. 4591 are observed by all the courts. Actually, the holidays in article 4591 are observed by the appellate courts. The trial courts, which are controlled by the commissioners courts, do not necessarily close on those dates. For example, article 4591 lists November 11, Veterans Day, as a holiday. On that date, the Supreme Court, the Court of Criminal Appeals, and all the courts of appeals are closed. The trial courts in Harris and Dallas Counties, however, are open for business.

As far as I can determine, the holidays observed by the trial courts depend on two things: (1) the terms of Appropriations Act for that year; and (2) the decisions of the county commissioners courts that implement the Appropriations Act. I cannot find any source of reliable information that identify county holidays. The lawyer must call each county in which she practices to ask for a list of holidays in that county. Even that can result in misinformation. In the case of ***Seismic & Digital Concepts, Inc. v. Digital Resources Corp.***, 583 S.W.2d 442 (Tex.App.--Houston [1st Dist.] 1979, no writ), the courthouse switchboard operator was mistaken when she told a lawyer that the courthouse would be closed, and this Court held the mistake did not extend the time for filing.

I do not have a suggestion for adopting uniform holidays throughout the state. If the Supreme Court could dictate the holidays for all the courts, that would solve the problem, but I am not sure the Court can do that. Short of that solution, I suggest that the Court amend the rules so that any date a courthouse is closed extends the filing date by one

date, whether the date is listed in article 4591 or is a holiday decreed by the commissioner's court of that county. I also suggest that when a courthouse is closed for any other reason (inclement weather, natural disaster, technical or mechanical failures), the date to file documents should be extended.

Some of the cases have held that a party has the option of taking the document to the house of the clerk or the judge. Realistically, that option is only available to a local lawyer, not a lawyer who is unaware that the courthouse is closed. For example, if a lawyer in Midland sends a document by Federal Express (which means it will be filed only when actually received) to the district clerk of Harris County, and on the date of delivery the Harris County courthouse is closed, the Federal Express delivery will not be completed on time. The problem is particularly acute when a party attempts to file a document for which no motion to extend is permitted, for example, the motion for new trial.

I include proposed amendments to TEX.R.CIV.P. 4 and TEX.R.APP.P. 5.

Yours truly,

Michol O'Connor

cc: Luke Soules

TEXAS RULES OF APPELLATE PROCEDURE 5. COMPUTATION OF TIME

(a) 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 begins to run is not to be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, ~~or~~ legal holiday, or a day the courthouse is closed by order of the county commissioners court, in which event the period extends to the end of the next day which is not a Saturday, Sunday, ~~and~~ legal holiday, or a day the courthouse is closed by order of the county commissioners court.

PLAYING BY THE RULES

Recent Amendments to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence Effective December 1, 1991

by John K. Chapin

On April 30, 1991, the Supreme Court transmitted to Congress a number of changes to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence. These changes are to take effect on December 1, 1991. Following is a discussion of the major changes. Other insubstantial changes were made to F.R.A.P. 6, 10, 26, and 26.1.

FEDERAL RULES OF APPELLATE PROCEDURE

(TRAP 5)

Nonreceipt of Notice of Appeal—Rule 4(a)(6)

Language is added to Rule 4(a)(6) to provide a limited opportunity for relief in circumstances in which the notice of entry of a judgment or order, required to be mailed by the district court clerk under F.R.C.P. 77(d), is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal. Under the new Rule 4(a)(6), if the district court finds that a party did not receive notice of entry of judgment or order from the clerk or any party within 21 days of its entry and no party would be prejudiced, the court may, upon motion filed within the earlier of 180 days of entry of the judgment or 7 days of receipt of the notice, reopen the time for appeal for a period of 14 days.

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June 27, 1990

Justice Nathan Hecht
Supreme Court of Texas
15th at Colorado
Austin, Texas 78711

RE: September 1990 Amendment to Tex. R. App. P. 5(b)(5).

Dear Judge Hecht:

Yesterday evening, while preparing a presentation on the new appellate rules for my firm's monthly litigation luncheon, I noticed that the 1990 amendment to Tex. R. App. P. 5(b)(5), setting out the requirement that a trial court find specifically the date a party receives knowledge of rendition of judgment, is not accompanied by a parallel amendment to Tex. R. Civ. P. 306a(4).

Although I have not looked at this in any great detail, my impression is that this is a mistake. Tex. R. App. P. 5(b)(1-5), (c) and (d) are virtually word-for-word the same as the seven subdivisions within Tex. R. Civ. P. 306a. Both rules deal with the computation of time for post-trial and appellate deadlines. Amending Tex. R. App. P. 5(b)(5) without a parallel amendment in Tex. R. Civ. P. 306a(4), might give rise to some unintended confusion.

If this is a mistake, it has the potential for creating some major difficulties. A party seeking to set aside a summary or default judgment on the ground of late notice could reasonably rely upon Tex. R. Civ. P. 306a, which appears to set out the procedures for a hearing and proof of such a motion. If the attorney does not happen to know that an additional proof requirement, i.e., a specific fact finding by the judge on date of actual notice, is required by the Rules of Appellate Procedure, that attorney could very well be placed in a position of following the Rules of Civil Procedure to the letter at trial, yet finding the appeal barred by failure to secure a specific fact finding under Tex. R. App. P. 5.

I understand that this is not the best time to bring up a question of this sort. The Court probably can no longer meet the 60-day notice requirement for making a further rule change in the current round, even if it so desired. I felt, however, that it was a matter I should bring to your attention. I would have no objection to your passing this letter along to appropriate members of the Supreme Court Advisory Committee.

Best regards,

Jim Paulsen

James W. Paulsen

JWP/eaj

4543.001

*145 nhd

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

February 12, 1992

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

Dear Luke:

Dick Countiss tells me that the Appellate Practice Section of the State Bar of Texas is exploring changes in the process of preparing appellate transcripts, as described in his letter to me, a copy of which is enclosed. I told him that the Rules Committee has had some brief discussions on the subject, and we may be hearing from him again.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

BURROW, COUNTISS & BARRIE
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David H. Burrow
Board Certified Personal Injury Trial Law
Texas Board of Legal Specialization

Richard N. Countiss
Board Certified Civil Appellate Law
Texas Board of Legal Specialization

Martin D. Barrie

Robert E. Ray

George E. Crow

Of Counsel:
Bob Gibbins, Austin

February 6, 1992

Re: Appellate Rules

Justice Nathan L. Hecht
Texas Supreme Court
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

Buddy Hanby and I chair a Rules Committee for the Appellate Practice Section of the State Bar. There are a number of changes in the appellate rules that have been suggested by various members of the section. One suggest we have heard a number of times, and one that I believe deserves serious attention, pertains to the manner in which the appellate record is transmitted to the appellate court. There is a general feeling among many of our members that the Federal system of processing and transferring the appellate record is far superior and considerably more efficient than our present State system.

I am writing to ask you two questions:

(1) What committee is presently responsible for changes in the appellate rules; and

(2 Has the Federal system proposal I just mentioned received any attention recently?

Obviously if the committee has considered this matter recently and rejected it, there would be no point in our pursuing it.

Thank you for your assistance. I look forward to seeing you at the next judicial conference.

Sincerely,

Richard N. Countiss

RNC:esg

cc: Mr. Clinard Buddy Hanby
Essmyer & Hanby
4300 Scotland Street
Houston, Texas 77007-7328

Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 11. Often we receive questions about whose duty it is to prepare the exhibits for transmission to the appellant court -- the court reporter or the trial court clerk. This would be cleared up by a specific rule.

Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 12. References in this rule should be to the district not Supreme Judicial District.

Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP
Rule 13(i). The clerk should be able to decline to file the record, etc. AND (not or) the Court should be able to dismiss.

00743

Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 16. This rule allows for a cause requiring immediate action to be taken to the nearest court of appeals. However, once a cause is taken to the nearest court, does that court have any power to issue a writ to a judge outside its district?

Is the nearest court of appeals acting as itself or as the original court of appeals?

The only appendix attached to the rules pursuant to R51(c) and 53(h) governs criminal cases only. More and more, we are receiving requests about the proper way to prepare a transcript and statement of facts in a civil case. When the Supreme Court repealed the predecessor rules to 51(c) and 53(h), it was unclear whether the orders issued pursuant to those rules were also repealed. Upon inquiry to the Supreme Court about the situation, we were told new orders would issue. As of yet, we have not been informed as to the decision by the Supreme Court.

CHARLES ADKIN SPAIN, JR.
Court of Appeals for the Third District of Texas
Post Office Box 12547
Capitol Station
Austin, Texas 78711-2547

Staff Attorney
Telephone: (512) 463-1733

July 20, 1993

TRAP 19

The Honorable Nathan Hecht
Justice
The Supreme Court of Texas
Supreme Court Building Room 104
201 West 14th Street
Austin, Texas 78701

Re: Texas Rules of Appellate Procedure

Dear Justice Hecht:

Here are additional random comments on the Rules. I apologize for not rounding them all up earlier.

(1) Texas Rule of Appellate Procedure 4(b): Does the Court intend that the term "certificate of mailing" refer to Form 3817 described in sections 931.1-.522 of the U.S. Postal Service's *Domestic Mail Manual*, or does the term "certificate of mailing" have a more general meaning that would include a receipt for certified mail (Form 3800) described in sections 912.1-.8?

(2) Texas Rule of Appellate Procedure 19: It would expedite motion practice in the courts of appeals to require a certificate of conference. Motions without opposition would bear the word "unopposed" in their caption and contain a statement that movant has conferred with all parties and no one opposes the motion. The appellate court could then consider such an unopposed motion without waiting the usual ten days. Motions with opposition would contain a statement that movant has conferred with all parties and counsel cannot agree about the disposition of the motion. Agreed or joint motions would be signed by all parties or their counsel similar to Texas Rule of Appellate Procedure 8.

(3) Texas Rules of Appellate Procedure 79(d), (e) and 100(f): Is it a "motion for rehearing en banc" or a "motion for reconsideration en banc"?

(4) Texas Rules of Appellate Procedure 90(c): In theory the rule allows the court of

appeals to order an opinion published after the court rules on the last timely filed motion for rehearing if the parties do not seek relief from the supreme court (no motion for rehearing is required, of course, in a criminal case). This may be a loophole.

(5) Texas Rule of Civil Procedure 5: Why is there no provision regarding prima facie evidence of the date of mailing by means of a certificate of mailing?

(6) Texas Rule of Civil Evidence 204: Do we really need the provisions that refer to taking judicial notice of the contents of the *Texas Register* and the *Texas Administrative Code* in light of the Administrative Procedure and Texas Register Act and the Texas Administrative Code Act? Tex. Rev. Civ. Stat. Ann. art. 6252-13a, § 4(c), art. 6252-13b, § 4 (West Supp. 1993); *Metro Fuels, Inc. v. City of Austin*, 827 S.W.2d 531, 532 n.3 (Tex. App.—Austin 1992, no writ).

(7) When does true plenary jurisdiction of the appellate court expire—after ruling on the last timely filed motion for rehearing, issuance of the mandate, or expiration of the term of court? Theoretically it's probably the expiration of the term of court, but I believe the supreme court would frown if a court of appeals in December sua sponte vacated a judgment the court of appeals originally rendered in January of the same year and rendered a new and different judgment, especially if the mandate issued in April. Perhaps it would be good to have an appellate rule similar to Texas Rule of Civil Procedure 329b that defines the plenary jurisdiction of the appellate court without reference to the term of court.

Once again, thank you for your receptiveness to comments on the Rules. My theory is not to gripe about the Rules, but rather try to correct the perceived flaws. I trust I'm not merely being a pest!

Respectfully,

CHARLES ADKIN SPAIN, JR.

Court of Appeals for the Third District of Texas
Price Daniel, Sr. Building Room 101
209 West 14th Street
Austin, Texas 78701

Staff Attorney
Telephone: (512) 463-1733

October 5, 1992

The Honorable Nathan Hecht
Justice
The Supreme Court of Texas
Price Danial Sr., Building Room GO4A
209 West 14th Street
Austin, Texas 78701

Re: Texas Rules of Appellate Procedure

Dear Justice Hecht:

Here are some random comments on the Rules:

(1) Rule 20: Since the new Rules for Admission to the Bar now govern pro hac vice admissions in the appellate courts, will nonadmitted attorneys tendering amicus curiae briefs have to comply with Rule for Admission to the Bar 19?

(2) Rule 57(a)(1): Change "number of the supreme judicial district" to "number of the court of appeals district".

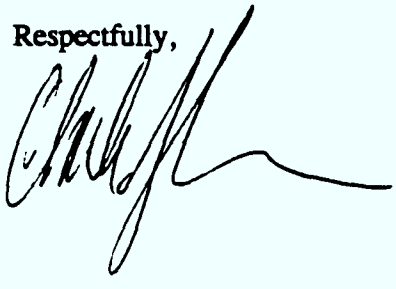
(3) Rule 90(i): What exactly is an "unpublished opinion"? Is a nonfinal opinion designated for publication, e.g., one with a pending motion for rehearing, a "published opinion"? *See Yeager v. State*, 727 S.W.2d 280, 281 n.1 (Tex. Crim. App. 1987); *Henderson v. State*, 822 S.W.2d 171, 172 (Tex. App.—Houston [1st Dist.] 1991, no pet.) (refusing to follow *Cole v. State*, No. 1179-87 (Tex. Crim. App. Nov. 14, 1990), *reh'g granted*, (July 3, 1991)). I believe that one possible solution is that the opinion is not "published" until it is released for final publication to West Publishing Company. This, of course, would prohibit citation to cases appearing only in the *Texas Supreme Court Journal*, but otherwise anyone who loses because a court relied on nonfinal authority must preserve a point of error alleging what really isn't error: "The court erred in relying on nonfinal case authority that may change on

rehearing." This appears to be more of a problem in criminal cases, but some amendment to Rule 90 would help.

(4) Rule 234: The supreme court and courts of appeals arguably need an equivalent rule to avoid the necessity of issuing an order to that effect, i.e., Order of December 31, 1987, 31 Tex. Sup. Ct. J. 160 (continuing to next term of court all causes, applications for writs of error, motions, and other matters filed and to be filed and not finally disposed of during 1987 term). It escapes me why former Texas Rule of Civil Procedure 458(d) was not carried forward to the Texas Rules of Appellate Procedure, but former Texas Rule of Criminal Post Trial and Appellate Procedure 314 was carried forward as Texas Rule of Appellate Procedure 234.

Thank you for your receptiveness to comments on the Rules.

Respectfully,



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THE SUPREME COURT OF TEXAS

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10/16

H/D, SC Subcs, Oblate, COAs Staffs

October 12, 1992

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

Dear Luke:

Enclosed are copies of the following letters:

1. Justice of the Peace John Hawkins regarding Rule 528.

2. Michael Weston regarding summary judgment procedures.

3. Charles Spain regarding the Texas Rules of Appellate Procedure.

I would appreciate your bringing these to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL. (512) 463-1312
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October 12, 1992

Mr. Charles Adkin Spain, Jr.
Court of Appeals for the Third District of Texas
Price Daniel, Sr. Building Room 101
209 West 14th Street
Austin TX 78701

Dear Mr. Spain:

Thank you for your letter regarding the Texas Rules of Appellate Procedure. I have sent a copy to the chairman of the Rules Advisory Committee with the request that your comments be considered fully in making additional revisions in the rules.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

xc: Mr. Luther H. Soules III

4543.001 10-7-93 SB

LHS WHD

RICHARD N. COUNTISS

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October 5, 1993

WHD Scac Agenda TRAP Sub C CJA Staff J. Hecht

Re: *Appellate Rules--Amicus Briefs*

Mr. Luther H. Soules, III
SOULES & WALLACE, A P.C.
Two Republic Bank Plaza
175 E. Houston Street
10th Floor
San Antonio, Texas 78205-2230

Mr. J. Shelby Sharpe
SHARPE, BATES & SPURLOCK, A P.C.
2400 Team Bank Building
500 Throckmorton Street
Fort Worth, Texas 76102

Gentlemen:

I am writing to each of you because your committees are concerned with change and revision to the Rules of Procedure. I am increasingly concerned by the abuse of the amicus curiae rules in appellate matters. More and more special interest groups are filing amicus curiae briefs in an attempt to overwhelm any litigant who takes a position contrary to the particular special interest.

Most of these briefs are filed at the last minute when there is insufficient time to respond to them before oral argument. Also, most make no attempt at an objective discussion of the law (which is what an amicus curiae brief is supposed to do).

I suggest that the following changes in the amicus curiae rules should be considered:

(1) Place a time limit on filing of amicus curiae briefs. A limitation of something like sixty days after the appellee's brief is filed seems to me to be a fair time frame.

(2) Require the amicus to file a Motion for Leave to File the Amicus Brief, demonstrating in the motion why the brief should be allowed.

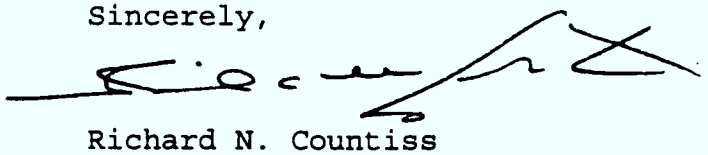
(3) Require the amicus curiae to serve everyone with the brief. I have discovered several that were filed in my cases but never sent to me.

(4) Do not allow the amicus curiae to file more than one brief. Several times I have gotten into a word war with an amicus curiae. After I filed a response to the brief, it filed a reply brief, and then I filed a reply to the reply, etc., etc.

In any event, I would appreciate the attention of your committee to the matter. It is a real problem and needs a solution.

Call me if you have any question.

Sincerely,



Richard N. Countiss

RNC:esg

4543.001

hhd
LHS

WILLIAM V. DORSANEO III
ATTORNEY AT LAW
3315 DANIELS
DALLAS, TEXAS 75275
(214) 692-2626

✓1-10-91
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1/22
HHD,
COAJ
SCAA Agenda
J. Hecht.

January 7, 1991

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

Re: **TRAP 40**

Dear Luke:

I am taking the liberty of placing the attached letter from Brian P. Sanford concerning TRAP 40 on my own agenda as chair of the appellate rules' subcommittee.

Best regards,

Bill

William V. Dorsaneo, III

WVD/sn
Attachment

BRIAN P. SANFORD, P.C.
ATTORNEY AND COUNSELOR
THE FORUM
4006 BELTLINE ROAD
SUITE 248
DALLAS, TEXAS 75244

TELEPHONE: 214/233-3200 TELECOPY: 214/716-1660

January 2, 1991

William V. Dorsaneo
SMU Law School
3315 Daniel
Dallas, Texas 75275

RE: Texas Rules of Appellate Procedure; Contest to Affidavit of Inability to Pay Costs of Appeal

Dear Mr. Dorsaneo:

I wish to again bring to your attention a concern I have with a Texas rule of procedure. The problems is with the procedure in Rule 40 of the Texas Rules of Appellate Procedure to contest an affidavit of inability to pay costs of appeal.

Rule 40(3) allows an appellant to file an affidavit stating that he is unable to pay the costs of appeal. The affidavit is presumed true unless a contest is filed by an interested officer of the court or party to the suit.

No mention is made in Rule 40 that a sworn verification must accompany the contest. However, in Slay v. Burnett Trust, 187 S.W. 2d 377 (Tex. 1945), the Texas Supreme Court held that an unverified contest is not sufficient to require the appellant to make further proof of his inability. This was again affirmed by the Court of Appeals in Amarillo in 1982 in Galvan v. United States Fire Co., 629 S.W. 2d 209 (Tex. App. - Amarillo 1982, writ ref'd. n.r.e.).

In a recent case I was involved in, unverified contests filed by my client, the district attorney's office, and the court reporter, were held to be insufficient under Slay v. Burnett Trust.

I do not understand the logic in requiring the contest to be verified since the burden of proof at the hearing of a contest remains upon the appellant. The contesting party is not required to produce any evidence if the appellant cannot meets its burden of proof.

The affidavit represents *prima facie* proof of inability to pay costs. A contest merely eliminates the sufficiency of the affidavit as *prima facie* proof and requires the appellant to prove his inability with competent evidence at a hearing before the Court. If the appellant is not able to meet his burden of proof, no evidence should be required to be presented by the contestant either by sworn verification or otherwise.

Possibly the rationale for the verification is to compare the affidavit and contest as analogous to the filing of a sworn account petition and the requirement that it be answered by a sworn denial. But in a sworn account the defendant presumably can swear that the account does not exist. In a Rule 40 contest, the appellant should not be allowed to proceed if he cannot prove by competent evidence his inability, regardless of whether a contestant can produce controverting evidence.

If a compelling reason for requiring the contest to be verified exists, the rule should state the requirement clearly, eliminating the trap for unsuspecting, simpleminded litigators such as I. It should also state the facts to be verified. Does a contestant swear that the appellant is able to give costs or that he merely wishes to contest the matter?

Thank you for your time and consideration.

Sincerely,

Brian P. Sanford

BPS/ds

cc: Ted M. Akin
Sylvia Blake

MICHOL O'CONNOR
JUSTICE
First Court of Appeals
1307 San Jacinto
Houston, Texas 77002
(713) 655-2716

4543.001

June 5, 1990

Mr. Luther H. Soules
Chair, Advisory Committee to the Supreme Court
Soules & Reed
800 Milam Building
San Antonio, TX 78205-1695

RE: Non-Jury Appeals

Dear Luke,

By the recent rules changes, the Supreme Court has reduced the differences between the appeal of the non-jury and jury trial. By the amendment to rule 41(a)(1), TEX.R.APP.P., the time to file the appeal bond to perfect the appeal in a non-jury case is extended by either the motion for new trial or the request for findings of fact and conclusions of law. By amendment to rule 54(a), TEX.R.APP.P., the time to file the record is extended by either the motion for new trial or the request for findings and conclusions.

The effect of the amendments to rules 41(a)(1) and 54(a) is to raise the request for findings and conclusions to the status of the motion for new trial for purposes of some of the time limits.

It makes a lot of sense to make findings of fact extend the appellate time limits. Most attorneys have no hope of getting a trial judge to reverse a non-jury trial on a motion for new trial. Lawyers file motions for new trial just to get more time to perfect the appeal. By permitting the request for findings to extend the time limits, an attorney can make sure all the necessary steps to the appeal are taken the time before the judgment is final.

The request for findings and conclusions, however, do not extend all the times limits in a non-jury trial. As the new system of non-jury appeals works, when an appellant files a request for findings but does not file a motion for new trial, the appellant has 90 days from the date the judgment is signed to perfect the appeal, and 120 days to file the record. In spite of the fact that appellant has plenty of time to file the bond and the record, the appellant must still file a notice to limit the appeal within 15 days of the day the judgment is signed and a formal bill of exceptions within 60 days.

See the enclosed timetable for the appeal in a non-jury case. You will note that I use an asterisk to indicate when the motion for new trial or the request for findings extend the time to take certain appellate steps. I have another symbol to indicate when just the motion for new trial extends the time.

If rules 40 and 52 are amended as I suggest, when an appellant files a request for findings but does not file a motion for new trial, the appellant has 90 days from the date of judgment is signed to perfect the appeal, 120 days to file the record, 75 days to file a notice to limit the appeal, and 90 days to file a formal bill of exceptions.

I suggest that the Supreme Court consider amendments to rule 40(a)(4), TEX.R.APP.P., Notice of limitation of appeal, and rule 52, TEX.R.APP.P., Formal bill of exceptions, so that the request for findings and conclusions extends the time to give notice to limit the appeal and to file a formal bill of exceptions.

Yours truly,

Michol O'Connor
Enclosures

c:\rules\luke

Rule 40. Ordinary Appeal -- How Perfected

(a) Appeals in Civil Cases.

(1) to (3) No change.

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

(5) No change.

(b) No change.

(1) to (2) No change.

If no motion for new trial if filed, appellant has 15 days from the date the judgment is signed to file a notice to limit the appeal. If a motion for new trial is filed, appellant has 75 days from the date the judgment is signed to file a notice to limit the appeal.

The odd time limits are tied to the time limits to file the appeal bond. If appellant wants to limit the appeal when no motion for new trial is filed, and files notice within 15 days of the judgment, it gives appellee notice that he will have to perfect his own appeal if he wants to challenge any other part of the case. In such a case, appellee has 15 days to file his own appeal bond as to the other part of the case.

The same thing is true when a motion for new trial is filed. If appellant wants to limit the appeal when a motion for new trial is filed, and files notice within 75 days of the judgment, it gives appellee notice that he will have to perfect his own appeal if he wants to challenge any other part of the case. In such a case, appellee has 15 days to file his own appeal bond as to the other part of the case.

If the filing of a requests for findings and conclusions extends the time to perfect the appeal, it should also extend the time to limit the appeal.

The filing of the request for findings and conclusions, however, does not extend the time to file the notice to limit the appeal under rule 40(a)(4), TEX.R.APP.P. I think it should.

Rule 52. Preservation of Appellate Complaints

(a) to (b) No change.

(c) Formal Bills of Exception.

(1) to (10) No change.

(11) Formal bills of exception shall be filed in the trial court within sixty days after the judgment is signed in a civil case or within sixty days after the sentence is pronounced or suspended in open court in a criminal case, or if a timely motion for new trial or request for findings of fact and conclusions of law have ~~has~~ been filed, formal bills of exception shall be filed within ninety days after the judgment is signed in a civil case or within ninety days after sentence is pronounced or suspended in open court in a criminal case. When formal bills of exception are filed they may be included in the transcript or in a supplemental transcript.

(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(b) 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 paragraph (a) of this rule.

In the jury trial, the filing of a motion for new trial extends the time to file the formal bill of exceptions from 60 days to 90 days.

In a non-jury trial, the filing of a motion for new trial extends the time to file the formal bill from 60 days to 90 days.

The filing of the request for findings and conclusions, however, does not extend the time to file the formal bill of exception under rule 52, TEX.R.APP.P. I think it should.

TIMETABLE FOR APPEAL OF A CIVIL TRIAL—STATE NON-JURY

Step	Action	Rule	Time Limit	Date Due	Date Filed
1	Judgment signed	306a†			
2	Request for findings of fact and conclusions of law (FoF)	296†	20 days from Step 1		
3	FoF filed by Trial Court	297 (a)†	20 days from Step 2		
4	Motion for new trial	324† 329b†	30 days from Step 1		
5	Amended motion for new trial	329b†	30 days from Step 1 and before MNT overruled		
6	Notice of past due FoF	297(b)†	30 days from Step 2		
7	FoF filed by Trial Court	297†	40 days from Step 2		
8	Request for additional FoF	298†	10 days from Step 3 or 7		
9	Additional FoF filed by Trial Court	298†	10 days from Step 8		
10	Motion for new trial overruled	329b†	By written order or 75 days from Step 1 (by op. of law)		
11	Letter to clerk of trial court designating transcript	51 (b)	At or before Step 16		
12	Letter to court reporter requesting statement of facts	53 (a) 53 (b)	Appellant: at or before Step 16 Appellee: 10 days after above		
13	Supersedeas bond to stay judgment	47, 48 627†	Promptly & no later than step 14		
14	Judgment is final	329b†	30 days from Step 1 or ◊ 30 days from Step 10		
15	Notice of limitation of appeal	40 (a)(4)	15 days from Step 1 or ◊ 75 days from Step 1		
16	Perfect the appeal—file $1000 cost bond or substitute	40, 41 46	30 days from Step 1 or * 90 days from Step 1		
17	Formal bills of exception	52 (c)	60 days from Step 1 or ◊ 90 days from Step 1		
18	File transcript and statement of facts in Court of Appeals; cost deposit $50	13 (a), 54	60 days from Step 1 or * 120 days from Step 1		
19	Motion to dismiss W.O.J. or as to informalities (6)	71, 72	30 days from Step 18		
20	Appellant's brief (6)	74 (k)	30 days from Step 18		
21	Appellee's brief (6)	74 (m)	25 days from Step 20		
22	Oral argument, if requested	75	Set by court		
23	Court of Appeals opinion	80	Promptly		
24	Motion for rehearing to Court of Appeals (6)	100 (a)	15 days from Step 23		
25	Motion for rehearing overruled	100 (c)			
26	Application for writ of error (12)	130 (b)	30 days from Step 25		
27	Petitioner's cost deposit $50‡	13 (d) 132 (b)	At Step 26		
28	Application for writ of error by other party (12)	130 (c)	40 days from Step 25		
29	Respondent's answer to application for writ of error (12)	136 (a)	15 days from Step 26 or Step 28		

TIMETABLE FOR APPEAL OF A CIVIL TRIAL—STATE
NON-JURY
(continued)

Step	Action	Rule	Time Limit	Date Due	Date Filed
30	Oral argument	171	Set by court		
31	Supreme Court opinion	181			
32	Motion for rehearing to the Supreme Court	190	15 days from Step 31		
33	Mandate	86 186			

† Texas Rules of Civil Procedure. All other references are to the Texas Rules of Appellate Procedure.

* If motion for new trial, motion to modify judgement, or request for FoF is filed.

‡ $50 check made payable to clerk of the Supreme Court, plus check to court of appeals for postage.

◊ If motion for new trial or motion to modify judgement is filed.

Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 40(a)(3)(B). This rule should clarify the time for paying costs when improper notice has been given. I.e., otherwise, he shall not be entitled to prosecute the appeal without paying the costs or giving security therefor within the time limit allowed by rule 41.

Rule 40(a)(3)(E). The last sentence should read: "If no written signed order is is made on the contest . . . ."

Rule 40(a)(3)(F). This rule should read: ". . . he shall be required to make such payment or give such security (one or both) to the extent of his ability within the time limit provided by rule 41(a)."

Rule 40(b)(1). Was this rule meant to change 44.02 proviso? Rule 40(b)(1) not consistent with art. 26.13(a)(3). Should 40(b)(1) apply only to felonies? If 40(b)(1) applies only to felonies, is 26.13 in conflict with non-proviso 44.02?

Notes and Comments

Comment to 1990 change: This amendment, together with other similar amendments conforming other appellate rules, requires the parties to any appeal to serve copies of all papers filed with the clerk of the appellate court (except the statement of facts and the transcript), and the clerk of the appellate court to mail notice and copies of all appellate court orders and opinions on all parties to the trial court's judgment.

RULE 41. ORDINARY APPEAL—WHEN PERFECTED

(a) Appeals in Civil Cases.

(1) *Time to Perfect Appeal.* [*Pub. Note: Supreme Court text as amended Sept. 4, 1990, effective retroactively to Sept. 1, 1990. See also Court of Criminal Appeals text following this paragraph.*] When security for costs on appeal is required, the bond or affidavit in lieu thereof shall be filed with the clerk within thirty days after the judgment is signed, or, within ninety days after the judgment is signed if a timely motion for new trial has been filed by any party or if any party has timely filed a request for findings of fact and conclusions of law in a case tried without a jury. If a deposit of cash is made in lieu of bond, the same shall be made within the same period.

(1) *Time to Perfect Appeal.* [*Pub. Note: Court of Criminal Appeals text as promulgated effective Sept. 1, 1990. See also Supreme Court text preceding this paragraph.*] When security for costs on appeal is required, the bond or affidavit in lieu thereof shall be filed with the clerk within thirty days (fifteen by the state) * after the judgment is signed, or, within ninety days after the judgment is signed if a timely motion for new trial has been filed by any party or if any party has timely filed a request for findings of fact and conclusions of law in a case tried without a jury. If a deposit of cash is made in lieu of bond, the same shall be made within the same period.

* Pub. Note: The parenthetical phrase "(fifteen by the state)" was included in the amendment to Rule 41(a)(1) made by Supreme Court Order dated April 24, 1990, effective Sept. 1, 1990. That amendment was adopted and promulgated by Order of the Court of Criminal Appeals dated June 26, 1990, effective September 1, 1990. By Order dated September 4, 1990, effective retroactively to September 1, 1990, the Supreme Court withdrew the amendment to Rule 41(a)(1) made by its Order dated April 24, 1990, and amended Rule 41(a)(1) as set forth above. The Court of Criminal Appeals has not entered a subsequent Order regarding Rule 41(a)(1).

(2) *Extension of Time.* An extension of time may be granted by the appellate court for late filing of a cost bond or notice of appeal or making the deposit required by paragraph (a)(1) or for filing the affidavit, if such bond or notice of appeal is filed, deposit is made, or affidavit is filed not later than fifteen days after the last day allowed and, within the same period, a motion is filed in the appellate court reasonably explaining the need for such extension. If a contest to an affidavit in lieu of bond is sustained, the time for filing the bond is extended until ten days after the contest is sustained unless the trial court finds and recites that the affidavit is not filed in good faith.

(b) Appeals in Criminal Cases.

(1) *Time to Perfect Appeal.* [*Pub. Note: Supreme Court text as promulgated effective September 1, 1986. See also Court of Criminal Appeals text following this paragraph.*] Appeal is perfected when notice of appeal is filed within thirty days after the day sentence is imposed or suspended in open court or the day an appealable order is signed by the trial judge; except, if a motion for new trial is timely filed, notice of appeal shall be filed within ninety days after the day sentence is imposed or suspended in open court.

(1) *Time to Perfect Appeal.* [*Pub. Note: Court of Criminal Appeals text as promulgated effective July 1, 1989. See also Supreme Court text preceding this paragraph.*] Appeal is perfected when notice of appeal is filed within thirty *(fifteen by the state)* days after the day sentence is imposed or suspended in open court or the day an appealable order is signed by the trial judge; except, if a motion for new trial is timely filed, notice of appeal shall be filed within ninety days after the sentence is imposed or suspended in open court.

(2) *Extension of Time.* An extension of time for filing notice of appeal may be granted by the court of appeals if such notice is filed within fifteen days after the last day allowed and within the same period a motion is filed in the court of appeals reasonably explaining the need for such extension.

(c) Prematurely Filed Documents. No appeal or** bond or affidavit in lieu thereof, notice of appeal, or notice of limitation of appeal shall be held ineffective because prematurely filed. In civil cases, every such instrument shall be deemed to have been filed on the date of but subsequent to the time of signing of the judgment or the time of the overruling of motion for new trial, if such a motion is filed. In criminal cases, every such instrument shall be deemed to have been filed on the date of but subsequent to the imposition or suspension of sentence in open court or the signing of an appealable order by the trial judge, provided that no notice of appeal shall ~~be effective if given before~~ a finding of guilt is made or a verdict is received.

** Pub. Note: So in original. The word "or" probably should not appear.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986; amended by Court of Criminal Appeals effective July 1, 1989; amended by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1990; amended by Supreme Court Sept. 4, 1990, effective retroactively to Sept. 1, 1990.)

8/25 HHD, SADC ~~State~~ Agenda TRAP SubC J. Hecht COAs

Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 41(a)(2). This rule should read: "If a timely contest to an affidavit in lieu of bond is timely sustained . . . ." Also, the rule should provide what the consequences are, if the trial court finds and recites that the affidavit is not filed in good faith.

Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 42(a)(3). This rule should specifically state whether the time limit required in ordinary appeals to file a motion for extension of time to file a perfecting instrument or the record is required to be followed in this rule.

Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 43(g). Does this rule really mean that an appellate court may modify its decision after issuing a mandate, other than to correct clerical errors?

00750

Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 44. This rule does not provide a time limit as to when a notice of appeal is due to be filed. In addition, the rule states that the deadline for filing the record runs from the date the notice of appeal is filed. The rule could be amended to conform with the time limits set forth in civil accelerated appeals. That is, the notice of appeal could be due 20 days from the date of the signed order, the record due 30 days from the date of the signed order, the appellant's brief due 20 days after the record, and the appellee's brief due 20 days after the filing of the appellant's brief. Of course, the rule should continue to provide the court with broad flexibility as does rule 42 in civil cases. Here, as in rule 42, it should be clarified if the extensions of time are governed as in ordinary appeals.

4543.001

HHD
LHS

1-22-92

FULBRIGHT & JAWORSKI
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LONDON
ZURICH
HONG KONG

January 17, 1992

1/24

HHD
Scott Ogilvie
TAP Scott
LHD Evelyn

Nathan L. Hecht, Justice
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Re: Deposit for Costs

Dear Justice Hecht:

Rule 46(a), TEX.R.APP.P., provides that an appellant file a bond securing payment of "the cost of the statement of facts and transcript" to perfect his appeal. Because the appeal bond or deposit inures to the benefit of the court reporter and clerk, the Texas courts have held that these officers may *not* condition the preparation or delivery of the statement of facts or transcript upon advance payment. *E.g.*, *City of Ingleside v. Johnson*, 537 S.W.2d 145 (Tex.Civ.App.—Corpus Christi 1976, orig. proceeding).

In practice, however, it has been my experience that court reporters always, and clerks frequently, require advance payment before they will prepare or deliver the statement of facts and transcript. In fact, as I write this letter, I am having this discussion with the Clerk of the Bexar County Probate Courts. Although we have filed a $1,000 deposit and have promised to pay the cost of preparing the transcript by check, the clerk is refusing to file the transcript until the check is received. The only remedy available to us is a mandamus proceeding, which is, of course, expensive and, in today's judicial climate, risky.

If both the court reporter and the clerk require advance payment, I fail to see why the Texas Rules have a bond/deposit requirement. In this case, the client will have paid the clerk the cost of preparing the transcript ($500), the court reporter the cost of preparing the statement of facts ($10,000), and the court of appeals for filing fees ($55), but nonetheless will have $1,000 tied up in the clerk's trust account—neither earning him interest nor securing payment.

Accordingly, I suggest that the $1,000 bond or deposit requirement be deleted and that an appellant perfect its appeal by filing a notice of appeal.

Thank you for your consideration of this matter.

Sincerely,

Sarah B. Duncan
Of Counsel to the Firm

xc:

Luther H. Soules III✓

Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 46(e). This rule should also include making arrangements for payments to the trial clerks.

00752

SMEAD, ANDERSON, WILCOX & DUNN
ATTORNEYS AT LAW
425 NORTH FREDONIA, SUITE 100
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TELEPHONE (214) 757-2868
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H. P. SMEAD, JR.
BOB ANDERSON
MELVIN R. WILCOX, III
MICHAEL L. DUNN

KYLE KUTCH
PETER L. BREWER

November 30, 1989

48

Justice Nathan L. Hecht
Supreme Court of Texas
Rules Advisory Committee
P.O. Box 12248
Austin, Texas 78711

Re: Tex. R. App. P. 48

To The Committee:

In response to the Court's invitation in the November, 1989 issue of the Texas Bar Journal, the following suggestion regarding the Rules of Appellate Procedure is presented. Rule 48 of the Texas Rules of Appellate Procedure allows an Appellant to "deposit cash or a negotiable obligation of the government of the United States of America or any agency thereof" in lieu of filing a cost bond. This portion of the Rule is commendable and should be retained. However, the rule goes on to state that "with leave of Court" an Appellant may "deposit a negotiable obligation of any bank or savings and loan association chartered by the government of the United States of America or any state thereof . . . ."

My question is: Why is it necessary to obtain leave of court in this instance? The trial courts of this state have better things to do than to worry about whether party's check is going to bounce or whether their bank is solvent at the moment. Further, it is most inconvenient for an Appellant to file this motion and obtain an order granting same when something which is as good as cash, such as a cashiers check, is presented.

I submit that there are better ways to protect the trial court's interest in being reimbursed for its costs. For example, if the negotiable obligation tendered for some reason fails, the Appellant could be given 10 days in which to tender a new obligation or face dismissal of his appeal with prejudice. Such a provision could be applied for

any obligation, and such would greatly shorten Rule 48. For that matter, Rule 48 could be conveniently made a part of Rule 46(a) regarding the cost bond thereby furthering the Court's mission of simplifying the Rules.

Sincerely,

SMEAD, ANDERSON, WILCOX AND DUNN

BY: _____
Peter L. Brewer
Former Briefing Attorney,
Texas Supreme Court
1987-88 term

dl

4543.001

9-19-91

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

September 16, 1991

Professor William Dorsaneo III
3315 Daniels
Dallas TX 75275-0116

Dear Bill:

Sarah Duncan's letter regarding the form of the appellate record (I have just gotten down to it in the stack) reminds me of the question that has been raised in various circles and on divers occasions: why can't the transcript be composed of original documents instead of copies, saving the parties the clerk's cost of photocopying the file? Isn't this the federal practice?

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

c: Mr. Luther H. Soules III

send flus to Hecht & a letter of thanks to Osborn

COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT
EL PASO COUNTY COURTHOUSE, SUITE 1203
500 E. SAN ANTONIO
EL PASO, TEXAS 79901-2421
(915) 546-2240 fax (915) 546-2252

Chief Justice
Max N. Osborn

Justices
Ward L. Koehler
Richard Barajas
Susan Larsen

Clerk
Barbara B. Dorris

Deputy Clerk
Denise Pacheco

Staff Attorney
William M. Lockhart

June 15, 1993

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

Dear Chief Justice Phillips:

I was glad to hear your talk at the University of Texas Appellate Practice Conference last week, and Jane and I certainly enjoyed the opportunity to see your new offices during the open house on Friday. I understand that the Court is now reviewing appellate rules and will probably make some changes.

I would strongly urge a reconsideration of T.R.A.P. 51. I told the lawyers at the Conference on Thursday that I thought Rule 51 was the very worst of all the appellate rules. I find it hard to believe that when we have appellate lawyers who know what the issues will be on appeal and who make $200 per hour, we place the responsibility for deciding what will be in a transcript upon a clerk making $200 a week who has no idea what the issues will be on appeal. Rule 51(a) says the transcript shall include "the live pleadings" but with many cases involving cross-actions, third-party claims and special appearances, how is a clerk to know what are the live pleadings?

Last week I reviewed a transcript which contained a motion for change of venue and an order overruling the motion, and a motion for continuance and an order overruling the motion. Certainly the appellate attorney knew if those motions and orders would be raised on appeal. The clerk did not. I am now reviewing a summary judgment case in which the transcript contains more than 300 pages of medical records which have absolutely nothing to do with any issue on appeal. Last month Justice Larsen wrote an opinion in a case with eleven amended petitions in the transcript and only the last one was necessary for the appeal.

Certainly Rule 51(b) permits the attorneys to designate what should be in the transcript, but it is not required. I urge that the Rule be changed to make the provisions of Rule 51(b) MANDATORY. The members of your Court see the same transcripts we do and they must be aware of the problem as it now exists. I first voiced this complaint in a concurring opinion in **Texas Employers' Insurance Association v. Stodghill**, 570 S.W.2d 398 at 402. I attach a copy of an opinion this Court issued last month and which is still pending on motion for rehearing. Please note footnote 1 on page 3 of the opinion and footnote 8 on page 17 of the opinion.

Surely we can do better!

Sincerely,

Max N. Osborn

MNO:st

4543.001 LHS
7-16-93 hhd

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

July 14, 1993

HHD, Supp Cpy Sent ✓ Sent COAJ Staff

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

Dear Luke:

Enclosed are letters from Chief Justice Max Oxborn and Charles Spain regarding Texas Rules of Appellate Procedure 51, 4(b), and 86.

I would appreciate your bringing these to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

July 14, 1993

Chief Justice Max N. Osborn
Eighth Court of appeals
El Paso County Courthouse, Suite 1203
500 East San Antonio
El Paso TX 79901-2421

Dear Chief Justice Osborn:

Thank you for your letter and comments regarding Texas Rule of Appellate Procedure 51. I have sent a copy to the chairman of the Rules Advisory Committee with the request that your comments be considered fully in making additional revisions in the rules.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

bc: Mr. Luther H. Soules III
Hon. Clarence Guittard

Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 51(c). In criminal cases, the clerk is required to retain a duplicate of the transcript for use by the parties with permission of the court. The rule should specify which court. I.e. trial court or appellate court.

00758

CHANGES PROPOSED BY LUKE SOULES:

TRAP 52a.

When either a timely request, objection, or motion points out distinctly a matter complained of and the grounds of the complaint specific enough to support the conclusion that the trial court was made fully aware of the complaint, no waiver of error will occur by any failure to preserve error in the trial court. Delete from Rule 274 and Rule 278.

Doc #5705.01

MICHOL O'CONNOR
JUSTICE
First Court of Appeals
1307 San Jacinto
Houston, Texas 77002
(713) 655-2716

4543.001

June 5, 1990

Mr. Luther H. Soules
Chair, Advisory Committee to the Supreme Court
Soules & Reed
800 Milam Building
San Antonio, TX 78205-1695

RE: Non-Jury Appeals

Dear Luke,

By the recent rules changes, the Supreme Court has reduced the differences between the appeal of the non-jury and jury trial. By the amendment to rule 41(a)(1), TEX.R.APP.P., the time to file the appeal bond to perfect the appeal in a non-jury case is extended by either the motion for new trial or the request for findings of fact and conclusions of law. By amendment to rule 54(a), TEX.R.APP.P., the time to file the record is extended by either the motion for new trial or the request for findings and conclusions.

The effect of the amendments to rules 41(a)(1) and 54(a) is to raise the request for findings and conclusions to the status of the motion for new trial for purposes of some of the time limits.

It makes a lot of sense to make findings of fact extend the appellate time limits. Most attorneys have no hope of getting a trial judge to reverse a non-jury trial on a motion for new trial. Lawyers file motions for new trial just to get more time to perfect the appeal. By permitting the request for findings to extend the time limits, an attorney can make sure all the necessary steps to the appeal are taken the time before the judgment is final.

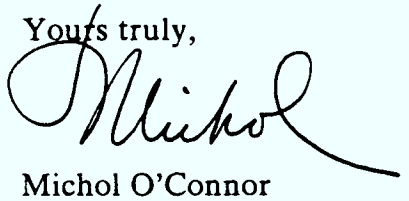
The request for findings and conclusions, however, do not extend all the times limits in a non-jury trial. As the new system of non-jury appeals works, when an appellant files a request for findings but does not file a motion for new trial, the appellant has 90 days from the date the judgment is signed to perfect the appeal, and 120 days to file the record. In spite of the fact that appellant has plenty of time to file the bond and the record, the appellant must still file a notice to limit the appeal within 15 days of the day the judgment is signed and a formal bill of exceptions within 60 days.

See the enclosed timetable for the appeal in a non-jury case. You will note that I use an asterisk to indicate when the motion for new trial or the request for findings extend the time to take certain appellate steps. I have another symbol to indicate when just the motion for new trial extends the time.

If rules 40 and 52 are amended as I suggest, when an appellant files a request for findings but does not file a motion for new trial, the appellant has 90 days from the date of judgment is signed to perfect the appeal, 120 days to file the record, 75 days to file a notice to limit the appeal, and 90 days to file a formal bill of exceptions.

I suggest that the Supreme Court consider amendments to rule 40(a)(4), TEX.R.APP.P., Notice of limitation of appeal, and rule 52, TEX.R.APP.P., Formal bill of exceptions, so that the request for findings and conclusions extends the time to give notice to limit the appeal and to file a formal bill of exceptions.

Yours truly,



Michol O'Connor
Enclosures

c:\rules\luke

Rule 40. Ordinary Appeal -- How Perfected

(a) Appeals in Civil Cases.

(1) to (3) No change.

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

(5) No change.

(b) No change.

(1) to (2) No change.

If no motion for new trial if filed, appellant has 15 days from the date the judgment is signed to file a notice to limit the appeal. If a motion for new trial is filed, appellant has 75 days from the date the judgment is signed to file a notice to limit the appeal.

The odd time limits are tied to the time limits to file the appeal bond. If appellant wants to limit the appeal when no motion for new trial is filed, and files notice within 15 days of the judgment, it gives appellee notice that he will have to perfect his own appeal if he wants to challenge any other part of the case. In such a case, appellee has 15 days to file his own appeal bond as to the other part of the case.

The same thing is true when a motion for new trial is filed. If appellant wants to limit the appeal when a motion for new trial is filed, and files notice within 75 days of the judgment, it gives appellee notice that he will have to perfect his own appeal if he wants to challenge any other part of the case. In such a case, appellee has 15 days to file his own appeal bond as to the other part of the case.

If the filing of a requests for findings and conclusions extends the time to perfect the appeal, it should also extend the time to limit the appeal.

The filing of the request for findings and conclusions, however, does not extend the time to file the notice to limit the appeal under rule 40(a)(4), TEX.R.APP.P. I think it should.

Rule 52. Preservation of Appellate Complaints

(a) to (b) No change.

(c) Formal Bills of Exception.

(1) to (10) No change.

(11) Formal bills of exception shall be filed in the trial court within sixty days after the judgment is signed in a civil case or within sixty days after the sentence is pronounced or suspended in open court in a criminal case, or if a timely motion for new trial or request for findings of fact and conclusions of law have ~~has~~ been filed, formal bills of exception shall be filed within ninety days after the judgment is signed in a civil case or within ninety days after sentence is pronounced or suspended in open court in a criminal case. When formal bills of exception are filed they may be included in the transcript or in a supplemental transcript.

(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(b) 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 paragraph (a) of this rule.

In the jury trial, the filing of a motion for new trial extends the time to file the formal bill of exceptions from 60 days to 90 days.

In a non-jury trial, the filing of a motion for new trial extends the time to file the formal bill from 60 days to 90 days.

The filing of the request for findings and conclusions, however, does not extend the time to file the formal bill of exception under rule 52, TEX.R.APP.P. I think it should.

TIMETABLE FOR APPEAL OF A CIVIL TRIAL—STATE
NON-JURY

Step	Action	Rule	Time Limit	Date Due	Date Filed
1	Judgment signed	306a†			
2	Request for findings of fact and conclusions of law (FoF)	296†	20 days from Step 1		
3	FoF filed by Trial Court	297 (a)†	20 days from Step 2		
4	Motion for new trial	324† 329b†	30 days from Step 1		
5	Amended motion for new trial	329b†	30 days from Step 1 and before MNT overruled		
6	Notice of past due FoF	297(b)†	30 days from Step 2		
7	FoF filed by Trial Court	297†	40 days from Step 2		
8	Request for additional FoF	298†	10 days from Step 3 or 7		
9	Additional FoF filed by Trial Court	298†	10 days from Step 8		
10	Motion for new trial overruled	329b†	By written order or 75 days from Step 1 (by op. of law)		
11	Letter to clerk of trial court designating transcript	51 (b)	At or before Step 16		
12	Letter to court reporter requesting statement of facts	53 (a) 53 (b)	Appellant: at or before Step 16 Appellee: 10 days after above		
13	Supersedeas bond to stay judgment	47, 48 627†	Promptly & no later than step 14		
14	Judgment is final	329b†	30 days from Step 1 or ◊ 30 days from Step 10		
15	Notice of limitation of appeal	40 (a)(4)	15 days from Step 1 or ◊ 75 days from Step 1		
16	Perfect the appeal—file $1000 cost bond or substitute	40, 41 46	30 days from Step 1 or * 90 days from Step 1		
17	Formal bills of exception	52 (c)	60 days from Step 1 or ◊ 90 days from Step 1		
18	File transcript and statement of facts in Court of Appeals; cost deposit $50	13 (a), 54	60 days from Step 1 or * 120 days from Step 1		
19	Motion to dismiss W.O.J. or as to informalities (6)	71, 72	30 days from Step 18		
20	Appellant's brief (6)	74 (k)	30 days from Step 18		
21	Appellee's brief (6)	74 (m)	25 days from Step 20		
22	Oral argument, if requested	75	Set by court		
23	Court of Appeals opinion	80	Promptly		
24	Motion for rehearing to Court of Appeals (6)	100 (a)	15 days from Step 23		
25	Motion for rehearing overruled	100 (c)			
26	Application for writ of error (12)	130 (b)	30 days from Step 25		
27	Petitioner's cost deposit $50‡	13 (d) 132 (b)	At Step 26		
28	Application for writ of error by other party (12)	130 (c)	40 days from Step 25		
29	Respondent's answer to application for writ of error (12)	136 (a)	15 days from Step 26 or Step 28		

TIMETABLE FOR APPEAL OF A CIVIL TRIAL—STATE
NON-JURY
(continued)

Step	Action	Rule	Time Limit	Date Due	Date Filed
30	Oral argument	171	Set by court		
31	Supreme Court opinion	181			
32	Motion for rehearing to the Supreme Court	190	15 days from Step 31		
33	Mandate	86 186			

† Texas Rules of Civil Procedure. All other references are to the Texas Rules of Appellate Procedure.

* If motion for new trial, motion to modify judgement, or request for FoF is filed.

‡ $50 check made payable to clerk of the Supreme Court, plus check to court of appeals for postage.

◊ If motion for new trial or motion to modify judgement is filed.

My second recommendation is that rules of appellate procedure 53(k) and 54 (c) be changed to provide that it is the court reporter's duty, not the appellant's duty, to file the statement of facts in the Court of Appeals and to obtain extensions of time for late filing. The present rules place this duty upon the appellant, which causes considerable inconvenience to lawyers in dealing with the many court reporters and substitute court reporters who are often involved in different parts of the case. Our rules should recognize that the court reporter is an officer of the court, and usually a full-time employee, who is well paid to perform this sole function. It is unreasonable to impose on a lawyer, who in most criminal cases will be working for a court-appointed fee, the duty of going to the court reporter's home or office, picking up the record, and transporting it downtown to the Court of Appeals.

Likewise, I can imagine no good reason for requiring the lawyer to obtain an extension of time for filing the statement of facts. The lawyer has no control over the statement of facts and makes no money from producing it. This burdensome responsibility should be placed upon the court reporter because the court reporter has sole control of the statement of facts and is the only one who makes money from producing it.

I recommend that appellate rule 53(k) read as follows:

> (k) **Duty of ~~Appellant~~ Court Reporter to File** It is the ~~appellant's~~ court reporter's duty to cause the statement of facts to be filed with the Clerk of the Court of Appeals.

Similarly, rule 54(c) should be changed to read as follows:

> (c) **Extension of Time** An extension of time may be granted for late filing in a court of appeals of a transcript or statement of facts, if a motion reasonably explaining the need therefor is filed, by appellant in the case of the late transcript and by the court reporter in the case of a late statement of facts, with the court of appeals not later than 15 days after the last date for filing the record. Such motion shall also reasonably explain any delay in the request required Rule 53(a).

Please let me know if there is any other information I can furnish concerning these suggestions. I would be happy to discuss these suggestions with you or your committee or any other interested committees at any time.

Sincerely,

Murry B. Cohen

4543.001

Court of Appeals
First Supreme Judicial District
1307 San Jacinto, 10th Floor
Houston, Texas 77002

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HJH.
SCAC Sub C ≡ (2)
CWAJ
SCAC Agenda.

September 27, 1989

Luther Soules, Attorney at Law
175 E. Houston
10th Floor
San Antonio, Texas

Re: Amendments to Texas Rules of Appellate Procedure

Dear Luke:

I have two proposals for changing our rules of appellate procedure. These changes have been discussed at a meeting of the Houston Bar Association Committee on the Appellate Judiciary and among various appellate judges, and I believe both proposals have considerable support.

First, I suggest that Rule 80(c) be amended to authorize the Court of Appeals to abate an appeal and remand the case to the District Court to conduct a hearing on any issue the Court of Appeals deems necessary in order to decide the appeal appropriately. This authority exists and is often used in the federal system and in many other states. It is arguable that such a procedure is already permissible under the existing rule that allows the court to make "any other appropriate order, as the law and the nature of the case may require." Nevertheless, there has been significant discussion in several recent cases of the need for such a rule. See Read v. State, 768 S.W.2d 919 (Tex. App.-Beaumont 1989), where Justice Brookshire advocated such a rule, and Mitchell v. State, 762 S.W.2d 916 (Tex. App.--San Antonio 1988, pet. ref'd), where the court used such a procedure, over the dissent of Justice Butts. Similar approaches have been used in Murphy v. State, 663 S.W.2d 604 (Tex. App.--Houston [1st Dist.] 1983, no writ), and Guillory, 638 S.W.2d 73 (Tex. App.--Houston [1st Dist.] 1982, no writ), both decided before the rules were enacted.

I propose that rule 80(c) provide:

> In addition, the court of appeals may make any other appropriate order as the law and the nature of the case may require, including abating the appeal and remanding the cause to the trial court for a hearing on any issue.

Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 54(c). This rule should also include a requirement to reasonably explain any delay in the request required by rule 51(b).

The Court discusses a line of cases decided by the U.S. Supreme Court that deal with the validity of factual warrantless administrative inspection cases. The Court finds that the Supreme Court has held that except in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant, *Camera v. Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967).

The Court notes that the Supreme Court held that the same rule applies where commercial property is involved. *See v. City of Seattle*, 387 U.S. 541 (1967).

The Court finds that the liquor industry has long been one of the most heavily regulated industries and that Congress has granted federal agents power to make warrantless searches and seizures of parties under the liquor laws. The Court notes that in *Colonnade Catering Corp. v. United States*, the Supreme Court held that "[w]here Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply."

The Court holds that in the context of a regulatory inspection system of business premises that is carefully limited in time, place and scope, the legality of the search depends not on consent, but on the authority of a valid statute. The Court concludes that "where, as here, regulatory inspections further [an] urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute."

The Court finds that by accepting a liquor license or permit, an individual agrees not to engage in or permit conduct on the premises that is lewd or immoral, or that constitutes an offense of public decency, including, but not limited to, possession of a narcotic or any equipment used or designed for the administering of a narcotic or permitting a person on the premises to use a narcotic.

The Court holds that the overwhelming and undisputed evidence reveals that the agents went to the defendant's club to determine whether intoxicated persons were actually being allowed to remain on the premises and to make a general regulatory liquor license inspection. The Court finds that there is no credible evidence that would cause one to conclude that the only and main purpose of the agents' visit to the club was to search for controlled substances.

The Court notes that the agent's discovery of the drugs was inadvertent and that the drugs were in plain view, thus an arrest, search or seizure based on testimony concerning an informant who allegedly reported narcotics violations in the defendant's club is not applicable when agents or peace officers are acting pursuant to §101.04 and are on licensed premises solely to make an inspection to determine compliance with the statute.

The Court finds that although the agents might have had a hunch that narcotics could be found somewhere on the premises, when they entered the club, it was only to make a general, but thorough, inspection for violations of the Alcoholic Beverage Code.

"In this instance, the inspection that was conducted was done by individuals who are commissioned to make just the kind of inspection that was made in this cause. Therefore, the administrative inspection, that resulted in the finding of the cocaine, which inspection was made pursuant to T.A.B.C. §101.04 in this cause, did not violate [the defendant's] rights under the Fourth and Fourteenth Amendments to the United States Constitution, nor did it violate his rights under Art. I, §9 of the Texas Constitution."

OPINION: Teague, J.; Duncan, J. concurring; White, J. not participating.

CONCURRENCE: Berchelmann, J.; McCormick, P.J. and Campbell, J. joining. The concurrence finds that the U.S. Supreme Court enunciated three criteria for measuring the constitutional validity of statutes which provide for warrantless searches of closely regulated businesses in *New York v. Burger*, 107 S.Ct. 2636 (1987): (1) there must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made; (2) the warrantless inspections must be necessary to further the regulatory scheme; and (3) the inspection program, in terms of certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant.

The concurrence would hold that §101.04 clearly meets the first two criteria set forth in *Burger* and would hold that the operative sections of the Alcoholic Beverage Code meet the third criteria by providing an adequate substitute for a warrant.

DISSENT: Clinton, J.; Miller, J. joining. The dissent states that the majority failed to demonstrate that §101.04 meets the criteria enunciated in *Burger*.

ATTORNEYS: Ken J. McLean, Houston, for the defendant; Criminal District Attorney George J. Filley III and Assistant DA Lorretta Owen, Victoria County, for the State.

TRIAL COURT: Clarence N. Stevenson; 24th District, Victoria County.

Texas Appeals Courts Civil Cases

Appellate Procedure

MOTION FOR REHEARING/ TRANSCRIPT REQUESTS/ MOTION FOR LEAVE TO SUPPLEMENT RECORD

- *Where there is an untimely request for a statement of facts, a motion for extension of time with a reasonable explanation for delay is necessary.*
- *Where a timely motion for new trial has been filed, a party must perfect his appeal within 90 days after the final judgment or order is signed.*
- *A timely request for a statement of facts can be*

made up to the final day appeal could have been perfected, even though the appeal has actually been perfected at some date prior to the deadline.

- *An untimely request for a statement of facts can be made without a motion and reasonable explanation if the statement of facts will be filed before the 60-day deadline under T.R.App.P 54(a), but if the statement of facts cannot be filed by that time, then a motion for an extension must be filed within 15 days after the last date for filing the record in accordance with Rule 54(c).*

Rodriguez v. American General Fire & Casualty Co., No. 08-89-00153-CV (El Paso), 11/27/89, 4 pp.

FACTS: The final order of judgment dismissing this case was signed on Feb. 24, 1989. A motion for rehearing was heard and denied March 17. An appellate bond for costs was subsequently filed with the district clerk on March 23. The insured requested a transcript of the hearing March 31, but did not request a statement of facts of the March 17 hearing until May 17.

The insured filed his brief on May 24, and thereafter, on June 19, the insurance company filed its brief. On July 11, the insured filed his motion for leave to supplement the record. Attached to that motion was an affidavit from the court's reporter, not giving any explanation for the late preparation or filing, but asserting rather that there was no evidentiary hearing on March 17 and implying that there had been no evidentiary hearing at any other time.

The insurance company filed a response, requesting that the insured's motion be denied and that the statement of facts not be filed. The insured's motion for leave to supplement the record was granted and the insurance company moved for rehearing.

HOLDING: Prior order granting the insured leave to supplement the record is set aside and motion for leave to supplement denied.

"Where a timely motion for new trial has been filed, [a party] must perfect his appeal within ninety days after the final judgment or order is signed." The Court holds that in this case, the insured had until May 25 to file his bond and thereby perfect his appeal. The Court notes that the insured filed his bond March 23, therefore it was timely filed.

The Court holds that if the insured's motion for leave to supplement the record, supported by his oral argument, is to be taken at face value as an effort to amend or supplement the record on appeal under T.R.App.P. 55(b), then it must fail because that rule applies only where a statement of facts had previously been timely filed with the court of appeals.

"Where no statement of facts had been filed, as in the instant case, the rules for amendment and supplementation of the record are inapplicable."

The Court finds that if the insured's motion could be construed as a motion to extend the time for filing a statement of facts under T.R.App.P. 54(c), it still must fail. "For one thing, no explanation, reasonable or otherwise, was offered in the motion or accompanying affidavit for the late filing request. For another, the motion was filed beyond the fifteen day time period after the last date for filing the record, as allowed by 54(c)."

The Court holds that the last day for filing would have been 125 days from Feb. 24, or June 24. The Court finds that the last day for filing the motion for extension of time would have been July 10, because the 15th day was a Sunday. The Court notes that the insured filed his motion July 11.

"Under the holding in *Monk v. Dallas Brake and Clutch Service Company, Inc.*, 683 S.W.2d 107 (Tex. App. — Dallas 1984, no writ), a motion for extension of time with a reasonable explanation for delay is necessary where there is an untimely request for a statement of facts under Rule 53(a), which will not be filed within the time prescribed by Rule 54(a)."

The Court notes the 14th Court of Appeals has taken a narrower view of Rule 53(a) and that in *Caldwell & Hurst v. Myers*, 705 S.W.2d 703 (Tex. App. — Houston [14th Dist] 1985, no writ), it held that the request to the court reporter must be made on or before the date prescribed for perfecting the appeal and the time to make such a request cannot be extended beyond that deadline under [Rule] 54(c) even though the statement of facts could be prepared and filed within the time required by Rules 54(a) and (c).

The Court states that language of Rule 53(a) seems to support the *Myers* ruling, although a proposed change in the rule would support the *Monk* interpretation by making it unnecessary to make a timely request for a statement of facts where the statement of facts or supplement will be filed within the time prescribed by Rule 54(a).

The Court holds that a timely request for a statement of facts can be made up to the final day appeal could have perfected, even though the appeal has actually been perfected at some date prior to the deadline.

The Court concludes that an untimely request for a statement of facts can be made without a motion and reasonable explanation if the statement of facts will be filed before the Rule 54(a) deadline, but if the statement of facts cannot be filed by that time, then a motion for an extension must be filed in accordance with Rule 54(c).

OPINION: Koehler, J.; panel consisting of Fuller, Woodard and Koehler, JJ.

ATTORNEYS: James F. Scherr and Lark H. Fogel, El Paso, for the insured; Karl O. Wyler III with Kemp, Smith, Duncan, & Hammond, El Paso, Brenda J. Norton with Diamond, Rash, Leslie, Smith & Samaniego, El Paso, and Paul Bracken, El Paso, for the insurance company.

TRIAL COURT: William E. Moody; 34th District, El Paso County.

pg001064

Discovery

INTERROGATORIES/ AFFIDAVITS/ MOTIONS TO EXTEND TIME/ REQUESTS FOR ADMISSIONS/ SUMMARY JUDGMENT/

00764

CHARLES ADKIN SPAIN, JR.

Court of Appeals for the Third District of Texas
Price Daniel, Sr. Building Room 101
209 West 14th Street
Austin, Texas 78701

Staff Attorney
Telephone: (512) 463-1733

October 5, 1992

The Honorable Nathan Hecht
Justice
The Supreme Court of Texas
Price Danial Sr., Building Room GO4A
209 West 14th Street
Austin, Texas 78701

Re: Texas Rules of Appellate Procedure

Dear Justice Hecht:

Here are some random comments on the Rules:

(1) Rule 20: Since the new Rules for Admission to the Bar now govern pro hac vice admissions in the appellate courts, will nonadmitted attorneys tendering amicus curiae briefs have to comply with Rule for Admission to the Bar 19?

(2) Rule 57(a)(1): Change "number of the supreme judicial district" to "number of the court of appeals district".

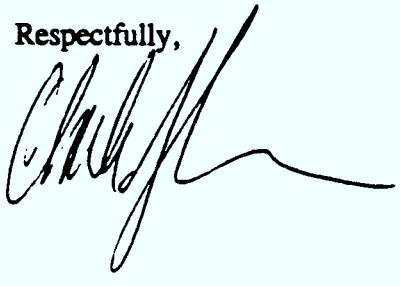
(3) Rule 90(i): What exactly is an "unpublished opinion"? Is a nonfinal opinion designated for publication, e.g., one with a pending motion for rehearing, a "published opinion"? *See Yeager v. State*, 727 S.W.2d 280, 281 n.1 (Tex. Crim. App. 1987); *Henderson v. State*, 822 S.W.2d 171, 172 (Tex. App.—Houston [1st Dist.] 1991, no pet.) (refusing to follow *Cole v. State*, No. 1179-87 (Tex. Crim. App. Nov. 14, 1990), *reh'g granted*, (July 3, 1991)). I believe that one possible solution is that the opinion is not "published" until it is released for final publication to West Publishing Company. This, of course, would prohibit citation to cases appearing only in the *Texas Supreme Court Journal*, but otherwise anyone who loses because a court relied on nonfinal authority must preserve a point of error alleging what really isn't error: "The court erred in relying on nonfinal case authority that may change on

rehearing." This appears to be more of a problem in criminal cases, but some amendment to Rule 90 would help.

(4) Rule 234: The supreme court and courts of appeals arguably need an equivalent rule to avoid the necessity of issuing an order to that effect, i.e., Order of December 31, 1987, 31 Tex. Sup. Ct. J. 160 (continuing to next term of court all causes, applications for writs of error, motions, and other matters filed and to be filed and not finally disposed of during 1987 term). It escapes me why former Texas Rule of Civil Procedure 458(d) was not carried forward to the Texas Rules of Appellate Procedure, but former Texas Rule of Criminal Post Trial and Appellate Procedure 314 was carried forward as Texas Rule of Appellate Procedure 234.

Thank you for your receptiveness to comments on the Rules.

Respectfully,



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THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

10/16

HFD, SC AC Subcs Offices COAs Staffs

October 12, 1992

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

Dear Luke:

Enclosed are copies of the following letters:

1. Justice of the Peace John Hawkins regarding Rule 528.

2. Michael Weston regarding summary judgment procedures.

3. Charles Spain regarding the Texas Rules of Appellate Procedure.

I would appreciate your bringing these to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

October 12, 1992

Mr. Charles Adkin Spain, Jr.
Court of Appeals for the Third District of Texas
Price Daniel, Sr. Building Room 101
209 West 14th Street
Austin TX 78701

Dear Mr. Spain:

Thank you for your letter regarding the Texas Rules of Appellate Procedure. I have sent a copy to the chairman of the Rules Advisory Committee with the request that your comments be considered fully in making additional revisions in the rules.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

xc: Mr. Luther H. Soules III

Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 57(b). This rule should allow the clerk to add additional counsel on request; however, the clerk should be allowed to designate one attorney for each party for the purpose of receiving notice and for the filing of papers, if the attorneys fail to timely designate lead counsel.

Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 61. This rule should provide for the disposition of all papers in all cases, with reference to the appropriate statutes governing disposition of exhibits, etc.

00767

Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 72(i). When an extension of time is requested for the filing of the transcript, the facts relied upon to reasonably explain the need for an extension must be supported by the affidavit of the trial clerk. This requirement should be added to this rule.

00768

PLAYING BY THE RULES

Recent Amendments to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence Effective December 1, 1991

by John K. Chapin

On April 30, 1991, the Supreme Court transmitted to Congress a number of changes to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence. These changes are to take effect on December 1, 1991. Following is a discussion of the major changes. Other insubstantial changes were made to F.R.A.P. 6, 10, 26, and 26.1.

FEDERAL RULES OF APPELLATE PROCEDURE

(TRAP 74-75) *Appellate Briefs; Oral Argument—Rules 28, 30, 34*

Rule 28 (a)(2) is added and the subsequent subsections renumbered. New (a)(2) requires an appellant to include in the appellant's brief a jurisdictional statement with specified contents. Rule 28(b) (appellee's briefs) is amended to conform to Rule 28(a)(2), except that the appellee need not include the jurisdictional statement unless the appellee is dissatisfied with the appellant's jurisdictional statement. Rule 28(h) is amended to provide that when more than one party files an appeal, the party filing the first appeal is normally treated as the appellant for purposes of Rules 28, 30, and 31. If notices of appeal are filed on the same day, Rule 28(h) as amended still follows the current approach of treating the plaintiff below as the appellant. The designations as appellant and appellee may be altered by agreement of the parties or by court order. Rule 34 (oral argument) is amended to conform its provisions to the new Rule 28(h). Rule 30 (appendix to the briefs on appeal) has been amended to make its provisions applicable to cross appeals, cross appellants, and cross appellees.

ate sm' and non-documentary cases, accordi.. ..o David M. Brodsky, Co-Chair of the Trial Practice Committee.

The video advocates point to three principal benefits which videotape trial records offer over paper transcripts: (1) cost savings for both the court and the litigants; (2) greater accuracy of the record; and (3) instant availability.

Not only does a video recording system save the court the annual salary and other costs of a court reporter, proponents say, it also substitutes a $5-15 video cassette charge for the thousands of dollars it sometimes costs litigants to obtain the trial transcript. In addition, video records, in theory, pick up everything—including the demeanor of witnesses and counsel. And, with a video record, one obtains the cassette at the end of the day—not long after trial, as is often the case with a paper record.

Many lawyers welcome the advent of appellate review by videotape. Mary H. Sears, Co-Chair of the Section's Appellate Practice Committee, sees "a great deal of advantage when the reviewing court has an opportunity to see the demeanor of the witness." This, of course, raises the question of "whether the reviewing court should have added power to reverse the trial court's factual findings," Sears adds.

Other litigators suggest greater caution in moving toward videotaped

Computer-Aided Customizing of Brief Can Earn You Sanctions

When getting in the last word says too much

by David Farnham, *Associate Editor*

The Seventh Circuit has recently condemned the innovation of using computer technology and laser printers to squeeze more text into a brief than the rules allow. In an opinion that promises sanctions for such ingenuity in the future, Judge Frank H. Easterbrook warned that "[b]efore filing a brief in a homemade size, counsel must brush up on the rules." *EDC, Inc. v. Navistar Int'l Transportation*, 915 F.2d 1082 (1990).

EDC's lawyer was very lucky: Judge Easterbrook considered throwing the appeal out of court because he ignored the length limits. Although no circuit has dismissed an appeal for that reason, the Seventh Circuit has previously struck a 27-page appendix where it contained text originally in an oversized brief, and the Fifth Circuit warned in *Neely v. Bankers Trust Co. of Texas*, 757 F.2d 621 (5th Cir. 1985) that violations may result in the Court's striking of briefs *sua sponte*.

Lawyers trying to fit an extra argument into the confines of a brief of limited pages must check the relevant circuit rules before employing the capabilities of computers and laser printers to customize their type size. Although Fed. R. App. P. 32(a) allows for the 11-point type employed by EDC, only the First, Fourth and Ninth Circuits leave the rule unamended. The Eighth Circuit calls for strict compliance with Rule 32(a), but adds the requirement that footnotes be in the same size type. In the other circuits, the practice varies.

The Second, Third, Fifth, Eleventh and Federal Circuits all require that type be at least 11-point, with the Fifth Circuit specifying that Elite type [12-point] shall not be considered 11-point for purposes of the rule.

While most of the circuits specify the size of pages and the corresponding margins and area of text in inches, the Fifth Circuit specifies the number of lines per page, the Second and Eleventh Circuits specify the spacing between the lines, and the Federal Circuit specifies the number of lines to the inch.

EDC initially sought permission to file a brief of 150 pages, three times the length permitted by Fed. R. App. P. 28(g). Next, EDC presented a 98-page brief along with a renewed motion to file a lengthy brief; that motion was granted in part and EDC was permitted to file a new brief of 65 pages. In response, EDC filed a 62-page brief, which was rejected by Judge Easterbrook because it deviated from Seventh Circuit Rule 32's prohibition of type smaller than 10-point.

In effect, EDC's 62-page brief contained 73 pages of text, and thus exceeded the 65-page limit set by Judge Easterbrook's order.

Finally, on order to show cause why the Court should not dismiss the appeal, EDC presented a 53-page brief that complied with the Circuit's type-size restrictions. This brief was accepted, but Judge Easterbrook was concerned that "[g]ame-playing wastes the time of this court," and that warnings such as *Westinghouse Electric Corp. v. NLRB*, 809 F.2d 419 (7th Cir. 1987)—counsel sanctioned $1,000 for attempting to evade page-limitation order—"serve little purpose if followed up only by further warnings." This point is underscored by David W. Clark, Jackson, MS, Co-Chair of the Section's Appellate Practice Committee, who notes that the court must be able to enforce its rules.

also an index of authorities alphabetically arranged, together with reference to the pages of the brief where the same are cited. The subject matter of each point or group of points shall be indicated in the table of contents.

(c) **Preliminary Statement.** The brief should contain a brief general statement of the nature of the cause or offense, i.e., whether it is suit for damages on a note, or a prosecution for murder, and the result in the court. Such statement should seldom exceed one-half page. The details should be reserved and stated in connection with the points to which they are pertinent.

(d) **Points of Error.** A statement of the points upon which an appeal is predicated shall be stated in short form without argument and be separately numbered. In parentheses after each point, reference shall be made to the page of the record where the matter complained of is to be found. A point is sufficient if it directs the attention of the appellate court to the error about which complaint is made. In civil cases, complaints that the evidence is legally or factually insufficient to support a particular issue or finding, and challenges directed against any conclusions of law of the trial court based upon such issues or findings, may be combined under a single point of error raising both contentions if the record references and the argument under the point sufficiently direct the court's attention to the nature of the complaint made regarding each such issue or finding or legal conclusion based thereon. Complaints made as to several issues or findings relating to one ground of recovery or defense may be combined in one point, if separate record references are made.

(e) **Brief of Appellee.** The 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 complain of any ruling or action of the trial court, his brief in regard to such matters shall follow substantially the form of the brief for appellant.

(f) **Argument.** A brief of the argument may present separately or grouped the points relied upon for reversal. The argument shall include: (1) a fair, condensed statement of the facts pertinent to such points, with reference to the pages in the record where the same may be found; and (2) such discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue. If complaint is made of any part of the charge given or refused, such part of the charge shall be set out in full. If complaint is made of the improper admission or rejection of evidence, the substance of such evidence so admitted or rejected shall be set out with references to the pages of the record where the same may be found. Repetition or prolixity of statement or argument must be avoided. Any statement made by appellant in his original brief as to the facts or the record may be accepted by the court as correct unless challenged by the opposing party.

(g) **Prayer for Relief.** The nature of the relief sought should be clearly stated.

(h) **Length of Briefs.** Except as specified by local rule of the court of appeals, appellate briefs in civil cases shall not exceed 50 pages, exclusive of pages containing the list of names and addresses of parties, the table of contents, index of authorities, points of error, and any addendum containing statutes, rules, regulations, etc. The court may, upon motion, permit a longer brief. 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.** Each party shall file six copies of his brief in the court of appeals in which the case is pending. Any court of appeals may by rule authorize the filing therein of fewer or more copies of briefs.

(j) **Briefs Typewritten or Printed.** The brief of either party may be typewritten, or printed. If typewritten, it must be double spaced.

(k) **Appellant's Filing Date.** Appellant shall file his 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.* In civil cases, 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.* In criminal cases, appellant's failure to file a brief in the time prescribed shall not authorize dismissal of the appeal or, except as herein provided, consideration of the appeal without briefs. When the appellant's brief has not been filed within such time, the clerk of the appellate court shall notify counsel for the parties and the trial judge that appellant's brief has not been filed. If no satisfactory response is received within ten days, the appellate court shall order the trial judge to immediately conduct a hearing to determine whether the appellant desires to prosecute his appeal, whether the appellant is indigent, or if not indigent, whether retained counsel has abandoned the appeal, and to make appropriate findings and

4543.001

hhd
LHS

FULBRIGHT & JAWORSKI
1301 McKINNEY, SUITE 5100
HOUSTON, TEXAS 77010-3095

TELEPHONE: 713/651-5151
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HOUSTON
WASHINGTON, D.C.
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SAN ANTONIO
DALLAS
LOS ANGELES
LONDON
ZURICH
HONG KONG

FULBRIGHT JAWORSKI &
REAVIS McGRATH
NEW YORK

✓12-31-90

December 26, 1990

Re: Supreme Court Advisory Committee

Mr. Luther H. Soules III
Soules & Wallace
175 E. Houston Street, 10th Floor
San Antonio, Texas 78205-2230

Mr. Russell H. McMains
McMains & Constant
One Shoreline Plaza
South Tower, Suite 2600
Corpus Christi, Texas 78470

Mr. Michael A. Hatchell
The Ramey Firm
500 First Place, Fifth Floor
Tyler, Texas 75710-0629

Gentlemen:

I attach a memorandum prepared by Ben Taylor of my office regarding amended Texas Rule of Appellate Procedure 74(a).

I told you so!

Sincerely yours,

Roger Townsend

Roger Townsend

RT/sp
Attachment

FULBRIGHT & JAWORSKI
1301 McKinney
Houston, Texas

MEMORANDUM

TO: Roger Townsend

DATE: December 18, 1990

FROM: Ben Taylor Ben

RE: *Page Avjet*--brief for appellant not filed because it fails to list all parties' addresses

---

I spoke by phone today with Mary Jane Duarte, deputy clerk for the Thirteenth Court of Appeals. The court "received" our brief today and will mail back to us a date-stamped copy so indicating. The clerk is also sending us, however, a postcard indicating that our brief is not in compliance with Texas Rule of Appellate Procedure 74(a), as amended effective September 1, 1990. Interpreting the amended rule, the Court has apparently instructed its clerk to require appellants to list names *and addresses* of all the parties, even though the rule only requires the clerk to "properly notify the parties ... *or their counsel*" of the judgment and all orders of the court of appeals.

According to Ms. Duarte, attorneys have repeatedly pointed out to the clerk's office that frequently the record will not reflect the addresses of all parties and/or there may be a lot of parties represented by one counsel of record. Ms. Duarte says her office has brought this problem to the Court's attention; nonetheless, the Court wants *all* parties' addresses listed. The Court also wants copies of its judgment and orders sent to all parties and their counsel as well.

Ms. Duarte assured me that, notwithstanding the language of the postcard we will receive, we will only need to file substitute pages i and ii. Ms. Duarte also said some attorneys have satisfied the Court by reciting that diligent efforts have been made and they were unable to obtain the addresses of all parties to the trial court's final judgment.

While the Court's intentions may be good, it is applying a stupid rule with unnecessary strictness and also imposing an unwarranted burden both on appellate counsel and the clerk. I suppose we can get addresses for Tesoro and its individual members somehow, and I have drafted a letter along

the lines you suggested (*see* attached). Separately, I wonder if Mr. McMains might somehow be able to get the Court to reconsider its unforgivable position on this matter.

Just think how bad this would have been in the *Izaguirre* case, with a widow and twelve kids living who knows where and whose addresses are not in the record. I hate to seem like I'm venting my spleen, but I just get thoroughly frustrated with new rule 74(a) and the Thirteenth Court of Appeals. Those people think it's an honest to God privilege to file a brief with their Court. At least now we have a more understanding clerk in Ms. Wilborn and her deputy, Mary Jane Duarte. The new rule and the Court are the problems now.

Ben

/tcm

Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 74. Should refer to judicial district not Supreme Judicial District.

Rule 74(h). This rule should apply to the length of briefs in both civil and criminal cases.

Court of Appeals

Thirteenth Supreme Judicial District

TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 75(f). A party to the appeal desiring oral argument shall make request therefor at the time he files his brief in the case by noting on the front right-hand corner of his brief that he is requesting oral argument. This addition states the specific place to request the oral argument, as opposed to letters, cards, notes, etc. that are kept in files away from the briefs. Also the court should be able to advance both civil and criminal cases for submission without oral argument where oral argument would not materially aid the court. Also the time limit for notice to the parties should be changed from 21 days to 2 weeks so that the notice provisions concerning argument and no argument cases is the same. See Rule 77.

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9-21-93 SH

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

September 20, 1993

H/HD
Scac opinion
Just
Cts Staff

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed is a letter from Charles Spain regarding Texas Rules of Appellate Procedure 79 and 90.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

CHARLES ADKIN SPAIN, JR.
Court of Appeals for the Third District of Texas
Post Office Box 12547
Capitol Station
Austin, Texas 78711-2547

Staff Attorney
Telephone: (512) 463-1733

September 16, 1993

The Honorable Nathan Hecht
Justice
The Supreme Court of Texas
Supreme Court Building Room 104
201 West 14th Street
Austin, Texas 78701

Re: Texas Rules of Appellate Procedure 79 and 90

Dear Justice Hecht:

To what does one concur or dissent? I thought a judge concurred or dissented to a judgment and joined or did not join in an opinion. To my consternation, however, it appears a judge concurs or dissents to a "decision."

Texas Rules of Appellate Procedure 79 and 90 appear to use the term "decision" as the overarching word (a "verbalization," as it were) for the postsubmission appellate process through rendition of judgment. The appellate "decision" does not appear to be anything tangible, as opposed to the opinion and judgment.

The difficulty begins in Rule 79(b) and (c) when the Rule refers to the situation in which one justice does not participate in the decision of a case and the remaining two justices cannot "concur" in the decision; thus, necessitating the designation or assignment of another judge to break the tie. Perhaps "concur" as used in this Rule more closely resembles "agree," rather than the meaning of "concur" usually associated with a "concurring" opinion.

Rule 90(e) goes on to discuss an opinion "concurring in or dissenting from the decision of the court of appeals." Since a judge could agree with the judgment and disagree with the reasoning in the majority opinion, it is arguably ambiguous to speak of "concurring in or dissenting from the decision" as the "decision" presumably encompasses both the opinion and judgment. In the situation I have described above, I guess the judge technically is concurring in part and dissenting in part to the "decision"!

I believe a more workable solution would be to replace the first sentence of Rule 90(e) with "Any justice may file an opinion concurring in or dissenting from the judgment of the court of appeals and joining or not joining in the majority opinion." One subtle benefit of such a change is that it reinforces the distinction between the opinion, an agent of stare decisis, and the judgment, a creature of res judicata. I would also change Rule 79(b) and (c) from "cannot concur in a decision" to "cannot agree in a decision." There may be one or two other places in which "decision" and "concur" are used that would have to be adjusted; I confess I have not done an exhaustive search.

As always, thank you for your willingness to entertain suggestions about the Rules that are weighty and suggestions that are somewhat more obscure.

Respectfully,

CHARLES ADKIN SPAIN, JR.
Court of Appeals for the Third District of Texas
Post Office Box 12547
Capitol Station
Austin, Texas 78711-2547

Staff Attorney
Telephone: (512) 463-1733

July 20, 1993

TRAP 79

The Honorable Nathan Hecht
Justice
The Supreme Court of Texas
Supreme Court Building Room 104
201 West 14th Street
Austin, Texas 78701

Re: Texas Rules of Appellate Procedure

Dear Justice Hecht:

Here are additional random comments on the Rules. I apologize for not rounding them all up earlier.

(1) Texas Rule of Appellate Procedure 4(b): Does the Court intend that the term "certificate of mailing" refer to Form 3817 described in sections 931.1-.522 of the U.S. Postal Service's *Domestic Mail Manual*, or does the term "certificate of mailing" have a more general meaning that would include a receipt for certified mail (Form 3800) described in sections 912.1-.8?

(2) Texas Rule of Appellate Procedure 19: It would expedite motion practice in the courts of appeals to require a certificate of conference. Motions without opposition would bear the word "unopposed" in their caption and contain a statement that movant has conferred with all parties and no one opposes the motion. The appellate court could then consider such an unopposed motion without waiting the usual ten days. Motions with opposition would contain a statement that movant has conferred with all parties and counsel cannot agree about the disposition of the motion. Agreed or joint motions would be signed by all parties or their counsel similar to Texas Rule of Appellate Procedure 8.

(3) Texas Rules of Appellate Procedure 79(d), (e) and 100(f): Is it a "motion for rehearing en banc" or a "motion for reconsideration en banc"?

(4) Texas Rules of Appellate Procedure 90(c): In theory the rule allows the court of

appeals to order an opinion published after the court rules on the last timely filed motion for rehearing if the parties do not seek relief from the supreme court (no motion for rehearing is required, of course, in a criminal case). This may be a loophole.

(5) Texas Rule of Civil Procedure 5: Why is there no provision regarding prima facie evidence of the date of mailing by means of a certificate of mailing?

(6) Texas Rule of Civil Evidence 204: Do we really need the provisions that refer to taking judicial notice of the contents of the *Texas Register* and the *Texas Administrative Code* in light of the Administrative Procedure and Texas Register Act and the Texas Administrative Code Act? Tex. Rev. Civ. Stat. Ann. art. 6252-13a, § 4(c), art. 6252-13b, § 4 (West Supp. 1993); *Metro Fuels, Inc. v. City of Austin*, 827 S.W.2d 531, 532 n.3 (Tex. App.—Austin 1992, no writ).

(7) When does true plenary jurisdiction of the appellate court expire—after ruling on the last timely filed motion for rehearing, issuance of the mandate, or expiration of the term of court? Theoretically it's probably the expiration of the term of court, but I believe the supreme court would frown if a court of appeals in December sua sponte vacated a judgment the court of appeals originally rendered in January of the same year and rendered a new and different judgment, especially if the mandate issued in April. Perhaps it would be good to have an appellate rule similar to Texas Rule of Civil Procedure 329b that defines the plenary jurisdiction of the appellate court without reference to the term of court.

Once again, thank you for your receptiveness to comments on the Rules. My theory is not to gripe about the Rules, but rather try to correct the perceived flaws. I trust I'm not merely being a pest!

Respectfully,

4543.001

Court of Appeals
First Supreme Judicial District
1307 San Jacinto, 10th Floor
Houston, Texas 77002

9-29-89

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HJH.
SCAC — Sub C ≡ (2)
CWAJ
SCAC agenda.

September 27, 1989

Luther Soules, Attorney at Law
175 E. Houston
10th Floor
San Antonio, Texas

Re: Amendments to Texas Rules of Appellate Procedure

Dear Luke:

I have two proposals for changing our rules of appellate procedure. These changes have been discussed at a meeting of the Houston Bar Association Committee on the Appellate Judiciary and among various appellate judges, and I believe both proposals have considerable support.

First, I suggest that Rule 80(c) be amended to authorize the Court of Appeals to abate an appeal and remand the case to the District Court to conduct a hearing on any issue the Court of Appeals deems necessary in order to decide the appeal appropriately. This authority exists and is often used in the federal system and in many other states. It is arguable that such a procedure is already permissible under the existing rule that allows the court to make "any other appropriate order, as the law and the nature of the case may require." Nevertheless, there has been significant discussion in several recent cases of the need for such a rule. See Read v. State, 768 S.W.2d 919 (Tex. App.-Beaumont 1989), where Justice Brookshire advocated such a rule, and Mitchell v. State, 762 S.W.2d 916 (Tex. App.--San Antonio 1988, pet. ref'd), where the court used such a procedure, over the dissent of Justice Butts. Similar approaches have been used in Murphy v. State, 663 S.W.2d 604 (Tex. App.--Houston [1st Dist.] 1983, no writ), and Guillory, 638 S.W.2d 73 (Tex. App.--Houston [1st Dist.] 1982, no writ), both decided before the rules were enacted.

I propose that rule 80(c) provide:

> In addition, the court of appeals may make any other appropriate order as the law and the nature of the case may require, including abating the appeal and remanding the cause to the trial court for a hearing on any issue.

My second recommendation is that rules of appellate procedure 53(k) and 54 (c) be changed to provide that it is the court reporter's duty, not the appellant's duty, to file the statement of facts in the Court of Appeals and to obtain extensions of time for late filing. The present rules place this duty upon the appellant, which causes considerable inconvenience to lawyers in dealing with the many court reporters and substitute court reporters who are often involved in different parts of the case. Our rules should recognize that the court reporter is an officer of the court, and usually a full-time employee, who is well paid to perform this sole function. It is unreasonable to impose on a lawyer, who in most criminal cases will be working for a court-appointed fee, the duty of going to the court reporter's home or office, picking up the record, and transporting it downtown to the Court of Appeals.

Likewise, I can imagine no good reason for requiring the lawyer to obtain an extension of time for filing the statement of facts. The lawyer has no control over the statement of facts and makes no money from producing it. This burdensome responsibility should be placed upon the court reporter because the court reporter has sole control of the statement of facts and is the only one who makes money from producing it.

I recommend that appellate rule 53(k) read as follows:

(k) **Duty of ~~Appellant~~ Court Reporter to File** It is the ~~appellant's~~ court reporter's duty to cause the statement of facts to be filed with the Clerk of the Court of Appeals.

Similarly, rule 54(c) should be changed to read as follows:

(c) **Extension of Time** An extension of time may be granted for late filing in a court of appeals of a transcript or statement of facts, if a motion reasonably explaining the need therefor is filed, by appellant in the case of the late transcript and by the court reporter in the case of a late statement of facts, with the court of appeals not later than 15 days after the last date for filing the record. Such motion shall also reasonably explain any delay in the request required Rule 53(a).

Please let me know if there is any other information I can furnish concerning these suggestions. I would be happy to discuss these suggestions with you or your committee or any other interested committees at any time.

Sincerely,

Murry B. Cohen

4543.001

hhd
CHS

√4-25-91
SB

Texas Tech University

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

April 22, 1991

4/29

HHD, TRAP Subc
Scac TRAP Agenda
Sca
J. Hecht - TRAP 84

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

Re: TRAP 84 and 182(b)

Dear Luke:

Effective September 1, 1990 the Court amended Rule 182(b) to allow the Court to award an appropriate amount as damages for delay. Prior to that time it read the same way as TRAP 84. However, TRAP 84 was not amended. Is there some reason why the Court would have a different way of awarding the amount as damages for delay for the Supreme Court than the courts of appeals or was the failure to modify TRAP 84 in line with 182(b) an oversight?

Sincerely,

Hadley

J. Hadley Edgar
Robert H. Bean Professor of Law

JHE/nt

4543.001

hhd
LHS

4-25-91
SB

A/29

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

April 22, 1991

HHD ; TRAP Subc
SCAC Agenda
SCAC
J. Hecht · TRAP 182(b)

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

Re: TRAP 84 and 182(b)

Dear Luke:

Effective September 1, 1990 the Court amended Rule 182(b) to allow the Court to award an appropriate amount as damages for delay. Prior to that time it read the same way as TRAP 84. However, TRAP 84 was not amended. Is there some reason why the Court would have a different way of awarding the amount as damages for delay for the Supreme Court than the courts of appeals or was the failure to modify TRAP 84 in line with 182(b) an oversight?

Sincerely,

Hadley

J. Hadley Edgar
Robert H. Bean Professor of Law

JHE/nt

CHARLES ADKIN SPAIN, JR.
Court of Appeals for the Third District of Texas
Post Office Box 12547
Capitol Station
Austin, Texas 78711-2547

Staff Attorney
Telephone: (512) 463-1733

July 13, 1993

The Honorable Nathan Hecht
Justice
The Supreme Court of Texas
Supreme Court Building Room 104
201 West 14th Street
Austin, Texas 78701

Re: Texas Rules of Appellate Procedure

Dear Justice Hecht:

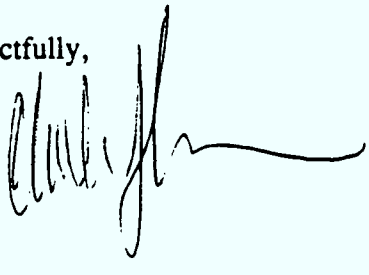
Here are some random comments on the Rules:

(1) Texas Rule of Appellate Procedure 4(b): I don't understand why the appellate mailbox rule applies only to "a motion for rehearing, any matter relating to taking an appeal or writ of error from the trial court to any higher court, or application for writ of error or petition for discretionary review." Texas Rule of Civil Procedure 5 applies to "any document." Is Rule 4(b) really more restrictive, and if so, is there a good reason why it is more restrictive? I recommend amending Rule 4(b) so it applies to "any document," which is certainly what the bar thinks (and perhaps prays) it means.

(2) Texas Rule of Appellate Procedure 86: Perhaps the mandate should issue fifty days after the last timely filed motion for rehearing has been overruled, instead of forty-five days, to avoid the clerk issuing the mandate before receipt through the U.S. mail of a copy of a motion for extension of time to file an application for writ of error that was put in the mail on the forty-fifth day pursuant to Texas Rule of Appellate Procedure 130(d). Query—Is the motion for extension timely filed by mail? (see comment one above)

Thank you for your receptiveness to comments on the Rules.

Respectfully,



July 14, 1993

Mr. Charles Adkin Spain, Jr.
Third Court of Appeals
P. O. Box 12547
Austin TX 78711-2547

Dear Charles:

Thank you for your letter and comments regarding Texas Rules of Appellate Procedure 4(b) and 86. I have sent a copy to the chairman of the Rules Advisory Committee with the request that your comments be considered fully in making additional revisions in the rules.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

c: Mr. Luther H. Soules III

Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 86(a)(4). The time limit for issuing a mandate should be increased to allow for the filing deadline of a motion for rehearing in the higher courts to elapse. In most instances within 15 days after receipt by the clerk of the order of the Supreme Court denying writ, we have not yet received the record back from the higher court. Therefore, we should be allowed to wait for the return of the record until we issue our mandate.

Rule 86(e). Once a mandate issues, a court of appeals should not be able to vacate, modify, correct or reform its judgment unless it is to correct a clerical error.

Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 87(b)(1). It is not necessary for the trial clerk to acknowledge receipt of the mandate to this Court. Also it is not necessary for the sheriff to notify us when the mandate has been carried out and executed. We would suggest that this language be deleted.

Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 88. This rule should allow the appellate court to collect costs after issuance of a mandate also.

The appendix should apply to both civil and criminal cases and should delete references to supreme judicial district and to appellant and the state . It should read appellant and appellee since the State is now allowed to appeal. Also the thickness of each volume of the transcript should be set forth.

4543.001 CHS
9-21-93
SH
hnd

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL. (512) 463-1312
FAX (512) 463-1365

September 20, 1993

1HD
SCAC appeals
Lucas
Ct Staff

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed is a letter from Charles Spain regarding Texas Rules of Appellate Procedure 79 and 90.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

CHARLES ADKIN SPAIN, JR.
Court of Appeals for the Third District of Texas
Post Office Box 12547
Capitol Station
Austin, Texas 78711-2547

Staff Attorney
Telephone: (512) 463-1733

September 16, 1993

The Honorable Nathan Hecht
Justice
The Supreme Court of Texas
Supreme Court Building Room 104
201 West 14th Street
Austin, Texas 78701

Re: Texas Rules of Appellate Procedure 79 and 90

Dear Justice Hecht:

To what does one concur or dissent? I thought a judge concurred or dissented to a judgment and joined or did not join in an opinion. To my consternation, however, it appears a judge concurs or dissents to a "decision."

Texas Rules of Appellate Procedure 79 and 90 appear to use the term "decision" as the overarching word (a "verbalization," as it were) for the postsubmission appellate process through rendition of judgment. The appellate "decision" does not appear to be anything tangible, as opposed to the opinion and judgment.

The difficulty begins in Rule 79(b) and (c) when the Rule refers to the situation in which one justice does not participate in the decision of a case and the remaining two justices cannot "concur" in the decision; thus, necessitating the designation or assignment of another judge to break the tie. Perhaps "concur" as used in this Rule more closely resembles "agree," rather than the meaning of "concur" usually associated with a "concurring" opinion.

Rule 90(e) goes on to discuss an opinion "concurring in or dissenting from the decision of the court of appeals." Since a judge could agree with the judgment and disagree with the reasoning in the majority opinion, it is arguably ambiguous to speak of "concurring in or dissenting from the decision" as the "decision" presumably encompasses both the opinion and judgment. In the situation I have described above, I guess the judge technically is concurring in part and dissenting in part to the "decision"!

I believe a more workable solution would be to replace the first sentence of Rule 90(e) with "Any justice may file an opinion concurring in or dissenting from the judgment of the court of appeals and joining or not joining in the majority opinion." One subtle benefit of such a change is that it reinforces the distinction between the opinion, an agent of stare decisis, and the judgment, a creature of res judicata. I would also change Rule 79(b) and (c) from "cannot concur in a decision" to "cannot agree in a decision." There may be one or two other places in which "decision" and "concur" are used that would have to be adjusted; I confess I have not done an exhaustive search.

As always, thank you for your willingness to entertain suggestions about the Rules that are weighty and suggestions that are somewhat more obscure.

Respectfully,

CHARLES ADKIN SPAIN, JR.
Court of Appeals for the Third District of Texas
Post Office Box 12547
Capitol Station
Austin, Texas 78711-2547

Staff Attorney
Telephone: (512) 463-1733

July 20, 1993

TRAP 90

The Honorable Nathan Hecht
Justice
The Supreme Court of Texas
Supreme Court Building Room 104
201 West 14th Street
Austin, Texas 78701

Re: Texas Rules of Appellate Procedure

Dear Justice Hecht:

Here are additional random comments on the Rules. I apologize for not rounding them all up earlier.

(1) Texas Rule of Appellate Procedure 4(b): Does the Court intend that the term "certificate of mailing" refer to Form 3817 described in sections 931.1-.522 of the U.S. Postal Service's *Domestic Mail Manual*, or does the term "certificate of mailing" have a more general meaning that would include a receipt for certified mail (Form 3800) described in sections 912.1-.8?

(2) Texas Rule of Appellate Procedure 19: It would expedite motion practice in the courts of appeals to require a certificate of conference. Motions without opposition would bear the word "unopposed" in their caption and contain a statement that movant has conferred with all parties and no one opposes the motion. The appellate court could then consider such an unopposed motion without waiting the usual ten days. Motions with opposition would contain a statement that movant has conferred with all parties and counsel cannot agree about the disposition of the motion. Agreed or joint motions would be signed by all parties or their counsel similar to Texas Rule of Appellate Procedure 8.

(3) Texas Rules of Appellate Procedure 79(d), (e) and 100(f): Is it a "motion for rehearing en banc" or a "motion for reconsideration en banc"?

(4) Texas Rules of Appellate Procedure 90(c): In theory the rule allows the court of

appeals to order an opinion published after the court rules on the last timely filed motion for rehearing if the parties do not seek relief from the supreme court (no motion for rehearing is required, of course, in a criminal case). This may be a loophole.

(5) Texas Rule of Civil Procedure 5: Why is there no provision regarding prima facie evidence of the date of mailing by means of a certificate of mailing?

(6) Texas Rule of Civil Evidence 204: Do we really need the provisions that refer to taking judicial notice of the contents of the *Texas Register* and the *Texas Administrative Code* in light of the Administrative Procedure and Texas Register Act and the Texas Administrative Code Act? Tex. Rev. Civ. Stat. Ann. art. 6252-13a, § 4(c), art. 6252-13b, § 4 (West Supp. 1993); *Metro Fuels, Inc. v. City of Austin*, 827 S.W.2d 531, 532 n.3 (Tex. App.—Austin 1992, no writ).

(7) When does true plenary jurisdiction of the appellate court expire—after ruling on the last timely filed motion for rehearing, issuance of the mandate, or expiration of the term of court? Theoretically it's probably the expiration of the term of court, but I believe the supreme court would frown if a court of appeals in December sua sponte vacated a judgment the court of appeals originally rendered in January of the same year and rendered a new and different judgment, especially if the mandate issued in April. Perhaps it would be good to have an appellate rule similar to Texas Rule of Civil Procedure 329b that defines the plenary jurisdiction of the appellate court without reference to the term of court.

Once again, thank you for your receptiveness to comments on the Rules. My theory is not to gripe about the Rules, but rather try to correct the perceived flaws. I trust I'm not merely being a pest!

Respectfully,

CHARLES ADKIN SPAIN, JR.

Court of Appeals for the Third District of Texas
Price Daniel, Sr. Building Room 101
209 West 14th Street
Austin, Texas 78701

Staff Attorney
Telephone: (512) 463-1733

October 5, 1992

The Honorable Nathan Hecht
Justice
The Supreme Court of Texas
Price Danial Sr., Building Room GO4A
209 West 14th Street
Austin, Texas 78701

Re: Texas Rules of Appellate Procedure

Dear Justice Hecht:

Here are some random comments on the Rules:

(1) Rule 20: Since the new Rules for Admission to the Bar now govern pro hac vice admissions in the appellate courts, will nonadmitted attorneys tendering amicus curiae briefs have to comply with Rule for Admission to the Bar 19?

(2) Rule 57(a)(1): Change "number of the supreme judicial district" to "number of the court of appeals district".

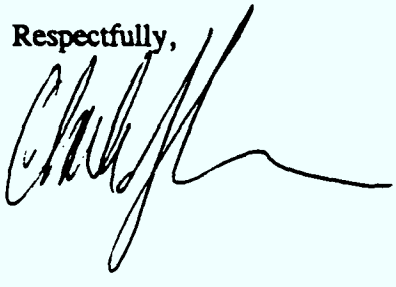
(3) Rule 90(i): What exactly is an "unpublished opinion"? Is a nonfinal opinion designated for publication, e.g., one with a pending motion for rehearing, a "published opinion"? *See Yeager v. State*, 727 S.W.2d 280, 281 n.1 (Tex. Crim. App. 1987); *Henderson v. State*, 822 S.W.2d 171, 172 (Tex. App.—Houston [1st Dist.] 1991, no pet.) (refusing to follow *Cole v. State*, No. 1179-87 (Tex. Crim. App. Nov. 14, 1990), *reh'g granted*, (July 3, 1991)). I believe that one possible solution is that the opinion is not "published" until it is released for final publication to West Publishing Company. This, of course, would prohibit citation to cases appearing only in the *Texas Supreme Court Journal*, but otherwise anyone who loses because a court relied on nonfinal authority must preserve a point of error alleging what really isn't error: "The court erred in relying on nonfinal case authority that may change on

rehearing." This appears to be more of a problem in criminal cases, but some amendment to Rule 90 would help.

(4) Rule 234: The supreme court and courts of appeals arguably need an equivalent rule to avoid the necessity of issuing an order to that effect, i.e., Order of December 31, 1987, 31 Tex. Sup. Ct. J. 160 (continuing to next term of court all causes, applications for writs of error, motions, and other matters filed and to be filed and not finally disposed of during 1987 term). It escapes me why former Texas Rule of Civil Procedure 458(d) was not carried forward to the Texas Rules of Appellate Procedure, but former Texas Rule of Criminal Post Trial and Appellate Procedure 314 was carried forward as Texas Rule of Appellate Procedure 234.

Thank you for your receptiveness to comments on the Rules.

Respectfully,



4543.001 LHS hnd

✓10-15-92 SB

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

10/16

HFD, SC, SubCs, SC Advisors, COAJs Staff

October 12, 1992

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

Dear Luke:

Enclosed are copies of the following letters:

1. Justice of the Peace John Hawkins regarding Rule 528.

2. Michael Weston regarding summary judgment procedures.

3. Charles Spain regarding the Texas Rules of Appellate Procedure.

I would appreciate your bringing these to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

October 12, 1992

Mr. Charles Adkin Spain, Jr.
Court of Appeals for the Third District of Texas
Price Daniel, Sr. Building Room 101
209 West 14th Street
Austin TX 78701

Dear Mr. Spain:

Thank you for your letter regarding the Texas Rules of Appellate Procedure. I have sent a copy to the chairman of the Rules Advisory Committee with the request that your comments be considered fully in making additional revisions in the rules.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

xc: Mr. Luther H. Soules III

4543.001 WHD 10-22-90 WP 483

Jackson, Jackson, Loving & Kindred

Attorneys at Law

Gary D. Jackson
Gloria A. Jackson
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500 Murray Financial Center
5550 LBJ Freeway
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Montfort at LBJ Freeway
Phone (214) 661-1744
FAX (214) 385-7512
Lock Box 13

19 October 1990

10/24 WHD CDA SCPA Gilstrap Hecht J.

Mr. Luther H. Soules
Ten Floor, Republic of Texas Plaza
175 East Houston Street
San Antonio, Texas 78205-2230
512/224-9144

Dear Mr. Soules:

At Baylor Law School Reunion last Friday, Chief Justice Bob Thomas of the Waco Court of Appeals gave me your name during our discussion of Rule 90, TRAP.

Twice recently we have been the victim of an unpublished opinion by the Dallas Court of Appeals. The word "victim" is used because the opinions were not published but did modify or alter existing law.

Justice Thomas said that you are on one of the advisory committees to the Supreme Court on appellate rules.

If you need a good example of the evils of the rule, consider the case of *Armstrong v. Judge Fite Company*.

On 19 September 1990, the Supreme Court denied our application for writ of error from a Dallas Court of Appeals opinion which refused to apply the rule of integration of writings to a management contract with a real estate broker and the earnest money contract which embodied the lease of the property that the broker was to manage. The Dallas Court in an opinion by Justice Warren Whitham found that the rule was inapplicable because our client could not show that the defendant relied upon or was a party to the earnest money contract (which the broker signed through his agent and had to rely upon to determine the amount of the rent and its commission, name of the lessee, date the rent was due, etc.) The opinion cited *Parks v. Frankfurt*, 476 S.W.2d 717 for the rule, but the case makes no reference to reliance or party status.

We moved for rehearing of the 19 September 1990 denial and also for publication of the unpublished opinion. Yesterday we learned that the Supreme Court overruled both motions without opinion.

Apparently the amendment authorizing motions for publication means nothing. As Justice Thomas commented, the rule barring citation of unpublished opinions may encourage the Supreme Court to give less scrutiny to applications for writ from unpublished opinions. A motion to publish may have been intended to and should promote a strong second look.

In our case, the Supreme Court has persisted in the denial in spite of its opinion in *Sun Marine Terminals, Inc., v. Artoc Bank and Trust, Limited,*

which was issued on 6 September 1990, and which we found in the digest pamphlet and sought leave to cite after our motion for rehearing was filed. In *Sun Marine*, Justice Hecht, writing for the Court, explained that a determination of whether Uni owed Sun for services rendered at the time payment was demanded on a letter of credit could not be determined solely by the letter of credit but required examination of the agreement between Uni and Sun. The opinion did not cite the rule of integration but it clearly shows reliance and party status are not required before a court may examine a second document to determine the obligations or rights of a litigant.

In short, the amendment allowing motions to publish appears to be a meaningless procedure which does not promote closer scrutiny of unpublished opinions. What is clear is that the Supreme Court is content to allow the "components" of reliance and party status imposed upon our client by the Dallas court to apply only to our client and not to other litigants.

All this is said, of course, in the firm conviction that we have rightly determined the applicable law!

You may have collected many, more glaring examples of the fundamental unfairness of Rule 90. If so, please share them with me. As recommended by Charles Herring, Jr., in "The Tomb of the Unknown Precedent", *The Texas Lawyer*, the rule barring citation needs to be changed. The rule will be changed when the evils of "secret law" become widely known.

Sincerely yours,

JACKSON, JACKSON, LOVING & KINDRED

Gloria A. Jackson

GAJ:hs

Court of Appeals
Second Court of Appeals District
The Courthouse
Fort Worth, Texas 76196
817/334-1900

TRAP 120

November 20, 1989

Justice Nathan L. Hecht
P. O. Box 12248
Austin, Texas 78711

Dear Judge Hecht:

Please present the following comment regarding a proposed amendment to Texas Rules of Appellate Procedure, Rule 120, to the Supreme Court meeting on November 30, 1989, the present rule and suggested amendments being as follows:

Rule 120 Habeas Corpus in Civil Cases

(d) Action on Petition. If the court is of the tentative opinion that ~~the writ should issue~~ **[relator is entitled to the relief sought,]** the court will **[issue the writ]**, set the amount of bond, order relator released and schedule the petition for oral argument. Otherwise, the court shall deny the writ without further hearing.

(g) Order of Court. If after hearing oral argument, the court determines that ~~the writ should be granted~~, **[relator should be dicharged from custody,]** it shall enter an order to that effect. Otherwise, the court shall remand relator to custody and direct the clerk to issue an order of committment. If relator is not available for return to custody, pursuant to the order of committment, the court may declare the bond to be forfeited.

In most original proceedings in appellate courts, the issuance of the writ is the vehicle by which relief is granted to the relator at the conclusion of the proceedings. In habeas corpus, however, the issuance of the writ must occur as the initial act of the court and prior to the court's hearing the matter upon oral argument and determination if the relator is entitled to be discharged from custody. In fact, the court does not arquire jurisdiction over the person of the relator until it causes the writ to issue or its issuance is waived by the respondent. See Ex parte Alderete, 203 S.W. 763, ___ (Tex.Crim. App. 1918).

Even a casual inspection of the only substantive statutes defining the writ, prescribing its form, and delineating the court's duties when presented with an application for relief, reveals that the court cannot be of the "tenative opinion that the writ should issue" referred to in Rule 120(d). The court is required to issue the writ without delay or deny the application. See Code of Criminal Procedure, art. 11.01 et seq.

As to Rule 120(g), it is submitted that, after hearing the matter, it is inappropriate for the court to determine "that the writ should be granted" since the writ should already have been granted in order to initiate the proceedings. By definition, the writ is "an order issued by a court or judge . . . directed to any one having a person in his custody . . . commanding him to produce such person . . . and show why he is in custody or under restraint." (C.C.P. art. 11.01)

In summary, the relief requested by the relator in a habeas corpus proceeding is always two-fold, the first part of which prays for the writ to issue to determine lawfulness of custody, and the second part being a prayer for discharge from custody. By comparison, the granting of leave to file petition for writ of mandamus equates to the issuance of the writ of habeas corpus because those acts are necessary to the exercise of jurisdiction. Similarly, after hearing, the issuance or denial of the writ of mandamus equates with the final decision in habeas corpus, either to discharge the relator or to remand him to custody. It is submitted that the amendments above suggested take into account the basic difference in the two types of original proceedings.

Sincerely yours,

Fred Fick
Chief Staff Attorney

CHARLES ADKIN SPAIN, JR.
Court of Appeals for the Third District of Texas
Post Office Box 12547
Capitol Station
Austin, Texas 78711-2547

Staff Attorney
Telephone: (512) 463-1733

TRAP 100

July 20, 1993

The Honorable Nathan Hecht
Justice
The Supreme Court of Texas
Supreme Court Building Room 104
201 West 14th Street
Austin, Texas 78701

Re: Texas Rules of Appellate Procedure

Dear Justice Hecht:

Here are additional random comments on the Rules. I apologize for not rounding them all up earlier.

(1) Texas Rule of Appellate Procedure 4(b): Does the Court intend that the term "certificate of mailing" refer to Form 3817 described in sections 931.1-.522 of the U.S. Postal Service's *Domestic Mail Manual*, or does the term "certificate of mailing" have a more general meaning that would include a receipt for certified mail (Form 3800) described in sections 912.1-.8?

(2) Texas Rule of Appellate Procedure 19: It would expedite motion practice in the courts of appeals to require a certificate of conference. Motions without opposition would bear the word "unopposed" in their caption and contain a statement that movant has conferred with all parties and no one opposes the motion. The appellate court could then consider such an unopposed motion without waiting the usual ten days. Motions with opposition would contain a statement that movant has conferred with all parties and counsel cannot agree about the disposition of the motion. Agreed or joint motions would be signed by all parties or their counsel similar to Texas Rule of Appellate Procedure 8.

(3) Texas Rules of Appellate Procedure 79(d), (e) and 100(f): Is it a "motion for rehearing en banc" or a "motion for reconsideration en banc"?

(4) Texas Rules of Appellate Procedure 90(c): In theory the rule allows the court of

appeals to order an opinion published after the court rules on the last timely filed motion for rehearing if the parties do not seek relief from the supreme court (no motion for rehearing is required, of course, in a criminal case). This may be a loophole.

(5) Texas Rule of Civil Procedure 5: Why is there no provision regarding prima facie evidence of the date of mailing by means of a certificate of mailing?

(6) Texas Rule of Civil Evidence 204: Do we really need the provisions that refer to taking judicial notice of the contents of the *Texas Register* and the *Texas Administrative Code* in light of the Administrative Procedure and Texas Register Act and the Texas Administrative Code Act? Tex. Rev. Civ. Stat. Ann. art. 6252-13a, § 4(c), art. 6252-13b, § 4 (West Supp. 1993); *Metro Fuels, Inc. v. City of Austin*, 827 S.W.2d 531, 532 n.3 (Tex. App.—Austin 1992, no writ).

(7) When does true plenary jurisdiction of the appellate court expire—after ruling on the last timely filed motion for rehearing, issuance of the mandate, or expiration of the term of court? Theoretically it's probably the expiration of the term of court, but I believe the supreme court would frown if a court of appeals in December sua sponte vacated a judgment the court of appeals originally rendered in January of the same year and rendered a new and different judgment, especially if the mandate issued in April. Perhaps it would be good to have an appellate rule similar to Texas Rule of Civil Procedure 329b that defines the plenary jurisdiction of the appellate court without reference to the term of court.

Once again, thank you for your receptiveness to comments on the Rules. My theory is not to gripe about the Rules, but rather try to correct the perceived flaws. I trust I'm not merely being a pest!

Respectfully,

4543.001

WHD
LHS

√5-5-92
SB

HAYNES AND BOONE, L.L.P.
ATTORNEYS AND COUNSELORS AT LAW

1600 SMITH STREET SUITE 3700
HOUSTON, TEXAS 77002-3445
TELEPHONE 713/547-2000
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AUSTIN
DALLAS
FORT WORTH
HOUSTON
SAN ANTONIO

WRITER'S DIRECT DIAL NUMBER:

(713) 547-2017

5/2

HHD
Sct Supc Agenda
✓ CoAJ staff
J Hecht.

May 1, 1992

Luther Soules
Soules & Wallace A P.C.
901 MoPac Expwy. So., Suite 315
Austin, Texas 78746

RE: Supreme Court Advisory Committee

Dear Luke:

This is to propose a clarification in Tex. R. App. P. 121(b) - the mandamus rule subsection concerning service.

A problem arises when taking an original proceeding to the supreme court after it has been ruled on by the court of appeals. Because the proceeding is an original proceeding, the court of appeals does not forward the record. The quandary for the movant is whether to again copy and serve all parties with the record. With multi-party cases and large records, this can be very expensive and burdensome.

My suggestion is:

> (b) Service. Relator shall promptly serve upon respondent and each real party in interest a copy of the motion, petition, brief, and record. In a supreme court proceeding, if an original proceeding has already been considered by a court of appeals, service of the record shall include an index of those documents previously served from the court of appeals proceeding and any new documents upon which relator relies that have not previously been served.

(Suggested addition underlined.)

Thank you for considering this problem.

Sincerely,

Lynne Liberato

LL/vll

h-37101

THE SUPREME COURT OF TEXAS

Justice Nathan L. Hecht — *Court Rules Liaison*

MEMORANDUM

TO: Luther H. Soules, Chairman
Supreme Court Rules Advisory Committee

October 2, 1990

RE: TRAP 121(d)

The Court proposes to change Texas Rule of Appellate Procedure 121(d) as follows:

Rule 121. Mandamus, Prohibition and Injunction in Civil Cases

(a) Commencement. [No change.]

(b) Service. [No change.]

(c) Action on Motion. [No change.]

(d) Temporary Relief. If the facts stated in the petition show that relator will be prejudiced unless immediate temporary relief is granted, the court may grant temporary relief ~~after granting the motion for leave to file,~~ without notice to respondents, as the exigencies of the case require. The court may require a bond for the protection of the adverse parties as a condition to the temporary relief. An order granting temporary relief shall be effective until the final decision of the case, unless vacated or modified.

(e) Notification. [No change.]

(f) Oral Argument. [No change.]

(g) Notice of Order. [No change.]

Ordinarily, the Court is reluctant to grant a motion for leave to file petition for mandamus until a response has been requested and filed. Not infrequently, however, the motion is accompanied by a request for temporary relief, and it is relatively clear that such relief should be granted pending final disposition. To grant a motion for

leave to file merely to grant temporary relief pending filing of a response, only to find that the motion should not have been granted, is a cumbersome procedure. A better procedure is to grant temporary relief staying proceedings until a response is received, and then decide the motion for leave to file. The Court is empowered to use this procedure. TEX. CONST. art. V, § 3; *Texas Farm Bureau Cotton Ass'n v. Lennox*, 297 S.W. 743 (Tex. 1927).

We invite any comments from the Rules Advisory Committee.

c: All Justices

Texas Tech University

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

8/20

August 15, 1990

HHD, Supc Sup Ct
✓ Agenda
J Hecht
COAs.

Mr. Luther Soules III
Soules & Wallace
Republic of Texas Plaza, 10th Floor
175 East Houston Street
San Antonio, Texas 78205-2230

Tex. R. App. P. 121(a)(3)

Dear Luke:

The above rule requires that three (3) copies of a mandamus motion, petition, and brief are to be filed in the court of appeals while T.R.A.P. 74(i) requires six (6) copies of a brief for an ordinary appeal. When we amended T.R.A.P. 74(i) to require six copies, did we forget about the number of copies on mandamus or was this a conscious decision?

It appears to me that the reason for requiring six copies for an ordinary appeal would apply equally to mandamus.

Sincerely,

Hadley

J. Hadley Edgar
Robert H. Bean Professor of Law

JHE:lw

4543.001 LHS hhd

4-19-91 SB

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

5/2 HHD
Sofe Subc TRAP
TRCP 751
✓ ✓ Agenda
✓ COAJ.
TRAP 131

April 17, 1991

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

Dear Luke:

Enclosed is a copy of a letter the Court's clerk received from John Holloway, along with comments from two attorneys communicated to my staff attorney by telephone.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

LAW OFFICES OF

JOHN H. HOLLOWAY

926 North Wilcrest Drive

Houston, Texas 77079

(713) 464-9264

to LHS

March 26, 1991

Mr. John T. Adams
Clerk
The Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Dear Mr. Adams:

Confirming my telephone conversation with you yesterday, please furnish me a copy of any Appellate rules, procedures or written directions of the Supreme Court which were in existance on or before November 9, 1990 which address the "technical" requirement for applications for writ of error.

I am not asking about published rules of appellate procedure as appear in the 1991 special pamphlet by West Publishing as to existing rules. For example, under Section 9 of Rules of Appellate Procedure, Rule 131 (i) specifically addresses the fifty page requirement of applications. Is there anything that the Supreme Court has ever published as to what a page is or what kind of type would be acceptable?

If any such rules, directions, procedures, etc. are available, please furnish a certified copy and I will promptly mail you the required fee for this information.

Thank you for your kind help.

Very truly yours,

John H. Holloway

JHH/jo

4543.001 nhd LHS

9-24-91 SB

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

9/24 HHD. Scope TRAP 360 v. Ogletree COA (Evelyn) Flag

September 23, 1991

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

Dear Luke:

Enclosed is a copy of a memo from the Court's clerk, John Adams, suggesting a rule dealing with documents filed with the Court.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

M E M O R A N D U M

September 9, 1991

MEMO TO: Justice Cook
Justice Hecht
IN TURN

SUBJECT: Request for Rule

FROM: John Adams, Clerk

Our office receives calls on a daily basis from attorneys who want to know if we require briefs to be bound and if so, what color the cover should be. We tell them that there is no rule covering these, but the Clerk's office prefers that if bound, that the cover not be black, dark blue or red nor plastic. Our reason for this, is that we use red ink for our filing stamps to distinguish them from the print on the page, and the red does not show up on the colors mentioned and does not stick to plastic. Additionally, it takes extra time to file when we have to turn back the covers before we can apply the file stamps.

We would appreciate a rule in the next change that specifies the Court's preference on binding, binding material and color. It would also be helpful if the fees that the Court has approved, were somehow incorporated into the rules, since we still receive many filings without the required fees.

4543.001

hhd
LMS

✓10-3-90
83

THE SUPREME COURT OF TEXAS

Justice Nathan L. Hecht — *Court Rules Liaison*

MEMORANDUM

TO: Luther H. Soules, Chairman
Supreme Court Rules Advisory Committee

October 2, 1990

RE: TRAP 172

Among the changes just adopted is the following to TRAP 172:

> Rule 172. Argument
>
> (a) Time. In the argument of cases in the Supreme Court, each side may be allowed ~~thirty minutes in the argument at the bar, with fifteen minutes more in conclusion by petitioner~~ such time as the court orders. ~~In cases involving difficult questions, the time allotted may be extended by the court, provided application is made before the day of argument. The court may, in its discretion, shorten the time for argument. It~~ The court may, upon application before the day of argument, extend the time for argument, and may also align the parties for purposes of presenting oral argument.
>
> (b) Number of Counsel. (No change.)
>
> (c) Amicus Curiae. (No change.)
>
> Comment to 1990 change: To conform the time allowed for oral argument to present practice.

The principal reason for the change was to remove the suggestion that thirty minutes is a standard argument time when in fact the time for argument is so frequently shortened or lengthened that there is no standard practice.

The Court is now considering a further change in practice, which the rule change also allows: to allot each side the same time for argument, allowing the petitioner (or party in that position) to reserve such time for rebuttal as counsel desires. Thus, for example, rather than allot petitioner thirty minutes for argument, respondent thirty minutes for argument, and petitioner fifteen minutes for rebuttal, as was once our

practice, the Court would simply allot each side thirty minutes and allow petitioner to reserve such time for rebuttal as counsel desired. This is the procedure in the United States Supreme Court (SCR 28.3), and appears also to be followed in the U.S. Courts of Appeals (FRAP Rule 34(b)) and in many state courts. Our experience is that allowing some time for rebuttal is important in the presentation of the case, but allowing extra time for rebuttal is unnecessary and gives perhaps some advantage to the petitioner, who certainly occupies no less favorable position than respondent and often enjoys a more favorable position by virtue of having convinced the Court to hear the case.

The Court is contemplating making the change effective January 1, 1991. However, we would first like to have the benefit of the views of the members of the Rules Advisory Committee. We therefore ask that you inform the members of this proposed change and ask that they give me their views in writing at their earliest convenience.

I appreciate your undertaking this on short notice.

c: All Justices

4543.001 LHS hhd

4-19-91 SB

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
RAUL A. GONZALEZ
OSCAR H. MAUZY
EUGENE A. COOK
JACK HIGHTOWER
NATHAN L. HECHT
LLOYD DOGGETT
JOHN CORNYN
ROBERT A. "BOB" GAMMAGE

CLERK
JOHN T. ADAMS

EXECUTIVE ASS'T
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T
MARY [illegible] DEFIBAUGH

HHD

Sep Subc TRAP TRCP 751

Agenda

Cons.

TRAP 211

April 17, 1991

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

Dear Luke:

Enclosed is a copy of a letter the Court's clerk received from John Holloway, along with comments from two attorneys communicated to my staff attorney by telephone.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

fo LHS

For future TRAP amendments:

Sarah Duncan, (512) 829-4511 [long distance], is revising a procedural manual, and wanted something she could cite to show why TRAP 211 "Extraordinary Matters" and TRAP 213 "**Postconviction** Applications for Writs of Habeas Corpus" which both appear in "Section Sixteen: Direct Appeals and Extraordinary Matters including **Post Conviction** Applications for Writ of Habeas Corpus"[1] do not apply to civil habeas corpus, mandamus and other extraordinary writs. She apparently felt it was not enough to cite the existence of TRAP 120 "Habeas Corpus in Civil Cases, TRAP 121 "Mandamus, Prohibition and Injunction in Civil Cases" and TRAP 122 "Orders of the Supreme Court on Petition for Mandamus, Habeas Corpus, and Prohibition" in "Section Eight: Original Proceedings." While she understood that the TRAP 120 et seq. governed civil cases, she felt that nothing precluded people from thinking that TRAP 211 requirements, including its specific description of internal administrative handling, could be tacked on to TRAP 120 et seq. requirements. She felt that the two rules were not necessarily inconsistent. She mentioned that she had discussed some similar problem with Judge Clinton before the rule changes.

So, to avoid causing problems to the literal-minded, perhaps the headings to the various sections of the rules should be amended to make unmistakeably clear which rules apply to which court.

[P.S.: Note the use of two alternative spellings of "postconviction" or "post conviction."]

---

[1] Between TRAP 210 "Direct Appeal in Death Penalty Cases" and TRAP 214 "Review of Certified State Criminal Law Questions."

4543.001 LHS hhd

4-19-91 SB

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
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5/2 HHD Soles Subc TRAP TRAP 751 ✓ Agenda ✓ COAJ. TRAP 213

April 17, 1991

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

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to LHS

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[1] Between TRAP 210 "Direct Appeal in Death Penalty Cases" and TRAP 214 "Review of Certified State Criminal Law Questions."

CHARLES ADKIN SPAIN, JR.

Court of Appeals for the Third District of Texas
Price Daniel, Sr. Building Room 101
209 West 14th Street
Austin, Texas 78701

Staff Attorney
Telephone: (512) 463-1733

TRAP 234

October 5, 1992

The Honorable Nathan Hecht
Justice
The Supreme Court of Texas
Price Danial Sr., Building Room GO4A
209 West 14th Street
Austin, Texas 78701

Re: Texas Rules of Appellate Procedure

Dear Justice Hecht:

Here are some random comments on the Rules:

(1) Rule 20: Since the new Rules for Admission to the Bar now govern pro hac vice admissions in the appellate courts, will nonadmitted attorneys tendering amicus curiae briefs have to comply with Rule for Admission to the Bar 19?

(2) Rule 57(a)(1): Change "number of the supreme judicial district" to "number of the court of appeals district".

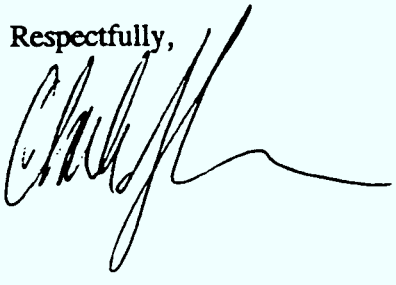
(3) Rule 90(i): What exactly is an "unpublished opinion"? Is a nonfinal opinion designated for publication, e.g., one with a pending motion for rehearing, a "published opinion"? *See Yeager v. State*, 727 S.W.2d 280, 281 n.1 (Tex. Crim. App. 1987); *Henderson v. State*, 822 S.W.2d 171, 172 (Tex. App.—Houston [1st Dist.] 1991, no pet.) (refusing to follow *Cole v. State*, No. 1179-87 (Tex. Crim. App. Nov. 14, 1990), *reh'g granted*, (July 3, 1991)). I believe that one possible solution is that the opinion is not "published" until it is released for final publication to West Publishing Company. This, of course, would prohibit citation to cases appearing only in the *Texas Supreme Court Journal*, but otherwise anyone who loses because a court relied on nonfinal authority must preserve a point of error alleging what really isn't error: "The court erred in relying on nonfinal case authority that may change on

rehearing." This appears to be more of a problem in criminal cases, but some amendment to Rule 90 would help.

(4) Rule 234: The supreme court and courts of appeals arguably need an equivalent rule to avoid the necessity of issuing an order to that effect, i.e., Order of December 31, 1987, 31 Tex. Sup. Ct. J. 160 (continuing to next term of court all causes, applications for writs of error, motions, and other matters filed and to be filed and not finally disposed of during 1987 term). It escapes me why former Texas Rule of Civil Procedure 458(d) was not carried forward to the Texas Rules of Appellate Procedure, but former Texas Rule of Criminal Post Trial and Appellate Procedure 314 was carried forward as Texas Rule of Appellate Procedure 234.

Thank you for your receptiveness to comments on the Rules.

Respectfully,



4543.001 LHS hnd
✓10-15-92 SB

THE SUPREME COURT OF TEXAS

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10/16

H/D, SCAC Subc Offices ✓ COAs Staffs

October 12, 1992

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

Dear Luke:

Enclosed are copies of the following letters:

1. Justice of the Peace John Hawkins regarding Rule 528.

2. Michael Weston regarding summary judgment procedures.

3. Charles Spain regarding the Texas Rules of Appellate Procedure.

I would appreciate your bringing these to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL. (512) 463-1312
FAX. (512) 463-1365

October 12, 1992

Mr. Charles Adkin Spain, Jr.
Court of Appeals for the Third District of Texas
Price Daniel, Sr. Building Room 101
209 West 14th Street
Austin TX 78701

Dear Mr. Spain:

Thank you for your letter regarding the Texas Rules of Appellate Procedure. I have sent a copy to the chairman of the Rules Advisory Committee with the request that your comments be considered fully in making additional revisions in the rules.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

xc: Mr. Luther H. Soules III

CC: LHS
orig: HHD
1-13-92

GENE L. DULANEY
DISTRICT JUDGE, 132ND JUDICIAL DISTRICT
Scurry and Borden Counties
Scurry County Courthouse
Snyder, Texas 79549
915-573-5371

HHD
Supr Ct
Evidence Sec
COPIES

January 10, 1992

Mr. Luther Soules
Soules and Wallace
175 East Houston Street
10th Floor
San Antonio, Texas 78205-2203

Dear Mr. Soules,

Your committee on Local Rules of Court and possible changes in the Rules of Civil Evidence and the Rules of Criminal Evidence has solicited input from the Judges of Texas.

I would request that Rule 606(b) of the Rules of Criminal Evidence, a copy of which is enclosed, be rewritten for clarification purposes.

In my opinion this rule is, at best, ambiguous and at worst is contradictory.

Thank you for your help.

Sincerely yours,

Gene L. Dulaney

Gene L. Dulaney

RULE 511. WAIVER OF PRIVILEGE BY VOLUNTARY DISCLOSURE

A person upon whom these rules confer a privilege against disclosure waives the privilege if (1) he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged or (2) he or his representative calls a person to whom privileged communications have been made to testify as to his character or a trait of his character, insofar as such communications are relevant to such character or character trait.

RULE 512. PRIVILEGED MATTER DISCLOSED UNDER COMPULSION OR WITHOUT OPPORTUNITY TO CLAIM PRIVILEGE

A claim of privilege is not defeated by a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege.

RULE 513. COMMENT UPON OR INFERENCE FROM CLAIM OF PRIVILEGE; INSTRUCTION

(a) Comment or Inference Not Permitted. Except as provided in Rule 504(a), the claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel, and no inference may be drawn therefrom.

(b) Claiming Privilege Without Knowledge of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) Jury Instruction. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

ARTICLE VI. WITNESSES

RULE 601. COMPETENCY AND INCOMPETENCY OF WITNESSES

(a) Every person is competent to be a witness except as otherwise provided in these rules. The following witnesses shall be incompetent to testify in any proceeding subject to these rules:

(1) *Insane Persons.* Insane persons who, in the opinion of the court, are in an insane condition of mind at the time when they are offered as a witness, or who, in the opinion of the court, were in that condition when the events happened of which they are called to testify.

(2) *Children.* Children or other persons who, after being examined by the court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated.

RULE 602. LACK OF PERSONAL KNOWLEDGE

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

RULE 603. OATH OR AFFIRMATION

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

RULE 604. INTERPRETERS

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.

RULE 605. COMPETENCY OF JUDGE AS WITNESS

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

RULE 606. COMPETENCY OF JUROR AS A WITNESS

(a) At the Trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict

or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify as to any matter relevant to the validity of the verdict or indictment. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

RULE 607. WHO MAY IMPEACH

The credibility of a witness may be attacked by any party, including the party calling him.

RULE 608. EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

(a) Opinion and Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence.

RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record but only if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if (1) based on the finding of the rehabilitation of the person convicted, the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment, or (2) probation has been satisfactorily completed for the crime for which the person was convicted, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment, or (3) based on a finding of innocence, the conviction has been the subject of a pardon, annulment, or other equivalent procedure.

(d) Juvenile Adjudications. Evidence of juvenile adjudications is not admissible under this rule unless required to be admitted by the Constitution of the United States or Texas.*

(e) Pendency of Appeal. Pendency of an appeal renders evidence of a conviction inadmissible.

(f) Notice. Evidence of a conviction is not admissible if after timely written request by the adverse party specifying the witness or witnesses, the proponent fails to give to adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

* Pub.Note: But see Vernon's Ann.C.C.P. art. 37.07, sec. 3, subsec. (a), which provides in part:

"Additionally, notwithstanding Rule 609(d), Texas Rules of Criminal Evidence, evidence may be offered by the state and the defendant of an adjudication of delinquency based on a violation by the defendant of a penal law of the grade of felony unless:

(1) the adjudication is based on conduct committed more than five years before the commission of the offense for which the person is being tried; and

(2) in the five years preceding the date of the commission of the offense for which the person is being tried, the person did not engage in conduct for which the person has been adjudicated as a delinquent child or a child in need of supervision and did not commit an offense for which the person has been convicted."

RULE 610. MODE AND ORDER OF INTERROGATION AND PRESENTATION

(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

CHARLES ADKIN SPAIN, JR.
Court of Appeals for the Third District of Texas
Post Office Box 12547
Capitol Station
Austin, Texas 78711-2547

Staff Attorney
Telephone: (512) 463-1733

TRCE 204

July 20, 1993

The Honorable Nathan Hecht
Justice
The Supreme Court of Texas
Supreme Court Building Room 104
201 West 14th Street
Austin, Texas 78701

Re: Texas Rules of Appellate Procedure

Dear Justice Hecht:

Here are additional random comments on the Rules. I apologize for not rounding them all up earlier.

(1) Texas Rule of Appellate Procedure 4(b): Does the Court intend that the term "certificate of mailing" refer to Form 3817 described in sections 931.1-.522 of the U.S. Postal Service's *Domestic Mail Manual*, or does the term "certificate of mailing" have a more general meaning that would include a receipt for certified mail (Form 3800) described in sections 912.1-.8?

(2) Texas Rule of Appellate Procedure 19: It would expedite motion practice in the courts of appeals to require a certificate of conference. Motions without opposition would bear the word "unopposed" in their caption and contain a statement that movant has conferred with all parties and no one opposes the motion. The appellate court could then consider such an unopposed motion without waiting the usual ten days. Motions with opposition would contain a statement that movant has conferred with all parties and counsel cannot agree about the disposition of the motion. Agreed or joint motions would be signed by all parties or their counsel similar to Texas Rule of Appellate Procedure 8.

(3) Texas Rules of Appellate Procedure 79(d), (e) and 100(f): Is it a "motion for rehearing en banc" or a "motion for reconsideration en banc"?

(4) Texas Rules of Appellate Procedure 90(c): In theory the rule allows the court of

appeals to order an opinion published after the court rules on the last timely filed motion for rehearing if the parties do not seek relief from the supreme court (no motion for rehearing is required, of course, in a criminal case). This may be a loophole.

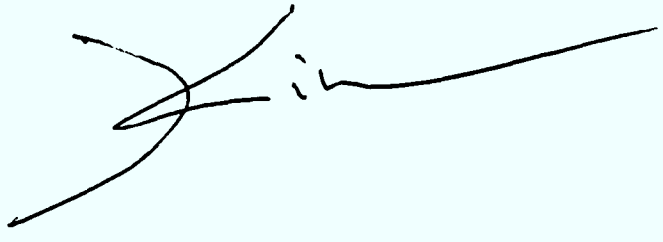
(5) Texas Rule of Civil Procedure 5: Why is there no provision regarding prima facie evidence of the date of mailing by means of a certificate of mailing?

(6) Texas Rule of Civil Evidence 204: Do we really need the provisions that refer to taking judicial notice of the contents of the *Texas Register* and the *Texas Administrative Code* in light of the Administrative Procedure and Texas Register Act and the Texas Administrative Code Act? Tex. Rev. Civ. Stat. Ann. art. 6252-13a, § 4(c), art. 6252-13b, § 4 (West Supp. 1993); *Metro Fuels, Inc. v. City of Austin*, 827 S.W.2d 531, 532 n.3 (Tex. App.—Austin 1992, no writ).

(7) When does true plenary jurisdiction of the appellate court expire—after ruling on the last timely filed motion for rehearing, issuance of the mandate, or expiration of the term of court? Theoretically it's probably the expiration of the term of court, but I believe the supreme court would frown if a court of appeals in December sua sponte vacated a judgment the court of appeals originally rendered in January of the same year and rendered a new and different judgment, especially if the mandate issued in April. Perhaps it would be good to have an appellate rule similar to Texas Rule of Civil Procedure 329b that defines the plenary jurisdiction of the appellate court without reference to the term of court.

Once again, thank you for your receptiveness to comments on the Rules. My theory is not to gripe about the Rules, but rather try to correct the perceived flaws. I trust I'm not merely being a pest!

Respectfully,



Adopted

Rule 407. SUBSEQUENT REMEDIAL MEASURES; NOTIFICATION OF DEFECT

(a) **Subsequent Remedial Measures.** When after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as providing ownership, control or feasibility of precautionary measures, if controverted, or impeachment. ~~Nothing in this rule shall preclude admissibility in products liability cases based on strict liability~~.

4543.001

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March 7, 1990

Direct Dial Number
(214) 939-5421

Luther H. Soules III
Soules & Wallace
175 East Houston Street
San Antonio, Texas 78205-2230

Justice Nathan L. Hecht
The Supreme Court of Texas
P. O. Box 12248
Capitol Station
Austin, Texas 78711

Hon. Sam Houston Clinton
Judge, Court of Criminal Appeals
P. O. Box 12308
Austin, Texas 78711

Re: Administration of Rules of Evidence Committee

Gentlemen:

I include herein the report of the Administration of Rules of Evidence Committee of the State Bar of Texas for 1989-90. Our Committee met on February 24, 1990, and considered numerous proposed rules changes, adopting three, tabling one, and rejecting the remainder. Attached hereto are the three rules changes adopted by our Committee.

First, we are proposing that additional language be added to Rule 102a(a)(1) to make it clear that running objections do preserve error in Texas and to specify the circumstances in which they are appropriate. As the attached discussion to the proposed rule shows, there is presently a split of authority in Texas as to the efficacy of running objections. We believe this rule will solve a very real problem that presently exists.

Second, our Committee has again proposed deletion of the last sentence of Tex. R. Civ. Evid. 407(a). This is the third year that our Committee has proposed this change. We have attached a comment to our proposed rules change. This comment makes it clear that, by deleting the last sentence of Rule 407(a), we are not intending that any inference be drawn as to the applicability of Rule 407(a) to products liability cases. It was the intention of our Committee that the rule itself should be neutral on this issue and that the matter should be left to the courts for development without the rule implying a result. If the Court adopts our recommendation, we would suggest that our comment be adopted as the legislative history of the rule to make it clear that courts should draw no inference from this deletion.

Third, attached is a proposed Rule 413 dealing with evidence of wealth or net worth. Our Committee voted not only to propose this rule to the Texas Supreme Court Advisory Committee, but also to refer it to the Committee on the Administration of Justice of the State Bar of Texas for their consideration of a similar procedural rule providing for the bifurcation of cases in which evidence of net worth or wealth will go to the jury. By copy of this letter, I am informing the Chairman of the COAJ of this matter.

In addition to these proposed changes, the Committee considered and tabled until next year a proposed addition to the 1000 series of the rules of evidence concerning the translation of foreign language documents. It was the sense of the Committee that such a rule was needed, but that more study was necessary to iron out the problems. Our Committee also considered a change to Rule 609(c)(2) concerning impeachment of a witness by evidence of a prior criminal conviction. I am enclosing, for your files, a copy of the subcommittee report from Mike Prince of Carrington Coleman concerning this proposal. The Committee voted to make no change to this rule. The Committee also considered changing Rule 614 of the Texas Rules of Criminal Evidence to require the production of a witness' written statement prior to the time that the witness testifies, but the Committee voted to make no change in this rule.

Our Committee also discussed whether to make changes in Rules 703 and 705 to make it clear that hearsay evidence relied upon by an expert for his opinion is admissible only for this limited purpose, but the Committee rejected this proposal. Suggestions were also made to change Rule 803(6) and to adopt a proposed Rule 803(25). The Committee voted to reject both of these changes, and I am attaching hereto copies of the reports of the subcommittee from Thomas C. Riney. Our Committee also rejected a proposed Rule 514 concerning a parent-child privilege and a proposed change to Rule 601(b), which would have specified the manner by which oral statements may be corroborated. Our Committee also considered several other miscellaneous proposals, but rejected them all.

Respectfully,

R. Doak Bishop

RDB/ls:143
Enclosures

cc: Hon. David Peeples
Justice
Fourth Court of Appeals
500 City Courthouse
San Antonio, Texas 78305

Darrell E. Jordan
President
State Bar of Texas

Rule 413

In a case in which exemplary damages are sought against a defendant, no evidence pertaining to the wealth or net worth of the defendant may be presented to, or in the presence of, the jury, or any juror, until after the point in the litigation at which findings have been made by the trier of fact that establish that the defendant may be liable in the case.

4543.001

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March 7, 1990

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175 East Houston Street
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Justice Nathan L. Hecht
The Supreme Court of Texas
P. O. Box 12248
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First, we are proposing that additional language be added to Rule 102a(a)(1) to make it clear that running objections do preserve error in Texas and to specify the circumstances in which they are appropriate. As the attached discussion to the proposed rule shows, there is presently a split of authority in Texas as to the efficacy of running objections. We believe this rule will solve a very real problem that presently exists.

Second, our Committee has again proposed deletion of the last sentence of Tex. R. Civ. Evid. 407(a). This is the third year that our Committee has proposed this change. We have attached a comment to our proposed rules change. This comment makes it clear that, by deleting the last sentence of Rule 407(a), we are not intending that any inference be drawn as to the applicability of Rule 407(a) to products liability cases. It was the intention of our Committee that the rule itself should be neutral on this issue and that the matter should be left to the courts for development without the rule implying a result. If the Court adopts our recommendation, we would suggest that our comment be adopted as the legislative history of the rule to make it clear that courts should draw no inference from this deletion.

Third, attached is a proposed Rule 413 dealing with evidence of wealth or net worth. Our Committee voted not only to propose this rule to the Texas Supreme Court Advisory Committee, but also to refer it to the Committee on the Administration of Justice of the State Bar of Texas for their consideration of a similar procedural rule providing for the bifurcation of cases in which evidence of net worth or wealth will go to the jury. By copy of this letter, I am informing the Chairman of the COAJ of this matter.

In addition to these proposed changes, the Committee considered and tabled until next year a proposed addition to the 1000 series of the rules of evidence concerning the translation of foreign language documents. It was the sense of the Committee that such a rule was needed, but that more study was necessary to iron out the problems. Our Committee also considered a change to Rule 609(c)(2) concerning impeachment of a witness by evidence of a prior criminal conviction. I am enclosing, for your files, a copy of the subcommittee report from Mike Prince of Carrington Coleman concerning this proposal. The Committee voted to make no change to this rule. The Committee also considered changing Rule 614 of the Texas Rules of Criminal Evidence to require the production of a witness' written statement prior to the time that the witness testifies, but the Committee voted to make no change in this rule.

Our Committee also discussed whether to make changes in Rules 703 and 705 to make it clear that hearsay evidence relied upon by an expert for his opinion is admissible only for this limited purpose, but the Committee rejected this proposal. Suggestions were also made to change Rule 803(6) and to adopt a proposed Rule 803(25). The Committee voted to reject both of these changes, and I am attaching hereto copies of the reports of the subcommittee from Thomas C. Riney. Our Committee also rejected a proposed Rule 514 concerning a parent-child privilege and a proposed change to Rule 601(b), which would have specified the manner by which oral statements may be corroborated. Our Committee also considered several other miscellaneous proposals, but rejected them all.

Respectfully,

R. Doak Bishop

RDB/ls:143
Enclosures

cc: Hon. David Peeples
Justice
Fourth Court of Appeals
500 City Courthouse
San Antonio, Texas 78305

Darrell E. Jordan
President
State Bar of Texas

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✓1-5-93 hhd
SB

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
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1/6

January 4, 1993 HHD, Same Evidence Subc Agenda ✓ OAJ Staff. NLH

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

Dear Luke:

Enclosed is a letter from Peter Chamberlain regarding Texas Rule of Civil Evidence (510(d)(6).

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

THE SUPREME COURT OF TEXAS
P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

January 4, 1993

Mr. Peter S. Chamberlain
P. O. Box 828
Greenville TX 75403-0828

Dear Mr. Chamberlain:

Thank you for your letter and comments regarding Texas Rule of Civil Evidence 510(d)(6). I have sent a copy to the chairman of the Rules Advisory Committee with the request that your comments be considered fully in making additional revisions in the rules.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

c: Mr. Luther H. Soules III

PETER S. CHAMBERLAIN
Attorney at Law
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November 3, 1992

Rules Committee
Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711-2248

Re: TEX. R. CIV. EV. 510(d)(6)
Counselor's Psychological Records
Amendment Needed

Dear Sirs:

I believe that the recent case of Cheatham v. Rogers, 824 S.W.2d 231 (Tex. App - Tyler 1992), concerning which see "Obtaining Mental Health Records of Non-Parties Under Rule 510(d)(6)," 55 Tex. B. J. No. 10, p. 1081, is likely to cause terrible mischief in cases in which expert assistance is needed. One dictum in it may also create problems in many other domestic cases.

Many experts whose evidence may be useful in child custody and related cases have themselves had psychological trauma, counseling, analysis, therapy, or all of these. This fact is typically well known to their university faculties and licensing bodies. Most professional experts used in child custody and child abuse cases are issued degrees by institutions regulated by the State, and licensed by the State, just as are attorneys. Whatever happened to the TEX. CONST. Art. II separation of powers doctrine if the appellate courts hold that the credibility of a professional holding a valid degree and current State license is, ipso facto, "effectively impeached."

Representing a number of apparently sexually abused children, I attended a recent CLE conference (credited on my current report) at which it became clear that a large number of professionals dealing with that dreadfully sensitive subject had "CLEP credits" as victims, and therapy for the lasting consequences, before they had academic training. I am afraid that the policies behind TEX. HEALTH CODE - MENTAL HEALTH CODE §611.001, formerly TEX. REV. CIV.

STAT. Art. 5561-h, and TEX. R. CIV. EV. 510, to further free communication to mental health professionals, and to avoid unwarranted invasions of personal privacy, will be frustrated by this ruling.

Will you please tell me how to go get an expert on child sexual abuse to donate, much less sell, her professional efforts, on behalf of one of the many sexually and otherwise abused children I represent from time to time, when the first thing the perpetrator's lawyer is going to do is inquire into the most intimate details of the expert's and her family's life? This ruling will make it downright difficult to get any professional, and certainly any professional who has, for whatever reason, ever consulted with a psychotherapist, psychologist, or psychiatrist, to testify in a matters involving child abuse and child sexual abuse, especially where a professional, or someone close to them, may have themselves suffered abuse. This ruling hands one more unfair weapon to a child abuser.

Even more disturbing is the Tyler Court's expressed position, in dictum, that:

> "If . . . the counselor's expert opinion comes from one who is impaired mentally or emotionally, she would be effectively impeached by such evidence."

When I took evidence from the late Edmund M. Morgan, and in every trial I have ever been in, the trial court and I were led to believe that the jury, or the trier of fact, was supposed to decide whether or not a witness was impeached or believed, based upon consideration of all the evidence in that particular case. The notion that the credibility of an expert or other witness "would be effectively impeached", as a matter of law pronounced by an appellate Court, "if the counselor . . . is impaired . . . emotionally," imports into our law and procedure an endless inquiry into the emotional condition of experts, of experts' professors, and maybe of experts' licensing board members' analysts, and appears to represent a substitution of judgment on credibility by the trier of fact who heard that expert or other witness with a fiat generalization. Our pattern jury instructions even leave the weight to be given to prior felony convictions of a witness to the jury "if [the jury decides] it does aid [that process]."

The late Dr. Carl Menninger, father of American psychiatry, published a paper shortly before his death [of which I have only a summary available at this moment] making a convincing case for the proposition that well over Forty Percent (40%) of women and girls, and over Twenty-Five Percent (25%) of boys and men, have been

traumatized by sexual abuse, at home, as children. If this rule stands, you are really going to open a lot of wounds, and we're going to get into an endless discovery process in child abuse and custody litigation--and also about one-fourth of other litigation generally--not to mention elections for Sheriff, Legislator, Governor, and for judges and Supreme Court Justices. It would be at least as logical to require Judges and Appellate Justices to turn over their, and their family's, sexual and psychological histories, so litigants can decide whether or not to move to disqualify them, or voters whether to vote for or against them, as to require, in the ordinary case, that a psychological expert's personal and family psychological records be disclosed.

It would appear that fundamental privacy guarantees should at least require a prima facie showing of good cause to believe that an expert, or other witness, is unfairly biased or that their competence or credibility is impaired, to justify this kind of invasion into such personal and private matters; that a particularized showing of good cause, plus an in camera review with appropriate privacy safeguards, is the very minimum due process before such deep-water fishing expedition is allowed, and that the Tyler Court has now rendered it necessary that the Rules be amended, and perhaps that the trial court give an instruction, make clear that emotional trauma does not disqualify or impeach an expert or other witness.

When I lobbied as far back as 1974 for what became TEX. REV. CIV. STAT. ANN. Art. 5561-h, now TEX. MENTAL HEALTH CODE §611.011 et seq., members of the Legislature were shocked to learn that Texas didn't already have protection of such fundamental privacy rights. One Legislator, who shall remain nameless, hastily joined the bill, and an amendment I proposed to make clear that it covered group-therapy situations, when he realized that his girlfriend's group members might be called, under earlier law, to testify about what she had said about him, and about transactions between them, in her group therapy process.

An expert or other witness' history as a child abuse victim would only rarely be expected to constitute relevant or material evidence under TEX. R. CIV. EV. 401 - 402. This is also a matter in which:

> "Although [allegedly or arguably] relevant, [it would clearly appear that such] evidence may [and should] be excluded if its probative value [whatever that would be, if any] is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, . . ." TEX. R. CIV. EV. 403.

I have spent much of the last year involved in litigation on behalf of sexually abused children, in matters directly and proximately related to that abuse, mostly pro bono. One responsible elected official from whom I sought help and the protection of the law for a child who had suffered head trauma, loss of use of an ear and most use of an eye, sexual child abuse by her father and others, and three years of diagnosed Post-Traumatic Stress Syndrome, said:

> "This is just a little **'BABY-DIDDLING'** case and I don't want to spend much time on it."

I have had my family's and my legally protected psychological records stolen and urged in an effort to blackmail or disqualify me as guardian ad litem in a child custody case. I have had where I met my wife, and the professional expertise of the best man at our wedding, inquired into in a deposition challenging my representation, as guardian ad litem, of a child whose father fabricated allegations of sexual abuse and tried unsuccessfully to make his daughter repeat it. ironically, I have discussed having received treatment for suicidal depression on television and elsewhere, and many church film libraries and other resources have copies.

I've been challenged as counsel for children as not being detached and neutral on child abuse and child sexual abuse issues. Even in the worst nightmare construction of TEX. R. CIV. PROC. 13 or TEX. R. PROF. COND. §3.08(a), etc., whatever my personal training or other expertise, I'm not supposed to be an expert in a suit where I'm counsel, I'm supposed to be an advocate. And neither I, nor the Court's appointed psychologist--nor the Court--is supposed to be neutral, on the issue of child sexual abuse. I'm against it, and I want experts, judges, and appellate justices, who are against it.

Does this rule, or dictum, of per se impeachment of credibility, extend to a child litigant shown to be a sexually abused child who State officials knew for three years was suffering from diagnosed Post-Traumatic Stress Syndrome--or to police officers, jurors, magistrates, trial judges, or appellate justices? My copy of the Mental Health Code would indicate that having received treatment for a mental or emotional problem would not be admissible on an issue of competence. Significantly, in Duckett v. State, 797 S.W.2d 906, 192 (Tex. Cr. App. en banc 1990), construing TEX. R. CRIM. EV. 704 which is essentially the same as TEX. R. CIV. EV. 704, it was correctly pointed out that an expert could explain why otherwise-impeaching inconsistent testimony of child sexual

abuse victims was not impeaching but to be expected in such cases. Do we now need experts to explain our expert witnesses' own personal psychological charts?

Of course, if this ruling stands, maybe all witnesses, certainly all experts in psychological or child-abuse matters--and maybe all witnesses--should be asked Two (2) opening questions:

1. Have you had counseling?

2. If not, why not?

Yours very truly

PETER S. CHAMBERLAIN

PSC:mtf
cc:

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166b(3)
168
→ TRCE 703

February 28, 1990

Re: Proposed Changes to Texas Rules of Civil Procedure 166b(3)(c) and 168

Chambers of the Hon. Nathan L. Hecht, Justice
Texas Supreme Court
P. O. Box 12248 - Capitol Station
Austin, Texas 78711
(512) 463-1348

Dear Justice Hecht:

In mid-December, I attended a Houston Bar Association function in which Chief Justice Phillips was the featured speaker. The Chief Justice indicated the Court had received some very good feedback from the Bar concerning the Court's 1990 changes to the Texas Rules of Civil Procedure. He encouraged those attendees who had not responded to do so. This letter is in response to that request. I addressed this letter to you as I am told you are the Justice who is coordinating the changes for the Texas Rules of Civil Procedure.

I have three concerns I wish the Court to consider. The first concern deals with the proper construction of what constitutes a "written statement" under TEX. R. CIV. P. 166b(3)(c)(ii). The second concern deals with a conflict between TEX. R. EVID. 703--Basis of Opinion Testimony and TEX. R. CIV. P. 168--Interrogatories to Parties. The third concern is the need for a new rule that would permit a vocational rehabilitation expert to examine a party.

RULE 703 -- BASIS OF OPINION TESTIMONY
RULE 168 -- INTERROGATORIES TO PARTIES

There is a direct conflict between TEX. R. EVID. 703 and TEX. R. CIV. P. 168. The problem is whether an expert witness may rely on hearsay in the form of interrogatory answers filed by a non-adverse party. Please consider the following hypothetical:

> P sues D in tort. D sues T/P-D for contribution and indemnity. T/P-D is one of P's designated expert witnesses and a key fact witness. D serves interrogatories upon T/P-D. T/P-D's answers are favorable to P. T/P-D dies without his deposition having been taken. However, T/P-D's deposition was twice scheduled and twice cancelled by D long before T/P-D's death. Nevertheless, P has an accident reconstruction expert who interviewed the decedent several times. The information P's expert obtains from T/P-D is consistent with the physical evidence in the case and the opinions of P's other experts, and is of the type reasonably relied upon by experts. Likewise, T/P-D's interrogatory answers are also of a type reasonably relied upon by experts. Further, suppose that at the trial neither D nor T/P-D's estate read T/P-D's answers to D's interrogatories. P wants his expert to read to the jury T/P-D's answers to D's interrogatories in P's case against D. Can he do so?

Although this is an issue of first impression, P's expert should be allowed to read T/P-D's answers to the jury. The issue presents a conflict between TEX. R. CIV. P. 168, which states that interrogatory answers may only be used against an answering party, and TEX. R. EVID. 703, which states that experts may rely on hearsay statements as a basis for their opinion. Rule 168 should yield to Rule 703 for the following reasons:

1. Rule 703 does not limit the form of hearsay upon which an expert may rely;

2. The cases which construe Rule 703 allow experts to rely on hearsay which is no more trustworthy than sworn interrogatory answers;

3. The categories of admissible hearsay should be interpreted broadly, in accord with the courts' policy of liberally construing Rule 703;

4. Rule 168's policy reasons do not apply to these facts; and

5. The proposed approach presents no inherent procedural difficulties, as demonstrated by the fact that FED. R. CIV. P. 33(b), the federal counterpart to TEX. R. CIV. P. 168, contains no such restriction on the use of interrogatory answers.

First, TEX. R. EVID. 703 simply provides that if facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." This language does not otherwise restrict the form of admissible hearsay in any way. Nowhere does Rule 703 prohibit the use of sworn interrogatory answers.

Second, the cases which construe Rule 703 have permitted experts to rely on hearsay that was no more trustworthy than sworn interrogatory answers. *Liptak v. Pensabene*, 736 S.W.2d 953, 957 (Tex. App.--Tyler 1987, no writ); *Sharpe v. Safway Scaffolding Co.*, 687 S.W.2d 386, 392 (Tex. App.--Houston [14th Dist.] 1985, no writ). In *Liptak*, the expert testified about reasonable attorneys' fees. He relied in part upon such hearsay as time sheets and discussions with the attorney handling the case. In *Sharpe*, the expert relied in part upon statements of witnesses who were at the accident scene. Both *Liptak* and *Sharpe* permit P's expert to rely upon hearsay information derived from his face-to-face conversations with T/P-D.

Thus, in comparison with the hearsay relied upon in *Liptak* and *Sharpe*, T/P-D's sworn interrogatory answers have, if anything, a higher indicia of trustworthiness. The answers are sworn. The answers are consistent with the physical evidence in the case and the opinions of other experts. Yet, interrogatory answers should not be automatically admitted into evidence simply because they have a higher indicia of trustworthiness. Nor should their use be limited simply because they are not being used against the answering party. On the contrary, interrogatory answers should be treated just like all other out-of-court statements. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2180 at 574 (1970). In other words, they should be subject to the same hearsay exceptions as other out-of-court statements. *See id.*

Third, the categories of admissible hearsay should be interpreted broadly. Both the *Liptak* and *Sharpe* courts held that when the Texas Supreme Court adopted the Texas Rules of Evidence, which became effective September 1, 1983, the Supreme Court effectively overruled its more restrictive holding in *Moore v. Grantham.*[5/] Thus, *Liptak* and *Sharpe* liberally construe Rule 703 to permit an expert to base his opinion entirely upon hearsay. *See Liptak*, 736 S.W.2d at 957; *Sharpe*, 687 S.W.2d at 392. If Rule 703 should be liberally construed to allow an expert to rely entirely upon hearsay, then the categories of available hearsay should also be liberally construed. This furthers the purpose of Rule 703: to remove technical barriers to the truth so that all information which an expert relies upon comes into evidence.

The fourth reason Rule 168 should yield to Rule 703 is because the policy reasons underlying Rule 168 do not apply to these facts. While the case law does not clearly articulate them, there appear to be two policy reasons for Rule 168's limited use at trial. First, the Rule prevents admissions from being used against any party except the party which made the admissions. *See Ford Motor Credit Co. v. Draper*, 401 S.W.2d 848, 850 (Tex. Civ. App.--Texarkana 1966, no writ). Second, an answering party should not be able to use self-serving answers that were not subject to the hazards of cross-examination. *See Black v. Frank Paxton Lumber Co.*, 405 S.W.2d 412, 414 (Tex. Civ. App.--Dallas 1966, writ ref'd n.r.e.).

Neither reason applies here. P is not seeking to use T/P-D's interrogatory answers as admissions against other parties. Rather, P wants to show the jury that the events observed by this deceased eyewitness are consistent with the

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[5/] 599 S.W.2d 287 (Tex. 1980). In *Moore*, the Texas Supreme Court said that expert opinion testimony based solely on hearsay is inadmissible. 599 S.W.2d at 290. However, where an expert relies in part upon hearsay and in part upon statements that are properly in evidence, then the opinion testimony is admissible. *Id.* Under *Moore*, an expert witness's opinion must be based upon facts within the expert's personal knowledge, or assumed from common or judicial knowledge, or established by evidence." 599 S.W.2d at 290 (quoting *Reed v. Barlow*, 157 S.W.2d 933, 935 (Tex. Civ. App.--San Antonio 1941, writ ref'd)). An expert's opinion "is without value, and is inadmissible, if based upon facts and circumstances claimed by him from ex parte statements of third persons, and not established by legal evidence before a jury trying the ultimate issues to which the opinion relates." *Moore*, 599 S.W.2d at 290.

physical evidence, which thereby corroborates and further strengthens P's theory of the case. Moreover, D can hardly complain about his inability to cross-examine T/P-D when it is D who propounded the interrogatories. T/P-D could have hurt D's case just as easily with the answers he might have given in a timely taken deposition. Interrogatory answers are no more self-serving than other types of statements.[6/]

Finally, the proposed approach presents no inherent procedural difficulties for either the Texas Rules of Civil Procedure or the Rules of Evidence. This is demonstrated by the fact that the Federal Rules of Civil Procedure do not impose the restrictions of Rule 168. FED. R. CIV. P. 33(b) states as follows:

> (b) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.

Under the Federal Rules, an expert witness could read into evidence the interrogatory answers of a non-adverse party. Therefore, I recommend that TEX. R. CIV. P. 168 be amended to state as follows:

> 2. Scope. Interrogatories may relate to any matters which may be inquired into under Rule 166b, *and the answers may be used to the extent permitted by the rules of evidence*....

In the event the Court is not comfortable in going as far as FED. R. CIV. P. 33(b), then I recommend that TEX. R. CIV. P. 168 be amended to state as follows:

> 2. Scope. Interrogatories ... may be used only against the party answering the interrogatories. *However, if such interrogatory answers would be otherwise admissible under TEX. R. EVID. 703, then Rule 703 shall control as to their admissibility*....

[6/] While D should not be allowed to argue a lack of the right to cross-examine, the same cannot be said if this were a multi-party case. Nevertheless, the trial court could accommodate P's request and allay the concerns of other defendants by giving the jury a limiting instruction.

new rules that will become effective this summer or later this year. Please call or write if I may be of further assistance.

Very truly yours,

Stephen A. Mendel

SAM/bao

4543 001

LHS

7-21-93

THE SUPREME COURT OF TEXAS

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July 20, 1993

HHD
Scott Goguela
Legal
COAS Staff

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

Dear Luke:

Enclosed is a letter Chief Justice Phillips received from Judge Michael Schattman regarding Texas Rule of Evidence 902(10) and section 18.001 of the Civil Practice and Remedy Code.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan

Nathan L. Hecht
Justice

NLH:sm

Encl.

July 20, 1993

Hon. Michael D. Schattman
348th District Court
Tarrant County Justice Center
401 West Belknap
Fort Worth TX 76196-0281

Dear Mike:

Thank you for your letter and comments regarding Texas Rule of Evidence 902(10) and section 18.001 of the Civil Practice and Remedy Code. I have sent a copy to the chairman of the Rules Advisory Committee with the request that your comments be considered fully in making additional revisions in the rules.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

c: Mr. Luther H. Soules III

MICHAEL D. SCHATTMAN
DISTRICT JUDGE
348TH JUDICIAL DISTRICT OF TEXAS
TARRANT COUNTY JUSTICE CENTER
401 W. BELKNAP
FORT WORTH, TEXAS 76196-0281
(817) 884-2715

JUDY SIMS
COURT COORDINATOR
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LESLIE WEBB
COURT REPORTER
(817) 884-1790

July 13, 1993

Hon. Tom Phillips, Chief Justice
Supreme Court of Texas
P. O. Box 12428
Austin, Texas 78711

Re: Conflict between Evid. Rule 902(10) and Civ. Prac. & Rem. Code §18.001.

Dear Chief Justice:

Maybe I am stupid, There are plenty of reversals to prove that. However, I have just encountered a problem to which I do not see a solution: an affidavit which satisfies the form requirements of both Evidence Rule 902 (10) and Civil Practice & Remedies Code §18.001 yet was filed between 14 and 30 days before trial. The rule makes the affidavit admissible if filed more than 14 days before trial. The statute, however, requires that the affidavit be on file 30 days before it is effective.

Should not these be the same? I can see splitting the baby and saying that an affidavit filed say 21 days before trial is admissible to prove the fact and amount of service but not its reasonableness and necessity. But does that make sense? I would suggest that, unless there is a good reason for the difference, Rule 902 (10) be changed to 30 days. That would make it consistent with the statute and with the time frame for supplementation of discovery.

Thank you for your consideration of this inquiry. I hope that the summer recess gives you an opportunity to get your batteries recharged.

Very truly yours,

Mike Schattman

Michael D. Schattman

MDS/jks

CIVIL JUSTICE REFORM ACT OF 1990
ADVISORY COMMITTEE
WESTERN DISTRICT OF TEXAS

Please read the following descriptions and respond to the questions:

I. PROPOSED AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE:

1. Rule 16. Pre-Trial Conferences; Scheduling; Management

Under Fed. R. Civ. P. 16 (b)(5) a district judge or a magistrate judge would be required to issue the pre-trial order as soon as practicable after meeting with the parties or corresponding with the parties in some other manner, but in no event more than 60 days after the appearance of a defendant.

The amendments to Fed. R. Civ. P. 16(c) would increase a judge's discretion to impose limitations or restrictions on the use of expert testimony under Fed. R. Evid 702.

The judge may issue an order disposing of claims or issues under Fed. R. Civ. P. 56 if all the parties have had a reasonable opportunity to discover and present material pertinent to the disposition of those matters. The judge also has increased discretion to implement methods of alternative dispute resolution.

The judge is allowed to issue an order establishing a reasonable limit on the length of time allowed for the presentation of evidence or on the number of witnesses or documents that may be presented by any one party.

The judge is entitled to issue an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could on the evidence be the basis for a judgment of the matter of law entered pursuant to Fed. R. Civ. P. 50(a) or a judgment on the partial findings pursuant to Fed. R. Civ. P. 52(c).

Finally, judges are given more discretion to order separate trials pursuant to Fed. R. Civ. P. 42(b) with respect to a claim, counterclaim, cross-claim, or third party claim, or with respect to any particular issue of fact arising in the case.

(a) Would you approve of such changes? Yes — Approve

(b) Disapprove?

(c) COMMENTS:

2. Rule 26. General Provisions Governing Discovery; Duty of Disclosure

A. General Disclosures

Pursuant to Fed. R. Civ. P. 26(a), parties will be required to disclose to every other party (i) the name and, if known, the address and telephone number of each person reasonably likely to have information that bears significantly on the claims and defenses, identifying the subject of the information; (ii) a general description, including the location of all documents, data compilations, and tangible things in the possession, custody, or control of the party that are reasonably likely to bear significantly on the claims and defenses; (iii) the computation of any category of damages claimed by the disclosing party, making available for inspection and copying, as under Fed. R. Civ. P. 34, the documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and (iv) the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to set aside part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment, making available such agreement for inspection and copying as under Fed. R. Civ. P. 34.

These disclosures must be made by the plaintiff within 30 days after the service of an answer to the complaint, by a defendant within 30 days after serving its answer to the complaint, and, in any event by any party that has appeared in the case within 30 days after receiving from another party a written demand for early disclosure accompanied by the demanding party's disclosures.

Furthermore, parties are required to disclose to every other party any evidence which the party may present at trial pertaining to expert testimony under Fed. R. Civ. P. 702, 703, or 705. The disclosure is to be in the form of a written report signed by the witness that includes a complete statement of all opinions to be expressed and the basis and reasons therefor, the data or other information relied upon in forming such opinions, and any exhibits to be used as a summary of or support for such opinions, the qualifications of the witness, a listing of any other cases in which the witnesses testified as an expert at trial or in deposition within the proceeding 4 years. This disclosure is required to be made 60 days before the date the case is scheduled for trial or has been directed to be ready for trial and is subject to the duty of supplementation. In lieu of providing a written report, a

party may disclose the required information about its expert witnesses through the depositions of those witnesses under Fed. R. Civ. P. 30 commenced at least 90 days before such trial date.

(a) Would you approve of such changes?

(b) Disapprove? Disapprove

(c) COMMENTS: Expensive level of detail. Damages calculation 4/c 30 days is overously early.

B. Evidentiary Disclosures

In addition to the preceding required disclosures, each party shall disclose to every other party the following information regarding the evidence that the disclosing party may present at trial other than solely for impeachment purposes:

(1) The name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if need arises;

(2) The designation of those witnesses whose testimony is expected to be presented by means of deposition and, if not taken by stenographic means, a transcript of the pertinent portions of such deposition testimony; and

(3) An appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those that the party expects to offer and those which the party may offer if the need arises. These disclosures must be made at least 30 days before trial.

(a) Would you approve of such changes? Approve.

(b) Disapprove?

(b) COMMENTS:

C. Limitations on Discovery

Under Fed. R. Civ. P. 26(b)(2) individual courts may impose limitations on the number and length of depositions and on the number of interrogatories that may be propounded by a party in a case.

(a) Would you approve of such changes? Approve.

(b) Disapprove?

(c) COMMENTS:

D. Signing of Disclosures

Any disclosure made pursuant to amended rule 26 must be signed by either an attorney of record, if the party is represented by that attorney, or by the party if that party is not represented by an attorney. The signature of the attorney or party constitutes a certification that (a) the signer has read the disclosure and (b) to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry, the disclosure is complete as of the time it was made.

(a) Would you approve of such changes? Approve as edited

(b) Disapprove?

unless qualified.

(c) COMMENTS:

6. Rule 30 Depositions Upon Oral Examination

Under Fed. R. Civ. P. 30(a), the proposed amendments would require a party to obtain leave of court to conduct a deposition upon oral examination if the person to be examined is confined in prison or if without the written stipulation of the parties (i) a proposed deposition, if taken, would result in more than ten depositions being taken under this rule or Fed. R. Civ. P. 31 (Depositions Upon Written Questions) by the plaintiffs, or by the defendants, or by third-party defendants; (ii) the person to be examined already has been deposed in the case; or (iii) the party seeks to take a deposition before the time specified in Fed. R. Civ. P. 26(d) (as amended) (i.e., before making the required disclosures) unless the notice contained a certification, with supporting facts, that the person to be examined is expected to go out of the United States and be unavailable for examination within the United States unless the person's deposition is taken before expiration of such period.

Pursuant to Fed. R. Civ. P. 30(d), unless otherwise authorized by the court or agreed to by the parties, examination of a deponent shall be limited to 8 hours. Additional time shall be allowed by the court if needed for a fair examination of the deponent, or if the deponent or another party has impeded or delayed the examination. If the deponent or another party has caused impediment, delay or other conduct that frustrates the fair examination of deponent, a court may impose upon the person or persons responsible therefor an appropriate sanction, including the reasonable cost in attorney fees incurred by any parties as a result thereof.

If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them.

Similar restrictions on the number of depositions and the taking of depositions before the required disclosures under Fed. R. Civ. P. 26 apply under Fed. R. Civ. P. 31 (Depositions Upon Written Questions).

(a) Would you approve of such changes?

(b) Disapprove? Disapprove

(c) COMMENTS: Too arbitrary for a universal Rule.

7. Rule 32. Use of Depositions in Court Proceedings

Fed R. Civ. P. 32 attempts to expand the use of depositions in court proceedings by allowing a party to use the deposition of a witness, whether or not a party, if the court finds that the witness was deposed under Fed. R. Civ. P. 26(a)(2)(A) or is a physician, dentist, or licensed psychologist who examined or treated a party whose physical or mental condition is in controversy. Fed. R. Civ. P. 32 limits the use of a deposition taken without leave of court pursuant to a notice under Fed. R. Civ. P. 30(a)(2)(C). Such a deposition shall not be used against the party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the deposition; nor shall a deposition be used against a party who, having received less than 7 days notice of the deposition, has promptly upon receiving such notice filed a motion for protective order under Fed. R. Civ. P. 26 requesting that the deposition be held at a different time or place and such motion is still pending at the time the deposition is held.

(a) Would you approve of such changes? Approve.

(b) Disapprove?

(c) COMMENTS:

8. Rule 33. Interrogatories of Parties

Without leave of court or written stipulation, any party may serve upon any other party written interrogatories not exceeding 15 in number including all subparts to be answered by the party served or if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent

consistent with the principles of Fed. R. Civ. P. 26(b)(2) without leave of court or written stipulation. Interrogatories may be served only after the time specified in Fed. R. Civ. P. 26(d) (after complete disclosure). Under Fed. R. Civ. P. 33, when objecting to an interrogatory, the objecting party must state the reasons for objections with specificity and must answer the interrogatory to the extent that the interrogatory is not objectionable.

(a) Would you approve of such changes?

(b) Disapprove? Disapprove

(c) COMMENTS: Too few. Should be two sets of 30.

9. Rule 37. Failure to Make Disclosure or Cooperate in Discovery: Sanctions

Under Fed. R. Civ. P. 37(a)(2), if a party fails to make a disclosure required by Fed. R. Civ. P. 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion shall be accompanied by certification of the movant that it has conferred with the party not making the disclosure in a good faith effort to secure the disclosure without court action. Fed. R. Civ. P. 37(a)(2)(B) requires a party that moves the court to require a deponent to answer questions propounded or submitted to that party under Fed. R. Civ. P. 30 or 31 to accompany the motion with certification by the movant that it has conferred with the person or party failing to make the discovery in a good faith effort to secure the information or material without court action.

Under Fed. R. Civ. P. 37(c)(1), a party that without substantial justification fails to disclose information as required by Fed. R. Civ. P. 26 shall not, unless such failure is harmless, be permitted to present as substantive evidence at trial or on a motion, under Fed. R. Civ. P. 56, any evidence not so disclosed, and, if such evidence is presented by an adverse party, the adverse party shall be permitted to disclose at the trial or hearing the fact of such failure to disclose. In addition or in lieu thereof, the court, on motion after affording an opportunity to be heard, may impose other appropriate sanctions, which, in addition to requiring payment of reasonable expenses including attorney's fees caused by the

failure, may preclude the party from conducting discovery and may include any actions authorized under Fed. R. Civ. P. 37.

Under Fed. R. Civ. P. 37(d), a party may move the court to sanction any other party that fails to respond to requested discovery. Any motions specifying the failure to respond to discovery must be accompanied by a certificate of the movant that it has conferred with the party failing to answer or respond in a good faith effort to obtain such answer or response without court action.

(a) Would you approve of such changes? Approve

(b) Disapprove?

(c) COMMENTS:

10. Rule 43. Taking of Testimony

Under Fed. R. Civ. P. 43, subject to the right of cross-examination, the court could permit or require that the direct examination of a witness be presented in the form of an affidavit complying with the requirements of Fed. R. Civ. P. 56(e) or by adoption of a written statement or report prepared by the witness.

(a) Would you approve of such changes? Approve

(b) Disapprove?

(c) COMMENTS:

11. Rule 54. Judgments; Costs

Under Fed. R. Civ. P. 54(d)(2), claims for attorney's fees and non-taxable expenses for services performed in connection with proceedings in the district court or the court of appeals, including fees sought under Fed. R. Civ. P. 11, 16, 26, 37, or 56 and under 28 U.S.C. § 1927, shall be made by motion unless

the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial. Unless otherwise provided by statute or directed by the court, the motion shall be filed and served within 14 days after entry of judgment, shall specify the judgment and the statute, rule, or other grounds entitling the moving party to the award, and shall state the amount or provide a fair estimate of the fees sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which a claim is made.

By local rule the court may establish (i) an appropriate scale of rates of compensation by which the value of legal services performed in the district is ordinarily to be measured, and (ii) procedures by which issues relating to the value of services are referred to taxing masters. In addition, the court may refer issues relating to the value of services to a special master under Fed. R. Civ. P. 53 without regard to the provisions of subdivision (b) thereof and may refer a motion for attorneys' fees to a magistrate judge under Fed. R. Civ. P. 72(b) as if a dispositive pretrial matter.

(a) Would you approve of such changes? Yes

(b) Disapprove?

(c) COMMENTS:

12. Rule 56. Summary Judgment

Under Fed. R. Civ. P. 56(a), a court may, without a trial, enter summary judgment with respect to a claim, counterclaim, cross-claim, third party claim, or an issue substantially affecting such a claim if a party is entitled thereto as a matter of law because of facts not in genuine issue. In its order granting summary judgment or by separate opinion, the court shall recite the law and facts on which the judgment is based. Pursuant to Fed. R. Civ. P. 56(b), a fact is not in genuine issue if it is stipulated or admitted by the parties who may be adversely affected thereby or if, considering the relevant admissible evidence shown to be available for presentation at a trial, or a lack thereof, and the burden of production or persuasion and standards applicable thereto, a party would be entitled at trial to a judgment as a matter of

law with respect thereto under Fed. R. Civ. P. 50 (motion for a directed verdict and for judgment notwithstanding the verdict).

A party may move for summary judgment at any time after the other parties to be affected thereby have made an appearance in the case and have been afforded a reasonable opportunity to discover relevant evidence pertinent thereto that is not in their possession or under their control. Within 28 days after the motion is served any other party may serve and file a response thereto, except that the response shall be served and filed within 14 days if the party has stipulated or admitted the facts asserted not to be in genuine issue. The proposed amendment to Fed. R. Civ. P. 56 also allows the court to exercise discretion in directing the parties upon its own initiative, to show cause within a reasonable period why specified facts should not be treated as not in genuine issue and why summary judgment based thereon should not be entered.

(a) Would you approve of such changes? Yes

(b) Disapprove?

(c) COMMENTS:

13. Rule 83. Rules by District Courts; Standing Orders

Under Fed. R. Civ. P. 83(b), with the approval of the Judicial Conference of the United States, a district court may adopt an experimental local rule inconsistent with the general Federal Rules of Civil Procedure if the adopted rule is not inconsistent with provisions of Title 28 of the United States Code and is limited in its period of effectiveness to 5 years or less. The enforcement of local rules and any standing orders promulgated pursuant to Fed. R. Civ. P. 83 shall be enforced by the courts in a manner that protects all parties against the forfeiture of substantial rights as a result of negligent failures to comply with a requirement of form imposed by such a local rule or standing order.

(a) Would you approve of such changes? No

(b) Disapprove? Disapprove.

(c) COMMENTS: Local rules inconsistent with FRCP page limits for Hab memoranda, must submit to parties.

14. Federal Rules of Evidence - Rule 702. Testimony by Experts

Under Fed. R. Evid. 702, a court must find that (1) scientific, technical or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, and (2) a witness is qualified as an expert by knowledge, skill, experience, training or education to provide such assistance, before the court may permit the witness to testify thereto in the form of an opinion or otherwise. Except with a leave of court for good cause shown, the witness shall not testify on direct examination in any civil action to any opinion or inference, or reason or basis therefore, that has not been seasonably disclosed as required by Fed. R. Civ. P. 26.

(a) Would you approve of such changes? Yes

(b) Disapprove?

(c) COMMENTS:

II. PROPOSALS BEFORE THE WESTERN DISTRICT COMMITTEE:

1. Magistrate Trials

Courts could install procedural mechanisms that would further encourage civil litigants to consent to magistrate trials. Two possible procedures to promote the use of magistrates by civil litigants are: (1) for the Clerk's office to send to the attorneys in each civil action, immediately after an answer or other response of pleading has been filed, a letter signed by all the district judges in the Western District of Texas, describing in detail the availability and nature of magistrate trials, and strongly encouraging the litigants to opt for a magistrate trial, if that process is appropriate for their particular case, and (2) for a magistrate to conduct an initial docket call in each civil case, after the filing of an answer or other responsive pleading, to ascertain the status and nature of the litigation and to allow the magistrate the opportunity to personally inform the litigants

of the magistrate-trial option and explain the possible advantages of such a procedure. The proposed amendments to Fed. R. Civ. P. 73 also are aimed at increasing the use of magistrates to conduct civil trials.

(a) Would you approve of such changes? Yes

(b) Disapprove?

(c) COMMENTS: But only if dispositive matters ~~must~~ must still be heard by the district judge when a party requests.

2. Magistrate Taking Guilty Pleas

The magistrates could assume the responsibility for taking guilty pleas (1) in all criminal cases, (2) in specific categories of criminal cases, or (3) at least in criminal cases in which a defendant files a written consent to such a procedure.

(a) Would you approve of such changes? Yes

(b) Disapprove?

(c) COMMENTS:

3. Expansion of Magistrate Staff

Magistrates could receive additional law clerks and secretarial support in order to allow the magistrates to dispose of more matters.

(a) Would you approve of such changes? Yes

(b) Disapprove?

(c) COMMENTS:

4. The Presentation at Trial of Testimony by Means of Carefully Edited Videotape, Replacing in Whole or in Part the Live Testimony of Witnesses.

The district courts could encourage or require the use of carefully edited videotape testimony at trial to replace live testimony of witnesses.

(a) Would you approve of such changes?

(b) Disapprove? Disapprove

(c) COMMENTS: There is adequate provision for use of video already.

5. Use of Videotape Technology to Replace Court Reporters and Paper Transcripts.

Videotape technology could replace the court reporter and the paper transcript. For example, one Kentucky state court has eliminated the court reporter and paper transcripts and has replaced them with videotape technology. The court uses a voice-activated videotape system as the official record in certain trials. The record is immediately available on appeal, thereby eliminating long delays associated with producing paper transcripts. On March 1, 1991, the United States District Court for the Western District of Texas (Judge Edward C. Prado) adopted a local rule for procedures to implement an experimental project using video recording equipment to make the official record of the court proceedings. During the two year experimental phase, videotapes will serve as the official record of court proceedings. No narrative of the proceedings can be made a part of the record on appeal nor can transcripts of the videotapes be included as part of the official record on appeal.

(a) Would you approve of such changes?

(b) Disapprove?

(c) COMMENTS: No opinion on this

6. Visiting Judges

Senior judges and district court judges from districts where the case load is lighter than in the Western District of Texas could be assigned to hold court in areas that have a significant docket backlog.

(a) Would you approve of such changes? Yes

(b) Disapprove?

(c) COMMENTS:

7. Masters

The use of judicially-appointed masters could be expanded to assist with pre-trial motions and discovery matters, and to resolve evidentiary disputes that arise during trial.

(a) Would you approve of such changes? Yes

(b) Disapprove?

(c) COMMENTS:

8. Summary Jury Trial

Summary jury trial is usually a court-annexed settlement procedure. The idea is to show the litigants, in a relative quick and inexpensive manner, how a jury probably would assess

the strengths of their claims. The purpose of SJT is to promote the settlement of cases where both sides have uncertainty as to how a jury might perceive liability and damages in the action.

A judge or magistrate conducts SJT in a court room setting. SJT takes the form of an abbreviated trial. Counsel for each party summarizes the party's position for approximately 1 to 2 hours. Counsel may summarize testimony and exhibits if counsel has personal knowledge of the testimony and sufficient support for the admissibility of the exhibits. At the conclusion of the case presentations, the jury receives an abbreviated charge and retires to deliberate. The jury either returns a consensus verdict or separate, individual verdicts that list each jurors personal assessment of the liability and damages.

(a) Would you approve of such changes?

(b) Disapprove?

(c) COMMENTS:

9. Uniformity of Local Rules and Procedures

Local rules vary substantially among the federal districts. Additionally, individual judges within the Western District of Texas have different procedures and different forms of pre-trial orders. See Einhorn & Plaut, A Guide to the Local Rules of Federal District Courts in Texas, 54 Tex. B.J. 604 (June 1991); Weir, Order in the Court: Rules of Federal District Courts in Texas, 54 Tex. B.J. 610 (June 1991). Sometimes this difference in procedures results in unnecessary lawyer confusion. Increased uniformity of local rules and procedures among the various federal courts might decrease attorney research time spent to develop cases according to varying procedures. Such uniformity also could reduce the time-consuming disputes that arise solely because of counsel's unfamiliarity with a court's imposed procedures.

(a) Would you approve of such changes?

(b) Disapprove?

(c) COMMENTS:

10. Telescoping Expert Testimony

To shorten the time devoted to expert testimony, a court could allow a party to eliminate most of the expert testimony that provides the foundation for a party's damage reports and would have the reports admitted directly into evidence without a sponsoring trial witness. The opposing party then would have an opportunity to attack the foundation of the expert's damage calculations. This proposal attempts to dispense with what could be numerous hours of expert testimony on specific damages issues. The proposed amendments to the Federal Rules of Civil procedure appear to increase the judges' discretion to limit the use of expert testimony.

(a) Would you approve of such changes?

(b) Disapprove?

(c) COMMENTS:

11. Time Limitations on Case Presentations

The court could specifically limit the time allotted to each party for presentation of the case. Specific rules could be enacted to determine whether the time devoted to such procedures such as cross-examination and objections should be subtracted from a party's allotted time interval.

(a) Would you approve of such changes?

(b) Disapprove?

(c) COMMENTS:

12. Limiting Witnesses

The court would limit the number of witnesses a party may offer to prove any particular fact issue.

(a) Would you approve of such changes? Yes

(b) Disapprove?

(c) COMMENTS:

13. Presentation of Witness Testimony in the Narrative Form

In some cases courts have required that the direct testimony of some or all of the witnesses be presented in a narrative or affidavit form (with the right of cross-examination preserved) rather than orally in court.

(a) Would you approve of such changes?

(b) Disapprove? Disapprove.

(c) COMMENTS: If narrative is adequate the testimony will probably come that way due to lack of objection.

14. Narrative Document Presentation

In some cases, courts have allowed parties to place documents into evidence without sponsoring witnesses. The documents pass through a pre-trial screening process. At trial, the party foregoes presentation of the testimony of a sponsoring witness and instead makes a "document presentation" by having counsel read the portions of documents relevant to a single subject or common theme. At the same time, the complete documents are shown to the jury. This procedure would be most

effective when a particular point is proveable only by following a chronological "paper trail."

(a) Would you approve of such changes? Yes

(b) Disapprove?

(c) COMMENTS: This is very effective in use of trials in the Western District of Texas — encourages fast and expedites trial fairness

15. Multi-Tracked Trial

During complex, lengthy trials, some courts have used a separate procedure for handling evidentiary disputes that could impede the presentation of the action. The trial proceeds as usual on one "track," while a magistrate handles a "second track," ruling on evidentiary issues outside the presence of the jury.

(a) Would you approve of such changes? Yes

(b) Disapprove?

(c) COMMENTS:

16. Increase in Support Staff

In courts with a heavy criminal docket, authorization of additional law clerks might allow an expedited resolution of the civil motion docket.

(a) Would you approve of such changes? Yes

(b) Disapprove?

(c) COMMENTS:

17. Short Oral Docket

This procedure would provide a regular, short docket to allow parties to present minor disputes that require only short oral presentations and discretionary court rulings, rather than written motions, briefing, and research.

(a) Would you approve of such changes? Yes

(b) Disapprove?

(c) COMMENTS:

18. Bifurcated Trials/Discovery

Some cases are susceptible to divided trials on separate issues (e.g., liability v. damages), which would allow the deferral of certain expensive discovery.

(a) Would you approve of such changes? Yes

(b) Disapprove?

(c) COMMENTS: But only if all necessary trials can be conducted and concluded within 18 to 24 months after filing.

19. Expedited Schedule for Resolving Dispositive Motions

Courts could establish time limits for the resolution of case-dispositive (or partially dispositive) motions, in order to allow the parties to avoid expensive, time-consuming discovery. The various discovery guidelines could be tolled either (1) during the time that the motions are pending, or (2) during the time the motions are pending after the court's time

limit for ruling on the motions has expired, unless the court finds that there is good cause not to allow such tolling.

(a) Would you approve of such changes?

(b) Disapprove? Disapprove.

(c) COMMENTS: This should be done only on a case by case basis.

20. Case Management for Tracking

Cases of different fa ual complexity and/or technical complexity could be channeled on separate dispositional tracks. Many courts have recognized the value of providing special treatment for large, complex cases. For each type of case the court establishes a separate track having a specific timetable for the disposition of the case and a different level of discovery and other pre-trial actions. One extreme example of this would be the "no discovery" track, under which the parties would agree not to conduct discovery; instead, they would try the case immediately before the court.

(a) Would you approve of such changes? Yes

(b) Disapprove?

(c) COMMENTS:

22. Aggressive Pre-trial Case Management

More aggressive judicial management of a case early in the pre-trial stage could reduce the time required to resolve the dispute at trial. The management efforts could take the form of pre-trial orders pertaining to wide-ranging stipulations, marking and/or admitting evidence, submitting joint or draft jury charges, and the disposition of motions concerning any of the pre-trial activities. Regular staff conferences with the

judge or magistrate could encourage both the attorneys and the court to "stay on top the case" and to expedite the disposition.

(a) Would you approve of such changes? Yes

(b) Disapprove?

(c) COMMENTS:

ADDITIONAL COMMENTS:

1. Are there any rule changes or proposals that you believe would increase efficiency and/or reduce costs in the federal court system? Mandatory civil case disposition within 18 months, or the average from filing date.

2. Are there any other matters you would like to discuss concerning the provided material? I would like to participate as the project develops.

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Chair: Texas Supreme Court Jury Advisory Committee (1984-present) Member (1975-present).

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2849L

All SCBA Members
✓ Agenda

Vast Revisions To Civil Rules Proposed By Judicial Conference Committee

Section urges caution on controversial amendments requiring disclosure of witnesses and documents bearing on claims, damages

by Bryan J. Holzberg, *Associate Editor*

The Judicial Conference Advisory Committee on Civil Rules has proposed various amendments to almost every facet of the present Federal Rules of Civil Procedure, including case management, discovery, sanctions, summary judgment, and timing.

The Section of Litigation expects to provide significant input on the proposed revisions. Section Chair Theodore R. Tetzlaff, Chicago, said the Council will be in the forefront of the ABA's response to the Judicial Conference's proposed amendments. This winter, following a plenary committee chair discussion chaired by Loren Kieve, Washington, DC, Co-Chair of the Federal Procedure Committee, the Section Council set forth the Section's response to the Judicial Conference's proposals.

The most controversial proposed amendment concerns required disclosure. The Conference Committee has proposed requiring parties, within 30 days after service of the answer, automatically to disclose witnesses, all documents bearing on a claim, and damage computations, while making all documents immediately available for inspection. Committee members expressed strong divisions of opinion on this concept. In response, the Council determined to wait for the results from various federal districts that are presently experimenting with similar proposals before taking a formal position on the disclosure amendments.

Former Section Chair Michael E. Tigar, Austin, said he remained "very skeptical of the discovery model" implicit in the proposed discovery amendments. "They are contrary to our adversary system and to lawyer autonomy," Tigar added.

The amendments "will create new discovery battles," warned Edwin J. Wesely, New York City. Wesely, a member of the Task Force on the Civil Justice Reform Act of 1990, supported the Council position to wait for data from the district courts experimenting with similar proposals.

Wesely said he favored "more tailored attention on individual cases rather than strict numerical limits" as reflected in certain proposals.

Other proposed amendments and Council positions include:

Rule 11 — Sanctions. The Section supports the requirement of a separate motion for sanctions which details the specific alleged violative conduct.

Rule 16 — Pre-Trial Conference. A conference would be held within 60 days of service of the answer and would include discussion of settlement and alternative dispute resolution. The Section prefers more self-executing models for case management, which diminish the need for elaborate pretrial statements.

Proposed discovery amendments "are contrary to our adversary system and to lawyer autonomy."

—Michael E. Tigar, former Section Chair

Rule 30 — Depositions. The proposal limits the number of depositions to ten, which do not exceed six hours each unless the court determines, after application, that a fair examination requires more time. The Section would approve a limit of five nonparty depositions limited to eight hours, but the parties may stipulate to extend this time and increase the number of depositions.

Rule 33 — Interrogatories. The proposal limits interrogatories to 15 including all sub-parts, except if more are permitted by the court. The Section would accept a limit of 30 interrogatories, which could be increased by the court or by agreement between the parties.

Rule 43 — Testimony. The proposal would permit the presentation of direct examination by the witness's affidavit or deposition. The Section strongly opposes this proposal.

Rule 56 — Summary Judgment. The Section perceives the proposal as largely codifying the standards made clear by the 1986 trilogy of the United States Supreme Court cases, and therefore views this proposal as substantively unnecessary.

The Council also voiced its desire for two additional amendments to those proposed by the Judicial Conference. The first would amend Rule 47 to permit attorney voir dire. The second amendment would change Rule 48 to require that juries consist of twelve members whose verdict must be unanimous.

Kieve believes that it is clear that amendments to the Rules will take place within the next year or so. The Section intends for its position to help "shape these changes where we feel strongly" on the proposals. Kieve added that the thrust of the amendments appear to be an attempt to "favor judicial control" while "placing presumptive limits on lawyer controls and self-policing."

Invitation

Litigation News invites letters. Send all correspondence to Michael B. Hyman, Editor-in-Chief, 200 North LaSalle St., Suite 2100, Chicago, IL 60601. Letters may be edited for style and space.

Matchmaker, Matchmaker

Litigation Assistance Partnership Project begins fourth year of placing* pro bono *cases

by Joseph P. Esposito, *Associate Editor*

Created in 1989 to match significant *pro bono* cases requiring substantial support with volunteer private law firms, the Litigation Assistance Partnership Project (LAPP) has succeeded in placing more than 40 cases around the country.

According to Patricia Lee Refo, Chicago, Co-Chair of the Pro Bono and Public Interest Practice Litigation Committee, a survey reveals that the efforts of the Section of Litigation, in conjunction with the National Legal Aid and Defender Association (NLADA), has resulted in more than $1.5 million in attorney time being devoted to 27 of those cases by the volunteer firms.

Susan Finkelstein, San Antonio, Co-Chair of the Pro Bono and Public Interest Practice Litigation Committee, explained that LAPP has placed cases "from Vermont to California, involving issues ranging from welfare and health care to employment and housing." The cases come from 20 states as well as the District of Columbia and have involved a wide variety of assignments for the participating law firms, from advice on trial tactics to preparation of petitions for certiorari and the filing of nationwide class actions.

One recent LAPP placement concerns the failure of state and federal agencies to impose sanctions available under Medicaid and Medicare upon nursing homes that fail to comply with health and safety regulations. Another recent case involves insurance coverage for ventilator-dependent patients. The largest case placed through LAPP is a nationwide class action against the Farmers Home Administration.

Legal aid offices and public interest programs that have impact litigation which would require significant legal resources may contact NLADA to request help. LAPP, together with NLADA, then matches the cases with volunteer law firms. Ann Barker, Knoxville, TN, who serves as a consultant to LAPP and who matches *pro bono* cases to law firms, explained that the Project's recent "emphasis has been on case recruitment."

Lawyers interested in participating in LAPP should contact either Ann Barker at (615) 521-5024, or Sandy Dale, Section of Litigation, 750 N. Lake Shore Drive, Chicago, IL 60611, (312) 988-5592.

LAPP has sponsored recruitment lunches in cities across the country to encourage participation in the Project. LAPP has succeeded in recruiting more than 200 firms nationwide for referrals. Barker emphasized that the participating firms "have done incredible work."

1991 Sec Agenda

Scott. The Feds are just now doing things Texas did in 1984.

Panel Reviews Possible Revisions to Federal Rules of Civil Procedure

Impact of changes to Rules 4, 34 and 45 is greatest

by Robert L. Rothman, *Associate Editor*

Proposed amendments to the Federal Rules of Civil Procedure affecting such areas as process serving and the taking of discovery from non-parties would streamline current practice.

The "very slow and very deliberate process" designed to elicit comment and criticism of the proposed amendments could lead to the changes taking effect during 1991 if approved by the Judicial Conference, the United States Supreme Court and Congress, according to Professor Paul D. Carrington, Duke University Law School.

A review of the changes being considered was conducted by the Litigation Section's Pretrial Practice and Discovery Committee at the Annual Meeting. Among the changes highlighted by Carrington and other members of the seminar panel were changes to:

- Rule 4 designed to simplify service of process;
- Rule 15(c) to limit parties from taking unjust advantage of inconsequential pleading errors to sustain a limitations defense;
- Rule 26(b)(5) requiring a party asserting privilege to provide detailed information supporting the claim;
- Rule 34 expanding coverage of non-parties; and
- Rule 45 to allow a party to subpoena documents from a non-party without a deposition, hearing or trial.

The changes, which are expected to be approved by the Supreme Court during this term, will not include a proposed revision to the rule governing summary judgments. Carrington said the proposed overhaul of Rule 56 was not ready for submission to the Judicial Conference of the United States due to additional changes that will require republication and the opportunity for further comment.

Gregory P. Joseph, New York, NY, program moderator, believes that the changes to Rules 4, 34 and 45 will have the largest impact on day-to-day practice. Under revised Rule 4, which would replace the mail service provisions of the existing Rule, the plaintiff may notify the defendant in writing by first class mail "or other equally reliable means" that it wishes to serve a complaint. If a copy of the complaint is enclosed, together with a new official form described in Rule 84, the defendant either has to waive service within 20 days or show why he or she should not have to pay the cost of service. Defendants who agree to waive service within 20 days receive the benefit of a further amendment providing that an answer is not due until 50 days from the date on which the request for waiver of service was sent. On the other hand, failure to comply with the request for a waiver of service may result in the defendant being required to pay all service costs, including reasonable attorneys' fees for any motion required to collect the costs of service.

The change to Rule 34, Joseph said, will mean that a request for production of documents can now be addressed to a non-party. This revision goes hand-in-hand with the changes being proposed to Rule 45, which would be amended to permit subpoenas for the production of documents and inspection of documents or premises without the formality of a deposition. The revised Rule 45 also will require the production of documents within a subpoenaed individual's control regardless of whether the materials are located in the district within which the subpoena can be served. The responding party may produce and permit inspection of documents without appearing unless a deposition, hearing or trial is scheduled. However, the responding party may serve written objections to the requested production within 14 days after service or before the time specified for the production.

Additionally, Joseph noted, under the revised Rule 45, an attorney will be authorized to issue a subpoena in the name of a court in which he or she is authorized to practice, or in the name of a court for a district in which a deposition or production is compelled by subpoena, provided that the subpoena pertains to an action pending in a court in which the attorney is authorized to practice. Thus, the process for issuance of subpoenas in districts other than the one in which the action is pending will be greatly simplified.

Another rule likely to be amended is Rule 15, which relates to amended and supplemental pleadings. The revision is designed "to avoid allowing defendants to benefit from trivial captioning errors," Joseph said. Under the proposed amendment, relation back now will occur whenever the amendment "changes the party or the name of the party" within the 120-day period provided in Rule 4(n) for service of the summons and complaint.

Section Calendar

January 10-12, 1991
Winter Council/Chair Meeting

February 8-9, 1991
Environmental Litigation Committee
Midwinter Meeting
Beaver Run Resort,Breckenridge, CO

February 14-17, 1991
Committee on Corporate Counsel
Midwinter Meeting
Registry Resort, Naples, FL

February 28-March 2, 1991
Products Liability Committee
Midyear Meeting
Marriott's Rancho Las Palmas Resort
Rancho Mirage, CA

March 15-16, 1991
Business Torts Litigation Committee
Midyear Meeting
Wyndham Palm Springs Hotel
Palm Springs, CA

April 5-6, 1991
Insurance Coverage
Midyear Meeting
Innisbrook Hotel
Tarpon Springs, FL

Al Capone Acquitted

Gangster beats tax evasion rap at Section retrial

by Wiley E. Mayne, Jr.
Associate Editor

Almost 60 years after his original conviction for income tax evasion, Alphonse Capone was acquitted by a Chicago jury after a "retrial" staged by the Litigation Section at the Annual Meeting. Aided by changes in the tax laws and a new defense team, "Lucky Al" avoided conviction on all the charges.

Planned as both entertaining and educational, the retrial featured professional actors appearing in period dress as Capone and various witnesses. The prosecution team of Linda Pence, Indianapolis, IN, and Thomas Mulroy, Chicago, IL, sought to prove Capone failed to report income by showing his lavish spending. "In 1925, Capone spent 10 percent of the national debt," Mulroy told the jury. Capone's tailor from Chicago's Marshall Field department store was called to the stand by the government team to testify about huge amounts spent on clothes. The prosecution also produced evidence that Capone's wealth came from illegal gambling operations.

But a key witness for the prosecution was Fred Ries, who had served as a bookkeeper for Capone. Capone's new and improved defense team, former Section Chair Michael Tigar, Austin, TX, and Terence MacCarthy, Chicago, IL, targeted Ries' testimony, claiming that the government had coerced testimony from the witness. Federal agent Louis H. Wilson had reputedly locked Ries, who feared insects, in a cell "crawling with cockroaches," telling him he could get out when he was "willing to play ball." In closing argument, Tigar urged the jurors not to condone "torture as a weapon to build a case."

Tigar later described the government's original case against Capone as an "unfair tax prosecution." However, Attorney General Richard Thornburgh, in Chicago for the Annual Meeting, cited the acquittal as evidence that the current system had gone too far in protecting criminals. The "new" Capone was benefitted by changes in the tax laws making it more difficult to prove the intent necessary to establish income tax evasion.

The "old" Capone would also have fared better under the new criminal sentencing guidelines. A follow-up program illustrated the application of those guidelines in the context of the original Capone conviction. Ignoring the mock jurors' acquittal, Judge A. David Mazzone, Boston, MA, employed the guidelines to sentence Capone to 57 months in prison, over 5 years less than the original 11-year term.

Feb. 1990

TRCP 90 156 216(1) 249 307 542 324(a)

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Ded Rules Sent

TRCP 21a 237a TRAP 41, 202, 210 57(a)(1) 12 74 41(a)(1) 54(a) (2)(d)

November 26, 1989

The Honorable Nathan L. Hecht, Justice
The Supreme Court of Texas
Post Office Box 12248
Capitol Station
Austin, Texas 78711

Dear Judge Hecht:

1. Is there a reason why the rules are initially subdivided in different ways? Some use parenthetical numbers (*e.g.*, Tex. R. Civ. P. 3a); some use parenthetical letters (*e.g.*, Tex. R. Civ. P. 298); some use plain numbers (*e.g.*, Tex. R. Civ. P. 273); some use plain letters (*e.g.*, Tex. R. Civ. P. 216); and others use no subdivision at all (*e.g.*, Tex. R. Civ. P. 296). It would probably be best to continuing the current method of subdivision for existing rules that ~~are merely being modified~~, but the court may wish to consider a uniform method of subdivision for new and totally rewritten rules ~~similar to the system employed~~ in the Texas Rules of Appellate Procedure.

I appreciate the opportunity to comment on the proposed rules amendments and hope that my comments are helpful.

Respectfully,

Charles A. Spain, Jr.

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166 166a 166(b) 166(b)6 167a 168 169 Comm on Pet Form

November 28, 1989

Honorable Nathan L. Hecht
P.O. Box 12248
Austin, TX 78711

RE: Comment on Proposed Rules Changes Regarding Discovery

Dear Justice Hecht:

Overhaul Needed: Finally, I personally believe that the entire area of discovery rules needs a complete reworking. I have read them a hundred times, have analyzed them sentence by sentence, written on them, given speeches on them, litigated them, etc., and I still have a hard time trudging through all of the different rules, all the different uses of terminology, all of the internal definitions, etc. I honestly believe that a complete overhaul of the discovery rules would greatly decrease the confusion among the bar and the litigation resulting therefrom. I realize the initial reaction to this suggestion is to try to pull one's hair out, but I honestly believe that this reorganization needs to be undertaken. These rules have got to be simplified. They have got to be better organized, less redundant, and written in language that a lay person could almost understand. The long run-on sentences need to be shortened. Perhaps this overhaul could be done under a new set of rules entitled "Texas Rules of Discovery." Start with a comprehensive list of definitions that will apply throughout the rules. Next, have a separate rule on "Permissible Forms of Discovery." See Rule 166b(1). Next, have a rule on "Permissible Scope of Discovery." See Rule 166b(2). Relying upon the prior definitions, state that the following is discoverable: facts, opinions, contentions, etc., relevant to the cause. Then state that these facts, etc., may be contained within oral testimony, documents, or tangible things (which terms would have already been defined above). Next, under another rule, set out examples of what may be discoverable, such as witness statements, the identity of experts, party communications, etc., all of which rules will be substantially shortened by the original "definition" section. Use short sentences, in laymen's language. Use standardized phrases, such as "requests" and "responses" to discovery. Next, have a separate rule on the "Duty to Initially Respond," which I discussed above. Next, have a separate rule on "Objections" wherein the four or five specific grounds for objections are set out in clear terms. Next, have a separate rule entitled, for example, "Objections Waived If Not Timely Raised," containing a simple statement that if a "discovery response" is not timely made, any objection thereto shall be deemed waived, "unless good cause . . . ." Next, have a separate rule entitled "Preservation Of Objections," which would be similar to present Rule 166b(4); however, having already set out the permissible objections, this rule would be more specific in how to preserve a particular type of objection. (Again, this is similar to present Rule 166b(4), except that I think it should be simpler language with shorter sentences per subject matter). Follow this by a new rule on "Protective Orders." See Rule 166b(5). Next, have a separate rule on the "Duty to Supplement," which would be similar to present Rule 166b(6). And so on.

Committee to Comprehensively Review all Rules and Consider Fed. R. Civ. P. Order or adoption of Substance

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November 15, 1989

Justice Nathan L. Hecht
P.O. Box 12248
Austin, Texas 78711

Re: Suggested Modification of Texas Rules of Civil Procedure

Dear Justice Hecht:

If the Court is truly serious about changing our rules of civil procedure in a way which will (i) increase the efficiency and fairness of the justice system; (ii) decrease the number and complexity of the rules; (iii) eliminate the need for constant amendments and the concomitant reeducation of bench and bar; (iv) reduce the cost and delay of litigation; and (v) bring Texas jurisprudence within the mainstream of litigation practice across the country, I offer the following recommendation, most seriously, and most urgently:

ADOPT RULES WHICH PARALLEL THE FEDERAL RULES.

This suggestion comes to you from a practitioner with 17 years of experience whose practice is limited exclusively to civil litigation.

The complexity and confusion of our current rules, and the constant process of amending them, is a disgrace to our judicial system. The rules have many pitfalls and perils which regularly trap or embarrass even the most experienced litigator and trial judge. The discovery rules, with automatic sanctions for exclusion of evidence, etc., are a source of constant squabble. They discourage professionalism between counsel and they virtually emasculate trial judges. The constantly changing appellate constructions of the rules make the trial practitioner's job something akin to Russian roulette. Compare e.g. your Court's opinion in **McKinney I** with the opinion on rehearing in **McKinney II**.

Fifty years ago last year the United States Supreme Court promulgated the Federal Rules of Civil Procedure. All of our law schools teach federal procedure. Lawyers all across the country are familiar with them, and, although many Texas "state court" practitioners eschew federal court, any competent litigator should be familiar with these rules. These rules entrust and empower trial judges with considerable discretion

concerning procedure and discovery. They work quite well -- both in federal courts and in the courts of many of our sister states.

The trends in Texas practice over the past decade have been in the general direction of harmony with the federal rules. For example, we have abolished the cumbersome Plea of Privilege "trials", and gravitated towards submission of "questions" to juries which more closely parallels the federal system (although we still do not trust our jurors to really know the effects of their answers).

Most importantly from the standpoint of actually persuading the Texas bench and bar that adoption of rules which parallel the federal rules would be a step in the right direction, in 1983 the Court promulgated Texas Rules of Evidence which closely parallel the federal rules. I sincerely believe that the time has come to seriously consider doing the same with respect to the Rules of Civil Procedure, and would volunteer my time to work on such a project if the Court was seriously interested in pursuing it.

Thank you for the opportunity to provide this comment. Please feel free to contact me if I can be of any further assistance.

Sincerely yours,

Arnold Anderson Vickery

AAV:v

Feb. 1990
Local Rules Sub
to
TRAP Rule

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November 22, 1989

TRCP 13
305

Justice Nathan L. Hecht
Box 12248
Austin, Texas-78711

Dear Judge Hecht:

As per the request of the Texas Supreme Court, I would like to offer the following suggestions concerning the Rules.

LOCAL RULES

1. Rescind ALL local rules and do not permit local Courts to trap the practicing attorney by making Rules.

2. Require a party taking the deposition or a party or witness to furnish the other attorney a copy of the deposition at the expense of the one taking the deposition.

3. Require the Appellant to deliver the copy of the Transcript and the Statement of Facts to the Appellee's attorney the day of or after the Appellant's Brief is mailed to the Court of Appeals; and, thereafter the Appellee's attorney will file same with the Clerk of the trial Court.

4. Remove, rescind, delete ALL sanctions by opposing counsel for alleged bad faith or frivilous law suits, because opposing counsel NOT having any counter-claim or cross-action is using these allegations alone to intimidate and coerce the opposing side. These allegations have become just as abusive as the party allegedly bringing a bad faith law suit. IF, retained in any manner, let JUST the trial Judge file a Motion and a hearing, and if a fact issue to be tried by a jury.

5. Require that a Judge NOT discuss any matter concerning the case with one attorney when the other attorney is NOT present, where there are opposing counsel. And, you might ought to say an attorney will not discuss matters with the Court unless the other attorney is present.

6. A Rule which would follow due process would require that NO order or judgment of the Court would be rendered or entered unless a hearing is set and notice served on all parties. This business of Courts just signing orders and/or judgments without opposing counself being afforded an opportunity to be heard is for the birds. This would not apply as to a default judgment and this might be clarified as to default judgments and say no motion need be served upon the defaulting party. Other jurisdictions require a Motion asking for a default judgment, and that it be served and a date, time and palce set for a hearing thereon.

7. A Rule that any appeal from an administrative agency will in fact be trial de novo and not test an Administrative Order under the substantial evidence rule.

Yours very truly, Hugh Harrell
WHH:wh cc: Ret.

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TEXAS SUPREME COURT

TASK FORCE ON SANCTIONS

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TEXAS SUPREME COURT
TASK FORCE ON SANCTIONS

Texas Supreme Court Task Force on Sanctions:

Lisa Blue
Herbert Boyland
Honorable Scott A. Brister
Carlyle H. Chapman, Jr.
Elizabeth Ann Crabb
Charles Herring, Jr. - Chairman
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REPORT OF
TEXAS SUPREME COURT
TASK FORCE ON SANCTIONS

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Appendices

I. INTRODUCTION

This Report presents the conclusions and recommendations of the Task Force on Sanctions, which the Texas Supreme Court appointed on June 19, 1991. The Report reflects not only the work of the ten members of the Task Force, but also input from forty-one other lawyers and judges who participated on an advisory basis, as well as hundreds of other Texas lawyers and judges who responded to a questionnaire sent out by the Task Force.

Over the past few years, Texas sanctions practice has been the subject of substantial critical commentary.[1] A central theme of such criticism is that the sanctions rules have evolved to a form that has encouraged, rather than discouraged, pretrial gamesmanship and procedural manipulation, often resulting in technical, outcome-determinative adjudications that were fundamentally inconsistent with the underlying objective of the rules set out in Texas Rule of Civil Procedure 1: "to obtain a just, fair, equitable and impartial adjudication of the rights of

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[1] See, e.g., David W. Holman & Byron C. Keeling, Disclosure of Witnesses in Texas: The Evolution and Application of Rules 166b(6) and 215(5) of the Texas Rules of Civil Procedure, 42 Baylor L. Rev. 405 (1990) (hereinafter "Holman & Keeling); Allen B. Rich, Certified Pleadings: Interpreting Texas Rule 13 in Light of Federal Rule 11, 11 Rev. Litig. 59 (1991) (hereinafter "Rich"); William Kilgarlin, Sanctions for Discovery Abuse: Is The Cure Worse Than the Disease?, 54 Tex. B.J. 658 (1991); Tommy Jacks, An Open Letter to the Texas Supreme Court, 25 Texas Trial Lawyers Forum 3 (1991); Charles Herring, Jr., The Rise of the "Sanctions Tort," Tex. Law., January 28, 1991 at 22; cf. Judge Sam D. Johnson, Thomas M. Contois, and Byron C. Keeling, The Proposed Amendments to Rule 11: Urgent Problems and Suggested Solutions, 43 Baylor L. Rev. 647 (1991) (hereinafter "Johnson, Contois & Keeling").

litigants under established principles of substantive law." Cases were legion in which trial courts levied "death penalty sanctions"[2] by granting default judgments or dismissals, striking pleadings, or striking critical lay or expert witnesses. The high success rate for pretrial sneak attacks has encouraged increasingly sophisticated maneuvering, set-ups, and machinations. Courts, attorneys and litigants have spent too much time, money, and other resources on sanctions proceedings, and too often procedural determinations have substituted for adjudications on the merits.

The Task Force received essentially the same input from the 251 lawyers and judges who responded to its published questionnaire. Seventy-five percent of the lawyers and 74% of the judges agreed that the current sanction rules result in too much time and money spent on sanctions practice. Sixty-seven percent of the lawyers and 65% of the judges also agreed that the current rules actually encourage Rambo tactics. Overall, 75% of both lawyers and judges concluded that Texas sanctions rules should be modified.

In the Task Force's view, the Texas Supreme Court's decisions in TransAmerican Natural Gas Corp. v. Powell[3] and

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[2] "Death penalty sanction" is "a term adopted by the legal community to describe a sanction imposed by the trial court which, in effect, eliminates a claim, counterclaim, or defense and precludes a decision on the merits of the party's claim, counterclaim, or defense." Goff v. Branch, 821 S.W.2d 732, 738 n.3 (Tex. App. -- San Antonio 1991, writ denied).

[3] 811 S.W.2d 913 (Tex. 1991).

Braden v. Downey[4] were extremely important and salutary developments in Texas sanctions practice. Those decisions, combined with the Court's appointment of this Task Force, represented a major effort by the Court to address some of the most serious problems that have developed in Texas sanctions practice. Several of the changes recommended by the Task Force seek to codify in the rules the teachings of TransAmerican and Braden.

The Task Force analyzed closely the two most important Texas Rules of Civil Procedure containing sanctions provisions, Rule 13, dealing with groundless pleadings, and Rule 215, dealing with discovery sanctions. The Task Force also reviewed the other sanctions provisions appearing in Rules 18a(h), 21b, 120a, 166a(h), 203, and 269(e). In sum, the Task Force recommends major revisions of Rule 13; replacement of Rule 215 with a new Rule 166d and with amendments to Rule 166b(6); repeal of Rules 18a(h), 21b, 166a(h), and 203; partial repeal of Rule 269(e); and creation of a new rule governing motions to disqualify attorneys, Rule 12a.

The Task Force's final proposals for each of the rules appear in the following Appendices:

RULES	APPENDIX
12a	C
13	B
18a(h)	G-1

[4] 811 S.W.2d 922 (Tex. 1991).

21b	G-2
120a	G-3
166a(h)	G-4
166b(6)(b)	D
166b(6)(e)	E
166b(6)(d) (replacing Rule 215(5))	F
166d (replacing Rule 215(1)-(4), (6))	A
203	G-6
269(e)	G-7

The Task Force recognizes that no single formulation or language in any particular rule is ideal. Often changes that solve one problem create another. Drafting almost any sanctions rule requires balancing rights and remedies, procedural protections and litigation efficiencies. Thus, in many instances the Task Force has considered several alternatives, each of which has advantages and disadvantages, and frequently two or more of the alternatives appear almost equally desirable.

Recognizing that ultimately the Texas Supreme Court must draft the rules, the Task Force offers these proposals only as suggestions for consideration by the Court and its Rules Advisory Committee. The Report attempts to explain in some detail the rationale for particular changes and to discuss various options the Task Force has considered. In most instances the Task Force is less concerned with the specific wording of the proposed changes than with the underlying concepts and rationale embodied in the proposals.

Part II of this Report describes in more detail the methodology and research of the Task Force, and Part III summarizes the responses to the Task Force's questionnaire. In Parts IV-VIII, the Task Force recommends several specific changes to the rules: Part IV recommends replacement of Rule 215(1)-(4) and (6) with proposed Rule 166d, which deals with discovery sanctions; Part V recommends amendment to Rule 13, which deals with groundless pleadings; Part VI recommends amendment of Rule 166b(6)(b) and Rule 215(5), which deal with disclosure of and exclusion of witnesses and evidence; Part VII recommends adoption of proposed Rule 12a to establish standards and procedures for motions to disqualify attorneys; and Part VIII recommends repeal of various minor sanctions provisions found in Texas Rules of Civil Procedure 18a(h), 21b, 120a, 166a(h), 203, and 269(e). Part IX discusses sanctions under the inherent powers doctrine, Part X analyzes suggestions for modifying appeal procedures for sanctions orders, and Part XI identifies some of the legal malpractice insurance issues affecting sanctions practice.

II. THE TASK FORCE AND ITS WORK

The Task Force on Sanctions first met on August 21, 1991. In addition to the ten members of the Task Force, forty-one other lawyers and judges personally participated in the Task Force efforts on a volunteer basis.[5] The Task Force conducted public meetings, with Task Force members and several volunteer

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[5] Appendix L lists Task Force members and volunteer participants.

participants attending each meeting and a court reporter recording the proceedings.

In the course of its research, the Task Force collected, Bates-stamped and distributed to Task Force members and other participants over 1400 pages of materials, including proposed drafts of rules, court decisions, articles, rules from other jurisdictions, bibliographies, proposed federal rule amendments, surveys, and correspondence from interested persons and groups.[6] The Task Force also conducted a comparative study of sanctions rules and statutes in various other states and jurisdictions. As discussed in the following section, the Task Force published and distributed a sanctions questionnaire, and received over 251 responses from Texas lawyers and judges. The Task Force also reviewed the work to date of the United States Judicial Conference's Standing Committee on Rules of Practice and Procedure (which is a part of the Judicial Conference's Advisory Committee on Civil Rules) concerning various current proposals to amend the Federal Rules of Civil Procedure, particularly with respect to sanctions practice under Federal Rules 11 and 37. (On September 21, 1992, the Judicial Conference adopted proposed amendments to forward for further review by the United States Supreme Court and Congress.)

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[6] A list of the materials distributed appears in Appendix M.

Additionally, the Task Force analyzed in some detail the ABA Section of Litigation's Standards and Guidelines for Rule 11 practice, published in June 1988.[7]

III. RESULTS OF THE TASK FORCE QUESTIONNAIRE

In an effort to solicit input from lawyers and judges concerning sanctions practice in Texas, the Task Force published a questionnaire in the December 16, 1991 issue of the Texas Lawyer. At the same time the Task Force sent the questionnaire to all Texas district judges. One hundred twelve judges and 139 lawyers responded, a total of 251 respondents. A copy of the questionnaire and a compilation of the responses appear in Appendix J.

Although the survey was unscientific, the answers are informative, particularly concerning questions on which both lawyer and judge respondents indicated overwhelming agreement. The Task Force had some concern that the lawyer respondents might be unrepresentative of lawyers generally or that only lawyers who

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[7] American Bar Association Section of Litigation, Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure, 121 F.R.D. 101, 101-30 (1988) (hereinafter "ABA Standards"). Although the ABA Standards deal with Rule 11, which addresses frivolous-pleadings sanctions rather than discovery sanctions, many of the considerations are the same. See, e.g., TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 921 (Tex. 1991) (Gonzalez, J., concurring) ("In my opinion, the ABA guidelines developed for determining when to assess sanctions under Federal Rule 11 are instructive whenever sanctions are imposed or denied under Texas Rule 215."). The text of the ABA Standards appears in Appendix K. The principal author of the ABA Standards was Gregory Joseph, who also has written the leading treatise on sanctions practice in federal court, Sanctions: The Federal Law of Litigation Abuse (1989 & Supp. 1992) (hereinafter "Joseph").

were intensely dissatisfied with the present sanctions system would respond to the questionnaire. No doubt that concern is valid to some extent, but the large number of judges who responded, and more importantly, who agreed with lawyer respondents on many issues, gave the Task Force some measure of comfort that the questionnaire at least served to identify major points of dissatisfaction among the practicing bar and bench. In several instances, the questionnaire results confirmed concerns expressed by commentators.

Areas of Agreement Among Lawyer and Judge Respondents

Sanctions issues on which large majorities (greater than 60%) of lawyers and judges agreed (combining the response categories of "agree" and "strongly agree") included the following, with the percentages of agreement indicated:

* Too much time, money. The current sanctions rules result in too much time and money spent on sanctions practice (lawyers 75%, judges 74%).

* The Rules encourage Rambo. Current rules encourage Rambo tactics (lawyers 67%, judges 65%), and fail to discourage Rambo tactics (lawyers 80%, judges 70%).

* Change the rules. The rules regarding sanctions should be modified (lawyers 75%, judges 75%).

* Consolidate the rules. Texas has too many sanctions rules; sanctions provisions should be consolidated (lawyers 76%, judges 68%).

* Require trial court findings. The rules should require that a trial judge state into the record specific reasons when imposing sanctions (lawyers 97%, judges 59%). (Most lawyers (58%) also felt that judges should state such findings when deciding not to impose sanctions, but most judges (61%) disagreed.)

* Make sanctions discretionary. The current mandatory language ("shall impose sanctions") should be changed to make the imposition of sanctions discretionary, even if

the court finds some type of violation (lawyers 72%, judges 92%).

* Include conference requirement. The rules should require attorneys to confer before seeking sanctions, as is now required before filing discovery motions under Rule 166b(7) (lawyers 87%, judges 93%).

* Include a "safe harbor." With respect to frivolous pleadings, the rules should have a "safe harbor" provision that would allow a party or lawyer to avoid sanctions by withdrawing the pleading after receiving notice of a claim that the pleading is frivolous (lawyers 71%, judges 77%).

* Require oral hearings. Trial courts should conduct oral hearings before imposing sanctions (lawyers 93%, judges 87%).

* Client notice before ultimate sanctions. Before ultimate sanctions (dismissal, default, etc.) are imposed, the client should receive actual notice (lawyers 86%, judges 75%).

* Include comments. The rules should include a comments section, similar to the federal rules or some of the Texas Rules of Civil Evidence (lawyers 87%, judges 81%).

* Mandating professional courtesy. The rules should specifically mandate professional courtesy (lawyers 67%, judges 81%).

* Persons sanctionable. Courts should be able to impose sanctions against parties (lawyers 89%, judges 95%), against lawyers (lawyers 89%, judges 100%), and against law firms (lawyers 61%, judges 76%).

* No ADR requirement. The rules should not require alternative dispute resolution before a party seeks sanctions (lawyers 66%, judges 77%).

* Reduce witness/evidence exclusion. The rules providing for witness/evidence exclusion should be liberalized: (1) to state expressly that a trial court may grant a continuance as an alternative to evidence/witness exclusion (lawyers 67%, judges 69%); (2) to permit a named party to a lawsuit to testify without being listed in answers to interrogatories (lawyers 86%, judges 93%); and (3) to permit a party to call as a witness any witness listed in any other party's interrogatory responses (lawyers 81%, judges 77%).

* Allow immediate appeals of severe sanctions. The rules should allow for immediate appeals of "severe sanctions" (lawyers 80%, judges 58%).

Additionally, on a related issue not strictly pertinent to sanctions practice, lawyers and judges agreed that Texas should provide an alternative accelerated docket to permit certain cases to proceed to trial quickly with a minimum of discovery, motions, and expense (lawyers 71%, judges 73%). Some federal courts are experimenting with such "rocket dockets," which allow parties by agreement to forgo expensive, time-consuming pretrial discovery and motion practice, and the respondents also appeared to favor such experimentation in state courts.

Lawyers v. Judges

On a few issues, the lawyer and judge respondents took significantly different positions. Not surprisingly, those differences related to judicial power, abuse of discretion, and appeals. A majority of lawyers (58%) felt that current sanctions rules provide judges with too much discretion; an even larger majority of judges (84%) disagreed with that statement. Similarly, a large majority of lawyers (81%) disagreed with the proposition that current sanctions rules provide judges "too little discretion"; a bare majority of judges (51%) felt they had too little discretion.

As noted above, most lawyers and judges agreed that the rules should require judges to state findings into the record when imposing sanctions. The lawyer respondents would go further, however; 67% would require a trial judge to make written findings of fact and conclusions of law. Undoubtedly

recognizing that most Texas judges lack adequate funding for secretarial and support staff, judges disagreed with the written findings proposal by an even larger margin (83%).

While most lawyers and judges agreed that some limited form of immediate appellate review is necessary with respect to any order imposing "severe" sanctions, lawyers, by a very narrow margin of 51%, wanted a broader, interlocutory appeal right of any sanctions order, while judges disagreed (69%) with creation of such an appeal right.

Other Agreements

By narrower margins than the items above (less than 60% approval), lawyer and judge respondents agreed on several other issues.

* Two-step requirement for discovery sanctions. Sanctions for discovery abuse should be permissible only after a court has issued an order compelling discovery and the order has been violated (lawyers 65%, judges 52%).

* Use of masters. Judges should be allowed to appoint a master to resolve discovery disputes (lawyers 58%, judges 70%). (Both groups opposed having masters resolve sanctions issues, though judges were almost evenly divided on this question (lawyers 62%, judges 50% to 49%).)

* Eliminate expert designation deadlines. The deadline in Rule 166b(6) that expert witnesses be identified "as soon as is practical, but in no event less than thirty (30) days" before trial except on leave of court should be eliminated; if a party or the court wants to set a deadline, that should be done by pretrial order (lawyers 57%, judges 51%).

* Reduce automatic exclusion of witnesses/evidence. As to the automatic exclusion of evidence of witnesses for failure to provide proper discovery response supplementation (absent a showing of good cause), the rules should be amended:

    . to allow more discretion for trial courts to admit such evidence/witness (lawyers 58%, judges 78%);

- to specify what constitutes good cause to admit such evidence/witness (lawyers 72%, judges 57%);

- to provide that a showing that the adverse party will not be prejudiced by the evidence/witness constitutes good cause for admission of the evidence/witness (lawyers 56%, judges 64%).

In most instances in which lawyer and judge respondents strongly agreed on sanctions issues, the Task Force has recommended corresponding changes in the rules.

IV. DISCOVERY SANCTIONS -- PROPOSED RULE 166d

A. Proposed Rule 166d -- Summary

The Task Force proposes substantial changes to current Rule 215, which deals with discovery sanctions. The most obvious change, but one of the least important, is to renumber the rule as Rule 166d, merely to move the rule closer to the general rules for pretrial discovery.[8] Overall, the goals of the Task Force's proposed revisions in Rule 166d are: to incorporate the

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[8] Current Rule 215 is in subsection B of section 9 of Part II of the rules; the title of section 9 is "Evidence and Depositions" and the title of subsection B is "Depositions." Section 8 is entitled "Pretrial Procedure" and contains the general scope of discovery rule (Rule 166b); under the rules' existing organization, section 8 appears to be a more logical place for this rule. Nonetheless, the Task Force does not consider the precise location of the rule to be particularly important, and recognizes that the Task Force on Revision of the Texas Rules of Civil Procedure is likely to recommend a more comprehensive reorganization of the rules.

The Task Force version of proposed Rule 166d also is renamed "Discovery Violations," changed from the current title of Rule 215, "Abuse of Discovery; Sanctions." Again, this change is relatively minor. Because proposed Rule 166d deals with more than just sanctions, and because the very word "sanctions" can have implications for whether a monetary award is covered by legal malpractice insurance, the Task Force has recommended the new caption. See discussion in Part XI, below.

principles of TransAmerican Natural Gas Corp. v. Powell[9] and Braden v. Downey;[10] to simplify and shorten the rule;[11] and to provide procedures to reduce some of the pretrial gamesmanship that has developed under current Rule 215.

Proposed Rule 166d reads as follows:

RULE 166d. DISCOVERY VIOLATIONS

1. **Procedure.** If a person or entity fails in whole or in part to respond to or supplement discovery, or abuses the discovery process in seeking or resisting discovery, the court may grant relief as set forth below.

(a) Motion. Any person or entity affected by such failure or abuse may file a motion specifically describing the violation, and may attach any necessary exhibits including affidavits, discovery, pleadings, or other documents. The motion shall be filed in the court in which the action is pending, except that a motion involving a person or entity who is not a party shall be filed in any district court in the district where the discovery is to take place. Motions or responses made under this rule shall be filed and served in accordance with Rules 21 and 21a. Nonparties affected by the motion shall be served as if parties. The motion shall contain the certificate required by Rule 166b(7).

(b) Hearing. Oral hearing is required for motions requesting sanctions under paragraph 3, unless waived by those involved. No oral hearing is required for motions requesting relief provided by paragraph 2. The court shall base its decision upon (i) pleadings, affidavits, stipulations, and discovery results submitted with the motion, (ii) judicial notice taken of the usual and customary expenses including attorney's fees and the contents of the case file, and (iii) testimony if the hearing is oral.

(c) Order. An order under this rule shall be in writing. An order granting relief or imposing sanctions shall be against the party, attorney, law firm, or other person or entity whose actions necessitated the motion. An order imposing sanctions under paragraph 3 of this rule shall contain written findings, or be supported by oral findings on the record, stating specifically (i) the conduct meriting sanctions, (ii) the reasons for the court's decision, (iii) why a lesser sanction would be ineffective, and (iv) if the sanction would preclude a decision on the merits of a party's claim, counterclaim, or defense, the conduct demonstrating that the party or the party's counsel has acted in flagrant bad faith or with callous disregard for the rules.

2. **Relief.** The court may compel or quash discovery as provided by Rule 166b. In addition, so long as the amount involved is not substantial, the court may award the prevailing person or entity reasonable expenses necessary in connection with the motion, including attorney's fees. The court may presume the usual and customary fee in connection with the motion is not substantial, unless circumstances or

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[9] 811 S.W.2d 913 (Tex. 1991).

[10] 811 S.W.2d 922 (Tex. 1991).

[11] Current Rule 215 contains 1841 words; proposed Rule 166d contains 804 words.

an objection suggests such award may preclude access to the courts. An award of expenses that is substantial is governed by paragraph 3(c). If a motion is granted in part and denied in part, the court may apportion expenses in a just manner. The court may enter these orders without any finding of bad faith or negligence, but shall not award expenses if the unsuccessful motion or opposition was substantially justified, or other circumstances make an award of expenses unjust.

3. **Sanctions.** In addition to or in lieu of the relief provided above, the court may enter an order imposing one or more of the sanctions set forth below. Any sanction imposed must be just and must be directed to remedying the particular violations involved. A sanction should be no more severe than necessary to satisfy its legitimate purposes.

(a) Reprimanding the offender publicly or privately;

(b) Disallowing further discovery in whole or in part;

(c) Assessing a substantial amount in expenses, including attorney's fees, of discovery or trial;

(d) Deeming certain facts or matters to be established for the purposes of the action;

(e) Barring introduction of evidence supporting or opposing designated claims or defenses;

(f) Striking pleadings or portions thereof, staying further proceedings until an order is obeyed, dismissing with or without prejudice the action or any part thereof, or rendering a default judgment;

(g) Granting the movant a monetary award in addition to or in lieu of actual expenses;

(h) Requiring community service, pro bono legal services, continuing legal education, or other services; or

(i) Entering such other orders as are just.

4. **Compliance.** Monetary awards pursuant to paragraphs 3(c) or 3(g) shall not be payable prior to final judgment, unless the court makes written findings or oral findings on the record stating why an earlier assessment of the award will not preclude access to the court. Sanctions pursuant to paragraph 3(h) shall be deferred until after an opportunity for appeal after final judgment. Otherwise, orders under this rule shall be operative at such time as directed by the court.

5. **Review.** An order under this rule shall be deemed to be part of the final judgment, and shall be subject to review on appeal therefrom. Any person or entity affected by the order may appeal in the same manner as a party to the underlying judgment.[12]

Proposed Rule 166d has five parts: (1) Procedure, including particular requirements for motions, hearings, and orders; (2) Relief, including compelling discovery, protective orders under Rule 166b, and awards of expenses when the amount is "not substantial"; (3) Sanctions, including a listing of specific

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[12] The complete text of the rule, with the proposed accompanying Comment, appears in Appendix A. As discussed below, the Task Force proposal for amending Rule 13 continues and expands the cross-reference that appears in that rule, so that Rule 13 would incorporate most of the procedural portions of Rule 166d.

sanctions that a court may impose; (4) Compliance, setting out the effective time for orders; and (5) Review. The Task Force also recommends moving current paragraph (5) of Rule 215 ("Failure to respond to or supplement discovery") to become part of the general "duty to supplement" provision in Rule 166b(6).[13]

Paragraph (1) of proposed Rule 166d begins with a single, general sentence designed to replace the several confusing, itemized paragraphs in current Rule 215 that set forth various categories of prohibited conduct for which sanctions or other relief may be imposed. Subparagraph (a) sets out the content and service requirements for a motion for sanctions. Subparagraph (b) requires an oral hearing, unless waived, before imposition of sanctions or substantial expenses, and also specifies the materials on which a court is to base its decision. Subparagraph (c) sets out the requirements for a Rule 166d order, including a specific findings requirement, and also lists the categories of persons against whom such an order may be entered.

Paragraph (2) deals with orders compelling discovery, orders quashing discovery, and protective orders under Rule 166b. It also permits a simplified procedure for orders that merely award non-substantial expenses, including attorney's fees, rather than sanctions.

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[13] This change, and additional revisions recommended to discovery supplementation procedures, are discussed in Part VI below.

Paragraph (3) specifies the types of sanctions that a court may impose and incorporates the TransAmerican principle that a sanction must be no more severe than necessary to satisfy its legitimate purposes.

Paragraph (4) sets out the timing requirements for orders, including the requirements of Braden v. Downey.[14]

Paragraph (5) provides that a sanctions order is deemed to be a part of a final judgment, subject to review on appeal, and provides for appeal by any person or entity affected.

B. Rule 166d -- Specific Issues

Several specific issues in proposed Rule 166d merit brief discussion. In order of the sections below, they are:

1. Violations
2. Motions
3. Oral Hearing
4. Order; Trial Court Findings
5. Relief and Sanctions
   a. Relief, "Non-Substantial" Expenses
   b. Sanctions
      (i) Purposes of Sanctions
      (ii) Least Severe Sanction
      (iii) Types of Sanctions
      (iv) Mitigating/Aggravating Factors
   c. Sanctions Discretionary
6. Compliance
7. Review; Appeal
8. Comments
9. Masters
10. Alternative Dispute Resolution
11. Notice to Client
12. Mandating Professional Courtesy
13. Violations of Rule 169

1. Violations

The first sentence of proposed Rule 166d(1) is brief: "If a person or entity fails in whole or in part to respond to or

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[14] 811 S.W.2d 922 (Tex. 1991).

supplement discovery, or abuses the discovery process in seeking or resisting discovery, the court may grant relief as set forth below." This provision is intended to replace the lengthy, somewhat confusing itemization that appears in current Rule 215. Several categories of prohibited conduct are identified in Rule 215 in paragraphs (1)(b), (2), (3), (4), and (5). This sentence is intended to replace all of those provisions.

Rule 215's current listing of prohibited conduct is lengthy and at times unclear. As with most lists, the effort to compile an exhaustive collection of all possible violations invariably omits some conduct that should be included in the list; commentators have noted various additional violations that could be added to current Rule 215. Partly in recognition of this fact, the 1984 amendments to Rule 215 added paragraph (3), which is itself a broad "abuse of discovery" provision. Arguably, that paragraph embraces all of the other conduct specified in other parts of Rule 215.[15] The only reason that the current language in Rule 215(3) does not replace all of the other specified violations is that paragraph (3) of Rule 215 purports to limit somewhat the categories of sanctions that are available under Rule 215(2)(b).[16]

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[15] "As a general proposition, [under Rule 215] any abuse in either failing to make discovery or in resisting discovery is grounds for a motion. The grounds expressly listed for seeking sanctions or an order to compel are apparently nonexclusive." Dan Price, Discovery Sanctions, in State Bar of Texas Prof. Dev. Program, 1 Advanced Civil Trial Course, G-22 (1992).

[16] Paragraph (3) of Rule 215 allows all of the sanctions authorized by Rule 215(2)(b) except for subparagraphs (6), (continued...)

In any event, as made clear in the Comment to the proposed rule, the intent of the simple language in Rule 166d(1) is to embrace all forms of discovery abuse, while avoiding an exhaustive itemization.

A possible objection to the Task Force approach in Rule 166d(1) is that it is too broad and general and does not provide adequate notice of prohibited conduct. As noted above, however, the proposed language essentially tracks existing paragraph (3) of Rule 215. Further, the Task Force proposal for the Comment to the rule would state expressly that the language does not eliminate or reduce the specific categories of violations currently itemized in Rule 215, and would enumerate those categories.[17]

Another possible objection to the proposed language is that although the structure of current Rule 215 is cumbersome, it reflects a complex, specific analysis of particular types of conduct and particular types of sanctions to address such conduct. In fact, however, the broad language of paragraph (3) of current Rule 215 defeats any such contention.

The Task Force proposal for Rule 166d contains careful procedural protections, including requirements for specific

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[16](...continued)
concerning contempt, and subparagraph (7), which simply deals with sanctions for a party who refuses to comply with an order under Rule 167a (physical and mental examinations of persons). Paragraph (3) also does not expressly incorporate the introductory language of paragraph (2)(b), to the effect that the court may make "such orders in regard to the failure as are just, and among others the following."

[17] See Appendix A.

motions, oral hearings, trial court findings, etc.; it also incorporates the least-severe-sanction doctrine of TransAmerican. Consequently, in the Task Force's view, the amended rule should provide substantial protection against judicial abuse in the imposition of improper or inappropriate sanctions.

The Task Force considered, but does not recommend, two alternatives that address the violations provision of the rule. The first approach seeks to define somewhat differently the general category of what constitutes "abusing the discovery process." For example, one alternative phrasing reads: "Engages in conduct primarily to delay unreasonably the discovery process, or to harass or to maliciously injure another person or entity. . . ."[18] At the other end of the spectrum were recommendations presented to the State Bar's Committee on

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[18] By comparison, the 1990 New York State Bar Association's "Report of Special Committee to Consider Sanctions for Frivolous Litigation in New York State Courts" recommended a focus on "abusive conduct," defined as conduct "undertaken or omitted primarily to delay or prolong unreasonably the resolution of the litigation or to harass or maliciously injure another." Rule 3.02 of the Texas Disciplinary Rules of Professional Conduct prohibits a lawyer from "tak[ing] a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter." Comment 2 to Rule 3.01 states that a pleading is frivolous if "it is made primarily for the purpose of harassing or maliciously injuring a person." Current Federal Rule 26(g) provides that the signature of the attorney or party constitutes a certification, in part, that the request, response, or objection is "not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation," and is not "unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation."

Administration of Justice to add specific categories of prohibited conduct, creating a lengthy laundry list of "abuse of discovery."[19] For the reasons discussed above, the Task Force rejected as unworkable and as unduly limiting the effort to create an exclusive listing.[20] The Task Force prefers the general statement of prohibited conduct, with a Comment to the rule noting the categories previously identified in Rule 215, but without further limiting trial courts.

2. Motions

Proposed Rule 166d(1)(a) deals with the form, contents, and service of the motion. Recognizing that persons other than parties to a lawsuit may be affected by discovery abuse, the provision allows "any person or entity affected" to file a motion.[21] Subparagraph (1)(a) also adds language requiring the movant to "specifically describ[e]" the alleged violation to ensure adequate notice to the respondent.[22] The rule allows

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[19] Copies of materials the Task Force received from the Committee on Administration of Justice, including the proposed redraft of Rule 215 from Shelby Sharpe, appear in Appendix O.

[20] For example, under one such laundry list, the final item is itself general: "If the court finds that a party is resisting discovery or if the court finds that any discovery request or answers or responses thereto are frivolous, oppressive, harassing, non-responsive or made for purposes of delay . . . ." See Appendix O.

[21] Similarly, current Rule 21[illegible](1) allows motions by "[a] party . . . and all other persons affected thereby."

[22] Neither Rule 13 nor Rule 215 contains language requiring specificity in a motion alleging violations. Although Rule 13 currently requires "notice and hearing" before imposition of sanctions, one commentator has criticized the "creative interpretation" some Texas courts have given those provisions, (continued...)

the movant to attach necessary exhibits to the motion, as Rule 215(6) currently permits. The rule also incorporates the conference requirement stated in Rule 166b(7).[23]

Proposed Rule 166d requires the filing of a motion before the court may impose sanctions. In effect, this eliminates the current practice under Rule 215(2)(b) and (3), which allow the court to impose sanctions sua sponte, even if no motion is filed. The rationale for this change is twofold. First, the Task Force agrees with the strong sentiment expressed by Texas lawyers (75%) and judges (74%) who responded to the questionnaire that our judicial system is now spending too much time and money on sanctions practice. If the supposedly offensive conduct does not sufficiently motivate the person affected to file a motion, or if the offended person decides for other reasons that sanctions are not an appropriate or desirable remedy to seek, a strong argument can be made that a court should not interject itself to generate such collateral sanctions proceedings. Second, as a practical matter, if a

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[22](...continued)
such as in finding adequate notice contained in a prayer for relief or notice received at the hearing itself. Rich, supra note 1, at 73-74.

[23] By large margins (lawyers 87%, judges 93%), respondents to the Task Force questionnaire indicated that the rule should require attorneys to confer before seeking sanctions. While placing this requirement in Rule 166d(1)(a) is somewhat repetitious with respect to discovery motions, the Task Force recommendation for Rule 13 incorporates this and other procedural provisions of proposed Rule 166d. See Part V, below. Thus, including this language in Rule 166d assures that a conference is necessary before any type of sanctions motion is filed, whether concerning discovery or pleadings.

judge observes conduct that he or she decides constitutes discovery abuse (and that is not independently punishable as contempt), the court can simply "invite" or encourage the filing of such motion, and in all probability a person injured by the conduct then will file the motion.

3. Oral Hearing

Proposed Rule 166d(1)(b) requires an oral hearing, unless waived by the parties, prior to imposition of sanctions under paragraph (3). As discussed below, the rule does not require the hearing before an award of "non-substantial" expenses under paragraph (2). The pertinent language reads:

> *Hearing*. Oral hearing is required for motions requesting sanctions under paragraph 3, unless waived by those involved. No oral hearing is required for motions requesting relief provided by paragraph 2. The court shall base its decision upon (i) pleadings, affidavits, stipulations, and discovery results submitted with the motion, (ii) judicial notice taken of the usual and customary expenses including attorney's fees and the contents of the case file, and (iii) testimony if the hearing is oral.

Thus, the Task Force's approach is to adopt the middle ground between requiring an oral hearing in every case and allowing imposition of sanctions without hearings.

Despite the possible additional burden of an oral hearing, the Task Force concluded that the imposition of sanctions is a sufficiently severe step with potentially serious consequences[24] that a person should have the right to a

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[24] The Task Force received several individual reports concerning the devastating impact of some sanctions orders. One example was the "Memorandum of Professor Barry Nakell Regarding Nature of Sanctions," in Robeson v. Britt, No. 89-06-CIV-3-H (continued...)

hearing, including the right to present evidence, before imposition of sanctions. By large margins (lawyers 93%, judges 87%), respondents to the Task Force questionnaire agreed that trial courts should conduct oral hearings before imposing sanctions. Further, as the Texas Supreme Court noted in TransAmerican, "the imposition of very severe sanctions is limited . . . by constitutional due process."[25]

Subparagraph (1)(b) allows those involved to waive the hearing, and no hearing is necessary for motions seeking relatively minor relief of non-substantial expenses provided by paragraph (2).

The final sentence of subparagraph (1)(b) requires that the court base its decision upon "(i) pleadings, affidavits, stipulations, and discovery results submitted with the motion, (ii) judicial notice taken of the usual and customary expenses including attorney's fees and the contents of the case file, and

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[24](...continued)
(E.D.N.C. Aug. 30, 1991), which stated in part: "[T]he sanctions have . . . crushed [Nakell]. . . . [T]he emotional impact upon him has been catastrophic. . . . The prospect of having to pay such a fine . . . was a source of great distress to Barry and his family. Worse was the public implication that he, a lawyer known for ethics and altruism, had been convicted of being capricious and unethical. This shook Barry, his family, and all who admired him. Rabbi Friedman adds: 'For Barry Nakell to be subjected to such negative public attention for these many months was a devastating punishment for him. . . . Not only did Professor Nakell's activity as a respected leader of the Jewish community diminish because of his embarrassment and the drain on his energies . . . , he even stopped attending the Saturday morning bible study group at which he was a regular.' . . . 'Professor Nakell has also had to undergo therapy to ameliorate the effects of this nightmarish ordeal.'" (Friedman Aff. ¶¶ 5, 7, 9; Braun Aff. ¶ 6)."

[25] 811 S.W.2d 913, 917 (Tex. 1991).

(iii) testimony if the hearing is oral." The Task Force considered, but rejected, a proposal adopting an affidavit procedure patterned after summary judgment practice under Rule 166a or the modified affidavit procedure under Rule 120a special appearance practice. Again, because of the potential seriousness of any imposition of sanctions, and because parties generally do not need to engage in discovery directed to the sanctions motion itself, the Task Force concluded that an oral hearing, with the right to present live testimony, was the preferable procedure.[26]

4. Order; Trial Court Findings

Paragraph (1)(c) of proposed Rule 166d contains the requirements for a court order that either grants relief under paragraph (2) or grants sanctions under paragraph (3). Paragraph (1)(c) reads:

> *(c) Order.* An order under this rule shall be in writing. An order granting relief or imposing sanctions shall be against the party, attorney, law firm, or other person or entity whose actions necessitated the motion. An order imposing sanctions under paragraph 3 of this rule shall contain written findings, or be supported by oral findings on the record, stating specifically (i) the conduct meriting sanctions, (ii) the reasons for the court's decision, (iii) why a lesser sanction would be ineffective, and (iv) if the sanction would preclude a

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[26] ABA Standard (M)(4) sets out a discretionary standard for when to conduct a hearing, but emphasizes the importance of a hearing if an issue of bad faith arises: "The court, in its discretion, shall determine whether to hold a hearing on sanctions under consideration. A hearing is ordinarily required prior to the issuance of any sanction that is based upon a finding of bad faith on the part of the alleged offender. A hearing is appropriate whenever it would assist the court in its consideration of the sanctions issue or would significantly assist the alleged offender in the presentation of his or her defense." ABA Standards, supra note 7, 121 F.R.D. at 128.

> decision on the merits of a party's claim, counterclaim, or defense, the conduct demonstrating that the party or the party's counsel has acted in flagrant bad faith or with callous disregard for the rules.

Paragraph (1)(c) continues the distinction between orders that impose non-substantial expenses under paragraph (2) and orders that impose sanctions under paragraph (3). Both types of orders must be in writing. An order imposing sanctions under paragraph (3), however, also must either "contain written findings, or be supported by oral findings on the record, stating specifically (i) the conduct meriting sanctions, (ii) the reasons for the court's decision, (iii) why a lesser sanction would be ineffective, and (iv) if the sanction would preclude a decision on the merits of a party's claim, counterclaim, or defense, the conduct demonstrating that the party or the party's counsel has acted in flagrant bad faith or with callous disregard for the rules." Thus, unless a court's award is limited to non-substantial expenses, the rule requires either written findings or oral findings on the record.

This findings requirement follows the Texas Supreme Court's suggestion and rationale in TransAmerican:

> It would obviously be helpful for appellate review of sanctions, especially when severe, to have the benefit of the trial court's findings concerning the conduct which it considered to merit sanctions, and we commend this practice to our trial courts. . . . Precisely to what extent findings should be required before sanctions can be imposed, however, we leave for further

> deliberation in the process of amending the rules of procedure.[27]

As the court further explained in Chrysler Corp. v. Blackmon:

> Written findings that support the decision to impose such sanctions have at least three salutary effects: 1) such findings aid appellate review, demonstrating that the trial court's discretion was guided by a reasoned analysis of the purposes sanctions serve and the means of accomplishing those purposes according to the TransAmerican and Braden standards; (2) such findings help assure the litigants, as well as the judge, that the decision was the product of thoughtful judicial deliberation; and (3) the articulation of the court's analysis enhances the likely deterrent effect of the sanctions order.[28]

The findings requirement should be a restraining influence on what some observers have viewed as the hair-trigger imposition of sanctions. Required findings should make it less likely that trial courts will impose, or that appellate courts will affirm, unjust or inappropriate sanctions, and more likely that legitimate sanctions will be upheld on appeal without the

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[27] 811 S.W.2d at 919 n.9. Rule 13 already contains a findings requirement. See, e.g., GTE Communications Sys. Corp. v. Curry, 819 S.W.2d 652 (Tex. App. -- San Antonio 1991, no writ) ("No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order. . . . The requirement that the court state its findings in the order is in lieu of the traditional findings of fact and conclusions of law which normally are filed in a trial on the merits in a non-jury case. These findings enable the appellate court to review the order in light of the facts found by the trial court. Without the findings required by rule 13, effective review of the sanctions is unavailable because the sanctioned party would be unable to overcome the presumption that the trial court found necessary facts in support of its judgment."). Some previous Texas decisions have been criticized for failing to comply with Rule 13's particularity requirement and for sometimes ignoring it completely. See Rich, supra note 1, at 75-79. See also the discussion of Rule 13, Part V below.

[28] 36 Tex. Sup. Ct. J. 76, 83 (Oct. 14, 1992).

necessity of remanding to require further development of the record.

The findings mandated by the proposed rule require that the trial court and litigants focus specifically upon the conduct meriting sanctions and the justifications for any court decision imposing sanctions. The third category of findings -- "why a lesser sanction would be ineffective" -- tracks the Supreme Court's language in TransAmerican[29] directing the trial court to consider lesser sanctions. The fourth category of findings -- "the conduct demonstrating that the party or the party's counsel has acted in flagrant bad faith or with callous disregard for the rules" -- also derives from TransAmerican, and this applies if the court chooses to impose a death penalty sanction, that is, a sanction that would preclude a decision on the merits of a claim or defense.

The findings provision adopted is similar to that recommended by Judge Sam Johnson, of the Fifth Circuit and formerly of the Texas Supreme Court, and his coauthors in their recent articles on Federal Rule 11.[30] The Task Force agrees

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[29] "A sanction imposed for discovery abuse should be no more severe than necessary to satisfy its legitimate purposes. It follows that courts must consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance." TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991).

[30] Johnson, Contois & Keeling, supra note 1 at 647; Judge Sam D. Johnson, Byron C. Keeling, & Thomas M. Contois, The Least Severe Sanction Adequate: Reversing the Trend in Rule 11 Sanctions 54 Tex. B.J. 952 (1991) (hereinafter "Johnson, Keeling & Contois"). The specific findings language that Judge Johnson and his coauthors recommended for Rule 11 included: "(1) what (continued...)

with Judge Johnson's observation that while, at first glance, it may seem somewhat burdensome to require district courts to consider each of these issues and to note their conclusions for the record, for several reasons such a requirement is well-justified:

> First, the bother is not that great: the factors listed are the factors a district court ought to consider in any event when imposing sanctions; all that is required here is that the court make a record of its deliberations. Second, given the potential size and effect of Rule 11 sanctions, a certain amount of care is warranted in the imposition of sanctions. Third, factual findings on each of these . . . issues would encourage federal district courts to consider more seriously the least sanction adequate doctrine, a doctrine which, if fully implemented, would eliminate the worst of the problems with the present rule. Fourth, requiring findings on each of these . . . issues is necessary if federal appellate courts are to review the imposition of sanctions more closely, to prevent abuses of the rule.[31]

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[30](...continued)
pleading, motion, or other paper is in violation of Rule 11, (2) why it is in violation, (3) what factors the court considered in choosing an appropriate sanction, (4) what sanctions, if any, were considered and rejected, and (5) why the court believes that the sanction imposed is the least severe sanction necessary to deter similar misconduct." Id. at 957.

By comparison, ABA Standard (N)(1), supra note 7, 121 F.R.D. at 128, provides: "Unless it is otherwise apparent from the record, the trial court should include an identification of each pleading, motion or other paper held to violate the Rule, a specification of the nature of the violation and an explanation of the manner in which the sanction was computed or otherwise determined."

As of this writing, the most recent proposed amendments to Federal Rule 11 contain this findings language: "When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed."

[31] Johnson, Keeling & Contois, supra note 30, at 957-58.

The Task Force questionnaire responses strongly endorsed a requirement that a trial judge state into the record specific reasons when imposing sanctions (lawyers 97%, judges 59%).

Although a majority of the lawyer respondents (67%) would have required that judges make written findings of fact and conclusions of law when imposing sanctions, a larger majority of judicial respondents disagreed (83%). Because most state judges lack adequate funds for secretarial staffing to type written findings, and because of the volume of sanctions hearings, the Task Force concluded that oral findings stated into the record should suffice, though of course the rule also permits the trial judge to include written findings in the sanctions order if the judge chooses to do so.[32]

Paragraph (1)(c) makes clear that a court may impose sanctions or other relief against a party, attorney, law firm,[33] or other person or entity whose actions necessitated the motion. This reflects the strong agreement among lawyers

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[32] Cf. Chrysler Corp. v. Blackmon, 36 Tex. Sup. Ct. J. 76 (Oct. 14, 1992) ("[W]e do not wish to unnecessarily burden our trial courts by requiring them to make written findings in all cases in which death penalty sanctions are imposed. First, the benefit of the trial court's explanation in the record of why it believes death penalty sanctions are justified may be sufficient to guide the appellate court. Second, written findings are not needed in the vast majority of relatively uncomplicated cases or even more complex cases involving only a few issues pertinent to the propriety of death penalty sanctions.")

[33] Interpreting Federal Rule 11, the United States Supreme Court held that a law firm was not vicariously liable for the conduct of its lawyers. Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989). The current draft of the proposed amendments to Federal Rule 11 would reverse that result, expressly permitting imposition of sanctions against law firms, as well as individual attorneys.

and judges who responded to the Task Force questionnaire that courts should be able to impose sanctions against: parties (lawyers 89%, judges 95%); lawyers (lawyers 89%, judges 100%); and law firms (lawyers 61%, judges 76%).[34]

The Task Force considered, but rejected, a suggestion that the rule require findings when the court decides not to impose sanctions. Although the Task Force received complaints that some trial courts have not imposed sanctions in cases when sanctions were clearly warranted, requiring the trial court to make findings even in the absence of any misconduct seems to the Task Force to be overly burdensome.

5. Relief and Sanctions

a. Relief, "Non-Substantial" Expenses

Paragraph (2) of proposed Rule 166d initially recognizes the authority under Rule 166b for orders compelling discovery and quashing discovery. As stated in the Comment, Rule 166d is not intended to change the procedures, standards, or substantive law regarding such orders, and Rule 166b shall control such matters.

Paragraph (2), however, also provides a simplified procedure for a court to award a prevailing party reasonable expenses,

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[34] The reference to non-parties (i.e., "against the party . . . or other person or entity") expands somewhat the availability of sanctions. Current Rule 215 allows motions for sanctions by parties and "all other persons affected," but appears to allow only certain categories of sanctions against non-parties. In many instances, of course, particular sanctions will be inapplicable to non-parties under proposed Rule 166d (e.g., striking pleadings). The Task Force concludes that the trial court should have discretion to determine appropriate sanctions against non-parties who abuse the discovery process.

including attorney's fees, "necessary in connection with the motion." As long as the amount of the award is "not substantial," the hearing requirement in paragraph (1)(b) and the findings requirement in paragraph (1)(c) do not apply. Current Rule 215(1)(d) also authorizes an award of expenses upon disposition of a motion to compel. Both versions of the rule permit the court to apportion expenses in a just manner.

Proposed Rule 166d authorizes the simplified procedure only if the amount is "not substantial," and the Comment makes clear that that standard considers both the amount of the award and the financial resources of the persons or entity involved. If the amount would be substantial measured by either reference, the additional procedural protections apply.

The proposed rule also allows the court to presume that the usual and customary attorney's fee in connection with the motion is not substantial, unless circumstances or an objection suggests such an award may preclude access to the courts.[35]

The simplified procedures are designed for routine orders ~~compelling or quashing discovery, and for~~ granting minimum awards of expenses, typically attorney's fees, in conjunction with such motions.

The Task Force considered a variety of options concerning what amount of expenses award should trigger the procedural

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[35] Cf. In the Matter of the Estate of Kidd, 812 S.W.2d 356, 359 (Tex. App. -- Amarillo 1991, writ denied) (under Tex. Civ. Proc. & Rem. Code § 38.004(2), trial court could take "judicial notice of usual and customary attorney's fees attributable to the discovery dispute. A rebuttable presumption exists that usual and customary attorney's fees are reasonable. . . . § 38.003.").

protections of a hearing and findings. As with many rule standards, the range of possible options runs from standards that are certain but possibly arbitrary and inflexible, to standards that are flexible but possibly ambiguous. An obvious objection to the "substantial amount" test is that, at least in the abstract, it may appear vague and ambiguous. In fact, however, the effect of a monetary award of expenses inevitably will vary depending upon the financial resources of the person liable. While an award of $1000 or more might be relatively insignificant for a large corporation, a much smaller sum might be beyond the financial resources of an indigent litigant. The Task Force considered specifying an amount certain, such as $250, $500, or $1000, as a threshold level for the findings and hearing requirements, but opted for the more flexible standard because of the unavoidably relative nature of financial impacts.

In one sense, the Task Force's approach is mid-range between an absolute standard (e.g., $1000) and the absence of clear due process guidance that exists in the current federal system. In determining whether a hearing is necessary, for example, the Advisory Committee Notes to Federal Rule 11 simply offer this Delphic comment: "The procedure obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration."[36]

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[36] The ABA Standards provide a thirteen-point blizzard of not particularly illuminating specific factors to consider in determining what due process requires:

(continued...)

As a practical matter, the Task Force's recommended standard means that in all cases of significant sanctions a hearing will be necessary, unless waived by the persons involved. Certainly trial judges should err on the side of caution and conduct a hearing whenever there is any doubt about the matter.

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[36](...continued)

"The procedure employed may vary with the circumstances, provided that due process requirements are satisfied. Among the factors that the court considers in fashioning a procedure to insure due process are:

a. the severity of the sanction under consideration;
b. the interests of the alleged offender in having a sanction imposed only when justified;
c. the risk of an erroneous imposition of sanctions relative to the probable value of additional notice and hearing;
d. the interest of the court in the efficient use of the judicial system, including the fiscal and administrative burdens that additional procedural requirements would entail;
e. whether the sanctions at issue were sought by a party or are being considered sua sponte by the court;
f. if the sanctions were sought by a party, the type of sanction sought;
g. the type of sanction under consideration by the court;
h. whether the alleged offender was notified, or is otherwise aware, that sanctions are under consideration, and the nature of those sanctions;
i. whether the sanction under consideration rests on a factual finding, such as a finding of bad faith on the part of the alleged offender;
j. whether the judge imposing or considering the sanction presided over the proceedings and is the same judge before whom the offense was committed;
k. whether the alleged offender has been provided an opportunity to be heard before sanctions issued;
l. whether the alleged offender will be provided an opportunity to be heard after sanctions issued;
m. whether counsel, client or both are the target of the proposed sanction, and the impact of the sanctions proceedings on the attorney-client relationship."

ABA Standard (M)(3), supra note 7, 121 F.R.D. at 127-28.

The ABA Standards do make clear, however, that a hearing is "ordinarily required" before imposition of any sanction based upon a finding of "bad faith." ABA Standard (M)(4), id. at 128.

Another approach that the Task Force considered but rejected was not to require hearings or findings for any order that simply awarded attorney's fees or other reasonable expenses in connection with the motion. In practice, however, pretrial motions can be very expensive. For example, in one reported Texas case the trial judge awarded $150,000 as attorney's fees following a summary judgment hearing.[37] Such a large award is a serious matter, and beyond the ability of many litigants and even some lawyers to pay.[38]

Finally, continuing the practice under current Rule 215, in awarding the non-substantial expenses under paragraph (2) of proposed Rule 166d the court need not make a finding of "bad faith or negligence"; on the other hand, the court should not award expenses if the unsuccessful motion or opposition was "substantially justified, or other circumstances make an award of expenses unjust."[39]

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[37] GTE Communications Sys. Corp. v. Curry, 819 S.W.2d 652 (Tex. App. -- San Antonio 1991, no writ) (the court of appeals conditionally granted mandamus relief against the trial court's award on the ground that the trial court order failed to state the particulars of good cause, as required by Rule 13).

[38] As discussed below, malpractice insurance coverage may be unavailable to pay the award or to reimburse a party or lawyer who pays the award. See Part XI, below.

[39] Similarly, current Rule 215(1)(d) provides that upon disposition of a motion to compel, a court "shall after opportunity for hearing, require a party . . . whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay . . . the reasonable expenses incurred in obtaining the order, . . . unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust."

b. Sanctions

Paragraph (3) of Rule 166d itemizes sanctions that the court may enter after following the procedures prescribed in paragraph (1). Paragraph (3) also tracks the language of TransAmerican in stating that any sanction imposed must be "directed to remedying the particular violations involved, and should be no more severe than necessary to satisfy [the sanction's] legitimate purposes."[40]

Courts and commentators have identified several factors for a trial judge to take into account in determining an appropriate sanction, including the following: (1) the purposes for which sanctions are imposed; (2) the types of sanctions available; (3) the principle that a sanction should be no more severe than necessary; and (4) mitigating or aggravating factors.[41] The Task Force's proposed Comment to Rule 166d deals with each of these factors.

(i) Purposes of Sanctions

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[40] "[A] just sanction must be directed against the abuse and toward remedying the prejudice caused the innocent party. . . . A sanction imposed for discovery abuse should be no more severe than necessary to satisfy its legitimate purposes." TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991).

[41] Cf. Joseph, supra note 7, at 216: "In exercising this discretion, the district judge takes into account several factors. These include: (1) the types of sanctions available; (2) the purpose (or purposes) . . . that the judge seeks to vindicate; (3) mitigating and aggravating factors that militate in favor of, or against, imposing a harsh (or lenient) sanction; (4) the least severe sanction that is adequate in the circumstances; and (5) whether it is appropriate to impose the sanction on counsel or client, or both."

As the proposed Comment to Rule 166d states, the legitimate purposes that a trial court may consider in awarding sanctions include the following:[42]

(1) specific deterrence of the offending party, or general deterrence of other litigants, from violating the rules;[43]

(2) punishing parties who violate the rules;[44]

(3) compensating, or remedying the prejudice caused to, the innocent party;[45] and

(4) securing compliance with the rules.

Depending upon the nature of the case and the violation, as well as the respective roles of parties and counsel, the deterrent, punitive, compensatory, or compliance aspects may have varying importance.

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[42] Compare ABA Standard (L)(5): "Among the purposes for which a court may impose Rule 11 sanctions are: (a) deterring dilatory or abusive litigation tactics by the same offender and others; (b) imposing punishment for deserving misconduct; (c) compensating an offended person for some or all of the reasonable expenses incurred by reason of the misconduct; (d) alleviating other prejudice to an offended person resulting from the misconduct, including prejudice to that person's litigation positions; and (e) streamlining litigation and bringing about economies in the use of judicial resources by curtailing frivolous and abusive practices." ABA Standards, supra note 7, 121 F.R.D. at 125.

[43] TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 918 (Tex. 1991); Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986).

[44] TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 918 (Tex. 1991); Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986).

[45] Cf. TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991) ("a just sanction must be directed . . . toward remedying the prejudice caused the innocent party").

(ii) Least Severe Sanctions

The Task Force endorses the Texas Supreme Court's salutary mandate in TransAmerican that the trial court should impose sanctions no more severe than necessary to satisfy legitimate purposes:

> [J]ust sanctions must not be excessive. The punishment should fit the crime. A sanction imposed . . . should be no more severe than necessary to satisfy its legitimate purposes. It follows that courts must consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance.[46]

Rule 166d addresses that principle in two places. Paragraph (1)(c) requires as one of the specific findings that a trial court state "why a lesser sanction would be ineffective." Paragraph (3) states that any sanction imposed "should be no more severe than necessary to satisfy its legitimate purposes."[47]

As the Texas Supreme Court has emphasized, important due process considerations also apply to any imposition of "death penalty" sanctions:

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[46] TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991); cf. Pelt v.Johnson, 818 S.W.2d 212, 216 n.1 (Tex. App. -- Waco 1991, no writ) ("We interpret this as equivalent to a rule that the court should impose the 'least severe sanction adequate' to accomplish the purpose of Rule 215.").

[47] Compare ABA Standard (L)(4): "In determining the appropriate sanction, the court considers which of the purposes underlying Rule 11 it seeks to implement and then imposes the least severe sanction adequate to serve the purpose or purposes." ABA Standards, supra note 7, 121 F.R.D. at 124; see also Johnson, Keeling & Contois, supra note 30 at 952 & n.6. & cases cited therein ("This 'least severe sanction adequate' requirement . . . implies the district courts should consider less severe alternatives to monetary sanctions.").

> The imposition of very severe sanctions is [also] limited . . . by constitutional due process. . . . Sanctions which are so severe as to preclude presentation of the merits of the case should not be assessed absent a party's flagrant bad faith or counsel's callous disregard for the responsibilities of discovery under the rules.[48]

The Task Force received a comment questioning the difficulty of determining what is a "less stringent" sanction and what is a "more stringent" sanction. For example, the question was asked: Is reprimanding an offender publicly and imposing a substantial monetary award less severe or more severe than a sanction disallowing further discovery and barring introduction of certain evidence? The Task Force concluded that the question requires a factual inquiry, and the answer will vary from case to case; however, for the trial court to analyze the various sanctions options before selecting an appropriate sanction for the particular case well serves the purpose of this requirement.

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[48] TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917-18 (Tex. 1991) (emphasis added); cf. Pelt v. Johnson, 818 S.W.2d 212 (Tex. App. -- Waco 1991, no writ) ("The ultimate sanctions should be applied only 'when [the offending party] is guilty of actual bad faith in discovery abuses and great harm comes to [the other party] as a result.'") (quoting Hogan v. Beckel, 783 S.W.2d 307, 309 (Tex. App. -- San Antonio 1990, writ denied)); Hanley v. Hanley, 813 S.W.2d 511, 520 (Tex. App. -- Dallas 1991, no writ) ("Dismissal must be a sanction of last, not first, resort."). The pertinent langauge in the proposed rule refers simply to "flagrant bad faith or callous disregard"; the Task Force concluded that both categories should apply to parties and counsel, rather than analyzing bad faith only for parties and analyzing callous disregard only for counsel.

(iii) Types of Sanctions

In proposed Rule 166d the Task Force recommends some changes from current Rule 215's listing of permissible types of sanctions, primarily to simplify and clarify particular sanctions, but also to change somewhat the emphasis among available sanctions. The authorized sanctions under proposed Rule 166d(3) are:

(a) Reprimanding the offender publicly or privately;
(b) Disallowing further discovery in whole or in part;
(c) Assessing a substantial amount in expenses, including attorney's fees, of discovery or trial;
(d) Deeming certain facts or matters to be established for the purposes of the action;
(e) Barring introduction of evidence supporting or opposing designated claims or defenses;
(f) Striking pleadings or portions thereof, staying further proceedings until an order is obeyed, dismissing with or without prejudice the action or any part thereof, or rendering a default judgment;
(g) Granting the movant a monetary award in addition to or in lieu of actual expenses;
(h) Requiring community service, pro bono legal services, continuing legal education, or other services; or
(i) Entering such other orders as are just.[49]

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[49] Cf. ABA Standard (L)(2):
Types of Sanctions: Among the types of sanction that the court, in its discretion, may choose to impose are:
a. a reprimand of the offender;
b. mandatory continuing legal education;
c. a fine;
d. an award of reasonable expenses, including reasonable attorneys' fees, incurred as a result of the misconduct;
e. reference of the matter to the appropriate attorney disciplinary or grievance authority;
f. an order precluding the introduction of certain evidence;
g. an order precluding the litigation of certain issues;
h. an order precluding the litigation of certain claims or defenses;
i. dismissal of the action;
j. entry of a default judgment;
k. injunctive relief limiting a party's future access to the courts; and

(continued...)

The nine specific sanctions listed in paragraph (3) of Rule 166d are not intended to change substantively the types of sanctions authorized under current Rule 215(2)(b). For simplicity and brevity, Rule 166d has minor language changes, but basically the subdivisions in Rule 215(2)(b) and in Rule 166d(3) correspond as follows:

Rule 215(2)(b) Provision	Rule 166d(3) Provision
(1)	(b)
(2)	(c)
(3)	(d)
(4)	(e)
(5)	(f)

Subparagraph (3)(i) of Rule 166d also contains a general authorization for "such other orders as are just," virtually

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[49](...continued)

1. censure, suspension or disbarment from practicing before the forum court, subject to applicable rules or statutes.

ABA Standards, supra note 7, 121 F.R.D. at 124; see also TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 921-22 (Tex. 1991) (Gonzalez, J., concurring). Justice Gonzalez cited the same ABA Standard, and listed the same options, but omited items (k) and (l). The Task Force took the same approach, except that it also deleted item (e), reference to an appropriate attorney disciplinary grievance authority, because the current disciplinary rules in Texas for lawyers and judges make adequate provision for that action, independent of the Rules of Civil Procedure. See, e.g., Texas Disciplinary Rules of Professional Conduct, Rule 8.03 (requiring lawyers to report misconduct that raises a "substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects"); Texas Code of Judicial Conduct, Canon 3B(3) ("A judge should take or initiate appropriate disciplinary measures against a lawyer for unprofessional conduct of which the judge may become aware.").

identical to the same language that appears in Rule 215(2)(b).[50]

For clarification, Rule 166d(3) lists three other permissible sanctions, each of which appears to be authorized under the broad language of current Rule 215(2)(b): reprimands [subparagraph (3)(a)]; monetary awards [subparagraph (3)(g)]; and personal service [subparagraph (3)(h)].[51] The basis for each of these newly specified categories is discussed below.

Reprimand: Proposed Rule 166d identifies reprimand as the first listed sanction in order to emphasize the availability of this frequently overlooked alternative. Often in the past

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[50] The Task Force considered, but rejected, a suggestion to eliminate this general provision. Proponents of eliminating this provision argued that it is too vague and ambiguous, that it provides no guidance or notice to litigants or courts concerning what additional sanctions are permissible, and that if anyone can think of another proper sanction, the rule should specifically refer to it. The Task Force, however, found persuasive the Supreme Court's statement in Braden v. Downey, 811 S.W.2d 922, 930 (Tex. 1991), that while the community service sanction imposed upon plaintiff's attorney was not specifically listed in the rule, "we do not criticize this type of creative sanction. . . . Although monetary sanctions unrelated to attorney fees and performance of community service are not among the possible sanctions enumerated in Rule 215, paragraph 2b, the rule generally authorizes a trial court to sanction discovery abuse by 'such orders . . . as are just.'" Although the Task Force concluded that the possible sanctions specifically listed in proposed Rule 166d will furnish ample latitude for the overwhelming majority of cases, nevertheless an exclusive list would prevent further experimentation and further evolution of sanctions practice as the experience of trial judges and lawyers increases. Providing a limited, exclusive list would prevent creative experimentation.

[51] The Task Force draft of Rule 166d omits the reference to contempt under subparagraphs (6) and (7) of Rule 215(2)(b) as a specific sanction for failure to obey court orders. That remedy does not appear to add to trial courts' existing contempt power for violations of court orders.

courts and parties have given too little consideration to alternatives to what is the most common sanction of all: an award of attorney's fees.[52] A mild verbal reprimand is among the "most lenient sanctions the court may impose,"[53] however, reprimands may vary from a "warm friendly discussion on the record" to a "hard-nosed reprimand in open court."[54]

Even a reprimand can have a serious impact,[55] and thus the procedural protections applicable under paragraph (3) sanctions also apply to reprimands. For example, the Texas Board of Legal Specialization's prescribed application form asks the question, "[H]ave you been . . . reprimanded . . . by a district court in Texas?" As one commentator described the potential for abuse of reprimands:

> Every lawyer knows that the "biggest sanction" imposed is being told that you are wrong. As a result of the sanctioning tool, however, courts step beyond the merits to attack lawyers. Characterizations such as beneath the level of "a first year law student," "wacky" and not of the level to cause the court to "applaud" are not atypical. This is base, mean language by judges whose interest in grinding an institutional ax overrides their responsibilities to the bar. Lawyers whose reputations

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[52] "An award of 'reasonable expenses,' including attorneys' fees, is the most common form of sanctions to issue for violation of Rule 11." Joseph, supra note 7, at 225.

[53] Joseph, supra note 7, at 218. Justice Gonzalez recognized reprimands as a permissible sanction in TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 921 (Tex. 1991) (quoting ABA Standard (L)(2)).

[54] Thomas v. Capital Security Servs., Inc., 836 F.2d 866, 878 (5th Cir. 1988) (en banc).

[55] Cf. Robinson v. National Cash Register Co., 808 F.2d 1119, 1131 (5th Cir. 1987) ("Sanctions should not be lightly imposed given the impact that they have on both the attorney's and party's reputations.").

> and careers are at stake deserve more than exercises in adjectival flippancy.[56]

On occasion, courts have required that a sanctioned attorney circulate the court's reprimand to other lawyers in the firm.[57]

Nevertheless, reprimands have a proper place in the panoply of available sanctions, and in appropriate cases, can fulfill very useful educational and deterrent functions. The Task Force concludes that the rule should specifically refer to the availability of reprimands.

Monetary Award: Paragraph (3) of proposed Rule 166d authorizes two types of monetary sanctions: in subparagraph (c), assessing "a substantial amount" in expenses, including attorney's fees, of discovery or trial; in subparagraph (g), granting the movant a monetary award in addition to or in lieu of actual expenses.

The express authorization of a monetary award in paragraph (3)(g) puts to rest a matter that perhaps has been somewhat unclear under earlier Texas case law. In his concurring opinion in TransAmerican, Justice Gonzalez specifically concluded that a monetary "fine" was a permissible sanction under Rule 215:

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[56] George Cochran, Rule 11: The Road to Amendment, 8 Fifth Cir Rptr. 559, 563 (1991) (footnotes omitted).

[57] See, e.g., Traina v. United States, 911 F.2d 1155, 1158 (5th Cir. 1990) (affirming a trial court order that reprimanded an Assistant United States Attorney and required her to show a copy of the order to her supervisor and to certify to the court that she had done so).

"[T]he range of sanctions available to a trial court under Rule 215 . . . include[s]: . . . a fine."[58]

In federal court, a fine inures to the benefit of the government, rather than to the opposing party.[59] In Texas,

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[58] TranAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 921 (Tex. 1991). Justice Gonzalez noted that the decision in Owens-Corning Fiberglass Corp. v. Caldwell, 807 S.W.2d 413, 415 (Tex. App. -- Houston [1st Dist.] 1991), orig. proceeding), had concluded that trial courts lacked authority to impose "a monetary fine as a sanction for abuse of the discovery process" under Rule 215(3). Owens-Corning concluded that monetary awards were appropriate under the general reference of Rule 215(2)(b) -- "such orders . . . as are just" -- but were not authorized under the more limited language of Rule 215(3). 807 S.W.2d at 415. Justice Gonzalez also interpreted Braden v. Downey, 811 S.W.2d 922 (Tex. 1991), as holding that a trial judge has authority to assess a fine. 811 S.W.2d at 921 n.3; see also Kutch v. Del Mar College, Inc., 831 S.W.2d 506, 513 n.4 (Tex. App. -- Corpus Christi 1992, no writ) ("Lesser sanctions such as an order assessing a fine . . . might have resulted in compliance . . . ."); Hanley v. Hanley, 813 S.W.2d 511, 521 (Tex. App. -- Dallas 1991, no writ) (reversing a $50,000 monetary sanction, but noting that while Rule 215(2)(b) does not specifically list a monetary penalty among its options, "a trial court is not limited to the laundry list of specifically authorized sanctions. In fact, the rule was written to permit the trial court flexibility for creative resourcefulness."); Firestone Photographs, Inc. v. Lamaster, 567 S.W.2d 273, 277 (Tex. App. -- Texarkana 1978, no writ) ("Although the right to impose monetary penalties . . . is not specifically mentioned, it seems that if the court, upon a party's disobedience, is empowered to immediately preclude the presentation of all that party's defenses and enter default judgment against him on the pleadings, it would alternatively have the right to impose periodic monetary penalties for his continuing disobedience, not to exceed the amount for which judgment could have been summarily entered.") In federal court, "[i]t is well settled that a fine may be an 'appropriate sanction' within the meaning of Rule 11." Joseph, supra note 7, at 221.

[59] Joseph, supra note 7, at 221. The committee notes to the currently proposed draft of the amendments to Federal Rule 11 provide that "if a monetary sanction is imposed, it should ordinarily be paid into the court as a penalty. However, under unusual circumstances, . . . deterrence may be ineffective unless the sanction not only requires the person violating the rule to make a monetary payment, but also direct some or all of thi-

(continued...)

however, allowing local courts to require payment of such fines to the court or the clerk might raise an appearance of impropriety by creating an incentive for courts to self-finance by collecting such fines. Hence, the Task Force has recommended monetary awards payable only to the injured movant.

Required Services: The Task Force recommends addition of the language in subparagraph (3)(h) in order to emphasize the availability of sanctions imposing requirements of specific performance, either for educational or community service purposes. In Braden v. Downey[60] the trial court had ordered, inter alia, that two of the attorneys perform community service for the Child Protective Services Agency of Harris County. The Supreme Court conditionally granted mandamus relief modifying the trial court's order to defer performance of the community service until after rendition of final judgment to allow an opportunity for appeal. The Court commented, however, that "[a]lthough . . . performance of community service [is] not among the possible sanctions enumerated in Rule 215, paragraph 2b, the rule generally authorizes a trial court to sanction discovery abuse by 'such orders . . . as are just.' We recognize that discovery abuse is widespread and we have given

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[59](...continued)
payment be made to those injured by the violation. . . . Accordingly, the rule authorizes the court . . . to award attorney's fees to another party. Any such award to another party, however, should not exceed the expenses and attorneys' fees for the services directly and unavoidably caused by the violation of the certification requirement."

[60] 811 S.W.2d 922 (Tex. 1991).

trial courts broad authority to curb such abuse."[61] At another point the Court stated that "we do not criticize this type of creative sanction . . . ."[62]

Justice Gonzalez, in his concurring opinion in TransAmerican, specifically stated that "mandatory continuing legal education" was a proper sanction under Rule 215.[63]

Thus, trial courts have broad authority for such creative sanctions, which often are preferable to strictly monetary awards.

(iv) Mitigating/Aggravating Factors

The Comment accompanying proposed Rule 166d lists certain mitigating and aggravating factors for a court to consider in determining an appropriate sanction in a particular case. Justice Gonzalez recommended a similar list in his concurring

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[61] Id. at 930.

[62] Id. Whether the community services required of the attorney for the Child Protective Service Agency of Harris County in Braden were legal services is not clear from the opinion, but federal courts have recognized the propriety of pro bono legal services as a sanction under Federal Rule 11. "Just as a court may directly penalize a lawyer financially for a violation of the Rule, it can achieve the same effect by ordering the lawyer to spend time for which he or she would otherwise be charging clients in the representation of pro bono litigants." Joseph, supra note 7, at 128-29 (Supp. 1992); see, e.g., Bleckner v. General Accident Ins. Co. of Am., 713 F. Supp. 642, 653 (S.D. N.Y. 1989) (ordering representation of pro se plaintiff because the attorney's violations wasted judicial resources; the court considered the sanction proper in order to compensate the federal judiciary for the losses resulting from the misconduct).

[63] 811 S.W.2d 912, 921 (Tex. 1991) (quoting ABA Standard (L)(2), supra note 7, 121 F.R.D. at 124).

opinion in TransAmerican;[64] both lists, in turn, derive from the ABA Standards.[65] In pertinent part the proposed Comment reads:

> In determining an appropriate sanction, a court may consider a variety of mitigating or aggravating factors, including:
>
> (a) the good faith or bad faith of the offender;
> (b) the degree of willfulness, vindictiveness, negligence, or frivolousness involved in the offense;
> (c) the knowledge, experience, and expertise of the offender;
> (d) prior history of sanctionable conduct by the offender;
> (e) the reasonableness of any expenses incurred by the offended person as a result of the misconduct;
> (f) the prejudice suffered by the offended person as a result of the misconduct;
> (g) the relative culpability of client and counsel, and the impact on their privileged relationship of an inquiry into that culpability;
> (h) the risk of chilling the specific type of litigation involved;
> (i) the impact of the sanction on the offender, including the offender's ability to pay a monetary sanction;
> (j) the impact of the sanction on the offended person, including the offended person's need for compensation;
> (k) the relative magnitude of sanction necessary to achieve the goal or goals of the sanction;
> (l) the burdens on the court system attributable to the misconduct, including consumption of judicial time, juror fees, and other court costs;
> (m) the degree to which the offended person attempted to mitigate any prejudice suffered;
> (n) the degree to which the offended person's own behavior caused any expenses for which recovery is sought;
> (o) the extent to which the offender persisted in advancing a position while on notice that the position had no basis in law or fact and was not warranted by existing law or a good faith argument

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[64] TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 920-21 (Tex. 1991) (Gonzalez, J., concurring).

[65] See ABA Standard (L)(6), supra note 7, 121 F.R.D. at 125.

for the extension, modification, or reversal of existing law.[66]

For the most part, the factors are self-explanatory, and as the proposed Comment makes clear, they are not meant to be an exclusive list. A few of the factors merit additional explanation.

• Good faith/bad faith of the offender: As discussed above, paragraph (2) of proposed Rule 166d permits a court to award non-substantial reasonable expenses necessary in connection the motion, and states that the court may do so without any finding of bad faith or negligence. Although the rule does not create an express willfulness prerequisite to the imposition of sanctions under paragraph (3), the offending party's good faith

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[66] Cf. Pelt v. Johnson, 818 S.W.2d 212, 216 (Tex. App. -- Waco 1991, no writ) ("Several factors are relevant to an inquiry concerning appropriateness of a sanction:

1. the extent of the party's personal responsibility;
2. the prejudice to the adversary caused by the failure to . . . respond to discovery;
3. any history of dilatoriness;
4. whether the conduct of the party or the attorney was willful or in bad faith;
5. the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and
6. the meritoriousness of the claim or defense."); accord Hanley v. Hanley, 813 S.W.2d 511, 517-18 (Tex. App. -- Dallas 1991, no writ) (listing the same six factors as Pelt).

The Committee Notes to the currently proposed draft of Federal Rule 11 identify the following as proper considerations: "Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleadings, or only one particular count or defense; whether the party has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants."

or bad faith is a proper factor to consider in determining the nature and severity of the sanction to be imposed.[67] Moreover, the Texas Supreme Court has emphasized that sanctions cannot be used to adjudicate the merits of a party's claims or defenses "unless a party's hindrance of the discovery process justifies a presumption that its claims or defenses lack merit."[68] Indeed, the court has created an express prerequisite of "flagrant bad faith" or "callous disregard" before ultimate sanctions may be imposed, and the proposed rule contains essentially the same language.[69] On the other hand, the absence of willfulness or bad faith, or a lesser degree of negligence, militates in favor of a lesser sanction.

• Prior history of sanctionable conduct: Only rarely should a court consider conduct apart from the case then pending before the court in determining whether to assess sanctions. A prior history of sanctionable conduct is pertinent chiefly in situations in which a lawyer or litigant has insisted on relitigating the same facts and issues repeatedly, especially when asserting a previously sanctioned position.[70]

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[67] The Advisory Committee Note to the 1983 amendment to Federal Rule 11 states: "The reference in the former text to willfulness as a prerequisite to disciplinary action has been deleted. However, in considering the nature and severity of the sanctions to be imposed, the court should take account of the state of the attorney's or party's actual or presumed knowledge when the pleading or other paper was signed."

[68] TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 918 (Tex. 1991).

[69] Id.

[70] Cf. Joseph, supra note 7, at 244.

• Risk of chilling effects: Because deterrence is a central purpose of sanctions,[71] the danger exists that improper sanctions will deter important litigation of a particular type or from a particular source. Representatives of the Texas legal aid community informed the Task Force that a common Rambo tactic is to seek sanctions against indigent clients or their legal aid counsel in civil rights cases.[72] Thus, particularly with respect to sanctions under proposed Rule 13, trial courts must be aware of that risk, and exercise appropriate care to avoid punishing or deterring creative advocacy. As Judge Weinstein once remarked:

> Sometimes there are reasons to sue even when one cannot win. Bad court decisions must be challenged if they are to be overruled, but the early challenges are certainly hopeless. The first attorney to challenge Plessy v. Ferguson was certainly bringing a frivolous action, but his efforts and the efforts of others eventually led to Brown v. Board of Education.[73]

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[71] See Part IV.B.5.b.i., above.

[72] Cf. Stephen Burbank, Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11, at 68-69 (American Judicature Society 1989) ("Probably no group of lawyers has been more concerned about the impact of amended Rule 11 on their clients and their practice than lawyers who specialize in plaintiffs' civil rights (including employment discrimination) law." The study found that plaintiffs and their counsel were sanctioned on motions in civil rights cases at a rate "considerably higher than the rate . . . for plaintiffs in non-civil rights cases.")

[73] Eastway Constr. Corp. v. City of New York, 637 F. Supp. 558, 575 (E.D. N.Y. 1986), modified, 821 F.2d 121 (2d Cir.), cert. denied, 484 U.S. 918 (1987). The Advisory Committee Note to current Federal Rule 11 states in part: "The rule is not intended to chill an attorney's enthusiasm in pursuing factual or legal theories." Cf. Mass. Gen. Law Ch. 231 § 6F: "No finding shall be made that any claim . . . was wholly insubstantial, frivolous . . . solely because a novel or unusual argument or principle of law was advanced in support thereof."

•Impact on Offender: A recent Texas decision dramatized the importance of a trial court considering the impact of the sanction chosen on the offender, particularly with respect to substantial monetary awards. A highly publicized sanctions award in Houston assessed almost $1 million against a plaintiff's attorneys, who reported that they lacked both the financial wherewithal to pay the sanction and any insurance coverage, and thus were facing potential bankruptcy.[74]

A trial judge who accurately assesses a sanction's effect on the offender, based upon the offender's ability to pay the sanction, is in a better position to serve properly two of the underlying purposes of sanctions, to punish violations and to deter future violations. If a monetary sanction is to be financially devastating, the trial judge at least should be aware of that fact and should exercise appropriate care before reaching such a result. In Doering v. Union County Bd. of Chosen Freeholders,[75] for example, the court reversed an award of attorney's fees sanctions because the district judge had not considered the offender's ability to pay:

> While a monetary sanction, such as attorney's fees, is clearly an acceptable choice of deterrent, courts must be careful not to impose monetary sanctions so great

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[74] See, e.g., Mark Ballard, Losers Face $1M Fine for Trial Tactics, Tex. Law., May 25, 1992 at 1; Wall St. J., May 22, 1992 at 1; Gary Taylor, Texas Lawyers Hit With Record Sanctions, Nat'l L.J., June 1, 1992 at 2. By judgment of May 21, 1992, in Mark Metzger v. Judy Sebek, et al., No. 90-053676, Harris County, Texas, the trial court ordered the plaintiff, and plaintiff's two counsel, jointly and severally, to pay a total of $994,000 in sanctions.

[75] 857 F.2d 191, 196 & n.4 (3d Cir. 1988).

> that they are punitive -- or that might even drive the sanctioned party out of practice. . . . Other proceedings such as disbarment exist to weed out incompetent lawyers.[76]

Culpability Determination: Conflict of Interest

In TransAmerican the Supreme Court emphasized that trial judges must attempt to determine whether the offensive conduct is attributable to counsel or client or both, and assess any sanction against the responsible person. Specifically, the court stated:

> In our view, whether an imposition of sanctions is just is measured by two standards. First, a direct relationship must exist between the offensive conduct and the sanction imposed. This means that a just sanction must be directed against the abuse and toward remedying the prejudice caused the innocent party. It also means that the sanction should be visited upon the offender. The trial court must at least attempt to determine whether the offensive conduct is attributable to counsel only, or to the party only, or to both. This we recognize will not be an easy matter in many instances. On the one hand, a lawyer cannot shield his client from sanctions; a party must bear some responsibility for its counsel's discovery abuses when it is or should be aware of counsel's conduct and the

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[76] Id.; see also Napier v. Thirty or More Unidentified Fed. Agents, 855 F.2d 1080, 1094 n.12 (3d Cir. 1988) ("Ability to pay is an appropriate consideration when determining the level of a sanction."); Oliveri v. Thompson, 803 F.2d 1265, 1281 (2d Cir. 1986) ("[I]t lies well within the district court's discretion to temper the amount to be awarded against an offending attorney by a balancing consideration of his ability to pay."), cert denied, 480 U.S. 918 (1987); In re Yagman, 796 F.2d 1165, 1185 (9th Cir. 1986) ("[T]he award entirely fails to consider Yagman's ability to pay such an immense sum which, in our view, is another factor relevant in determining reasonableness") modified, 803 F.2d 1085, cert. denied, 484 U.S. 963 (1987). Cf. Doe v. Keane, 117 F.R.D. 103, 107 (W.D. Mich. 1987) ("Rule 11 is to deter baseless litigation but not at the cost of the financial ruin of the parties or attorneys."). The Committee Notes to the currently proposed version of Federal Rule 11 include as one of the factors for the court's consideration "what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case" (emphasis added).

> violation of discovery rules. On the other hand, a party should not be punished for counsel's conduct in which it is not implicated apart from having entrusted to counsel its legal representation. The point is, the sanctions the trial court imposes must relate directly to the abuse found.[77]

In short, trial courts must attempt to determine relative culpability and impose sanctions accordingly.[78] While errors of law often will be counsel's responsibility,[79] and matters

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[77] 811 S.W.2d 913, 917 (Tex. 1991) (emphasis added).

[78] See Pelt v. Johnson, 818 S.W.2d 212, 217 (Tex. App. -- Waco 1991, no writ) ("[I]n selecting an appropriate sanction, the relative culpability of a party and his attorney must be evaluated. . . . The record reveals that [the parties] relied on the advice of their attorney."); Glass v. Glass, 826 S.W.2d 683, 687 (Tex. App. -- Texarkana 1992, writ denied) (reversing sanctions awarded against a client for pleadings that her attorney filed; "Here, the punishment meted out is clearly for counsel's misconduct, namely the filing of pleadings in violation of Rule 13."); Hanley v. Hanley, 813 S.W.2d 511, 517-18 (Tex. App. -- Dallas 1991, no writ) (in reversing a trial court sanction order that struck pleadings, the court specifically considered "the extent of the party's personal responsibility," and concluded that "many of the actions complained about are actions that [the parties] took upon [their attorney's] instructions"); Jaques v. TEIA, 816 S.W.2d 129 (Tex. App. -- Houston [1st Dist.] 1991, no writ); see also ABA Standard (L)(3)(a): "Sanctions should be allocated among the persons responsible for the offending pleading, motion or other paper, based upon their relative culpability" and Standard (L)(6)(g): "Among the factors which the court may consider . . . in assessing the amount [of the sanction], are: . . . ~~g. [T]~~the relative culpability of client and counsel, and the impact on their privilege relationship of an inquiry into that area." ABA Standards, supra note 7, 121 F.R.D. at 124-25; cf. Westmoreland v. CBS, Inc., 770 F.2d 1168, 1178-79 (D.C. Cir. 1985) ("[T]he district court is in the best position to judge the relative responsibility of counsel and client, and to apportion the sanction accordingly.").

[79] See, e.g., Anschutz Petroleum Mktg. v. E.W. Saybolt & Co., 112 F.R.D. 355, 358 (S.D.N.Y. 1986) ("In the case at bar, [the] third-party complaint . . . was dismissed primarily on the basis of the legal insufficiency . . . , viewed against a background of essentially undisputed facts. . . . In these circumstances, prima facie responsibility for the Rule 11 violation falls upon

(continued...)

of fact frequently will result from a client's representations, obviously those general divisions of responsibility will vary from case to case. For example, a client's in-house counsel may insist upon a particular legal argument that outside counsel, who signs the pleadings, may agree to reluctantly after appropriate cautionary advice. On the other hand, outside counsel's independent investigation or personal familiarity with the result of factual discovery may make him or her completely responsible for groundless factual representations. Similarly, in the discovery context, the decision to refuse to produce documents may be the result of erroneous legal advice from either in-house counsel or outside counsel, or may result from a client's insistent refusal after receiving appropriate warnings from counsel.

Thus, the determination of relative culpability may be complex and fact specific. A resulting danger is that the culpability determination may create a serious conflict of interest between attorney and client. The attorney and client may have directly opposing financial and other interests, depending upon the outcome of the culpability determination. Moreover, different types of awards may have different effects

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[79](...continued)
counsel . . . . , who in contrast to their lay client are in a better position to assess the strengths or weaknesses of legal theories of recovery."); Borowski v. DePuy, Inc., 850 F.2d 297, 305 (7th Cir. 1988) ("Courts generally impose sanctions entirely on counsel when the attorney has failed to research the law or is responsible for sharp practice.").

on whether legal malpractice insurance coverage is available to pay the loss.[80]

Consequently, several federal decisions have emphasized that a conflict of interest arising from the culpability determination may necessitate separate counsel for the client in connection with the sanctions proceedings.[81] The rules, of course, should not seek to drive a procedural wedge between attorney and client, but discovery or an evidentiary hearing inquiring into their respective motivations and conduct can have that result. Not only may the attorney and client have different motivations in answering the question "Who was at fault?", but an evidentiary inquiry into the pertinent events

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[80] See Part XI, below. For example, under some legal malpractice insurance policies, a court assessment of a monetary award would not be covered, yet if the court dismissed or granted a default judgment, insurance coverage might apply.

[81] See e.g., Calloway v. Marvel Entertainment Group, 854 F.2d 1452, 1473 (2d Cir. 1988) (reversing sanctions against a client because the lawyer had not withdrawn from representation after the conflict became apparent; "the entire Rule 11 proceeding against [the client] was thoroughly tainted by the [law firm's] representation . . . notwithstanding a self-evident conflict of interest"), rev'd on other grounds sub nom. Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989); Healey v. Chelsea Resources, Ltd., 947 F.2d 611, 623 (2d Cir. 1991) ("A potential for conflict is inherent in a sanctions motion that is directed against both a client and a lawyer, even when, as here, the two agree that an action was fully warranted in fact and law. . . . A sanctions motion attacking the factual basis for the suit will almost inevitably put the two in conflict, placing in question the attorney's right to rely on the client's representations and the client's right to rely on his lawyer's advice."); Eastway Constr. Co. v. City of New York, 637 F. Supp. 558, 570 (E.D.N.Y. 1986) (interests of client and attorney are directly adverse when the question is who is at fault, and the client will need new counsel); Cochran, supra note 56, at 568 ("If, as most Rule 11 motions are currently drafted, the role of the client is also at issue, there is a conflict of interest sufficient to require some courts to order disqualification.").

may risk disclosure of privileged information that otherwise would be protected by attorney-client or work product privileges.

There are no easy, complete solutions to this problem, but the proposed Comment to the rule suggests certain steps and policies for counsel and trial judges to keep in mind.[82] In some instances, counsel and client may have resolved the issue in advance. For example, if before making a particular discovery response counsel has advised against making the response and warned the client of the possible sanctions, and the client persists in instructions to make the response and agrees to assume the risk, then the problem may be solved by the time of the hearing. After a sanctions motion is filed, counsel and clients still may have an opportunity to resolve the matter before the hearing, though at that point the client may need independent legal advice. The court also should take reasonable

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[82] With respect to sanctions motions under Rule 13 attacking allegedly groundless pleadings, ordinarily the court should postpone determination of a sanctions motion until after a resolution of the merits by summary judgment, special exceptions, or trial. A conflict may still arise at that point, of course, when the court conducts the sanctions hearing, but at least the intrusion into the attorney-client relationship will have been minimized during the adjudication of the merits of the case. Deferring the ruling on other sanctions motions, or at least deferring the culpability determination, until final resolution of the case also may be desirable in many instances. The Committee Note to the currently proposed draft of Federal Rule 11 states: "The court may defer its ruling (or its decision as to the identity of the persons to be sanctioned) until final resolution of the case in order to avoid immediate conflicts of interest and to reduce the disruption created if a disclosure of attorney-client communications is needed to determine whether a violation occurred or to identify the person responsible for the violation."

steps to avoid unnecessary intrusion into the attorney-client relationship,[83] including limiting discovery and evidentiary inquiries concerning these issues.[84] The 1983 Advisory Committee note to Rule 11, for example, states:

> To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record. Thus, discovery should be conducted only by leave of the court, and then only in extraordinary circumstances.

Protective orders under Rule 166b and in camera inspection by the court are additional measures available to protect against disclosure of information protected by attorney-client privilege, work product exemption, or other privileges.[85]

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[83] See ABA Standard (L)(3)(b): "In allocating sanctions between counsel and the client, the court takes into account the privileged nature of their relationship and avoids encroaching upon the attorney-client privilege or jeopardizing counsel's ability to act, and act effectively, for the client." ABA Standards, supra note 7, 121 F.R.D. at 124.

[84] Cf. ABA Standard (M)(5): "Except in extraordinary circumstances, discovery is not permitted on Rule 11 motions." ABA Standards, supra note 7, 121 F.R.D. at 128. But see City of Houston v. Harrison, 778 S.W.2d 916 (Tex. App. -- Houston [14th Dist.] 1989, orig. proceeding) (holding that a trial judge did not abuse his discretion in ordering that a lawyer be deposed for the purpose of determining what "reasonable inquiry" the lawyer performed prior to filing suit). As one commentator observed, "regardless of whether the information is privileged or not, the potential abuse of what might be termed 'Rule 13 discovery' is staggering." Rich, supra note 1, at 81-82.

[85] Cf. Joseph, supra note 7, at 499 (observing that in connection with the culpability determination, "While there is no easy solution to this dilemma [of disclosing/protecting privileged or confidential information], the court in exercising its discretion should be sensitive to it and should take care not to impinge unnecessarily on the attorney-client relationship.").

c. Sanctions Discretionary, Rather Than Mandatory

The Task Force recommends that discovery sanctions be discretionary rather than mandatory, even if a violation is found to exist. Current Texas rules vary on this point, with Rule 13 making sanctions mandatory and Rule 215 making certain expense awards mandatory but sanctions discretionary.

The Task Force's proposed language for Rule 166d is discretionary language (e.g., "the court may enter an order imposing one or more of the sanctions set forth below"). This change is in recognition of the fact that in some instances a clear, but minor and insignificant, violation may occur, and a trial judge might conclude that sanctions are inappropriate.[86] A substantial majority of lawyers (72%) and an even larger majority of judges (92%) responding to the Task Force questionnaire indicated that the imposition of sanctions should be discretionary rather than mandatory, even if the court finds some type of violation.[87]

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[86] See also Joseph, supra note 7, at 34-35 (Supp. 1992): "There are at least three reasons why the imposition of sanctions should be discretionary, not mandatory (hence, why 'shall' should be changed to 'may'). First, it would honestly reflect present practice. Sanctions are not always awarded despite a violation. Courts have . . . carved out exceptions for . . . 'de minimis' or 'technical' violations . . . . Second, this change would prevent mandatory sanctions from interfering with parties' settlement plans. . . . Third, . . . the judge does not presently have discretion to decide, in a marginal case, that the time and attention necessary to determine whether sanctions should be awarded in a particular case are not worth the effort."

[87] The currently proposed draft of Federal Rule 11 adopts the discretionary approach.

6. Compliance

Paragraph (4) of proposed Rule 166d sets out the timing for compliance with orders. In general, orders under the rule shall be operative at such time as the court directs. Two exceptions apply. First, in compliance with the Supreme Court's directive in Braden, monetary awards pursuant to paragraphs (3)(c) or (3)(g) are not payable prior to final judgment, unless the court makes written findings or oral findings on the record stating why an earlier assessment of the award will not preclude access to the court.[88]

The second exception tracks another holding from Braden, and applies to an order imposing sanctions in the form of directing personal performance of services or continuing legal education under paragraph (3)(h). The order must defer performance of such sanctions until after an opportunity for appeal after final judgment.[89]

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[88] Braden v. Downey, 811 S.W.2d 922, 929 (Tex. 1991). In Braden, the court quoted from and adopted the Fifth Circuit's procedure set out in Thomas v. Capital Security Serv., Inc., 836 F.2d 866, 929 (5th Cir. 1988). The only difference between the Braden procedure and that in Rule 166d(4) is that the latter allows trial judges the option to make oral findings on the record rather than requiring written findings to be made on this point. See also Chrysler Corp. v. Blackmon, 36 Tex. Sup. Ct. J. 76, 81-82 (Oct. 14, 1992).

[89] "Braden's attorney argues that if he is compelled to perform community service before an appealable judgment is rendered in the case, no relief on appeal can ever restore his time or make him whole. We agree. . . . If, however, the community service imposed . . . was not to be performed until the judgment in the case was final on appeal, Braden's attorney could fully obtain by appeal any relief to which he might be entitled." Braden v. Downey, 811 S.W.2d 922, 930 (Tex. 1991).

7. Review; Appeal

Paragraph (5) of proposed Rule 166d provides that an order under this rule shall be deemed to be part of the final judgment and subject to review on appeal. The rule permits any person or entity affected by the order to appeal in the same manner as a party to the underlying judgment. Current Rule 215 similarly states that sanctions orders shall be subject to review on appeal from final judgment, and the only addition in Rule 166d is to make clear that any other person or entity affected by the order also may appeal.[90]

The Task Force also considered suggestions concerning interlocutory appeals, as discussed in Part X below.

8. Comments

Large majorities of lawyers (87%) and judges (81%) responding to the Task Force questionnaire agreed that the rules should include explanatory comments, similar to the comments accompanying the Federal Rules of Civil Procedure[91] and some of the Texas Rules of Civil Evidence.[92] The few comments included with the current Texas Rules of Civil Procedure serve primarily to identify portions of rules amended, without providing interpretive explanation or guidance.[93] None of the

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[90] The two appeal provisions in current Rule 215 appear in subparagraphs (2)(c) and (3).

[91] See, e.g., Fed. R. Civ. P. 11, 26, 37.

[92] See, e.g., Tex. R. Civ. Evid. 106, 801.

[93] Texas Supreme Court orders amending the rules contain language to the effect that "the comments appended to these (continued...)

current comments exceed two sentences in length. Particularly in light of the substantial revisions to the sanctions rules recommended by the Task Force, such explanatory comments seem particularly desirable to provide guidance to the bench and bar. Accordingly, the Task Force has included comments with the draft rules, including Rule 166d.[94]

9. Masters

The Task Force does not recommend any change in the rules to allow trial courts to appoint masters to deal specifically with sanctions issues. Although Task Force questionnaire respondents indicated agreement (lawyers 58%, judges 70%) that the rules should be amended to allow appointments of masters to resolve "any discovery disputes,"[95] the respondents opposed (lawyers 62%; judges 50% to 49%) a change allowing such appointments specifically to resolve sanctions disputes. Because another task force is dealing with discovery issues generally, the Task Force on Sanctions concluded that this issue is better left for that group to address.

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[93](...continued)
changes are incomplete, . . . They are included only for the convenience of the bench and bar, and they are not part of the rules." See, e.g., Order of April 24, 1990.

[94] By comparison, the Advisory Committee Notes to the 1983 amendments to Federal Rule 11 contain nineteen paragraphs of text. The Notes and Comments to Tex. R. Civ. Evid. 801 consist of five paragraphs, twenty-three sentences.

[95] See Simpson v. Canales, 806 S.W.2d 802 (Tex. 1991) (in a toxic tort case involving one plaintiff and eighteen defendants, the trial court abused its discretion under Tex. R. Civ. P. 171 in appointing a master to hear all pretrial discovery issues because the case did not involve the sort of exceptional circumstances required for a master appointment).

10. Alternative Dispute Resolution

The Task Force does not recommend that the sanctions rules contain any specific reference to alternative dispute resolution (ADR). Respondents to the Task Force questionnaire agreed (lawyers 66%, judges 77%) that the rules should not require ADR before a party may seek sanctions.

As discussed above,[96] proposed Rule 166d contains a conference requirement to assure that lawyers attempt to resolve disputed matters before filing sanctions motions.

11. Notice to Client

Task Force questionnaire respondents strongly agreed (lawyers 86%, judges 75%) that before ultimate sanctions (dismissal, default, etc.) are imposed, the client should receive actual notice. For two reasons, however, the Task Force has not recommended including any such reference in the text of the rules.

First, the Texas Supreme Court's clear directive in TransAmerican already requires that trial courts inquire into the respective roles of counsel and client: "The trial court must at least attempt to determine whether the offensive conduct is attributable to counsel only, or to the party only, or to both."[97] In many cases, therefore, that determination of

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[96] See Part IV.B.2, above.

[97] TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991).

relative culpability will require notice to, and perhaps even testimony from, the client.[98]

Second, Rule 1.03 of the Texas Disciplinary Rules of Professional Conduct requires that a lawyer "keep a client reasonably informed about the status of the matter" and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The possible imposition of sanctions against a client clearly is the type of matter that Texas lawyers already have an ethical obligation to communicate to clients.

The Task Force concluded that those existing duties of the court and counsel should serve to effect actual notice whenever necessary, without an additional, cumbersome, and possibly intrusive procedure requiring some sort of formal certificate from counsel that the client has received such notice. If any doubt exists, the trial judge can simply ask counsel whether the client is aware of the proceedings.

12. Mandating Professional Courtesy

The questionnaire respondents endorsed the proposition that the rules should specifically mandate professional courtesy (lawyers 67%, judges 81%), but the Task Force recommends against adding such language in the sanctions rules.

The Task Force strongly agrees that far too much time, effort, money, and court resources have been spent on sanctions

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[98] See the discussion of the culpability determination and possible resulting conflict of interest issues, Part IV.B.5.b.iv, above.

gamesmanship during the past few years. Nonetheless, the Task Force concludes that specific procedural reforms, such as those recommended in this Report, are a more direct and appropriate response than inserting a broad and unavoidably ambiguous "mandate" of "professional courtesy" into the civil procedure rules.

Moreover, similar requirements already appear in the "Texas Lawyer's Creed -- A Mandate for Professionalism," which the Texas Supreme Court and the Texas Court of Criminal Appeals adopted by joint order on November 7, 1989. One of the primary purposes of the Creed is to counteract abusive tactics in litigation, ranging from "lack of civility to outright hostility and obstructionism."[99] Although the Courts' order emphasized that parties should not "abuse" the Creed to "incite ancillary litigation," the order also expressly stated that, when necessary, courts have two additional bases to enforce compliance: "their inherent powers and rules already in existence."[100] To some extent the Creed overlaps in its purposes and textual provisions with the sanctions rules already in existence in the Texas Rules of Civil Procedure. Pertinent Creed provisions addressing the concern for professional courtesy include the following:

> "I will advise my client that civility and courtesy are expected and are not a sign of weakness." Article II.4

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[99] Joint Order of the Texas Supreme Court and the Court of Criminal Appeals, November 7, 1989.

[100] Id.

> "A client has no right to demand that I abuse anyone or indulge in any offensive conduct." Article II.6
>
> "A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer's conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct." Article III

As Texas lawyers develop increasing familiarity and experience with the Creed, this mechanism for encouraging, and when necessary enforcing, professional courtesy should serve to alleviate such practice deficiencies about as well as any other set of rules could do so. In any event, additional experience under the Creed seems desirable before resorting to comparable amendments in the Texas Rules of Civil Procedure. The Creed has been in effect for only three years, and thus remains very new and as yet underutilized by Texas lawyers.

13. Violations of Rule 169

Current Rule 215(4) specifies certain relief and procedures applicable if a party fails to admit the genuineness of any document or the truth of any matter requested under Rule 169 and if the party requesting the admissions thereafter proves such matter. The Task Force concluded that such language is unnecessary in light of the relief and sanctions provisions of proposed Rule 166d. Therefore, the Task Force recommends deletion of the following language:

> If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 169 and if the party requesting the admissions thereafter proves the genuineness of the document or the

> truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 169(1), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

On the other hand, the Task Force recommends retention of the provision in current Rule 215(4) that provides for testing the sufficiency of answers or objections. That procedure seems more appropriate in Rule 169 than in the sanctions rule, and thus the Task Force recommends transferring that language to Rule 169, as shown in Appendix G-5. The last sentence of the Comment to proposed Rule 166d notes the deletion and the transfer.

V. SANCTIONS FOR GROUNDLESS PLEADINGS AND OTHER PAPERS -- RULE 13

A. Rule 13 -- Introduction

Rule 13, which generally addresses groundless pleadings and filings, is similar to Federal Rule 11.[101] Because of the massive amount of litigation[102] and decisional confusion that the federal rule has generated, the Task Force recommends

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[101] See, e.g., Rodriquez v. State Dept. of Highways & Public Transp., 818 S.W.2d 503, 504 (Tex. App. -- Corpus Christi 1991, no writ) (noting the "strong similarity between" the two rules).

[102] During the first eight years after the 1983 amendments to Rule 11, Lexis reported over 3000 Rule 11 decisions. Joseph, supra note 7, at 17-18 n.22, 27-28 & n.34 (Supp. 1992). One study suggests that the number of federal decisions under Rule 11 actually totals many times that figure. Id.

several changes to Rule 13 in order to avoid some of the problems that have developed in federal practice.

Reviewing the thousands of Rule 11 decisions to date, the author of the leading treatise on federal sanctions concluded that "inconsistency has been the hallmark of the Rule 11 jurisprudence."[103] Thus, the Task Force has attempted to study and learn from the federal rule, or as Henry Wheeler Shaw put it, "It's a wise man who profits by experience, but it's a good deal wiser one who lets the rattlesnake bite the other fellow." For the last year various federal court advisory committees and related groups have worked on amendments to Federal Rule 11, and the Task Force has monitored the development of those proposals as well.[104]

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[103] Joseph, supra note 7, at 17 (Supp. 1992). Examples abound of the unpredictability and chaotic results that appear in Rule 11 jurisprudence: "Two years after amendment, the Federal Judicial Center documented the proposition that on the same set of facts, almost half of judges surveyed would have sanctioned a complaint as frivolous which the other half determined not to violate the Rule. Courts of appeal now concede that they 'have been required with some regularity to reverse district court awards of sanctions.' Lawyers sanctioned by the district court for bringing 'frivolous' cases have secured reversals not only of sanctions but also on the merits. Cases abound in which appellate panels split on the issue of whether legal arguments are sufficiently frivolous to warrant sanctions. Identical arguments raised before the same district court are 'held in one case not to violate rule 11, but to "egregious[ly] violate it in the next" . . . .' Arguments found frivolous and sanctionable by a district court are, less than a year later, found meritorious by the United States Supreme Court." Cochran, supra note 56, at 561-62 (footnotes omitted).

[104] In response to the continuing Rule 11 controversy, the Advisory Committee on the Civil Rules of the United States Judicial Conference proposed amendments to Rule 11, which the Judicial Conference's Standing Committee on Federal Rules of Practice and Procedure is still circulating at this writing.
(continued...)

Fortunately, Texas has not yet suffered the volume of pleadings sanctions practice that has afflicted federal courts. In part, no doubt, this is because of the fact that until 1990, Rule 13 contained a ninety-day grace period, which made sanctions enforcement nearly impossible.

In sum, the Task Force's proposed amendments to Rule 13 would:

* add a "safe harbor" procedure, similar to the provision now under consideration for Federal Rule 11;
* eliminate the "fictitious suits" provision; and
* incorporate the same procedures (motion, hearings, findings, etc.) and sanctions proposed by the Task Force for Rule 166d.

The discussion below explains those changes, and the complete text of proposed Rule 13 and the accompanying Comment appear in Appendix B.

Initially, however, as discussed in the next section of this Report, the Task Force considered a more fundamental question: Is a frivolous or groundless pleadings rule necessary in Texas at all?

At this writing the federal court system is in the process of attempting to revise Federal Rule 11, and the Task Force also considered, but recommends against, waiting to adopt the same

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[104](...continued)
See, e.g., Johnson, Contois & Keeling, supra note 1, at 678; Rule 11 Reform, Nat'l L.J., May 25, 1992 at 12; Randall Samborn, Rule 11 Reforms Are Criticized, Nat'L L.J., May 25, 1992 at 3. The most recent version of the federal Committee's version of Rule 11, as of this writing, appears in Appendix I.

scheme as the federal rule. Current Federal Rule 11 is seriously flawed and highly controversial, and the extent to which the proposed amendments will solve the problems in federal practice under that rule remains uncertain.

The federal Judicial Conference of the United States has sent its proposal to the United States Supreme Court for its consideration, to be followed by review by Congress; thus, December 1, 1993, is the earliest possible date for a new federal rule to go into effect.

Rule 13, in its current version, differs from Federal Rule 11 in ways that already provide a measure of protection against some of the over-use or abuse experienced under the federal rule, including:

- Rule 13 requires that courts presume that papers are filed in "good faith."
- Rule 13 requires a showing of "good cause" before imposition of sanction, and requires that the sanctions order state "the particulars" of the good cause.
- The respective signature certifications of the rules differ. Part of Rule 11's certification is that the instrument is "well grounded" in fact and law. Rule 13's standard is easier for the pleader to meet: that the instrument is not "groundless," defined as having "no basis in law or fact." Thus, under state practice, a pleader satisfies the requirement if any basis exists in law or fact; under federal practice, a pleader must meet a much tougher standard, by demonstrating a "well-

grounded" basis. Additionally, Rule 13 has dependent certifications, which require that in order for a violation of the rule to exist, either the pleadings must be (1) groundless and in bad faith, or (2) groundless and for harassment. A pleading that is simply groundless, without being brought in bad faith or for purpose of harassment, is not sanctionable under Rule 13.

B. Need for A Frivolous Pleadings Rule

The Task Force received significant input, especially from the Texas legal aid community, questioning whether a frivolous pleadings sanctions rule is necessary or even appropriate.

In addition to complaints concerning the large quantities of legal and judicial resources devoted to litigation of collateral sanctions issues and concerning the confusing and inconsistent decisions under Federal Rule 11,[105] a major complaint against the federal rule is that courts have applied it more frequently against plaintiffs and particularly against plaintiffs in civil rights suits.[106]

Task Force member Beth Crabb, of Texas Rural Legal Aid, Inc., surveyed federal decisions under Rule 11 and observed:

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[105] See note 103, above.

[106] See, e.g., Cochran, supra note 56, at 567-68 & n.86; M. Tobias, Rule 11 & Civil Rights Litigation, 37 Buffalo L. Rev. 485 (1988).

> There are numerous cases such as Szabo[107] in which the district court and members of a circuit panel disagree as to whether an argument is not "merely losing" but "losing and sanctionable." Such cases have led a number of commentators to argue that a sanctions rule should be addressed to abusive conduct and litigation tactics, and not to grade the merits of legal arguments and punish those who, in the mind of the grader, flunk.

As she also pointed out, a number of commentators have concluded that "the basic assumption of the Rule [11], that 'frivolous' litigation is a significant problem, is incorrect."[108]

Despite the significant sentiment among many commentators and practitioners in favor of abolishing any frivolous or groundless pleadings rule, state or federal, the Task Force concludes that such an option is unavailable for Texas courts at

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[107] Szabo Food Servs., Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987), cert. dism'd, 485 U.S. 901 (1988). In Szabo the district court concluded that sanctions were inappropriate, but a two-to-one majority of a Seventh Circuit panel reversed, characterizing the losing argument as "wacky." That remark elicited this comment from the dissent: "The majority finds the due process claim here to be objectively frivolous and 'wacky' -- apparently because the claim is partially based on 'obscure cases,' and because it fails to cite, rather than strives to distinguish certain other cases. . . . The majority's 'wackiness' conclusion requires an analysis consuming five dense paragraphs and citing more than twenty cases -- a possible indicator that the result is not so blindingly obvious as to bring it reasonably within the ambit of Rule 11." Id. at 1085.

[108] See Cochran, supra note 56, at 574. A 1990 New York study committee reached this conclusion concerning that state's frivolous pleading provision: "The Committee found no empirical or other data to suggest that the problems confronting the New York State courts are caused by the bringing of frivolous complaints or other pleadings." New York State Bar Association, "Report of Special Committee to Consider Sanctions for Frivolous Litigation in New York State Courts" (March 20, 1990). In lieu of a frivolous pleadings rule, the Committee recommended prohibiting "abusive conduct," defined as "conduct . . . undertaken or omitted primarily to delay or prolong unreasonably the resolution of the litigation or to harass or maliciously injure another." Id. at 7.

this time. In 1987 the Texas Legislature effectively mandated the existence of such provisions,[109] adopting a groundless-pleadings statute; the Texas Supreme Court amendment to Rule 13, July 15, 1987, repealed the statutory provisions, amending Rule 13 to deal with the same issue.[110] Thus, absent further legislative action, a sanctions rule for groundless pleadings now appears to be legislatively mandated in Texas.

C. Safe Harbor

The Task Force has proposed a "safe harbor" provision for Rule 13:

> Motions under this rule shall be served at least twenty-one (21) days before being filed or presented to the court; if the challenged pleading, motion, or other paper is withdrawn or corrected within that twenty-one (21) day period, the motion under this rule shall not be filed or presented to the court.

The Comment to the rule makes clear that if a motion is presented in violation of this requirement, it should be denied.

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[109] See Tex. Civ. Prac. & Rem. Code §§ 9.011-.014 (Vernon Supp. 1992). Section 9.011 provides: "The signing of a pleading as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry, the pleading is not: (1) groundless and brought in bad faith; (2) groundless and brought for the purpose of harassment; or (3) groundless and interposed for any improper purpose, such as to cause unnecessary delay or needless increase in the cost of litigation."

[110] See, e.g., Goad v. Goad, 768 S.W.2d 356, 358 (Tex. App. -- Texarkana 1989, writ denied), cert. denied, 493 U.S. 1021 (1990); The Texas Supreme Court's Order of July 15, 1987, effective January 1, 1988, provided as follows: "SB No. 5 [Acts 1987, 70th Leg., 1st C.S., ch. 2], Article 2. Trial; Judgment, Section 2.01. Subtitle A, Title 2, Civil Practice and Remedies Code, Chapter 9 "Frivolous Pleadings and Claims" otherwise to be effective September 2, 1987, insofar as it conflicts with this rule, is repealed pursuant to Tex. Const. Art. 5 § 31, and Tex. Gov. Code § 22.004(c)."

Respondents to the Task Force questionnaire strongly endorsed (lawyers 71%, judges 77%) such a "safe harbor" provision to allow a party or lawyer to avoid sanctions by withdrawing the offending paper after receiving the motion.

The Task Force language is very similar to that appearing in the current version of proposed amended Federal Rule 11.[111] The federal proposal is expected "to retard the growth of Rule 11 motion practice,"[112] and the Task Force expects the same result from such a provision in the state rule. This result also is consistent with the general sentiment expressed by Task Force questionnaire respondents (lawyers 75%, judges 74%) that current sanctions rules result in too much time and money spent on sanctions practice.

The Task Force intends the safe harbor provision to help limit the sanction rule's potential chilling effects, but recognizes that even a safe harbor procedure can be misused for tactical advantage. For example, by sending a notice of purported violation a litigant may force its opponent to undertake extensive activity in a 21-day period in order to assess the appropriate response. Also, the notice provision may increase rather than decrease the number of disputes if

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[111] The currently proposed federal language reads: "[The motion] shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." See Appendix I.

[112] Joseph, supra note 7, at 18 (Supp. 1992).

attorneys contest the notice's timing, clarity, and other technical matters. In addition, the procedure has a "threat and retreat" aspect. Because there is no requirement that a party follow a notice with an actual motion for sanctions, the potential exists for a sort of "Liar's Poker" in which a party threatens sanctions to attempt to frighten the opponent into abandoning a claim. The Task Force, of course, recommends that the Supreme Court monitor practice and experience under this safe harbor provision, if it is adopted, to determine whether such problems develop.

The Task Force considered an alternative proposal requiring only that a Rule 13 motion for sanctions have a certificate demonstrating (1) written notification to the respondent of a probable violation and the reasons therefor, and (2) that efforts to persuade the party voluntarily to withdraw or correct the paper were unsuccessful.[113] The Task Force concluded, however, that service of the actual motion would provide better and more clearly worded notice. Additionally, a party faced with the burden of preparing a motion that the opposing party could circumvent simply by withdrawing or modifying the challenged pleading might well conclude that the effort was not

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[113] An earlier, August 1991 version of the proposed revision to Federal Rule 11 also contained a similar certification requirement, which the most recent version has changed to require actual service of the motion. See note 108, above. The August 1991 version provided in part: "On separate motion accompanied by a certificate from the movant reflecting that, although it notified in writing another party of a probable violation . . . and the reasons therefor, it was unsuccessful in persuading such other party voluntarily to withdraw or correct the claim, defense . . . ."

worthwhile, thereby averting entirely an unnecessary exchange of motion paperwork.

D. Deletion of Fictitious-Suits Provision

The Task Force recommends deleting the second sentence of current Rule 13; those provisions refer to "fictitious suits" and false statements made for delay:

> Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt.

The fictitious suits language has no counterpart in Federal Rule 11.[114]

The last case to discuss the purpose of this part of Rule 13 cites its predecessor, former Rule 51.[115] The Rule 51 language read:

> Any attorney who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in a pleading presenting a state of case which he knows to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of contempt; and the court of its own motion, or at the instance of any party, will direct an inquiry to ascertain the facts.[116]

The court in Boyd v. Beville explained in dicta that "the spirit and intent of [this provision] were to enforce the observance of

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[114] The 1983 amendment to Federal Rule 11 deleted the rule's previous provision for striking pleadings and motions as sham and false. 1983 Advisory Committee Note to Federal Rule 11.

[115] See Boyd v. Beville, 91 Tex. 439, 44 S.W. 287 (1898).

[116] Id. at 290.

that sound and wholesome principle of pleading that allegations contained in pleas filed in court shall be true -- at least, that they shall not be false within the knowledge of the pleader."[117] The Beville decision applied Rule 51 to a case involving an amended petition filed to avoid an objection that a variance existed between an affidavit for attachment and the plaintiff's original petition, when the plaintiff and counsel knew that statements made in the amendment were false. The court held the amendment violated the "spirit" of Rule 51 even in the absence of a contention that the false pleading was for the purpose of delay.

Apparently no reported decisions have applied Rule 13 or Rule 51 to a fictitious lawsuit. As one commentator observed in recommending elimination of the provision:

> Since there has been no reliance on the present rule or the former rule on which it is based in eighty years, and since false pleading can be shown at a trial to work to the extreme disadvantage of the pleader, and the Court is not otherwise without means of holding such pleader in contempt, there would not seem a present reason to have such rule, and it is noted of course that there is no federal counterpart.[118]

Other language in the rule allows sanctions against the same conduct, and the express reference to the contempt remedy adds nothing meaningful to the remedies recommended by the Task Force in Rule 166d or existing independently in a trial court's contempt power.

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[117] Id.

[118] 25 B. Thomas McElroy, Civil Pretrial Procedure § 1139 (Texas Practice 1980).

E. Presenting Pleadings or Other Papers

The Task Force recommends changing Rule 13 to change the focus of the rule from the simple act of signing, to the more meaningful act of presenting the document to the court, whether by signing, filing, submitting, or later advocating. This change is as follows:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, motion, or other paper, an attorney or unrepresented party is certifying . . . .

This change adopts the language proposed in the current draft of Federal Rule 11,[119] and makes clear that if a litigant learns that a position ceases to have any merit, the litigant may not thereafter present or otherwise advocate those positions. For example, an attorney who signs a document not knowing that the document is groundless and in bad faith, but who later learns that it is, should not thereafter have immunity under the rule to continue advocating the position before the court.

Further, the change makes the rule applicable to documents that a party or attorney does not personally sign but, in effect, asks the court to rely upon by presenting the documents to the court. Current Rule 166a(h) adopts the "presentation" concept for affidavits in connection with summary judgment motions, and this general provision in Rule 13 would apply more broadly to other affidavits. It also would allow repeal of the separate sanctions provision in Rule 166a(h).[120]

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[119] See Appendix I.

[120] See discussion in Part VIII, below.

F. Issues Controlled by Rule 166d

1. General Procedures, Relief, and Sanctions

The discussion above concerning the procedure, compliance, and review provisions in proposed Rule 166d also applies to the Task Force's proposal for amended Rule 13. Paragraph (c) of proposed Rule 13 expressly incorporates those provisions:

> The procedure, compliance, and review provisions of Rule 166d shall govern motions and proceedings under this rule . . . .[121]

For the reasons previously discussed under proposed Rule 166d,[122] the Task Force also recommends changing the rule's current mandatory language ("shall impose") to discretionary language ("may award relief").

Incorporating these Rule 166d provisions into Rule 13 should make sanctions practice more consistent under the two rules. Additionally, although both TransAmerican and Braden were discovery cases decided under Rule 215, in general the salutary principles set forth in those decisions are equally applicable to Rule 13 proceedings.

2. Findings

The Task Force's proposal for Rule 13 incorporates the Rule 166d requirement of trial court findings.[123] This procedure not only provides consistency between the rules, but also increases the procedural protections provided by the findings

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[121] See discussion of Rule 166d procedures in Part IV, above.

[122] See Part IV.B.5.c, above.

[123] See discussion in Part IV.B.4, above.

requirement in the current rule, which cases have applied somewhat inconsistently.[124]

G. Alternatives

The Task Force considered, but rejected, other amendments proposed for Rule 13. As discussed above, a New York State Bar Association report recommended changing the focus of that state's procedures from frivolous pleadings to "abusive conduct."[125]

As noted above, as of this writing the process of review and revision of Federal Rule 11 continues.[126] The most current version of the proposed amendments, as adopted by the Judicial Conference of the United States on September 21, 1992, and sent to United States supreme Court for its action, appears in Appendix I. Some of the most significant changes appearing in that version are:

- The rule adopts a discretionary standard, rather than the mandatory standard in the current rule, if the court determines that a violation exists.[127]

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[124] The pertinent language in the current rule reads: "No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order." Tex. R. Civ. P. 13. Compare Bloom v. Graham, 825 S.W.2d 244 (Tex. App. -- Fort Worth 1992, writ denied) (good cause and particularity requirements can be waived) with GTE Communications Sys. Corp. v. Curry, 819 S.W.2d 652 (Tex. App. -- San Antonio 1991, no writ) (granting mandamus relief against a $150,000 monetary sanction; "rule 13's requirement that the trial court state the particulars of good cause found for imposing sanctions is mandatory").

[125] See discussion in Part V.B, above.

[126] See discussion in Part V.A, above.

[127] See discussion in Parts IV.B.5.c and V.F, above.

- The certification created by signing a pleading or other paper has four parts; the signer is certifying to the best of the signer's knowledge, information and belief, formed after an inquiry reasonable under the circumstances that: (1) the paper is not presented for "any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation"; (2) the legal contentions are supported by existing law or by a non-frivolous argument for the extension, modification or reversal of existing law or the establishment of new law;[128] (3) the factual contentions have evidentiary support or "if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery";[129] (4) the denials of factual contentions are warranted on the evidence or if specifically so identified, are reasonably based on a lack of information or belief.[130]

- The rule allows sanctions against a law firm, as well as against individual attorneys, effectively reversing the holding of Pavelic & LeFlore v. Marvel Entertainment Group.[131] The rule states that "absent exceptional circumstances," a law

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[128] The Advisory Committee Notes explain that this change is to eliminate any "empty-head pure-heart" justification for patently frivolous arguments. The previous language in Rule 11 referred to a "good faith argument," as does Texas Rule 13. Although recognizing that this theoretical problem also exists in Rule 13, on balance the Task Force does not recommend departing from the current Rule 13 standards.

[129] This "red flag" procedure has received substantial criticism on the ground that it invites motions for summary judgment or special exceptions. The Task Force does not recommend it.

[130] This provision is the defendant's equivalent of the preceding provision.

[131] 493 U.S. 120 (1989) (held: the 1983 version of Rule 11 does not permit sanctions against the law firm of an attorney who signed a groundless complaint). The Task Force's similar recommendation is discussed in Part IV.B.4, above.

firm "shall be held jointly responsible" for violations by its partners and employees.[132]

- The rule contains a safe harbor provision.[133]
- The rule expressly states that any sanction must be limited to what is "sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."[134]
- The rule is slightly more specific than the current rule in terms of the other sanctions that a court may impose, but it still lacks the specificity that the Task Force has proposed by recommending the incorporation of Rule 166d.[135]
- The rule prohibits monetary sanctions against a represented party for frivolous legal contentions.[136]
- Although the rule retains authorization for a court to award sanctions on its own initiative, it limits that right by requiring that a court first issue a show cause order, and by providing that the court may not do so if the parties have previously taken the voluntary dismissal or settled the claims.[137]

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[132] The Task Force views this mandate as inappropriate, especially in light of the proposed Comment to the rule concerning the required culpability determination.

[133] See discussion in Part IV.B.5.b.i, above.

[134] Texas courts have recognized that other purposes, in addition to deterrence, are valid considerations in imposing sanctions, and thus this provision appears inappropriate for Texas. See discussion in Part IV.B.5.b.i, above.

[135] See discussion in Part V.F, above.

[136] While this principle is reasonable as a general proposition, in some cases a sophisticated client (such as a lawyer/litigant or a corporation with in-house counsel supervising the litigation) may be the ultimate decision-maker responsible for including a groundless claim or defense. The Task Force concludes that the judge should retain discretion to determine the appropriate person or persons to be sanctioned.

[137] See discussion in Part IV.B.2, above.

- The rule contains a findings requirement; the court, when imposing sanctions, must "describe the conduct determined to constitute a violation of [the] rule and explain the basis for the sanction imposed."[138]

- The rule is inapplicable to the newly proposed federal procedure for disclosures, as well as to discovery requests and responses.

- The proposed Comment to the rule states that its procedures ordinarily should apply to sanctions imposed under inherent powers.[139]

Gregory Joseph also has suggested changing the certification in Rule 11 from the current certification that the pleading "to the best of the signer's knowledge, information, and belief formed after reasonable inquiry . . . is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law," to a simple certification that the contentions are not "frivolous," defined as "lacking any basis in fact or law or unsupported by a colorable argument for a change in the law."[140] Joseph's rationale for this proposal is twofold. First, he argues that while the "reasonable inquiry" test is ostensibly an objective (reasonable-person) test, the wildly inconsistent applications of Rule 11 in federal court demonstrate that the test has become subjective, with different judges looking at the same set of

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[138] The Task Force findings proposal is more specific. See discussion in Parts IV.B.4 and V.F, above.

[139] See discussion in Part IX, below.

[140] Joseph, supra note 7, at 39 (Supp. 1992). The Texas rule's definition of "groundless" is very similar to Joseph's standard.

facts and coming to different conclusions.[141] Second, Joseph argues that the Rule 11 analysis "ineluctably intrudes on the attorney-client relationship": the rule initially requires a reasonable pre-filing inquiry into fact and law, and then mandates a reasonable analysis of the results of that inquiry to determine whether the filed paper is warranted in fact and law. The first-stage focus creates a tactical opportunity for the opponent to drive a wedge between client and counsel by focusing on what counsel did in preparing to file the offending pleading.[142]

Although the objective "frivolousness" test proposed by Joseph has much to recommend it, at this time the Task Force does not conclude that such change is necessary in the Texas rule. As discussed above, sanctions are more difficult to obtain under Rule 13 than under Rule 11. Thus, the risk of abuse from trial courts construing the rule too "subjectively" appears much less likely under Texas practice.

Joseph's proposal is more attractive from the perspective of adopting an objective standard that reduces the danger of intrusion into the attorney-client relationship. Rule 13 has been criticized because the references to bad faith and harassment arguably create subjective factors that trial courts may apply to focus on the state of mind of the alleged

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[141] Id. at 28-29.

[142] Id. at 30-31.

offender.[143] As discussed above, however, in the sanctions context consideration of certain subjective elements is almost inevitable, at least when making the determination of an appropriate sanction.[144] To some extent courts can reduce the significance of this problem by first considering the objective aspects of whether the pleading is groundless, and only then, if necessary, focusing on the subjective aspects.[145]

Another criticism of Rule 13 arises from the dual certification, which differs from Federal Rule 11.[146] Under Rule 13, both as currently written and in the Task Force's proposal, the signer certifies that the instrument is not "groundless and filed in bad faith or groundless and filed for the purpose of harassment" (emphasis added). Although the rule's language has some ambiguity,[147] the Task Force agrees that the most logical reading of the rule is that in order for a violation of the rule to exist, either the pleading must be (1)

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[143] See Rich, supra note 1, at 82. The "groundless" factor in the rule is an objective standard. Id. at 64-65.

[144] See discussion of the factors to consider in determining an appropriate sanction, in Part IV.B.5.b.iv., above.

[145] If the rule were to be amended to adopt Joseph's objective approach, proposed paragraphs (a) and (b) might be modified to read as follows:

(a) By presenting to the court (whether by signing, filing, submitting, or later advocating) the pleading, motion, or other paper, an attorney or unrepresented party is certifying that it is not groundless.

(b) . . . "groundless" for purposes of this rule means lacking any basis in law or fact or unsupported by a colorable argument for a change in the law. . . .

[146] See, e.g., Rich, supra note 1, at 65-66.

[147] Id. at 65.

groundless and in bad faith, or (2) groundless and for harassment.[148] A pleading that is merely groundless, without being brought in bad faith or for purpose of harassment, is not sanctionable under Rule 13. These "dependent certifications" differ from Federal Rule 11, and this difference will make it more difficult under state practice to obtain sanctions under the rule than is true of current Federal Rule 11.[149] The Task Force disagrees, however, that this interpretation has a "profound and debilitating impact" on the rule.[150] Texas lawyers and judges responding to the Task Force questionnaire indicated strongly that the current sanction rules result in too much time and money spent on sanctions practice. The many thousands of sanctions decisions under Federal Rule 11 demonstrate a disproportionate allocation of resources of parties, lawyers, and judges to federal sanctions practice. Therefore, the fact that sanctions are more difficult to obtain under Texas Rule 13 than under the federal counterpart is not, in the Task Force's view, an undesirable distinction.

In any event, the Task Force has concluded that while subjective elements are almost inevitably a part of some sanctions motion determinations, trial courts can guard against

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[148] Id. at 65-66. The Comment to proposed Rule 166d makes clear that the dependent certification interpretation is correct.

[149] Under the current federal rule, the signer certifies that, based upon the reasonable inquiry, that the paper is well grounded in fact and is warranted by law, and that it is not interposed for any improper purpose.

[150] Rich, supra note 1, at 66.

undue intrusion into the attorney-client relationship and can control many of the potentially resulting problems. On balance, the advantages of the dual standard in Rule 13 outweigh the disadvantages.

VI. DISCLOSURE AND EXCLUSION OF WITNESSES AND EVIDENCE

The two rules that currently govern pretrial disclosure of witnesses, Rules 166b(6) and 215(5), were designed to serve the salutary purposes of preventing trials by ambush and facilitating settlements. In their current form, however, the rules have created several problems and received substantial criticism. "Enacted to promote fairness between the parties, the rules have often produced results that appear harsh and inequitable. Enacted to lessen court involvement and paper wars between parties, the rules have produced much of the opposite -- a rash of motions and hearings to exclude testimony and impose sanctions."[151] Accordingly, the Task Force recommends amendments to both rules. In sum, the proposed changes would:

- provide a specific, unambiguous deadline (thirty days before trial) for the disclosure of expert witnesses;

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[151] David W. Holman & Byron C. Keeling, Disclosure of Witnesses in Texas: The Evolution and Application of Rules 166(b) and 215(5) of the Texas Rules of Civil Procedure, 42 Baylor L. Rev. 405, 406-07 (1990); see also Tommy Jacks, "An Open Letter to the Texas Supreme Court," supra note 1 at 3 ("In the [Texas Supreme] Court's efforts to prevent 'trial by ambush' by imposing stringent new standards for supplementing discovery responses, a new and more dangerous monster has been set loose upon judges, lawyers, and litigants. We now have to contend routinely with tactics of pre-trial 'ambush-in-reverse.'").

- expressly authorize sanctions other than exclusion of undisclosed witnesses or evidence, including the remedy of continuance and an award of expenses;
- add a reference in the Comment to the rule concerning factors that a court may consider in determining whether "good cause" exists under Rule 215(5);
- add limited exemptions for party-witnesses.

Additionally, for purposes of organizational clarity, the Task Force recommends that the witness/evidence exclusion provision that now appears in Rule 215(5) be moved and renumbered as Rule 166b(6)(d), so that it will immediately follow the current provision on supplementation of witness and evidence.[152]

A. Rule 166b(6)(b)

Confusion and controversy have surrounded the provision of Rule 166b(6)(b) requiring designation of expert witnesses "as soon as is practical."[153] Accordingly, the Task Force recommends amendment of the rule to provide an unambiguous thirty-day deadline for the disclosure of expert witnesses:

> b. If the party expects to call an expert witness when the identity or the subject matter of such expert witness' testimony has not been previously disclosed in response to an appropriate inquiry directly addressed to these matters, such response must be supplemented to include the name, address and telephone number of the expert witness and the substance of the testimony concerning which the expert witness is expected to testify, ~~as soon as is practical, but in no event less than~~ **at least** thirty (30) days prior to the beginning of trial except on leave of court.

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[152] The Task Force recognizes that this suggestion is relatively unimportant, and that other task forces are likely to recommend a more comprehensive reorganization of the rules.

[153] See note 151, supra.

Under the current version of Rule 166b, a party must answer all specific discovery requests for the identity and location of expert witnesses and "persons having knowledge of relevant facts."[154] In addition, a party must supplement its earlier answers if it acquires information upon the basis of which it knows either of the following: (1) the answers were incorrect or incomplete when made; or (2) the answers, although correct or complete when made, are no longer true and complete and the failure to amend would mislead the questioning party.[155] Such supplementation is due "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."[156] Such supplementation applies to discovery responses pertaining to persons with knowledge of relevant facts. For expert witnesses, however, supplementation is required "as soon as is practical, but in no event less than thirty (30) days prior to the beginning of trial except on leave of court."[157]

The subtle difference between the deadline for disclosure of persons with knowledge of relevant facts and the deadline for disclosure of expert witnesses has confused practitioners and judges. The language of Rule 166b(6)(b) suggests that a trial court can impose sanctions for the failure to disclose experts

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[154] Tex. R. Civ. P. 166b(2)(d).

[155] Tex. R. Civ. P. 166b(6)(a).

[156] Tex. R. Civ. P. 166b(6).

[157] Tex. R. Civ. P. 166b(6)(b) (emphasis added).

even prior to thirty days before trial if it would have been practical for the offering party to disclose earlier than it did. There are problems with this conclusion, however. Requiring parties to disclose experts "as soon as is practical" is no standard at all: it does not give practitioners a reasonable idea of when they should disclose experts. In some cases parties have spent several days in hearings attempting to strike each other's experts, arguing about the timeliness of their respective expert designations. For that matter, the courts of appeals have split over the question whether a trial court may exclude the testimony of an expert disclosed more than thirty days before trial.[158]

In response to the Task Force questionnaire, 63% of the responding lawyers and 78.5% of the responding judges concluded that the "as soon as practical" language in Rule 166b(6)(b) either is "too vague" or "should be eliminated." The Task Force agrees, and recommends the language providing the clear thirty-day deadline above.

The Task Force considered other alternatives. One approach would be to eliminate completely any express time limit for the disclosure of expert witnesses, and leave the matter to counsel and the trial judge to impose a time limit through a Rule 166 pretrial calendar. Arguably, if the parties are not concerned enough to obtain a pretrial order setting deadlines for the

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[158] Compare Mother Frances Hosp. v. Coats, 796 S.W.2d 566, 570-71 (Tex. App. -- Tyler 1990, orig. proceeding) (generally no) with Builder's Equip. Co. v. Onion, 713 S.W.2d 786, 788 (Tex. App. -- San Antonio 1986, orig. proceeding) (yes).

designation of experts, the rules should not interfere with that assessment. On the other hand, the disadvantage of this approach is that it places still greater burdens upon the trial courts. While a pretrial disclosure calendar is helpful in almost any large, complex suit, it may be unnecessary additional paperwork in small or even medium-sized cases.

The Task Force also considered alternative deadlines for expert witness disclosure, such as forty-five days or sixty days before trial, rather than the thirty days. It can be argued that a thirty-day time, without the incentive/deterrent of an as-soon-as-is-practical standard, may mean that in many cases parties will wait until the very last possible date to designate experts, leaving inadequate time for remaining pretrial discovery before trial. Under the current rule, however, essentially the same type of last minute rush occurs at or near the thirty-day deadline. The Task Force concludes that if the parties want a period longer than thirty days, the pretrial order procedure remains available and is a better alternative. Moreover, lawyers already are familiar with the general thirty-day time limit that applies to other supplementation.

B. Proposed Rule 166b(6)(e)

Proposed Rule 166b(6)(e) addresses the problem that arises when a party who has designated a witness is dismissed from the suit less than thirty days before trial and no other party has designated such witness. Under current practice no other party could use the witness, even if no surprise is involved, and thus there exists the potential for abuse through timing settlements to silence certain witnesses. The proposed rule would change that result, allowing any other party to designate such witness within seven days of notice of such dismissal.

C. Proposed Rule 166b(6)(d) -- Former Rule 215(5)

The Task Force has addressed three areas of possible change in the evidence/exclusion provision, current Rule 215(5). (The proposal also would renumber this provision as Rule 166b(6)(d).) The changes include: specifying additional permissible sanctions; identifying, in a Comment, certain factors that may be considered in determining what is "good cause" sufficient to permit the admission of evidence in the absence of proper supplementation; exempting certain categories of witnesses from exclusion.

1. Permissible Sanctions

The Task Force recommends that proposed Rule 166b(6)(d) expressly permit, as alternatives to exclusion, the granting of a continuance, with discretion for the court to award expenses resulting from the continuance or other orders authorized by proposed Rule 166d:

> Unless the court makes a finding of good cause, a party who fails to make or supplement a discovery response shall not be entitled to present evidence that the party was under a duty to provide, or to offer the testimony of a witness other than a named party who has not been properly designated. The burden of establishing good cause is upon the party offering the evidence or witness, and good cause must be shown in the record. Notwithstanding the foregoing, the court may, in its discretion, grant a continuance to allow a response to be made or supplemented, and may condition such continuance upon payment of expenses related thereto by the party requesting the continuance or other orders pursuant to Rule 166d.

In response to the Task Force's questionnaire, 67% of the judges and 69% of the lawyers indicated that the rule should state expressly that a trial court may grant a continuance as an alternative to the exclusion of the evidence or witness.

In Alvarado v. Farah Mfg. Co.[159], the Texas Supreme Court succinctly identified the problem created by the fact that Rule 215(5) sets out exclusion as the sole remedy.

> The difficulty with the rule lies not so much in the requirement of strict adherence, but in the severity of the sanction it imposes for every breach. The consequences of the rule should not be harsher in any case than the vice the rule seeks to correct. The sole sanction should not be the exclusion of all evidence not properly identified in discovery; rather, as with other failure to comply with discovery, the trial court should have a range of sanctions available to it to enforce the rules without injustice.[160]

Despite the fact that the express language refers to only the exclusion remedy, the court concluded that trial courts currently have the discretion to grant continuances and impose appropriate sanctions:

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[159] 830 S.W.2d 911 (Tex. 1992).

[160] Id. at 915.

> We note, however, that the trial courts are not without power to prevent the enforcement of Rule 215(5) from operating as an injustice in a particular case. When a party has failed to timely identify evidence in response to discovery requests, the trial court has the discretion to postpone the trial and, under Rule 215(3), to impose an appropriate sanction upon the offending party for abuse of the discovery process. Such sanction may be used to compensate the non-offending party for any wasted expense in preparing for trial. Although the trial court should not allow delay to prejudice a non-offending party, the trial court should ordinarily be able to cure any prejudice by a just imposition of sanctions.[161]

The majority and dissenting opinions in Alvarado disagreed concerning the extent to which the majority's solution was consistent with the existing language and intent of Rule 215(5).[162] Thus, Alvarado indicates that, at the least, clarification of the rule might be advisable. That is the purpose of this proposed amendment.

2. Good Cause

The Task Force recommends addition of a statement in the Comment to proposed Rule 166b(6)(d) for the purpose of

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[161] Id. at 915-16. Tex. R. Civ. P. 70 correctly provides that if a continuance results from a party filing an amended or supplemental pleading at such time as to surprise the opposing party, the court may "in its discretion require the party filing such pleading to pay to the surprised party the amount of reasonable costs and expenses incurred by the other party as a result of the continuance, including attorney fees."

[162] The dissent stated that the majority's result meant that "apparently . . . trial courts are free to disregard the rule's plain language . . . . Nothing in Rule 215(5) suggests that a failure to supplement discovery should be cured by postponement of the trial and sanctions under Rule 215(3)." Id. at 919. The majority responded: "Contrary to the dissent's argument, we do not encourage trial courts to disregard or circumvent Rule 215(5). . . . While Rule 215(5) might be revised to better accomplish this result, it does not as written force a trial court to sanction a lesser offense with excessive severity." Id. at 916 n.5.

specifying certain factors that a trial court may consider in determining whether "good cause" exists for admission of evidence not properly provided or supplemented in discovery:

> Among the factors that the court may consider in determining whether good cause exists are the following:
>
> (1) the existence or absence of surprise to the opponent;[163]
> (2) the existence or absence of prejudice to the opponent, including delay or expense;[164]
> (3) the good faith of counsel or the party in attempting to supplement;[165] and
> (4) the importance of the undisclosed evidence or witnesses to the proponent's case.[166]
>
> The mere fact that the court may find that evidence exists establishing one or more of these factors does not necessarily compel a finding of good cause. These are proper factors for the court to consider, but the court has the discretion to determine what weight to give the factors in a particular case. Nor is this list exclusive of other factors that a court might consider.

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[163] See Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394, 395 (Tex. 1989) ("Although lack of surprise is not the standard, it may be a factor for the trial court to consider when weighing whether good cause exists for allowing the testimony of undisclosed witness."); Alvarado v Farah Mfg. Co., 830 S.W.2d 911 (Tex. 1992) (citing Gee for the proposition that while lack of surprise is not the standard, it may be a factor); cf. Smith v. Southwest Feed Yards, 35 Tex. Sup. Ct. J. 963, 965 (June 25, 1992), No. D-1503, 1992 WL 140839, at *2 ("[T]he constraints of Rule 215(5) may permit testimony by a party who is an individual not listed in response to a Rule 166b(2)(d) interrogatory, when identity is certain and when his or her personal knowledge of relevant facts has been communicated to all other parties, through pleadings by name and response to other discovery at least thirty (30) days in advance of trial.").

[164] Cf. Alvarado v. Farah Mfg. Co., 830 S.W.2d 911, 915-16 (Tex. 1992) ("Although the trial court should not allow delay to prejudice the non-offending party, the trial court should ordinarily be able to cure any prejudice by a just imposition of sanctions."); Holman & Keeling, supra note 151, at 453.

[165] Holman & Keeling, supra note 151, at 452-53.

[166] Id. at 453.

One of the difficulties with the good cause requirement in current Rule 215(5) is that the rule contains absolutely no definition or guidance concerning what constitutes good cause. While the proposal discussed in the preceding section -- to clarify that trial courts have discretion to impose sanctions other than exclusion -- should ameliorate what sometimes has appeared to be the overly harsh effect of the rule, nonetheless the Task Force concludes that if the phrase "good cause" is to remain in the rule, some guidance should be provided to bench and bar concerning the meaning of the term.

Unfortunately, to date many litigants and attorneys have learned the hard way what is not good cause.[167] Responses to

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[167] See, e.g., Smith v. Southwest Feed Yards, 35 Tex. Sup. Ct. J. 963, 969 (June 25, 1992), No. D-1503, 1992 WL 140839, at *7 (Cornyn, J., dissenting) ("Eleven times before today, and as recently as three months ago, this court has considered the sufficiency of proffered evidence of good cause under Rule 215(5). In each case, until now, the court has not found good cause to allow the testimony of a previously undisclosed, incompletely disclosed, or untimely disclosed person with knowledge of relevant facts in the face of a proper discovery request. Alvarado v. Farah Mfg. Co., Inc., 830 S.W.2d 911 (Tex. 1992) (finding that requesting counsel's "awareness" of witness and deposition of her in another case was not good cause for admission of testimony, nor was counsel's intended use of witness for rebuttal purposes only); Rainbo Baking Co. v. Stafford, 764 S.W.2d 379 (Tex. App. -- Beaumont 1989), writ ref'd n.r.e. per curiam, 787 S.W.2d 41, 42 (Tex. 1990) (finding that counsel's expectation of settlement was not good cause); Sharp v. Broadway Nat. Bank, 784 S.W.2d 669, 671-72 (Tex. 1990) (per curiam) (finding that late designation of expert witness was not good cause, despite deposition of witness, no surprise and claim of unfairness at being able to call expert witness under the circumstances); Clark v. Trailways, Inc., 774 S.W.2d 644, 646 (Tex. 1989) (concluding that uniqueness of witness's knowledge did not constitute good cause), cert. denied, 110 S. Ct. 1122 (1990); McKinney v. National Union Fire Ins. Co., 772 S.W.2d 72 (Tex. 1989); Boothe v. Hausler, 766 S.W.2d 788, 789 (Tex. 1989) (per curiam) (finding that 'great harm' caused by inability to

(continued...)

the Task Force questionnaire indicated that 72% of attorneys and 57% of judges supported amending current Rule 215(5) to specify the types of conduct or conditions that constitute "good cause." Further, 58% of lawyers and 78% of judges agreed that trial courts should have greater discretion to admit the testimony of undisclosed witnesses.

In theory, a court might consider several possible factors in determining good cause.[168] The Task Force, however, rejected most such factors, agreeing with the Supreme Court's caution in Alvarado that relaxing the good cause standard too much would undermine the rule:

> To relax the good cause standard in Rule 215(5) would impair its purpose. Counsel should not be excused from

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[167](...continued)
call witness was not good cause); Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394, 396 (Tex. 1989) (finding no good cause in the record); E.F. Hutton v. Youngblood, 741 S.W.2d 363, 364 (Tex. 1987) (finding that inadvertent, late decision about calling expert witness and opposing counsel's ability to cross-examine undisclosed witness on attorney's fees was not good cause); Gutierrez v. Dallas Indep. School Dist., 729 S.W.2d 691 (Tex. 1987); Morrow v. H.E.B., 714 S.W.2d 297 (Tex. 1986) (per curiam) (failing to provide witness's address was not good cause, despite offer to allow deposition of witness and no surprise); Yeldell v. Holiday Hills Retirement & Nursing Center, Inc., 701 S.W.2d 243, 246-47 (Tex. 1985) (failing to supplement answers, true when given, was not good cause when party later learned of witness, but failed to supplement)."

[168] Holman and Keeling have suggested the following factors: good faith; length of trial; length of litigation; lack of surprise; lack of prejudice; communications with opposing counsel; pending motion for continuance; settlement negotiations; attempts to supplement; lack of communication from the opposing party; importance of the witness; uncontrollable circumstances; and fraud or estoppel. Holman & Keeling, supra note 151, at 452-56.

the requirements of the rule without a strict showing of good cause.[169]

Although the list of factors poses some risk of lengthy arguments and evidentiary hearings pertaining to each such factor and the relative importance of the factors, the Task Force concludes that some guidance is better than no guidance; such arguments and hearings occur now.

In sum, there appears to be no easy, comprehensive answer to the question, "How should the term 'good cause' be defined?" Reasonable minds and reasonable proposals may differ. One way or another, however, proposed Rule 166b(6)(d) should be amended to better inform judges and practitioners what the term "good cause" means.

At least one Task Force member would prefer to distinguish between "good cause" that justifies late supplementation on the one hand and the factors that a court should consider in deciding what sanction to employ on the other. Under such a system, the court would undertake three analytical steps. First, the court would determine whether discovery responses had been supplemented in a timely fashion. Second, if a party failed to supplement in the required time, the court would consider whether there was good cause for late supplementation. This step would involve consideration of the reasons that the discovery was not completed on time. Good cause at this step, then, would involve issues such as the party's diligence in

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[169] Alvarado v. Farah Mfg. Co., Inc., 830 S.W.2d 911, 915 (Tex. 1992).

locating a witness and notifying opposing counsel and the foreseeability that the witness' testimony would be necessary. The court might find at this step that a party had shown good cause for the late supplementation, in which case the evidence should be admissible at trial. Alternatively, the court might find that a party had not shown good cause for late supplementation. In the latter case, the court would go on to step three. This third step would require the court to decide whether to exclude evidence as a sanction or whether to grant a continuance to cure the problem. At this step, different factors would be relevant: the existence or absence of surprise to the opponent; the existence or absence of prejudice to the opponent, including delay or expense; and the importance of the undisclosed evidence or witnesses to the proponent's case. The current wording of Rule 215 made it impossible for the courts to analyze separately the reasons for late supplementation and its effects on the parties -- if "good cause" could not be found, the rule provided only for exclusion of the evidence. The proposed rule allows what are really two separate issues to be considered separately. Enacting this proposal would not require rewriting of the rule as the Task Force has proposed it, but only restructuring the section of the Comment that defines good cause.

3. Exemption of Certain Classes of Witness

The Task Force recommends adding language to proposed Rule 166b(6)(d) to exempt named parties from exclusion:

> Unless the court makes a finding of good cause, a party who fails to make or supplement a discovery response shall not be entitled to present evidence that the party was under a duty to provide, or to offer the testimony of a witness, other than a named party, who has not been properly designated.

As noted above, despite the Texas Supreme Court's consistently strict interpretation of Rule 215(5), several parties have run afoul of the rule's sanction, with the effect that either parties or party representatives have been barred from testifying because of failure to designate properly or timely.[170] Recent Supreme Court decisions have relaxed slightly the Rule 215(5) exclusion with respect to party witnesses.[171]

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[170] See, e.g., Smith v. Southwest Feed Yards, 35 Tex. Sup. Ct. J. 963, 968 (June 25, 1992), No. D-1503, 1992 WL 140839 (Hecht, J., concurring) ("[I]n the past two years we have received applications for writ of error in seven cases besides this one in which a party or a party's representative called to testify at trial was not timely identified in answer to interrogatories.").

[171] See, e.g., id., (an individual should not have been barred from testifying as a fact witness in his own defense for lack of proper designation, when the case was a simple suit on an account and the party was the sole individual defendant, the party gave notice of intent to testify seven days before trial in compliance with a pretrial order, the plaintiff pleaded that the individual defendant party was indebted to it, and in answer to interrogatories the defendant party made clear that he had personal knowledge of facts relevant to the lawsuit); Henry S. Miller Co. v. Bynum, 35 Tex. Sup. Ct. J. 1021, 1023 (July 1, 1992), No. D-0494, 1992 WL 148110 (trial court had discretion to find good cause to permit testimony of party who was not identified in interrogatory responses but had been deposed and was the only individually named party); Rogers v. Stell, 35 Tex. Sup. Ct. J. 1094, 1095 (July 1, 1992), No. D-2348, 1992 WL 148120 (undisclosed individual party witness should have been allowed to testify at trial when the party did not respond to or supplement a response to interrogatories seeking persons to be called at trial, but properly identified herself as a person with knowledge of relevant facts in answer to other interrogatories).

Large majorities of lawyers (85%) and judges (93%) responding to the Task Force questionnaire agreed that the rule should be amended to permit a named party to a lawsuit to testify without being listed in answers to interrogatories.

On the other hand, the Task Force recognizes the concern expressed in Smith v. Southwest Feed Yards[172] that allowing all parties to testify would create too large a loophole:

> Excluding every party from the identification authorized by Rule 166b(2)(d) would open a broad loophole encompassing every employee of an entity and every plaintiff in a large class action.

Thus, the proposed rule would exempt only named parties. Employees of an entity party or members of a large class who are not named personally would still have to be identified, thus closing this loophole. Further the Task Force proposes to include a statement in the Comment recommending use of Rule 166 to require designation of witnesses when a large number of named parties in the case would create undue confusion:

> Where the number of named parties creates uncertainty as to which will testify, the court should require designation pursuant to Rule 166(h).

The Task Force considered, but rejected, an exemption of a party's own attorney of record whose testimony is offered concerning the party's own attorney's fees. Proponents of such an exemption argue that as with party witnesses, such testimony should never really surprise the opposing party. Failure of a party's attorney to designate himself or herself as a witness on

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[172] 35 Tex. Sup. Ct. J. 963 (June 25, 1992), No. D-1503, 1992 WL 140839.

attorney's fees is almost always the result of sheer inadvertence, and exclusion may sometimes be unfair, though the current rule clearly requires that result.[173] Opponents felt that because such arguments might apply just as well to known medical expense witnesses or others, this exemption might appear to show undue favoritism to attorneys, and that other changes proposed by the Task Force should ameliorate the harshness of the current rule.

Another witness category suggested for exemption, but not accepted by the Task Force, is "a witness who was not designated by the offering party but was designated by another party and was deposed before trial with the party against whom the testimony is offered in attendance." The argument offered in support of this exception is that "it seems silly to refuse to allow testimony of a witness whom everyone has deposed simply because the person who wishes to offer the testimony failed to dot that particular 'i.'" A narrower variation of this option would limit it to the deposition testimony of such witness.

Another witness category suggested for exemption from the exclusion provision, but rejected by the Task Force, is the witness who has "previously testified at trial." This suggested exemption would address the situation that arises when a witness is called to testify by one party who properly disclosed the

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[173] See Sharp v. Broadway Nat'l Bank, 784 S.W.2d 669, 671 (Tex. 1990) ("The fact that a witness will testify only about attorney fees does not excuse proper identification in discovery"); Cooke v. Dykstra, 800 S.W.2d 556 (Tex. App. -- Houston [14th Dist.] 1990, no writ).

witness, but then is subsequently called to testify by a party who did not identify the witness. The rationale for this possible exemption is to prevent a party from using the disclosure rules to keep its opponent from recalling a witness. For example, if later testimony in a trial suggests that an earlier witness called by the plaintiff testified untruthfully, the defendant should be able to recall the earlier witness even though the defendant did not identify the witness as one of its experts or a person with knowledge of relevant facts. Although the current rule is perhaps not entirely clear in its application to this situation, the Task Force's understanding is that the opposing party would be able to recall the witness, in effect to continue its right of cross-examination, subject to the trial court's discretion. The cross-examination right would arise initially when another party that had properly designated the witness called the witness to the stand. Texas Rule of Civil Evidence 611 allows a party to cross-examine a witness "on any matter relevant to any issue in the case, including credibility,"[174] and thus the non-designating party would have the right to full cross-examination after another party called the witness to testify on direct examination. The Task Force agrees with the intent of this suggestion, but at this time does not recommend a change in the rule's language.

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[174] The state rule, of course, differs from Fed. R. Evid. 611, which initially limits cross-examination to "the subject matter of the direct examination and matters affecting the credibility of the witness," though the federal rule also allows the court, in its discretion, to permit inquiry into additional matters.

VII. DISQUALIFICATION OF ATTORNEYS -- PROPOSED RULE 12a

The Task Force proposes a new rule for the disqualification of lawyers, Rule 12a. Professor John F. Sutton, Jr., of the University of Texas Law School, suggested the new rule. The complete text of proposed Rule 12a and the explanatory Comment appear in Appendix C.

Motions to disqualify counsel are a common source of pretrial skirmishing. From the perspective of the attorney who is the target of such a motion, the range of potential, resulting "sanctions" can be costly indeed:

- a time-consuming, expensive (and sometimes uncompensated), and embarrassing (or at least uncomfortable) hearing;
- interjection of a source of potential divisiveness into the attorney-client relationship;
- loss of the client's representation, either temporarily in a particular matter, or permanently if the proceeding sufficiently injures the attorney-client relationship;
- a malpractice or other claim by the client for reimbursement of fees or for other damages associated with the disqualification hearing or prior representation.

The client, of course, may suffer corresponding categories of inconvenience and injury.

Courts disfavor motions to disqualify counsel.[175] The Texas Disciplinary Rules of Professional Conduct recognize that a conflict of interest objection raised by an opposing party "should be viewed with great caution . . . for it can be misused as a technique of harassment."[176] Nonetheless, the reality of current litigation practice is that many such motions are filed -- unfortunately, sometimes groundlessly and for harassment, as a Rambo tactic. Such conduct, of course, is sanctionable under Rule 13, and proposed Rule 12a would not change that result.

Yet despite the sometimes critical importance of such disqualification proceedings for both client and counsel, currently no rules exist setting forth either the substantive or procedural standards for disqualification.[177]

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[175] See, e.g., Spears v. Fourth Court of Appeals, 797 S.W.2d 654, 656 (Tex. 1990) ("Disqualification is a severe remedy. . . . The courts must adhere to an exacting standard when considering motions to disqualify so as to discourage their use as a dilatory trial tactic.").

[176] Supreme Court of Texas, Rules Governing The State Bar of Texas art. X, § 9 (Texas Disciplinary Rules of Professional Conduct) (Vernon Supp. 1992), Rule 1.06 Comment 17; see also Texas Lawyer's Creed -- A Mandate for Professionalism, Art. III.19 (prohibiting a lawyer from seeking "disqualification unless it is necessary for protection of [the] client's lawful objectives or is fully justified by the circumstances").

[177] See, e.g., Texas Disciplinary Rules of Professional Conduct, Rule 3.08 Comments 9, 10 ("Rule 3.08 sets out a disciplinary standard and is not well suited to use as a standard for procedural disqualification. . . . This Rule may furnish some guidance in those procedural disqualification disputes where the party seeking disqualification can demonstrate actual prejudice to itself resulting from the opposing lawyer's service in the dual role. However, it should not be used as a tactical weapon to deprive the opposing party of the right to be represented by the lawyer of his or her choice." (emphasis added)).

Faced with this gap in the rules, courts have referred to the Texas Disciplinary Rules of Professional Conduct "for guidance."[178] Because the Texas Disciplinary Rules of Professional Conduct are exactly that, rules for discipline rather than for disqualification, the guidance provided is often inadequate. Understandably, the disciplinary rules do not take into account all of the costs -- to the litigants, the lawyers, and the judicial system itself -- that result from applying the rules to an ongoing litigation matter to disqualify counsel. Nor, of course, do the disciplinary rules contain notice and hearing requirements or treat other procedural matters that are important for resolving motions to disqualify. For these reasons, a new rule of civil procedure is appropriate to resolve such issues.

Another reason to adopt a rule of civil procedure to deal with attorney disqualification is that the Texas Rules of Civil

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[178] Spears v. Fourth Court of Appeals, 797 S.W.2d 654, 658 (Tex. 1990) ("While this rule [3.08] is not intended as a standard for procedural disqualification, it may provide guidance in those cases in which the movant can demonstrate actual prejudice as a result of the dual roles of lawyer and witness."); Ayres v. Canales, 790 S.W.2d 654, 656 n.2, 658 (Tex. 1990). In federal court, at least in the Fifth Circuit, the most recent decision rejects reliance solely upon the Texas Disciplinary Rules of Professional Conduct. See In re Dresser Indust., Inc., No. 92-2199, 1992 WL 200875, at *3 (5th Cir. 1992) ("The district court clearly erred in holding that . . . the Texas rules, which it adopted, are the 'sole' authority governing a motion to disqualify. Motions to disqualify are substantive motions affecting the rights of the parties and are determined by applying standards developed under federal law. . . . When presented with a motion to disqualify . . . we consider the motion governed by the ethical rules announced by the national profession in the light of the public interest and the litigants' rights.").

Procedure have proven far easier to amend than are the disciplinary rules. Even what were for the most part minor, technical, corrective amendments to the Texas Disciplinary Rules of Professional Conduct, effected by the Texas Supreme Court's Order of October 23, 1991, were the subject of some controversy.[179] Placing the attorney disqualification provision in the rules of civil procedure will allow the Supreme Court to modify the rule as necessary to adapt to evolving experience of the bench and bar.

At least one member of the Task Force, however, disagrees with the proposed rule. While sympathetic with the plight of attorneys faced with motions to disqualify, and understanding the cumbersome procedure required to amend the Texas Disciplinary Rules of Professional Conduct, this view first expresses concern that the rule of procedure might allow conduct prohibited by the Disciplinary Rules. Second, this viewpoint suggests that the mere existence of proposed Rule 12a might highlight the availability of motions to disqualify, generate

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[179] Justice Doggett observed in his concurring opinion: "A decision to accept the original recommendation that this court use the inherent power doctrine to impose professional conduct standards from the top down rather than from the bottom up through lawyer participation would seriously erode the process that worked so effectively to produce these rules. I write separately because today's action should not be viewed as a precedent by those who may desire to shortcut the referendum process on some future controversial, substantive change in the disciplinary rules. The only statutory authority for this court to promulgate disciplinary rules provides that this be accomplished 'under Section 81.024', the attorney referendum provision." Order for Amendments of the Texas Disciplinary Rules of Professional Conduct (Oct. 23, 1991) (Doggett, J., concurring).

disputes concerning the meaning of the rule, and result in more rather than less disqualification proceedings. Finally, this member finds some of the dual representation allowed by proposed Rule 12a to conflict with widely-accepted norms of professional conduct.

A majority of the Task Force, however, supports Rule 12a as proposed, and concludes that the frequency of this form of pretrial skirmishing (with very serious potential consequences for counsel and clients alike) and the current lack of disqualification standards and procedures militates in favor of adoption of this reasonable effort to balance the interests involved.

The Task Force suggests placing this new rule after Rule 12 and numbering it Rule 12a. Rule 12 also involves the disqualification of attorneys in litigation, setting forth the procedure for challenging an attorney's authority to act for a party.

In summary, proposed Rule 12a has the following organization and basic structure:

- Paragraph (1) makes clear that this rule and Rule 12 govern attorney disqualification.
- Paragraph (2) deals with a situation in which an attorney is representing multiple parties whose interests in the litigation are directly opposing in the pending matter.[180]

  This paragraph also introduces the "taint of trial" concept that continues throughout the rule

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[180] Compare Texas Disciplinary Rules of Professional Conduct, Rule 1.06(a) ("A lawyer shall not represent opposing parties to the same litigation.").

and that is defined in paragraph (15). Thus, while the corresponding provisions in the Texas Disciplinary Rules of Professional Conduct for purposes of discipline simply prohibit an attorney from representing opposing parties in the same litigation, for purposes of disqualification this rule tempers that prohibition by requiring not only that the prohibited conduct be present, but also that "for the attorney to continue to represent the party will taint the fairness of the trial." This allows the trial judge to adopt a more pragmatic perspective in applying conflict of interest rules and related principles in the litigation context, thereby reducing what might otherwise be unnecessary disruption to the litigation process.

- Paragraph (3) deals with a motion by a party who is currently represented by the attorney in another matter or who is a former client of the attorney.[181]

- Paragraph (4) allows intervention by a client or former client of the attorney for the purpose of moving to disqualify the attorney.

- Paragraph (5) sets out a screening procedure for law firms, under which the court may permit another attorney who practices with the disqualified attorney's firm to continue the representation under specified circumstances.

- Paragraph (6) provides for disqualification of an attorney who previously practiced in a firm with an attorney who is subject to disqualification, if the first attorney had obtained certain information protected by the attorney-client evidentiary privilege.

- Paragraph (7) deals with disqualifications arising from successive government and private employment.[182]

- Paragraph (8) deals with disqualifications arising from previous service as an adjudicatory official

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[181] Compare Texas Disciplinary Rules of Professional Conduct, Rule 1.09.

[182] Compare Texas Disciplinary Rules of Professional Conduct, Rule 1.10.

The Task Force recommends repeal of Rule 18a(h). The central purpose of the rule appears to be to allow sanctions for motions to recuse that are, in effect, groundless and in bad faith.[185] Such conduct already is punishable under Rule 13. Further, Rule 18a(h) is unclear, or at least cryptic, in terms of the procedures that apply for the imposition of sanctions. Apparently the determination of the motion to recuse and the imposition of sanctions may occur in the same hearing. The rule is procedurally vague in failing to specify such matters as: what type of hearing is necessary; what type of evidence the court is to consider; whether the movant must initially introduce evidence to show the true purpose of the motion or at least to show that it is not "solely for . . . delay"; what type of order the trial judge must enter; whether the ruling must be in writing or must contain any findings; what classes of persons may be sanctioned (i.e., whether sanction may be imposed against a party or counsel or both); and the meaning of the "sufficient cause" standard.

The Task Force proposal for Rule 13, which incorporates the procedures of Rule 166d, addresses all of those issues and adequately protects against abuse.

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[185] The "without sufficient cause" standard grants more discretion to impose sanctions than does the "groundless" standard. In fact, the "without sufficient cause" standard arguably grants judges too much discretion, allowing the judges to impose sanctions any time a motion to recuse fails (i.e., there was not sufficient cause to prevail). At least, the standard appears too vague. The second part of the standard, referring to "for the purpose of delay," appears to add little, in the context of a motion-to-recuse proceeding, to the bad faith standard of Rule 13.

VIII. OTHER RULES: Tex. R. Civ. P. 18a(h), 21b, 120a, 166a(h), 203, 269(e)

In addition to analyzing the major sanctions issues raised by Rules 13 and 215, the Task force has reviewed the other provisions in the Texas Rules of Civil Procedure that contain sanctions provisions: Tex. R. Civ. P. 18a(h), 21b, 120a, 166a(h), 203, 269(h). Most of those rules contain only brief mention of sanctions in specialized applications that are not directly related to pleadings or discovery sanctions. In accordance with the sentiment expressed in response to the Task Force questionnaire that Texas has too many sanctions rules, the Task Force recommends repeal of the sanctions portions of all of these rules. Most of these provisions add little, if anything, to the sanctions and procedures established by the Task Force's proposals for Rules 13 and 166d. Moreover, these minor sanction rules are rife with procedural ambiguities; reliance upon a consistent set of procedural protections and standards will simplify sanctions practice and eliminate traps for the unwary.

Tex. R. Civ. P. 18a(h): Rule 18a(h) addresses motions to recuse that are "brought solely for the purpose of delay and without sufficient cause." It reads:

> If a party files a motion to recuse under this rule and it is determined by the presiding judge or the judge designated by him at the hearing and on motion of the opposite party, that the motion to recuse is brought solely for the purpose of delay and without sufficient cause, the judge hearing the motion may, in the interest of justice, impose any sanction authorized by Rule 215(2)(b).

or as a law clerk to an adjudicatory official.[183]

- Paragraphs (9), (10), (11), and (12) deal with situations arising from an attorney potentially being a witness in the case.[184]

- Paragraph (13) contains a general discretionary provision, allowing the court to deny a motion filed under paragraphs (3) through (10) if the court finds that "in reasonable probability the fairness of the trial will not be tainted."

- Paragraph (14) sets out procedural aspects of motions to disqualify, including: requiring the movant to file such a motion promptly or risk waiver; establishing the burden of persuasion; authorizing an oral hearing on the motion upon written request; specifying the matters that the court may consider in making its determination; and requiring the order granting or denying the motion to state specifically the reasons for the court's decision.

- Paragraph (15) contains definitions, including such matters as: the screening procedures; substantial hardship; substantially related matter; and "taint of trial."

In general, then, proposed Rule 12a adopts a practical approach to attorney disqualification, making fairness and prejudice the touchstones of the analysis. The result gives trial judges substantial discretion in making the disqualification determination.

In the Task Force's view, proposed Rule 12a should provide guidance that has previously been lacking for lawyers and judges, and should reduce the incentive to use disqualification motions as tactical gambits.

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[183] Compare Texas Disciplinary Rules of Professional Conduct, Rule 1.11.

[184] Compare Texas Disciplinary Rules of Professional Conduct, Rule 3.08.

One possible objection to relying exclusively on Rule 13 as a basis for punishing improper motions to recuse is that Rule 18a(h) is designed to operate under the control of the judge rather than parties; that is, under Rule 18a(h) the judge decides whether to proceed with sanctions, without the necessity of any party's filing a motion. On the other hand, that is one of the problems with the rule: the rule is unclear concerning when and how the judge proceeds from the motion-to-recuse determination to the sanctions determination. Moreover, as discussed above in connection with Rule 166d, eliminating express reference to a sua sponte procedure probably has little or no practical significance; if a judge asks for or invites the filing of a motion for sanctions, the likelihood is very high that one or more parties will file such a motion.[186]

Alternatively, if Rule 18a(h) is not repealed, the Task Force recommends that the rule be amended to incorporate by reference the applicable procedural aspects of proposed Rule 166d.

Rule 21b: Rule 21b specifically addresses sanctions for failure to serve or deliver copies of pleadings or motions. The Task Force recommends repeal of Rule 21b. Again, repeal is consistent with the sentiment expressed in response to the Task Force questionnaire that too many sanctions rules exist.

With the liberalization of service methods under Rules 21 and 21a under the 1990 rule amendments, service is simpler and

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[186] See discussion in Part IV.B.2, above.

should be less of a problem than in the past. Moreover, in almost every instance of improper service, the motion or other instrument will contain a certificate of service, as required under both Rules 21 and 21a.[187] Because Rule 13 applies to any statement contained in any filed document, Rule 13 sanctions should apply to any groundless, bad faith statement in a certificate of service.

Alternatively, if the rule is not repealed, the Task Force recommends that the rule incorporate by reference the applicable procedural aspects of proposed Rule 166d.

Tex. R. Civ. P. 120a: Rule 120a contains an unnecessary cross-reference to Rule 13:

> Should it appear to the satisfaction of the court at any time that any such affidavits are presented in violation of Rule 13, the court shall impose sanctions in accordance with that rule.

By its terms, this provision adds nothing to Rule 13. Current Rule 13 applies only to papers filed by parties and their attorneys. Thus, this provision in Rule 120a would not apply, for example, to groundless/bad faith Rule 120a affidavits of non-party affiants. The Task Force's proposal for Rule 13 is broader, and would reach such non-party affidavits. Thus this provision is both procedurally redundant and too narrow. The Task Force recommends repeal.

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[187] The certification provision in Rule 21 reads: "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." Rule 21a contains similar language.

Rule 166a(h): Rule 166a(h) addresses affidavits filed in bad faith or solely for delay in connection with summary judgment motions. The rule provides:

> 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.

This provision is identical to, and derived from, current Federal Rule 56(g).

The Task Force recommends repeal of this provision. If the Task Force recommendation is adopted for amending Rule 13 to broaden its application to papers "presented," instead of simply papers "signed," then Rule 13 will apply to affidavits presented in connection with summary judgment motions, and will provide protection against affidavits that are groundless and in bad faith or groundless and for harassment.

Similarly, the current version of the proposed amendments to the Federal Rules of Civil Procedure would repeal Rule 56(g); the federal committee's comment to that proposal concludes that Federal Rule 5b(g) is simply unnecessary in light of the proposed amendments to Federal Rule 11, which also contain the "presentation" proscription.

Rule 166a(h) contains a number of procedural ambiguities, such as: what is meant by the operative standard (i.e., "should it appear to the satisfaction of the court at any time"); whether a hearing is necessary before sanctions are imposed, and

if so, what type of hearing and what evidence the court is to consider; whether the court must enter an order imposing sanctions, and if so, whether the order must contain findings; etc. Thus, if Rule 166a(h) is retained, the Task Force recommends that the rule be amended to incorporate by reference the applicable procedural provisions of proposed Rule 166d.

Rule 203: Rule 203 provides for awards of expenses, including attorney's fees, if a party giving notice of a deposition fails to attend or if a witness fails to attend because of the fault of the party giving the notice.[188]

The Task Force recommends repeal of Rule 203. In cases in which such an award is justified under the current rule, proposed Rule 166d should provide adequate relief. Rule 203 also contains procedural ambiguities similar to those discussed above in connection with the other minor sanctions rules.

Rule 269(e): Rule 269(e) contains a sanctions reference of sorts:

> Mere personal criticism by counsel upon each other shall be avoided, and when indulged in shall be promptly corrected as a contempt of court.

(emphasis added).[189] The Task Force recommends repeal of the underlined language. Courts possess ample contempt power to control the conduct of counsel, and the rule's contempt reference in this one particular instance seems inadvisable and even misleading.

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[188] See Appendix H-6.

[189] The complete text of current Rule 269 appears in Appendix H-8.

IX. INHERENT POWERS

Because of the uncertainties concerning Texas courts' inherent powers to impose sanctions, the Task Force has not recommended, at this time, inclusion of any specific language addressing sanctions imposed under inherent powers. Depending upon how that doctrine develops, however, it may become necessary or desirable to adopt language making clear that the procedures applicable under proposed Rules 13 and 215 also govern sanctions imposed under that doctrine.

In the recent decision in Kutch v. Del Mar College,[190] the court of appeals held that even in cases in which no specific rule creates authority for sanctions, Texas courts "have inherent power to sanction for bad faith conduct." The court observed that the United States Supreme Court had reached a similar conclusion in Chambers v. NASCO,[191] which held that federal district courts have inherent powers to sanction abusive conduct not expressly covered by federal sanctions rules.[192] The court in Kutch stated:

> The power to compel compliance with valid orders incident to the administration of justice is fundamental, and closely related to the core functions of the judiciary. We expressly recognize this power today. Consequently, we hold that Texas Courts have the inherent power to sanction for abuse of the judicial process which may not be covered by rule or statute. This power includes the power to sanction appropriately

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[190] 831 S.W.2d 506 (Tex. App. -- Corpus Christi 1992, no writ).

[191] 111 S. Ct. 2123 (1991).

[192] Kutch v. Del Mar College, 831 S.W.2d 506, 509 (Tex. App. -- Corpus Christi 1992, no writ).

> for failure to comply with a valid court order incident to one of the core functions of the judiciary. . . . [T]he core functions of the judiciary . . . are: hearing evidence, deciding issues of fact raised by the pleadings, deciding questions of law, entering final judgment and enforcing that judgment. . . . Inherent power to sanction exists to the extent necessary to deter, alleviate, and counteract bad faith abuse of the judicial process, such as any significant interference with the traditional core functions of Texas courts.[193]

The Kutch decision relied in part on Mackie v. Koslow's,[194] which held that a "trial court had the power implicit under rule 166 to provide in his pretrial order that the refusal to participate in [a] status conference or the failure to file a timely joint status report would result . . . [in] dismissal, default, or other sanctions."

On the other hand, in an article published before the Kutch decision, one commentator argued that existing rules provide adequate sanction powers and that Texas courts should limit sanctions to those rules and not rely upon inherent powers.[195]

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[193] Id. at 510.

[194] 796 S.W.2d 700, 703 (Tex. 1990). See also Lassiter v. Shavor, 824 S.W.2d 667 (Tex. App. -- Dallas 1992, no writ) ("Courts possess all inherent powers for the enforcement of their lawful orders.").

[195] Kevin Risley, Why Texas Courts Should Not Retain the Inherent Power to Ignore Sanctions, 44 Baylor L. Rev. 253 (1992); cf. Texas Supreme Court, Order for Amendments of the Texas Disciplinary Rules of Professional Conduct (October 23, 1991) (Doggett, J., concurring) (stating that the Texas Supreme Court's "overuse of 'its inherent power' is inherently dangerous"). But see Joint Order of the Texas Supreme Court and the Texas Court of Criminal Appeals, November 7, 1989, adopting the "Texas Lawyer's Creed -- A Mandate for Professionalism": "[C]ompliance with [these] rules depends . . . finally when necessary by enforcement by the courts through their inherent powers and rules already in existence." (emphasis added).

In the absence of a controlling decision by the Texas Supreme Court, the scope and extent of Texas courts' inherent powers in the sanctions context remain uncertain.[196] One commentator has expressed the concern that if such general, inherent powers to sanction are upheld, as the court concluded in Kutch, "there are no objective standards for the imposition -- or appellate review -- of such sanction."[197] In Kutch, however, the court held that certain limitations apply to the inherent power to sanction, including: the need for "some evidence and factual findings that the conduct complained of significantly interfered with the court's legitimate exercise" of one of its "core functions"; due process requirements for notice and hearing; and the principles set forth in TransAmerican.[198]

The Task Force recommends that if the Texas Supreme Court determines that the inherent powers doctrine provides an independent and significant basis for sanctions, the rules should be amended to apply to inherent powers sanctions the

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[196] See Risley, supra note 195, at 265. See generally J. D. Page & Doug Sigel, The Inherent and Express Powers to Sanction, 31 S. Tex. L. Rev. 43 (1990).

[197] Risley, supra note 195, at 255.

[198] Kutch v. Del Mar College, et al., 831 S.W.2d 506, 510-11 (Tex. App. -- Corpus Christi 1992, no writ).

procedures and standards recommended by the Task Force under proposed Rule 166d.[199]

X. APPEALS

Discovery sanctions usually are not appealable "until the district court renders a final judgment."[200] The Task Force does not recommend a change in the rules concerning the existing structure of appellate review of sanctions orders. Proposed Rule 166d(5), discussed above,[201] essentially continues the current approach to appeals from sanctions orders.

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[199] Similarly, in light of the United States Supreme Court's decision in Chambers v. NASCO, 111 S. Ct. 2123 (1991), allowing federal courts to rely upon inherent powers to sanction misconduct, Gregory Joseph has recommended amendment of Federal Rule 11 to make clear that its procedural protections apply to any sanctions motion, whatever the basis, and specifically including motions under inherent powers. His proposed amendment to Rule 11 would include this language: "A motion for sanctions under this rule or any other rule, statute, or the inherent power of the court shall be [subject to the rules's specified procedures]." Joseph, supra note 7 at 26-27, 32-33 (Supp. 1992). If the Texas Supreme Court determines that the sanctions rules should address sanctions under inherent powers, that result could be achieved by adding the following language as a separate new paragraph to proposed Rule 166d: "6. Inherent Powers. This rule shall govern motions for sanctions under the inherent powers of the court, and all proceedings related to such motions, including motions that challenge conduct other than discovery violations."

Alternatively, because Rule 166d deals with discovery sanctions and related matters, but inherent power sanctions as defined in Kutch reach non-discovery matters, it might be better or clearer to deal with inherent power sanctions in a separate rule, perhaps entitled "Inherent Powers Sanctions," that incorporates the applicable Rule 166d procedures.

[200] Braden v. Downey, 811 S.W.2d 922, 928 (Tex. 1991) (quoting Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986)).

[201] See Part IV.B.7, above.

As also discussed above, the Supreme Court's decision in Braden somewhat ameliorated the problem of certain sanctions appeals by requiring postponement of the effective date of specified types of orders. The "compliance" provision of proposed Rule 166d(4) incorporates those changes. See discussion in Part IV.B.6 above.

The Task Force recognizes that in response to the questionnaire, lawyers (80%) and judges (58%) agreed that the rules should allow for immediate appeals of "severe sanctions." Additionally, a narrow majority of lawyer respondents (51%) wanted a broader, interlocutory appeal right of any sanctions order, though judges strongly opposed (69%) such a right.

For three reasons, the Task Force does not recommend a further rule change to provide additional appellate review prior to final judgment. First, the Braden procedures incorporated in paragraph (4) of proposed Rule 166d address concerns for appellate review, as do the Supreme Court's holdings in recent cases dealing with mandamus review, discussed below. Second, the Texas Supreme Court has made clear its opposition to a general rule of immediate appellate review: "The judicial system cannot afford immediate review of every discovery sanction."[202] Sanctions often have a severe effect on both lawyer and client, and the broad-based sentiment of practitioners to assure effective and prompt appellate review is completely understandable. Nevertheless, creating an automatic

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[202] Braden v. Downey, 811 S.W.2d 922, 928 (Tex. 1991); accord Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1992).

right of immediate appeal of all sanctions orders is neither feasible nor desirable.

Third, creation of an interlocutory appeal right would be difficult. Interlocutory appeals usually require express legislative authorization.[203]

The Task Force recognizes that in creating Rule 76a, concerning sealing court records, the Texas Supreme Court devised by rule amendment a mechanism for immediate appeals, or at least allowed certain appeals at an earlier stage than they would otherwise occur.[204] The procedural device used for Rule 76a was to "deem" that orders sealing or unsealing court records are automatically "severed from the case and a final judgment which may be appealed." Thus, Rule 76a(8) does not create a rule-made right of interlocutory appeal, but rather an automatically severed order, appealable as a final judgment.

In theory perhaps, sanctions orders could be treated in the same manner, that is, deeming them to be automatically severed and therefore final judgments. Traditionally, however, a claim is properly severable if: "(1) the controversy involves more

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[203] Cherokee Water Co. v. Ross, 698 S.W.2d 363, 365 (Tex. 1985) ("[U]nless there is a statute specifically authorizing an interlocutory appeal, the Texas appellate courts have jurisdiction only over final judgments."); Guillory v. Davis, 530 S.W.2d 870, 871 (Tex. Civ. App. -- Beaumont 1975, writ dism'd) ("[T]he rule is well recognized in Texas that an interlocutory order is not appealable unless specifically made so by statute.").

[204] Tex. R. Civ. P. 76a(8) ("Any order (or a portion of an order or judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party or intervenor who participated in the hearing preceding issuance of such order.").

than one cause of action, (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues."[205] A sanctions issue would appear not to meet the first and second requirements, and in some cases may not meet the third requirement.[206] At least some sealing orders also may not meet the traditional severability requirements, however, so that may not be determinative. In some cases, such as in a suit brought to protect trade secrets, the issues raised in a discovery sanctions proceeding might appear more "independent" from the underlying cause of action than would be true of a sealing/unsealing proceeding in the same case.

Even if a Rule 76a approach were theoretically possible, such a right would add little of value to existing appellate review rights. A Rule 76a appeal is not automatically accelerated. Given the volume of sanctions appeals that inevitably would result, such a right likely would not create any significant benefit for the sanctioned party/appellant.

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[205] Guaranty Fed. Sav. Bank v. Horseshoe Operating Co., 793 S.W.2d 652, 658 (Tex. 1990).

[206] See Cass v. Stephens, 823 S.W.2d 731 (Tex. App. -- El Paso 1992, no writ ("The sanctions imposed are so intertwined with each other and with the claims retained in the main suit as to involve the same facts and issues. Under such circumstances, we hold that a severance of part of the sanctions . . . from the remaining sanctions and from the remaining claims was an abuse of discretion. In the absence of a valid severance, there is no final judgment before us.").

The other mechanism for review of sanctions orders is mandamus, which remains available in at least the three discovery contexts discussed in Walker v. Packer:[207] (1) when the appellate court would not be able to cure the trial court's error (such as when a trial court orders disclosure of privileged material, or compels production of patently irrelevant documents to an extent constituting harassment); (2) when a trial court's discovery error severely compromises a party's ability to present a viable claim or defense at trial (such as a sanctions order striking pleadings, dismissing an action, or granting default judgment); and (3) when the trial court disallows discovery and the missing documents cannot be made part of the appellate record, or the trial court after proper request refuses to make such documents a part of the record, rendering the reviewing court unable to evaluate the effect of the trial court's error on the record court.

The second of those categories effectively allows mandamus review of most severe sanctions orders. Earlier, in Braden,[208] the Court distinguished two prior rulings that refused mandamus review of discovery sanctions on the grounds that the right of appeal was an adequate remedy. In Street v. Second Court of Appeals,[209] the trial court had ordered that a party pay $1050 attorney's fees as discovery sanctions and that

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[207] 827 S.W.2d 833 (Tex. 1992).

[208] 811 S.W.2d 922 (Tex. 1991).

[209] 715 S.W.2d 638 (Tex. 1986).

the party's pleadings would be stricken if payment was not made within four days.[210] In Stringer v. Eleventh Court of Appeals,[211] the trial court had imposed $200 attorney's fees as sanctions. The Braden decision distinguished Street and Stringer, noting that the $10,000 monetary sanction in Braden was payable before any opportunity for supersedeas and appeal and was of such a magnitude as to raise "the real possibility that a party's willingness or ability to continue the litigation will be significantly impaired."

In TransAmerican, the Court held that when a trial judge imposes sanctions that have

> the effect of precluding a decision on the merits of a party's claims -- such as by striking pleadings, dismissing an action, or rendering default judgment -- a party's remedy by eventual appeal is inadequate, unless the sanctions are imposed simultaneously with the rendition of a final, appealable judgment. If such an order of sanctions is not immediately appealable, the party may seek review of the order by petition for writ of mandamus. Although not every such case will warrant issuance of the extraordinary writ, this case does.[212]

Thus, the proposed rules, combined with currently available mandamus relief, would appear to provide adequate protection in most, if not all, cases of "severe sanctions." To the extent that some commentators feel that a broader appeal right is necessary, either by interlocutory appeal or mandamus, those

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[210] Braden v. Downey, 811 S.W.2d 922, 929 (Tex. 1991).

[211] 720 S.W.2d 801 (Tex. 1986).

[212] TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 920 (Tex. 1991).

remedies appear to require legislative action or further case law development by the Texas Supreme Court.

By comparison, the ABA Standards provide that an order imposing sanctions on a party is appealable after final judgment, but an order imposing sanctions on a non-party is immediately appealable.[213] With respect to non-parties, a provision automatically "deeming" a sanctions order to be severed and a final judgment, similar to the Rule 76a procedure, is perhaps more feasible and would follow the majority rule in federal court under Rule 11.[214] Moreover, a stronger argument can be made that non-parties should not have to wait until the parties resolve the litigation on the merits to challenge a sanctions order. Nevertheless, the interest of avoiding multiple, piecemeal appeals militates in favor of requiring even counsel and non-parties to wait for final judgment appeal of sanctions orders that are not otherwise reviewable by mandamus.

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[213] ABA Standard (P): "1. Parties. An order imposing sanctions upon a party is appealable upon the entry of judgment or a final decision adverse to that party. . . . 2. Non-Parties. An order imposing sanctions on counsel, or any other non-party to the underlying action, may immediately be appealed as a final order." ABA Standards, supra note 7, 121 F.R.D. at 130.

[214] Most federal courts hold that Rule 11 sanctions against counsel and non-parties are immediately appealable under the collateral order doctrine; however, discovery sanctions orders, or at least discovery orders imposing monetary sanctions, generally are not appealable until final judgment. See Joseph, supra note 7, at 303-06, 404, 501-02, 540-42; id. at 250 (Supp. 1992).

XI. LEGAL MALPRACTICE INSURANCE CONSIDERATIONS

The Task Force reviewed several cases that raised issues concerning the applicability of legal malpractice insurance in various sanctions contexts.[215] One court has referred to Federal Rule 11 as a "new form of legal malpractice,"[216] and no doubt many impositions of sanctions result in subsequent legal malpractice claims. Whether a client completely loses a claim or defense as a result of a dismissal or default judgment sanction, or whether the client is subjected to an order requiring payment of expenses or other monetary award, the client may seek to hold the lawyer responsible for the resulting losses. The Task Force recognizes the seriousness of the problem but has no specific recommendations for changes in the rules to respond to the legal malpractice insurance issues.

From the client's perspective, the culpability determination required by TransAmerican provides some relief,[217] in that the trial court must attempt to determine who is at fault, whether "counsel only, or . . . the party only or . . . both."[218] On the other hand, the lawyer against whom monetary sanctions are assessed personally, or who ends up having to reimburse the

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[215] See generally Andrew S. Hanen & Jett Hanna, Legal Malpractice Insurance: Exclusions, Selected Coverage and Consumer Issues, 33 S. Tex. L. Rev. 75 (1992).

[216] Hays v. Sony Corp., 847 F.2d 412, 418 (7th Cir. 1988).

[217] See discussion in Part IV.B.5, above.

[218] TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991). Even successful opposition to a sanctions motion, of course, may result in substantial expenses, including attorney's fees, for a prevailing respondent.

client's losses, obviously would prefer to have insurance payment or reimbursement for such expenditures.

One obvious problem in tailoring the rules to address these matters is that legal malpractice insurance policies vary substantially and are subject to rapid change. Typical of the exclusions that appear in some current legal malpractice policies are the following:

> [1.] This policy does not apply to: [A]ny Claim based on or arising out of any fine or court-imposed monetary sanctions of any nature assessed against any Insured or Insured's client.
>
> [2.] This policy does not apply to: [C]laims which seek costs, interest, expenses and/or attorney's fees incurred in litigation based upon or arising out of an actual or alleged violation of Title 28 U.S.C. Sec. 1927, any similar federal or state statute or regulation, an order issued pursuant to any of the foregoing statutes, or otherwise imposed by law.[219]

Clearly these two different examples could have different insurance coverage results in Texas, depending upon the type of sanction imposed. In some instances, whether a court imposes a monetary award sanction or a sanctions order of dismissal or default judgment -- both of which might produce the same ultimate financial cost to the client -- may have very different results for purposes of insurance coverage.[220]

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[219] Hanen & Hanna, supra note 215, at 116.

[220] Whether a sanction arises from bad faith or malicious conduct also may be important under some intentional conduct exclusions. Cf. Hanen & Hanna, supra note 215, at 83-91; see, e.g., O'Connell v. Home Ins. Co., 1990 WL 137386, at *5 (D.D.C. September 8, 1990) ("The Policy is ambiguous as to whether Rule 11 sanctions are excluded from the Policy coverage. This Court does not adopt the view that all Rule 11 sanctions are meant to be punitive, or should be constituted as a fine or penalty."; the (continued...)

Depending on the type of conduct involved, the insurability issue may implicate public policy considerations.[221]

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[220](...continued)
court held that the policy in issue covered the costs sanctions arising from the Rule 11 violation.); Bar Plan v. Campbell, No. 57946, 1991 Mo. App. Lexis 1429 (September 17, 1991) ("[S]anctions may be imposed not only for deliberately wrongful acts but also for negligent conduct. . . . The policy before us is a malpractice policy intended to protect lawyers from the results of their negligent acts while acting in their capacities as attorneys. . . . It is not enough, therefore, to contend that the imposition of sanctions alone is sufficient to preclude coverage."; the court held coverage did not apply, under the applicable exclusion, because the court sanctioned the lawyer for "deliberately wrongful acts").

[221] See Note, Insuring Rule 11 Sanctions, 88 Mich. L. Rev. 344 (1989); Joseph, supra note 7, at 179 (Supp. 1992). As Gregory Joseph has observed, the most obvious, yet simplistic, consideration is that because sanctions are, at least in part, deterrent in nature, insurance perhaps should be foreclosed for the same reason that insuring punitive damages is generally precluded. Joseph, however, suggests five reasons why insuring against Rule 11 awards should not be precluded as a matter of public policy: "First, the principal deterrent effect of the Rule is not financial; it is reputational. Permitting insurance will not have any effect on the primary deterrent impact of the Rule. Second, to the extent that compensation to an injured party is an appropriate, if secondary, purpose of the Rule, permitting insurance will enhance the probability that the injured party receive recompense for out-of-pocket losses it suffers. Third, . . . [p]ermitting insurance to protect vicariously liable lawyers would not appear unfair or conflict with the purpose of Rule 11. Fourth, in the extraordinary case where the financial sanction is astronomically large, a serious question can be raised whether it serves the deterrent purpose of the Rule to bankrupt or to close the practice of an attorney for a Rule 11 violation. . . . Fifth, permitting insurance will raise the cost to all lawyers of practicing law and may thereby induce even careful lawyers to exert further care to avoid Rule 11 exposure." Id. at 179-80.

Some federal court sanctions orders have prohibited reimbursement from employer, client, or insurer. See, e.g., Derechin v. State Univ. of New York, 963 F.2d 513 (2d Cir. 1992); cf. Wold v. Minerals Eng'g Co., 575 F. Supp. 166, 168 (D. Colo 1983) ("[P]ayment . . . shall not be reimbursed directly or indirectly from the funds, assets, or resources of [the defendant] itself"); Heuttig & Schromm, Inc. v. Landscape Contractors Council, 582 F. Supp. 1519 (N.D. Cal. 1984) (ordering (continued...)

Legal malpractice insurance coverage for sanctions appears to be in the financial interest of both lawyers and clients. Nonetheless, because of the wide variety of legal malpractice insurance policies, because of unresolved public policy issues, and because insurance companies might attempt to "write around" any amended rule, the Task Force concludes that rule amendments addressing these issues are not now feasible. At this time, the Task Force simply urges the Texas Supreme Court and all Texas judges to be cognizant of the sometimes very harsh and personal financial reality of large monetary awards or death-penalty sanctions for both lawyers and clients.

XII. CONCLUSION

The Task Force on Sanctions has identified and addressed most, if not all, of the problems that have appeared in Texas sanctions practice during the last few years. The recommendations in this Report, if adopted, will substantially improve sanctions practice by providing simpler, more consistent, and more expeditious procedures, thereby saving time, money, and other resources for clients, lawyers, and courts alike.

On the other hand, these suggestions are no panacea. The best of rules, if misapplied or manipulated, will produce unsatisfactory results. Part of the problem in Texas has been

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[221](...continued)
sanctioned attorneys to certify that the client would not pay the sanction), aff'd, 790 F.2d 1421 (9th Cir. 1986).

the profit incentive created by the prospect of instant, total litigation success for the litigant who successfully lures an opponent into a sanctions trap. The Texas Supreme Court's landmark decision in TransAmerican has done much to undermine that unfortunate trend and to eliminate such unearned prizes.

The specific language and recommendations in this Report are by no means exclusive solutions to the specific sanctions problems addressed. To the contrary, a variety of reasonable alternatives exist, and indeed the Task Force has discussed many of those alternatives above.

In the final analysis, the Task Force also endorses Judge Johnson's plea for judicial tolerance in sanctions practice:

> Attorneys must not be held to unreasonably high standards of practice. The goal of our system of justice is not to perfect a model display of adversarial exchange, but to resolve disputes . . . as quickly and as cheaply as possible, with as little acrimony as possible. . . . Like judges, attorneys make mistakes. Tolerance is required.[222]

The members of the Task Force on Sanctions have appreciated the opportunity to work on this project and stand ready to provide any additional assistance or input that the Texas Supreme Court or the Court's Rules Advisory Committee deem appropriate.

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[222] Johnson, Contois & Keeling, supra note 1, at 675-76.

APPENDICES

The attached copies of the text of the current state and federal rules, and the excerpts from volume 121 of Federal Rules Decisions, are included with the kind permission and express authorization of West Publishing Company.

APPENDIX A

RULE 166d. DISCOVERY VIOLATIONS

RULE 166d. DISCOVERY VIOLATIONS

1. Procedure. If a person or entity fails in whole or in part to respond to or supplement discovery, or abuses the discovery process in seeking or resisting discovery, the court may grant relief as set forth below.

(a) Motion. Any person or entity affected by such failure or abuse may file a motion specifically describing the violation, and may attach any necessary exhibits including affidavits, discovery, pleadings, or other documents. The motion shall be filed in the court in which the action is pending, except that a motion involving a person or entity who is not a party shall be filed in any district court in the district where the discovery is to take place. Motions or responses made under this rule shall be filed and served in accordance with Rules 21 and 21a. Nonparties affected by the motion shall be served as if parties. The motion shall contain the certificate required by Rule 166b(7).

(b) Hearing. Oral hearing is required for motions requesting sanctions under paragraph 3, unless waived by those involved. No oral hearing is required for motions requesting relief provided by paragraph 2. The court shall base its decision upon (i) pleadings, affidavits, stipulations, and discovery results submitted with the motion, (ii) judicial notice taken of the usual and customary expenses including attorney's fees and the contents of the case file, and (iii) testimony if the hearing is oral.

(c) Order. An order under this rule shall be in writing. An order granting relief or imposing sanctions shall be against the party, attorney, law firm, or other person or entity whose actions necessitated the motion. An order imposing sanctions under paragraph 3 of this rule shall contain written findings, or be supported by oral findings on the record, stating specifically (i) the conduct meriting sanctions, (ii) the reasons for the court's decision, (iii) why a lesser sanction would be ineffective, and (iv) if the sanction would preclude a decision on the merits of a party's claim, counterclaim, or defense, the conduct demonstrating that the party or the party's counsel has acted in flagrant bad faith or with callous disregard for the rules.

2. Relief. The court may compel or quash discovery as provided by Rule 166b. In addition, so long as the amount involved is not substantial, the court may award the prevailing person or entity reasonable expenses necessary in connection with the motion, including attorney's fees. The court may presume the usual and customary fee in connection with the motion is not substantial, unless circumstances or an objection suggests such award may preclude access to the courts. An award of expenses that is substantial is governed by paragraph 3(c). If a motion is granted in part and denied in part, the court may apportion expenses in a just manner. The court may enter these orders without any finding of bad faith or negligence, but shall not award expenses if the unsuccessful motion or opposition was

substantially justified, or other circumstances make an award of expenses unjust.

3. Sanctions. In addition to or in lieu of the relief provided above, the court may enter an order imposing one or more of the sanctions set forth below. Any sanction imposed must be just and must be directed to remedying the particular violations involved. A sanction should be no more severe than necessary to satisfy its legitimate purposes.

(a) Reprimanding the offender publicly or privately;

(b) Disallowing further discovery in whole or in part;

(c) Assessing a substantial amount in expenses, including attorney's fees, of discovery or trial;

(d) Deeming certain facts or matters to be established for the purposes of the action;

(e) Barring introduction of evidence supporting or opposing designated claims or defenses;

(f) Striking pleadings or portions thereof; staying further proceedings until an order is obeyed, dismissing with or without prejudice the action or any part thereof, or rendering a default judgment;

(g) Granting the movant a monetary award in addition to or in lieu of actual expenses;

(h) Requiring community service, pro bono legal services, continuing legal education, or other services; or

(i) Entering such other orders as are just.

4. Compliance. Monetary awards pursuant to paragraphs 3(c) or 3(g) shall not be payable prior to final judgment, unless the court makes written findings or oral findings on the record stating why an earlier assessment of the award will not preclude access to the court. Sanctions pursuant to paragraph 3(h) shall be deferred until after an opportunity for appeal after final judgment. Otherwise, orders under this rule shall be operative at such time as directed by the court.

5. Review. An order under this rule shall be deemed to be part of the final judgment, and shall be subject to review on appeal therefrom. Any person or entity affected by the order may appeal in the same manner as a party to the underlying judgment.

COMMENT

New Rule 166d renumbers former Rule 215, which is repealed, to move the rule closer to the general rules for pretrial discovery. The substantive amendments to the rule generally seek to simplify and shorten the rule, to incorporate the principles of TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913 (Tex. 1991), and Braden v. Downey, 811 S.W.2d 922 (Tex. 1991), and to establish procedures that reduce the pretrial gamesmanship that developed under the former rule.

Paragraph (1). The first sentence of Rule 166d(1) provides a general prohibition against discovery violations, replacing the several, somewhat confusing, itemized paragraphs of the former rule. The broad prohibition recognizes that any attempt to specify all possible types of discovery misconduct must fail. At the same time, this amendment is not intended to eliminate from the rule's coverage any of the specific categories listed in the former rule, including: failure of an entity party or other deponent to make a designation as required by the rules; failure of a deponent to appear for deposition or to answer deposition questions; failure to serve answers or objections to interrogatories; failure to respond to a request for inspection or production; evasive or incomplete answers to discovery; failure to comply with a person's written request for the person's own statement; failure to obey court orders concerning discovery; abuse of the discovery process in seeking, making, or resisting discovery; submission of interrogatories or requests for inspection or production that are unreasonably frivolous, oppressive, or harassing, or responses or answers that are unreasonably frivolous or made for purposes of delay.

Subparagraph (1)(a) deals with the form, contents, and service of the motion. To ensure adequate notice to the respondent, the rule requires that the motion specifically describe any alleged violation. The requirement that a motion be filed before the court may impose sanctions eliminates the former practice, which allowed the court to impose sanctions sua sponte, even in the absence of a motion. As a practical matter, if a judge observes conduct that constitutes discovery abuse and that is not independently punishable as contempt, the court may simply "invite" or encourage the filing of such motion, and in all probability a person injured by the conduct will file a motion.

Subparagraph (1)(b) requires an oral hearing, unless waived by the persons involved, prior to imposition of sanctions under paragraph (3). The rule does not require the hearing before an award of "non-substantial" expenses under paragraph (2). The final sentence specifies the materials on which a court is to base its decision.

Subparagraph (1)(c) contains the requirements for a court order that either grants relief under paragraph (2) or grants

sanctions under paragraph (3). This provision also contains the distinction between orders that impose non-substantial expenses under paragraph (2), and orders that impose sanctions under paragraph (3). Both types of orders must be in writing. An order imposing sanctions under paragraph (3), however, also must contain written findings or be supported by oral findings on the record. This subparagraph also makes clear that a court may impose sanctions or other relief against a party, attorney, law firm, or other person or entity whose actions necessitated the motion.

Paragraph (2). Paragraph (2) begins by recognizing that discovery violations may be remedied by orders compelling or quashing discovery as provided in Rule 166b. Rule 166d is not intended to change the procedures, standards, or substantive law regarding such orders, and Rule 166b shall control such matters. Paragraph (2) provides a simplified procedure for granting minimum awards of expenses, typically attorney's fees, in connection with such motions. As long as the amount of the award is "not substantial," the oral hearing requirement in paragraph (1)(b), the findings requirement in paragraph (1)(c), and the mandatory delay of compliance until final judgment in paragraph 4 do not apply. These additional safeguards are required, unless waived by agreement, if the amount involved is "substantial" either in absolute terms, or in relative terms taking into account the financial resources of the person or entity liable. If an objection is made contending that a requested monetary sanction would preclude access to the courts, the court must follow the procedures applicable to paragraph 3(c) prior to making any such award.

Paragraph (3). Paragraph (3) itemizes sanctions that the court may enter after following the procedures prescribed in paragraph (1). Paragraph (3) also adopts the principle from TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913 (Tex. 1991), that any sanction imposed must be "directed to remedying the particular violations involved, and should be no more severe than necessary to satisfy [the sanction's] legitimate purposes."

The rule continues the requirement that a sanction be "just," which requires that a direct relationship exist between the offensive conduct and the sanction imposed, and that the sanction imposed not be excessive. Id. at 917; Chrysler Corp. v. Blackmon, 36 Tex. Sup. Ct. J. 76, 80 (Oct. 14, 1992).

A trial judge may consider several factors in determining an appropriate sanction, including: (1) the purposes for which sanctions are imposed; (2) the types of sanctions available; (3) the principle that sanction should be no more severe than necessary; (4) mitigating or aggravating factors.

The legitimate purposes that a trial court may consider in awarding sanctions include the following:

(1) specific deterrence of the offending party, or general deterrence of other litigants, from violating the rules;
(2) punishing a party who violates the rules;
(3) securing compliance with the rules; and
(4) compensating, or remedying the prejudice caused to, the innocent party.

See TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917-18 (Tex. 1991); Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986); Chrysler Corp. v. Blackmon, 36 Tex. Sup. Ct. J. 76, 80 (Oct. 14, 1992). Depending upon the nature of the case and the violation, as well as the respective roles of parties and counsel, the deterrent, punitive, compliance, or compensatory aspects may have varying importance.

Rule 166d addresses the least-severe-sanction principle of TransAmerican in two places. Paragraph (1)(c) requires as one of the specific findings that a trial court state "why a lesser sanction would be ineffective." Paragraph (3) states that any sanction imposed "should be no more severe than necessary to satisfy its legitimate purposes." Before imposing severe sanctions, the court must consider whether lesser sanctions will fully promote deterrence, punishment, compliance, and remedy of prejudice.

In the case of a "death penalty" sanction that would preclude a decision on the merits of a party's claim, counterclaim or defense, important due process considerations apply. TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917-18 (Tex. 1991). Accord Chrysler Corp. v. Blackmon, 36 Tex. Sup. Ct. J. 76 (Oct. 14, 1992). Paragraph (1)(c) requires that before a court may impose such sanctions, the court must find that the party or the party's counsel has engaged in conduct demonstrating flagrant bad faith or callous disregard for the rules. Even if such flagrant bad faith or callous disregard is present, lesser sanctions must first be tested to determine whether they are adequate to secure deterrence, punishment, compliance, and remedy of prejudice. Id.

A death penalty sanction should not be used to deny a trial on the merits unless the sanctioned party's conduct justifies a presumption that the party's claims or defenses lack merit and that it would be unjust to permit the party to present the substance of its position. Id.

The nine specific sanctions listed in paragraph (3) of Rule 166d are not intended to change substantially the types of sanctions authorized under former Rule 215. The changes simplify the language and clarify the availability of specific sanctions. Subparagraph (3)(i) also contains a general authorization for "such other orders as are just," to continue the authority for trial courts to exercise creativity in developing sanctions that fit the particular case.

The rule identifies reprimand as the first listed sanction to emphasize the availability of this frequently overlooked alternative, which may range from a "warm friendly discussion on the record" to a "hard-nosed reprimand in open court." Cf. Thomas v. Capital Security Serv., Inc., 836 F.2d 866, 878 (5th Cir. 1988).

Paragraph (3) authorizes two types of monetary sanctions: in subparagraph (c), assessing "a substantial amount" in expenses, including attorney's fees, of discovery or trial; in subparagraph (g), granting the movant a monetary award in addition to or in lieu of actual expenses.

Subparagraph (3)(h) adds specific reference to the availability of sanctions requiring specific performance, either for educational or community service purposes. Cf. Braden v. Downey, 811 S.W.2d 922 (Tex. 1991).

In determining an appropriate sanction, a court may consider a variety of mitigating or aggravating factors, including:

(a) the good faith or bad faith of the offender;
(b) the degree of willfulness, vindictiveness, negligence, or frivolousness involved in the offense;
(c) the knowledge, experience, and expertise of the offender;
(d) prior history of sanctionable conduct by the offender;
(e) the reasonableness of any expenses incurred by the offended person as a result of the misconduct;
(f) the prejudice suffered by the offended person as a result of the misconduct;
(g) the relative culpability of client and counsel, and the impact on their privileged relationship of an inquiry into that culpability;
(h) the risk of chilling the specific type of litigation involved;
(i) the impact of the sanction on the offender, including the offender's ability to pay a monetary sanction;
(j) the impact of the sanction on the offended person, including the offended person's need for compensation;
(k) the relative magnitude of sanction necessary to achieve the goal or goals of the sanction;
(l) the burdens on the court system attributable to the misconduct, including consumption of judicial time, juror fees, and other court costs;
(m) the degree to which the offended person attempted to mitigate any prejudice suffered;

(n) the degree to which the offended person's own behavior caused any expenses for which recovery is sought;

(o) the extent to which the offender persisted in advancing a position while on notice that the position had no basis in law or fact and was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

Cf. TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 921 (Tex. 1991) (Gonzalez, J., concurring); American Bar Association Section of Litigation, Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure, 121 F.R.D. 101, 124 (1988) (Standard (L)(2)).

Paragraph (2) permits a court to award non-substantial reasonable expenses necessary in connection the motion, even without any finding of bad faith or negligence. Although the rule does not create an express willfulness prerequisite to the imposition of sanctions under paragraph (3) -- except for death penalty sanctions -- the offending party's good faith or bad faith is a proper factor to consider in determining the nature and severity of the sanction to be imposed. The absence of willfulness or bad faith, or a lesser degree of negligence, militates in favor of a lesser sanction.

Only rarely should a court consider conduct apart from the case then pending before the court in determining whether to assess sanctions. A prior history of sanctionable conduct is pertinent chiefly in situations in which a lawyer or party has insisted on relitigating the same facts and issues, especially when asserting a previously sanctioned position.

In awarding a monetary sanction, the trial court should attempt to determine the impact on the offender, based upon the offender's ability to pay. Such an assessment is necessary to serve properly two of the underlying purposes of sanctions, to punish violations and to deter future violations.

The court also should exercise care in making the culpability determination required by TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991): "The trial court must at least attempt to determine whether the offensive conduct is attributable to counsel only, or to the party only, or to both." The determination of relative culpability may be complex and fact specific, and a conflict of interest may arise between attorney and client, who may have directly opposing financial and other interests, depending upon the outcome of the culpability determination. The trial court should take appropriate steps to minimize as much as possible any intrusion into the attorney-client relationship. In some cases postponing the decision of a sanctions motion, or at least the culpability

determination, may be helpful. The court also should control discovery and evidentiary inquiries concerning sanctions issues to assure that such inquiries do not unnecessarily invade the attorney-client relationship or risk disclosure of privileged information. Protective orders and in camera inspection of privileged materials also may be useful to minimize such disruption.

Paragraph (3) also makes clear that even if the court concludes that a discovery violation has occurred, imposition of sanctions remains discretionary; the court still may determine that sanctions are inappropriate. A clear but minor and insignificant discovery violation may occur, yet the court may conclude that the circumstances do not warrant sanctions.

Paragraph (4). Paragraph (4) sets out the timing for compliance with orders, in accordance with the directives of Braden v. Downey, 811 S.W.2d 922, 929-30 (1991).

Paragraph (5). Paragraph (5) provides that an order under this rule shall be deemed to be part of the final judgment and subject to review on appeal. The rule also permits any person or entity affected by the order to appeal in the same manner as a party to the underlying judgment.

The supplementation provision of former Rule 215(5) has been moved to Rule 166b(6)(d). The rule deletes the language from the former rule concerning the availability of expenses for failure to comply with Rule 169, but comparable relief remains available under the general provisions of paragraphs (2) and (3) of Rule 166d. Other procedural matters from the former rule concerning Rule 169 have been transferred to Rule 169.

APPENDIX B

RULE 13. EFFECT OF PRESENTING PLEADINGS, MOTIONS, AND OTHER PAPERS

RULE 13. EFFECT OF PRESENTING PLEADINGS, MOTIONS, AND OTHER PAPERS

(a) By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, motion, or other paper, an attorney or unrepresented party is certifying that to the best of the presenter's knowledge, information, and belief, formed after reasonable inquiry, the instrument is not groundless and presented in bad faith or groundless and presented for the purpose of harassment.

(b) Courts shall presume that pleadings, motions, and other papers are presented in good faith. "Groundless" for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law. A general denial does not constitute a violation of this rule. The amount requested for damages does not constitute a violation of this rule.

(c) Any party adversely affected by a violation of this rule may file a motion seeking relief or sanctions. The procedure, compliance, and review provisions of Rule 166d shall govern motions and proceedings under this rule, except that motions under this rule shall be served at least twenty-one (21) days before being filed or presented to the court; if the challenged pleading, motion, or other paper is withdrawn or corrected within that twenty-one (21) day period, the motion under this rule shall not be filed or presented to the court.

(d) Upon finding a violation of this rule, the court may award relief and sanctions as provided in Rule 166d(2) and (3).

COMMENT

For clarity, the amendment divides the rule into three paragraphs.

Paragraph (a). This paragraph changes the focus of the rule from signing documents to the more meaningful act of presenting documents, whether by signing, filing, submitting, or advocating. This change makes clear that if a litigant learns that a position ceases to have any merit and is in bad faith or for harassment, the litigant may not thereafter present or otherwise advocate those positions. For example, an attorney who signs a document not knowing that the document is groundless and in bad faith, but who later learns that it is, does not thereafter have immunity under the rule to continue advocating the position before the court. Further, the change makes the rule applicable to

documents that a party or attorney does not personally sign but, in effect, asks the court to rely upon by presenting the documents to the court.

For a violation of this paragraph to occur, the paper presented must be either (1) groundless and in bad faith, or (2) groundless and for harassment. A paper that is merely groundless, but not in bad faith or for harassment, is not sanctionable under this rule.

Courts considering Rule 13 sanctions should take care to assure that sanctions are not used to deter those who pursue nontraditional, unpopular, or political cases, and should exercise appropriate care to avoid punishing or deterring creative advocacy:

> Sometimes there are reasons to sue even when one cannot win. Bad court decisions must be challenged if they are to be overruled, but the early challenges are certainly hopeless. The first attorney to challenge Plessy v. Ferguson was certainly bringing a frivolous action, but his efforts and the efforts of others eventually led to Brown v. Board of Education.

Eastway Construction Corp. v. City of New York, 637 F. Supp. 558, 575 (E.D.N.Y. 1986), modified, 821 F.2d 121 (2d Cir.), cert. denied, 484 U.S. 918 (1987).

The amendment deletes the fictitious-suits provision of the former rule, which was unnecessary and rarely used.

Paragraph (b). This paragraph retains the presumption that papers are presented in good faith, and also retains the definition of "groundless."

Paragraph (c). This provision sets out the procedures and remedies for violations of the rule. In general, the rule adopts by reference most of the procedures and remedies from Rule 166d, making practice under these two sanctions rules more consistent.

A party adversely affected by a violation of the rule may file a motion for relief or sanctions. To avoid collateral litigation of sanctions issues that the parties themselves do not deem sufficient or appropriate for contest, the rule omits authority for the trial court to initiate sanctions proceedings sua sponte. As a practical matter, in almost every case in which a trial court encourages an injured party to file such a motion, the party will do so; however, if the parties affected choose not to pursue such sanctions, whether as part of settlement or for other reasons, that decision will control.

To make Texas sanctions practice more consistent, and to adopt the salutary procedural protections specified by the Texas

Supreme Court for discovery sanctions, the rule generally incorporates the procedure, compliance, and review provisions of Rule 166d. See the Comment to Rule 166d concerning those provisions. Thus, except for differences expressly stated in the rules, those provisions of Rule 166d apply to and control practice under this rule.

The amendment creates a "safe harbor" provision, so that a motion under this rule must be served at least twenty-one (21) days before being filed or presented. A motion presented before the expiration of the twenty-one (21) days should be denied. This procedure provides the respondent with an opportunity to amend or withdraw the offending paper and thereby to avoid sanctions or other relief.

The certificate of conference requirement of Rule 166d(1)(a) also applies to Rule 13 motions.

Paragraph (d). The last paragraph of Rule 13 authorizes the relief and sanctions provided in Rule 166d(2) and (3). This provision also makes the award of relief or sanctions discretionary with the trial court -- changing the previous mandatory language ("shall impose") to permissive ("may award") -- so that the trial court may choose not to award relief or sanctions even if a technical violation of the rule occurs.

APPENDIX C

RULE 12a. DISQUALIFICATION OF ATTORNEY

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(1) An attorney representing a party may be disqualified by the court from further representation of the party only pursuant to this Rule or Rule 12.

(2) The court on its own motion may disqualify an attorney from further representation of a party if the court finds that:

(a) in the pending matter the attorney is representing more than one party whose interests in the litigation are directly opposing; and

(b) for the attorney to continue to represent the party will taint the fairness of the trial.

(3) On motion by a party who is a former client of an attorney or who is currently represented by an attorney in another matter, the court in its discretion may disqualify that attorney from further representation of another party in a pending matter upon a showing that:

(a) the interests of the other party being represented by the attorney in the pending matter are materially and directly adverse to the interests of the movant in a substantially related matter in which the attorney represents or represented the movant; or

(b) while representing the movant, the attorney acquired information protected by the attorney-client evidentiary privilege that in reasonable probability could be used in the pending matter to the disadvantage of movant; in the court's discretion such showing of which may be made in an in camera hearing or by in camera consideration of affidavit evidence; or

(c) the representation by the attorney of such other party in the pending matter in reasonable probability will have an adverse effect upon the representation of movant's interests in the other matter in which the attorney represents the movant; or

(d) the representation by the attorney of such other party in the pending matter constitutes a direct attack upon the work product attained for movant in the other matter in which the attorney represented the movant.

(4) A person who is not a party to the pending matter but who is a client or former client of an attorney who is representing a party in the pending matter may intervene for the purpose of moving to disqualify the attorney on one or more of the grounds specified in paragraph (3).

(5) In the event an attorney is held by the court to be disqualified pursuant to paragraph (3) of this rule, the court in its discretion may permit another attorney who practices with the firm of the disqualified attorney, or who is similarly associated in law practice with the disqualified attorney, to continue the representation of one or more of the parties if the court finds that:

(a) such representation will not taint the fairness of the trial;

(b) the disqualified attorney has been satisfactorily screened;

(c) knowing consent to the continuation of the representation is given by the party or parties whose representation is permitted to continue; and

(d) continuation of the presentation will not materially and adversely affect the interests of the movant.

(6) An attorney who previously had practiced in a firm with an attorney who is subject to disqualification ("disqualified attorney") under paragraphs (3) or (4) of this rule is also subject to disqualification under those paragraphs even though the attorney has not personally represented movant if the attorney is shown to have acquired from the disqualified attorney, from the disqualified attorney's firm, or from movant information protected by the attorney-client evidentiary privilege that in reasonable probability could be used to the disadvantage of movant in the litigation.

(7) Upon motion by a party, or motion by an interested person who intervenes, or upon the court's own motion, an attorney may be disqualified from representing a client in a pending matter if that attorney is prohibited from representing that client under Rule 1.10 of the Texas Disciplinary Rules of Professional Conduct regarding successive government and private employment. If the court disqualifies an attorney under this paragraph, the court in its discretion may permit another attorney who practices with the firm of the disqualified attorney, or who is similarly associated in law practice with the disqualified attorney, to continue the representation of one or more of the parties if the court finds that the representation will not taint the fairness of the trial and that the disqualified attorney has been satisfactorily screened.

(8) Upon motion by an opposing party or upon the court's own motion, the court in its discretion may disqualify an attorney from further representation of a party in a pending matter when it appears that the attorney while serving previously as a law clerk to an adjudicatory official or as a judge, magistrate,

hearing officer, master, arbitrator, or other adjudicatory official acted personally and substantially as a law clerk or in a judicial capacity concerning the matter now before the court. If the court disqualifies an attorney under this paragraph, the court in its discretion may permit another attorney who practices with the firm of the disqualified attorney, or who is similarly associated in law practice with the disqualified attorney, to continue the representation of one or more of the parties if the court finds that the representation will not taint the fairness of the trial and that the disqualified attorney has been satisfactorily screened.

(9) Subject to the provisions of paragraphs (11) and (12), upon motion by any party to the pending matter, the court may disqualify an attorney from further representation of his or her client or clients in the matter upon a showing that:

(a) the attorney will be or is likely to be a witness necessary to establish an essential fact on behalf of the attorney's client; and

(b) the prejudice, if any, that will result to movant if the attorney is not disqualified substantially outweighs the prejudice to the attorney's client if the attorney is not allowed to continue the representation.

(10) Subject to the provisions of paragraphs (11) and (12), upon motion by any party to the pending matter, the court may disqualify an attorney from further representation of his or her client or clients in the matter upon a showing that:

(a) movant in good faith will call the attorney as a necessary witness to a material fact substantially adverse to the attorney's client; and

(b) the prejudice, if any, that will result to movant if the attorney is not disqualified substantially outweighs the prejudice to the attorney's client if the attorney is not allowed to continue the representation.

(11) An attorney is not subject to disqualification under paragraphs (9) or (10) if it reasonably appears that:

(a) the testimony relates to an uncontested issue;

(b) the testimony on behalf of attorney's client will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

(c) the testimony relates to the nature and value of legal services rendered in the case;

(d) the attorney is a party to the action and is appearing pro se;

(e) the attorney has promptly notified opposing counsel that the attorney expects to testify in the matter and disqualification would work substantial hardship on the attorney's client, unless movant after receiving notification promptly demonstrates to the court by clear and convincing evidence that movant will sustain actual prejudice if the attorney is not disqualified; or

(f) the movant under paragraph (10) failed to promptly notify the attorney whose disqualification is sought of movant's intent in good faith to call the attorney as a necessary witness to a material fact substantially adverse to the attorney's client.

(12) An attorney disqualified in accordance with paragraphs (9) or (10) may continue to represent the client except as an active advocate before the tribunal in the presentation of the pending matter. The disqualification of an attorney under paragraphs (9) or (10) does not disqualify other attorneys who are partners or associates of the disqualified attorney.

(13) In exercising its discretion, the court may deny a motion filed under paragraphs (3) through (10) if the court finds that in reasonable probability the fairness of the trial will not be tainted by the continued representation.

(14) A motion for disqualification shall be made promptly when the movant knows, or should have known, of the facts supporting the motion. Failure to file a motion promptly will constitute waiver. The motion for disqualification shall state the specific grounds therefor. Except as otherwise stated in this rule, movant has the burden of persuasion by a preponderance of the evidence. Upon written request by movant, any party, or any attorney to the proceeding, served in accordance with Rules 21 and 21a, the court shall conduct an oral hearing on the motion. The court shall make its determination based upon the pleadings, stipulations, affidavits, attachments, and the results of the discovery processes, on file, and any oral testimony. The order granting or denying the motion shall state with specificity the reasons for the court's decision.

(15) Definitions:

(a) "Screen" means that the attorney in question and the attorney's firm isolate the attorney to the extent that the attorney will not come in contact with files regarding the matter, will not give or receive any relevant or material information regarding the matters in question, will not receive any fee or remuneration in connection with the

pending matter, and will not participate in any manner in the representation in the pending matter.

(b) "Information Protected by the Attorney-client Evidentiary Privilege" is information protected by the rule of privilege set forth in Rule 503 of the Texas Rules of Civil Evidence or in Rule 503 of the Texas Rules of Criminal Evidence, or by the principles of attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence for United States Courts and Magistrates.

(c) "Private practice" refers to the practice of law by an attorney in any manner other than as a government attorney, a public officer, or an employee of a government agency.

(d) "Substantial hardship" refers to an adverse effect that is both material and important to a meaningful degree.

(e) Substantially Related Matter: A matter is "substantially related" to another matter when it appears that the two matters are so closely related factually that factual information regarding one of the matters will be of material importance or consequence in the other matter. "Matter" contemplates a discrete and isolable transaction or set of transactions between identifiable parties. A superficial resemblance between facts or issues is not sufficient to constitute a substantial relationship, and facts, common to the two matters, that are publicly known do not constitute a substantial relationship.

(f) Taint of Trial: The fairness of a trial is not tainted by the possibility that an attorney's independent professional judgment might not be exercised solely for the benefit of the client being represented. The fairness of a trial is tainted if:

(i) information protected by the attorney-client evidentiary privilege is likely to be used to the material disadvantage of a client or a former client;

(ii) movant is likely to be substantially prejudiced in the course of the trial by failure to disqualify the attorney; or

(iii) the continued participation in the trial by the attorney whose disqualification is sought is likely to adversely affect legal services previously rendered to movant.

COMMENT

New Rule 12a deals with disqualification of attorneys. The rule provides specific procedures and standards to govern such disqualification proceedings. Texas attorneys remain subject to the Texas Disciplinary Rules of Professional Conduct for disciplinary purposes, and this rule is not intended to vary the meaning, effect, or application of those rules in the disciplinary context.

Courts disfavor motions to disqualify counsel. Sharp v. Broadway Nat'l Bank, 784 S.W.2d 669, 671 (Tex. 1990). "Disqualification is a severe remedy. . . . The courts must adhere to an exacting standard when considering motions to disqualify so as to discourage their use as a dilatory tactic." Spears v. Fourth Court of Appeals, 797 S.W.2d 654, 656 (Tex. 1990).

In considering motions to disqualify, courts sometimes have referred to the Texas Disciplinary Rules of Professional Conduct "for guidance," while recognizing that those rules are intended for disciplinary purposes, not disqualification. See Spears v. Fourth Court of Appeals, 797 S.W.2d 654, 658 (Tex. 1990); Ayres v. Canales, 790 S.W.2d 654, 656 n.2, 658 (Tex. 1990); Texas Disciplinary Rules of Professional Conduct, Rule 3.08 Comments 9, 10. While Rule 12a now governs disqualification proceedings, the Texas Disciplinary Rules of Professional Conduct continue to apply and control for purposes of lawyer discipline.

Because a motion to disqualify presented by an opposing party can be misused as a form of harassment, Rule 12a guards against misuse, particularly by giving the trial judge considerable discretion in determining such motions and, under paragraph (13), in denying such motions if the court finds that in reasonable probability the fairness of the trial will not be tainted by the continued representation. A motion for disqualification that is groundless and in bad faith or groundless and for harassment is sanctionable under Rule 13.

Paragraph (1) of the rule makes clear that this rule and Rule 12 -- which provides a procedure for a challenged attorney to show authority to prosecute or defend a suit -- govern attorney disqualification.

Paragraph (2) deals with a situation in which an attorney represents multiple parties whose interests in the litigation are directly opposing.

Paragraph (3) deals with a motion by a party who is currently represented by an attorney in another matter or who is a former client of the attorney, and paragraph (4) allows intervention by such client or former client for the purpose of moving to disqualify the attorney.

Paragraph (5) provides discretion for the court, in the event the court disqualifies an attorney under paragraphs (2) or (3), to permit another attorney who is in the same firm, or who is similarly associated with the disqualified attorney, to continue the representation if specified conditions are met.

Paragraph (6) provides for disqualification of an attorney who previously practiced in a firm with an attorney who is subject to disqualification, if the first attorney obtained certain information protected by the attorney-client evidentiary privilege.

Paragraph (7) deals with disqualification arising from successive government and private employment, and paragraph (8) deals with disqualification arising from previous service as an adjudicatory official or as a law clerk to an adjudicatory official.

Paragraphs (9), (10), (11), and (12) deal with situations arising from an attorney potentially being a witness in the case.

Paragraph (14) sets out procedural aspects of motions to disqualify, including: requiring the movant to file such a motion promptly or risk waiver; the burden of persuasion; authorizing an oral hearing on the motion upon written request; specifying the matters that the court may consider in making its determination; and requiring that the order granting or denying the motion state specifically the reasons for the court's decision.

Paragraph (15) sets out the definitions of terms used in the rule.

APPENDIX D

RULE 166b(6)(b)

b. If the party expects to call an expert witness when the identity or the subject matter of such expert witness' testimony has not been previously disclosed in response to an appropriate inquiry directly addressed to these matters, such response must be supplemented to include the name, address and telephone number of the expert witness and the substance of the testimony concerning which the expert witness is expected to testify, at least thirty (30) days prior to the beginning of trial except on leave of court.

COMMENT

The amendment requires that supplementation of the information concerning expert witnesses be made at least thirty (30) days before trial, except on leave of court, and eliminates the former provision's additional, confusing reference to supplementation "as soon as is practical."

APPENDIX E

RULE 166b(6)(e)

RULE 166b(6)(e)

Notwithstanding any other rule of supplementation, any witness that has been deposed and identified in discovery responses by a party dismissed from the lawsuit within thirty (30) days prior to the beginning of trial may be timely designated by any other party within seven (7) days of notice of such dismissal.

APPENDIX F

RULE 166b(6)(d)

Unless the court makes a finding of good cause, a party who fails to make or supplement a discovery response shall not be entitled to present evidence that the party was under a duty to provide, or to offer the testimony of a witness, other than a named party, who has not been properly designated. The burden of establishing good cause is upon the party offering the evidence or witness, and good cause must be shown in the record. Notwithstanding the foregoing, the court may, in its discretion, grant a continuance to allow a response to be made or supplemented, and may condition such continuance upon payment of expenses related thereto by the party requesting the continuance or other orders pursuant to Rule 166d.

COMMENT

The amendment transfers from former Rule 215(5) to this rule the provision dealing with effect of failing to respond to or supplement discovery. The new provision permits the trial court -- as an alternative to complete exclusion of evidence or testimony not properly identified or supplemented -- to grant a continuance or other relief provided by Rule 166d. Cf. Alvarado v. Farah Mfg. Co., Inc., 830 S.W.2d 911 (Tex. 1992).

Among the factors that the court may consider in determining whether good cause exists for admission of evidence not properly provided or supplemented in discovery are the following:

(1) the existence or absence of surprise to the opponent;
(2) the existence or absence of prejudice to the opponent, including delay or expense;
(3) the good faith of counsel or the party in attempting to supplement; and
(4) the importance of the undisclosed evidence or witnesses to the proponent's case.

See Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394, 395 (Tex. 1989); Alvarado v. Farah Mfg. Co., Inc., 830 S.W.2d 911, 915-16 (Tex. 1992); see also Smith v. Southwest Feed Yards, 835 S.W.2d 89, 91 (Tex. 1992). The mere fact that the court may find that evidence exists establishing one or more of these factors does not necessarily compel a finding of good cause. These are proper factors for the court to consider, but the court has the discretion to determine what weight to give the factors in a particular case. Nor is this list exclusive of other factors that a court might consider.

The amended rule also exempts from the exclusion provision a party to the litigation. The party exemption applies to named parties; it is not intended to extend to corporate representatives who are not named parties or to unnamed members

APPENDIX G-1

RULE 18a(h)

RULE 18a(h)

The Task Force recommends repeal of paragraph (h) of Rule 18a.

APPENDIX G-2

RULE 21b

RULE 21b

The Task Force recommends repeal of this rule.

APPENDIX G-3

RULE 120a

The Task Force recommends repeal of the following language in Rule 120a:

> Should it appear to the satisfaction of the court at any time that any such affidavits are presented in violation of Rule 13, the court shall impose sanctions in accordance with that rule.

APPENDIX G-4

RULE 166a(h)

RULE 166a(h)

The Task Force recommends repeal of paragraph (h) of Rule 166a.

APPENDIX G-5

RULE 169. REQUESTS FOR ADMISSION

RULE 169. REQUESTS FOR ADMISSION

1. **Request for Admission.** At any time after commencement of the action, a party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 166b set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including genuineness of any documents described in the request. Copies of the documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Whenever a party is represented by an attorney of record, service of a request for admissions shall be made on his attorney unless service on the party himself is ordered by the court. A true copy of a request for admission or of a written answer or objection, together with proof of the service thereof as provided in Rule 21a, shall be filed promptly in the clerk's office by the party making it.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted without necessity of a court order unless, within thirty days after the service of the request, or within such time as the court may allow, or as otherwise agreed by the parties, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of fifty days after the service of the citation and petition upon that defendant. For purposes of this subdivision an evasive or incomplete answer may be treated as a failure to answer. If objection is made, the reason therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons that the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or easily obtainable by him is sufficient to enable him to admit or deny. A party who considers that a matter of which an admission is requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 166d, deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admission may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall

APPENDIX G-6

RULE 203

RULE 203

The Task Force recommends repeal of this rule.

APPENDIX G-7

RULE 269(e)

RULE 269(e)

Arguments on the facts should be addressed to the jury, when one is impaneled in a case that is being tried, under the supervision of the court. Counsel shall be required to confine the argument strictly to the evidence and to the arguments of opposing counsel. Mere personal criticism by counsel upon each other shall be avoided.

COMMENT

The amendment deletes the unnecessary reference to the court's contempt power.

APPENDIX H-1

RULE 18a(h)

certified copy, an order of referral, the motion, and all opposing and concurring statements. Except for good cause stated in the order in which further action is taken, the judge shall make no further orders and shall take no further action in the case after filing of the motion and prior to a hearing on the motion. The presiding judge of the administrative judicial district shall immediately set a hearing before himself or some other judge designated by him, shall cause notice of such hearing to be given to all parties or their counsel, and shall make such other orders including orders on interim or ancillary relief in the pending cause as justice may require.

(e) If within ten days of the date set for trial or other hearing a judge is assigned to a case, the motion shall be filed at the earliest practicable time prior to the commencement of the trial or other hearing.

(f) If the motion is denied, it may be reviewed for abuse of discretion on appeal from the final judgment. If the motion is granted, the order shall not be reviewable, and the presiding judge shall assign another judge to sit in the case.

(g) The Chief Justice of the Supreme Court may also appoint and assign judges in conformity with this rule and pursuant to statute.

(h) If a party files a motion to recuse under this rule and it is determined by the presiding judge or the judge designated by him at the hearing and on motion of the opposite party, that the motion to recuse is brought solely for the purpose of delay and without sufficient cause, the judge hearing the motion may, in the interest of justice, impose any sanction authorized by Rule 215(2)(b).

(Added June 10, 1980, eff. Jan. 1, 1981; amended Dec. 5, 1983, eff. April 1, 1984; April 10, 1986, eff. Sept. 1, 1986; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

This is a new rule.

Change by amendment effective April 1, 1984: Section (a) is changed textually.

Comment: The words "the Court of Criminal Appeals" have been added in (a); and subsection "1" has been added to (g).

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.** A judge shall recuse himself in any proceeding in which:

(a) his impartiality might reasonably be questioned;

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

(c) he or a lawyer with whom he previously practiced law has been a material witness concerning it;

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

(e) 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;

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

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

(g) he or his spouse, or a person within the first degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding.

(3) 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.

(4) In this rule:

(a) "proceeding" includes pretrial, trial, or other stages of litigation;

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

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

(d) "financial interest" means ownership of a legal or equitable interest, however small, or a rela-

APPENDIX H-2

RULE 21b

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.

(Amended Sept. 20, 1941, eff. Dec. 31, 1941; Aug. 18, 1947, eff. Dec. 31, 1947; July 11, 1977, eff. Jan. 1, 1978; June 10, 1980, eff. Jan. 1, 1981; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Source: Art. 2291.

Change by amendment effective January 1, 1978: The phrase, "if it relates to a pending suit." was deleted from the end of the first sentence. The phrase, "If the motion does not relate to a pending suit," was deleted from the beginning of the second sentence.

Change by amendment effective January 1, 1981: The rule is broadened to encompass matters other than motions and to require three-day notice unless the period is shortened.

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.

RULE 21a. METHODS OF SERVICE

Every notice required by these rules, and every pleading, plea, motion, or other form of request required to be served under Rule 21, 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 to the party to be served, or the party's duly authorized agent or attorney of record, as the case may be, either in person or by agent or by courier receipted delivery or by certified or registered mail, to the party's last known address, or by telephonic document transfer to the recipient's current telecopier number, or by 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. Service by telephonic document transfer after 5:00 p.m. local time of the recipient shall be deemed served on the following day. Whenever a party has the right or is required to do some act 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. Notice may be served by a party to the suit, an attorney of record, a sheriff or constable, 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 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 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.

(Added Aug. 18, 1947, eff. Dec. 31, 1947; amended July 21, 1970, eff. Jan. 1, 1971; Oct. 3, 1972, eff. Feb. 1, 1973; July 11, 1977, eff. Jan. 1, 1978; June 10, 1980, eff. Jan. 1, 1981; Dec. 5, 1983, eff. April 1, 1984; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Note: Adopted as a new rule effective December 31, 1947.

Change by amendment effective January 1, 1971: The second and third sentences have been added to make service by mail complete upon proper deposit in the mail and to enlarge the time for acting after service by mail; the sentence formerly providing for notice of a motion by filing and entry on the motion docket has been eliminated.

Change by amendment effective February 1, 1973: The words "Postal Service" have been substituted for "Post Office Department" and a sentence has been inserted authorizing the court to grant an extension of time or other relief upon finding that a notice or document was not received or, if service was by mail, was not received within three days from the date of deposit in the mail.

Change by amendment effective January 1, 1978: The phrase "not relating to a pending suit" in the next to last sentence is deleted.

Change by amendment effective January 1, 1981: The next to last sentence from the end of the former rule requiring three-day notice is deleted, because Rule 21 is concurrently amended to require that notice.

Change by amendment effective April 1, 1984: This rule consolidates Rules 21a and 21b.

Comment to 1990 change: To allow for service by current delivery means and technologies.

RULE 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, after notice and hearing, impose an appropriate sanction available under Rule 215–2b.

(Added April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Comment to 1990 change: New rule. Repealed provisions of Rule 73, 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.

RULE 21c. [REPEALED]

(Repealed April 10, 1986, eff. Sept. 1, 1986.)

SECTION 2. INSTITUTION OF SUIT

RULE 22. COMMENCED BY PETITION

A civil suit in the district or county court shall be commenced by a petition filed in the office of the clerk.

Notes and Comments

Source: Art. 1971, with minor textual change.

RULE 23. SUITS TO BE NUMBERED CONSECUTIVELY

It shall be the duty of the clerk to designate the suits by regular consecutive numbers, called file numbers, and he shall mark on each paper in every case the file number of the cause.

Notes and Comments

Source: Texas Rule 82 (for District and County Courts).

RULE 24. DUTY OF CLERK

When a petition is filed with the clerk he shall indorse thereon the file number, the day on which it was filed and the time of filing, and sign his name officially thereto.

Notes and Comments

Source: Art. 1972.

RULE 25. CLERK'S FILE DOCKET

Each clerk shall keep a file docket which shall show in convenient form the number of the suit, the names of the attorneys, the names of the parties to the suit, and the nature thereof, and, in brief form, the officer's return on the process, and all subsequent proceedings had in the case with the dates thereof.

Notes and Comments

Source: Art. 1973.

RULE 26. CLERK'S COURT DOCKET

Each clerk shall also keep a court docket in a permanent record that shall include the number of the case and the names of the parties, the names of the attorneys, the nature of the action, the pleas, the motions, and the ruling of the court as made.

(Amended April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Source: Texas Rule 79 (for District and County Courts), with minor textual change.

RULE 27. ORDER OF CASES

The cases shall be placed on the docket as they are filed.

Notes and Comments

Source: Texas Rule 80 (for District and County Courts).

SECTION 3. PARTIES TO SUITS

RULE 28. SUITS IN ASSUMED NAME

Any partnership, unincorporated association, private corporation, or individual doing business under an assumed name may sue or be sued in its partnership, assumed or common name for the purpose of enforcing for or against it a substantive right, but on a motion by any party or on the court's own motion the true name may be substituted.

(Amended July 21, 1970, eff. Jan. 1, 1971.)

Notes and Comments

Source: Part of Federal Rule 17(b).

Change: Addition of "an individual doing business under an assumed name," and partnership or common name.

Change by amendment effective January 1, 1971: Language has been added to make the rule applicable to a private corporation and authorize the true name of the party to be substituted on motion.

RULE 29. SUIT ON CLAIM AGAINST DISSOLVED CORPORATION

When no receiver has been appointed for a corporation which has dissolved, suit may be instituted on any claim against said corporation as though the

APPENDIX H-3

RULE 120a

RULE 120. ENTERING APPEARANCE

The defendant may, in person, or by attorney, or by his duly authorized agent, enter an appearance in open court. Such appearance shall be noted by the judge upon his docket and entered in the minutes, and shall have the same force and effect as if the citation had been duly issued and served as provided by law.

Notes and Comments

Source: Art. 2046, unchanged.

RULE 120a. SPECIAL APPEARANCE

1. Notwithstanding the provisions of Rules 121, 122 and 123, a special appearance may be made by any party either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant on the ground that such party or property is not amenable to process issued by the courts of this State. A special appearance may be made as to an entire proceeding or as to any severable claim involved therein. Such special appearance shall be made by sworn motion filed prior to motion to transfer venue or any other plea, pleading or motion; provided however, that a motion to transfer venue and any other plea, pleading, or motion may be contained in the same instrument or filed subsequent thereto without waiver of such special appearance; and may be amended to cure defects. The issuance of process for witnesses, the taking of depositions, the serving of requests for admissions, and the use of discovery processes, shall not constitute a waiver of such special appearance. Every appearance, prior to judgment, not in compliance with this rule is a general appearance.

2. Any motion to challenge the jurisdiction provided for herein shall be heard and determined before a motion to transfer venue or any other plea or pleading may be heard. No determination of any issue of fact in connection with the objection to jurisdiction is a determination of the merits of the case or any aspect thereof.

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 such affidavits are presented in violation of Rule 13, the court shall impose sanctions in accordance with that rule.

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.

(Added April 12, 1962, eff. Sept. 1, 1962; amended July 22, 1975, eff. Jan. 1, 1976; June 15, 1983, eff. Sept. 1, 1983; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Note: This is a new rule, effective September 1, 1962.

Change by amendment effective January 1, 1976: Words are added in the third sentence which permit amendments to the special appearance motion.

Change by amendment effective September 1, 1983: To conform to S.B. 898, 68th Legislature, 1983.

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.

RULE 121. ANSWER IS APPEARANCE

An answer shall constitute an appearance of the defendant so as to dispense with the necessity for the issuance or service of citation upon him.

Notes and Comments

Source: R.C.S. Art. 2047, unchanged.

RULE 122. CONSTRUCTIVE APPEARANCE

If the citation or service thereof is quashed on motion of the defendant, such defendant shall be deemed to have entered his appearance at ten o'clock a.m. on the Monday next after the expiration of twenty (20) days after the day on which the citation or service is quashed, and such defendant shall be deemed to have been duly served so as to require him to appear and answer at that time, and if he fails to do so, judgment by default may be rendered against him.

Notes and Comments

Source: R.C.S. Articles 2048 and 2093, Sec. 8.

APPENDIX H-4

RULE 166a(h)

would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

(g) When Affidavits Are Unavailable. 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 refuse the application for judgment or 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.

(h) Affidavits Made in Bad Faith. 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.

(Added Oct. 12, 1949, eff. March 1, 1950; amended Oct. 1, 1951, eff. March 1, 1952; July 20, 1966, eff. Jan. 1, 1967; July 21, 1970, eff. Jan. 1, 1971; July 11, 1977, eff. Jan. 1, 1978; June 10, 1980, eff. Jan. 1, 1981; Dec. 5, 1983, eff. April 1, 1984; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Note: Adopted as a new rule effective March 1, 1950.

Source: Federal Rule 56, as originally promulgated, except that the following wording in subdivision (a) has been eliminated: "pleading in answer thereto has been served"; and in its place the following language has been substituted: "adverse party has appeared or answered."

Change by amendment effective March 1, 1952: The last sentence is added to paragraph (a).

Change by amendment effective January 1, 1967: Fourth sentence of paragraph (c) was added.

Change by amendment effective January 1, 1971: The first sentence of paragraph (c) has been added, and the words "answers to interrogatories" have been inserted in the fifth sentence of paragraph (c).

Change by amendment effective January 1, 1978: The time requirements in (c) are changed. The third, fourth, and fifth sentences of (c) are new. The last sentence of (e) is new.

Change by amendment effective January 1, 1981: The second sentence adds the words "with notice to opposing counsel," "and any supporting affidavits," and "filed and." Third sentence adds the words, "file and."

Change by amendment effective April 1, 1984: Section (c) is changed to include stipulations and authenticated and certified public records as matters in support of a summary judgment.

Comment to 1990 change: This amendment provides a mechanism for using previously non-filed discovery in summary judgment practice. Such proofs must all be filed in advance of the hearing in accordance with Rule 166a. Paragraphs (d) through (g) are renumbered (e) through (h).

RULE 166b. FORMS AND SCOPE OF DISCOVERY; PROTECTIVE ORDERS; SUPPLEMENTATION OF RESPONSES

1. Forms of Discovery. Permissible forms of discovery are (a) oral or written depositions of any party or non-party, (b) written interrogatories to a party, (c) requests of a party for admission of facts and the genuineness or identity of documents or things, (d) requests and motions for production, examination, and copying of documents or other tangible materials, (e) requests and motions for entry upon and examination of real property and (f) motions for a mental or physical examination of a party or person under the legal control of a party.

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.* Parties may obtain discovery regarding any matter which is relevant to the subject matter in the pending action whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. It is also not ground for objection that an interrogatory propounded pursuant to Rule 168 involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time. It is also not ground for objection that a request for admission propounded pursuant to Rule 169 relates to statements or opinions of fact or of the application of law to fact or mixed questions of law and fact or that the documents referred to in a request may not be admissible at trial.

b. *Documents and Tangible Things.* A party may obtain discovery of the existence, description, nature, custody, condition, location and contents of any and all documents, (including papers, books, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, and any other data compilations from which information can be

APPENDIX H-5

RULE 166b(6)

paragraph 2, a party 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 support such claim either in the form of affidavits served at least seven days before the hearing or by testimony. If the trial court determines that an in camera inspection and review by the court of some or all of the requested discovery is necessary, the objecting party must segregate and produce the discovery to the court in a sealed wrapper or by answers made in camera to deposition questions, to be transcribed and sealed in event the objection is sustained. 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 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.** On motion specifying the grounds and made by any person against or from whom discovery is sought under these rules, the court may make any order in the interest of justice necessary to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights. Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents. Specifically, the court's authority as to such orders extends to, although it is not necessarily limited by, any of the following:

a. ordering that requested discovery not be sought in whole or in part, or that the extent or subject matter of discovery be limited, or that it not be undertaken at the time or place specified.

b. ordering that the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court.

c. ordering that for good cause shown results of discovery be sealed or otherwise adequately protected, that its distribution be limited, or that its disclosure be restricted. Any order under this subparagraph 5(c) shall be made in accordance with the provisions of Rule 76a with respect to all court records subject to that rule.

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 to reasonably supplement his response if he obtains information upon the basis of which:

(1) he knows that the response was incorrect or incomplete when made;

(2) he knows that the response though correct and complete when made is no longer true and complete and the circumstances are such that failure to amend the answer is in substance misleading; or

b. If the party expects to call an expert witness when the identity or the subject matter of such expert witness' testimony has not been previously disclosed in response to an appropriate inquiry directly addressed to these matters, such response must be supplemented to include the name, address and telephone number of the expert witness and the substance of the testimony concerning which the expert witness is expected to testify, as soon as is practical, but in no event less than thirty (30) days prior to the beginning of trial except on leave of court.

c. In addition, a duty to supplement answers may be imposed by order of the court or agreement of the parties, or at any time prior to trial through new requests for supplementation of prior answers.

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.

(Added Dec. 5, 1983, eff. April 1, 1984; amended July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990; Sept. 4, 1990, eff. retroactively to Sept. 1, 1990.)

Notes and Comments

This is a new rule effective April 1, 1984.

This new rule combines all scope of discovery concepts into one rule. It incorporates provisions previously located in Rules 167, 186a and 186b.

In the provisions concerning production of documents or tangible things for inspection contained in new Rule 166b, possession, custody or control is defined in terms of a "superior right to compel" from a third party; the existence and contents of settlement agreements are made discoverable; the rule validates the use of interrogatories and admissions that involve the application of law to fact or so-called mixed questions by providing that they are not objectionable on that basis; the rule contains a redraft of the medical authorization provisions of former Rule 167; seeks to clarify rules concerning experts and their reports.

APPENDIX H-6

RULE 203

dence at a deposition upon oral examination to be recorded by other than stenographic means, including videotape recordings, without leave of court, and the non-stenographic recording may be presented at trial in lieu of reading from a stenographic transcription of the deposition, subject to the following rules:

a. Any party intending to make a non-stenographic recording shall give five days' notice to all other parties by certified mail, return receipt requested, and shall specify in said notice the type of non-stenographic recording which will be used.

b. After the notice is given, any party may make a motion for relief under Rule 166b. If a hearing is not held prior to the taking of the deposition, the non-stenographic recording shall be made subject to the court's ruling at a later time.

c. Any party shall have reasonable access to the original recording and may obtain a duplicate copy at his own expense.

d. The expense of a non-stenographic recording shall not be taxed as costs, unless before the deposition is taken, the parties so agree, or the court so orders on motion and notice.

e. The non-stenographic recording shall not dispense with the requirement of a stenographic transcription of the deposition unless the court shall so order on motion and notice before the deposition is taken, and such order shall also make such provision concerning the manner of taking, preserving and filing the non-stenographic recording as may be necessary to assure that the recorded testimony will be intelligible, accurate and trustworthy. Such order shall not prevent any party from having a stenographic transcription made at his own expense. In the event of an appeal, the non-stenographic recording shall be reduced to writing.

2. **Deposition by Telephone.** The parties may stipulate in writing, or the court may upon motion order, that a deposition be taken by telephone. For the purposes of this rule and Rules 201, 215–1a and 215–2a, a deposition taken by telephone is taken in the district and at the place where the deponent is to answer questions propounded to him.

(Added Dec. 5, 1983, eff. April 1, 1984.)

Notes and Comments

This is a new rule effective April 1, 1984: This combines former Rule 215c with new deposition by telephone material that was taken from Federal Rule 30(b)(7).

RULE 203. FAILURE OF PARTY OR WITNESS TO ATTEND OR TO SERVE SUBPOENA; EXPENSES

1. **Failure of Party Giving Notice to Attend.** If the party giving the notice of the taking of an oral deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees.

2. **Failure of Witness to Attend.** If a party gives notice of the taking of an oral deposition of a witness and the witness does not attend because of the fault of the party giving the notice, if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees.

(Added Dec. 5, 1983, eff. April 1, 1984.)

Notes and Comments

This is a new rule effective April 1, 1984. This is former Rule 215b with modification.

RULE 204. EXAMINATION, CROSS-EXAMINATION AND OBJECTIONS

1. **Written Cross-Questions on Oral Examination.** At any time before the expiration of ten days from the date of the service of the notice provided for in Rule 200, any party, in lieu of participating in the oral examination may serve written questions on the party proposing to take the deposition who shall cause them to be transmitted to the officer authorized to take the deposition who shall propound them to the witness and record the answers verbatim.

2. **Oath.** Every person whose deposition is taken upon oral examination shall be first cautioned and sworn to testify the truth, the whole truth and nothing but the truth.

3. **Examination.** The witness shall be carefully examined, his testimony shall be recorded at the time it is given and thereafter transcribed by the officer taking the deposition, or by some person under his personal supervision.

4. **Objections to Testimony.** The officer taking an oral deposition shall not sustain objections made to any of the testimony or fail to record the testimony of the witness because an objection is made by any of the parties or attorneys engaged in taking the testimony. Any objections made when the deposition is taken shall be recorded with the testimony and reserved for the action of the court in which the cause is pending. Absent express agreement recorded in the deposition to the contrary:

APPENDIX H-7

RULE 215

After first giving all the attorneys of record written notice that they have an opportunity to claim and withdraw the same, the clerk, unless otherwise directed by the court, may dispose of them thirty days after giving such notice. If any such document is desired by more than one attorney, the clerk shall make the necessary copies and prorate the cost among all the attorneys desiring the document.

Order effective Jan. 1, 1988.

RULES 210 TO 214. [REPEALED]

(Repealed Dec. 5, 1983, eff. April 1, 1984.)

Notes and Comments

For subject matter of former rule 210, see, now, rule 206.

For subject matter of former rules 211 to 213, see, now, rule 207.

RULE 215. ABUSE OF DISCOVERY; SANCTIONS

1. Motion for Sanctions or Order Compelling Discovery. A party, upon reasonable notice to other parties and all other persons affected thereby, may apply for sanctions or an order compelling discovery as follows:

a. *Appropriate Court.* On matters relating to a deposition, an application for an order to a party may be made to the court in which the action is pending, or to any district court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken. As to all other discovery matters, an application for an order will be made to the court in which the action is pending.

b. *Motion.*

(1) If a party or other deponent which is a corporation or other entity fails to make a designation under Rules 200–2b, 201–4 or 208; or

(2) if a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails:

(a) to appear before the officer who is to take his deposition, after being served with a proper notice; or

(b) to answer a question propounded or submitted upon oral examination or upon written questions; or

(3) if a party fails:

(a) to serve answers or objections to interrogatories submitted under Rule 168, after proper service of the interrogatories; or

(b) to answer an interrogatory submitted under Rule 168; or

(c) to serve a written response to a request for inspection submitted under Rule 167, after proper service of the request; or

(d) to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection submitted under Rule 167;

the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or inspection or production in accordance with the request, or apply to the court in which the action is pending for the imposition of any sanction authorized by paragraph 2b herein without the necessity of first having obtained a court order compelling such discovery.

When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion pursuant to Rule 166b.

c. *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

d. *Disposition of Motion to Compel: Award of Expenses.* If the motion is granted, the court shall, after opportunity for hearing, require a party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay, at such time as ordered by the court, the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or attorney advising such motion to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

In determining the amount of reasonable expenses, including attorney fees, to be awarded in connection with a motion, the trial court shall award

expenses which are reasonable in relation to the amount of work reasonably expended in obtaining an order compelling compliance or in opposing a motion which is denied.

e. *Providing Person's Own Statement.* If a party fails to comply with any person's written request for the person's own statement as provided in paragraph 2(g) of Rule 166b, the person who made the request may move for an order compelling compliance with paragraph 2(g) of Rule 166b. If the motion is granted, the movant may recover the expenses incurred in obtaining the order, including attorney fees, which are reasonable in relation to the amount of work reasonably expended in obtaining the order.

2. Failure to Comply With Order or With Discovery Request.

a. *Sanctions by Court in District Where Deposition is Taken.* If a deponent fails to appear or to be sworn or to answer a question after being directed to do so by a district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

b. *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rules 200–2b, 201–4 or 208 to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under paragraph 1 of this rule or Rule 167a, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:

(1) An order disallowing any further discovery of any kind or of a particular kind by the disobedient party;

(2) An order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;

(3) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(4) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(5) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(6) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(7) When a party has failed to comply with an order under Rule 167a(a) requiring him to appear or produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination.

(8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

c. *Sanction Against Nonparty for Violation of Rule 167.* If a nonparty fails to comply with an order under Rule 167, the court which made the order may treat the failure to obey as contempt of court.

3. Abuse of Discovery Process in Seeking, Making, or Resisting Discovery. If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may, after notice and hearing, impose any appropriate sanction authorized by paragraphs (1), (2), (3), (4), (5), and (8) of paragraph 2b of this rule. Such order of sanction shall be subject to review on appeal from the final judgment.

4. Failure to Comply With Rule 169.

a. *Deemed Admission.* Each matter of which an admission is requested shall be deemed admitted unless, within the time provided by Rule 169, the party to whom the request is directed serves upon the party requesting the admissions a sufficient written answer or objection in compliance with the requirements of Rule 169, addressed to each matter of which an admission is requested. For purposes of this subdivision an evasive or incomplete answer may be treated as a failure to answer.

b. *Motion.* The party who has requested the admission may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines

that an answer does not comply with the requirements of Rule 169, it may order either that the matter is admitted or that an amended answer be served. The provisions of paragraph d of subdivision 1 of this rule apply to the award of expenses incurred in relation to the motion.

c. *Expenses on Failure to Admit.* If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 169 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 169(1), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

5. **Failure to Respond to or Supplement Discovery.** A party who fails to respond to or supplement his response to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in a response or supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter, unless the trial court finds that good cause sufficient to require admission exists. The burden of establishing good cause is upon the party offering the evidence and good cause must be shown in the record.

6. **Exhibits to Motions and Responses.** Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents.

(Amended Dec. 5, 1983, eff. April 1, 1984; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Source: Art. 3768, unchanged.

This is a new rule effective April 1, 1984. Rule 170 is deleted because this rule covers conduct in violation of Rule 167. The revisions to Rule 168, the deletion of Rule 170, and the provisions of new Rule 215 are intended to clarify under what circumstances the most severe sanctions authorized under the rules are imposable. New Rule 215 retains the conclusion reached in *Lewis v. Illinois Employers Ins. Co. of Wausau*, 590 S.W.2d 119 (Tex. 1979), and extends such rule to cover all discovery requests, except requests for admissions. New Rule 215 leaves to the discretion of the court whether to impose sanctions with or without an order compelling discovery, so that the court will be free to apply the proper sanction or order based upon the degree of the discovery abuse involved.

This rule is rewritten to gather all discovery sanctions into a single rule. It includes specific provisions concerning the consequences of failing to comply with Rule 169, and spells out penalties imposable upon a party who fails to supplement discovery responses. It provides for sanctions for those who seek to make discovery in an abusive manner.

Comment on 1988 Change: This amendment states that the party offering the evidence has the burden of establishing good cause for any failure to supplement discovery before trial and provides a manner for making a record for discovery hearings.

Comment to 1990 change: To require notice and hearing before an imposition of sanctions under paragraph 3, and to specify that such sanctions be appropriate.

RULES 215a TO 215c. [REPEALED]

(Repealed Dec. 5, 1983, eff. April 1, 1984.)

Notes and Comments

For subject matter of former rules 215a, 215b, and 215c, see, now, rules 215, 203, and 202, respectively.

SECTION 10. THE JURY IN COURT

RULE 216. REQUEST AND FEE FOR JURY TRIAL

a. **Request.** No jury trial shall be had in any civil suit, unless a written request for a jury trial is filed with the clerk of the court a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than thirty days in advance.

b. **Jury Fee.** Unless otherwise provided by law, a fee of ten dollars if in the district court and five dollars if in the county court must be deposited with the clerk of the court within the time for making a written request for a jury trial. The clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet.

(Amended March 31, 1941, eff. Sept. 1, 1941; Sept. 20, 1941, eff. Dec. 31, 1941; Oct. 12, 1949, eff. March 1, 1950; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Source: Arts. 2124 and 2125.

Comment to 1990 change: Additional fees for jury trials may be required by other law, e.g., Texas Government Code § 51.604.

APPENDIX H-8

RULE 269(e)

(d) Arguments on questions of law shall be addressed to the court, and counsel should state the substance of the authorities referred to without reading more from books than may be necessary to verify the statement. On a question on motions, exceptions to the evidence, and other incidental matters, the counsel will be allowed only such argument as may be necessary to present clearly the question raised, and refer to authorities on it, unless further discussion is invited by the court.

(e) Arguments on the facts should be addressed to the jury, when one is impaneled in a case that is being tried, under the supervision of the court. Counsel shall be required to confine the argument strictly to the evidence and to the arguments of opposing counsel. Mere personal criticism by counsel upon each other shall be avoided, and when indulged in shall be promptly corrected as a contempt of court.

(f) Side-bar remarks, and remarks by counsel of one side, not addressed to the court, while the counsel on the other side is examining a witness or arguing any question to the court, or addressing the jury, will be rigidly repressed by the court.

(g) The court will not be required to wait for objections to be made when the rules as to arguments are violated; but should they not be noticed and corrected by the court, opposing counsel may ask leave of the court to rise and present his point of objection. But the court shall protect counsel from any unnecessary interruption made on frivolous and unimportant grounds.

(h) It shall be the duty of every counsel to address the court from his place at the bar, and in addressing the court to rise to his feet; and while engaged in the trial of a case he shall remain at his place in the bar.

(Amended March 31, 1941, eff. Sept. 1, 1941; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Source of Subdivision (a): Art. 2183.

RULE 270. ADDITIONAL TESTIMONY

When it clearly appears to be necessary to the due administration of justice, the court may permit additional evidence to be offered at any time; provided that in a jury case no evidence on a controversial matter shall be received after the verdict of the jury.

(Amended Dec. 5, 1983, eff. April 1, 1984.)

Notes and Comments

Source: Art. 2181.

Change by amendment effective April 1, 1984: Textual changes.

D. CHARGE TO THE JURY

RULE 271. CHARGE TO THE JURY

Unless expressly waived by the parties, the trial court shall prepare and in open court deliver a written charge to the jury.

(Amended May 25, 1973, eff. Sept. 1, 1973; July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art. 2184.

Change by amendment effective September 1, 1973: Last two sentences of the original rule have been deleted.

RULE 272. REQUISITES

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.

(Amended Sept. 20, 1941, eff. Dec. 31, 1941; May 25, 1973, eff. Sept. 1, 1973; July 22, 1975, eff. Jan. 1, 1976; July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art. 2185.

Change by amendment effective September 1, 1973: Last sentence of the original rule has been deleted.

Changes by amendment effective January 1, 1976: The rule has largely been rewritten.

APPENDIX I-1(a)

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(f) **Construction of Pleadings.** All pleadings shall be so construed as to do substantial justice.

[Amended effective July 1, 1966; August 1, 1987.]

RULE 9. PLEADING SPECIAL MATTERS

(a) **Capacity.** It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, the party desiring to raise the issue shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) **Fraud, Mistake, Condition of the Mind.** In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) **Conditions Precedent.** In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be specifically and with particularity.

(d) **Official Document or Act.** In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) **Judgment.** In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) **Time and Place.** For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) **Special Damage.** When items of special damage are claimed, they shall be specifically stated.

(h) **Admiralty and Maritime Claims.** A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h).

[Amended effective July 1, 1966; July 1, 1968; July 1, 1970; August 1, 1987.]

RULE 10. FORM OF PLEADINGS

(a) **Caption; Names of Parties.** Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(b) **Paragraphs; Separate Statements.** All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) **Adoption by Reference; Exhibits.** Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

RULE 11. SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; SANCTIONS

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the

pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

[Amended effective August 1, 1983; August 1, 1987.]

RULE 12. DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON THE PLEADINGS

(a) When Presented. A defendant shall serve an answer within 20 days after the service of the summons and complaint upon that defendant, except when service is made under Rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state. A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after the service upon that party. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)–(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time

APPENDIX I-1(b)

PROPOSED AMENDMENTS AND COMMENTS TO
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office of the clerk. ~~Papers may be filed by facsimile transmission if permitted by rules of the district court, provided that the rules~~ A court may, by local rule, permit papers to be filed by facsimile or other electronic means if such means are authorized by and consistent with standards established by the Judicial Conference of the United States. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rules or practices.

COMMITTEE NOTES

This is a technical amendment, using the broader language of Rule 25 of the Federal Rules of Appellate Procedure. The district court--and the bankruptcy court by virtue of a cross-reference in Bankruptcy Rule 7005--can, by local rule, permit filing not only by facsimile transmissions but also by other electronic means, subject to standards approved by the Judicial Conference.

Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper ~~of a party represented by an attorney~~ shall be signed by at least one attorney of record in the attorney's individual

name, or, if the party is not represented by an attorney, shall be signed by the party, ~~whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address.~~ Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. ~~The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the~~

~~cost of litigation. If a pleading, motion, or other~~ An unsigned paper ~~is not signed, it~~ shall be stricken unless ~~it is signed promptly after the~~ omission of the signature is corrected promptly after being called to the attention of ~~the pleader or movant~~ attorney or party.

(b) Representations to Court. ~~If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.~~ By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to

cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an

order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless

the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

COMMITTEE NOTES

Purpose of revision. This revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule. For empirical examination of experience under the 1983 rule, see, e.g., New York State Bar Committee on Federal Courts, Sanctions and Attorneys' Fees (1987); T. Willging, The Rule 11 Sanctioning Process (1989); American Judicature Society, Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11 (S. Burbank ed., 1989); E. Wiggins, T. Willging, and D. Stienstra, Report on Rule 11 (Federal Judicial Center 1991). For book-length analyses of the case law, see G. Joseph, Sanctions: The Federal Law of Litigation Abuse (1989); G. Solovy, The Federal Law of Sanctions (1991); G. Vairo, Rule 11 Sanctions: Case Law Perspectives and Preventive Measures (1991).

The rule retains the principle that attorneys and pro se litigants have an obligation to the court to

refrain from conduct that frustrates the aims of Rule 1. The revision broadens the scope of this obligation, but places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court. New subdivision (d) removes from the ambit of this rule all discovery requests, responses, objections, and motions subject to the provisions of Rule 26 through 37.

Subdivision (a). Retained in this subdivision are the provisions requiring signatures on pleadings, written motions, and other papers. Unsigned papers are to be received by the Clerk, but then are to be stricken if the omission of the signature is not corrected promptly after being called to the attention of the attorney or pro se litigant. Correction can be made by signing the paper on file or by submitting a duplicate that contains the signature. A court may require by local rule that papers contain additional identifying information regarding the parties or attorneys, such as telephone numbers to facilitate facsimile transmissions, though, as for omission of a signature, the paper should not be rejected for failure to provide such information.

The sentence in the former rule relating to the effect of answers under oath is no longer needed and has been eliminated. The provision in the former rule that signing a paper constitutes a certificate that it has been read by the signer also has been eliminated as unnecessary. The obligations imposed under subdivision (b) obviously require that a pleading, written motion, or other paper be read before it is filed or submitted to the court.

Subdivisions (b) and (c). These subdivisions restate the provisions requiring attorneys and pro se litigants to conduct a reasonable inquiry into the law and facts before signing pleadings, written motions, and other documents, and mandating sanctions for violation of these obligations. The revision in part expands the responsibilities of litigants to the court, while providing greater constraints and flexibility in dealing with infractions of the rule. The rule continues to require litigants to "stop-and-think" before initially making legal or factual contentions. It also, however, emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer

tenable and by generally providing protection against sanctions if they withdraw or correct contentions after a potential violation is called to their attention.

The rule applies only to assertions contained in papers filed with or submitted to the court. It does not cover matters arising for the first time during oral presentations to the court, when counsel may make statements that would not have been made if there had been more time for study and reflection. However, a litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit. For example, an attorney who during a pretrial conference insists on a claim or defense should be viewed as "presenting to the court" that contention and would be subject to the obligations of subdivision (b) measured as of that time. Similarly, if after a notice of removal is filed, a party urges in federal court the allegations of a pleading filed in state court (whether as claims, defenses, or in disputes regarding removal or remand), it would be viewed as "presenting"--and hence certifying to the district court under Rule 11--those allegations.

The certification with respect to allegations and other factual contentions is revised in recognition that sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation. Tolerance of factual contentions in initial pleadings by plaintiffs or defendants when specifically identified as made on information and belief does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not a license to join parties, make claims, or present defenses without any factual basis or justification. Moreover, if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention. Subdivision (b) does not require a formal amendment to pleadings for which evidentiary support is not obtained, but rather calls upon a litigant not

thereafter to advocate such claims or defenses.

The certification is that there is (or likely will be) "evidentiary support" for the allegation, not that the party will prevail with respect to its contention regarding the fact. That summary judgment is rendered against a party does not necessarily mean, for purposes of this certification, that it had no evidentiary support for its position. On the other hand, if a party has evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have sufficient "evidentiary support" for purposes of Rule 11.

Denials of factual contentions involve somewhat different considerations. Often, of course, a denial is premised upon the existence of evidence contradicting the alleged fact. At other times a denial is permissible because, after an appropriate investigation, a party has no information concerning the matter or, indeed, has a reasonable basis for doubting the credibility of the only evidence relevant to the matter. A party should not deny an allegation it knows to be true; but it is not required, simply because it lacks contradictory evidence, to admit an allegation that it believes is not true.

The changes in subdivisions (b)(3) and (b)(4) will serve to equalize the burden of the rule upon plaintiffs and defendants, who under Rule 8(b) are in effect allowed to deny allegations by stating that from their initial investigation they lack sufficient information to form a belief as to the truth of the allegation. If, after further investigation or discovery, a denial is no longer warranted, the defendant should not continue to insist on that denial. While sometimes helpful, formal amendment of the pleadings to withdraw an allegation or denial is not required by subdivision (b).

Arguments for extensions, modifications, or reversals of existing law or for creation of new law do not violate subdivision (b)(2) provided they are "nonfrivolous." This establishes an objective standard, intended to eliminate any "empty-head pure-heart" justification for patently frivolous arguments. However, the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or

through consultation with other attorneys should certainly be taken into account in determining whether paragraph (2) has been violated. Although arguments for a change of law are not required to be specifically so identified, a contention that is so identified should be viewed with greater tolerance under the rule.

The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc. See Manual for Complex Litigation, Second, § 42.3. The rule does not attempt to enumerate the factors a court should consider in deciding whether to impose a sanction or what sanctions would be appropriate in the circumstances; but, for emphasis, it does specifically note that a sanction may be nonmonetary as well as monetary. Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants: all of these may in a particular case be proper considerations. The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.

Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty. However, under unusual circumstances, particularly for (b)(1) violations, deterrence may be ineffective unless the

sanction not only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by the violation. Accordingly, the rule authorizes the court, if requested in a motion and if so warranted, to award attorney's fees to another party. Any such award to another party, however, should not exceed the expenses and attorneys' fees for the services directly and unavoidably caused by the violation of the certification requirement. If, for example, a wholly unsupportable count were included in a multi-count complaint or counterclaim for the purpose of needlessly increasing the cost of litigation to an impecunious adversary, any award of expenses should be limited to those directly caused by inclusion of the improper count, and not those resulting from the filing of the complaint or answer itself. The award should not provide compensation for services that could have been avoided by an earlier disclosure of evidence or an earlier challenge to the groundless claims or defenses. Moreover, partial reimbursement of fees may constitute a sufficient deterrent with respect to violations by persons having modest financial resources. In cases brought under statutes providing for fees to be awarded to prevailing parties, the court should not employ cost-shifting under this rule in a manner that would be inconsistent with the standards that govern the statutory award of fees, such as stated in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

The sanction should be imposed on the persons--whether attorneys, law firms, or parties--who have violated the rule or who may be determined to be responsible for the violation. The person signing, filing, submitting, or advocating a document has a nondelegable responsibility to the court, and in most situations should be sanctioned for a violation. Absent exceptional circumstances, a law firm is to be held also responsible when, as a result of a motion under subdivision (c)(1)(A), one of its partners, associates, or employees is determined to have violated the rule. Since such a motion may be filed only if the offending paper is not withdrawn or corrected within 21 days after service of the motion, it is appropriate that the law firm ordinarily be viewed as jointly responsible under established principles of agency. This provision is designed to remove the restrictions of the former rule. Cf.

Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989) (1983 version of Rule 11 does not permit sanctions against law firm of attorney signing groundless complaint).

The revision permits the court to consider whether other attorneys in the firm, co-counsel, other law firms, or the party itself should be held accountable for their part in causing a violation. When appropriate, the court can make an additional inquiry in order to determine whether the sanction should be imposed on such persons, firms, or parties either in addition to or, in unusual circumstances, instead of the person actually making the presentation to the court. For example, such an inquiry may be appropriate in cases involving governmental agencies or other institutional parties that frequently impose substantial restrictions on the discretion of individual attorneys employed by it.

Sanctions that involve monetary awards (such as a fine or an award of attorney's fees) may not be imposed on a represented party for violations of subdivision (b)(2), involving frivolous contentions of law. Monetary responsibility for such violations is more properly placed solely on the party's attorneys. With this limitation, the rule should not be subject to attack under the Rules Enabling Act. See Willy v. Coastal Corp., ___ U.S. ___ (1992); Business Guides, Inc. v. Chromatic Communications Enter. Inc., ___ U.S. ___ (1991). This restriction does not limit the court's power to impose sanctions or remedial orders that may have collateral financial consequences upon a party, such as dismissal of a claim, preclusion of a defense, or preparation of amended pleadings.

Explicit provision is made for litigants to be provided notice of the alleged violation and an opportunity to respond before sanctions are imposed. Whether the matter should be decided solely on the basis of written submissions or should be scheduled for oral argument (or, indeed, for evidentiary presentation) will depend on the circumstances. If the court imposes a sanction, it must, unless waived, indicate its reasons in a written order or on the record; the court should not ordinarily have to explain its denial of a motion for sanctions. Whether a violation has occurred and what sanctions, if any, to impose for a violation are matters committed to the discretion of the trial court; accordingly, as under

current law, the standard for appellate review of these decisions will be for abuse of discretion. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) (noting, however, that an abuse would be established if the court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence).

The revision leaves for resolution on a case-by-case basis, considering the particular circumstances involved, the question as to when a motion for violation of Rule 11 should be served and when, if filed, it should be decided. Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely. In other circumstances, it should not be served until the other party has had a reasonable opportunity for discovery. Given the "safe harbor" provisions discussed below, a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention).

Rule 11 motions should not be made or threatened for minor, inconsequential violations of the standards prescribed by subdivision (b). They should not be employed as a discovery device or to test the legal sufficiency or efficacy of allegations in the pleadings; other motions are available for those purposes. Nor should Rule 11 motions be prepared to emphasize the merits of a party's position, to exact an unjust settlement, to intimidate an adversary into withdrawing contentions that are fairly debatable, to increase the costs of litigation, to create a conflict of interest between attorney and client, or to seek disclosure of matters otherwise protected by the attorney-client privilege or the work-product doctrine. As under the prior rule, the court may defer its ruling (or its decision as to the identity of the persons to be sanctioned) until final resolution of the case in order to avoid immediate conflicts of interest and to reduce the disruption created if a disclosure of attorney-client communications is needed to determine whether a violation occurred or to identify the person responsible for the violation.

The rule provides that requests for sanctions must be made as a separate motion, i.e., not simply included as an additional prayer for relief contained

in another motion. The motion for sanctions is not, however, to be filed until at least 21 days (or such other period as the court may set) after being served. If, during this period, the alleged violation is corrected, as by withdrawing (whether formally or informally) some allegation or contention, the motion should not be filed with the court. These provisions are intended to provide a type of "safe harbor" against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation. Under the former rule, parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11; under the revision, the timely withdrawal of a contention will protect a party against a motion for sanctions.

To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the "safe harbor" period begins to run only upon service of the motion. In most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion.

As under former Rule 11, the filing of a motion for sanctions is itself subject to the requirements of the rule and can lead to sanctions. However, service of a cross motion under Rule 11 should rarely be needed since under the revision the court may award to the person who prevails on a motion under Rule 11--whether the movant or the target of the motion--reasonable expenses, including attorney's fees, incurred in presenting or opposing the motion.

The power of the court to act on its own initiative is retained, but with the condition that this be done through a show cause order. This procedure provides the person with notice and an opportunity to respond. The revision provides that a monetary sanction imposed after a court-initiated show cause order be limited to a penalty payable to the court and that it be imposed only if the show cause order is issued before any voluntary dismissal or an agreement of the parties to settle the claims made by or against the litigant.

Parties settling a case should not be subsequently faced with an unexpected order from the court leading to monetary sanctions that might have affected their willingness to settle or voluntarily dismiss a case. Since show cause orders will ordinarily be issued only in situations that are akin to a contempt of court, the rule does not provide a "safe harbor" to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court's own initiative. Such corrective action, however, should be taken into account in deciding what sanction to impose if, after consideration of the litigant's response, the court concludes that a violation has occurred.

Subdivision (d). Rules 26(g) and 37 establish certification standards and sanctions that apply to discovery disclosures, requests, responses, objections, and motions. It is appropriate that Rules 26 through 37, which are specially designed for the discovery process, govern such documents and conduct rather than the more general provisions of Rule 11. Subdivision (d) has been added to accomplish this result.

Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions. It does not supplant statutes permitting awards of attorney's fees to prevailing parties or alter the principles governing such awards. It does not inhibit the court in punishing for contempt, in exercising its inherent powers, or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules or under 28 U.S.C. § 1927. See Chambers v. NASCO, ___ U.S. ___ (1991). Chambers cautions, however, against reliance upon inherent powers if appropriate sanctions can be imposed under provisions such as Rule 11, and the procedures specified in Rule 11--notice, opportunity to respond, and findings--should ordinarily be employed when imposing a sanction under the court's inherent powers. Finally, it should be noted that Rule 11 does not preclude a party from initiating an independent action for malicious prosecution or abuse of process.

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(6) the advisability of referring matters to a magistrate or master;

(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

(8) the form and substance of the pretrial order;

(9) the disposition of pending motions;

(10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and

(11) such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.

(d) Final Pretrial Conference. Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

(f) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

[Amended effective August 1, 1983; August 1, 1987.]

IV. PARTIES

RULE 17. PARTIES PLAINTIFF AND DEFENDANT; CAPACITY

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) Capacity to Sue or Be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C. §§ 754 and 959(a).

(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order

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penses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(c) **Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) **Sequence and Timing of Discovery.** Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) **Supplementation of Responses.** A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(f) **Discovery Conference.** At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

(1) A statement of the issues as they then appear;

(2) A proposed plan and schedule of discovery;

(3) Any limitations proposed to be placed on discovery;

(4) Any other proposed orders with respect to discovery; and

(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and each party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

(g) **Signing of Discovery Requests, Responses, and Objections.** Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the

APPENDIX I-4(a)

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motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply With Order.

(1) *Sanctions by Court in District Where Deposition Is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action Is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) [Abrogated].

(f) [Repealed].

(g) Failure to Participate in the Framing of a Discovery Plan. If a party or a party's attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule

request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon that defendant. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

[Amended effective March 19, 1948; July 1, 1970; August 1, 1987.]

RULE 37. FAILURE TO MAKE OR COOPERATE IN DISCOVERY: SANCTIONS

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the

26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

[Amended effective October 20, 1949; July 1, 1970; August 1, 1980; October 1, 1981; August 1, 1987.]

VI. TRIALS

RULE 38. JURY TRIAL OF RIGHT

(a) **Right Preserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) **Demand.** Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(c) **Same: Specification of Issues.** In the demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) **Waiver.** The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

(e) **Admiralty and Maritime Claims.** These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

[Amended effective July 1, 1966; August 1, 1987.]

RULE 39. TRIAL BY JURY OR BY THE COURT

(a) **By Jury.** When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or of all those issues does not exist under the Constitution or statutes of the United States.

(b) **By the Court.** Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c) **Advisory Jury and Trial by Consent.** In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

RULE 40. ASSIGNMENT OF CASES FOR TRIAL

The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts deem expedient. Precedence shall be given to actions entitled thereto by any statute of the United States.

RULE 41. DISMISSAL OF ACTIONS

(a) **Voluntary Dismissal: Effect Thereof.**

(1) *By Plaintiff; By Stipulation.* Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

APPENDIX I-4(b)

PROPOSED AMENDMENTS AND COMMENTS TO
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COMMITTEE NOTES

The rule is revised to reflect the change made by Rule 26(d), preventing a party from seeking formal discovery until after the meeting of the parties required by Rule 26(f).

Rule 37. Failure to Make Disclosure or Cooperate in Discovery: Sanctions

(a) **Motion For Order Compelling** Disclosure or **Discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:

(1) **Appropriate Court.** An application for an order to a party ~~may~~ shall be made to the court in which the action is pending~~, or, on matters relating to a deposition, to the court in the district where the deposition is being taken~~. An application for an order to a ~~deponent~~ person who is not a party shall be made to the court in the district where the ~~deposition is being taken~~ discovery is being, or is to be, taken.

(2) **Motion.**

(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The

motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make

the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order. ~~If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).~~

(3) Evasive or Incomplete Disclosure, Answer, or Response. For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(4) ~~Award of Expenses of Motion~~ and Sanctions.

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity ~~for hearing,~~ to be heard, require the party or deponent whose conduct necessitated the motion or the

party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in ~~obtaining the order~~ making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the ~~opposition to the motion~~ opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity ~~for hearing,~~ to be heard, require the moving party or the attorney ~~advising~~ filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the

making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

• • • •

(c) ~~Sanctions on~~ Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable

expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule and may include informing the jury of the failure to make the disclosure.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1A) the request was held objectionable pursuant to Rule 36(a), or (2B) the admission sought was of no substantial importance, or (3C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (4D) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own

Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court

shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has ~~applied~~ a pending motion for a protective order as provided by Rule 26(c).

* * * *

(g) Failure to Participate in the Framing of a Discovery Plan. If a party or a party's attorney fails to participate in good faith in the development and submission ~~framing~~ of a proposed discovery plan ~~by agreement~~ as ~~is~~ required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

COMMITTEE NOTES

Subdivision (a). This subdivision is revised to

reflect the revision of Rule 26(a), requiring disclosure of matters without a discovery request.

Pursuant to new subdivision (a)(2)(A), a party dissatisfied with the disclosure made by an opposing party may under this rule move for an order to compel disclosure. In providing for such a motion, the revised rule parallels the provisions of the former rule dealing with failures to answer particular interrogatories. Such a motion may be needed when the information to be disclosed might be helpful to the party seeking the disclosure but not to the party required to make the disclosure. If the party required to make the disclosure would need the material to support its own contentions, the more effective enforcement of the disclosure requirement will be to exclude the evidence not disclosed, as provided in subdivision (c)(1) of this revised rule.

Language is included in the new paragraph and added to the subparagraph (B) that requires litigants to seek to resolve discovery disputes by informal means before filing a motion with the court. This requirement is based on successful experience with similar local rules of court promulgated pursuant to Rule 83.

The last sentence of paragraph (2) is moved into paragraph (4).

Under revised paragraph (3), evasive or incomplete disclosures and responses to interrogatories and production requests are treated as failures to disclose or respond. Interrogatories and requests for production should not be read or interpreted in an artificially restrictive or hypertechnical manner to avoid disclosure of information fairly covered by the discovery request, and to do so is subject to appropriate sanctions under subdivision (a).

Revised paragraph (4) is divided into three subparagraphs for ease of reference, and in each the phrase "after opportunity for hearing" is changed to "after affording an opportunity to be heard" to make clear that the court can consider such questions on written submissions as well as on oral hearings.

Subparagraph (A) is revised to cover the situation where information that should have been produced without a motion to compel is produced after the

motion is filed but before it is brought on for hearing. The rule also is revised to provide that a party should not be awarded its expenses for filing a motion that could have been avoided by conferring with opposing counsel.

Subparagraph (C) is revised to include the provision that formerly was contained in subdivision (a)(2) and to include the same requirement of an opportunity to be heard that is specified in subparagraphs (A) and (B).

Subdivision (c). The revision provides a self-executing sanction for failure to make a disclosure required by Rule 26(a), without need for a motion under subdivision (a)(2)(A).

Paragraph (1) prevents a party from using as evidence any witnesses or information that, without substantial justification, has not been disclosed as required by Rules 26(a) and 26(e)(1). This automatic sanction provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence, whether at a trial, at a hearing, or on a motion, such as one under Rule 56. As disclosure of evidence offered solely for impeachment purposes is not required under those rules, this preclusion sanction likewise does not apply to that evidence.

Limiting the automatic sanction to violations "without substantial justification," coupled with the exception for violations that are "harmless," is needed to avoid unduly harsh penalties in a variety of situations: e.g., the inadvertent omission from a Rule 26(a)(1)(A) disclosure of the name of a potential witness known to all parties; the failure to list as a trial witness a person so listed by another party; or the lack of knowledge of a pro se litigant of the requirement to make disclosures. In the latter situation, however, exclusion would be proper if the requirement for disclosure had been called to the litigant's attention by either the court or another party.

Preclusion of evidence is not an effective incentive to compel disclosure of information that, being supportive of the position of the opposing party, might advantageously be concealed by the disclosing party. However, the rule provides the court with a wide range of other sanctions--such as

declaring specified facts to be established, preventing contradictory evidence, or, like spoliation of evidence, allowing the jury to be informed of the fact of nondisclosure--that, though not self-executing, can be imposed when found to be warranted after a hearing. The failure to identify a witness or document in a disclosure statement would be admissible under the Federal Rules of Evidence under the same principles that allow a party's interrogatory answers to be offered against it.

Subdivision (d). This subdivision is revised to require that, where a party fails to file any response to interrogatories or a Rule 34 request, the discovering party should informally seek to obtain such responses before filing a motion for sanctions.

The last sentence of this subdivision is revised to clarify that it is the pendency of a motion for protective order that may be urged as an excuse for a violation of subdivision (d). If a party's motion has been denied, the party cannot argue that its subsequent failure to comply would be justified. In this connection, it should be noted that the filing of a motion under Rule 26(c) is not self-executing--the relief authorized under that rule depends on obtaining the court's order to that effect.

Subdivision (g). This subdivision is modified to conform to the revision of Rule 26(f).

Rule 38. Jury Trial of Right

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(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand

APPENDIX J

TASK FORCE QUESTIONNAIRE AND RESPONSES

TASK FORCE ON SANCTIONS QUESTIONNAIRE
JUDGES' RESPONSES

[TOTAL NO. OF RESPONDENTS: 112]

1. Generally the current rules that govern sanctions should be:

retained in their current form:	20.5%
modified:	74.5%
repealed completely:	5.0%

2. Current sanctions rules:

a) are reasonable and work well.

Strongly agree:	8.6%
Agree:	35.2%
Disagree:	39.1%
Strongly disagree:	16.2%
Don't know:	.9%

b) result in too much time and money spent on sanctions practice.

Strongly agree:	37.6%
Agree:	36.7%
Disagree:	20.2%
Strongly disagree:	3.7%
Don't know:	1.8%

c) are clearly written.

Strongly agree:	7.3%
Agree:	37.6%
Disagree:	46.0%
Strongly disagree:	7.3%
Don't know:	1.8%

d) are vague and ambiguous.

Strongly agree:	7.3%
Agree:	38.2%
Disagree:	38.2%
Strongly disagree:	11.3%
Don't know:	4.5%

e) provide trial judges too much discretion.

Strongly agree:	0.0%
Agree:	11.7%
Disagree:	53.2%
Strongly disagree:	30.6%
Don't know:	4.5%

f) provide trial judges too little discretion.

Strongly agree:	20.2%
Agree:	31.2%
Disagree:	39.4%
Strongly disagree:	5.5%
Don't know:	3.7%

g) provide trial judges with the proper amount of discretion.

Strongly agree:	6.4%
Agree:	33.0%
Disagree:	43.1%
Strongly disagree:	13.8%
Don't know:	3.7%

h) encourage Rambo tactics.

Strongly agree:	28.0%
Agree:	36.9%
Disagree:	27.0%
Strongly disagree:	3.6%
Don't know:	4.5%

i) discourage Rambo tactics.

Strongly agree:	4.6%
Agree:	17.4%
Disagree:	47.7%
Strongly disagree:	22.0%
Don't know:	8.3%

3. The sanctions rules should:

a) require attorneys to confer before seeking sanctions.

Strongly agree:	54.5%
Agree:	38.2%
Disagree:	5.5%
Strongly disagree:	1.8%
Don't know:	0.0%

b) require an oral hearing before imposition of sanctions.

Strongly agree:	33.3%
Agree:	53.2%
Disagree:	9.9%
Strongly disagree:	2.7%
Don't know:	.9%

c) require a trial judge to state into the record specific reasons when:

(i) imposing sanctions.

Strongly agree:	16.4%
Agree:	42.7%
Disagree:	24.6%
Strongly disagree:	13.6%
Don't know:	2.7%

(ii) deciding not to impose sanctions.

Strongly agree:	7.4%
Agree:	28.7%
Disagree:	44.4%
Strongly disagree:	16.7%
Don't know:	2.8%

d) require a trial judge to make written findings of fact and conclusions of law when:

(i) imposing sanctions.

Strongly agree:	3.6%
Agree:	12.7%
Disagree:	44.6%
Strongly disagree:	38.2%
Don't know:	.9%

(ii) deciding not to impose sanctions.

Strongly agree:	1.9%
Agree:	6.5%
Disagree:	50.9%
Strongly disagree:	39.8%
Don't know:	.9%

e) allow sanctions for discovery abuse only after a court has issued an order compelling discovery, and then the order has been violated.

Strongly agree:	10.1%
Agree:	42.2%
Disagree:	34.9%
Strongly disagree:	11.9%
Don't know:	.9%

f) require alternative dispute resolution before seeking sanctions.

Strongly agree:	4.5%
Agree:	11.8%
Disagree:	57.3%
Strongly disagree:	19.2%
Don't know:	7.2%

g) allow a judge to appoint a master to resolve any:

(i) discovery disputes.

Strongly agree:	26.4%
Agree:	43.6%
Disagree:	17.3%
Strongly disagree:	9.1%
Don't know:	3.6%

(ii) sanctions issues.

Strongly agree:	12.8%
Agree:	35.8%
Disagree:	36.8%
Strongly disagree:	12.8%
Don't know:	1.8%

h) allow for immediate, interlocutory appeal of:

(i) any sanctions order.

Strongly agree:	8.2%
Agree:	19.1%
Disagree:	40.0%
Strongly disagree:	29.1%
Don't know:	3.6%

(ii) orders imposing "severe" sanctions.

Strongly agree:	16.5%
Agree:	41.3%
Disagree:	25.7%
Strongly disagree:	15.6%
Don't know:	.9%

i) specify a maximum amount on permissible monetary sanctions (other than attorney's fees).

Strongly agree:	3.6%
Agree:	37.3%
Disagree:	42.8%
Strongly disagree:	13.6%
Don't know:	2.7%

j) postpone, until after a decision on the merits, any hearing to determine whether to impose sanctions on the lawyer or client or both, in order to avoid or postpone a lawyer/client conflict during pretrial proceedings.

Strongly agree:	3.6%
Agree:	27.3%
Disagree:	45.6%
Strongly disagree:	14.5%
Don't know:	9.0%

k) require that, before ultimate sanctions (e.g., dismissal, default) are imposed, the client must receive actual notice.

Strongly agree: 23.4%

Agree: 51.4%

Disagree: 16.2%

Strongly disagree: 5.4%

Don't know: 3.6%

l) allow a party or lawyer to avoid sanctions for frivolous pleadings, motions, etc. by withdrawing the pleading after receiving notice that the pleading is frivolous.

Strongly agree: 13.8%

Agree: 63.3%

Disagree: 14.7%

Strongly disagree: 4.6%

Don't know: 3.6%

m) allow sanctions, when appropriate, against:

(i) the lawyer(s) involved.

Strongly agree: 39.1%

Agree: 60.9%

Disagree: 0.0%

Strongly disagree: 0.0%

Don't know: 0.0%

(ii) the lawyer's firm.

Strongly agree: 23.1%

Agree: 52.8%

Disagree: 20.4%

Strongly disagree: .9%

Don't know: 2.8%

(iii) the parties.

Strongly agree:	30.0%
Agree:	64.6%
Disagree:	4.5%
Strongly Disagree:	0.0%
Don't know:	.9%

n) allow sanctions to deter or punish:

(i) frivolous suits, pleadings, motions.

Strongly agree:	33.9%
Agree:	55.1%
Disagree:	5.5%
Strongly disagree:	1.8%
Don't know:	3.7%

(ii) discovery abuse.

Strongly agree:	36.9%
Agree:	61.3%
Disagree:	.9%
Strongly disagree:	0.0%
Don't know:	.9%

o) if a violation of the rule is found, make imposition of sanctions:

(i) discretionary.

Strongly agree:	39.8%
Agree:	51.8%
Disagree:	6.5%
Strongly disagree:	1.9%
Don't know:	0.0%

(ii) mandatory.

Strongly agree:	7.5%
Agree:	10.3%
Disagree:	51.4%
Strongly disagree:	30.8%
Don't know:	0.0%

p) specifically mandate professional courtesy.

Strongly agree:	43.5%
Agree:	37.1%
Disagree:	10.2%
Strongly disagree:	4.6%
Don't know:	4.6%

q) have a comments section, similar to the federal rules, to clarify the application of the rules.

Strongly agree:	26.7%
Agree:	54.3%
Disagree:	8.6%
Strongly disagree:	.9%
Don't know:	9.5%

4. With respect to Rule 166b(6), which requires identification of an expert witness "as soon as is practical, but in no event less than thirty (30) days" before trial except on leave of court:

a) the "as soon as is practical" standard.

is too vague:	45.0%
is sufficiently clear:	37.0%
should be eliminated:	18.0%

b) the rule should not contain a deadline, but should leave the matter to be set by a pretrial order if a party or court wants to set a deadline.

Strongly agree:	*16.3%*
Agree:	*34.3%*
Disagree:	*33.3%*
Strongly disagree:	*15.2%*
Don't know:	*.9%*

5. With respect to Rule 215(5), which provides for the automatic exclusion of evidence and witnesses, absent a showing of good cause for admission, as to a party who fails to supplement discovery responses properly, should the rule be amended to:

a) provide more discretion for trial courts to admit such evidence/witness.

Strongly agree:	*36.1%*
Agree:	*41.7%*
Disagree:	*16.7%*
Strongly disagree:	*5.5%*
Don't know:	*0.0%*

b) specify what constitutes good cause to admit such evidence/witness.

Strongly agree:	*12.2%*
Agree:	*44.9%*
Disagree:	*28.0%*
Strongly disagree:	*12.1%*
Don't know:	*2.8%*

c) **provide that a showing that the adverse party will not be prejudiced by the evidence/witness constitutes good cause for admission of the evidence/witness.**

Strongly agree:	*11.2%*
Agree:	*52.3%*
Disagree:	*24.3%*
Strongly disagree:	*9.4%*
Don't know:	*2.8%*

d) **provide that "excusable neglect" constitutes good cause for admission of the evidence/witness.**

Strongly agree:	*5.6%*
Agree:	*25.2%*
Disagree:	*53.3%*
Strongly disagree:	*8.4%*
Don't know:	*7.5%*

e) **require the adverse party to show prejudice before the evidence/witness is excluded.**

Strongly agree:	*7.5%*
Agree:	*42.5%*
Disagree:	*40.6%*
Strongly disagree:	*9.4%*
Don't know:	*0.0%*

f) **state expressly that a trial court may grant a continuance as an alternative to evidence/witness exclusion.**

Strongly agree:	*17.8%*
Agree:	*51.4%*
Disagree:	*22.4%*
Strongly disagree:	*6.5%*
Don't know:	*1.9%*

g) permit a named party to a lawsuit to testify without being listed in answers to interrogatories.

Strongly agree:	*49.5%*
Agree:	*43.0%*
Disagree:	*4.7%*
Strongly agree:	*1.9%*
Don't know:	*.9%*

h) permit attorney's fees experts to testify without being listed in answers to interrogatories.

Strongly agree:	*20.8%*
Agree:	*43.4%*
Disagree:	*26.4%*
Strongly disagree:	*5.6%*
Don't know:	*3.8%*

i) permit a party to call as a witness any witness listed in any other party's interrogatory responses.

Strongly agree:	*28.0%*
Agree:	*48.6%*
Disagree:	*18.7%*
Strongly disagree:	*2.8%*
Don't know:	*1.9%*

6. Should discovery rules be amended to adopt a new procedure, as is now under consideration for the federal rules, that certain discovery disclosures be automatic, including that:

a) within a specified time (e.g., 30 or 60 days) after service of an answer, each party must identify each person "likely to have information that bears significantly on any claim or defense," identify or produce each document "likely to bear significantly on any claim or defense," and disclose a computation of damages.

Strongly agree:	27.8%
Agree:	36.1%
Disagree:	17.6%
Strongly disagree:	10.2%
Don't know:	8.3%

b) by a specified date prior to trial (e.g., 30 or 60 days), each party must identify each expected trial witness and produce an expert witness report (including opinions; information relied upon; exhibits; qualifications).

Strongly agree:	25.7%
Agree:	47.7%
Disagree:	15.6%
Strongly disagree:	6.4%
Don't know:	4.6%

7. There are too many sanctions rules; a single rule should contain all sanctions provisions.

Strongly agree:	22.7%
Agree:	45.5%
Disagree:	20.9%
Strongly disagree:	1.8%
Don't know:	9.1%

8. Judges abuse sanctions powers:

Frequently:	3.7%
Infrequently:	52.8%
Don't know:	43.5%

9. Texas should provide an alternative accelerated docket, to permit cases to proceed to trial quickly with a minimum of discovery, motions, and expense.

Strongly agree:	*31.1%*
Agree:	*42.5%*
Disagree:	*13.2%*
Strongly disagree:	*2.8%*
Don't know:	*10.4%*

10. Years of service as a state district judge:

1-5:	*40.9%*
6-10:	*32.7%*
11-15:	*13.6%*
16-20:	*5.5%*
21-25:	*5.5%*
26 or more:	*1.8%*

COMMENTS

1. *We have too many statutory schemes disguised as "rules (e.g. TRCP 694-809) and too many rules on one subject (e.g. TRCP 99-119). Some excision and consolidation is in order, but sanctions are OK. Rule 13 is usable in its present form.*

2. I would prefer the rules before the current discovery amendments to what we have now. The discovery rules merely cause ambush by discover rather than substantive resolution of disputes. Too much time spent on needless discovery. England has almost no discovery, no lack of fairness at trial. Everything we've done on discovery in the '80s was wrong. I tried suits for 25 years before amendments and we had no trouble finding out about other sides case. Only 3 rules I'd retain is (1) List people with knowledge and (2) list testifying experts (3) discover insurance.

3. I like the new proposed federal rules. Trial by ambush would be much better than what we have now.

4. The new federal approach (#6) looks good. More discretion to trial courts, not to impose sanctions, but to summarily handle discovery disputes on submission - NOT HEARING. On sanctions, rather than oral hearing, try a procedure analogous to summary judge practice, with a reasonable standard for appellate review after the trial. Please, fewer hearings, not more!!

5. Glad to see a comprehensive examination of the Rules.

6. Leave new rules unchanged for at least 5 years, to afford adequate time for testing.

7. I personally like the rules to be fairly specific; if not, some attorneys use non-specifics to feed procrastinative tendencies.

8. It should go without saying that the reason for trials is to discover the truth and do justice, the current rules discourage this. A witness should be allowed to testify if the opposition is not surprised or harmed, if he is, a continuance should be granted. Judges need the ability to be fair and do what is right.

9. Rather than answer all these SILLY questions, I say that a judge ought to be allowed to fine those who could possibly know how to answer it.

Hell out of lawyers who file frivolous lawsuits and frivolous motions (including motions to sanction and motions to compel) on the judge's own motion. The rules should make all lawyers afraid to file discovery motions of any kind and "dog" type lawsuits. If this breaks and bankrupts lawyers, so be it.

You will never get anywhere until you decide that trial by ambush is a good thing, as compared to full discovery, which only serves the purpose of making lawsuits extremely expensive and excruciatingly boring.

10. Regarding #2(e): as long as elected they <u>are</u> going to use discretion.

    Regarding #5(a): particularly in <u>child custody cases - welfare of child - best interest</u>.

    Regarding #5(f): Some attorneys do not even have the knowledge to ask for a continuance or to withdraw _____ if ready.

11. These rules should apply to civil claims (exclusive if attorneys fee) in excess of $50,000.00 and to contested divorce matters on file over 120 days.

12. Let's quit the game playing and get back to Rule 1, or the public will correctly perceive that the civil courts put form over substance - a common criticism of our criminal justice system.

13. We need to look closely at following or "adopting" Federal Discovery and Sanction Rules.

14. Re: #10 - however, I was a family court master for 7 years before being elected to district bench.

15. I think discovery abuse and the need for sanctions hearings has lessened in the last year in my Court. Maybe we are learning.

16. Regarding #4: Place burden on objecting party to show harm.

    My general feeling is that we have tried to incorporate too many rules and regulations into the sanction area and have created a problem that was intended to be solved. No client should have their right jeopardized because the lawyer failed to list names of witnesses. We need some method to deal with this other than these "automatic" rules.

    As a sitting district judge, it is my firm belief that the rules now bind and constrain the presiding judge from effecting a fair remedy in many cases. Specifically, in the event that a witness has not been properly identified, there should be a procedure whereby the district judge can determine whether or not in his opinion this omission will prejudice one of the parties, has been deliberately done,

or will be in any way harmful to allow this witness to testify. For instance, when the plaintiff or defendant himself is not allowed to testify or when a witness's deposition has been taken months earlier is not allowed to testify an injustice can result that the district court could correct if allowed to do so. On the other hand, the court must be given the discretion to determine whether omissions were made for a purpose and would not prejudice a party. We cannot enact enough rules to govern every specific situation and there has to be some discretion and trust placed in our district judges whom we elect and if they are not exercising that judgment properly they can be defeated. If we are not going to give local district judges the discretion to make these judgment calls we will never have the ability to properly handle these situations.

As to the rule on sanctions for frivolous pleadings, etc., it is my general feeling that such a rule does serve a laudable purpose. I believe that it compels all parties to look seriously at the matters they place in our courts to be resolved in a public forum. Since I am not that familiar with the federal court rule, it is difficult for me to evaluate it. I would think that drawing upon the experience and the decisions made in federal court certainly could be helpful. I believe that the Transamerica decision setting out the requirements for sanctions serves the purpose of any excessive sanctions that may have been imposed. I have used sanctions very few times, but the rule needs to be in place for the proper case.

I think the requirement of a hearing and stating into the record reasons for the ruling is a good requirement. Certainly if a judge cannot articulate good reason for sanctions, they should not be imposed.

However, I hope that we do not enact a rule that ends up like a contempt proceeding that is basically useless by the trial court in conducting a proper trial.

I do feel that in the egregious case the sanction should not be levied upon the parties but on the attorney that is guilty of such conduct.

17. As a prefatory remark, I will note that sanctions practice appears to be different in Tarrant county than in the other urban counties. While for a time we seemed to swim in discovery disputes, the tide has changed somewhat. I thought it was because lawyers felt that the practice had gotten out of hand, but maybe it was because it became known that Tarrant County judges were generally not very amenable to sanctions relief.

A few general conclusions can be stated:

1. Rule 215 sanctions. Abuse of discovery would all but disappear if the Supreme Court would rethink the automatic exclusion of witnesses. Automatic exclusion is currently far and away the most frequently used predatory discovery weapon. The previous flexible system based upon surprise (and ultimately, abuse of discretion) worked fine.

The goals hoped to be achieved by the last round of major rules revisions were never achieved. Instead, they encouraged gamesmanship -- even rewarded it. Lawyers determined that there was profit to be made in the offensive use of sanctions motions and quit talking to one another. Clients found that offensive use of the discovery process wore out opponents and instructed lawyers to zealously pursue them. In the meantime, we in the judiciary legitimized this by "buying into" discovery disputes. We heard them, granted relief where informal resolution sufficed before and the cycle accelerated. We actually engendered the conduct which is so widely regarded as Rambo tactics. The tide could have been stemmed by refusing to tolerate such nonsense.

I believe the cycle has slowed, and if the Supreme Court would revise Rule 215 to conform with the spirit of Transamerican Natural Gas Pipeline Corp. v. Powell, 811 S.W.2d 913 (Tex. 1991) we will be far better off.

On the other hand, I have found the problem of designation of experts "as soon as practicable" to be an easy one to administer and decide. I would leave it alone.

2. The Rule 13 problem. Possibly the filing of frivolous pleadings is a problem to some, but I find it insignificant compared to the other issues to be addressed by your committee.

3. More Importantly. Suggestions have been made to create more procedures to facilitate discovery and require all sorts of automatic disclosures in every case. Frankly, the system seemed to work fine before we tried to "fix" it. Plain old interrogatories, requests for production and depositions are handy tools that work well.

I would like to be one voice in the cacophony imploring you to seriously consider whether, besides eliminating Rule 215 problems, we really need more rules. Creating new rules was what got us in trouble in the first place. We need fewer rules. As it is now, a case cannot be litigated

other than by the wealthy. The proposals mentioned in your questionnaire presuppose that dockets are predominated by giant product liability cases. To the contrary, they are predominated by general negligence cases that do not need the medicine prescribed.

In short, less is better.

18. Regarding #6. This would seem to open Pandora's box.

19. Many lawyers abuse discovery in order to delay trials and increase fees.

20. In 3 years I have imposed sanctions only 3 times; each time the sanction was payment of attorneys fees for the party who was abused, and I thought the abuse was very clearcut.

21. Regarding #5(f): Agree, but <u>NOT</u> if proponent of evidence/witness has announced "ready".

    Regarding #5(h): Strongly agree, but <u>only</u> if the attorney is the Rule 8 attorney.

    Regarding #9: Strongly agree if by agreement. We could call it ADR!

22. Regarding #5g: Strongly agree. Otherwise is ignorance.

    Sanctions are consuming entirely too much time. It will soon rival the old special issue practice for wasted time and effort.

23. Sanctions should be used to encourage discovery or discourage frivolous pleading; not as an alternative to summary judgments. Training for judges in creatively and fairly applying sanction techniques would be a great benefit to judges and possibly provide for a forum for exchange of techniques or tools.

24. Enforcement of these current rules seem to lead to artificial rather than just results. Trial Judges should be allowed considerable discretion but not so much as to allow injustice. Management of the dockets is very important and some acceleration by time scheduling important.

25. With respect to #9 above (p.6) A.D.R. procedures may be used where appropriate.

26. Discovery and sanctions have resulted in the average person unable to afford the expense of an attorney. If we do not curtail the time used in discovery the public will demand it. We are now in the quagmire of the old pleading system. Ethical lawyers are being punished.

27. Regarding #5e: See 5c above, to put burden on offering, non-adverse party.

28. With reference to Rule 13, I have imposed sanctions (attorney fees) on two different occasions. On one occasion, a local attorney filed a lawsuit that involved the State and the attorney had to know that his client was not entitled to the relief requested. The Attorney General's Office had a representative at the hearing and requested attorney fees in an amount which was less than $200.00 = nothing like a practicing attorney would have requested. I imposed the sanctions on both the attorney and the client, who was also in the Courtroom.

The second time was when the attorney made a motion to set aside a divorce decree that was approximately four years old at the time. He wanted it set aside because of lack of jurisdiction. The Respondent participated in the trial with reference to custody and visitation. The attorney was a new attorney, but was not a real young attorney. The attorney, in my opinion, was completely in error in what he was doing, and so was his client. The ex-wife in this case had moved to Wisconsin approximately three years after the divorce was granted. The attorneys for the ex-wife requested a sanction of $5,000.00 in attorney fees. I granted it. Because of the intervention of one of his former law professors, the attorneys settled their claim for $2,500.00 - which I approved. However, after reading the bitter denunciation of the Judge in his Motion for Rehearing, I would like to have levied a several thousand dollar sanction in the form of a fine. This was before the settlement was reached. Though I believed it was sufficient to notify the grievance committee in his jurisdiction, I did not. I do not think the procedure under the old rule would be appropriate.

With reference to the naming of an expert witness, maybe the Judges should have a little more discretion when thinking about attorney fees where an attorney intends to call another attorney to testify to the reasonableness of the attorney fees. I can think of one case that involved several million dollars. A person on the payroll of the Plaintiff attended fifteen or twenty depositions at which all the attorneys to the lawsuit were involved. He was not

named as an expert witness, but was called as an expert witness during the trial. I did not let the witness testify, but I would have except it might have been an abuse of discretion if I did.

I am sure what the Judges in the larger towns say will be a whole lot more informative as far as stating problems with the discovery process.

29. Regarding #3(q): Unless the rules are made clear; if they are clear enough, comments would be unnecessary.

30. Family law cases should perhaps be treated a little differently.

31. Trial judges need more discretion in managing pre-trial and trial related sanctions - severe sanctions should be immediately appealable. Judge should be liable to sanction lawyer abusing trial procedure without having to hold lawyer in contempt of it.

32. "Transamerican" should be the standard for all sanctions - trial court should have broad discretion with expedited review by court of appeals.

33. Discovery rules are adequate. Appellate decisions on the rules are sometimes "light & variable." The rules are not impediments for the search for truth but unfortunately, variable judicial philosophy has made them a tactical battleground in and of themselves. Transamerica has got us headed in the right direction.

34. We need sanctions with judicial discretion.

35. You need calm judge and some rules. With poor judge there is temptation to multiply the rules. We need better, reality related judicial CLS seminars.

Regarding #6(a) Or have trigger mechanism. Except by agreement - deadline be moved back.

36. My experience in civil practice is limited as I have served my years as an attorney as a prosecutor. Therefore my answers are subject to change as I handle more civil cases.

37. Regarding #5h: Agree, limited to counsel of record.

38. Sanctions are needed to encourage orderly discovery and prevent abuse or delay.

39. Regarding #3(q): Stay away from Federal Rules. They are designed to hinder, not aid justice by making pre-trial matters so burdensome a litigant cannot afford to try his case on the merits.

Regarding #4b: Deadline should be more than 30 days.

Regarding #6(a): Stay away from Federal Rules. This opinion of many that the federal rules are superior and Texas Rules should be pattered thereafter is ludicrous. Federal rules promote a plethora of trial by ambush because of too many automatic pre-trial sanctions.

(1) Automatic sanctions should be done away with. (2) Interrogatories should be reduced. (3) Certain interrogatories should be prohibited. Suggestions: (A.) Allow no interrogatories until after answer date. (B.) Interrogatories must be submitted within specified time after answer date. (C.) No Request for Admissions until Interrogatory answer date has passed. (D.) Eliminate interrogatory asking name of persons with knowledge of relevant facts. (E.) No depositions allowed until interrogatory deadline has passed. (F.) No need to designate parties or lawyers (experts) who are to testify as to attorney fees unless ordered by court. (G.) Pre-trial litigation must decrease and lawyers have to assume responsibility for preparing their own cases, not pre-trial ambush.

40. Help - I have a very active trial docket; however the imposition of sanctions has been a problem for me only once in over seven years. Please note the geographic and demographic make-up of my district. When discovery problems do arise, they have a significant impact on my docket.

41. Regarding #3(h)(ii): severe sanctions have to be clearly defined.

Regarding #3(l): Notice from who? Court or opposing attorney?

Regarding #3(n)(i): It doesn't seem to work in actual practice.

42. Figure out a better way to accomplish "in camera" inspections -- when does a judge have time to examine 100's and sometimes 1000's of pages of documents -- put burden on counsel.

TASK FORCE ON SANCTIONS QUESTIONNAIRE
ATTORNEY RESPONSES

[TOTAL NO. OF RESPONDENTS: 139]

1. Generally the current rules that govern sanctions should be:

retained in their current form:	9.6%
modified:	75.0%
repealed completely:	14.8%

2. Current sanctions rules:

a) are reasonable and work well.

Strongly agree:	2.2%
Agree:	15.9%
Disagree:	50.7%
Strongly disagree:	29.7%
Don't know:	1.5%

b) result in too much time and money spent on sanctions practice.

Strongly agree:	38.3%
Agree:	36.2%
Disagree:	20.6%
Strongly disagree:	2.8%
Don't know:	2.1%

c) are clearly written.

Strongly agree:	2.2%
Agree:	16.9%
Disagree:	63.2%
Strongly disagree:	16.2%
Don't know:	1.5%

d) are vague and ambiguous.

Strongly agree:	13.9%
Agree:	57.4%
Disagree:	26.5%
Strongly disagree:	1.5%
Don't know:	.7%

e) provide trial judges too much discretion.

Strongly agree:	25.9%
Agree:	31.7%
Disagree:	31.7%
Strongly disagree:	4.3%
Don't know:	6.4%

f) provide trial judges too little discretion.

Strongly agree:	2.3%
Agree:	10.9%
Disagree:	59.1%
Strongly disagree:	21.9%
Don't know:	5.8%

g) provide trial judges with the proper amount of discretion.

Strongly agree:	1.4%
Agree:	18.1%
Disagree:	53.6%
Strongly disagree:	18.1%
Don't know:	8.8%

h) encourage Rambo tactics.

Strongly agree:	37.3%
Agree:	29.7%
Disagree:	23.9%
Strongly disagree:	4.9%
Don't know:	4.2%

i) discourage Rambo tactics.

Strongly agree:	2.1%
Agree:	13.2%
Disagree:	52.8%
Strongly disagree:	27.1%
Don't know:	4.8%

3. The sanctions rules should:

a) require attorneys to confer before seeking sanctions.

Strongly agree:	51.4%
Agree:	35.7%
Disagree:	9.4%
Strongly disagree:	2.1%
Don't know:	1.4%

b) require an oral hearing before imposition of sanctions.

Strongly agree:	59.6%
Agree:	33.3%
Disagree:	5.7%
Strongly disagree:	1.4%
Don't know:	0.0%

c) require a trial judge to state into the record specific reasons when:

(i) imposing sanctions.

Strongly agree:	63.6%
Agree:	32.9%
Disagree:	2.8%
Strongly disagree:	.7%
Don't know:	0.0%

(ii) deciding not to impose sanctions.

Strongly agree:	35.5%
Agree:	32.6%
Disagree:	26.2%
Strongly disagree:	5.0%
Don't know:	.7%

d) require a trial judge to make written findings of fact and conclusions of law when:

(i) imposing sanctions.

Strongly agree:	45.0%
Agree:	22.1%
Disagree:	26.4%
Strongly disagree:	4.4%
Don't know:	2.1%

(ii) deciding not to impose sanctions.

Strongly agree:	17.3%
Agree:	23.7%
Disagree:	40.3%
Strongly disagree:	16.5
Don't know:	2.2%

e) allow sanctions for discovery abuse only after a court has issued an order compelling discovery, and then the order has been violated.

Strongly agree:	35.5%
Agree:	29.8%
Disagree:	21.3%
Strongly disagree:	11.3%
Don't know:	2.1%

f) require alternative dispute resolution before seeking sanctions.

Strongly agree:	7.6%
Agree:	14.5%
Disagree:	40.5%
Strongly disagree:	25.9%
Don't know:	11.5%

g) allow a judge to appoint a master to resolve any:

(i) discovery disputes.

Strongly agree:	17.0%
Agree:	41.8%
Disagree:	24.8%
Strongly disagree:	13.6%
Don't know:	2.8%

(ii) sanctions issues.

Strongly agree:	12.4%
Agree:	22.6%
Disagree:	41.6%
Strongly disagree:	20.5%
Don't know:	2.9%

h) allow for immediate, interlocutory appeal of:

(i) any sanctions order.

Strongly agree:	*20.7%*
Agree:	*29.8%*
Disagree:	*34.0%*
Strongly disagree:	*12.0%*
Don't know:	*3.5%*

(ii) **orders imposing "severe" sanctions.**

Strongly agree:	*45.0%*
Agree:	*35.0%*
Disagree:	*12.1%*
Strongly disagree:	*5.0%.*
Don't know:	*2.9%*

i) **specify a maximum amount on permissible monetary sanctions (other than attorney's fees).**

Strongly agree:	*15.7%*
Agree:	*37.9%*
Disagree:	*28.6%*
Strongly disagree:	*8.6%*
Don't know:	*9.2%*

j) **postpone, until after a decision on the merits, any hearing to determine whether to impose sanctions on the lawyer or client or both, in order to avoid or postpone a lawyer/client conflict during pretrial proceedings.**

Strongly agree:	*17.7%*
Agree:	*26.2%*
Disagree:	*38.3%*
Strongly disagree:	*12.1%*
Don't know:	*5.7%*

k) require that, before ultimate sanctions (e.g., dismissal, default) are imposed, the client must receive actual notice.

Strongly agree:	40.1%
Agree:	45.8%
Disagree:	9.9%
Strongly disagree:	1.4%
Don't know:	2.8%

l) allow a party or lawyer to avoid sanctions for frivolous pleadings, motions, etc. by withdrawing the pleading after receiving notice that the pleading is frivolous.

Strongly agree:	25.0%
Agree:	46.4%
Disagree:	17.1%
Strongly disagree:	7.9%
Don't know:	3.6%

m) allow sanctions, when appropriate, against:

(i) the lawyer(s) involved.

Strongly agree:	29.0%
Agree:	59.4%
Disagree:	6.5%
Strongly disagree:	4.4%
Don't know:	.7%

(ii) the lawyer's firm.

Strongly agree:	16.8%
Agree:	43.8%
Disagree:	23.4%
Strongly disagree:	13.1%
Don't know:	2.9%

(iii) the parties.

Strongly agree:	*21.7%*
Agree:	*66.7%*
Disagree:	*5.8%*
Strongly Disagree:	*2.9%*
Don't know:	*2.9%*

n) allow sanctions to deter or punish:

(i) frivolous suits, pleadings, motions.

Strongly agree:	*32.1%*
Agree:	*55.0%*
Disagree:	*7.9%*
Strongly disagree:	*2.9%*
Don't know:	*2.1%*

(ii) discovery abuse.

Strongly agree:	*34.3%*
Agree:	*62.0%*
Disagree:	*2.2%*
Strongly disagree:	*1.5%*
Don't know:	*0.0%*

o) if a violation of the rule is found, make imposition of sanctions:

(i) discretionary.

Strongly agree:	*20.9%*
Agree:	*51.5%*
Disagree:	*20.1%*
Strongly disagree:	*4.5%*
Don't know:	*3.0%*

(ii) mandatory.

Strongly agree: 6.6%

Agree: 19.1%

Disagree: 44.9%

Strongly disagree: 27.2%

Don't know: 2.2%

p) specifically mandate professional courtesy.

Strongly agree: 29.9%

Agree: 37.3%

Disagree: 18.7%

Strongly disagree: 9.7%

Don't know: 4.4%

q) have a comments section, similar to the federal rules, to clarify the application of the rules.

Strongly agree: 29.4%

Agree: 52.9%

Disagree: 9.6%

Strongly disagree: 3.7%

Don't know: 4.4%

4. With respect to Rule 166b(6), which requires identification of an expert witness "as soon as is practical, but in no event less than thirty (30) days" before trial except on leave of court:

a) the "as soon as is practical" standard

(i) is too vague: 53.5%

(ii) is sufficiently clear: 22.5%

(iii) should be eliminated: 24.0%

b) the rule should not contain a deadline, but should leave the matter to be set by a pretrial order if a party or court wants to set a deadline

Strongly agree:	*19.7%*
Agree:	*37.1%*
Disagree:	*25.8%*
Strongly disagree:	*14.4%*
Don't know:	*3.0%*

5. With respect to Rule 215(5), which provides for the automatic exclusion of evidence and witnesses, absent a showing of good cause for admission, as to a party who fails to supplement discovery responses properly -- Should the rule be amended to:

a) provide more discretion for trial courts to admit such evidence/witness

Strongly agree:	*24.3%*
Agree:	*33.3%*
Disagree:	*22.2%*
Strongly disagree:	*16.7%*
Don't know:	*3.5%*

b) specify what constitutes good cause to admit such evidence/witness

Strongly agree:	*24.4%*
Agree:	*47.5%*
Disagree:	*20.9%*
Strongly disagree:	*4.3%*
Don't know:	*2.9%*

c) provide that a showing that the adverse party will not be prejudiced by the evidence/witness constitutes good cause for admission of the evidence/witness

Strongly agree:	14.0%
Agree:	42.2%
Disagree:	31.3%
Strongly disagree:	9.4%
Don't know:	3.1%

d) provide that "excusable neglect" constitutes good cause for admission of the evidence/witness

Strongly agree:	10.0%
Agree:	30.7%
Disagree:	37.9%
Strongly disagree:	12.9%
Don't know:	8.5%

e) require the adverse party to show prejudice before the evidence/witness is excluded

Strongly agree:	14.0%
Agree:	32.6%
Disagree:	34.1%
Strongly disagree:	15.6%
Don't know:	3.7%

f) state expressly that a trial court may grant a continuance as an alternative to evidence/witness exclusion

Strongly agree:	17.5%
Agree:	49.6%
Disagree:	16.1%
Strongly disagree:	13.9%
Don't know:	2.9%

g) permit a named party to a lawsuit to testify without being listed in answers to interrogatories

Strongly agree:	*47.9%*
Agree:	*37.9%*
Disagree:	*7.8%*
Strongly disagree:	*6.4%*
Don't know:	*0.0%*

h) permit attorney's fees experts to testify without being listed in answers to interrogatories

Strongly agree:	*27.3%*
Agree:	*31.7%*
Disagree:	*28.1%*
Strongly disagree:	*10.8%*
Don't know:	*2.1%*

i) permit a party to call as a witness any witness listed in any other party's interrogatory responses

Strongly agree:	*38.9%*
Agree:	*41.7%*
Disagree:	*12.9%*
Strongly disagree:	*6.5%*
Don't know:	*0.0%*

6. Should discovery rules be amended to adopt a new procedure, as is now under consideration for the federal rules, that certain discovery disclosures be automatic, including:

a) within a specified time (e.g., 30 or 60 days) after service of an answer, each party must identify each person "likely to have information that bears significantly on any claim or defense," identify or produce each document "likely to bear significantly on any claim or defense," disclose a computation of damages

Strongly agree:	*21.7%*
Agree:	*21.7%*
Disagree:	*24.0%*
Strongly disagree:	*29.0%*
Don't know:	*3.6%*

b) by a specified date prior to trial (e.g., 30 or 60 days), each party must identify each expected trial witness and produce an expert witness report (opinions; information relied upon; exhibits; qualifications)

Strongly agree:	*19.3%*
Agree:	*31.1%*
Disagree:	*21.5%*
Strongly disagree:	*26.7%*
Don't know:	*1.4%*

7. There are too many sanctions rules; a single rule should contain all sanctions provisions.

Strongly agree:	*30.6%*
Agree:	*45.5%*
Disagree:	*13.4%*
Strongly disagree:	*3.0%*
Don't know:	*7.5%*

8. Judges abuse sanctions powers:

Frequently:	*36.7%*
Infrequently:	*41.0%*
Don't know:	*22.3%*

9. Texas should provide an alternative accelerated docket, to permit cases to proceed to trial quickly with a minimum of discovery, motions, and expense.

Strongly agree:	*30.6%*
Agree:	*40.3%*
Disagree:	*11.2%*
Strongly disagree:	*6.7%*
Don't know:	*11.2%*

10. Size of your firm:

1-2:	*32.6%*
3-5:	*14.5%*
6-10:	*11.6%*
11-20:	*6.5%*
21-50:	*14.5%*
More than 50:	*20.3%*

11. Primary area of your litigation practice:

general litigation:	*22.0%*
commercial litigation:	*31.6%*
family law:	*8.9%*
personal injury - plaintiffs:	*21.4%*
personal injury - defense:	*12.5%*
other:	*3.6%*

12. Years of practice:

1-5:	22.4%
6-10:	17.4%
11-15:	15.2%
16-20:	16.7%
21-25:	14.5%
26 or more:	13.8%

COMMENTS:

1. Sanctions too frequently imposed, too harsh. Should not be imposed (exclusion of testimony, striking pleadings, dismissal) except after oral hearing and order and violation of order. With regard to witnesses, we've gone past the point of notice to having to cross T's and dot i's. If party attempting to secrete witness, then motion, oral hearing and order before sanctions.

2. The major metropolitan areas need a Special Master, who is well-versed in current discovery laws, to whom all discovery disputes <u>can</u> be referred by the trial judge.

3. Regarding #4 - Experts: <u>Not</u> "practical" to disclose until fact witnesses upon whose testimony the expert may base his/her opinion have been deposed.

4. My primary complaint with regard to the utilization of sanctions by attorneys and trial courts arises from my perception that sanctions or the threat thereof are frequently used (1) to coerce discovery and (2) to recover attorney's fees (where they otherwise might not be recoverable), rather than punish actual wrongdoing.

5. We have markedly different perspectives on sanctions practice. I believe that Rambo litigation has not abated, although it may now be practiced in a more sophisticated manner. For example, instead of blanket objections to document requests, there are blanket productions where masses of uncalled for documents are produced, but "smoking gun" materials are buried or omitted. Based on my eight years of practice in commercial litigation in Dallas, I am convinced that

strong sanctions, applied more vigorously, are warranted. No doubt, some streamlining and consolidation of the Rules would be helpful. I disagree with views you have expressed in the Texas Lawyer, however, suggesting that sanctions are too often imposed. My experience has been that trial courts impose sanctions infrequently, and then with undue reluctance. Commercial litigation is a high-stakes business, and many lawyers will be dissuaded from improper conduct they perceive as giving them an edge only when and if sanctions are imposed and publicized. Placing excessive restraint on the discretion of trial judges is not the way to go.

6. The "Rambo" lawyers whom the present system of sanctions was designed to police are the very ones who have mastered techniques to abuse the system and win their cases through sanctions abuse without a trial on the merits. Certain state district judges seem to enjoy these technical games and gymnastics and take every opportunity to get a case off of their trial dockets by striking pleadings or pressuring one side to accept an unfair settlement over discovery matters that are trivial compared to the right to a trial by jury.

The ultimate sanction of striking pleadings and the sanction of ordering that one side cannot put on witnesses nor cross examine witnesses should only be allowed when there has been total non-compliance with discovery requests for a period of at least six months, with no reasonable explanation.

Certain courts are too obsessed with bringing cases to trial within six months of filing regardless of the complexity of the case and the number of parties. Most multi-party cases can't be prepared and discovery completed that quickly. If all parties agree that discovery is not complete and that they want a continuance, the Judge should not have the right to dictate when the parties' case will be tried unless the case is over one year old and other continuances have been granted.

The present state of discovery and pre-trial procedure is far too expensive on clients. Most litigants would be better off if the present rules of discovery were scrapped, and they could just get their lawyer and witnesses and to go court for trial.

7. Our judiciary has allowed advocates to take over the system. Fairness, impartiality and justice are being sacrificed in the name of legal gamesmanship. It is a sad commentary upon our profession to be required to debate the necessity of sanctions. However, they are necessary. They are the tools by which an impartial judiciary should take control of the process and restore litigation to a search for truth and justice.

The concept embodied in question 6 of the questionnaire is more than a mere procedural device. It is the central theme of the reason for discovery. That is, both sides should be required to disclose the facts under evidence. Advocacy is the art of presenting those facts. Today, advocacy has become the art of obturation, one-upsmanship and even trickery. Little wonder that the public holds our profession and our system in such low esteem.

8. Too many cases are decided based on sanctions. Judges use sanctions to "hometown" attorneys and clients from other cities. We need changes.

9. Regarding #3 - This is only effective if judges enforce.

Regarding #9 - Unavailable where parties disagree. Already in effect where parties agree.

These are answered based on what I think should be done, not what I think can be done.

10. Regarding #6a - No more hide the ball - let's be frank and settle or try it.

11. I have witnessed the evolution of "Trial by Ambush" to "Ambush by Discovery".

When plaintiffs and defendants are excluded from testifying at their own trials because their attorneys failed to list them as witnesses, something is wrong with the system.

When attorneys representing either the plaintiff or the defendant are not allowed to testify because they weren't listed as expert witness when the party had asked for attorney's fees, something is wrong with the system.

When the main purpose of the system seems to be utilization of sanctions to prevent fair trials, something is wrong with the system.

I know of a divorce trial wherein the husband's attorney was successful in keeping the wife from testifying as to the value of their community home because her attorney had not listed her as an "EXPERT" witness and the husband's attorney successfully argued to the court that while a party could testify as to the value of the property owned by them that she was testifying as an expert witness and since she hadn't been listed as an expert witness that she shouldn't be allowed to testify..

The trial judge agreed and refused to let the wife testify as to the value of the parties' community property home.

When this happens, something is wrong with the system.

There should be an amendment to the rules that if an individual is listed as an expert witness, the fact that the individual is listed as an expert should also have the effect of also listing that person as a fact witness without separately having to so list that "expert".

I have heard of an instance where the wife's attorney was listed as an expert witness and not as a fact witness and at the trial the attorney for the husband successfully argued that while the wife's attorney could be allowed to testify as to the value of attorney's fees in general that he should not be allowed to testify as to what he had done as regards his representation of the wife in the case because those were "facts" and he hadn't been listed as a fact witness.

When rulings like this are made, something is wrong with the system.

We attorneys are rapidly getting into the same "trap" that the physicians find themselves.

Physicians many times order what some might think are "unnecessary" tests to protect the physician. In other words, these physicians are, by the system, required to practice DEFENSIVE MEDICINE.

We attorneys, even in a simple divorce, find ourselves practicing DEFENSIVE LAW by sending out a set of interrogatories; a request for production; taking depositions; etc.; when in many instances this discovery is probably not required. But if the attorney's client comes back at a later date against the attorney and says that he or she was not adequately represented because all possible discovery was not done, the attorney's in the "trap".

As a result the middle class many times is being denied competent representation because the middle class cannot afford the competent representation.

The rules should be amended to provide, among other things:

1. that all witnesses must be named more than 30 days before the date of trial and if a witness is not named more than 30 days from the trial of the matter, the witness may still be allowed to testify unless the other party can show "surprise" and if the other party can show "surprise", then the case will be continued by the Court for a reasonable time and all expenses associated with this "late designation" shall be borne by the party not timely designating the witness or witnesses.

2. that "death penalty" sanctions only be granted when they involve a direct violation of a direct order of the Court and then only if there is no other reasonable sanction that might be imposed.

Cases where a party knows of the existence of the other party's expert more than 30 days before the trial of the matter; knows that this expert will or probably will testify; takes the expert's deposition; and, objects to this expert testifying because the opposing party failed to list this expert in their answers to interrogatories and the objection is sustained, the system needs to be changed.

I am aware of an attorney in this area who prides himself on the fact that as soon as the other party answers (if the other party is the defendant) or as soon as he answers (if the other party is the plaintiff) the attorney sends over a set of interrogatories asking only two questions -- one as to any fact witnesses and one as to any expert witnesses.

Since these interrogatories are asked so early, the usual answer is "has not been determined" or "will supplement".

The attorney referred to above many times does not send a second set of interrogatories and/or if he does send a second set of interrogatories then he doesn't in any way refer to fact witnesses and/or expert witnesses but rather he asks other very complicated interrogatories and then concentrates all of his efforts on this set of interrogatories and never mentions his first set of interrogatories.

As a result, many times the opposing attorney forgets to supplement his answers to the "first set" of interrogatories.

Then, at the trial of the matter, when the opposing party attempts to put on his first witness, the attorney that sent this first set of interrogatories stands up and says that witness was not listed in the opposing party's answers to interrogatories and therefore should not be allowed to testify.

Therefore, in family law cases, sometimes this attorney is successful in keeping the other party from testifying; from keeping the other party's attorney from testifying either for attorney's fees and/or against attorney's's fees; court appointed psychologists from testifying if the testimony is unfavorable to the sending attorney; etc.

When this happens, something is wrong with the system.

When things of this nature are pointed out to the attorneys doing these things, the usual response is either "this is an adversarial system and I need to protect my client" or "if I did go ahead and let him testify, I'd probably end up getting sued".

When this happens, something is wrong with the system.

The current system replaced a bad system with a worse system.

One of the prime examples of the problems with the present system are when an attorney receives interrogatories containing what he believes are objectionable interrogatories; the receiving attorney files objections to the interrogatories and asks for sanctions against the sending attorney for asking these objectionable questions; the sending attorney then files a motion asking for sanctions against the receiving attorney because of the receiving attorney's "frivolous" objections; and, then the receiving attorney files a motion asking for sanctions against the sending attorney for filing a "frivolous" motion for sanctions against the receiving attorney.

As a trial attorney who operated both under the prior "discovery" system and under the current "discovery" system, the "prior" system, for all of its defects, was better than the current system.

Many of the discovery rules seem to have been designed to combat "RAMBO" tactics in "MEGA-CASES" and are not appropriate to the 99+% of the other cases filed in this state.

There might be two sets of rules for cases in this state -- one for "non complex" cases and one for "complex" cases. To designate a case as a complex case, any party to the litigation could make application to the Court to designate the case as a "complex" case and the Court could then either designate the case as a "complex" case or refuse to designate the case as a "complex" case.

If the case were designated as a complex case, then one set of "very strict" rules would apply; while if the case was not designated as a "complex" case, then a much more liberal set of rules would apply.

The present discovery rules are the perfect example of what happens when one uses a sledge hammer to kill a mosquito.

12. *Here are three opinions that make absolutely no sense. The defense lawyers in this dog bite case have charged their client over $50,000.00 to defend the case. My litigation expenses exceeded $6,000.00 and my time was over three hundred hours. The Court of Appeals lied and misstated the law.*

In the case Powers vs. Palacios, found at 771 S.W.2d 716 (Tex.App. -- Corpus Christi, 1989, writ denied), the trial court sanctioned my client and I for bringing a frivolous lawsuit when a pit bull kept and harbored at Mr. Palacios' residence escaped and attacked my client, who was delivering mail in the neighborhood, amputating a good portion of her right index finger.

Shortly after defense counsel filed an answer to the lawsuit I contacted him to schedule the deposition of his client. Upon counsel's representation that he was "too busy" for the next two months, I agreed to take his client's deposition on a Monday, at 9:30 a.m. which was some 59 days later. A few weeks later, the defense lawyer filed a Motion for Summary Judgment, attaching to it his client's affidavit and scheduling the Summary Judgment hearing for 9:15 a.m. -- fifteen minutes before the time he agreed his client's deposition should be taken.

I then rescheduled the deposition for two weeks before the time that the Motion for Summary Judgment was scheduled; however, the trial court quashed the deposition and ordered it be taken fifteen minutes after the Summary Judgment hearing. Thereafter, I requested the trial court reschedule the Summary Judgment hearing, but such motion was denied. In complete frustration, I filed a non-suit four days before the Summary Judgment Motion was to be heard, which under the rules and case law is perfectly permissible.

I unfortunately believed that I owed to the trial court the courtesy of appearing for the now moot summary judgment hearing to inform the court that a non-suit had been filed four days previous. However, without notice and without offering any testimony whatsoever the defense lawyer asked for $4,500.00 in attorney's fees as sanctions for bringing a frivolous lawsuit. The court, after not asking one question regarding the law or facts of the case summarily imposed a $2,500.00 sanction under the guise of utilizing Texas Practice and Remedy's Code 9.012. Fortunately, the legislature provided procedural protections for such arbitrary abuses, however, these procedural protections were ignored by the trial court. Specifically, the trial court must recite specific findings of good cause in its order and the trial court must allow a party ninety days in which to either amend the pleading or withdraw it. Neither of those rights were afforded the litigant in this case.

On appeal the appellate court, although finding error, misstated the record and wrote that the ninety day requirement was waived (in fact, there was a full blown hearing on the issue), and that the trial court's failure to state good cause in its ruling as mandated by Tex.R.Civ.P. 13 was not harmful. The appellate court wrote the trial court "clearly held" the lawsuit frivolous, but the trial court did no such thing. And, even though the trial court did no such thing and even though the appellate court did not review any of the evidence, the Court of Appeals rubber-stamped the trial court's actions. In fact, we filed an affidavit with the trial court of a neighbor who testified the pit bull "Two-By-Four" was always kept at Palacios' house and had terrorized the neighborhood for years.

Even more significant, we assigned as error in the appellate court both legal and factual insufficiency of evidence points of error, but the appellate court did not review the evidence and also ignored these points of error. Thereafter, the Supreme Court decided not to address these significant issues brought to it.

Ironically, the case was refiled and tried to a jury. After the close of evidence the trial court overruled the defendant's motions for a directed verdict based on no evidence on the theories of negligence, negligence per se, strict liability and gross negligence. Although, the jury returned a defense verdict, the case again went into the appellate court which affirmed the trial court. This time however, the appellate court was forced into reciting the underlying facts of the case. We finally got the attention of the Texas Supreme Court and it reversed the trial court and remanded for a new trial.

However, given that the Supreme Court says one things, the harsh reality of the practice of law in Texas is that you can get away with, and even be rewarded for, abusive litigation tactics because the current rules reward unethical conduct. Basically, under the current rules it is an "anything goes" approach to litigation, and under the "abuse of discretion" standard that appellate courts so love to use, I have learned that these rules are unfairly used for unjust results.

Do the rules encourage abusive litigation? No question about it. Do the rules need to be revised to avoid the kind of horrible results that occurred in the Powers' case? Absolutely!

13. *As you can no doubt tell, I take a dim view of Rule 215, in particular. I recently for the first time in 45 years of law practice found myself before a judge who knew neither the law or rules of evidence. I ended up with a mistrial and a "contempt of Court" fine of $1,500.00, which the Judge then tried to change to a "sanctions" order. I ultimately ended up with a sanction of some $33,000.00, which was utterly ridiculous. Both were set aside, but only after I had to employ other counsel to represent me.*

There was no question but the "sanctions" order created a conflict of interest with my client. I had to use a case out of Houston, which I see has now been overturned to even allow my client to testify. The real problem was that plaintiff had sued the wrong defendant which the Court refused to recognize.

I successfully practiced law for many years before sanctions appeared. Not often do I agree with former Justice Kilgarlin, but I certainly agreed with his recent article in the Texas Bar Journal concerning Rule 215, sanctions.

Our Courts today are cluttered with motions relating to discovery, and there are more Writs of Mandamus being filed now per year that were probably filed in my first 40 years of law practice.

I used to investigate a law suit, perhaps take one or two depositions and go to trial; and dispose of the entire matter in two to three months. Now even a mildly contested law suit may take a year or more with numerous unnecessary court appearances to resolve pre-trial problems.

Further, too many trial Judges become advocates on one side or the other. To give such a Judge the further power of sanctions violates every concept of justice in our courts.

As to "frivolous" law suits, I believe a jury should be allowed to make that determination not a judge who wishes to clear his docket.

All a dismissal of a so-called "frivolous" law suit does is cause an appeal which further burdens the appellate courts.

In today's environment in our Courts some of the most notable constitutional law cases would probably be dismissed as "frivolous".

14. The task force has discussed the conflict inherent in a motion for sanctions against both a lawyer and the lawyer's client.

The Second Circuit recently clearly recognized the conflict, in Healey v. Chelsea Resources, 947 F.2d 611, 623 (2nd Cir. 1991): "A potential for conflict is inherent in a sanctions motion that is directed against both a client and a lawyer, even when, as here, the two agree that an action was fully warranted in fact and law."

I suggest our Texas rule should follow the Second Circuit and provide that whenever a motion seeks sanctions against both lawyer and client the motion shall not be hard until decision on the merits has been rendered and the client has had opportunity to secure independent counsel to represent him in opposing the motion.

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APPENDIX K

AMERICAN BAR ASSOCIATION SECTION OF LITIGATION, "STANDARDS AND GUIDELINES FOR PRACTICE UNDER RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE"

STANDARDS AND GUIDELINES FOR PRACTICE UNDER RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE

AMERICAN BAR ASSOCIATION
SECTION OF LITIGATION

June 1988

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RULE 11 STANDARDS AND GUIDELINES

Introduction

The Standards and Guidelines that follow were drafted by the Trial Practice Committee of the Section of Litigation of the American Bar Association. They were approved by the Section of Litigation in September 1988. Two underlying concerns motivated the drafting and publication of these Standards and Guidelines: (1) uneven application of Rule 11 by the courts and (2) a lack of awareness among many lawyers of significant issues that arise under the Rule.

The Committee's survey of all reported Rule 11 decisions (which now number more than 1,000) confirmed that, on many of the recurring issues, the courts apply Rule 11 uniformly. The survey also confirmed, however, that on some material issues there are differences among the district courts and individual judges that can lead to disparate treatment of similarly situated persons. These Standards and Guidelines are intended to reduce instances of disparate treatment by setting forth a uniform position on each major issue raised by Rule 11. Where the courts have differed in their approaches to the Rule, the Section has expressed its preferred approach.

These Standards and Guidelines are also intended to educate the bar on the complexities of practice under Rule 11. Most of the Standards and Guidelines are non-controversial and codify existing case law. Representative citations are provided after each Standard for the convenience of the reader. Where the Standards and Guidelines take a position on controversial issues—such as those on which the circuits are split—the divergence of authorities is reflected by "*but see*" citations and, in five instances, by a statement of the opposing view.[1] The citations do not purport to be exhaustive, and neither the citations nor the headings in the text are intended to add to or detract from the substance of the respective Standards that they accompany.

Some courts appear to have construed Rule 11 expansively in order to reach litigating conduct deemed undesirable or inappropriate. These Standards and Guidelines strive to construe the Rule neither broadly nor narrowly but in a balanced way, in light of the text and the avowed purposes of the Rule. This approach recognizes that judges have numerous sanctioning powers to which they can turn when confronted with inappropriate behavior that is not proscribed by Rule 11. The sources of these powers include, among others: Federal Rules of Civil Procedure 16(f), 26(g), 30(g)(2), 37, 41, 45(f), 55 and 56(g); 28 U.S.C. §§ 1912 and 1927; Federal Rule of Appellate Procedure 38; civil and criminal contempt power; and the inherent power of the court.[2] Courts are urged to turn to these other sources of authority in appropriate cases

1. *See* Standards (C)(4), (H)(3), (K)(2), (O)(2) and (Q).

2. *See generally* ABA Section of Litigation, SANCTIONS: RULE 11 AND OTHER POWERS (2d ed. 1988).

rather than to read into Rule 11 sanctioning power that the Rule does not confer.

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TEXT OF FEDERAL RULE OF CIVIL PROCEDURE 11

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred

because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(1)

1938 Notes of Advisory Committee on Rules

This is substantially the content of former Equity Rules 24 (Signature of Counsel) and 21 (Scandal and Impertinence) consolidated and unified. Compare former Equity Rule 36 (Officers Before Whom Pleadings Verified). Compare to similar purposes, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 4, and *Great Australian Gold Mining Co. v. Martin, L.R.*, 5 Ch.Div. 1, 10 (1877). Subscription of pleadings is required in many codes. 2 Minn.Stat. (Mason, 1927) § 9265; N.Y.R.C.P. (1937) Rule 91; 2 N.D.Comp.Laws Ann. (1913) § 7455.

This rule expressly continues any statute which requires a pleading to be verified or accompanied by an affidavit, such as:

U.S.C. Title 28 former:

§ 381 (Preliminary injunctions and temporary restraining orders).

§ 762 (Suit against the United States).

U.S.C., Title 28, former § 829 (now § 1927) (Costs; attorney liable for, when) is unaffected by this rule.

For complaints which must be verified under these rules, see Rules 23(b) (Secondary Action by Shareholders) and 65 (Injunctions).

For abolition of the rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances. See Pa. Stat.Ann. (Purdon, 1931) see 12 P.S.Pa., § 1222; for the rule in equity itself, see *Greenfield v. Blumenthal*, 69 F.2d 294 (C.C.A.3d. 1934).

(2)

1983 Amendment [Advisory Committee Notes]

Since its original promulgation, Rule 11 has provided for the striking of pleadings and the imposition of disciplinary sanctions to check abuses in the signing of pleadings. Its provisions have always applied to motions and other papers by virtue of incorporation by reference in Rule 7(b)(2). The amendment and the addition of Rule 7(b)(3) expressly confirms this applicability.

Experience shows that in practice Rule 11 has not been effective in deterring abuses. See 6 Wright & Miller, Federal Practice and Procedure: Civil § 1334 (1971). There has been considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions. See Rhodes, Ripple & Mooney, Sanctions Imposable for Violations of the Federal Rules of Civil Procedure 64–65, Federal Judicial Center (1981). The new language is intended to reduce the reluctance of courts to impose sanctions, see Moore, Federal Practice ¶ 7.05 at 1547, by

emphasizing the responsibilities of the attorney and reinforcing those obligations by the imposition of sanctions.

The amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation. *See, e.g., Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980); *Hall v. Cole*, 412 U.S. 1, 5, 93 S.Ct. 1943, 1946, 36 L.Ed.2d 702 (1973). Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.

The expanded nature of the lawyer's certification in the fifth sentence of amended Rule 11 recognizes that the litigation process may be abused for purposes other than delay. *See, e.g., Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078 (2d Cir.1977).

The words "good ground to support" the pleading in the original rule were interpreted to have both factual and legal elements. *See, e.g., Heart Disease Research Foundation v. General Motors Corp.*, 15 Fed.R.Serv.2d 1517, 1519 (S.D.N.Y.1972). They have been replaced by a standard of conduct that is more focused.

The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances. *See Kinee v. Abraham Lincoln Fed.Sav. & Loan Ass'n*, 365 F.Supp. 975 (E.D.Pa.1973). This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation. *See Nemeroff v. Abelson*, 620 F.2d 339 (2d Cir.1980).

The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper whether the pleading, motion or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

The rule does not require a party or an attorney to disclose privileged communications or work product in order to show that the signing of the pleading, motion, or other paper is substantially justified. The provisions of Rule 26(c), including appropriate orders after in camera inspection by the court, remain available to protect a party claiming privilege or work product protection.

Amended Rule 11 continues to apply to anyone who signs a pleading, motion, or other paper. Although the standard is the same for unrepresented parties, who are obliged themselves to sign the pleadings, the court has sufficient discretion to take account of the special circumstances that often arise in pro se situations. *See Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

The provision in the original rule for striking pleadings and motions as sham and false has been deleted. The passage has rarely been utilized, and decisions thereunder have tended to confuse the issue of attorney honesty with the merits of the action. *See generally* Risinger, Honesty in Pleading and its Enforcement: Some "Striking" Problems with Fed.R.Civ.P. 11, 61 Minn.L.Rev. 1 (1976). Motions under this provision generally present issues better dealt with under Rules 8, 12, or 56. *See Murchison v. Kirby*, 27 F.R.D. 14 (S.D.N.Y.1961); 5 Wright & Miller, Federal Practice and Procedure: Civil § 1334 (1969).

The former reference to the inclusion of scandalous or indecent matter, which is itself strong indication that an improper purpose underlies the pleading, motion, or other paper, also has been deleted as unnecessary. Such matter may be stricken under Rule 12(f) as well as dealt with under the more general language of amended Rule 11.

The text of the amended rule seeks to dispel apprehensions that efforts to obtain enforcement will be fruitless by insuring that the rule will be applied when properly invoked. The word "sanctions" in the caption, for example, stresses a deterrent orientation in dealing with improper pleadings, motions or other papers. This corresponds to the approach in imposing sanctions for discovery abuses. *See National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976) (per curiam). And the words "shall impose" in the last sentence focus the court's attention on the need to impose sanctions for pleading and motion abuses. The court, however, retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted.

The reference in the former text to wilfulness as a prerequisite to disciplinary action has been deleted. However, in considering the nature and severity of the sanctions to be imposed, the court should take account of the state of the attorney's or party's actual or presumed knowledge when the pleading or other paper was signed. Thus, for example, when a party is not represented by counsel, the absence of legal advice is an appropriate factor to be considered.

Courts currently appear to believe they may impose sanctions on their own motion. *See North American Trading Corp. v. Zale Corp.*, 83 F.R.D. 293 (S.D.N.Y.1979). Authority to do so has been made explicit in order to overcome the traditional reluctance of courts to intervene unless requested by one of the parties. The detection and punishment of a violation of the signing requirement.

encouraged by the amended rule, is part of the court's responsibility for securing the system's effective operation.

If the duty imposed by the rule is violated, the court should have the discretion to impose sanctions on either the attorney, the party the signing attorney represents, or both, or on an unrepresented party who signed the pleading, and the new rule so provides. Although Rule 11 has been silent on the point, courts have claimed the power to impose sanctions on an attorney personally, either by imposing costs or employing the contempt technique. *See* 5 Wright & Miller, Federal Practice and Procedure: Civil § 1334 (1969); 2A Moore, Federal Practice ¶ 11.02, at 2104 n. 8. This power has been used infrequently. The amended rule should eliminate any doubt as to the propriety of assessing sanctions against the attorney.

Even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client. *See Browning Debenture Holders' Committee v. DASA Corp., supra.* This modification brings Rule 11 in line with practice under Rule 37, which allows sanctions for abuses during discovery to be imposed upon the party, the attorney, or both.

A party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so. The time when sanctions are to be imposed rests in the discretion of the trial judge. However, it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation, and in the case of motions at the time when the motion is decided or shortly thereafter. The procedure obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration. In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.

To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record. Thus, discovery should be conducted only by leave of the court, and then only in extraordinary circumstances.

Although the encompassing reference to "other papers" in new Rule 11 literally includes discovery papers, the certification requirement in that context is governed by proposed new Rule 26(g). Discovery motions, however, fall within the ambit of Rule 11.

(3)

1987 Amendment [Advisory Committee Note]

The amendments are technical. No substantive change is intended.

A. "PLEADING, MOTION, OR OTHER PAPER"

1. Scope.

a. *Generally.* Rule 11 applies to all pleadings, motions and other papers served or filed in civil actions in federal district court, subject to the exclusions set forth in Rule 81.

Fed.R.Civ.P. 1, 7, 11, 81.

b. *Limitations.*

i. Rule 11 does not apply to all manner of litigating misconduct but only to the signing of a pleading, motion or other paper in violation of the Rule. Misconduct that does not involve the signing of such a document is not sanctionable under the Rule.

Oliveri v. Thompson, 803 F.2d 1265, 1274 (2d Cir.1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1268 (2d Cir.1987); *Adduono v. World Hockey Ass'n*, 824 F.2d 617, 621 (8th Cir.1987); *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1128, 1129, 1132 (5th Cir.1987); *United Energy Owners Committee, Inc. v. United States Energy Mgmt. Sys.*, 837 F.2d 356, 364–65 (9th Cir.1988). *See also* Standard (K)(2) (Vicarious Liability) and (K)(3) (Successor Liability), *infra*.

ii. Although Rule 11 by its terms applies to all signed papers that are served or filed, certain papers are governed by more specific requirements imposed in other rules.

See, e.g., Rule 26(g) (discovery requests and responses); Adv.Com. Note to Fed.R.Civ.P. 11; *Bell v. Bell*, No. 86–4321 (5th Cir. Sept. 17, 1986). *Cf.* Rule 37(c) (improper failure to admit); Rule 56(g) (affidavits filed on summary judgment).

2. **Removed Proceedings.** Rule 11 does not apply to, and sanctions may not be imposed for defects in, pleadings, motions or other papers served or filed in a state court action, even if that action is subsequently removed to federal court.

Brown v. Capitol Air, Inc., 797 F.2d 106, 108 (2d Cir.1986); *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253, 256–57 (4th Cir.1987).

a. Rule 11 applies to the removal petition that is filed in federal district court.

Davis v. Veslan Enters., 765 F.2d 494, 499–500 (5th Cir.1985).

b. Rule 11 applies to all pleadings, motions and other papers served or filed in federal court following removal.

Brown v. Capitol Air, Inc., 797 F.2d 106, 108 (2d Cir.1986); *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253, 256–57 (4th Cir.1987); Fed.R.Civ.P. 81(c).

3. **Appeals.** Rule 11 applies to a notice of appeal that is served or filed in federal district court.

Thornton v. Wahl, 787 F.2d 1151, 1153 (7th Cir.1986), *cert. denied*, 479 U.S. 851, 107 S.Ct. 181, 93 L.Ed.2d 116 (1986).

a. Where sanctions have been (1) wrongly denied or (2) properly granted by the district court, reasonable expenses, including attorneys' fees, incurred on an appeal of that decision may be recovered under Rule 11.

Westmoreland v. CBS, Inc., 770 F.2d 1168, 1179 (D.C.Cir.1985); *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 607 (1st Cir.1988) (same).

b. Rule 11 does not otherwise apply to papers served or filed on appeal, unless the local rules of the pertinent court of appeals incorporate Rule 11.

Braley v. Campbell, 832 F.2d 1504, 1510 n. 4 (10th Cir.1987); *In re Disciplinary Action Boucher*, 837 F.2d 869, 871 (9th Cir.1988); *In re Disciplinary Action Curl*, 803 F.2d 1004, 1007 (9th Cir.1986). *But see Thornton v. Wahl*, 787 F.2d 1151, 1153 (7th Cir.1986), *cert. denied*, 479 U.S. 851, 107 S.Ct. 181, 93 L.Ed.2d 116 (1986) (Rule 11 applies to appellate briefs).

4. **Court Papers.** Rule 11 applies only to papers signed in connection with federal court litigation if those papers are served or filed pursuant to statute, rule or order, or are served or filed by or on behalf of the signatory, in the action *sub judice*.

Adduono v. World Hockey Ass'n, 824 F.2d 617, 620–21 (8th Cir.1987).

a. Rule 11 does not extend to settlement agreements that are not submitted to or filed with the court for approval.

Adduono v. World Hockey Ass'n, 824 F.2d 617, 621 (8th Cir.1987).

b. A court may not impose Rule 11 sanctions for transgressions which occurred before another court or in another action, except that an appellate court may order the imposition of sanctions for transgressions that occurred before a lower court in the same action.

Burull v. First Nat'l Bank, 831 F.2d 788, 790 (8th Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 1225, 99 L.Ed.2d 425 (1988). *But cf.* Standard (L)(6)(d), *infra* (prior violations may be considered in determining an appropriate sanction).

B. "SIGNED BY AT LEAST ONE ATTORNEY OF RECORD . . . [OR BY ANY] PARTY WHO IS NOT REPRESENTED BY AN ATTORNEY"

1. **Signing Requirement.**

a. Every pleading, motion or other paper must be signed. If a party is represented, the signature must be that of one of the attorneys of record for the party and may not be that of a law firm. If a party appears *pro se*, the party must sign every pleading, motion or other paper, and the party's signature has the same effect as that of an attorney.

Robinson v. National Cash Register Co., 808 F.2d 1119, 1128 (5th Cir.1987).

b. "If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant." Fed.R.Civ.P. 11.

2. **Reading Requirement.** Rule 11 requires that every pleading, motion or other paper be read by the signer before it is signed. Personal ignorance of defects in a paper challenged as unmeritorious is no defense.

Zaldivar v. City of Los Angeles, 780 F.2d 823, 830 (9th Cir.1986); *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir.1986), *cert. denied*, 479 U.S. 851, 107 S.Ct. 181, 93 L.Ed.2d 116 (1986).

C. "THE SIGNATURE OF AN ATTORNEY OR PARTY CONSTITUTES A CERTIFICATE BY THE SIGNER"

1. **Certification.** Upon signing a pleading, motion or other paper, an attorney or *pro se* litigant certifies that he or she has fulfilled the affirmative duties imposed by Rule 11. This certification includes: (1) that the signer has conducted a reasonable inquiry into the facts that support the pleading, motion or other paper; (2) that the signer has conducted a reasonable inquiry into the law such that the paper embodies existing law or a good faith argument for the extension, modification, or reversal of existing legal principles; and (3) that the paper is not interposed for any improper purpose.

Fed.R.Civ.P. 11; *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866, 874 (5th Cir.1988).

2. **Standard.** In determining whether Rule 11 has been violated, the court tests the certification under an objective standard of reasonableness, except that it may inquire into the signer's actual knowledge and motivation to determine whether a paper was interposed for an improper purpose.

Note: The improper purpose standard is set forth in Part H, *infra*.

3. **Time of Testing Certification.** The certification by the signer is tested as of the time the pleading, motion or other paper is signed. The court must strive to avoid the wisdom of hindsight in determining whether the certification was valid when the paper was signed, and all doubts must be resolved in favor of the signer.

Adv.Com. Note to Fed.R.Civ.P. 11; *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir.1985); *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir.1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 540 (3d Cir.1985); *INVST Fin. Group, Inc. v. Chem-Nuclear Sys.*, 815 F.2d 391, 401 (6th Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 291, 98 L.Ed.2d 251 (1987); *Laborers Local 938 v. B.R. Starnes Co.*, 827 F.2d 1454, 1458 (11th Cir.1987); *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir.1987).

4. **No Continuing Obligation.**

a. Rule 11 does not impose a continuing obligation on the signer to update, correct or withdraw any pleading, motion or other paper which, when signed, satisfies the requirements of the Rule.

Oliveri v. Thompson, 803 F.2d 1265, 1274, 1275 (2d Cir.1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); *Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, Inc.*, 809 F.2d 451, 454

(7th Cir.1987); *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866, 874–75 (5th Cir.1988). *But see Albright v. Upjohn Co.*, 788 F.2d 1217, 1221 n. 7 (6th Cir.1986).

b. The adequacy under Rule 11 of each pleading, motion or other paper is tested as of the time that it is signed. Thus, each newly signed paper must satisfy the Rule's requirements, and must reflect the results of intervening inquiry, including discovery, investigation and other case developments, since the last prior paper was signed.

Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, Inc., 809 F.2d 451, 454 (7th Cir.1987) ("There is an implicit obligation to update because Rule 11 applies to all papers filed in the litigation. Each filing must reflect the results of reasonable inquiry. Rare is the case that goes from complaint and answer to trial without an intervening filing. Updating occurs in the course of these filings").

NOTE: An alternative rule is enforced in certain courts. This alternative may be stated as follows:

> Rule 11 imposes a continuing obligation on the signer to update, correct or withdraw any pleading, motion or other paper which, when signed, satisfies the requirements of the Rule if the signer later learns that there is no reasonable basis for the previously asserted position.

See, e.g., Albright v. Upjohn Co., 788 F.2d 1217, 1221 n. 7 (6th Cir.1986). *But see Oliveri*, 803 F.2d 1265, 1274–75 (2d Cir.1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); *Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, Inc.*, 809 F.2d 451, 454 (7th Cir.1987); *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866, 874–75 (5th Cir.1988).

D. "FORMED AFTER REASONABLE INQUIRY"

1. **Duty to Investigate.** Rule 11 imposes an affirmative duty of investigation as to both law and fact.

Rachel v. Banana Republic, Inc., 831 F.2d 1503, 1508 (9th Cir.1987); *Donaldson v. Clark*, 819 F.2d 1551, 1555–56 (11th Cir.1987); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253 (2d Cir.1985); Adv.Com. Note to Fed.R.Civ.P. 11.

2. **Timing of Investigation.** Reasonable inquiry must precede signing. A pleading, motion or other paper may not be signed first and the basis investigated thereafter.

Rachel v. Banana Republic, Inc., 831 F.2d 1503, 1508 (9th Cir.1987); Adv.Com. Note to Fed.R.Civ.P. 11.

3. **Objective Standard.** Whether an adequate investigation into fact and law has been made is judged under a standard of objective reasonableness.

Fed.R.Civ.P. 11; *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253 (2d Cir.1985).

4. **Circumstantial Nature of Inquiry.** What constitutes a reasonable inquiry depends upon the circumstances.

a. "[W]hat constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer;

whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar."

Adv.Com. Note to Fed.R.Civ.P. 11.

b. Whether a party is represented by counsel may affect the determination whether a particular prefiling inquiry was reasonable in the circumstances, but the duty to conduct a reasonable prefiling investigation extends to *pro se* litigants as well as represented parties.

Shrock v. Altru Nurses Registry, 810 F.2d 658, 661–62 (7th Cir.1987).

Reasonable Inquiry into Fact

5. **Generally.** In determining whether a reasonable inquiry into fact has been made, the court considers all relevant circumstances, including:

a. the amount of time that was available to the signer to investigate the facts;

b. the complexity of the factual and legal issues in question;

c. the extent to which pre-signing investigation was feasible;

d. the extent to which pertinent facts were in the possession of opponents or third parties, or otherwise were not readily available to the signer;

e. the knowledge of the signer;

f. the extent to which counsel relied upon his or her client for the facts underlying the pleading, motion or other paper;

g. the extent to which counsel had to rely upon his or her client for the facts underlying the pleading, motion or other paper;

h. whether the case was accepted from another attorney and, if so, at what stage of the proceedings;

i. the extent to which counsel relied upon other counsel for the facts underlying the pleading, motion or other paper;

j. the extent to which counsel had to rely upon other counsel for the facts underlying the pleading, motion or other paper;

k. the resources reasonably available to the signer to devote to the inquiry; and

l. the extent to which the signer was on notice that further inquiry might be appropriate.

Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1435 (7th Cir.1987); *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866, 875–76 (5th Cir.1988); *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir.1987).

6. ***Pro Se* Status.** While the fact that a party is appearing *pro se* may be relevant to the court's determination whether a reasonable inquiry into fact was made, the choice to proceed without counsel does not excuse a *pro se* litigant from the duty to conduct a reasonable inquiry into the factual basis of every pleading, motion and other paper that he or she signs. The standard imposed by the Rule is objective:

what a reasonable person in the *pro se* litigant's position would have done.

Shrock v. Altru Nurses Registry, 810 F.2d 658, 661–62 (7th Cir.1987).

7. **Repetitive Submissions.** Re-serving or re-filing a pleading, motion or other paper that was previously adjudicated deficient, without substantially addressing the factual deficiencies previously adjudicated, violates the duty to conduct a reasonable inquiry into fact.

Orange Prod. Credit Ass'n v. Frontline Ventures, Ltd., 792 F.2d 797, 800–01 (9th Cir.1986); *Fuji Photo Film USA, Inc. v. Aero Mayflower Transit Co.*, 112 F.R.D. 664, 667–68 (S.D.N.Y.1986).

8. **Available Information.** The signer is obliged to review documents and information reasonably available to the signer that tend to prove or disprove any fact or claim asserted.

Burgess v. United States Postal Service, Nos. 83 Civ. 8122, 8133 RLC (S.D.N.Y. Aug. 1986).

9. **Pre–Signing Obligation.** Reasonable inquiry into fact must precede the signing of any pleading, motion or paper. No document may be signed before the requisite inquiry has been made.

Cabell v. Petty, 810 F.2d 463, 466 (4th Cir.1987).

10. **Reliance on Client.**

a. A reasonable inquiry into fact ordinarily requires more than exclusive reliance on representations of fact made by a client.

Southern Leasing Partners, Ltd. v. McMullan, 801 F.2d 783, 788 (5th Cir.1986).

b. In determining whether a reasonable inquiry into fact requires more than exclusive reliance on representations of fact made by a client, the court considers all relevant circumstances, including:

i. the availability of alternate sources of information;

ii. the character of the client's knowledge, including whether it is firsthand, derivative or hearsay in nature;

iii. the plausibility of the client's account;

iv. the history and duration of the relationship between the attorney and the client;

v. the extent to which the attorney questioned the client; and

vi. the other factors considered by the court in determining whether a reasonable inquiry into fact has been made (Standard (D)(5), *supra*).

Continental Air Lines, Inc. v. Group Systems Int'l Far East, Ltd., 109 F.R.D. 594, 597 (C.D.Cal.1986); *Whittington v. Ohio River Co.*, 115 F.R.D. 201, 206 (E.D.Ky.1987); *Nassau–Suffolk Ice Cream, Inc. v. Integrated Resources, Inc.*, 114 F.R.D. 684, 689 (S.D.N.Y.1987); *Harris v. Marsh*, 679 F.Supp. 1204, 1385–86 (E.D.N.C.1987); *Fleming Sales Co. v. Bailey*, 611 F.Supp. 507, 519 (N.D.Ill.1985).

11. **Reliance on Counsel.**

a. The duty to conduct a reasonable inquiry into fact may require more of counsel than exclusive reliance on other counsel to determine the merit of factual allegations.

Unioil, Inc. v. E.F. Hutton & Co., Inc., 809 F.2d 548, 557–58 (9th Cir.1986), *cert. denied*, — U.S. —, 108 S.Ct. 83, 98 L.Ed.2d 45 (1987).

b. In determining whether a reasonable inquiry into fact requires more of counsel than exclusive reliance on other counsel, the court considers all relevant circumstances, including:

i. the availability of alternate sources of information (including the client);

ii. the basis of relied-upon counsel's knowledge, including whether it is firsthand, derivative or hearsay in nature;

iii. the plausibility of the factual account;

iv. the respective roles of counsel in the litigation (e.g., local counsel, lead counsel, forwarding counsel);

v. the respective expertise of relying counsel and of counsel on whom reliance is placed;

vi. the history, duration and nature of the relationship between counsel;

vii. the extent to which the signer questioned counsel upon whom reliance was placed concerning the nature and scope of the latter's inquiry into fact; and

viii. the other factors considered by the court in determining whether a reasonable inquiry into fact has been made (Standard (D)(5), *supra*).

Reasonable Inquiry Into Law

12. **Generally.** In determining whether a reasonable inquiry into the law has been made, the court considers all relevant circumstances, including:

a. the amount of time that was available to the signer to research and analyze the relevant legal issues;

b. the complexity of the factual and legal issues in question;

c. the clarity or ambiguity of existing law;

d. the plausibility of the legal position asserted;

e. whether the signer is an attorney or *pro se* litigant;

f. the knowledge of the signer;

g. whether the case was accepted from another attorney and, if so, at what stage of the proceedings;

h. the extent to which counsel relied upon other counsel to conduct the legal research and analysis underlying the position asserted;

i. the extent to which counsel had to rely upon other counsel to conduct the legal research and analysis underlying the position asserted;

j. the resources reasonably available to the signer to devote to the inquiry; and

k. the extent to which the signer was on notice that further inquiry might be appropriate.

Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1435 (7th Cir.1987); *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866, 875–76 (5th Cir.1988); *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir.1987).

13. ***Pro Se* Status.** While the fact that a party is appearing *pro se* is relevant to the court's determination whether a reasonable inquiry into law was made, the choice to proceed without counsel does not excuse a *pro se* litigant from the duty to conduct a reasonable inquiry into the legal basis of every pleading, motion and other paper that he or she signs. The standard imposed by the Rule is objective: what a reasonable person in the *pro se* litigant's position would have done.

Stelly v. Comm'r, 761 F.2d 1113, 1116 (5th Cir.1985) (construing Fed.R. App.P. 38), *cert. denied*, 474 U.S. 851, 106 S.Ct. 149, 88 L.Ed.2d 123 (1985); *Bacon v. American Fed'n of State, County and Mun. Employees Council No. 13*, 795 F.2d 33, 35 (7th Cir.1986) (same); *Shrock v. Altru Nurses Registry*, 810 F.2d 658, 661–62 (7th Cir.1987); *Pryzina v. Ley*, 813 F.2d 821, 823–24 (7th Cir.1987).

14. **Repetitive Submissions.** Re-serving or re-filing a pleading, motion or other paper that was adjudicated deficient, without substantially addressing legal deficiencies previously adjudicated, violates the duty to conduct a reasonable inquiry into law.

Zaldivar v. City of Los Angeles, 780 F.2d 823, 831–32 (9th Cir.1986); *Cannon v. Loyola University of Chicago*, 784 F.2d 777 (7th Cir.1986), *cert. denied*, 479 U.S. 1033, 107 S.Ct. 880, 93 L.Ed.2d 834 (1987); *Martin v. Supreme Court of New York*, 644 F.Supp. 1537, 1544–45 (N.D.N.Y. 1986).

15. **Pre–Signing Obligation.** The duty to conduct a reasonable inquiry into law requires the signer to research and analyze the legal issues involved before signing a pleading, motion or other paper.

Thornton v. Wahl, 787 F.2d 1151, 1154 (7th Cir.1986), *cert. denied*, 479 U.S. 851, 107 S.Ct. 181, 93 L.Ed.2d 116 (1986).

16. **Reliance on Client.** The duty to conduct a reasonable inquiry into law generally precludes reliance by counsel on representations of law made by a client where the client is not a lawyer. Where the client is a lawyer, the following paragraph is applicable.

In re Disciplinary Action of Curl, 803 F.2d 1004, 1006–07 (9th Cir. 1986).

17. **Reliance on Counsel.**

a. The duty to conduct a reasonable inquiry into law may require more than exclusive reliance on other counsel to determine the merit of legal positions asserted.

Robinson v. National Cash Register Co., 808 F.2d 1119, 1128 (5th Cir.1987).

b. In determining whether a reasonable inquiry into law requires more than exclusive reliance on other counsel, the court considers all relevant circumstances, including:

i. the plausibility of the legal position asserted;

ii. the respective roles of counsel in the litigation (e.g., local counsel, lead counsel, forwarding counsel);

iii. the respective expertise of counsel;

iv. the history, duration and nature of the relationship between counsel;

v. the extent to which the signer questioned counsel upon whom reliance was placed concerning the nature and scope of the latter's inquiry into law; and

vi. the other factors considered by the court in determining whether a reasonable inquiry into the law has been made (Standard (D)(12), *supra*).

Robinson v. National Cash Register Co., 808 F.2d 1119, 1128 (5th Cir.1987); *Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548, 557–58 (9th Cir.1986), *cert. denied*, — U.S. ——, 108 S.Ct. 83, 98 L.Ed.2d 45 (1987); *In re Disciplinary Action Curl*, 803 F.2d 1004, 1006–07 (9th Cir.1986).

E. "WELL GROUNDED IN FACT"

1. **Generally.** In addition to requiring a reasonable inquiry into fact, Rule 11 requires that the signer reasonably believe that each pleading, motion or other paper is well grounded in fact. A pleading, motion or other paper is well grounded in fact if a reasonable person in the signer's position, following reasonable inquiry, would believe the statements of fact contained therein. The reasonableness of the signer's belief is judged under an objective standard.

a. Rule 11 sanctions are not appropriate merely because a pleading, motion or paper does not prevail on the merits. Losing on the merits, without more, does not warrant the imposition of sanctions.

Wasyl, Inc. v. First Boston Corp., 813 F.2d 1579, 1583 (9th Cir.1987); *Oliveri v. Thompson*, 803 F.2d 1265, 1279 (2d Cir.1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); *Hartman v. Hallmark Cards, Inc.*, 833 F.2d 117, 124 (8th Cir.1987).

b. Isolated factual errors do not ordinarily warrant the imposition of sanctions if the pleading, motion or other paper as a whole is well grounded in fact.

Forrest Creek Assoc., Ltd. v. McLean Sav. & Loan Ass'n, 831 F.2d 1238, 1244–45 (4th Cir.1987).

c. It is not a violation of Rule 11 to assert or pursue a litigable issue of fact.

Rossman v. State Farm Mut. Auto Ins. Co., 832 F.2d 282, 289–90 (4th Cir.1987).

2. **Speculation.** Speculation may not be presented as fact.

In re Kelly, 808 F.2d 549, 551–52 (7th Cir.1986); *In re Disciplinary Action Curl*, 803 F.2d 1004, 1006–07 (9th Cir.1986).

3. **Unfounded or Untrue Statements.** A baseless statement or deliberate misstatement may not be presented as a statement of fact.

Frazier v. Cast, 771 F.2d 259, 265 (7th Cir.1985); *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1537 (9th Cir.1986); *Perkinson v. Gilbert/Robinson, Inc.*, 821 F.2d 686, 690–91 & n. 4 (D.C. Cir.1987).

F. "WARRANTED BY EXISTING LAW"

1. **Generally.** A position is warranted by existing law if it is supported by a non-frivolous legal argument. A legal argument is non-frivolous if it is likely to succeed on the merits or if reasonable persons could differ as to the likelihood of its success on the merits. A legal argument is frivolous only if it is obviously and wholly without merit.

Hoover Universal, Inc. v. Brockway Imco, Inc., 809 F.2d 1039, 1044 (4th Cir.1987); *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1537 (9th Cir.1986); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1081–82 (7th Cir.1987), *cert. dismissed*, — U.S. —, 108 S.Ct. 1101, 99 L.Ed.2d 229 (1988). *Cf. Autorama Corp. v. Stewart*, 802 F.2d 1284, 1288–89 (10th Cir.1986) (construing Fed.R.App.P. 38); *Reliance Ins. Co. v. Sweeney Corp.*, 792 F.2d 1137, 1138 (D.C.Cir.1986) (same). *See also* Standard (G)(2), *infra*.

a. Rule 11 sanctions are not appropriate merely because a pleading, motion or paper does not prevail on the merits. Losing on the merits, without more, does not warrant the imposition of sanctions.

Wasyl, Inc. v. First Boston Corp., 813 F.2d 1579, 1583 (9th Cir.1987); *Oliveri v. Thompson*, 803 F.2d 1265, 1279 (2d Cir.1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); *Hartman v. Hallmark Cards, Inc.*, 833 F.2d 117, 124 (8th Cir.1987).

b. Advancing a groundless claim or defense may violate Rule 11 even if other claims or defenses in the same paper are not groundless.

Frantz v. United States Powerlifting Fed'n, 836 F.2d 1063, 1067 (7th Cir.1987) (groundless claim); *Burull v. First Nat'l Bank*, 831 F.2d 788, 789–90 (8th Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 1225, 99 L.Ed.2d 425 (1988) (same); *Kramer, Levin, Nessen, Kamin & Frankel v. Aronoff*, 638 F.Supp. 714, 726 (S.D.N.Y.1986) (groundless affirmative defenses and counterclaims).

c. Advancing a non-meritorious argument or position, not interposed for an improper purpose, does not ordinarily justify the imposition of sanctions if the paper, as a whole, is warranted by existing law.

Brown v. Federation of State Medical Bds., 830 F.2d 1429 (7th Cir. 1987); *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540–41 (9th Cir.1986).

d. Advancing a debatable issue of law is not sanctionable.

Laborers Local No. 938 Joint Health & Welfare Trust Fund v. B.R. Starnes Co., 827 F.2d 1454, 1458 (11th Cir.1987); *Morristown Daily Record, Inc. v. Graphic Communications, Union Local 8N*, 832 F.2d 31, 32 n. 1 (3d Cir.1987).

2. **Recurring Problems.** A pleading, motion or other paper is not warranted by existing law if it asserts a claim or defense that is plainly barred by operation of the doctrine of collateral estoppel or *res judicata*

or by the applicable statute of limitations and the signer lacks a non-frivolous argument for avoiding the bar.

McLaughlin v. Bradlee, 803 F.2d 1197, 1201 (D.C.Cir.1986); *Norris v. Grosvenor Mktg., Ltd.*, 803 F.2d 1281, 1286–87 (2d Cir.1986); *Sam & Mary Housing Corp. v. New York State*, 632 F.Supp. 1448, 1452–53 (S.D.N.Y.1986); *Magnus Elec., Inc. v. La Republica Argentina*, 830 F.2d 1396, 1403–04 (7th Cir.1987); *International Ass'n of Machinists v. Boeing Co.*, 833 F.2d 165, 172 (9th Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 1488, 99 L.Ed.2d 715 (1988); *O'Connell v. Champion Int'l Corp.*, 812 F.2d 393, 395 (8th Cir.1987).

3. **Judicial Views.** The fact that a judge has considered and accepted a legal argument is evidence that the argument is non-frivolous.

Indianapolis Colts v. Mayor & City Council of Baltimore, 775 F.2d 177, 182 (7th Cir.1985).

4. **Misrepresentation of Law.** A baseless statement or a deliberate misrepresentation of law may not be made in a pleading, motion or other paper.

Thornton v. Wahl, 787 F.2d 1151, 1154 (7th Cir.1986), *cert. denied*, 479 U.S. 851, 107 S.Ct. 181, 93 L.Ed.2d 116 (1986).

G. "WARRANTED BY ... A GOOD FAITH ARGUMENT FOR THE EXTENSION, MODIFICATION, OR REVERSAL OF EXISTING LAW"

1. **Objective Standard.** Whether a pleading, motion, or other paper is warranted by a good faith argument for the extension, modification, or reversal of existing law is judged under a standard of objective reasonableness.

Eastway Constr. Co. v. City of New York, 762 F.2d 243, 254 (2d Cir.1985); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1081–82 (7th Cir.1987), *cert. dismissed*, — U.S. —, 108 S.Ct. 1101, 99 L.Ed.2d 229 (1988).

2. **Factors.** In determining whether a pleading, motion, or other paper is warranted by a good faith argument for the extension, modification, or reversal of existing law, the court considers all relevant circumstances, including:

a. whether the signer has offered arguments in support of the extension, modification or reversal of existing law;

b. the legal sufficiency and plausibility of those arguments;

c. the creativity, novelty or innovativeness of those arguments;

d. any other objective indication that the signer sought the extension, modification or reversal of existing law;

e. the candor and adequacy of the discussion of existing law, including adverse precedent;

f. the clarity or ambiguity of existing law;

g. the nature of the case, including whether constitutional doctrines are implicated; and

h. the danger of chilling either (i) the enthusiasm or creativity of counsel or (ii) reasonable efforts to extend, modify, or reverse existing law.

Brown v. Federation of State Medical Bds., 830 F.2d 1429 (7th Cir. 1987); *Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir.1987); *Dalton v. United States*, 800 F.2d 1316, 1320 (4th Cir.1986); *Southern Leasing Partners, Ltd. v. McMullan*, 801 F.2d 783, 788–89 (5th Cir.1986); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1081–82 (7th Cir.1987), *cert. dismissed*, — U.S. ——, 108 S.Ct. 1101, 99 L.Ed.2d 229 (1988); *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir.1986); *Gaiardo v. Ethyl Corp.*, 835 F.2d 479 (3d Cir.1987).

H. "IMPROPER PURPOSE"

1. **Generally.** No pleading, motion or other paper may be interposed for an improper purpose, such as to harass or to cause unnecessary delay or a needless increase in the cost of litigation. Fed.R.Civ.P. 11.

2. **Objective Standard.** Whether a signer acted with an improper purpose is judged under an objective standard.

Brown v. Federation of State Medical Bds., 830 F.2d 1429 (7th Cir. 1987); *In re TCI, Ltd.*, 769 F.2d 441, 445 (7th Cir.1985).

a. *Successive Filings.* Repetitive service or filing of previously rejected positions evidences an improper purpose.

Zaldivar v. City of Los Angeles, 780 F.2d 823, 831–32 (9th Cir.1986).

b. *"Harass[ment]."* "Harass[ment]," within Rule 11, is not gauged by the effect of the challenged conduct on the opposing party—whether e.g., the conduct did in fact bother, annoy or vex. The focus is on the improper purpose of the signer, objectively tested, rather than the consequences of the signer's act, subjectively viewed by the signer's opponent.

Zaldivar v. City of Los Angeles, 780 F.2d 823, 831–32 (9th Cir.1986).

3. **Filing of Objectively Meritorious Paper for Improper Purpose.**

a. The service or filing of a pleading, motion or other paper for an improper purpose violates the Rule, even if the paper is well grounded in fact and law.

Brown v. Federation of State Medical Bds., 830 F.2d 1429 (7th Cir. 1987); *In re TCI, Ltd.*, 769 F.2d 441 (7th Cir.1985); *Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192, 1202 (7th Cir.1987). *But see Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1508 (9th Cir.1987); *Cf. Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir.1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987).

b. The service or filing of excessive, successive or repetitive pleadings, motions or other papers may constitute evidence of an improper purpose even if each paper is well founded in fact and law.

Robinson v. National Cash Register Co., 808 F.2d 1119, 1130 (5th Cir.1987).

NOTE: An alternative rule is enforced in certain courts. This alternative may be stated as follows:

> A pleading, motion or other paper that is well grounded in fact and law does not violate the improper purpose clause regardless of the signer's subjective intent.

Rachel v. Banana Republic, Inc., 831 F.2d 1503, 1508 (9th Cir.1987); *Hudson v. Moore Business Forms, Inc.*, 836 F.2d 1156, 1159 (9th Cir.1987). *Cf. Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir.1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987). *But see Brown, supra; Hill, supra; Robinson, supra.*

I. "THE COURT, UPON ... ITS OWN INITIATIVE"

1. ***Sua Sponte* Sanctions.** The court may impose Rule 11 sanctions upon its own initiative, provided that the manner in which sanctions are imposed comports with due process requirements and, in appropriate cases, with other applicable rules or statutes.

Sanko S.S. Co. v. Galin, 835 F.2d 51, 53 (2d Cir.1987); *Gagliardi v. McWilliams*, 834 F.2d 81, 82–83 (3d Cir.1987). *See also* Standards (L)(2)(k) (Types of Sanctions) and (M) (Procedure), *infra*.

J. "THE COURT ... SHALL IMPOSE"

1. **Mandatory Nature of Sanctions.** If a pleading, motion or other paper is not well grounded in fact or warranted by existing law or by a good faith argument for the extension, modification or reversal of existing law, or if it is interposed for an improper purpose, the court must, subject to the following paragraph, impose a sanction.

Brown v. Federation of State Medical Bds., 830 F.2d 1429 (7th Cir. 1987); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253 n. 7 (2d Cir.1985); *McLaughlin v. Bradlee*, 803 F.2d 1197, 1205 (D.C.Cir. 1986).

2. **Equitable Considerations.** A court may decline to impose a sanction if a violation of the Rule is merely technical or *de minimis* in nature or if, in the circumstances, it would be inequitable to impose a sanction.

Oliveri v. Thompson, 803 F.2d 1265, 1280 (2d Cir.1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); *Brown v. Capitol Air, Inc.*, 797 F.2d 106, 108 (2d Cir.1986); *Greenberg v. Sala*, 822 F.2d 882, 887 (9th Cir.1987); *but see Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866 (5th Cir.1988) (en banc).

3. **Discretion as to Form.** The type of sanction that is imposed rests within the discretion of the judge.

Westmoreland v. CBS, Inc., 770 F.2d 1168, 1174–75 (D.C.Cir.1985); *Eastway Constr. Corp. v. City of New York*, 821 F.2d 121, 123 (2d Cir.), *cert. denied*, — U.S. —, 108 S.Ct. 269, 98 L.Ed.2d 226 (1987); *Albright v. Upjohn Co.*, 788 F.2d 1217, 1222 (6th Cir.1986); *INVST Fin. Group, Inc. v. Chem-Nuclear Sys.*, 815 F.2d 391, 401 (6th Cir.), *cert. denied*, — U.S. —, 108 S.Ct. 291, 98 L.Ed.2d 251 (1987); *Unioil, Inc.*

v. E.F. Hutton & Co., 809 F.2d 548, 559 (9th Cir.1986), *cert. denied.* — U.S. —, 108 S.Ct. 83, 98 L.Ed.2d 45 (1987). *See also* Part L. *infra.*

K. "UPON THE PERSON WHO SIGNED IT, A REPRESENTED PARTY, OR BOTH"

1. **Generally.** Sanctions may be imposed on the signer of the offending pleading, motion or other paper; on the signer's client; or both. Fed.R.Civ.P. 11; *Chevron, U.S.A., Inc. v. Hand*, 763 F.2d 1184, 1187 (10th Cir.1985).

2. **Vicarious Liability.**

Liability for a Rule 11 violation ordinarily does not extend beyond the signing attorney, other than to the client.

Robinson v. National Cash Register Co., 808 F.2d 1119, 1132 (5th Cir.1987); *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866 (5th Cir.1988) (en banc); *see also In re DeLorean Motor Co. Litig.*, 59 B.R. 329 (E.D.Mich.1986). *But see: Calloway, infra; Anschutz, infra; Sony, infra.*

NOTE: An alternative rule is enforced in certain courts. This alternative may be stated as follows (in two parts):

a. Liability for a Rule 11 violation extends beyond a signing attorney to other members of his or her law firm.

Calloway v. Marvel Entertainment Group, 650 F.Supp. 684, 687–88 (S.D.N.Y.1986); *Anschutz Petroleum Mktg. Corp. v. E.W. Saybolt & Co.*, 112 F.R.D. 355 (S.D.N.Y.1986); *Sony Corp. v. S.W.I. Trading, Inc.*, 104 F.R.D. 535, 542 (S.D.N.Y.1985). *But see Robinson, infra; DeLorean, infra.*

b. The liability of other members of the firm exists only to the extent that the pertinent court papers were signed and served or filed in violation of Rule 11 while the offender was a member of the firm; it does not extend to other papers.

Calloway v. Marvel Entertainment Group, 650 F.Supp. 684, 687–88 (S.D.N.Y.1986).

3. **Successor Liability.** When new counsel assumes responsibility for a pending case, new counsel's liability is limited to liability for the pleadings, motions and other papers that he or she signs; no responsibility is assumed for papers previously signed by predecessor counsel except to the extent that such papers are expressly relied upon or incorporated within papers signed by successor counsel.

United States v. Kirksey, 639 F.Supp. 634 (S.D.N.Y.1986). *Note: See also* Standard (C)(4)(a)–(b), *supra.*

L. "AN APPROPRIATE SANCTION"

1. **Generally.** The district court is vested with broad discretion to fashion an appropriate sanction for violation of Rule 11.

Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 n. 7 (2d Cir.1985); *McLaughlin v. Bradlee*, 803 F.2d 1197, 1205 (D.C.Cir.1986); *Albright v. Upjohn Co.*, 788 F.2d 1217, 1222 (6th Cir.1986).

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2. **Types of Sanctions.** Among the types of sanction that the court, in its discretion, may choose to impose are:

a. a reprimand of the offender;

b. mandatory continuing legal education;

c. a fine;

d. an award of reasonable expenses, including reasonable attorneys' fees, incurred as a result of the misconduct;

e. reference of the matter to the appropriate attorney disciplinary or grievance authority;

f. an order precluding the introduction of certain evidence;

g. an order precluding the litigation of certain issues;

h. an order precluding the litigation of certain claims or defenses;

i. dismissal of the action;

j. entry of a default judgment;

k. injunctive relief limiting a party's future access to the courts; and

l. censure, suspension or disbarment from practicing before the forum court, subject to applicable rules or statutes.

Lieb v. Topstone Indus., Inc., 788 F.2d 151, 157–58 (3d Cir.1986); *Davis v. Veslan Enters.*, 765 F.2d 494, 500–01 & n. 14 (5th Cir.1985); *In re Kelly*, 808 F.2d 549, 552 (7th Cir.1986); *Cheek v. Doe*, 828 F.2d 395, 397–98 (7th Cir.), *cert. denied*, — U.S. —, 108 S.Ct. 349, 98 L.Ed.2d 374 (1987); *In re Disciplinary Action Curl*, 803 F.2d 1004, 1007 (9th Cir.1986); *Cotner v. Hopkins*, 795 F.2d 900, 902–03 (10th Cir.1986); *Gagliardi v. McWilliams*, 834 F.2d 81, 82–83 (3d Cir.1987); *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866 (5th Cir.1988) (en banc); *Frantz v. United States Powerlifting Federation*, 836 F.2d 1063, 1066 (7th Cir. 1987).

3. **Allocation.**

a. *Relative Culpability.* Sanctions should be allocated among the persons responsible for the offending pleading, motion or other paper, based upon their relative culpability.

Chevron, U.S.A., Inc. v. Hand, 763 F.2d 1184, 1187 (10th Cir.1985); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1178–79 (D.C.Cir.1985).

b. *Attorney–Client Relationship.* In allocating sanctions between counsel and client, the court takes into account the privileged nature of their relationship and avoids encroaching upon the attorney-client privilege or jeopardizing counsel's ability to act, and act effectively, for the client.

4. **Least Severe Sanction.** In determining the appropriate sanction, the court considers which of the purposes underlying Rule 11 it seeks to implement and then imposes the least severe sanction adequate to serve the purpose or purposes.

Matter of Yagman, 796 F.2d 1165, 1182–83 (9th Cir.1986); *INVST Fin. Group, Inc. v. Chem-Nuclear Sys.*, 815 F.2d 391, 404 (6th Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 291, 98 L.Ed.2d 251 (1987); *Cabell v. Petty*, 810 F.2d 463, 466–67 (4th Cir.1987); *Brown v. Federation of*

State Medical Bds., 830 F.2d 1429, 1437 (7th Cir.1987); *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866 (5th Cir.1988); *Gaiardo v. Ethyl Corp.*, 835 F.2d 479 (3d Cir.1987).

5. **Purposes of Rule 11.** Among the purposes for which a court may impose Rule 11 sanctions are:

a. deterring dilatory or abusive litigation tactics by the same offender and others;

b. imposing punishment for deserving misconduct;

c. compensating an offended person for some or all of the reasonable expenses incurred by reason of the misconduct;

d. alleviating other prejudice to an offended person resulting from the misconduct, including prejudice to that person's litigation positions; and

e. streamlining litigation and bringing about economies in the use of judicial resources by curtailing frivolous and abusive practices.

Westmoreland v. CBS, Inc., 770 F.2d 1168, 1180 (D.C.Cir.1985); *Brown v. Capitol Air, Inc.*, 797 F.2d 106, 108 (2d Cir.1986); *Oliveri v. Thompson*, 803 F.2d 1265, 1281 (2d Cir.1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1083 (7th Cir.1987), *cert. dismissed*, — U.S. —, 108 S.Ct. 1101, 99 L.Ed.2d 229 (1988); *Brown v. Federation of State Medical Bds.*, 830 F.2d 1429, 1437-38 (7th Cir.1987); *Lieb v. Topstone Indus., Inc.*, 788 F.2d 151, 158 (3d Cir.1986); *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir.1987).

6. **Mitigating and Aggravating Factors.** Among the factors which the court may consider (1) as militating in favor of, or against, the imposition of a particular sanction, or (2) in the case of a monetary sanction, in assessing the amount thereof, are:

a. the good faith or bad faith of the offender;

b. the degree of willfulness, vindictiveness, negligence or frivolousness involved in the offense;

c. the knowledge, experience and expertise of the offender;

d. any prior history of sanctionable conduct on the part of the offender;

e. the reasonableness and necessity of the out-of-pocket expenses incurred by the offended person as a result of the misconduct;

f. the nature and extent of prejudice, apart from out-of-pocket expenses, suffered by the offended person as a result of the misconduct;

g. the relative culpability of client and counsel, and the impact on their privileged relationship of an inquiry into that area;

h. the risk of chilling the specific type of litigation involved;

i. the impact of the sanction on the offender, including the offender's ability to pay a monetary sanction;

j. the impact of the sanction on the offended party, including the offended person's need for compensation;

k. the relative magnitude of sanction necessary to achieve the goal or goals of the sanction;

l. burdens on the court system attributable to the misconduct, including consumption of judicial time and incurrence of juror fees and other court costs;

m. the degree to which the offended person attempted to mitigate any prejudice suffered by him or her;

n. the degree to which the offended person's own behavior caused the expenses for which recovery is sought;

o. the extent to which the offender persisted in advancing a position while on notice that the position was not well grounded in fact or warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and

p. the time of, and circumstances surrounding, any voluntary withdrawal of a pleading, motion or other paper.

Lieb v. Topstone Indus., Inc., 788 F.2d 151, 157–58 (3d Cir.1986); *Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir.1987); *In re Disciplinary Action of Curl*, 803 F.2d 1004, 1007 (9th Cir.1986); *Huettig & Schromm, Inc. v. Landscape Contractors Council*, 790 F.2d 1421, 1426–27 (9th Cir.1986); *INVST Financial Group, Inc. v. Chem-Nuclear Sys., Inc.*, 815 F.2d 391, 404 (6th Cir.), *cert. denied*, —— U.S. ——, 108 S.Ct. 291, 98 L.Ed.2d 251 (1987); *Cleveland Demolition Co. v. Azcon Scrap Corp.*, 827 F.2d 984, 988 (4th Cir.1987); *Chevron, U.S.A., Inc. v. Hand*, 763 F.2d 1184, 1187 (10th Cir.1985); *Oliveri v. Thompson*, 803 F.2d 1265, 1281 (2d Cir.1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); *Anschutz Petroleum Mktg. Corp. v. E. W. Saybolt & Co.*, 112 F.R.D. 355, 358 (S.D.N.Y.1986); *Miller v. United States*, 669 F.Supp. 906, 911 & n. 3 (N.D.Ind.1987); *Brown v. Federation of State Medical Bds.*, 830 F.2d 1429 (7th Cir.1987).

7. **Attorneys' Fees.**

a. If the court decides to award a monetary sanction to compensate an offended person for attorneys' fees incurred as a result of a Rule 11 violation, the relevant circumstances include:

i. the time and labor required;

ii. the novelty and difficulty of the questions involved;

iii. the skill requisite to perform the legal service properly;

iv. the customary fee;

v. whether the fee is fixed or contingent;

vi. time limitations imposed by the client or the circumstances;

vii. the amount involved and the results obtained;

viii. the experience, reputation and ability of the attorneys;

ix. awards in similar cases; and

x. the other factors set forth in Standard (L)(6), *supra*.

Great Hawaiian Fin. Corp. v. Aiu, 116 F.R.D. 612, 619 (D. Haw. 1987); *Eastway Constr. Corp. v. City of New York*, 637 F.Supp. 558, 569–75

(E.D.N.Y.1986), *mod'd*, 821 F.2d 121, 122–24 (2d Cir.), *cert. denied*. —— U.S. ——, 108 S.Ct. 269, 98 L.Ed.2d 226 (1987).

b. An agreed-upon fee between a successful party and counsel might be reasonable between attorney and client, in light of the circumstances, yet not reasonable when judicially shifted to the opposing party pursuant to Rule 11.

Aetna Casualty & Sur. Co. v. Fernandez, 830 F.2d 952, 956–57 & nn. 17–18 (8th Cir.1987); *Doe v. Keane*, 117 F.R.D. 103, 106–07 (W.D. Mich.1987).

M. PROCEDURE

1. **Generally.** Due process requires that, before sanctions are imposed, the alleged offender be afforded fair notice and an opportunity to be heard.

Gagliardi v. McWilliams, 834 F.2d 81, 82–83 (3d Cir.1987).

2. **Notice.** Sanctions may not be imposed upon a person who is not on notice of (a) the fact that sanctions are under consideration, (b) the reasons why sanctions are under consideration or (c) the type of sanctions under consideration.

Gagliardi v. McWilliams, 834 F.2d 81, 82–83 (3d Cir.1987); *Sanko S.S. Co. v. Galin*, 835 F.2d 51, 53 (2d Cir.1987); *Shrock v. Altru Nurses Registry*, 810 F.2d 658, 662 (7th Cir.1987); *Braley v. Campbell*, 832 F.2d 1504, 1514–15 (10th Cir.1987) (en banc).

3. **Factors.** The procedure employed may vary with the circumstances, provided that due process requirements are satisfied. Among the factors that the court considers in fashioning a procedure to insure due process are:

a. the severity of the sanction under consideration;

b. the interests of the alleged offender in having a sanction imposed only when justified;

c. the risk of an erroneous imposition of sanctions relative to the probable value of additional notice and hearing;

d. the interest of the court in the efficient use of the judicial system, including the fiscal and administrative burdens that additional procedural requirements would entail;

e. whether the sanctions at issue were sought by a party or are being considered *sua sponte* by the court;

f. if the sanctions were sought by a party, the type of sanction sought;

g. the type of sanction under consideration by the court;

h. whether the alleged offender was notified, or is otherwise aware, that sanctions are under consideration, and the nature of those sanctions;

i. whether the sanction under consideration rests on a factual finding, such as a finding of bad faith on the part of the alleged offender;

j. whether the judge imposing or considering the sanction presided over the proceedings and is the same judge before whom the offense was committed;

k. whether the alleged offender has been provided an opportunity to be heard before sanctions issued;

l. whether the alleged offender will be provided an opportunity to be heard after sanctions issued;

m. whether counsel, client or both are the target of the proposed sanction, and the impact of the sanctions proceedings on the attorney-client relationship.

Adv.Com.Note to Fed.R.Civ.P. 11; *Donaldson v. Clark*, 819 F.2d 1551, 1558–60 (11th Cir.1987); *INVST Fin. Group, Inc. v. Chem-Nuclear Sys., Inc.*, 815 F.2d 391, 405 (6th Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 291, 98 L.Ed.2d 251 (1987); *McLaughlin v. Bradlee*, 803 F.2d 1197, 1205–06 (D.C. Cir.1986); *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 540–41 (3d Cir.1985); *Davis v. Veslan Enters.*, 765 F.2d 494, 500 & n. 12 (5th Cir.1985); *Shrock v. Altru Nurses Registry*, 810 F.2d 658, 662 (7th Cir.1987); *Rodgers v. Lincoln Towing Serv., Inc.*, 771 F.2d 194, 205–06 (7th Cir.1985).

4. **Hearing.** The court, in its discretion, shall determine whether to hold a hearing on sanctions under consideration. A hearing is ordinarily required prior to the issuance of any sanction that is based upon a finding of bad faith on the part of the alleged offender. A hearing is appropriate whenever it would assist the court in its consideration of the sanctions issue or would significantly assist the alleged offender in the presentation of his or her defense.

Rodgers v. Lincoln Towing Serv., Inc., 771 F.2d 194, 205–06 (7th Cir.1985); *INVST Fin. Group, Inc. v. Chem-Nuclear Sys.*, 815 F.2d 391, 405 (6th Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 291, 98 L.Ed.2d 251 (1987); *Brown v. Nat'l Board of Medical Examiners*, 800 F.2d 168, 173 (7th Cir.1986).

5. **Discovery.** Except in extraordinary circumstances, discovery is not permitted on Rule 11 motions.

See Adv.Com.Note to Fed.R.Civ.P. 11.

N. FINDINGS AND CONCLUSIONS

1. **Sanction Granted.** The record must reflect the specific reasons for which a sanction is imposed and the basis on which the imposition rests. The degree of specificity required will depend upon the circumstances and upon the amount, type and effect of the sanction imposed. Unless it is otherwise apparent from the record, the trial court should include an identification of each pleading, motion or other paper held to violate the Rule, a specification of the nature of the violation and an explanation of the manner in which the sanction was computed or otherwise determined.

F. H. Krear & Co. v. Nineteen Named Trustees, 810 F.2d 1250, 1268 (2d Cir.1987); *Brown v. Federation of State Medical Bds.*, 830 F.2d 1429

(7th Cir.1987); *Lieb v. Topstone Indus., Inc.*, 788 F.2d 151, 158 (3d Cir.1986).

2. **Sanction Denied.** If the court denies a motion for sanctions, it shall have discretion to determine whether to place on the record the reasons for its action.

Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866 (5th Cir.1988) (en banc).

O. JURISDICTION TO IMPOSE SANCTIONS

1. **Generally.** A court has jurisdiction to impose sanctions upon any counsel or *pro se* litigant who has signed a pleading, motion or other paper served or filed in the action before the court, even if the court lacks jurisdiction over the subject matter of the action.

Orange Prod. Credit Ass'n v. Frontline Ventures Ltd., 792 F.2d 797, 801 (9th Cir.1986); *News-Texan, Inc. v. City of Garland*, 814 F.2d 216, 219–20 (5th Cir.1987).

2. **Post–Dismissal or Post–Judgment Sanctions.**

a. The court may impose sanctions for a violation of Rule 11 after the underlying action has been dismissed or judgment entered.

McLaughlin v. Bradlee, 803 F.2d 1197, 1205 (D.C.Cir.1986); *Hicks v. Southern Maryland Health Sys. Agency*, 805 F.2d 1165, 1166–67 (4th Cir.1986); *Jackson Marine Corp. v. Harvey Barge Repair, Inc.*, 794 F.2d 989, 991–92 (5th Cir.1986); *In re Ruben*, 825 F.2d 977, 981–82 (6th Cir.1987); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1077–79 (7th Cir.1987), *cert. dismissed*, — U.S. —, 108 S.Ct. 1101, 99 L.Ed.2d 229 (1988); *Langham-Hill Petroleum Inc. v. Southern Fuels Co.*, 813 F.2d 1327, 1330–31 (4th Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 99, 98 L.Ed.2d 60 (1987). *But see: Foss, infra; Johnson, infra.*

b. The court's discretion to impose post-judgment or post-dismissal sanctions may be limited by local court rule.

Hicks v. Southern Maryland Health Sys. Agency, 805 F.2d 1165, 1166 (4th Cir.1986); *In re Ruben*, 825 F.2d 977, 982 (6th Cir.1987); *cf. White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 450–55, 102 S.Ct. 1162, 1165–68, 71 L.Ed.2d 325 (1982).

NOTE: An alternative rule is enforced in certain courts. This alternative may be stated as follows (in two parts):

a. Once an action is dismissed, the court loses all jurisdiction and is precluded from entering an award of sanctions.

Johnson Chemical Co. v. Home Care Prods., Inc., 823 F.2d 28, 31 (2d Cir.1987); *Foss v. Federal Intermediate Credit Bank*, 808 F.2d 657, 660 (8th Cir.1986). *But see: McLaughlin v. Bradlee*, 803 F.2d 1197, 1205 (D.C. Cir.1986); *Hicks v. Southern Maryland Health Sys. Agency*, 805 F.2d 1165, 1166–67 (4th Cir.1986); *Jackson Marine Corp. v. Harvey Barge Repair, Inc.*, 794 F.2d 989, 991–92 (5th Cir.1986); *In re Ruben*, 825 F.2d 977, 981–82 (6th Cir.1987); *Szabo Food Serv. Inc. v. Canteen Corp.*, 823 F.2d 1073, 1077–79 (7th Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 1101, 99 L.Ed.2d 229 (1988); *Langham-Hill Petroleum*

Inc. v. Southern Fuels Co., 813 F.2d 1327, 1330–31 (4th Cir.1987), *cert. denied*, — U.S. ——, 108 S.Ct. 99, 98 L.Ed.2d 60 (1987).

b. Following the entry of judgment, no sanctions may be imposed.

Adduono v. World Hockey Ass'n, 824 F.2d 617 (8th Cir.1987).

P. APPEALABILITY

1. **Parties.**

a. An order imposing sanctions upon a party is appealable upon the entry of judgment or a final decision adverse to that party.

28 U.S.C. § 1291.

b. An order imposing sanctions is appealable only after sanctions have been fixed.

In re Jeanette Corp., 832 F.2d 43, 46 & n. 2 (3d Cir.1987).

2. **Non-Parties.** An order imposing sanctions on counsel, or any other non-party to the underlying action, may immediately be appealed as a final order.

Optyl Eyewear Fashion Int'l Corp. v. Style Cos., 760 F.2d 1045, 1047 n. 1 (9th Cir.1985); *Unioil, Inc. v. E.F. Hutton & Co., Inc.*, 809 F.2d 548, 556 (9th Cir.1986), *cert. denied*, — U.S. ——, 108 S.Ct. 83, 98 L.Ed.2d 45 (1987); *Sanko S.S. Co. v. Galin*, 835 F.2d 51, 53 (2d Cir.1987); *Frazier v. Cast*, 771 F.2d 259, 262 (7th Cir.1985).

Q. APPELLATE REVIEW

Generally. All aspects of an order imposing sanctions—factual findings, legal conclusions and the appropriateness of the sanction imposed—are reviewed under the abuse-of-discretion standard. *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866 (5th Cir.1988) (en banc).

NOTE: An alternative rule is enforced in certain courts. This alternative may be stated as follows:

Upon review of a district court order imposing sanctions:

a. factual determinations are reviewed under the clearly erroneous standard;

b. the legal conclusion that the facts constitute a violation of the Rule is reviewed *de novo;* and

c. the appropriateness of the sanction imposed is reviewed under the abuse-of-discretion standard.

Zaldivar v. City of Los Angeles, 780 F.2d 823, 828 (9th Cir.1986); *Brown v. Federation of State Medical Bds.*, 830 F.2d 1429 (7th Cir.1987).

APPENDIX L

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APPENDIX M

LIST OF BATES-STAMPED MATERIALS REVIEWED BY THE TASK FORCE

SUPREME COURT TASK FORCE ON SANCTIONS

Index of Batestamped Materials

1. Letter from Chuck Herring to Task Force and advisory committee enclosing items 1 through 8 below. (000000-000-A)

   Correspondence from Luke Soules, Chairman of the Texas Supreme Court Advisory Committee, transmitting materials that the Committee has received or developed pertaining to proposed amendments or comments applicable to sanctions. (000001-000034)

2. A preliminary bibliography of sanctions articles and papers. (000035-000039)

3. The Texas Supreme Court's decisions in Transamerican Natural Gas Corporation v. Powell and Braden v. Downey. (000040-000070)

4. Various sanctions rules, statutes: Rules 13, 18a, 21b, 166a, 166b, 215, 269, Tex. R. Civ. P.; Rule 84, Tex. R. App. P.; §§ 9.011, 9.012, Tex. Civ. Prac. & Rem. Code; Rules 11, 16, 26, 37, Fed. R. Civ. P.; Rule 38, Fed. R. App. P.; 28 U.S.C. §§ 1912, 1927. (000071-000100)

5. Proposed amendments to Rules 16, 26, 30, 33, 37, 56, Fed. R. Civ. P. (000101-000138)

6. Miscellaneous articles and additional materials. (000139-000148)

7. Rule 203, Tex. R. Civ. P. (000149)

8. Supreme Court Order - Appointment of Task Forces to Consider Changes in the Rules of Procedure in Texas Courts. (000150-000152)

9. 6/91 proposed amendments to Fed. R. Civ. P. 26. (000153-000169)

10. Memo to Chuck Herring from Jett Hanna on legal malpractice issues concerning sanctions, including Loigman v. Massachusetts Bay Insurance Co. (000170-000178)

11. Letter from David Nagle to Chuck Herring attaching proposed set of new rules. (000179-000187)

12. Letter from Judge Scott Brister to Chuck Herring enclosing a draft amendment to Rule 215. (000188-000197)

13. Textual comparison of Rule 13 of the TRCP with Rule 11 of the FRCP. (000198-000204)

14. Letter from Chuck Herring to Task Force and advisory committee members enclosing items 9 through 13 above. (000205-000222)

15. Letter from Stephen R. Marsh to Judge Scott Brister commenting on Judge Brister's proposals regarding a revised TRCP Rule 215. (000223-000227)

16. Letter from Stephen R. Marsh to Chuck Herring responding to the Issues and Questions raised at the first Task Force meeting. (000228-000236)

17. Article from September 1991 issue of Trial: "A Reasonable Rule 11" by Bob Gibbins. (000237)

18. Letter from Stephen R. Marsh to Chuck Herring enclosing a draft of Tex. R. Civ. P. 215. (000238-000242)

19. Letter from Chuck Herring to Task Force and advisory committee members enclosing items 15 through 18 above. (000243)

20. Letter from Chuck Herring to Task Force and advisory committee members enclosing items 20 through 24 below. (000243-A - 243-B)

    A paper furnished by Jett Hanna, authored by Joel Wilson, "Difficult Decisions: The Relationship Between Malpractice and Sanctions." (000244-287)

21. Letter from Beth Crabb enclosing the New York State Bar Association "Report of Special Committee to Consider Sanctions for Frivolous Litigation in New York State Courts" (March 20, 1990). (000288-353)

22. Letter from Stephen Marsh enclosing a proposed redraft of Tex. R. Civ. P. 13. (000354-356)

23. Letter from Harold Nix responding to C. Herring August 26, 1991 letter. (000357-358)

24. Lists of Texas cases citing Rule 13 and Rule 215. (000359-376)

25. 10/7/91 Texas Lawyer article: "The Defense Blows It. AG Misses Deadline, Defends Whistleblower Suit Without Experts." (000377-379)

26. 9/29/91 Letter from Beth Crabb to Chuck Herring enclosing (1) Rule 11 outline, (2) a copy of the "Call for Written Comments on Rule 11...," published by the Advisory Committee, identifying some of the major concerns and

criticisms of Rule 11 and attaching a bibliography of Rule 11 materials, (3) a copy of the currently proposed revisions to Rule 11 and Advisory Committee notes, (4) a supplemental bibliography on Rule 11 materials, (5) a copy of Cochran, Rule 11: The Road To Amendment, 8 Fifth Cir. Rptr 559 (1991). (000380-447)

27. Browning v. Kramer, 931 F.2d 340 (5th Cir. 1991). (000448-456)

28. 9/11/91 Letter to Chuck Herring from David Holman. (000457-458)

29. 9/9/91 Letter to Chuck Herring from Robert Valadez enclosing a memorandum outlining New York's procedural analogues to Texas Rules 13 and 215; also, text of New York rules with excerpts from the commentaries and notes of decisions. (000459-545)

30. 7/31/91 Letter to J. Ross Hostetter from Burt Berry re discovery issues, citing an opinion in American Home Insurance Company v. Cooper, 786 S.W.2d 769. (000546-547)

31. 8/9/91 Letter to Justice Kilgarlin from Stephen Marsh, attaching an article entitled "Professionalism and Modern Litigation Technique." (000548-552)

32. 9/13/91 Letter to Chuck Herring from Stephen Marsh. Also attached is a copy of Cochran, Rule 11: The Road To Amendment, 8 Fifth Cir. Rptr 559 (1991). (000553-572)

33. Letter from Chuck Herring to Task Force and advisory committee members enclosing items 25 through 32 above. (000573-574)

34. Appendices to memo (#35) re various states' rules comparable to Texas Rules 13 and 215. (000575-678)

35. Sanctions Task Force; Overview of various states' rules comparable to Texas Rules 13 and 215: Illinois, Maryland, Massachusetts, Mississippi, New Jersey, Ohio, and Wisconsin. (000679-694)

36. Letter from Chuck Herring to Task Force and Advisory Committee Members enclosing items 34 and 35 above. (000695)

37. Rodriguez v. State Dept. of Highways and Public Transportation, No. 13-90-352-CV (Tex. App. -- Corpus Christi October 3, 1991, n.w.h.). (000696-701)

38. American Bar Association Standards and Guidelines for Practice under Rule 11 of the Federal Rules of Civil Procedure, 121 F.R.D. 101 (1988). (000702-731)

39. Amended Bibliography of sanctions articles, annotations and books. (000732-744)

40. Bill Burton's memo re Dean John Sutton's proposed changes re TRCP 11 and re new rule concerning disqualification of lawyers. (000745-747)

41. October 29, 1991 letter from Judge Brister enclosing a revised version of his original draft of Rule 215. (000748-749)

42. October 30, 1991 letter from Luke Soules enclosing a letter from James Kronzer regarding proposed changes to TRCP 166b. (000750-751)

43. October 28, 1991 letter from Professor John Sutton enclosing a Georgia Supreme Court opinion, Yost v. Torok. (000752-755)

44. October 1991 Texas Bar Journal article entitled "The Least Severe Sanction Adequate: Reversing the Trend in Rule 11 Sanctions," by Judge Sam D. Johnson, Byron C. Keeling, and Thomas M. Contois. (000756-763)

45. California Rules of Procedure on sanctions for discovery misuse received from David Nagle. (000764)

46. October 25, 1991 letter from Byron Keeling enclosing a draft article for Baylor Law Review, entitled "The Proposed Amendments to Rule 11: Urgent Problems and Suggested Solutions," by Judge Sam D. Johnson, Thomas M. Contois, and Byron C. Keeling. (000765-815)

47. Pages 3 thru 6 and 18 thru 20 of the amici curiae brief in Chrysler Corporation v. The Honorable Robert Blackmon, now pending in the Texas Supreme Court. (000816-823)

48. November 13, 1991 letter from Byron C. Keeling enclosing the memorandum regarding the nature of sanctions in Robeson Defense Committee v. Britt. (000824-864)

49. November 19, 1991 letter from Beth Crabb enclosing "Bench-Bar Proposal to Revise Civil Procedure Rule 11," 137 F.R.D. 159. (000865-881)

50. November 19, 1991 memo from Dudley Page McClellan entitled "The applicability against the State of Texas and its agencies of sanctions under the Texas Rules of Civil Procedure." (000882-897)

51. October 28, 1991 Texas Lawyer article entitled "Celebrating -- and Helping Repair -- the Texas Rules of Civil Procedure" by Alex Wilson Albright. (000898)

52. Recent decisions: Service Lloyds Insurance Company vs. Harbison; Mossler vs. Shields; Felderhoff vs. Knauf, et al.; Koepp vs. Utica Mutual Insurance Company; Welex v. Broom; General Electric Credit Corporation v. Midland Central Appraiser District; Owens-Corning Fiberglas v. Caldwell; and O'Connell v. The Home Insurance Company, dealing with the issue of whether a sanctions award was within the coverage of a legal malpractice insurance policy. (000899-923)

53. Missouri decision concerning malpractice insurance coverage for Rule 11 sanctions. (000924-926)

54. Rule 215 draft modifying slightly Judge Brister's draft. (000927-930)

55. Letter from Chuck Herring to Task Force and Advisory Committee Members enclosing items 41 through 54 above. (000931-933)

56. December 17, 1991 letter from Judge Bruce Auld enclosing supplemental comments to his questionnaire response. (000934-935)

57. December 19, 1991 letter from Judge Jack Carter enclosing additional comments to his questionnaire response. (000936-937)

58. December 19, 1991 letter from Judge Kenneth A. Douglas enclosing additional comments to his questionnaire response. (000938-939)

59. December 9, 1991 Texas Lawyer Commentary: "Rambo Judges Undermine the Court System." (000940)

60. December 17, 1991 letter from D. Bradley Kizzia enclosing additional comments to his questionnaire response. (000943)

61. December 18, 1991 letter from Leonard A. Hirsch enclosing additional comments to his questionnaire response. (000944-945)

62. Revised draft of Rule 13, which addresses some (though not all) of the points discussed at our last meeting. (000941-942);

63. Revised version of Rule 215 (000946-949).

64. Letter from Chuck Herring to Task Force and Advisory Committee Members enclosing items 56 through 63 above. (000950-951)

65. December 24, 1991 letter from Bradford M. Condit containing additional comments to his questionnaire response and sanctions related cases. (000952-975)

66. Comments from Judge William R. Powell of Houston regarding rules 13 and 215. (000976)

67. January 2, 1992 letter from John L. Bates enclosing additional comments to his questionnaire response. (000977-978)

68. January 2, 1992 letter from Dewey J. Gonsoulin regarding a recent publication entitled "Judicial Sanctions" published by the Defense Research Institute. (000979)

69. January 6, 1992 letter from Professor John F. Sutton regarding a recent Second Circuit decision recognizing the conflict potential inherent in a motion for sanctions. (000980)

70. Letter from Chuck Herring to Task Force and Advisory Committee Members enclosing items 65 through 69 above. (000981)

71. 12/19/91 note from Lisa Bagley with her comments on sanctions. (000982)

72. 12/30/91 letter from W. Ted Minick containing comments regarding the sanctions questionnaire. (000983)

73. 01/15/92 letter from Alan B. Rich enclosing his article entitled "Certified Pleadings: Interpreting Texas Rule 13 in Light of Federal Rule 11," 11 REV. LITIGATION 59 (1991). (000984-1009)

74. 01/17/92 letter from James R. Bass containing comments regarding the sanctions questionnaire. (001010-1014)

75. 01/27/92 letter from Stephen R. Marsh enclosing the opinion in McCoy v. Knowles, an 8/91 report from the President's Council on Competitiveness: "Agenda for Civil Justice Reform in America," and a draft proposal or Rule 215. (001016-1028, 001058-1062)

76. National Union Fire Ins. Co. v. Wyar, No. 01-90-01054-CV (Tex. App. -- Galveston 11/21/91). (001029-1040)

77. Healey v. Chelsea Resources Ltd., 947 F.2d 611 (2nd Cir. 1991). (001041-1057)

78. Sanctions Questionnaire: Compilation of Judges' Responses. (001063-1084)

79. Sanctions Questionnaire: Compilation of Attorneys' Responses. (001085-1108)

80. Letter from Bill Burton enclosing a rough draft of proposed Rule 12A, as suggested by Dean John F. Sutton, Jr. (001109-1116)

81. Letter from Chuck Herring to Task Force and Advisory Committee Members enclosing items 71 through 80 above. (001117-1118)

82. Stephen Marsh transmittal of a page from O'Connor's Texas Rules regarding automatic exclusion. (001118A)

83. 1991 DRI publication entitled "Judicial Sanctions." (001119-1160)

84. Revised version of a draft of Rule 13. (001161-1162)

85. Revised version of a draft of Rule 166d (formerly Rule 215). (001163-1168)

86. Draft of "Notice to Client" language (001169)

87. Draft of "Duty to Supplement" language. (001170)

88. March 6, 1992 memorandum from Mary Wolf regarding sanctions for bringing fictitious suit under Rule 13. (001171-1173)

89. Several relevant opinions: Javor v. Dellinger, 3 Cal. Rptr.2d 662 (Cal. App. 1992); Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277 (Pa. 1992); Lassiter v. Shavor, 824 S.W.2d 667 (Tex. App. -- Dallas 1992, no writ); Bloom v. Graham, 825 S.W.2d 244 (Tex. App. -- Fort Worth 1992, writ denied); Rogers v. Stell, 828 S.W.2d 115 (Tex. App. -- Dallas 1992, no writ); Glass v. Glass, 826 S.W.2d 683 (Tex. App. -- Texarkana 1992, no writ); Shell Western E & P, Inc. v. Partida, 823 S.W.2d 400 (Tex. App. -- Corpus Christi 1992, no writ); Willy v. Coastal Corporation, 112 S. Ct. 1076 (1992), reh'g denied, 112 S. Ct. 2001 (1992); Baylor Medical Plaza Services Corp. v. Kidd, No. 6-91-057-CV, 1992 WL 59438 (Tex. App. -- Texarkana 1992, n.w.h.); Koslow's v. Mackie, 796 S.W.2d 700 (Tex. 1990). (001174-1257)

90. February 10, 1992 letter from Byron Keeling. (001258-1263)

91. February 24, 1992 letter from Evelyn Avent to Members of the Committee on Administration of Justice enclosing a redraft of Rule 215 from Shelby Sharpe. (001264-1274)

92. December 19, 1991 excerpt from The Advocate, "Procedure Update," regarding Rule 13 Sanctions - Standard of Appellate Review. (001275-1285)

93. March 18, 1992 letter to Evelyn Avent from Shelby Sharpe enclosing additional changes to Rule 215 draft. (001286-1298)

94. "Vast Revisions to Civil Rules Proposed by Judicial Conference Committee," Litigation News, April 19, 1992, regarding proposals for mandatory discovery disclosure. (001299)

95. "Sanctions were Reversed because of Court's Failure to Articulate Basis for Award," Federal Litigation Guide Reporter, pp. 107-109. (001300-1302)

96. "Sanctions Should be Decided Separately from Merits when Credibility of Plaintiff is at Issue," Federal Litigation Guide Reporter, pp. 111-112. (001303-1304)

97. May 6, 1992 update re Rule 11 proposals. (001305-1306)

98. "Quayle Likes the 'English Rule' But Brits Have their Doubts," Legal Times, February 10, 1992. (001307-1309)

99. "Heavy Sanctions," Wall Street Journal, May 22, 1992. (001310-1311)

100. "Immigration Lawyers Balk at New INS Sanctions," Legal Times, June 1, 1992. (001312-1313)

101. "Texas Lawyers Hit With Record Sanctions," The National Law Journal, June 1, 1992. (001314)

102. "Rule 11 Reform," The National Law Journal, May 25, 1992. (001315)

103. "Rule 11 Reforms are Criticized," The National Law Journal, May 25, 1992. (001316)

104. May 8, 1992 letter from Stephen Marsh suggesting changes to current sanctions laws. (001317-1318)

105. "Respondents to Litigation News Fax Poll Want Reforms," Litigation News, June 1992. (001319-1325)

106. "Fax Poll Results Draw Positive Reaction," Litigation News, June 1992. (001326-1327)

107. Judicial Conference Standing Committee on Rules of Practice and Procedure (Judicial Conference Advisory Committee on Civil Rules), drafts for Rules 11 and 37. (001328-1345)

108. "Losers Face $1M Fine for Trial Tactics; Rule 13 Sanction Catches Task Force's Eye," Texas Lawyer, May 25, 1992. (001346-1347)

109. Second draft of Dean Sutton's proposed Rule 12a, dealing with disqualification of attorneys. (001348-1353)

110. Draft of Rule 13, with comments. (001354)

111. Draft of Rule 166d [formerly Rule 215], with comments. (001355-1359)

112. Another version of Rule 13, designed to combine both Rule 13 and former Rule 215 into a single rule. (001360-1362)

113. Another version of Rule 166d [former Rule 215], which is sort of "non-Bristerized" draft. (001363-1368)

114. Letter from Chuck Herring to Task Force and Advisory Committee Members enclosing items 82 through 113 above. (001369-1376)

115. June 24, 1992 letter from Lev Hunt, regarding joint report of the Corpus Christi Chamber of Commerce and the Nueces County Bar Association. (001377-1383)

116. June 26, 1992 letter from L.T. "Butch" Bradt, concerning Judge West's $1 million sanctions, also enclosing the judgment. (001384-1390)

117. "Rare Sanctions Against Firm, Client," ABA Journal, July 1992. (001391)

118. "Why Texas Courts Should Not Retain the Inherent Power to Impose Sanctions," Baylor Law Review, Vol. 44, p. 253, by Kevin F. Risley. (001392-1416)

119. Reports concerning: a federal court order imposing sanctions without possibility of reimbursement from any source, including client, employer, or insurer; a Fifth Circuit decision reversing trial court Rule 11 sanctions for failure to make specific findings why the sanction chosen is the least severe sanction adequate to accomplish Rule 11's purposes; May 8th version of Rule 11; a Fifth circuit case holding that a 33-month delay between an alleged violation of Rule 11 and a motion for sanctions was too long and defeated the rule's deterrent purpose. (001417-1422)

120. McKellar Development Group, Inc. v. Fairbank, 827 S.W.2d 579 (Tex. App. -- San Antonio 1992, n.w.h.); Kutch v. Del Mar College, No. 13-91-285-CV, 1992 WL 106842 (Tex. App. -- Corpus Christi, May 21, 1992, n.w.h.); Smith v. Southwest

Feed Yards, No. D-1503, 1992 WL 140839 (Tex. June 25, 1992). (001423-1444)

121. Letter from Chuck Herring to Task Force and Advisory Committee Members enclosing items 115 through 120 above. (001445-1447)

APPENDIX N

ORDER OF TEXAS SUPREME COURT,
JUNE 19, 1991,
APPOINTING TASK FORCE ON SANCTIONS

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 91-0048

APPOINTMENT OF TASK FORCES TO CONSIDER CHANGES IN THE RULES OF PROCEDURE IN TEXAS COURTS

ORDERED:

To assist the Supreme Court in determining whether changes should be made in the rules of procedure in Texas courts:

1. The following persons are appointed as a Task Force on Sanctions to study, to consult with such other interested persons as may seem appropriate, and to report to the Rules Advisory Committee as soon as practicable what changes, if any, should be made in the Texas Rules of Civil Procedure governing the imposition of sanctions:

Charles F. Herring, Jr., Chairman

Lisa Blue	Elizabeth A. Crabb
Herbert Boyland	Russell H. McMains
Hon. Scott A. Brister	Elizabeth G. Thornburg
Carlyle H. Chapman, Jr.	Robert A. Valadez

2. The following persons are appointed as a Task Force on Discovery to study, to consult with such other interested persons as may seem appropriate, and to report to the Rules Advisory Committee what changes, if any, should be made in the Texas Rules of Civil Procedure governing the scope and conduct of discovery:

David W. Keltner, Chairman

Paul N. Gold	William Powers, Jr.
Mark L. Kincaid	Dan R. Price
Hon. Bonnie Leggat	Eduardo R. Rodriguez
James W. McCartney	James B. Sales
David L. Perry	Jonathan W. Vickery

3. The following persons are appointed as a Task Force on the Jury Charge to study, to consult with such other interested persons as may seem appropriate, and to report to the Rules Advisory Committee what changes, if any, should be made in the Texas Rules of Civil Procedure governing the jury charge:

Hon. Ann Tyrrell Cochran, Chairman

George W. Bramblett, Jr.	John G. Lewis
Michael A. Hatchell	Richard R. Orsinger
Daniel K. Hedges	Jorge C. Rangel
P. Michael Jung	Paula Sweeney

4. The following persons are appointed as a Task Force on Revision of the Texas Rules of Civil Procedure to study, to consult with such other interested persons as may seem appropriate, and to report directly to the Supreme Court as soon as practicable whether those rules should be recodified into a more coherent and easily usable body, either with or without substantive change:

William V. Dorsaneo III, Chairman

Alexandra W. Albright	Fred Hagans
James W. Cannon, Jr.	Hon. Lynn N. Hughes
David E. Chamberlain	David Lopez
John C. Chambers	Linda Turley

5. Luther H. Soules III, chairman of the Rules Advisory Committee, is appointed an *ex officio* member of each task force.

6. Hon. Nathan L. Hecht is appointed liaison from the Supreme Court to each task force.

7. Each task force should identify issues within the scope of its charge, research relevant materials, and report both recommendations and divergent views. The Court may, from time to time, modify the charge of each task force.

SIGNED AND ENTERED this 19th day of June, 1991.

Thomas R. Phillips, Chief Justice

Raul A. Gonzalez, Justice

Oscar H. Mauzy, Justice

Eugene A. Cook, Justice

Jack Hightower, Justice

Nathan L. Hecht, Justice

Lloyd Doggett, Justice

John Cornyn, Justice

Bob Gammage, Justice

APPENDIX O

STATE BAR OF TEXAS COMMITTEE
ON ADMINISTRATION OF JUSTICE --
PROPOSALS FOR TEX. R. CIV. P. 215

STATE BAR OF TEXAS

re Chuck Herring

7-21-92

February 24, 1992

TO: Members of the Committee on Administration of Justice

FROM: Evelyn A. Avent, Secretary

Enclosed is a redraft of Rule 215 which Shelby Sharpe has completed and which will be on the March 14 Agenda for final action.

If you have any suggestions regarding the redraft, please contact Shelby as soon as possible so that any corrections or changes which seem appropriate may be made and the final draft mailed to the committee as least one week in advance of the March 14 meeting.

Evelyn

Evelyn A. Avent

Enclosure

001264

P. O. Box 12487 Austin, Texas 78711

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording of existing Rule 215.

RULE 215. ABUSE OF DISCOVERY; SANCTIONS

1. Motion for Sanctions or Order Compelling Discovery. A party, upon reasonable notice to other parties and all other persons affected thereby, may apply for sanctions or an order compelling discovery as follows:

a. *Appropriate Court.* On matters relating to a deposition, an application for an order to a party may be made to the court in which the action is pending, or to any district court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken. As to all other discovery matters, an application for an order will be made to the court in which the action is pending.

b. *Motion.*

(1) If a party or other deponent which is a corporation or other entity fails to make a designation under Rules 200-2b, 201-4 or 208; or

(2) if a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails:

(a) to appear before the officer who is to take his deposition, after being served with a proper notice; or

(b) to answer a question propounded or submitted upon oral examination or upon written questions; or

(3) if a party fails:

(a) to serve answers or objections to interrogatories submitted under Rule 168, after proper service of the interrogatories; or

(b) to answer an interrogatory submitted under Rule 168; or

(c) to serve a written response to a request for inspection submitted under Rule 167, after proper service of the request; or

(d) to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection submitted under Rule 167;

the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or inspection or production in accordance with the request, or apply to the court in which the action is pending for the imposition of any sanction authorized by paragraph 2b herein without the necessity of first having obtained a court order compelling such discovery.

When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion pursuant to Rule 166b.

c. *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

d. *Disposition of Motion to Compel: Award of Expenses.* If the motion is granted, the court shall, after opportunity for hearing, require a party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay, at such time as ordered by the court, the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or attorney advising such motion to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

In determining the amount of reasonable expenses, including attorney fees, to be awarded in connection with a motion, the trial court shall award expenses which are reasonable in relation to the amount of work reasonably expended in obtaining an order compelling compliance or in opposing a motion which is denied.

e. *Providing Person's Own Statement.* If a party fails to comply with any person's written request for the person's own statement as provided in paragraph 2(g) of Rule 166b, the person who made the request may move for an order compelling compliance with paragraph 2(g) of Rule 166b. If the motion is granted, the movant may recover the expenses incurred in obtaining the order, including attorney fees, which are reasonable in relation to the amount of work reasonably expended in obtaining the order.

2. **Failure to Comply With Order or With Discovery Request.**

a. *Sanctions by Court in District Where Deposition is Taken.* If a deponent fails to appear or to be sworn or to answer a question after being directed to do so by a district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

b. *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rules 200–2b, 201–4 or 208 to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under paragraph 1 of this rule or Rule 167a, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:

(1) An order disallowing any further discovery of any kind or of a particular kind by the disobedient party;

(2) An order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;

(3) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(4) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(5) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(6) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(7) When a party has failed to comply with an order under Rule 167a(a) requiring him to appear or produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination.

(8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

c. *Sanction Against Nonparty for Violation of Rule 167.* If a nonparty fails to comply with an order under Rule 167, the court which made the order may treat the failure to obey as contempt of court.

3. Abuse of Discovery Process in Seeking, Making, or Resisting Discovery. If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may, after notice and hearing, impose any appropriate sanction authorized by paragraphs (1), (2), (3), (4), (5), and (8) of paragraph 2b of this rule. Such order of sanction shall be subject to review on appeal from the final judgment.

4. Failure to Comply With Rule 169.

a. *Deemed Admission.* Each matter of which an admission is requested shall be deemed admitted unless, within the time provided by Rule 169, the party to whom the request is directed serves upon the party requesting the admissions a sufficient written answer or objection in compliance with the requirements of Rule 169, addressed to each matter of which an admission is requested. For purposes of this subdivision an evasive or incomplete answer may be treated as a failure to answer.

b. *Motion.* The party who has requested the admission may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of Rule 169, it may order either that the matter is admitted or that an amended answer be served. The provisions of paragraph d of subdivision 1 of this rule apply to the award of expenses incurred in relation to the motion.

c. *Expenses on Failure to Admit.* If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 169 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 169(1), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

5. Failure to Respond to or Supplement Discovery. A party who fails to respond to or supplement his response to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in a response or supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter, unless the trial court finds that good cause sufficient to require admission exists. The burden of establishing good cause is upon the party offering the evidence and good cause must be shown in the record.

6. Exhibits to Motions and Responses. Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents.

RULE 215. DISCOVERY DISPUTES; SANCTIONS

1. Abuse of Discovery. The following may be considered an abuse of discovery:

(a) a party or other deponent which is a corporation or other entity fails to make a designation under Rule 200-2b, 201-4 or 208; or

(b) a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails:

(1) to appear before the officer who is to take his deposition, after being served with a proper notice; or

(2) to answer a question properly propounded or submitted upon oral examination or upon written questions; or

(3) to produce a properly subpoenaed document, item or thing; or

(4) to complete a deposition without cause; or

(c) a party fails:

(1) to serve answers or objections to interrogatories submitted under Rule 168, after proper service of the interrogatories; or

(2) to responsively answer an interrogatory submitted under Rule 168; or

(3) to serve a written response to a request for inspection or production submitted under Rule 167, after proper service of the request; or

(4) to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection submitted under Rule 167; or

(5) to comply with any persons written request for the persons own statement as provided in paragraph 2(g) of Rule 166b; or

(6) to respond to or supplement answers or responses to a request for discovery; or

(7) to comply with an order under Rule 167a(a) requiring the party to appear or produce a person for examination, unless the person failing to comply shows the party is unable to appear or to produce such person for examination; or

(d) a party or an officer, director or managing agent of a party or a person designated under Rules 200-2b, 201-4 or 208 to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order under Rule 167a; or

(e) an attorney terminates a deposition prior to its completion without cause; or

(f) if the court finds that a party is resisting discovery or if the court finds that any discovery request or answers or responses thereto are frivolous, oppressive, harassing, non-responsive or made for purposes of delay.

For purposes of this rule, an evasive or incomplete answer or response is to be treated as a failure to answer or respond.

2. Motion and Proceedings Thereon. Following the commission of an abuse of discovery by any party or person, a party may file a motion seeking an order compelling discovery or for sanctions without the necessity of first having obtained a court order compelling such discovery which shall not be heard until all parties and all other persons affected thereby have received reasonable notice.

(a) Motions or responses made under this rule may have exhibits attached including affidavits, discovery, pleadings, or any other documents.

(b) When a motion relates to the taking of a deposition on oral examination, the proponent of the motion may complete or adjourn the examination before he applies for an order.

(c) The party who has requested an admission under Rule 169 may move to determine the sufficiency of the answer or objection.

(d) On matters relating to a deposition, the motion for an order to a party may be made to the court in which the action is pending or to any court of competent jurisdiction in the district where the deposition is being taken. A motion for an order

to a deponent who is not a party shall be made to the court in the district where the deposition is being taken. As to all other discovery matters, the motion for an order will be made to the court in which the action is pending.

(e) Except on leave of court, the party or person against whom a motion has been filed under this rule may file a written response not later than seven (7) days prior to the date of hearing of the motion. Service of any response shall be accomplished on the movant not later than seven (7) days prior to the date of hearing, except on leave of court.

(f) No oral testimony shall be received at the hearing unless an issue of fact is raised by a timely filed response. An issue of fact is raised by an affidavit of a person with knowledge or other sworn testimony attached to the response. Oral testimony shall be received only regarding the fact or facts put in issue by an affidavit or other sworn testimony.

(g) The court shall place a motion filed pursuant to Section 1 (b), (d), (e), or (f) of this rule on an expedited docket for hearing.

4. Disposition of Motion.

(a) If the court finds that the discovery dispute is an honest difference of opinion reasonably grounded regardless of whether the motion is granted in whole or in part or denied, then the court shall enter an appropriate order on the motion without awarding any sanctions.

(b) If the court finds that there is clear and convincing proof establishing an abuse of discovery or a failure to obey an order regarding discovery regardless of whether the motion is granted in whole or in part or denied, the court shall enter an appropriate order on the motion and shall impose such sanctions as are just and appropriate for the conduct to the sanctioned.

(c) If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion pursuant to Rule 166b.

(d) Any order entered under this rule requiring payment of money to movant or respondent shall be paid into the registry of the court for disposition in the final judgment which shall be subject to review by appeal following entry of the judgment.

(e) If the court overrules an objection to a matter requested to be admitted under Rule 169, the court may order that the matter is admitted or permit the party to file an amended answer within a reasonable time, but not more than 30 days from the date of hearing, whichever order is just under the circumstances. If the court enters an order that the matter is admitted, the court may assess such expenses and costs against the disobedient party or attorney advising him, or both, as the court deems just.

(f) If a nonparty fails to comply with an order under Rule 167, the court which made the order may treat the failure to obey as contempt of court.

(g) In lieu of any of the foregoing orders or in addition thereto, the court may enter an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.

5. Sanctions for Pre-Trial Discovery Abuses. The court should not assess sanctions which are so severe as to preclude presentation of the merits of the case absent a party's flagrant bad faith or counsel's callous disregard for the responsibilities of discovery under the rules. Sanctions for consideration are:

(a) an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him, or both; or

(b) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order; pr

(c) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence; or

(d) an order disallowing any further discovery of any kind or of a particular kind by the party

committing the abuse of discovery;

(e) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party.

6. Guidelines for Sanctions. In determining the propriety and scope of sanctions, the court shall consider the following guidelines:

(a) the good faith or bad faith of the offender;
(b) the degree of willfulness, vindictiveness, negligence, or frivolousness involved in the offense;
(c) the knowledge, experience, and expertise of the offender;
(d) any prior history of sanctionable conduct on the part of the offender;
(e) the reasonableness and necessity of the out-of-pocket expenses incurred by the offended person as a result of the misconduct;
(f) the nature and extent of prejudice, apart from the out-of-pocket expenses suffered by the offended person as a result of the misconduct;
(g) the relative culpability of client and counsel, and the impact on their privileged relationship of an inquiry into that area;
(h) the risk of chilling the specific type of litigation involved;
(i) the impact of the sanction on the offender, including the offender's ability to pay a monetary sanction;
(j) the impact of the sanction on the offended party, including the offended person's need for compensation;
(k) the relative magnitude of sanction necessary to achieve the goal or goals of the sanction;
(l) burdens on the court system attributable to the misconduct, including consumption of judicial time and incurrence of juror fees and other court costs;
(m) the degree to which the offended person attempted to mitigate any prejudice suffered by him or her; and
(n) the degree to which the offended person's own behavior caused the expenses for which recovery is sought.

7. Trial Sanctions for Discovery Abuses.

(a) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 169 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the court may enter an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees, unless the court finds that (1) the request was held objectionable pursuant to Rule 169(1), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(b) A party who fails to respond to or supplement his response or answer to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in a response or supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter, unless the trial court finds that good cause sufficient to require admission exists. The burden of establishing good cause is upon the party offering the evidence and good cause must be shown in the record.

8. Appeal. Any order of sanction under this rule shall be subject to review on appeal from final judgment. Upon written request by any attorney or party filed not later than 10 days after the signing of an order of sanction, the court shall file findings of fact and conclusions of law not later than 30 days after the signing of such order. If the court fails to file timely findings of fact and conclusions of law, the person making the request shall follow the procedure set forth in Rule 297. Notice of the filing of the request shall be served as provided by Rule 21a.

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

Rule 215 is poorly organized, lacks sufficient guidelines and instructions for the bench and bar to be justly implemented and to comply with due process. The changes should bring about better organization, clarification in dealing with discovery disputes, direction for determining when sanctions are appropriate, guidelines for sanctions in accordance with the latest Supreme Court of Texas opinions construing Rule 215, and a standard of review for an appeal of an order of sanctions. Because sanctions are so consequential, they should only be based upon a high standard of proof. Findings of fact and conclusions of law will also provide a better appellate review.

4543.001

10-15-93

ANN TYRRELL COCHRAN
JUDGE, 270TH DISTRICT COURT
CIVIL COURTS BUILDING
HOUSTON, TEXAS 77002

April 12, 1993

Hon. Nathan Hecht
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

Enclosed for consideration by the Supreme Court are recommended rule changes from your Task Force on Rules Relating to the Jury Charge. These proposals have the unanimous recommendation of the members of that task force and, as explained in greater detail below, are the result of our consulting with a great many other lawyers, judges, and law professors.

The greatest challenge to the task force came in considering proposals to simplify the means to preserve appellate complaint. As you well know, an earlier proposal to move to an "object only" system raised a good deal of opposition from the trial bench. In order to understand the concerns of the trial judges, we asked Justice Linda Thomas, then chair of the Judicial Section, to appoint several trial judges from across the state to meet with us and share their concerns. Our two meetings with these judges were very productive. All agreed that the current system needed to be revised to simplify preservation of error, but given the complicated nature of so much civil litigation, and the lack of clerical support, time, and research facilities so many trial judges face, there was a serious concern that total abolition of the tender requirement would give rise to greater problems in preparing a correct charge at the trial court level. Thought was given to earlier proposals to allow judges to order tender without making tender a prerequisite to appellate complaint, but we concluded that the lack of appellate consequences made such orders unenforceable and thus unhelpful.

In addition to the trial judges, task force members have sought and received advice and comment from the consultative group, many lawyers

who have expressed interest in our work, and legal scholars. We feel that our conclusions have the support of a wide cross-section of the trial and appellate bar as well as the trial judiciary.

The conclusion of the task force was that objection should always be required, but that an additional requirement of written tender should be necessary only in the following limited circumstances: (1) the question, definition, or instruction is totally omitted from the proposed charge; and (2) it is something that party has the burden to plead. This approach gives the trial judge the "bare bones" of the charge, but alleviates the current problem of requiring a party to write a correct charge for the opposing side.

We also addressed the problems currently posed by the appellate construction of the requirement that any tender be in "substantially correct" form, and have proposed instead the following language:

"Defects in a requested question, definition, or instruction shall not constitute a waiver of error if the request provides the trial court reasonable guidance in fashioning a correct question, definition, or instruction."

The task force believes that this approach satisfies the legitimate concerns of the trial bench and offers as well a workable system of preservation of error.

The task force retained the substance of Rule 279 regarding the effect of omissions from the charge. Two substantive clarifications were made: (1) that express or deemed findings by the court on omitted elements may be made against any party who has failed to preserve appellate complaint regarding the omission,but not against a party who has preserved appellate complaint; and (2) that evidentiary sufficiency challenges to express findings under Rule 279 are governed by the same rules for preservation of appellate complaint as in the case of findings in bench trials. See Tex. R. App. P. 52(d).

The jury instructions (Rule 226a) have been rewritten, primarily to simplify the language used and to reorganize at what point in the trial certain instructions are given. A few are new. Instructions about conduct in the jury room and the role of the presiding juror were added at the suggestion of trial judges who have found over the years that jurors need more information about that stage of the trial. An instruction about the effect of sustaining evidentiary objections has been added, as has one telling the jury that they are bound to follow the law whether they think it is right or wrong. (The latter was added as emphasis in light of the fact that the types of jury misconduct that may be grounds for motions for

new trial have changed since the Rule 226a instructions were originally written.)

We did attempt to consolidate and reorganize the rules with which we were dealing, and understand that Professor Dorseano's task force will be looking at these aspects as well. Michael Jung, of our task force, is serving as our unofficial liason with that group.

The enclosed report is submitted in two forms: (1) a plain copy of the proposal; and (2) an annotated version, with underlining and strike-outs to show the changes.

Thank you for allowing me to work on this project for you. The members of the task force are excellent lawyers and fine people. It has been a pleasure to serve with them.

Very truly yours,

Ann Tyrrell Cochran

Supreme Court Jury Charge Task Force

Proposed Revisions to Tex. R. Civ. P. 226, 226a, 236, and 271-279

Rule 226. Oath to Jury Panel

Before the parties or their attorneys begin the examination of the jury panel, the jurors shall be sworn by the court or under its direction as follows: "Do you solemnly swear or affirm that you will give true answers to all questions asked you concerning your qualifications as a juror, so help you God?"

Rule 226a. Instructions to Jury Panel and Jury

The judge shall give the following instructions to the jury panel and to the jury. If the case is tried to a six-person jury, the references to ten or eleven jurors in these instructions should be changed to read "five."

Part 1 - Jury Panel

After the members of the panel have been sworn as provided in Rule 226 and before the voir dire examination, the judge shall read the following instructions, with such modifications as the circumstances of the particular case may require, to the jury panel.

The case that is now on trial is _____ v. _____. This is a civil lawsuit that will be tried before a jury. Your duty as jurors will be to decide the disputed facts. It is the duty of the judge to see that the case is tried in accordance with the rules of law. It is very important that you follow carefully all instructions that I give you now and later during the trial. If you do not obey these instructions, it may become necessary for another jury to retry this case with all of the attendant waste of your time here and the expense to the litigants and the taxpayers of this county for another trial.

1. Do not mingle with or talk with the parties, the lawyers, the witnesses, or any other person who might be connected with or interested in this case, except for casual greetings. You may not even

have casual conversation about things completely unrelated to this lawsuit with any of those people.

2. Do not accept any favors from these people, and do not give them any favors. You must avoid even slight favors, such as rides, food, or refreshments.

3. Do not discuss this case with anyone, including your spouse. Do not let anyone discuss the case in your presence. If anyone tries to talk about the case with you or in your hearing, tell me immediately.

4. The attorneys will now have an opportunity to talk with you about the case and the people involved, and to ask you some questions about your backgrounds, experiences, attitudes, and opinions. Listen to the questions and give true and complete answers. Do not conceal information. If you cannot hear or understand the questions, please let me know.

5. If a question is asked of the whole panel that requires an answer from you, please raise your hand and keep it raised long enough for everyone to make a quick note of the people who responded.

Part 2 - Jury

Immediately after the jurors are selected and have been sworn as provided in Rule 236, the judge shall give each juror a copy of the following written instructions and then read them to the jury.

By your oath, you are now officials of this court, and active participants in the administration of justice. It is essential to the administration of fair and impartial justice that you follow these instructions:

1. You must continue to obey the instructions I gave you earlier. Do not talk about the case with anyone, and do not have any contact with the parties, attorneys, witnesses, or other interested persons outside the courtroom.

2. Do not even discuss the case among yourselves until you have heard all of the evidence, the court's charge, the attorneys'

arguments, and I have sent you to the jury room to begin your deliberations.

3. You are the judges of the facts of this case. It is your duty to listen to and consider carefully the evidence admitted under my rulings, and to answer the specific questions about the facts that I will submit to you in writing in the court's charge.

4. In arriving at your verdict, you can consider only the evidence admitted during the trial. Do not make any investigation about the facts of this case. Do not seek out any information contained in documents, books, or records that are not in evidence. Do not make personal inspections or observations outside the courtroom. Do not let anyone else do any of these things for you. This avoids a trial based upon secret evidence.

5. The law is determined by the legislature and courts of this state. You are obligated to follow my instructions about the law, regardless of whether you think the law is right or wrong.

6. During the presentation of evidence, the attorneys may make legal objections. If an objection to a question is sustained, disregard the question, and do not speculate as to why it was asked or what the answer would have been. If an objection to a witness's answer is sustained, disregard that answer. It is not in evidence, and should not be considered. Do not speculate about or consider for any reason the objections or my rulings themselves.

I stress again that it is imperative that you follow these instructions, as well as any others that I may later give you. If you do not obey these instructions, then it may become necessary for another jury to retry this case with all of the attendant waste of your time here and the expense to the litigants and the taxpayers of this county for another trial. Keep your copy of these instructions, and refer to them should any question arise about the rules that govern your conduct during this trial. A violation of any instruction must be reported to me as soon as possible.

Part 3 - Court's Charge

The following written instrutions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the jury as part of the charge:

1. This case is submitted to you by asking questons about the facts. Your answers must be based only upon the evidence, including exhibits, admitted during the trial.

2. In considering the evidence, you are bound to follow the law set forth in this charge, as well as all instructions concerning jurors' conduct that you have been given.

3. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony.

4. Do not let bias, prejudice, or sympathy play any part in your deliberations.

5. Do not become a secret witness by telling other jurors about other incidents, experiences, or lawsuits. Do not tell other jurors about any special knowledge, information, or expertise you may have. You must confine your deliberations to the evidence presented in open court. This avoids a trial based upon secret evidence.

6. Do not discuss or consider attorneys' fees. [Omit when attorneys' fees are in issue.]

7. Do not discuss or consider whether insurance protects any party. [Omit when coverage is in issue.]

8. This charge includes all legal instructions and definitions that are necessary to assist you in reaching your verdict, so do not seek out any information in law books or dictionaries.

9. Every answer required by the charge is important.

10. Do not decide who you think should win and then try to answer the questions accordingly. Simply answer the questions; and do not concern yourselves with the effect of your answers.

11. Do not decide a question by any method of chance.

12. Do not answer a question that calls for a numerical answer by adding together each juror's figure and then dividing by the number of jurors to get an average.

13. Do not do any trading on your answers. That is, one juror must not agree to answer one question a certain way if other jurors will agree to answer another question a certain way.

14. After you retire to the jury room, you will select a presiding juror. You will then deliberate upon your answers.

15. It is the duty of that presiding juror:

a. to preside during the deliberations to provide order and compliance with the charge;
b. to write, sign, and deliver to the bailiff any communication to me;
c. to conduct the vote; and
d. to write your answers in the spaces provided.

16. You may render your verdict on the vote of ten or more members of the jury, but the same ten or more must agree upon each of the answers made.

17. If the verdict is reached by unanimous agreement, the presiding juror will sign the verdict on the certificate page for the entire jury.

18. If the verdict is less than unanimous, the ten or eleven jurors who agree to each and every answer will sign the verdict individually on the certificate page.

19. If you observe a violation of my instructions outside the jury room, by either a juror or any other person, you must report that to me.

20. During your deliberations, any juror who observes a violation of my instructions shall point out the violation and caution the offending juror not to violate the instruction again.

21. You must not discuss the case with anyone, not even with other members of the jury, unless all of the jurors are in the jury room. If anyone other than a juror tries to talk to you about the case before you reach a verdict, tell me immediately.

22. When all required questions have been answered, the presiding juror has written your answers on the charge, and the

verdict has been signed, you will summon the bailiff and be returned to court with your verdict.

[Instructions, definitions, and questions to be placed here.]

Certificate

We, the jury, have answered the questions as shown and return these answers to court as our verdict.

Signature of presiding juror, if unanimous. [One signature line here.]

Signatures of jurors voting for the verdict, if not unanimous. [Eleven signature lines here.]

Part 4 - Jury Release

The judge shall give the jury the following oral instructions after accepting the verdict and then release them:

I earlier instructed you to observe strict secrecy during the trial, not to discuss this case with anyone except other jurors while you were deliberating. I am about to discharge you. Once I have done that, you are released from that and all of the other orders that I gave you. You will be absolutely free to discuss anything about this case with anyone. You will be just as free to decline to talk about the case if that is your decision.

[Judge's commendation of jurors and the important service they have performed may be added here.]

Rule 236. Jurors' Oath

The jury shall be sworn by the court or under its direction as follows: "Do you solemnly swear or affirm that you will return a true verdict, according to the law stated in the court's charge and to the evidence submitted to you under the rulings of this court, so help you God?"

Rule 271. Charge to the Jury

The trial court shall prepare a written charge to the jury. The court shall provide counsel with written copies of the proposed charge, and shall provide a reasonable opportunity for the parties to prepare their requests and objections and to present them on the record outside the presence of the jury after the conclusion of the evidence and before the charge is read to the jury. After the requests and objections are made and ruled upon and any modifications to the charge are made, the court shall read the charge to the jury in open court in the precise words in which it is written. The court shall deliver one or more copies of the written charge to the jury. The charge shall be signed by the court and filed with the clerk.

Rule 272. Standards for the Jury Charge

1. General Standards

a. Pleading Required. A party who has the burden of pleading a matter shall not be entitled to the submission of a question, instruction, or definition regarding that matter unless the matter is affirmatively raised by the party's pleading.

b. Comment on the Evidence. The court shall not directly comment on the weight of the evidence or advise the jury of the effect of their answers, but an otherwise proper question, instruction, or definition 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.

2. Questions

a. In General. The court shall submit questions on the disputed material factual issues which are raised by the pleadings and the evidence.

b. Broad Form Submission. The court shall, whenever feasible, submit the case upon broad form questions.

c. Conditional Submission. The court may predicate the jury's consideration of one or more questions upon specified answers to another question or questions on which the materiality of the predicated question or questions depends.

d. Disjunctive Submission. The court may submit a question disjunctively when the evidence shows as a matter of law that one or the other of the conditions or facts inquired about necessarily exists.

e. Inferential Rebuttal. Inferential rebuttal questions shall not be submitted.

3. Instructions and Definitions

a. In General. The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict.

b. Burden of Proof. The placing of the burden of proof may be accomplished by instructions or by inclusion in the questions.

Rule 273. Repealed.

Rule 274. Preservation of Appellate Complaints

1. Requests. A party may not assign as error the failure to give a question, definition, or instruction on a contention which that party was required to plead unless the record reflects that, after the conclusion on the evidence and before or at the time of objecting, the party tendered such question, definition, or instruction to the judge in writing. Defects in a requested question, definition, or instruction shall not constitute a waiver of error if the request provides the trial court reasonable guidance in fashioning a correct question, definition, or instruction. If a request has been filed and bears the judge's signature, it shall be presumed, unless otherwise noted in the record, that the request was tendered at the proper time.

2. Objections. No party may assign as error the giving or the failure to give a question definition, or instruction unless that party objects thereto before the charge is read to the jury, stating distinctly the matter objected to and the grounds of the objection. An objection is required even if the objecting party is required to tender a request under paragraph 1 of this rule. Objections shall be in writing or shall be made orally in the presence of the court, the court reporter, and opposing counsel. It shall be presumed, unless otherwise noted in the record, that a party making objections did so at the proper time.

3. Obscured or Concealed Objections or Requests. When an objection or request is obscured or concealed by voluminous unfounded objections or requests, minute differentiations or numerous unnecessary objections or requests, such objection or request shall not preserve appellate complaint. No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only. A judgment shall not be reversed because of the failure of the court to submit different shades of the same question, definition, or instruction.

4. Rulings. The court shall announce its rulings on objections in open court before reading the charge to the jury. In the absence of an express ruling, any objection not cured by the charge is deemed overruled.

5. Evidentiary Sufficiency Complaints. A claim that there was no evidence to support the submission of a question, or that the answer to the question was established as a matter of law, may be made for the first time after the verdict. A claim that there was factually insufficient evidence to support the jury's answer to a question, or that the answer to a question was against the great weight and preponderance of the evidence, must be made after the verdict. Any of such claims may be made regardless of whether the submission of the question was requested by the complainant.

Rule 275. Repealed.

Rule 276. Repealed.

Rule 277. Repealed.

Rule 278. Repealed.

Rule 279. Omissions from the Charge

1. Omission of Entire Ground. Any independent grounds of recovery or of defense which is not conclusively established under the evidence and all elements of which are omitted from the charge

without preservation of appellate complaint by the party relying thereon is waived.

2. Omission of One or More Elements. When an independent ground of recovery or defense consists of more than one element, and one or more of the elements necessary to sustain such ground of recovery or defense, and necessarily referably thereto, is submitted to and found by the jury, and one or more of such elements is omitted from the charge, the 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, if the party aggrieved by the findings has failed to preserve appellate complaint with respect to the omitted elements. If no such written findings are made, the omitted elements shall be deemed found by the court in such manner as to support the judgment if such deemed findings are supported by legally and factually sufficient evidence. The legal or factual sufficiency of the evidence to support express findings made under this rule may be challenged in the same manner as challenges to express findings in nonjury cases.

SUPREME COURT JURY CHARGE TASK FORCE
PROPOSED REVISIONS TO TEX. R. CIV. P. 271-79

REVISED DRAFT 10/19/92

RULE 271. CHARGE TO THE JURY

Amended Text	Sources and Dispositions
~~Unless expressly waived by the parties,~~ The trial court shall prepare ~~and in open court deliver~~ a written charge to the jury. The court shall provide counsel with written copies of the proposed charge, and shall provide a reasonable opportunity for the parties to prepare their requests and objections and to present them on the record outside the presence of the jury after the conclusion of the evidence and before the charge is read to the jury. After the requests and objections are made and ruled upon and any modifications to the charge are made, the court shall read the charge to the jury in open court in the precise words in which it is written. The court shall deliver one or more copies of the written charge to the jury. The charge shall be signed by the court and filed with the clerk.	Disposition: Omitted as unnecessary Disposition: Fourth sentence of New Rule 271 Source: Second sentence of Current Rule 272 and second sentence of Current Rule 273 Source: Current Rule 275 Source: First sentence of Current Rule 271 Source: First sentence of Current Rule 272

RULE 272. ~~REQUISITES~~ STANDARDS FOR THE JURY CHARGE

Amended Text	Sources and Dispositions
~~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.~~	Disposition: First sentence of New Rule 271 Disposition: Fifth sentence of New Rule 271 Disposition: Omitted as unnecessary
~~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.~~	Disposition: Second sentence of New Rule 271 Disposition: Second sentence of New Rule 274(2)
~~All objections not so presented shall be considered as waived.~~	Disposition: First sentence of New Rule 274(2)
~~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.~~	Disposition: First sentence of New Rule 274(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 sufficient bill of exception to the rulings of the court thereon.~~	Disposition: Omitted as unnecessary
~~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.~~	Disposition: Third sentence of New Rule 274(2)

1. General Standards.

a. Pleading Required. A party who has the burden of pleading a matter shall not be entitled to the submission of a question, instruction, or definition regarding that matter unless the matter is affirmatively raised by the party's pleading.

Source: Generalization of second sentence of Current Rule 278

b. Comment on the Evidence. The court shall not directly comment on the weight of the evidence or advise the jury of the effect of their answers, but an otherwise proper question, instruction, or definition 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.

Source: Generalization of ninth sentence of Current Rule 277

2. Questions.

a. In General. The court shall submit questions on the disputed material factual issues which are raised by the pleadings and the evidence.

Source: Adapted from first sentence of Current Rule 278

b. Broad Form Submission. The court shall, whenever feasible, submit the case upon broad form questions.

Source: First sentence of Current Rule 277

c. Conditional Submission. The court may predicate the jury's consideration of one or more questions upon specified answers to another question or questions on which the materiality of the predicated question or questions depends.

Source: Generalization of seventh sentence of Current Rule 277

d. Disjunctive Submission. The court may submit a question disjunctively when the evidence shows as a matter of law that one or the other of the conditions or facts inquired about necessarily exists.

Source: Adapted from eighth sentence of Current Rule 277

e. Inferential Rebuttal. Inferential rebuttal questions shall not be submitted.

Source: Third sentence of Current Rule 277

3. Instructions and Definitions.

a. In General. The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict.

Source: Second sentence of Current Rule 277 and first sentence of Current Rule 278

b. Burden of Proof. The placing of the burden of proof may be accomplished by instructions or by inclusion in the questions.

Source: Fourth sentence of Current Rule 277

~~RULE 273. JURY SUBMISSIONS~~ [Repealed]

Amended Text	Sources and Dispositions
~~Either 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.~~	Disposition: Omitted as unnecessary
~~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.~~	Disposition: Second sentence of New Rule 271 Disposition: Omitted as unnecessary
~~A request by either party for any questions, definitions, or instructions shall be made separate and apart from such party's objections to the court's charge.~~	Disposition: Requirement repealed

RULE 274. ~~OBJECTIONS AND REQUESTS~~ PRESERVATION OF APPELLATE COMPLAINTS

Amended Text	Sources and Dispositions
1. Requests. A party may not assign as error the failure to give a question, definition, or instruction on a contention which that party was required to plead unless the record reflects that, after the conclusion of the evidence and before or at the time of objecting, the party tendered such question, definition, or instruction to the judge in writing. Defects in a requested question, definition, or instruction shall not constitute a waiver of error if the request provides the trial court reasonable guidance in fashioning a correct question, definition, or instruction. If a request has been filed and bears the judge's signature, it shall be presumed, unless otherwise noted in the record, that the request was tendered at the proper time.	Source: Adapted from fifth and sixth sentences of Current Rule 278 Source: New Source: Adapted from third sentence of Current Rule 276
2. Objections. No party may assign as error the giving or the failure to give a question, definition, or instruction unless that party objects thereto before the charge is read to the jury, ~~A party objecting to a charge must point out~~ stating distinctly the ~~objectionable~~ matter objected to and the grounds of the objection. An objection is required even if the objecting party is required to tender a request under paragraph 1 of this rule. Objections shall be in writing or shall be made orally in the presence of the court, the court reporter, and opposing counsel. It shall be presumed, unless otherwise noted in the record, that a party making objections didso at the proper time. ~~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.~~	Source: Second sentence of Current Rule 274 Source: New Source: Second sentence of Current Rule 272 Source: Sixth sentence of Current Rule 272 Disposition: First sentence of new Rule 274(2)

3. Obscured or Concealed Objections or Requests. When ~~the complaining party's~~ an objection~~,~~ or requested ~~question, definition, or instruction~~ is~~, in the opinion of the appellate court,~~ obscured or concealed by voluminous unfounded objections or requests, minute differentiations, or numerous unnecessary objections or requests, such objection or request shall ~~be untenable~~ not preserve ~~error~~ appellate complaint. No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only. A judgment shall not be reversed because of the failure of the court to submit different shades of the same question, instruction, or definition.

Source: Adapted from fourth sentence of Current Rule 278

4. Rulings. The court shall announce its rulings on objections in open court before reading the charge to the jury. In the absence of an express ruling, any objection not cured by the charge is deemed overruled.

Source: Fourth sentence of Current Rule 272

Source: Acord v. General Motors Corp., 669 S.W.2d 111 (Tex. 1984)

5. Evidentiary Sufficiency Complaints. A claim that there was no evidence to support the submission of a question, or that the answer to the question was established as a matter of law, may be made for the first time after the verdict. A claim that there was factually insufficient evidence to support the jury's answer to a question, or that the answer to the question was against the great weight and preponderance of the evidence, must be made after the verdict. Any of such claims may be made regardless of whether the submission of the question was requested by the complainant.

Source: Adapted from fourth sentence of Current Rule 279

~~RULE 275. CHARGE READ BEFORE ARGUMENT~~ [Repealed]

Amended Text	Sources and Dispositions
~~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.~~	Disposition: Third sentence of New Rule 271

~~RULE 276. REFUSAL OR MODIFICATION~~ [Repealed]

Amended Text	Sources and Dispositions
~~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 endorse thereon "Refused," and sign the same officially.~~	Disposition: Requirement repealed
~~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.~~	Disposition: Requirement repealed
~~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.~~	Disposition: Third sentence of New Rule 274(1), in modified form

~~RULE 277. SUBMISSION TO THE JURY~~ [Repealed]

Amended Text	Sources and Dispositions
~~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.~~	Disposition: New Rule 272(2)(b) Disposition: New Rule 272(3)(a)
~~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.~~	Disposition: New Rule 272(2)(e) Disposition: New Rule 272(3)(b)
~~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 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 predicate the damage question or questions upon affirmative findings of liability.~~	Disposition: Omitted as substantive Disposition: Omitted as too case-specific for inclusion in the Rules of Civil Procedure Disposition: New Rule 272(2)(c), in modified form
~~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.~~	Disposition: New Rule 272(2)(d)
~~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.~~	Disposition: New Rule 272(3)(c)

~~RULE 278. SUBMISSION OF QUESTIONS, DEFINITIONS, AND INSTRUCTIONS~~
[Repealed]

Amended Text	Sources and Dispositions
~~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.~~	Disposition: New Rules 272(2)(a) and 272(3)(a)
~~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.~~	Disposition: Omitted as unnecessary
~~Nothing herein shall change the burden of proof from what it would have been under a general denial.~~	Disposition: New Rule 272(1)
~~A judgment shall not be reversed because of the failure to submit other and various phases or different shades of the same question.~~	Disposition: Omitted as unnecessary
~~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.~~	Disposition: Third sentence of New Rule 274(3)
~~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 tendered by the party complaining of the judgment.~~	Disposition: First sentence of New Rule 274(1), in modified form
	Disposition: First sentence of New Rule 274(1), in modified form

RULE 279. OMISSIONS FROM THE CHARGE

Amended Text

Sources and Dispositions

1. Omission of Entire Ground. ~~Upon appeal all~~ Any independent grounds of recovery or of defense which is not conclusively established under the evidence and ~~no element of which is submitted or requested~~ all elements of which are omitted from the charge without preservation of appellate complaint by the party relying thereon ~~are~~ is waived.

2. Omission of One or More Elements. When an independent ground of recovery or defense consists of more than one element, ~~if~~ and one or more of ~~such~~ the elements necessary to sustain such ground of recovery or defense, and necessarily referable thereto, ~~are~~ is submitted to and found by the jury, and one or more of such elements ~~are~~ is 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 the party aggrieved by the findings has failed to preserve appellate complaint with respect to the omitted elements. If no such written findings are made, ~~such~~ the omitted elements shall be deemed found by the court in such manner as to support the judgment if such deemed findings are supported by legally and factually sufficient evidence. The legal or factual sufficiency of the evidence to support express findings made under this rule may be challenged in the same manner as challenges to express findings in nonjury cases. ~~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.~~

Disposition: Later in same sentence

Disposition: Second sentence of New Rule 279(2)

Disposition: Omitted as unnecessary

Source: Language conformed to Current Rule 299

Source: Second sentence of Current Rule 279

Source: New; to conform to Tex. R. App. P. 52(d)

Disposition: New Rule 274(5), in modified form

Proposed Amendment: Rule 226a

Rule 226a. ~~Admonitory~~ Instructions to Jury Panel and Jury.

The ~~court~~ judge shall give ~~such admonitory~~ the following instructions to the jury panel and to the jury ~~as may be prescribed by the Supreme Court in an order or orders entered for that purpose~~. If the case is to tried to a six-person jury, the references to ten or eleven jurors in these instructions should be changed to read "five." New

Part 1 - Jury Panel

~~That the following oral instructions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the jurors~~ After ~~they~~ the members of the panel have been sworn as provided in Rule 226 and before the voir dire examination, the judge shall read the following instructions, with such modifications as the circumstances of the particular case may require, to the jury panel.

The case that is now on trial is _____ v. _____. This is a civil lawsuit ~~action~~ that will be tried before a jury. Your duty as jurors will be to decide the disputed facts. It is the duty of the judge to see that the case is tried in accordance with the rules of law. ~~In this case, as in all cases, the actions of the judge, parties, witnesses, attorneys and jurors must be according to law. The Texas law permits proof of any violation of the rules of proper jury conduct. By this I mean that jurors and others may be called upon to testify in open court about acts of jury misconduct.~~ It is very important that you follow carefully all instructions that I give you now and later during the trial ~~which I am now~~

~~going to give you, as well as others which you will receive while this case is on trial.~~ If you do not obey these instructions ~~the instructions I am about to give you~~, it may become necessary for another jury to retry this case with all of the attendant waste of your time here and the expense to the litigants and the taxpayers of this county for another trial. Throughout your service, you must obey the following instructions:

1. Do not mingle with or talk with the parties, the lawyers, the witnesses, or any other person who might be connected with or interested in this case, except for casual greetings. You may not even have casual conversation about things completely unrelated to this lawsuit with any of those people. ~~They have to follow these same instructions and you will understand it when they do.~~

2. Do not accept ~~from, nor give to, any of those persons~~ any favors ~~however slight~~ from these people, and do not give them any favors. You must avoid even slight favors, such as rides, food, or refreshments.

3. Do not discuss ~~anything about~~ this case ~~, or even mention it to anyone whomsoever, including your wife or husband, nor permit anyone to mention it in your hearing until you are discharged as jurors or excused from this case~~ with anyone, including your spouse. Do not let anyone discuss the case in your presence. If anyone ~~attempts to discuss this case~~ tries to talk about the case with you or in your hearing, tell ~~report it to~~ me immediately ~~at once~~.

4. The attorneys will now have an opportunity to talk with you about the case and the people involved, and to ask you some questions about your backgrounds, experiences, attitudes, and opinions. ~~The parties through~~

~~their attorneys have the right to direct questions to each of you concerning your qualifications, background, experiences, and attitudes. In questioning you, they are not meddling in your personal affairs, but are trying to select fair and impartial jurors who are free from any bias or prejudice in this particular case.~~ Listen to the questions and give true ~~full~~ and complete answers. Do not conceal information ~~or give answers which are not true~~. If you cannot hear or understand the questions, please let me know.

5. ~~4b. If the attorneys ask some questions directed to you as a group which require an answer on your part individually, hold up your hand until you have answered the questions.~~ If a question is asked of the whole panel that requires an answer from you, please raise your hand, and keep it raised long enough for everyone to make a quick note of the people who responded.

~~Do you understand these instructions? If you, please let me know now.~~

~~Whether you are selected as a juror for this case or not, you are performing a significant service which only free people can perform. We shall try the case as fast as possible consistent with justice, which requires a careful and correct trial. If selected on the jury, unless I instruct you differently, you will be permitted to separate at recesses and for meals, and at night.~~

~~The attorneys will now proceed with their examination.~~

Part 2 - Jury

~~That the following oral and written instructions, with such modifications as the circumstances of~~

~~the particular case may require shall be given by the court to the jury immediately after the jurors are selected for the case:~~
Immediately after the jurors are selected and have been sworn as provided in Rule 236, the judge shall give each juror a copy of the following written instructions and then read them to the jury.

Written Instructions

By ~~the~~ your oath ~~which you take as jurors~~, you ~~become~~ are now officials of this court, and active participants in the ~~public~~ administration of justice. ~~I now give you further instructions which you must obect throughout this trial.~~

~~It is your duty to listen to and consider the evidence and to determine fact issues later submitted to you, but I, as judge, will decide matters of the law. You will now receive written instructions which you will observe during this trial, together with such other instructions as I may hereafter give, or as heretofore I have given to you. (A copy of the written instructions set out below in this Section II shall thereupon be handed to each juror.) As you examine the instructions which have just been handed to youl, we will go over them briefly together. The first three instructions have previously been stated, and you will continue to observe them throughout the trial. These and the other instructions just handed to you are as follows:~~ It is essential to the administration of fair and impartial justice that you follow these instructions:

See new paragraph 3

See paragraph 1

1. You must continue to obey the instructions I gave you earlier. Do not talk about the case with anyone, and do not have any contact with the parties, attorneys, witnesses, or other

interested persons outside the courtroom. ~~Do not mingle with nor talk to the lawyers, the witnesses, the parties, or any other person who might be connected with or interested in this case, except for casual greetings. They have to follow these same instructions and you will understand it when they do.~~

~~2. Do not accept from, nor give to, any of those persons any favors however slight, such as rides, food or refreshments.~~ See paragraph 1

~~3. Do not discuss anything about this case, or even mention it to anyone whomsoever, including your wife or husband nor permit anyone to mention it in your hearing until you are discharged as jurors or excused from this case. If anyone attempts to discuss this case, report it to me at once.~~ See paragraph 1

2. Do not even discuss the case among yourselves until ~~after~~ you have heard all of the evidence, the court's charge, and the attorneys' arguments, and ~~until~~ I have sent you to the jury room to begin your deliberations ~~consider your verdict~~.

3. You are the judges of the facts of this case. It is your duty to listen to and consider carefully the evidence admitted under my rulings, and to answer the specific questions about the facts that I will submit to you in writing in the court's charge. From second introductory paragraph

4. In arriving at your verdict, you can consider only the evidence admitted during the trial. Do not make any investigation about the facts of this case. ~~Occasionally we have a juror who privately seeks out information about a case on trial. This is improper. All evidence must be presented in open court so that each side may question the witnesses and make proper objection. These rules apply to jurors the same~~

~~as they apply to the parties and to me. If you know of, or learn anything about, this case except from the evidence admitted during the course of thie trial, you should tell me about it at once. You have just taken an oath that you will render a verdict on the evidence submitted to you under my rulings.~~ Do not seek out any information contained in documents, books, or records that are not in evidence. Do not make personal inspections or observations outside the courtroom. Do not let anyone else do any of these things for you. This avoids a trial based upon secret evidence.

~~6. Do not make personal inspections, observations, investigations, or experiments nor personally view premises, things, or articles not produced in court. Do not let anyone else do any of these things for you.~~ — See paragraph 4

~~7. Do not tell other jurors your own personal experiences nor those of other persons, nor relate any special information. A juror may have special knowledge of matters such as business, technical or professional matters or he may have expert knowledge or opinions, or he may know what happened in this or some other lawsuit. To tell the other jurors any of this information is a violation of these instructions.~~ — Moved to Part 3 - Court's Charge

5. The law is determined by the legislature and courts of this state. You are obligated to follow my instructions about the law, regardless of whether you think the law is right or wrong. — New

6. During the presentation of evidence, the attorneys may make legal objections. If an objection to a question is sustained, disregard the question, and do not speculate as to why it was asked or what the answer would have been. If an objection to a witness's answer is sustained, disregard that answer. It is not in evidence, and should not be considered. Do not speculate about — New

or consider for any reason the objections or my rulings themselves.

~~8. Do not discuss or consider attorneys' fees unless evidence about attorneys' fees is admitted.~~

Moved to Part 3 - Court's Charge

~~9. Do not consider, discuss, nor speculate whether or not any party is or is not protected in whole in part by insurance of any kind.~~

Moved to Part 3 - Court's Charge

~~10. Do not seek information in law books, dictionaries, public or private records or elsewhere, which is not admitted in evidence.~~

~~At the conclusion of all the evidence, I may submit to you a written charge asking you some specific questions. You will not be asked, and you should not consider, whether one party or the other should win. Since you will need to consider all of the evidence admitted by me, it is important that you pay close attention to the evidence as it is presented.~~

~~The Texas law permits proof of any violation of the rules of proper jury conduct. By this I mean that jurors and others may be called upon to testify in open court about acts of jury misconduct. I instruct you, therefore, to follow carefully all instructions which I have given you, as well as others which you later receive while this case is on trial.~~

~~You may keep these instructions and review them as the case proceeds. A violation of these instructions should be reported to me.~~

I stress again that it is imperative that you follow these instructions, as well as any others that I may later give you. If you do not obey these instructions, then it may become necessary for another jury to re-try this case with all of the attendant waste of your time here and the

expense to the litigants and the taxpayers of this county for another trial. Keep your copy of these instructions, and refer to them should any question arise about the rules that govern your conduct during this trial. A violation of any instruction must be reported to me as soon as possible.

Part 3 - Court's Charge

~~That~~ The following written instructions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the jury as part of the charge:

1. This case is submitted to you by asking questions about the facts ~~which you must decide from the evidence you have heard in this trial~~. Your answers must be based only upon the evidence, including exhibits, admitted during the trial.

2. In considering the evidence, you are bound to follow the law set forth in this charge, as well as all instructions concerning jurors' conduct that you have been given.

New emphasis

3. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony ~~but in matters of law, you must be governed by the instructions in this charge~~.

~~In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.~~

See paragraph 2

4. ~~1.~~ Do not let bias, prejudice, or sympathy play any part in your deliberations.

~~2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.~~

See paragraph 1

5. Do not become a secret witness by telling other jurors about other incidents, experiences, or lawsuits. Do not tell other jurors about any special knowledge, information, or expertise you may have. You must confine your deliberations to the evidence presented in open court. This avoids a trial based upon secret evidence.

Moved from Part 2

6. Do not discuss or consider attorneys' fees. [Omit when attorneys' fees are in issue.]

Moved from Part 2

7. Do not discuss or consider whether insurance protects any party. [Omit when coverage is in issue.]

Moved from Part 2

8. This charge includes all legal instructions and definitions that are necessary to assist you in reaching your verdict, so do not seek out any information in law books or dictionaries.

Moved from Part 2

9. ~~3. Since~~ Every answer ~~that is~~ required by the charge is important, ~~no juror should state or consider that any required answer is not important~~.

10. ~~4. You must not~~ Do not decide who you think should win and then try to answer the questions accordingly. Simply answer the questions, and do not ~~discuss or~~ concern yourselves with the effect of your answers.

11. ~~5. You will not~~ Do not decide ~~the answer to~~ a question by ~~lot or by drawing straws or by~~ any ~~other~~ method of chance.

12. ~~5. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by~~ Do not answer a question that calls for a numerical answer by adding together each juror's figure and dividing by the number of jurors to get an average.

13. ~~5.~~ Do not do any trading on your answers. That is, one juror must not agree to answer ~~a certain~~ one question ~~one~~ a certain way if other jurors will agree to answer another question ~~another~~ a certain way.

14. After you retire to the jury room, you will select ~~your own~~ a presiding juror. ~~The first thing the presiding juror will do is to have this complete charge read aloud and then~~ You will then deliberate upon your answers ~~to the questions asked~~.

15. It is the duty of that presiding juror:

a. to preside during the deliberations to provide order and compliance with the charge; New

b. to write, sign, and deliver to the bailiff any communication to me;

c. to conduct the vote; and

d. to write your answers in the spaces provided.

16. ~~6.~~ You may render your verdict on the vote of ten or more members of the jury, but the same ten or more must agree upon each of the answers made. ~~and to the entire verdict. You will not, therefore, enter into an agreement to be~~

~~bound by a majority or any other vote of less that ten jurors.~~

17. If the verdict ~~and all of the answers therein~~ is reached by unanimous agreement, the presiding juror ~~shall~~ will sign the verdict on the certificate page for the entire jury.

18. If the verdict is less than unanimous, the ten or eleven jurors who agree to each and every answer will sign the verdict individually on the certificate page. ~~If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.~~

19. If you observe a violation of my instructions outside the jury room, by either a juror or any other person, you must report that to me. New

20. During your deliberations, ~~the presiding juror or~~ any ~~other~~ juror who observes a violation of my ~~the court's~~ instructions shall ~~immediately warn the one who is violating the same~~ point out the violation and caution the offending juror not to violate the instruction ~~do so~~ again.

~~These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys, and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.~~

21. You must not discuss the case with anyone, not even with other members of the jury, unless all of the jurors are in the jury room. If anyone other than a juror tries to talk to you about the case before you reach a verdict, tell me immediately. New

22. When all required questions have been answered, the presiding juror has written your answers on the charge, and the verdict has been signed, you will summon the bailiff and be returned to court with your verdict.

New

[Questions, definitions, and instructions to be placed here.]

Certificate

We, the jury, have answered the ~~above and foregoing~~ questions as shown ~~herein indicated,~~ and ~~herewith~~ return these answers to ~~same into~~ court as our verdict.

Signature of presiding juror, if unanimous. [One signature line here] ~~(To be signed by the presiding juror if unanimous.)~~

Signatures of jurors voting for the verdict, if not unanimous: [11 signature lines here] ~~(To be signed by those rendering the verdict if not unanimous.)~~

Part 4 - Jury Release

The judge shall give the jury the following oral instructions after accepting the verdict and then release them. ~~That the following oral instructions shall be given by the court to the jury after the verdict has been accepted by the court and before the jurors are discharged.~~

I ~~The court has~~ earlier instructed you to ~~that you should~~ observe strict secrecy during the trial, not to ~~and that you should not~~ discuss this case with anyone except other jurors while you

were deliberating. I am ~~now~~ about to discharge you. Once I have done that ~~after your discharge~~, you are released from that and all of the other orders that I gave you ~~from your secrecy~~. You will ~~then~~ be absolutely free to discuss anything about the case ~~and your deliberations~~ with anyone. ~~However,~~ You will be just as ~~are also~~ free to decline to talk about ~~discuss~~ the case ~~and your deliberations~~ if that is your decision ~~you wish~~.

~~After you are discharged, it is lawful for the attorneys or other persons to question you to determine whether any of the standards for jury conduct which I have given you in the course of this trial were violated and to ask you to give an affidavit to that effect. You are free to discuss or not to discuss these matters and to give or not to give an affidavit.~~

[Judge's commendation of jurors and the important service they have performed may be added here.]

Rule 226. Oath to Jury Panel

Before the parties or their attorneys begin the examination of the jury panel ~~jurors whose names have thus been listed~~, the jurors shall be sworn by the court or under its direction as follows: "Do you~~, and each of you, do~~ solemnly swear or affirm that you will give true answers ~~true answers give~~ to all questions asked of ~~propounded to~~ you concerning your qualifications as a juror, so help you God?"

Rule 236. Jurors' Oath

The jury shall be sworn by the court or under its direction as follows: "Do you~~, and each of~~

~~you, do~~ solemnly swear or affirm that ~~in all cases between parties which shall be to you submitted,~~ you will return a true verdict ~~a true verdict render~~ according to the law stated in the court's charge ~~as it may be given you in charge by the court~~ and to the evidence submitted to you under the rulings of this court, so help you God?"

Report of

Texas Supreme Court

Task Force on the

Rules of Civil Procedure

November 8, 1993

To: The Honorable Nathan L. Hecht
Rules Member, Supreme Court of Texas

From: William V. Dorsaneo, III
Chairman, Task Force on Revision of the Texas Rules of Civil Procedure

Re: Recodification of the Texas Rules of Civil Procedure

Status Report

1. The Need for Recodification: Background.

As originally promulgated, the Texas Rules of Civil Procedure consisted of approximately 822 separate rules divided into eight parts:

I. General Rules.
II. Rules of Practice in District and County Courts.
III. Rules of Procedure for the Courts of Civil Appeals.
IV. Rules of Practice for the Supreme Court.
V. Rules of Practice in Justice Courts.
VI. Rules Relating to Ancillary Proceedings.
VII. Rules Relating to Special Proceedings.
VIII. Closing Rules.

This original structure has been rendered substantially obsolete by subsequent Texas Supreme Court orders. As a result of the adoption of the Texas Rules of Appellate Procedure, Parts III and IV were completely repealed and the number of civil procedural rules was reduced by approximately 130 rules. In addition to the large gap that was created by the promulgation of the Rules of Appellate Procedure, another consequence of their removal from the Rules of Civil Procedure is that the civil procedural rulebook now begins with two separate sections of "general rules," i.e., the General Rules (Rules 1-14c) contained in Part I and the General Rules (Rules 15-21b) contained in the first section of Part II.

In addition to the major structural change that resulted from the adoption of the appellate rules, other major revisions have been made in Part II of the rulebook. Most notably, the rules concerning pretrial discovery, venue practice, the jury charge, and findings of fact in bench trials and have been rewritten; the rules concerning the need for and the procedural mechanisms for serving papers and notices on other parties or

their counsel have been changed; the rules concerning postjudgment motions and the duration and extent of the trial court's plenary power have been substantially revised; new rules have been adopted recognizing new procedural mechanisms, i.e. special appearances, summary judgments, mental and physical examinations; and a large number of rules have been repealed for a variety of reasons. Nonetheless, despite all of this activity, many of the current rules are substantially verbatim renditions of the parts of the Revised Civil Statutes of 1925 that were deemed procedural and, therefore, appropriate for inclusion in the rules of civil procedure by the Texas Supreme Court and the original rules committee.

Currently, the Texas Rules of Civil Procedure are divided into six parts and numbered 1-14c (general rules), 15-330 (district and county level courts) 523-591 (justice court rules) 572-734 (ancillary proceedings), 737-813 (special proceedings) and 814-822 (closing rules). Parts I and II contain the most important rules and include the following sections and subsections:

I. General Rules (1-14c)
II. Rules of Practice in District and County Courts
- Sec. 1 General Rules (15-21b)
- Sec. 2 Institution of Suit (22-27)
- Sec. 3 Parties to Suits (28-44)
- Sec. 4. Pleading
  - A. General (45-77)
  - B. Pleadings of Plaintiff (78-82)
  - C. Pleadings of Defendant (83-98)
- Sec. 5. Citation (99-124)
- Sec. 6. Costs and Security Therefor (125-149)
- Sec. 7. Abatement and Discontinuance of Suit (150-165a)
- Sec. 8. Pre-Trial Procedure (166-175)
- Sec. 9. Evidence and Depositions
  - A. Evidence (176-105)
  - B. Depositions (187-215)
- Sec. 10. The Jury in Court (216-236)
- Sec. 11. Trial of Causes
  - A. Appearance and Procedure (237-250)
  - B. Continuance and Change of Venue (251-261)
  - C. The Trial (262-270)
  - D. Charge to the Jury (271-279)
  - E. Case to the Jury (280-289)
  - F. Verdict (290-295)
  - G. Findings by Court (296-299a)
  - H. Judgments (300-314)
  - I. Remittitur and Correction (315-316)
  - J. New Trials (320-329b)
  - K. Certain District Courts (330)

2. The Desirability of Reorganization.

The Task Force recommends that Parts I and II of the Texas Rules of Civil Procedure containing Rules 1-330 be substantially reorganized. From an overall standpoint, the members of the Task Force have concluded that it is feasible and desirable to reorganize the Texas Rules of Civil Procedure in the current rulebook in the following manner:

I. General Rules
II. Commencement of Action; Service of Process, Pleadings, Motions and Orders
III. Pleadings and Motions
IV. Parties
V. Discovery and Pretrial Procedure
VI. Trial
VII. Judgments; Motions for Judgment; New Trials
VIII. Provisional and Final Remedies
IX. Special Proceedings
X. Counsel, Courts, Clerks, Court Reporters, Court Records, and Court Costs
XI. Closing Rules.

The method of organization is based on the way that the Federal Rules of Civil Procedure are organized except for the inclusion of a separate subsection for Pretrial Procedure in the structure that we recommend. We believe that this organization is far superior to the current one for two basic reasons. First, the changes made in the original rules have impaired the structural utility of the original rulebook. Second, the proposed general structure is substantially less complicated as well as being more in tune with modern procedural thinking concerning particular procedural subjects and, therefore, more user friendly. In other words, given the procedural developments that have occurred in Texas since the rules were promulgated originally, the federal structure is a better one than the original structure.

A detailed table of contents based on the proposed structure is attached to this memorandum as an appendix.

3. The Need for Revision of Sections and Specific Rules With or Without Substantive Changes.

The Task Force also recommends that the sections and the specific rules of procedure concerning practice in district and county level courts within each part and section be amended by combining discrete rules, by eliminating unnecessary rules and by reordering the remaining rules into a more workable and understandable organization within each section of the new

general structure. Many of the current Texas Rules of Civil Procedure governing the practice in district and county level courts are one paragraph items with relatively uninformative titles that could and should be combined, with or without substantive change. This is especially so in contrast to the current federal rules and the Texas rules that were based on the 1937 draft of the federal rules, which are longer rules having titled subparts.

Probably, the original drafters thought it wise not to change the predecessor rules and statutes too much in 1939-1940, because of a presumed familiarity with them by the bench and bar. However, because of the fractionalization of particular subjects into a large number of short rules it is frequently difficult for lawyers and judges to see and appreciate the relationship between related matters. As a result, this method of organization and drafting is also productive of needless complexity, uncertainty and some procedural stupidity. Of course, this part of the revision process is an especially difficult and time-consuming one for several reasons.

First, because the original rules were copied from the revised civil statutes of 1925, which were themselves copied from earlier codifications, they are poorly worded and poorly ordered. Unlike each of the codes "recodifying" the statutes that have been enacted in the past twenty-five years, the Texas rules of procedure have not been restated in modern language, rearranged into a more logical order, or systematically cleansed of duplicative, expired or other ineffective provisions.

Second, when the original rules were promulgated, although many of them were in fact taken from the then existing federal rules, a number of changes were made in them either organizationally or textually. For the most part, these changes were mistakes that should be reversed.

Third, despite the fact that most of the major efforts at revising specific parts of the rulebook that have been undertaken during the past fifteen years have produced substantial improvements, a number of other piecemeal changes that have been made over time have compromised the overall utility of the rulebook.

A preliminary and working draft of a set of reorganized rules developed by the Task Force as well as a disposition table are also attached to this memorandum as appendices.

4. The Need for More Work on Ancillary and Special Proceedings.

The third recommendation of the Task Force is that the rules governing Ancillary Proceedings and Special Proceedings be

substantially revised in two fundamental ways. First, many of the subjects covered in both the Ancillary Proceedings and Special Proceedings sections of the current rulebook are also covered both procedurally and substantively in either the Civil Practice and Remedies Code, the Property Code or in some other codification. The Task Force believes that this truncation or in some cases duplication of coverage is undesirable. Although we have not completed our analysis of the Ancillary Proceedings and Special Proceedings and are not in a position to make specific recommendations, one major part of the revision process would entail the repeal of procedural rules coupled with statutory amendments.

Conclusion

Since the original promulgation of the Texas Rules of Civil Procedure, amendments have been made or are being made on the most important procedural subjects. Most of these changes have been beneficial and they can be retained in substantial measure. Nonetheless, the sophistication of modern Texas lawyers is not matched by the overall organization of our procedural rules which contain an excessive number of rules, incomplete treatment of important subjects, a separation of pertinent information concerning an individual subject into a number of rules that are not in reasonable proximity to each other, as well as unnecessary redundancy. Despite the fact that current rules are workable and notwithstanding the overall contributions of the fine lawyers and jurists who have worked for the improvement of the rules in the years following their initial promulgation, after more than fifty years of service, the rulebook needs special attention.

It is our privilege to be of service to the Court in pursuit of this worthwhile endeavor.

Respectfully submitted,

William V. Dorsaneo III
Chairperson, Task Force
on Revision of the Texas
Rules of Civil Procedure

APPENDIX "A"

Table of Contents

APPENDIX "B"
DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

CURRENT TRCP	PROPOSED TRCP	COMMENTS
1 Objective of Rules	1 Objective of Rules	No wording change from existing rule. "Liberal construction" is only substantive phrase in the rule.
2 Scope of Rules	2 Scope of Rules	No wording change from existing rule. This rule appears wordy and cumbersome as written. Is it necessary to relate back to the various September 1, 1941 statutes?
3 Construction of Rules	3 Construction of Rules	No wording change from existing rule
3a Local Rules	4 Local Rules	No wording change from existing rule
4 Computation of Time	6 Time (a)Computation	New rule tracks wording of old rule
5 Enlargement of Time	6 Time (b)Enlargement (c)Use of U.S. Postal Service	(b) New rule tracks wording of old rule (c) Note the current and new Texas rule allow for 10 days tardy. The Fed rule adds 3 days
6 Suits Commenced on Sunday	5 Commencement of Suit	The essence of old rule 6 is included; however the reference to injunction, attachment, garnishment, sequestration, or distress proceeding exception has not been included.
7 May Appear by Attorney	110 May Appear by Attorney; Attorney in Charge; Number of Counsel Heard; Attorney to Show Authority (a)May Appear by Attorney	No wording change from existing rule
8 Attorney in Charge	110 May Appear by Attorney; Attorney in Charge; Number of Counsel Heard; Attorney to Show Authority (b)Attorney in Charge	No wording change from existing rule
9 Number of Counsel Heard	110 May Appear by Attorney; Attorney in Charge; Number of Counsel Heard; Attorney to Show Authority (c)Number of Counsel Heard	No wording change from existing rule
10 Withdrawal of Attorney	112 Withdrawal of Attorney	No wording change from existing rule
11 Agreements to Be in Writing	113 Agreements to be in Writing	No wording change from existing rule
12 Attorney to Show Authority	110 May Appear by Attorney; Attorney in Charge; Number of Counsel Heard; Attorney to Show Authority (d)Attorney to Show Authority	No wording change from existing rule
13 Effect of Signing of Pleadings, Motions and other Papers; Sanctions	24 Signing of Pleadings, Motions, and Other Papers; Sanctions (b), (c), (d)	Significant wording change from Rule 13. Also incorporates rule 57. Generally reorganized.
14 Affidavit by Agent	Delete	
14b Return or Other Disposition of Exhibits	120 Duties of Clerk (g)Exhibits	Reworded. Proposed rule incorporates existing rules 23, 24, 25, 26, 27, and 246
14b Return or Other Disposition of Exhibits SUPREME COURT ORDER RELATING TO RETENTION AND DISPOSITION OF EXHIBITS	124 Withdrawal of Exhibits by Parties (a)Disposal of Exhibits	Reworded from existing rule
14c Deposit in Lieu of Surety Bond	133 Security for Costs	No wording change.
15 Writs and Process	9 Process, Service and Filing of Pleadings, Motions and Other Papers (a)Form	No wording change from existing rule

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

16 Shall Endorse All Process	9 Process, Service and Filing of Pleadings, Motions and Other Papers (b)Endorsement	Slight wording change from existing rule
17 Officer to Execute Process	9 Process, Service and Filing of Pleadings, Motions and Other Papers (c)Fees 129 Issuance and Service of Process (b)In-County Process	No wording change from existing rule DUPLICATION.
18 When Judge Dies During Term, Resigns or Is Disabled	114 Effect of Vacant Judgeship on Proceedings	Significantly reworded and shortened
18a Recusal or Disqualification of Judges	115 Recusal or Disqualification of Judges	Significantly reworded
18b Grounds for Disqualification and Recusal of Judges	116 Grounds for Disqualification and Recusal of Judges	Slight wording change from existing rule, plus a "definitions" section added
18c Recording and Broadcasting of Court Proceedings	118 Recording and Broadcasting of Court Proceedings	No wording change from existing rule
19 Non-Adjournment of Term	Not included in draft. Consider Deletion.	Review for obsolescence in light of continuous terms
20 Minutes Read and Signed	119 Minutes Read and Signed. Consider Deletion.	No wording change from existing rule. Review for obsolescence; procedure likely ignored for most part
21 Filing and Serving Pleadings and Motions	9 Process, Service, and Filing of Pleadings, Motions and Other Papers (d)Filing and Serving Pleadings and Motions	No wording change from existing rule
21a Methods of Service	9 Process, Service, and Filing of Pleadings, Motions and Other Papers (e)Methods of Service	Some wording changes from existing rule
21b Sanctions for Failure to Serve or Deliver Copy of Pleadings and Motions	9 Process, Service, and Filing of Pleadings, Motions and Other Papers (f)Sanctions	No wording change from existing rule
22 Commenced by Petition	5 Commencement of Suit	No wording change from existing rule
23 Suits to Be Numbered Consecutively	120 Duties of Clerk (a)Assignment of File Numbers	Reworded. Proposed rule incorporates existing rules 14b, 24, 25, 26, 27, and 246
24 Duty of Clerk	120 Duties of Clerk (b)Endorsement on Petitions	Reworded. Proposed rule incorporates existing rules 14b, 23, 25, 26, 27, and 246
25 Clerk's File Docket	120 Duties of Clerk (c)File Docket	Reworded. Proposed rule incorporates existing rules 14b, 23, 24, 26, 27, and 246
26 Clerk's Court Docket	120 Duties of Clerk (e)Court Docket	Reworded. Proposed rule incorporates existing rules 14b, 23, 24, 25, 27, and 246
27 Order of Cases	120 Duties of Clerk (d)Order of Cases and Denoting File Number on Instruments	Reworded. Proposed rule incorporates existing rules 14b, 23, 24, 25, 26, and 246
28 Suits in Assumed Name	30 Parties Plaintiff and Defendant (b)Capacity to Sue or Be Sued in Assumed Name	No wording change from existing rule. Tracks Fed. rule 17(a).
29 Suit on Claim Against Dissolved Corporation	Delete	This should be covered in the TBCA (Art. 7.12).
30 Parties to Suits	Delete	This should be covered in the CPRC (Sec. 17.001).
31 Surety Not to Be Sued Alone	Delete	This should be covered in the CPRC (Sec. 17.001).
32 May Have Question of Suretyship Tried	Delete	This special rule for sureties is unecessary.
33 Suits by or Against Counties	Transfer to CPRC or Delete	See Ch. 17, CPRC.

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

34 Against Sheriff, Etc.	Transfer to CPRC or Delete	See Ch. 17, CPRC.
35 On Official Bonds	Transfer to CPRC or Delete	See Ch. 17, CPRC.
36 Different Officials and Bondsmen	Transfer to CPRC or Delete	See Ch. 17, CPRC.
37 Additional Parties	Delete	This rule is unnecessary.
38 Third-Party Practice	27 Third-Party Practice	No wording change from existing rule.
39 Joinder of Persons Needed for Just Adjudication	32 Joinder of Persons Needed for Just Adjudication	No wording change from existing rule. Tracks Fed. Rule 19
40 Permissive Joinder of Parties	33 Permissive Joinder of Parties	No wording change from existing rule. Tracks Fed. Rule 20
41 Misjoinder and Nonjoinder of Parties	34 Misjoinder and Nonjoinder of Parties	No wording change from existing rule. Tracks Fed. Rule 21
42 Class Actions	36 Class Actions 37 Derivative Suit	No wording change from existing rule, except all language on derivative suits moved to proposed Rule 37. Tracks Fed. Rules 23 and 23.1
43 Interpleader	35 Interpleader	No wording change from existing rule. Tracks Fed. Rule 22(1)
44 May Appear by Next Friend	30 Parties Plaintiff and Defendant (c)Next Friends and Guardians Ad Litem (1)	Significant wording change. Removed language concerning next friends agreement to judgments and their binding nature. Also incorporates existing Rule 173
45 Definition and System	20 Pleadings Allowed; Form of Motions (a)Pleadings	Slight rewording from existing rule plus elimination of "recycled paper" preference
46 Petition and Answer; Each One Instrument of Writing	Consider Deletion.	This rule is probably unnecessary.
47 Claims for Relief	21 General Rules of Pleading (a)Claims for Relief	Slight rewording from existing rule.
48 Alternative Claims for Relief	21 General Rules of Pleading (b)Alternate Claims for Relief	No wording change from existing rule. Tracks Fed. rule 8(e)
49 Where Several Counts	Delete	This rule is unnecessary.
50 Paragraphs, Separate Statements	23 Form of Pleadings (b)Paragraphs	No wording change from existing rule. Tracks Fed. Rule 10(b)
51 Joinder of Claims and Remedies	31 Joinder of Claims and Remedies	No wording change, except confusing language on multiple party joinder and joinder of cross claims and third-party claims eliminated. Tracks Fed. rule 18
52 Alleging a Corporation	Delete; see Proposed Rule 27(e).	
53 Special Act or Law	22 Pleading Special Matters (a)Special Act or Law	No wording change from existing rule
54 Conditions Precedent	22 Pleading Special Matters (b)Conditions Precedent	No wording change from existing rule. Tracks Fed. rule 9(c)
55 Judgment	22 Pleading Special Matters (c)Judgment	No wording change from existing rule. Tracks Fed. rule 9(e)
56 Special Damage	22 Pleading Special Matters (d)Special Damage	Wording addition to define special damages per Sherrod v. Bailey. Tracks Fed. rule 9(g)
57 Signing of Pleadings	24 Signing of Pleadings, Motions, and Other Papers; Sanctions (a)	No wording change from existing rule, but also incorporates Sanctions Task Force Proposal.
58 Adoption by Reference	23 Forms of Pleadings (c)Adoption by Reference	No wording change from existing rule. Tracks Fed. rule 10 (c), first sentence
59 Exhibits and Pleading	23 Forms of Pleadings (d)Exhibits and Pleading	No wording change from existing rule

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

60 Intervenor's Pleadings	38 Intervention (a)Intervenor's Pleadings	No wording change from existing rule. Also incorporates existing Rule 61
61 Trial: Intervenors: Rules Apply to All Parties	Delete.	This rule is unnecessary.
62 Amendment Defined	28 Amended and Supplemental Pleadings (a)Amendment Defined	No wording change from existing rule. Also incorporates existing rule 65
63 Amendments and Responsive Pleadings	28 Amended and Supplemental Pleadings (b)When to Amend; Amended Instrument	No wording change from existing rule. Also incorporates existing rule 64
64 Amended Instrument	28 Amended and Supplemental Pleadings (b)When to Amend; Amended Instrument	No wording change from existing rule. Also incorporates existing rule 63
65 Substituted Instrument Takes Place of Original	28 Amended and Supplemental Pleadings (a)Amendment Defined	No wording change from existing rule. Also incorporates existing rule 62
66 Trial Amendment	28 Amended and Supplemental Pleadings (c)Trial Amendment	No wording change from existing rule. Also incorporates existing rule 67. Tracks Fed. rule 15(b), last two sentences
67 Amendments to Conform to Issues Tried Without Objection	28 Amended and Supplemental Pleadings (c)Trial Amendment	No wording change from existing rule. Also incorporates existing rule 66. Tracks Fed. rule 15(b)
68 Court May Order Repleader	Delete	Not addressed in draft
69 Supplemental Petition or Answer	21 General Rules of Pleadings (c)Supplemental Petition or Answer	Not addressed in draft.
70 Pleading: Surprise: Cost	Consider adding.	Not addressed in draft.
71 Misnomer of Pleading	Consider adding.	
74 Filing With the Court Defined	Consider adding.	
75 Filed Pleadings; Withdrawals	Consider adding.	Not addressed in draft.
75a Filed Exhibits: Court Reporter to File With Clerk	123 Filing of Exhibits by Reporter or Stenographer for Court	Slight wording change from existing rule
75b Filed Exhibits: Withdrawal	124 Withdrawal, Return, Disposal and Copying of Exhibits (b)Withdrawal of Exhibits by Parties (c)Withdrawal of Exhibits for Appellate Purposes	Includes all of existing rule, plus incorporates existing rule 14b
76 May Inspect Papers	125 Inspection of Court Records and Papers	Slight wording change from existing rule
76a Sealing Court Records	126 Sealing Court Records	No wording change from existing rule
77 Lost Records and Papers	127 Lost Records and Papers	No wording change from existing rule
78 Petition; Original and Supplemental; Indorsement	20 Pleadings Allowed; Form of Motions (b)Petition and Answer; Original and Supplemental 23 Form of Pleadings (a)Indorsement; Identity of the Parties	Wording significantly changed from existing rule. Also incorporates existing rules 79 and 83.
79 The Petition	20 Pleadings Allowed; Form of Motions (b)Petition and Answer; Original and Supplemental 23 Form of Pleadings (a)Indorsement; Identity of the Parties	Wording significantly changed from existing rule. Also incorporates existing rules 78 and 83.
80 Plaintiff's Supplemental Petition	21 General Rules of Pleadings (d)Contents of Supplemental Pleadings (1)Plaintiff	No wording change from existing rule
81 Defensive Matters	21 General Rules of Pleading (e)Denials of Claims and Defenses (2)	No wording change from existing rule

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

82 Special Defenses	21 General Rules of Pleading (e)Denials of Claims and Defenses (3)	Wording significantly changed from existing rule
83 Answer; Original and Supplemental; Indorsement	20 Pleadings Allowed; Form of Motions (b)Petition and Answer; Original and Supplemental 23 Form of Pleadings (a)Indorsement; Identity of the Parties	Wording significantly changed from existing rule. Also incorporates existing rules 78 and 79.
84 Answer May Include Several Matters	25 Presentation of Defenses; Plea or Motion Practice (c)Hearings	No wording change from existing rule
85 Original Answer; Contents	Delete	This rule is unnecessary.
86 Motion to Transfer Venue	64 Venue (a)Change of Venue by Consent (b)Motion to Transfer Venue	Some wording change and reorgainization
87 Determination of Motion to Transfer	64 Venue (b)Motion to Transfer Venue (2)Determination of Motion to Transfer	Slight wording change
88 Discovery and Venue	64 Venue (c)Discovery and Venue	No wording change from existing rule
89 Transferred If Motion is Sustained	64 Venue (b)Motion to Transfer Venue (2)(d)Transferred if Motion Sustained	No wording change from existing rule
90 Waiver of Defects in Pleading [first sentence]	20 Pleadings Allowed; Form of Motions (d)Demurrers Abolished	No wording change from existing rule
90 Waiver of Defects in Pleading [all but first sentence[	21 General Rules of Pleading (h)Waiver	Significant wording change also changes the meaning of the rule. Previously only the loser waived defect on appeal; the new rule indicates the winner does too.
91 Special Exceptions	21 General Rules of Pleading (g)Special Exceptions	No wording change from existing rule
92 General Denial	21 General Rules of Pleading (e)Denials of Claims or Defenses (1)	No wording change from existing rule
93 Certain Pleas to Be Verified	22 Pleading Special Matters (e)Certain Pleas to Be Verified	No wording change from existing rule
94 Affirmative Defenses	21 Pleading Special Matters (f)Affirmative Defenses	Requirements for suit on an insurance contract eliminated. Also incorporates existing rule 95. Tracks Fed. rule 8(c)
95 Pleas of Payment	21 Pleading Special Matters (f)Affirmative Defenses	No wording change from existing rule. Also incorporates existing rule 94.
96 No Discontinuance	Delete	This rule is probably unnecessary.
97 Counterclaim and Cross-Claim	26 Counterclaim and Cross-Claim	No wording change from existing rule. Tracks Fed. rule 13
98 Supplemental Answers	21 General Rules of Pleadings (d)Contents of Supplemental Pleadings (2)Defendant	No wording change from existing rule
99 Issuance and Form of Citation	7 Citation and Service - Non-Publication 25 Presentation of Defenses; Plea or Motion Practice (a)When Presented	Proposed rule 7(a)-(d) tracks existing rule 99(a)-(d) word for word. Proposed rule 7 incorporates existing rules 103, 105, 106, 107, 108, and 108a.

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

103 Who May Serve	7 Citation and Service - Non-Publication (e)Who May Serve	No wording change from existing rule. Note that the title of this section is "...Non-Publication", yet this proposed rule addresses citation by publication
105 Duty of Officer or Person Receiving	7 Citation and Service - Non-Publication (f)Duty of Recipient	No wording change from existing rule
106 Method of Service	7 Citation and Service - Non-Publication (g)Method of Service	No wording change from existing rule
107 Return of Service	7 Citation and Service - Non-Publication (h)Return of Service	No wording change from existing rule
108 Defendant Without State	7 Citation and Service - Non-Publication (i)Defendant Not In State	No wording change from existing rule
108a Service of Process in Foreign Countries	7 Citation and Service - Non-Publication (j)Service in Foreign Country	No wording change from existing rule
109 Citation by Publication	8 Citation by Publication (a)General	Significant wording change in new rule
109a Other Substituted Service	8 Citation by Publication (g)Other Substituted Service	No wording change from existing rule
110 Effect of Rules on Other Statutes	8 Citation by Publication (b)Effect of This Rule on Other Statutes	Significant wording change in new rule. Eliminates reference to companion rules
111 Citation by Publication in Action Against Unknown Heirs or Stockholders of Defunct Corporations	Delete	This should be covered in CPRC, Ch. 17.
112 Parties to Actions Against Unknown Owners or Claimants of Interest in Land	Delete	This should be covered in CPRC, Ch. 17.
113 Citation by Publication in Actions Against Unknown Owners or Claimants of Interest in Land	Delete	This should be covered in CPRC, Ch. 17.
114 Citation by Publication; Requisites	8 Citation by Publication (c)Requisites	Substantial wording change from existing rule. Eliminates details of required form and timing. Also incorporates existing rule 115.
115 Form of Published Citation in Actions Involving Land	8 Citation by Publication (c)Requisites	Slight wording change from existing rule. Also incorporates existing rule 114.
116 Service of Citation by Publication	8 Citation by Publication (d)Service	No wording change from existing rule
117 Return of Citation by Publication	8 Citation by Publication (e)Return	No wording change from existing rule
117a Citation in Suits for Delinquent Ad Valorem Taxes	Delete	This should be covered in CPRC, Ch. 17.
118 Amendment	7 Citation and Service - Non-Publication (l)Amendment 8 Citation by Publication (f)Amendment	No wording change from existing rule. Exact wording in both new rule 7(l) and 8(f). APPEARS REDUNDANT
119 Acceptance of Service	7 Citation and Service - Non-Publication (k)Acceptance of Service	Slight wording change from existing rule
119a Copy of Decree	Delete.	This should be covered in the Family Code.
120 Entering Appearance		This rule is unnecessary.

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

120a Special Appearance	63 Special Appearance	Slight wording change
121 Answer is Appearance	Delete.	This rule is unnecessary.
122 Constructive Appearance	This rule should be added.	
123 Reversal of Judgment	This rule should be added.	
124 No Judgment Without Service	This rule should be added.	
125 Parties Responsible	Delete.	This rule is probably unnecessary.
126 Fee for Execution of Process, Demand	129 Issuance and Service of Process (c)Out-of-County Process (d)Indigent Parties	Slight wording change from existing rule
127 Parties Liable for Other Costs	128 Parties Liable for Costs (b)Other Costs	Slightly reworded
129 How Costs Collected	130 Collection (a)How Costs are Collected	Reworded and shortened
130 Officer to Levy	130 Collection (b)Officer to Levy	Slightly reworded
131 Successful Party to Recover	131 Party's Recovery of Its Costs (a)General	No wording change. Also incorporates existing rule 133 & 141
133 Costs of Motion	Delete.	This rule is probably meaningless.
136 Demand Reduced by Payments	131 Party's Recovery of Its Costs (b)Reduction on Demand	No wording change from existing rule.
137 In Assault and Battery, Etc.	131 Party's Recovery of Its Costs (c)Assault, Battery or Defamation Claims	Slight wording change from existing rule. This rule is probably obsolete.
138 Cost of New Trial	Parties Liable for Costs (c)New Trial	No wording change from existing rule
139 On Appeal and Certiorari	Delete.	This rule should be in the TRAP.
140 No Fee for Copy	Consider adding to Proposed Rule 132.	
141 Courts May Otherwise Adjudge Costs	131 Party's Recovery of Its Costs (a)General	No wording change. Also incorporates existing rule 131 & 133
142 Security for Costs	129 Issuance and Service of Process (a)Collection by Clerk	No wording change from existing rule
143 Rule for Costs	133 Security for Costs (a)Rule for Costs	Slight wording change
143a Costs on Appeal to County Court	Delete.	This rule should be in the Justice Court rules.
144 Judgment on Cost Bond	133 Security for Costs (b)Cost Bonds	Slightly reworded. Also incorporates existing rule 148
145 Affidavit of Inability	134 Inability to Pay Costs	No wording change from existing rule
146 Deposit for Costs	133 Security for Costs (c)Deposit for Costs	Slight wording change
147 Applies to Any Party	128 Parties Liable for Cost (a)In General	Slight wording change
148 Secured by Other Bond	133 Security for Costs (b)Cost Bonds	Slightly reworded. Also incorporates existing rule 144
149 Execution for Costs	130 Collection (c)Execution for Costs	Slightly reworded
150 Death of Party	39 Substitution of Parties (a)Death of a Party	No wording change from existing rule. Also incorporates existing rules 151, 152, and 153
151 Death of Plaintiff	39 Substitution of Parties (a)Death of a Party	Slight wording change from existing rule. Also incorporates existing rules 150, 152, and 153

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

152 Death of Defendant	39 Substitution of Parties (a)Death of a Party	Slight wording change from existing rule. Also incorporates existing rules 150, 151, and 153.
153 When Executor, Etc., Dies	39 Substitution of Parties (a)Death of a Party	Slight wording change from existing rule. Also incorporates existing rules 150, 151, and 152.
154 Requisites of Scire Facias	39 Substitution of Parties (b)Requisites of Scire Facias	No wording change form existing rule
155 Surviving Parties	39 Substitution of Parties (c)Surviving Parties	No wording change from existing rule
156 Death After Verdict or Close of Evidence	39 Substitution of Parties (d)Death After Verdict or Close of Evidence	No wording change from existing rule
158 Suit for the Use of Another	39 Substitution of Parties (e)Suit for the Use of Another	No wording change from existing rule
159 Suit for Injuries Resulting in Death	39 Substitution of Parties (f)Suit for Injuries Resulting in Death	No wording change from existing rule
160 Dissolution of Corporation	Add to Proposed Rule 39.	
161 Where Some Defendants Not Served	Consider adding.	
162 Dismissal or Non-Suit	Add.	
163 Dismissal as to Parties Served, Etc.	Add.	
165 Abandonment	Consider adding.	
165a Dismissal for Want of Prosecution	61 Dismissal for Want of Prosecution	Slight wording change only
166 Pretrial Conference	60 Scheduling nad Pretrial	This proposal is being studied by the CCR.
166a Summary Judgment	102 Summary Judgment	Reworded and reorganized. Same substantive information, in general
166b Forms and Scope of Discovery; Protective Orders, Supplementation of Responses	40 General Provisions Regarding Discovery; Scope	The new rule has been reorganized. New rules 40 - 44 now cover the subject matter of 166b & 166c. Discovery Task Force currently addressing need for substantive changes.
166b Forms and Scope of Discovery; Protective Orders, Supplementation of Responses	41 Exemptions and Privleges from Discovery	The new rule has been abbreviated. Previous items now in subsequent rules.
166b Forms and Scope of Discovery; Protective Orders, Supplementation of Responses	42 Discovery Disputes	The new rule has been reorganized. New rules 40 - 44 now cover the subject matter of 166b & 166c. Discovery Task Force currently addressing need for substantive changes.
166b Forms and Scope of Discovery; Protective Orders, Supplementation of Responses	43 Duty to Supplement	The new rule has been reorganized. New rules 40 - 44 now cover the subject matter of 166b & 166c. Discovery Task Force currently addressing need for substantive changes.
166c Stipulations Regarding Discovery Procedure	44 Stipulations Regarding Discovery Procedures	The new rule has been reorganized. New rules 40 - 44 now cover the subject matter of 166(b) & 166(c). Discovery Task Force currently addressing need for substantive changes. Also incorporates 204 language.
167 Discovery and Production of Documents and Things for Inspection, Copying or Photographing [Also has sections from 166b 2 b, c & h]	45 Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes	Significant wording change and reorganization from existing rule. Some headings added or changed. Generally tracks Fed. rule 34
167a Physical and Mental Examination of Persons	46 Physical and Mental Examination of Persons	No wording change from existing rule. Tracks Fed. rule 35

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

168 Interrogatories to Parties	47 Interrogatories to Parties	Wording has been rearranged, but is essentially the same, except language regarding service has been eliminated (168(1)). Tracks Fed. rule 33
169 Requests for Admission	48 Requests for Admission	No wording change from existing rule. Tracks Fed. rule 36
171 Master in Chancery	62 Masters and Auditors (a)Master in Chancery	No wording change from existing rule. Also incorporates existing rule 172. Tracks Fed. rule 53
172 Audit	62 Masters and Audit (b)Audit	No wording change from existing rule. Also incorporates existing rule 171
173 Guardian Ad Litem	30 Parties Plaintiff and Defendant (c)Next Friends and Guardian Ad Litem (2)	Slight wording change from existing rule. Also incorporates existing rule 44
174 Consolidation; Separate Trials	67 Consolidation; Separate Trials; and Severance	Additional wording from existing rule. Also incorporates part of existing rule 41
175 Issue of Law and Dilatory Pleas	60 Pretrial and Discovery Conferences; Scheduling; Management (i)Issue of Law and Dilatory Pleas	No wording change from existing rule
176 Witnesses Subpoenaed	72 Subpoenas (a)Witnesses Subpoenaed	No wording change from existing rule
177 Form of Subpoena	72 Subpoenas (b)Form of Subpoena	No wording change from existing rule
177a Subpoena for Production of Documentary Evidence	72 Subpoena (c)Subpoena for Production of Documentary Evidence	No wording change from existing rule. Tracks Fed. rule 45(c)?? [The existing rule references 45(b), but this appears to be in error]
178 Service of Subpoenas	72 Subpoena (d)Service of Subpoena	No wording change from existing rule
179 Witness Shall Attend	72 Subpoena (e)Witness Shall Attend	No wording change from existing rule
180 Refusal to Testify	Delete.	This rule is unnecessary.
181 Party as Witness	Delete.	This rule is unnecessary.
183 Interpreters	117 Interpreters	No wording change from existing rule. Tracks Fed. rule 43(f)
185 Suit on Account	Delete.	This rule is unnecessary.
187 Deposition to Perpetuate Testimony	49 Deposition to Perpetuate Testimony	No wording change from existing rule
188 Depositions in Foreign Countries	54 Deposition in Foreign Jurisdiction	No wording change from existing rule
200 Depositions Upon Oral Examinations	50 Deposition Upon Oral Examination	No wording change from existing rule. Also incorporates other existing rules
201 Compelling Appearance; Production of Documents and Things; Deposition of Organization	53 Compelling Appearance at Depositions	Slight wording changes from existing rule
202 Non-Stenographic Recording; Deposition by Telephone	50 Deposition Upon Oral Examination (b)Notice of Examination	Abbreviated form of existing rule included. Seems to require rework as significant provisions are not included.
203 Failure of Party or Witness to Attend or to Serve Subpoena; Expenses	Delete; This should be covered in the general sanction's rules	See p. 115 of the Report of Sanctions' Task Force.
204 Examination, Cross-Examination and Objections	50 Deposition Upon Oral Examination (c)Examination, Cross-Examination and Objections	No wording change from existing rule. Also incorporates other existing rules

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

205 Submission to Witness; Changes; Signing	50 Deposition Upon Oral Examination (d)Record and Transcript of Examination (1)Submission to Witness; Changes; Signing	No wording change from existing rule. Also incorporates other existing rules
206 Certification by Officer; Exhibits; Copies; Notice of Delivery	50 Deposition Upon Oral Examination (d)Record and Transcript of Examination (2)-(5)	No wording change from existing rule. Sections have been combined and rearranged. Also incorporates other existing rules
207 Use of Deposition Transcripts in Court Proceedings	52 Use of Depositions in Court Proceedings	No major wording change from existing rule. Also incorporates other existing rule 209
208 Depositions Upon Written Questions	51 Depositions Upon Written Questions	No wording change from existing rule
209 Retention and Disposition of Deposition Transcripts and Depositions Upon Written Questions	52 Use of Depositions in Court Proceedings	No major wording change from existing rule. Also incorporates other existing rule 207
215 Abuse of Discovery; Sanctions	55 Abuse of Discovery; Sanctions	
216 Request and Fee for Jury Trial	73 Preserving the Right to Jury Trial (a)Request (b)Jury Fee	No wording change form existing rule
217 Oath of Inability	73 Preserving the Right to Jury Trial	No wording change from existing rule
218 Jury Docket	Delete.	This rule is probably unnecessary.
219 Jury Trial Day	Delete.	This rule is probably unnecessary.
220 Withdrawing Cause From Jury Docket	73 Preserving the Right to Jury Trial	No wording change from existing rule
221 Challenge to the Array	74 Challenging the Assembly of the Jury Panel	Reworded. Also incorporates existing rule 222
222 When Challenge is Sustained	74 Challenging the Assembly of the Jury Panel	Reworded. Also incorporates existing rule 221
223 Jury List in Certain Counties	75 Seating the Jury Panel	Major rewrite. Procedures removed from rule
224 Preparing Jury List	75 Seating the Jury Panel	Major rewrite. Procedures removed from rule
225 Summoning Talesman	75 Seating the Jury Panel	Major rewrite. Procedures removed from rule
226 Oath to Jury Panel	76 Swearing in, Instructing, and Examining the Jury Panel	Major rewrite. Removes reference to "God" in oath.
226a Admonitory Instructions to Jury Panel and Jury	79 Oath and Instructions to Jury (b)Instructions	L. Hughes draft intended. Not yet included
227 Challenge to Juror	77 Challenges for Cause	Major rewrite. Also incorporates existing rules 228, 229, & 231
228 "Challenge for Cause" Defined	77 Challenges for Cause	Major rewrite. Also incorporates existing rules 227, 229, & 231
229 Challenge for Cause	77 Challenges for Cause	Major rewrite. Also incorporates existing rule 227, 228, & 231
230 Certain Questions Not to Be Asked	Delete.	This rule is unnecessary.
231 Number Reduced by Challenges	77 Challenges for Cause	Major rewrite. Also incorporates existing rules 227, 228, & 229
232 Making Peremptory Challenges	Delete.	This rule is unnecessary.
233 Number of Peremptory Challenges	78 Peremptory Challenges	Major rewrite. Also incorporates existing rule 234 & adds Batson/Edmundson procedure
234 Lists Returned to the Clerk	78 Peremptory Challenges	Major rewrite. Also incorporates existing rule 233 & adds Batson/Edmundson procedure
235 If Jury is Incomplete	Delete.	This rule is probably unnecessary.
236 Oath to Jury	79 Oath and Instructions to Jury (a)Oath	Rule reworded. Reference to "God" eliminated.

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

237 Appearance Day.	Delete.	This rule is unnecessary.
237a Cases Remanded From Federal Court	103 Default Judgment (a)When Available	Reworded and reorganized. Also incorporates existing rule 239
238 Call of Appearance Docket.	Delete.	This rule is obsolete.
239 Judgment by Default	103 Default (a)When Available	Reworded and reorganized. Also incorporates existing rule 237a
239a Notice of Default Judgment	103 Default (d)Notice of the Judgment	Rule reworded and shortened
240 Where Only Some Answer	103 Default (b)Interlocutory Judgment	Rule reworded
241 Assessing Damages on Liquidated Demands	103 Default (c)Damages (1)Liquidated Demands	Rule reworded
243 Unliquidated Damages	103 Default (c)Damages (2)Unliquidated Demands	Rule reworded
244 On Service by Publication	103 Default (e)After Service by Publication	No wording change from existing rule
245 Assignment of Cases for Trial	70 Assignment of Cases for Trial (a)Assignment for Trial	No wording change from existing rule
246 Clerk to Give Notice of Settings	70 Assignment of Cases for Trial (b)Notice of Setting 120 Duties of Clerk (f)Notice of Trial to Non-Resident Attorney	No wording change form existing rule BUT RULE IS DUPLICATED IN 70(b) & 120(f)
247 Trial When Set	Delete.	This rule is unnecessary.
248 Jury Cases.	Delete.	This rule is unnecessary.
248		
251 Continuance	66 Continuance (a)In General	Slight wording change from existing rule
252 Application for Continuance	66 Continuance (b)Continuance on Motion of Party (1), (2), (3)(A) 72 Subpoenas (f)Application for Continuance	New rule reworded and reorganized
253 Abence of Counsel as Ground for Continuance	66 Continuance (b)Continuance on Motion of Party (3)(B)Absence of Counsel	No wording change from existing rule
254 Attendance on Legislature	66 Continuance (b)Continuance (3)(C)Attendance on Legislature	New rule reworded
255 Change of Venue by Consent	64 Venue (a)Change of Venue by Consent	No wording change from existing rule. Incorporates existing rule 86 also
257 Granted on Motion	64 Venue (b)Motion to Transfer Venue (3)Change of Venue Granted on Motion	No wording change from existing rule
258 Shall be Granted	64 Venue (b)Motion to Transfer Venue (3)(B)Shall Be Granted	No wording change from existing rule
259 To What County	64 Venue (b)Motion to Transfer Venue (3)(C)Transferred to What County	No wording change from existing rule

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

261 Transcript on Change	64 Venue (b)Motion to Transfer Venue (3)(D)Transcript on Change	No wording change from existing rule
262 Trial by the Court	Delete.	This rule is unnecessary.
263 Agreed Case	70 Assignment of Cases for Trial (c)Agreed Method of Trial	Existing rule reworded and modified. Also incorporates existing rule 264, in part.
264 Videotape Trial	70 Assignment of Cases for Trial (c)Agreed Method of Trial	Existing rule reworded and modified. Also incorporates existing rule 263, in part.
265 Order of Proceedings on Trial by Jury	71 Order of Trial (a)Order of Proceedings	Slight wording changes from existing rule to make rule apply to all trials.
266 Open and Close--Admission	71 Order of Trial (b)Open and Close--Admission	No wording change from existing rule
267 Witnesses Placed Under Rule	Delete.	This is covered in Evid. R. 614.
268 Motion for Instructed Verdict	100 Motion for Judgment	Significant wording changes from existing rule
269 Argument	71 Order of Trial (c)Order of Argument 111 Attorney Conduct During Trial	In new rule 71, (1)-(3) track (a)-(c) of old rule. In new rule 111, (a)-(e) track (d)-(h) of existing rule.
270 Additional Testimony	71 Order of Trial (d)Additional Testimony	No wording change from existing rule
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280 Presiding Juror of Jury	85 Deliberations (a)Presiding Juror	Wording changed from existing rule
281 Papers Taken to Jury Room	85 Deliberations (d)Charge and Exhibits	Wording changed from existing rule
282 Jury Kept Together	85 Deliberations (b)Separation	Wording changed from existing rule
283 Duty of Officer Attending Jury	85 Deliberations (c)Bailiff	Wording changed from existing rule.
284 Judge to Caution Jury	Delete.	This rule is probably unnecessary.
285 Jury May Communicate with Court	86 Communication (a)Generally	Wording changed from existing rule
286 Jury May Further Receive Instructions	86 Communication (a)Generally	Wording changed from existing rule
287 Disagreement as to Evidence	86 Communication	Wording changed from existing rule. Reference to obtaining notes on witness testimony eliminated.
288 Court Open for Jury	Delete.	This rule is probably unnecessary.
289 Discharge of Jury	87 Verdict (g)Discharge	Wording changed from existing rule
290 Definition and Substance	87 Verdict (a)Defined	Wording changed. Reference to general and special verdists eliminated.

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

291 Form of Verdict	87 Verdict (b)Form	Wording changed from existing rule. Now require answers to questions submitted by the court rather than "No special form ..."
292 Verdict by Portion of Original Jury	87 Verdict (c)Requirements (1)Signing (2)Number	Wording changed from existing rule
293 When the Jury Agrees	87 Verdict (d)Receipt	Wording changed from existing rule
294 Polling the Jury	87 Verdict (e)Polling	Wording changed from existing rule
295 Correction of Verdict	87 Verdict (f)Defects	Wording changed from existing rule
296 Requests for Findings, etc.	88 Findings by the Court; Judgment on Partial Findings.	This proposed rule changes current practice.
297 Time to File, etc.	88 Findings by the Court; Judgments on Partial Findings.	This proposed rule changes current practice.
298 Additional or Amended Findings of Fact and Conclusions of Law	88 Findings by the Court, Etc. (a)Modification of Findings.	
299 Omitted Findings	88 Findings by the Court, etc. (a)Modification of Findings.	Slight wording change from existing rule.
299a Findings of Fact to be Separately Filed.	101. Judgments, Decrees and Orders; Effective Dates.	This is an entirely new rule.
300 Court to Render Judgment	100 Motion for Judgment as a Matter of Law; Modification of Judgments and Corrections of Clerical Mistakes (a)Motion for Judgment as a Matter of Law	Wording changed from existing rule. Also incorporates existing rules 268 & 301
301 Judgments	100 Motion for Judgment as a Matter of Law; Modifications of Judgments and Corrections of Clerical Mistakes (a)Motion for Judgment as a Matter of Law 101 Judgments, Decrees and Orders; Effective Dates (a)Definition; Form and Substance	Wording changed from existing rule. Also incorporates existing rules 268 & 300
302 On Counterclaims.	Delete.	This rule is unnecessary.
303 On Counterclaims for Costs.	Delete.	This rule is unnecessary.
304 Judgment Upon Record.	Delete.	This rule is unnecessary.
305 Proposed Judgment	101 Judgments, Decrees and Orders; Effective Dates (b)Proposed Judgments	Reworded from existing rule
306 Recitation of Judgment	101 Judgments, Decrees and Orders; Effective Dates (a)Definition; Form and Substance	Slight wording change from existing rule. Also incorporates portion of existing rule 301
306a Periods to Run From Signing of Judgment	101 Judgments, Decrees and Orders; Effective Dates (f)Effective Dates: Periods to Run from Signing of Judgment	No wording change from existing rule
306c Prematurely Filed Documents	104 New Trials (f)Prematurely Filed Motions	No wording change from existing rule
307 Exceptions, Etc., Transcript.	Delete.	This rule is obsolete.

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

308 Court Shall Enforce its Decrees	101 Judgments, Decrees and Orders; Effective Dates (c)Judgments for Personal Property	Slight wording change from existing rule
308a In Suits Affecting the Parent-Child Relationship	Delete.	This should be covered in the Family Code.
309 In Foreclosure Proceedings	101 Judgments, Decrees and Orders; Effective Dates (d)Judgments in Foreclosure Proceedings	No wording change from existing rule. Also incorporates existing rule 310
310 Writ of Possession	101 Judgments, Decrees and Orders; Effective Dates (d)Judgments in Foreclosure Proceedings	Reworded from existing rule. Also incorporates existing rule 309
311 On Appeal from Probate Court.	Delete.	This rule is obsolete.
312 On Appeal from Justice Court.	Delete.	This rule is obsolete.
313 Against Executors, Etc.	101 Judgments, Decrees and Orders; Effective Dates (e)Judgments Against Personal Representatives	No wording change from existing rule
314 Confession of Judgment.	Delete.	This rule is obsolete.
315 Remittitur.	Consider Adding .	
316 Correction of Clerical Mistakes in Judgment Record	100 Motion for Judgment as a Matter of Law; Modication of Judgments or Findings and Correction of Clerical Mistakes	Slight wording change from existing rule
320 Motions and Actions of Court Thereon	104 New Trials (a)Motion for New Trials (e) Partial New Trials; Remittiturs	Rule shortened and reorganized
321 Form	104 New Trials (c)Form of Motion; Need for Affidavits	Reworded and reorganized. Also incorporates existing rule 322
322 Generality to be Avoided	104 New Trials (c)Form of Motion; Need for Affidavits	Reworded and reorganized. Also incorporates existing rule 321
324 Prerequisites of Appeal	104 New Trials (b)Prerequisite on Appeal	No wording change in (a) & (b) of existing rule. Part (c) Judgment Notwithstanding Findings; Cross-Points has been eliminated
326 Not More Than Two.	Consider Adding.	
327 For Jury Misconduct	104 New Trials (d)Special Rules for Complaints of Jury Misconduct	No wording change from existing rule
329 Motion for New Trial on Judgment Following Citation by Publication	106 Motion for New Trial on Judgment Following Citation by Publication	No wording change from existing rule
329a County Court Cases.	Consider Deletion.	This seems obsolete.
329b Time for Filing Motions (g)	100 Motion for Judgment as a Matter of Law; Modication of Judgments and Correction of Clerical Mistakes (b)Motion for Modification of Judgment or Findings 105 Time for Filing Motions	Wording slighty changed from existing rule. Rules generally reorganized
330 Rule of Practice and Procedure in Certain District Courts.	Delete.	Move to Government Code.

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

	30 Parties Plaintiff and Defendant (a)Real Party in Interest	New. Source Fed. R. 17(a).
	20 Pleadings Allowed; Form of Motions (c)Motions and Other Papers	New. Source Fed. R. 7.
	25 Presentation of Defenses; Plea or Motion Practice (b)How Presented	New. Source Fed. R. 12.
	121 Duties (Court Reporters)	New. Source Tex.R.App.P. 11
	122 Work (Court Reporters)	New. Source Tex.R.App.P. 12
	132 Taxable Costs	New.
	65 Pleas in Abatement	New. Case law

APPENDIX "B"
DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES
(Current rules that have been deleted from proposed rules)

CURRENT TRCP	PROPOSED TRCP	COMMENTS
14 Affidavit by Agent	Delete	
19 Non-Adjournment of Term	Not included in draft. Consider Deletion.	Review for obsolescence in light of continuous terms
20 Minutes Read and Signed	119 Minutes Read and Signed. Consider Deletion.	No wording change from existing rule. Review for obsolescence; procedure likely ignored for most part
29 Suit on Claim Against Dissolved Corporation	Delete	This should be covered in the TBCA (Art. 7.12).
30 Parties to Suits	Delete	This should be covered in the CPRC (Sec. 17.001).
31 Surety Not to Be Sued Alone	Delete	This should be covered in the CPRC (Sec. 17.001).
32 May Have Question of Suretyship Tried	Delete	This special rule for sureties is unecessary.
33 Suits by or Against Counties	Transfer to CPRC or Delete	See Ch. 17, CPRC.
34 Against Sheriff, Etc.	Transfer to CPRC or Delete	See Ch. 17, CPRC.
35 On Official Bonds	Transfer to CPRC or Delete	See Ch. 17, CPRC.
36 Different Officials and Bondsmen	Transfer to CPRC or Delete	See Ch. 17, CPRC.
37 Additional Parties	Delete	This rule is unnecessary.
46 Petition and Answer; Each One Instrument of Writing	Consider Deletion.	This rule is probably unnecessary.
49 Where Several Counts	Delete	This rule is unnecessary.
52 Alleging a Corporation	Delete; see Proposed Rule 27(e).	
61 Trial: Intervenors: Rules Apply to All Parties	Delete.	This rule is unnecessary.
68 Court May Order Repleader	Delete	Not addressed in draft
85 Original Answer; Contents	Delete	This rule is unnecessary.
96 No Discontinuance	Delete	This rule is probably unnecessary.
111 Citation by Publication in Action Against Unknown Heirs or Stockholders of Defunct Corporations	Delete	This should be covered in CPRC, Ch. 17.
112 Parties to Actions Against Unknown Owners or Claimants of Interest in Land	Delete	This should be covered in CPRC, Ch. 17.
113 Citation by Publication in Actions Against Unknown Owners or Claimants of Interest in Land	Delete	This should be covered in CPRC, Ch. 17.
117a Citation in Suits for Delinquent Ad Valorem Taxes	Delete	This should be covered in CPRC, Ch. 17.
119a Copy of Decree	Delete.	This should be covered in the Family Code.
121 Answer is Appearance	Delete.	This rule is unnecessary.
125 Parties Responsible	Delete.	This rule is probably unnecessary.

APPENDIX "B"

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

(Current rules that have been deleted from proposed rules)

133 Costs of Motion	Delete.	This rule is probably meaningless.
139 On Appeal and Certiorari	Delete.	This rule should be in the TRAP.
143a Costs on Appeal to County Court	Delete.	This rule should be in the Justice Court rules.
180 Refusal to Testify	Delete.	This rule is unnecessary.
181 Party as Witness	Delete.	This rule is unnecessary.
185 Suit on Account	Delete.	This rule is unnecessary.
218 Jury Docket	Delete.	This rule is probably unnecessary.
219 Jury Trial Day	Delete.	This rule is probably unnecessary.
230 Certain Questions Not to Be Asked	Delete.	This rule is unnecessary.
232 Making Peremptory Challenges	Delete.	This rule is unnecessary.
235 If Jury is Incomplete	Delete.	This rule is probably unnecessary.
237 Appearance Day.	Delete.	This rule is unnecessary.
238 Call of Appearance Docket.	Delete.	This rule is obsolete.
247 Trial When Set	Delete.	This rule is unnecessary.
248 Jury Cases.	Delete.	This rule is unnecessary.
262 Trial by the Court	Delete.	This rule is unnecessary.
267 Witnesses Placed Under Rule	Delete.	This is covered in Evid. R. 614.
284 Judge to Caution Jury	Delete.	This rule is probably unnecessary.
288 Court Open for Jury	Delete.	This rule is probably unnecessary.
302 On Counterclaims.	Delete.	This rule is unnecessary.
303 On Counterclaims for Costs.	Delete.	This rule is unnecessary.
304 Judgment Upon Record.	Delete.	This rule is unnecessary.
307 Exceptions, Etc., Transcript.	Delete.	This rule is obsolete.
308a In Suits Affecting the Parent-Child Relationship	Delete.	This should be covered in the Family Code.
311 On Appeal from Probate Court.	Delete.	This rule is obsolete.
312 On Appeal from Justice Court.	Delete.	This rule is obsolete.
314 Confession of Judgment.	Delete.	This rule is obsolete.
329a County Court Cases.	Consider Deletion.	This seems obsolete.
330 Rule of Practice and Procedure in Certain District Courts.	Delete.	Move to Government Code.

APPENDIX "B"
DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES
(Current rules to be added to proposed rules)

CURRENT TRCP	PROPOSED TRCP	COMMENTS
70 Pleading: Surprise: Cost	Consider adding.	Not addressed in draft.
71 Misnomer of Pleading	Consider adding.	
74 Filing With the Court Defined	Consider adding.	
75 Filed Pleadings; Withdrawals	Consider adding.	Not addressed in draft.
122 Constructive Appearance	This rule should be added.	
123 Reversal of Judgment	This rule should be added.	
124 No Judgment Without Service	This rule should be added.	
140 No Fee for Copy	Consider adding to Proposed Rule 132.	
160 Dissolution of Corporation	Add to Proposed Rule 39.	
161 Where Some Defendants Not Served	Consider adding.	
162 Dismissal or Non-Suit	Add.	
163 Dismissal as to Parties Served, Etc.	Add.	
165 Abandonment	Consider adding.	
315 Remittitur.	Consider Adding .	
326 Not More Than Two.	Consider Adding.	

APPENDIX "C"

MASTER PROPOSED CIVIL PROCEDURE RULES

SECTION 1
General Rules

Rule 1. Objective of Rules

The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.

[Current Rule: Tex. R. Civ. P. 1].
[Original Source: New Rule 1].

Rule 2. Scope of Rules

These rules shall govern the procedure in the justice, county, and district courts of the State of Texas in all actions of a civil nature, with such exceptions as may be hereinafter stated. Where any statute in effect immediately prior to September 1, 1941, prescribed a rule of procedure in lunacy, guardianship, or estates of decedents, or any other probate proceedings in the county court differing from these Rules, and not included in the "List of Repealed Statutes," such statute shall apply; and where any statute in effect immediately prior to September 1, 1941, and not included in the "List of Repealed Statutes," prescribed a rule of procedure in any special statutory proceeding differing from these rules, such statute shall apply. All statutes in effect immediately prior to September 1, 1941, prescribing rules of procedure in bond or recognizance forfeitures in criminal cases are hereby continued in effect as rules of procedure governing such cases, but where such statutes prescribed no rules of procedure in such cases, these rules shall apply. All statutes in effect immediately prior to September 1, 1941, prescribing rules of procedure in tax suits are hereby continued in effect as rules of procedure governing such cases, but where such statutes prescribed no rules of procedure in such cases, these rules shall apply; provided, however, that Rule ____ (current Rule 117a) shall control with respect to citation in tax suits.

[Current Rule: Tex. R. Civ. P. 2].
[Original Source: Federal Rule 1, adapted to Texas practice].
[Official Comments]:

Change by Amendment effective September 1, 1986. Amended to delete any reference to appellate procedure.

Rule 3. Construction of Rules

Unless otherwise expressly provided, the past, present or future tense shall each include the other; the masculine, feminine, or neuter gender shall each include the other, and the singular and plural number shall each include the other.

[Current Rule: Tex. R. Civ. P. 3].
[Original Source: Art. 10, subdivisions 2, 3 and 4].

Rule 4. Local Rules

Each administrative judicial region, district court, county court, county court at law, and probate court may make and amend local rules governing practice before such courts, provided:

(a) that any proposed rule or amendment shall not be inconsistent with these rules or with any rule of the administrative judicial region in which the court is located;

(b) no time period provided by these rules may be altered by local rules;

(c) any proposed local rule or amendment shall not become effective until it is submitted and approved by the Supreme Court of Texas;

(d) any proposed local rule or amendment shall not become effective until at least thirty days after its publication in a manner reasonably calculated to bring it to the attention of attorneys practicing before the court or courts for which it is made;

(e) all local rules or amendments adopted and approved in accordance herewith are made available upon request to the members of the bar;

(f) no local rule, order, or practice of any court, other than local rules and amendments which fully comply with all requirements of this Rule ____ (Current Rule 3a), shall ever be applied to determine the merits of any matter.

[Current Rule: Tex. R. Civ. P. 3a].
[Original Source: New Rule].
[Official Comments]:

Change by Amendment effective April 1, 1984. Moves Rule 817 to Rule 3a to emphasize the superiority of the general rules over local rules of procedure and requires Supreme Court

approval so as to achieve uniformity.

Change by Amendment effective September 1, 1986. Amended to delete any reference to appellate procedure. The words "Court of Appeals, each" have been deleted.

Change by Amendment effective September 1, 1990. To make Texas Rules of Civil Procedure timetables mandatory and to preclude use of unpublished local rules or other "standing" orders or local practices to determine issues of substantive merit.

SECTION 2
Commencement of Action; Service of Process, Pleadings Motions and Orders

Rule 5. Commencement of Suit

A civil suit in the district or county court shall be commenced by a petition filed in the office of the clerk. No civil suit shall be commenced on Sunday.

[Current Rule: Tex. R. Civ. P. 22 and the applicable portion of Rule 6.].
[Original Source: Art. 1974, unchanged and Art. 1971, with minor textural change].
[Task Force Comments: There is an exception in current rule 6 for "cases of injunction, attachment, garnishment, sequestration, or distress proceedings"; it is unclear whether this exception applies to commencement of the suit and/or service of process. If it applies to commencement of the suit, then the exception would be added to the last sentence of the proposed rule].

Rule 6. Time

The following rule applies to any period of time prescribed or allowed by these rules, by order of a court, or by any applicable statute.

(a) Computation. The day of the act, event or default which begins the period is not to be included in the computation. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or 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 for purposes of the three-day periods in Rules ____ (current Rule 21) and _____ (current Rule 21a), which extend other periods by three days when service is made by registered or certified mail or by facsimile, and for purposes of the five-day period provided for under Rule ____ (current Rules 748, 749, 749a, 749b, and 749c).

(b) **Enlargement.** When by these rules, by a notice given thereunder or by order of a court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if an application is made before the expiration of the period originally prescribed or as extended by a previous order; or (2) upon motion permit the act to be done after the expiration of the specified period where good cause is shown for the failure to act. This section does not apply to any action brought under the rules relating to new trials.

(c) **Use of United States Postal Service.** If any document is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail on or before the last day for filing the document, it shall be filed by the clerk and be deemed timely filed if it is received by the clerk not more than ten days tardy. A legible post-mark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing.

[Current Rule: Tex. R. Civ. P. 4 and 5].
[Original Source: Federal Rule 6].
[Official Comments]:

Changes to Rule 4:

Change: Omission of the Federal provision excluding intermediate Sundays or holidays when the period of time is less than seven days and the Federal reference is to half-holidays.

Change by amendment effective January 1, 1961. The word ''Saturday'' was added in last sentence.

Change by amendment effective September 1, 1990. Amended to omit counting Saturdays, Sundays and legal holidays in all periods of less than five days with certain exceptions.

Changes to Rule 5:

Change: The second clause in the Federal rule requires a showing that the failure to act ''was the result of excusable neglect.'' Also, specific reference is made in this rule to the time limitations relating to motions for new trial and for rehearings, and to appeals and writs of error, while in the Federal Rule the cross reference to such subjects is by Rule number.

Change by amendment effective March 1, 1950. The first proviso was added at the end of the rule.

Change by amendment effective January 1, 1971. The language of the first proviso has been changed to eliminate the requirement that the date of mailing be shown by a postmark on the envelope and an additional proviso has been added to make a legible postmark conclusive as to the date of mailing.

Change by amendment effective February 1, 1973. The words ''affixed by the United States Postal Service'' have been inserted in the final proviso.

Change by amendment effective January 1, 1976. A legible postmark shall be prima facie, not conclusive, evidence of date of mailing.

Change by amendment effective September 1, 1986. Amended to delete any reference to appellate procedure. The phrase ''or motions for rehearing or the period for taking an appeal or writ of error from the trial court to any higher court or the period of application for writ of error in the Supreme Court'' and the phrase ''motion for rehearing, any matter relating to taking an appeal or writ of error from the trial court to any higher court, or application for writ of error'' have been deleted.

Change by amendment effective September 1, 1990. To make the last date for mailing under Rule 5 coincide with the last date for filing.

Rule 7. Citation and Service - Non-Publication

(a) Issuance. Upon the filing of the petition, the clerk, when requested, shall forthwith issue a citation 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. 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, (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 twenty 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 twenty 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.

[Current Rule: Tex.R.Civ.P. 99].
[Original Source: Art. 2021].
[Official Comments]:

Change: The rule authorizes the clerk to issue as many citations for the defendant or defendants as the plaintiff may request, without the delay of securing a return on any prior citation.

(e) Who May Serve. 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.

[Current Rule: Tex.R.Civ.P. 103].
[Original Source: New Rule].
[Official Comments]:

Change by amendment effective January 1, 1981. The rule is amended to permit service by mail by an officer of the county in which the case is pending or the party is found and also service by the clerk of the court.

Change by amendment effective January 1, 1988. The amendment makes clear that the courts are permitted to authorize persons other than Sheriffs or Constables to serve citation. Further, Sheriffs or Constables are not restricted

to service in their county. The last sentence is added to avoid the necessity of motions and fees.

(f) Duty of Recipient. 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.

[Current Rule: Tex. R. Civ. P. 105].
[Original Source: Art. 2025, unchanged].
[Official Comments]:

Change by amendment effective January 1, 1978. The spelling of the word ''indorse'' was corrected to ''endorse.''

(g) Method of Service.

(1) Unless the citation or an order of the court otherwise directs, the citation shall be served by any person authorized by Rule _____ (currently Rule 103) by

(A) 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

(B) 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.

(2) Upon motion supported by affidavit stating the location of the defendant's usual place of business or usual place of abode or other place where the defendant can probably be found and stating specifically the facts showing that service has been attempted under either (1)(A) or (1)(B) at the location named in such affidavit but has not been successful, the court may authorize service

(A) 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

(B) in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit.

[Current Rule: Tex. R. Civ. P. 106].
[Original Source: Art. 2026].
[Official Comments]:

Change: The officer is directed to note upon the copy of the citation, which he delivers to the defendant, the date of

delivery. He delivers a copy of the petition in all cases.

Change by amendment effective January 1, 1976. Service ''by registered or certified mail'' is authorized in certain instances.

Change by amendment effective January 1, 1978. Subdivisions (b) and (e) are new. The rule is rewritten.

Change by amendment effective January 1, 1981. The rule is reorganized to clarify its meaning. Alternate methods of service are authorized if either (a)(1) or (a)(2) are tried without success. Both methods are not required.

Change by amendment effective January 1, 1988. Conforms to amendment to Rule 103.

(h) **Return of Service.** 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 return of citation by an authorized person shall be verified. When the citation was served by registered or certified mail as authorized by Rule ____ (current Rule 106), 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 failure 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 ____ (current Rule 106), 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, or process under Rules ____ (current Rules 108 or 108a), with proof of service as provided by this rule or by Rules ____ (Current Rules 108 or 108a), or as ordered by the court in the event citation is executed under Rule ____ (current Rule 106), shall have been on file with the clerk of the court ten days, exclusive of the day of filing and the day of judgment.

[Current Rule: Tex. R. Civ. P. 107].
[Original Source: Arts. 2034 and 2036].
[Official Comments]:

Change: That part of the rule derived from Art. 2034 has been changed only textually. The last sentence of the rule supersedes Art. 2036 in the District and County Courts in harmony with the new rules making the time for answer date from the day of service.

Change by amendment effective January 1, 1978. Provides manner of return when service by mail or by an alternative method.

Change by amendment effective January 1, 1981. The only changes are the references to Rule 106.

Change by amendment effective January 1, 1988. Amendments are made to conform to changes in Rule 103.

Change by amendment effective September 1, 1990. To state more directly that a default judgment can be obtained when the defendant has been served with process in a foreign country pursuant to the provisions of Rules 108 or 108a.

(i) Defendant Not In State. Where the defendant is absent from the State, or is a nonresident of the State, the form of notice to such defendant of the institution of the suit shall be the same as prescribed for citation to a resident defendant; and such notice may be served by any disinterested person competent to make oath of the fact in the same manner as provided in Rule ____ (current Rule 106) hereof. The return of service in such cases shall be endorsed on or attached to the original notice, and shall be in the form provided in Rule ____ (current Rule 107), and be signed and sworn to by the party making such service before some officer authorized by the laws of this State to take affidavits, under the hand and official seal of such officer. A defendant served with such notice shall be required to appear and answer in the same manner and time and under the same penalties as if he had been personally served with a citation within this State to the full extent that he may be required to appear and answer under the Constitution of the United States in an action either in rem or in personam.

[Current Rule: Tex. R. Civ. P. 108].
[Original Source: Arts. 2037 and 2038].
[Official Comments]:

Change: This rule supersedes the former statutes governing non-resident notice. Form of citation and method of service is to be the same as provided for resident defendants.

Change by amendment effective January 1, 1976. The words after ''State'' in the last sentence are new. Its purpose is to permit acquisition of in personam jurisdiction to the constitutional limits.

(j) Service in Foreign Country.

(1) Manner. Service of process may be effected upon a party in a foreign country if service of the citation and petition is made: (a) in the manner prescribed by the law of the

foreign country for service in that country in an action in any of its courts of general jurisdiction; or (b) as directed by the foreign authority in response to a letter rogatory or a letter of request; or (c) in the manner provided by Rule ____ (current Rule 106); or (d) pursuant to the terms and provisions of any applicable treaty or convention; or (e) by diplomatic or consular officials when authorized by the United States Department of State; or (f) by any other means directed by the court that is not prohibited by the law of the country where service is to be made. The method for service of process in a foreign country must be reasonably calculated, under all of the circumstances, to give actual notice of the proceedings to the defendant in time to answer and defend. A defendant served with process under this rule shall be required to appear and answer in the same manner and time and under the same penalties as if he had been personally served with citation within this state to the full extent that he may be required to appear and answer under the Constitution of the United States or under any applicable convention or treaty in an action either in rem or in personam.

(2) **Return.** Proof of service may be made as prescribed by the law of the foreign country, by order of the court, by Rule ____ (currently, Rule 107), or by a method provided in any applicable treaty or convention.

[Current Rule: Tex. R. Civ. P. 108a].
[Original Source: ?].
[Official Comment: New rule effective April 1, 1984].

(k) **Acceptance of Service.** The defendant may accept service of process, or waive the issuance or service thereof, by a written memorandum signed by the defendant, his duly authorized agent or attorney, after suit is brought if such memorandum is sworn to before a proper officer, excluding any attorney in the case, and filed with the court. Such acceptance or waiver shall have the same force and effect as if the citation had been issued and served as provided by law. The party signing the memorandum shall be delivered a copy of plaintiff's petition, and the memorandum shall so state that such was received by the party. In every divorce action such memorandum shall also include the defendant's mailing address.

[Current Rule: Tex. R. Civ. P. 119; with only grammatical changes].
[Original Source: Art. 2045].
[Official Comments]:

Change: Addition of requirement that the waiver of service be sworn to before an officer authorized to administer oaths.

Change by amendment effective December 31, 1941. It is provided that the officer shall be ''other than an attorney in the case,'' and the last sentence is added.

Change by amendment effective January 1, 1955. Last sentence added.

Change by amendment effective January 1, 1961. Requirement added that written memorandum constituting acceptance of process or waiver of issuance and service thereof be signed ''after suit is brought.''

(1) **Amendment.** At any time in its discretion and upon such notice and on such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

[Current Rule: Tex. R. Civ. P. 118].
[Original Source: Art. 2044, Federal Rule 4(h)].
[Official Comments]:

Change: The rule authorizes amendment in the process as well as in the proof of its service.

Rule 8. Citation by Publication

(a) General. Upon oath made by a party to a suit, his agent or attorney [hereinafter in this section "party"] that one or more of the following situations exist, the clerk shall issue citation for a defendant for service by publication:

(1) if the residence of any defendant is unknown to the party, or

(2) if the defendant is a transient person whose whereabouts cannot be ascertained through due diligence of the party, or

(3) if the defendant is absent from or is a nonresident of the State and the party has been unable to obtain personal service as provided for in Rule _____ (current Rule 108).

In all such cases it shall be the duty of the court to inquire into the sufficiency of the diligence exercised in attempting to ascertain the residence or whereabouts of the defendant or to obtain service of nonresident notice before granting any judgment on such service.

[Current Rule: Tex. R. Civ. P. 109].
[Original Source: Art. 2039 First sentence, with minor textural change].

[Official Comments]:

Change by amendment effective January 1, 1976. The word ''continental'' before ''United States'' in the last sentence is deleted.

Change by amendment effective April 1, 1984. The last sentence of the former rule is deleted.

(b) Effect of This Rule on Other Statutes. Where a statute authorizing citation by publication provides expressly for requisites of such citation, these rules shall not govern. Otherwise, the provisions of these rules shall govern.

[Current Rule: Tex. R. Civ. P. 110].
[Original Source: New Rule].

(c) Requisites. Where citation by publication is authorized by these rules, the citation shall contain the requisites prescribed by Rule ____ (current Rules 15 and 99), insofar as they are not inconsistent with this section. No copy of the plaintiff's petition shall accompany this citation. The citation shall be directed to the defendant or defendants by name, if known, or to the defendant or defendants as designated in the petition, or such other classification as may be fixed by any statute or by these rules. If there are two or more defendants, separate citation is not required for each; it shall be sufficient for the citation to be directed to all of them by name or classification. The citation shall contain the names of the parties, a brief statement of the nature of the suit (no details or particulars of the claim are required), and a description of any property involved and of the interest of the defendant(s).

If the suit involves land, the brief statement of the claim shall state the kind of suit, the number of acres of land involved, or the lot and block number, or any other plat description that may be of record if the land is situated in a city or town, the survey on which and the county in which the land is situated, and any special pleas which are relied upon in such suit.

[Current Rule: Tex. R. Civ. P. 114 and 115].
[Original Source: Art. 2041, with minor textural change, and Art. 2092(6)].

(d) Service. The citation, when issued, shall be served by the sheriff or any constable of any county of the State of Texas or by the clerk of the court in which the case is pending, by having the same published once each week for four (4) consecutive weeks, the first publication to be at least twenty-eight (28) days before the return day of the citation. In all suits which do not involve the title to land or the partition of real estate,

such publication shall be made in the county where the suit is pending, if there be a newspaper published in said county, but if not, then in an adjoining county where a newspaper is published. In all suits which involve the title to land or partition of real estate, such publication shall be made in the county where the land, or a portion thereof, is situated, if there be a newspaper in such county, but if not, then in an adjoining county to the county where the land or a part thereof is situated, where a newspaper is published.

[Current Rule: Tex.R.Civ.P. 116].
[Original Source: Arts. 2042 and 2092(6)].
[Official Comments]:

Change by amendment effective April 1, 1984. Rule 116 was not amended when Rule 103 was changed, effective January 1, 1981. It was therefore inconsistent with Rule 103.

(e) Return. The return of the officer executing such citation shall be endorsed or attached to the same, and show how and when the citation was executed, specifying the dates of such publication, be signed by him officially and shall be accompanied by a printed copy of such publication.

[Current Rule: Tex. R. Civ. P. 117].
[Original Source: Art. 2043, unchanged].

(f) Amendment. At any time in its discretion and upon such notice and on such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

[Current Rule: Tex. R. Civ. P. 118].
[Original Source: Art. 2044; Federal Rule 4(h)].
[Official Comments: New rule effective December 31, 1947].

Change: The rule authorizes amendment in the process as well as in the proof of its service.

(g) Other Substituted Service. Whenever citation by publication is authorized, the court may, on motion, prescribe a different method of substituted service, if the court finds, and so recites in its order, that the method so prescribed would be as likely as publication to give defendant actual notice. When such method of substituted service is authorized, the return of the officer executing the citation shall state particularly the manner in which service is accomplished, and shall attach any return receipt, returned mail, or other evidence showing the result of such service. Failure of defendant to respond to such citation shall not render the service invalid. When such

substituted service has been obtained and the defendant has not appeared, the provisions of Rules ____ (current Rules 244 and 329) shall apply as if citation had been served by publication.

[Current Rule: Tex. R. Civ. P. 109a].
[Original Source: New rule effective January 1, 1976].

Rule 9. Process, Service and Filing of Pleadings, Motions and Other Papers.

(a) Form. The style of all writs and process shall be "The State of Texas;" and unless otherwise specially provided by law or these rules every such writ and process shall be directed to any sheriff or any constable within the State of Texas, shall be made returnable on the Monday next after expiration of twenty days from the date of service thereof, and shall be dated and attested by the clerk with the seal of the court impressed thereon; and the date of issuance shall be noted thereon.

[Current Rule: Tex. R. Civ. P. 15].
[Original Source: Art. 2286].
[Official Comments]:

Change: Elimination of the former requirement that the writ be addressed to the sheriff or any constable of a specific county and that the writ be returnable to a term of court. Compare Rule 101.

(b) Endorsement. For all process, every officer or authorized person shall endorse the day and hour on which he received them, the manner in which he executed them, and the time and place the process was served and shall sign the returns officially.

[Current Rule: Tex. R. Civ. P. 16].
[Original Source: Art. 6875, with minor textural changes].
[Official Comments]:

Change by amendment effective January 1, 1988. Article 3926a, effective September 1, 1981, authorizes the commissioner's court of each county to set a ''reasonable'' fee for service of process; mileage is no longer an authorized expense for serving process.

(c) Fees. Except where otherwise expressly provided by law or these rules, the officer receiving any process to be executed shall not be entitled in any case to demand his fee for executing the same in advance of such execution, but his fee shall be taxed and collected as other costs in the case.

[Current Rule: Tex. R. Civ. P. 17].
[Original Source: Art. 3911].

[Official Comments]:

Change: Addition of the matter to the first comma.

(d) Filing and Serving Pleadings and Motions. Every 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 filed with the clerk of the court in writing, shall state the grounds therefor, shall set forth the relief or order sought, and at the same time a true copy shall be served on all other parties, and shall be 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 parties not less than three days before the time specified for the hearing, unless otherwise provided by these rules or shortened by the court.

If there is more than one other party represented by different attorneys, one copy of such pleading shall be delivered or mailed to each attorney in charge.

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.

[Current Rule: Tex. R. Civ. P. 21].
[Original Source: Art. 2291].
[Official Comments]:

Change by amendment effective January 1, 1978. The phrase, ''if it relates to a pending suit.'' was deleted from the end of the first sentence. The phrase, ''If the motion does not relate to a pending suit,'' was deleted from the beginning of the second sentence.

Change by amendment effective January 1, 1981. The rule is broadened to encompass matters other than motions and to require three-day notice unless the period is shortened.

Change by amendment effective September 1, 1990. To require filing and service of all pleadings and motions on all parties and to consolidate notice and service Rules 21, 72 and 73.

(e) Methods of Service.

(1) General. Except as otherwise provided in these rules or by order of the court, every order required by its terms to be served, every pleading subsequent to the original petition, every paper relating to discovery required to be served upon a

party, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, designation of record on appeal, request for finding of fact and/or law, and similar paper shall be filed with the clerk of the court in writing, may be served by:

(A) delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record as the case may be, either in person or by agent;

(B) by courier receipted delivery;

(C) by certified or registered mail, to the party's last known address;

(D) by facsimile to the recipient's current telecopier number; or

(E) by such other manner as the court in its discretion may direct.

(2) **When Complete.** 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. Service by facsimile after 5:00 p.m. local time of the recipient shall be deemed served on the following day. Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail or by facsimile, three days shall be added to the prescribed period.

(3) **Who May Serve.** Notice may be served by a party to the suit, an attorney of record, a sheriff or constable, 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 on the filed instrument. A 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.

(4) **Extension of Time.** Nothing herein shall preclude any party from offering proof that the notice or 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.

(5) **Cumulative.** The provisions of this section relating to the method of service of notice are cumulative of all other methods of service prescribed by these rules.

[Current Rule: Tex. R. Civ. P. 21a].
[Original Source: New Rule effective December 31, 1947].
[Official Comments]:

Change by amendment effective January 1, 1971. The second and third sentences have been added to make service by mail complete upon proper deposit in the mail and to enlarge the time for acting after service by mail; the sentence formerly providing for notice of a motion by filing and entry on the motion docket has been eliminated.

Change by amendment effective February 1, 1973. The words ''Postal Service'' have been substituted for ''Post Office Department'' and a sentence has been inserted authorizing the court to grant an extension of time or other relief upon finding that a notice or document was not received or, if service was by mail, was not received within three days from the date of deposit in the mail.

Change by amendment effective January 1, 1978. The phrase ''not relating to a pending suit'' in the next to last sentence, is deleted.

Change by amendment effective January 1, 1981. The next to last sentence from the end of the former rule requiring three-day notice is deleted because Rule 21 is concurrently amended to require that notice.

Change by amendment effective April 1, 1984. This rule consolidates Rules 21a and 21b.

Change by amendment effective September 1, 1990. To allow for service by current delivery means and technologies.

(f) Sanctions. 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 _____ (current Rules 21 and 21a), the court may in its discretion, after notice and hearing, impose an appropriate sanction available under Rules ____ (current Rule 215-2b).

[Current Rule: Tex. R. Civ. P. 21b].
[Original Source: New rule effective September 1, 1990].
[Official Comments]:

Repealed provisions of Rule 73-to the extent they 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].

SECTION 3
Pleadings and Motions

Rule 20. Pleadings Allowed; Form of Motions

(a) Pleadings. Pleadings in the district and county courts shall be by petition and answer and shall consist of a statement in plain and concise language of the plaintiff's cause of action or the defendant's grounds of defense. That an allegation be evidentiary or be of legal conclusion shall not be grounds for objection when fair notice to the opponent is given by the allegations as a whole. Pleadings shall be in writing, on paper measuring approximately 8 1/2 inches by 11 inches, and signed by the party or his attorney, and either the signed original together with any verification or a copy of said original and copy of any such verification shall be filed with the court. When a copy of the signed original is tendered for filing, the party or his attorney filing such copy is required to maintain the signed original for inspection by the court or any party incident to the suit, should a question be raised as to its authenticity. All pleadings shall be construed so as to do substantial justice.

Pleadings shall contain any other matter which may be required by any law or rule authorizing or regulating any particular action or defense.

[Current Rule: Tex. R. Civ. P. 45].
[Original Source: Art. 1997 (in part); Texas Rules 1 and 32 (for the District and County Courts) and Federal Rule 8(f)].
[Official Comments]:

Change by amendment effective September 1, 1990. To provide for filing of pleadings having either original or copies of signatures and verifications including documents telephonically transferred.

(b) Petition and Answer; Original and Supplemental. The pleading of the plaintiff shall consist of an original petition, and such supplemental petitions as may be necessary. The answer of the defendant shall consist of an original answer and such supplemental answers as may be necessary.

[Current Rules: Tex. R. Civ. P. 78, 83].
[Original Source: Texas Rules 3 and 60 (for District and County Courts)].

(c) Motions and Other Papers. An application to the court for an order shall be by motion which, unless made during a

hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by these rules. All motions shall be signed in accordance with Rule _____ (currently Rule 13).

[Current Rule: Tex. R. Civ. P. 21].
[Original source: Federal Rule 7(b)].
[Official Comments]:

Change by amendment effective January 1, 1971. The second and third sentences have been added to make service by mail complete upon proper deposit in the mail and to enlarge the time for acting after service by mail; the sentence formerly providing for notice of a motion by filing and entry on the motion docket has been eliminated.

Change by amendment effective February 1, 1973. The words ''Postal Service'' have been substituted for ''Post Office Department'' and a sentence has been inserted authorizing the court to grant an extension of time or other relief upon finding that a notice or document was not received or, if service was by mail, was not received within three days from the date of deposit in the mail.

Change by amendment effective January 1, 1978. The phrase ''not relating to a pending suit'' in the next to last sentence, is deleted.

Change by amendment effective January 1, 1981. The next to last sentence from the end of the former rule requiring three-day notice is deleted because Rule 21 is concurrently amended to require that notice.

Change by amendment effective April 1, 1984. This rule consolidates Rules 21a and 21b.

Change by amendment effective September 1, 1990. To allow for service by current delivery means and technologies.

(d) Demurrers Abolished. General demurrers shall not be used.

[Current Rule: Tex. R. Civ. P. 90 (1st sentence of Rule 90)].
[Original Source: New Rule].

Rule 21. General Rules Of Pleading

(a) Claims for Relief. An original pleading which sets forth a claim for relief, whether an original petition, counterclaim, cross-claim, or third party claim, shall contain;

(1) a short statement of the cause of action sufficient to give notice of the claim involved, provided that in all claims for unliquidated damages only the statement that the damages sought are within the jurisdictional limits of the court is necessary; provided, further, that upon special exception the court shall require the pleader to amend so as to specify the maximum amount claimed.

(2) a demand for judgment for all the other relief to which the party deems himself entitled.

[Current Rule: Tex. R. Civ. P. 47].
[Original Source: Federal Rule 8(a) and Peek v. Equip. Services Co., 779 S.W.2d 802 (Tex. 1989)].
[Official Comments]:

Change by amendment effective January 1, 1988. The amendment makes it clear that Rule 11 is subject to modification by any other rule of Civil Procedure.

(b) Alternative Claims for Relief. A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based upon legal or equitable grounds or both.

[Current Rule: Tex. R. Civ. P. 48].
[Original Source: Federal Rule 8(e), in part, unchanged].
[Official Comments]:

Change: Omission of the Federal requirement that jurisdictional grounds be stated. The Federal Rule requires ''a short and plain statement of the claim showing that the pleader is entitled to relief,'' for which wording of subdivision (a) above has been substituted.

Change by amendment effective January 1, 1978. Textual changes in first sentence, and first sentence of (c), all of (b), and the proviso in (c) are new.

(c) Supplemental Petition or Answer. Each supplemental petition or answer, made by either party, shall be a response to the last preceding pleading by the other party, and shall not repeat allegations formerly pleaded further than is necessary as an introduction to that which is stated in the pleading then being drawn up. These instruments, to wit, the original petition and its several supplements, and the original answer and its several supplements, shall respectively, constitute separate and district parts of the pleadings of each party; and the position and identity, by number and name, with the indorsement of each instrument, shall be preserved throughout the pleadings of either party.

[Current Rule: Tex. R. Civ. P. 69].
[Original Source: Texas Rule 10 (for District and County Courts)].

(d) Contents of Supplemental Pleadings.

(1) Plaintiff. The plaintiff's supplemental petitions may contain special exceptions, general denials, and the allegations of new matter not before alleged by him, in reply to those which have been alleged by the defendant.

[Current Rule: Tex. R. Civ. P. 80].
[Original Source: Texas Rule 5 (for District and County Courts), unchanged].

(2) Defendant. The defendant's supplemental answers may contain special exceptions, general denial, and the allegations of new matter not before alleged by him, in reply to that which has been alleged by the plaintiff.

[Current Rule: Tex. R. Civ. P. 98].
[Original Source: Texas Rule 8 (for District and County Courts)].

(e) Denials of Claims or Defenses.

(1) A general denial of matters pleaded by the adverse party which are not required to be denied under oath, shall be sufficient to put the same in issue. When the defendant has pleaded a general denial, and the plaintiff shall afterward amend his pleading, such original denial shall be presumed to extend to all matters subsequently set up by the plaintiff. When a counterclaim or cross-claim is served upon a party who has made an appearance in the action, the party so served, in the absence of a responsive pleading, shall be deemed to have pleaded a general denial of the counterclaim or cross-claim, but the party shall not be deemed to have waived any special appearance or motion to transfer venue. In all other respects the rules

prescribed for pleadings of defensive matter are applicable to answers to counterclaims and cross-claims.

[Current Rule: Tex. R. Civ. P. 92].
[Original Source: Arts. 2006 (part) and 2012, combined without change].
[Official Comment]:

Change by amendment effective April 1, 1985. The second paragraph is new. It clarifies some ambiguity in the law and undertakes to codify the law. The phrase ''plea of privilege'' has been corrected to ''motion to transfer venue.''

(2) When a defendant sets up a counterclaim, the plaintiff may plead thereto under rules prescribed for pleadings of defensive matter by the defendant, so far as applicable. Whenever the defendant is required to plead any matter of defense under oath, the plaintiff shall be required to plead such matters under oath when relied on by him.

[Current Rule: Tex. R. Civ. P. 81].
[Original Source: Art. 2004, unchanged].

(3) When a party pleads an affirmative defense contained in (d) of this rule the adverse party is not required to deny such defense, but the same shall be regarded as denied unless expressly admitted.

[Current Rule: Tex. R. Civ. P. 82].
[Original Source: Art. 2005, unchanged].

(f) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

[Current Rule: Tex. R. Civ. P. 94 (except last sentence)].
[Original Source: Portion of Federal Rule 8(c), unchanged].

When a defendant shall desire to prove payment, he shall file with his plea an account stating distinctly the nature of such payment, and the several items thereof; failing to do so, he shall not be allowed to prove the same, unless it be so plainly and particularly described in the plea as to give the plaintiff full notice of the character thereof.

[Current Rule: Tex. R. Civ. P. 95].

[Original Source: Art. 2014].
[Official Cmments]:

Change: Omission of reference to counterclaim and set off.

(g) Special Exceptions. A special exception shall not only point out the particular pleading excepted to, but it shall also point out intelligibly and with particularity the defect, omission, obscurity, duplicity, generality, or other insufficiency in the allegations in the pleading excepted to.

[Current Rule: Tex. R. Civ. P. 91].
[Original Source: Texas Rule 18 (for District and County Courts)].

(h) Waiver. Every defect, omission, or fault in a pleading either of form or of substance, which is not specifically pointed out by exception in writing and brought to the attention of the judge in the trial court at least ____ days before trial {omit : before the instruction or charge to the jury or, in a non-jury case, before the judgment is signed}, shall be deemed to have been waived by the party failing to except, provided that this rule shall not apply as to any party against whom a default judgment is rendered.

[Current Rule: Tex. R. Civ. P. 90].
[Original Source: New Rule].
[Official Comments]:

Change by amendment effective January 1, 1981. The words ''motion or'' before ''exception'' are deleted, and ''rendition of judgment'' is changed to ''judgment is signed.''

[Task Force Comments: The underlined text indicates a recommendation for substantive changes].

Rule 22. Pleading Special Matters

(a) Special act or law. A pleading founded wholly or in part on any private or special act or law of this State or of the Republic of Texas need only recite the title thereof, the date of its approval, and set out in substance so much of such act or laws as may be pertinent to the cause of action or defense.

[Current Rule: Tex. R. Civ. P. 53].
[Original Source: Art. 2000, unchanged].

(b) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it shall be sufficient to aver generally that all conditions precedent have been performed or have occurred. When such performances or occurrences have

been so plead, the party so pleading same shall be required to prove only such of them as are specifically denied by the opposite party.

[Current Rule: Tex. R. Civ. P. 54].
[Original Source: Federal Rule 9(c)].
[Official Comment]:

Change by amendment of March 31, 1941. The practice on failure of specific denial is made clearer by changes in the wording of the last sentence.

(c) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it shall be sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

[Current Rule: Tex. R. Civ. P. 55].
[Original Source: Federal Rule 9(e)].
[Official Comment: No change except the substitution of ''it shall be'' for ''it is''].

(d) Special Damage. When items of special damage are claimed, they shall be specifically stated. Special damages are those damages that arise naturally but not necessarily from another's wrongful conduct; they vary with the circumstances of each case.

[Current Rule: Tex. R. Civ. P. 56].
[Original Source: Federal Rule 4(g)].
[Task Force Comment: The second sentence is based on Sherrod v. Bailey, 580 S.W.2d 24 (Tex. Civ. App.--Houston [1st Dist.] 1979, writ ref'd n.r.e.)].

(e) Certain Pleas to be Verified. A pleading setting up any of the following matters, unless the truth of such matters appear of record, shall be verified by affidavit.

(1) That the plaintiff has not legal capacity to sue or that the defendant has not legal capacity to be sued.

(2) That the plaintiff is not entitled to recover in the capacity in which he sues, or that the defendant is not liable in the capacity in which he is sued.

(3) That there is another suit pending in this State between the same parties involving the same claim.

(4) That there is a defect of parties, plaintiff or defendant.

(5) A denial of partnership as alleged in any pleading as to any party to the suit.

(6) That any party alleged in any pleading to be a corporation is not incorporated as alleged.

(7) Denial of the execution by himself or by his authority of any instrument in writing, upon which any pleading is founded, in whole or in part and charged to have been executed by him or by his authority, and not alleged to be lost or destroyed. Where such instrument in writing is charged to have been executed by a person then deceased, the affidavit shall be sufficient if it states that the affiant has reason to believe and does believe that such instrument was not executed by the decedent or by his authority. In the absence of such a sworn plea, the instrument shall be received in evidence as fully proved.

(8) A denial of the genuineness of the indorsement or assignment of a written instrument upon which suit is brought by an indorsee or assignee and in the absence of such a sworn plea, the indorsement or assignment thereof shall be held as fully proved. The denial required by this subdivision of the rule may be made upon information and belief.

(9) That a written instrument upon which a pleading is founded is without consideration, or that the consideration of the same has failed in whole or in part.

(10) A denial of an account which is the foundation of the plaintiff's action, and supported by affidavit.

(11) That a contract sued upon is usurious. Unless such plea is filed, no evidence of usurious interest as a defense shall be received.

(12) That notice and proof of loss or claim for damage has not been given as alleged. Unless such plea is filed such notice and proof shall be presumed and no evidence to the contrary shall be admitted. A denial of such notice or such proof shall be made specifically and with particularity.

(13) In the trial of any case appealed to the court from the Industrial Accident Board the following, if pleaded, shall be presumed to be true as pleaded and have been done and filed in legal time and manner, unless denied by verified pleadings:

(A) Notice of injury.

(B) Claim for Compensation

(C) Award of the Board

(D) Notice of intention not to abide by the award of the Board.

(E) Filing of suit to set aside the award.

(F) That the insurance company alleged to have been the carrier of the workers' compensation insurance at the time of the alleged injury was in fact the carrier thereof.

(G) That there was good cause for not filing claim with the Industrial Accident Board within the one year period provided by statute.

(H) Wage rate.

A denial of any of the matters set forth in subdivisions (a) or (g) of paragraph 13 may be made on information and belief.

Any such denial may be made in original or amended pleadings; but if in amended pleadings the same must be filed not less than seven days before the case proceeds to trial. In case of such denial the things so denied shall not be presumed to be true, and if essential to the case of the party alleging them, must be proved.

(14) That a party plaintiff or defendant is not doing business under an assumed name or trade name as alleged.

(15) In the trial of any case brought against an automobile insurance company by an insured under the provisions of an insurance policy in force providing protection against uninsured motorists, an allegation that the insured has complied with all terms of the policy as a condition precedent to bringing the suit shall be presumed to be true unless denied by verified pleadings which may be upon information and belief.

(16) Any other matter required by statute to be pleaded under oath.

[Current Rule: Tex. R. Civ. P. 93].
[Original Source: Arts. 573, 574, 1999, 2010, 3734, and 5074].
[Official Comments]:

Change: The basic statute relating to sworn pleadings was Art. 2010. With it have been combined provisions from a number of other specific statutes requiring sworn pleas. No change of meaning has been intended in so far as the combinations, as such, are concerned. The scope of sworn denials has, however, been broadened. Subdivision (b) will, under this rule, include the plea that ''the defendant has

not legal capacity to be sued.'' Subdivision (c) has been extended to include a denial of defendant's liability in the capacity in which he is sued. In subdivision (d) the term ''cause of action'' has been replaced by the word ''claim.'' Subdivisions (f) and (g) apply to allegations in any pleading, not merely to the petition as formerly stated in Art. 2010.

Change by amendment of March 31, 1941. Subdivisions (m) and (n) (Source: Art. 5546, and Acts 1937, 45th Leg., p. 535, ch. 261, sec. 2) and (o) added.

Change by amendment effective December 31, 1941. Section (6) has been added to subdivision (n).

Change by amendment effective December 31, 1943. Section (7) and the new sentence concerning sections (1) and (7) have been added to subdivision (n), and minor textual changes have been made in the last paragraph of this subdivision.

Change by amendment effective March 1, 1950. A new subdivision, designated (o), has been added, and the subdivision formerly lettered (o) has been designated (p).

Change by amendment effective January 1, 1971. Final clause of subdivision (k) has been changed to harmonize with Rule 185 as amended. Section (8) has been added to subdivision (n).

Change by amendment effective January 1, 1976. Subdivision (p) is new and is adopted for the purpose of simplifying issues in uninsured motorist cases.

Change by amendment effective September 1, 1983. To conform to S.B. 291 and 898, 68th Legislature, 1983.

Change by amendment effective April 1, 1984. Section 10 is changed to conform to amended Rule 185.

Rule 23. Form of Pleadings

(a) Indorsement; Identity of the Parties. The petition and answer and all supplemental petitions and answers shall be indorsed, so as to show their respective positions in the process of pleading, as "original petition/answer," "plaintiff's/defendant's first supplemental petition/answer," and so on, to be successively numbered, named and indorsed. The petition shall state the names of the parties and their residences, if known, together with the contents described in Rule ____ (currently Rule 47) General rules of pleading (__) above.

[Current Rule: Tex. R. Civ. P. 78, 79, 83].
[Original Source: Texas Rules 3 and 6 (for District and County Courts)].

(b) Paragraphs. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings, so long as the pleading containing such paragraph has not been superseded by an amendment as provided in Rule ____ (currently Rule 65) Amended and Supplemental Pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

[Current Rule: Tex. R. Civ. P. 50].
[Original Source: Federal Rule 10(b)].

(c) Adoption by Reference. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion, so long as the pleading containing such statements has not been superseded by an amendment as provided by Rule ____ (currently Rule 65) Amended and Supplemental Pleadings.

[Current Rule: Tex. R. Civ. P. 58].
[Original Source: Federal Rule 10(c), first sentence].

Change: Addition of words after comma.

(d) Exhibits and Pleading. Notes, accounts, bonds, mortgages, records, and all other written instruments, constituting, in whole or in part, the claim sued on, or the matter set up in defense, may be made a part of the pleadings by copies thereof, or the originals, being attached or filed and referred to as such, or by copying the same in the body of the pleading in aid and explanation of the allegations in the petition or answer made in reference to said instruments and shall be deemed a part thereof for all purposes. Such pleadings shall not be deemed defective because of the lack of any allegations which can be supplied from said exhibit. No other instrument of writing shall be made an exhibit in the pleading.

[Current Rule: Tex. R. Civ. P. 59].
[Original Source: Texas Rule 19 (for District and county Courts)].
[Official Comments]:

Change: The rule has been shortened. Provision is made for copying the exhibit into the body of the pleading. Addition of provision making the exhibit a part of the pleading for

all purposes and for supplying allegations from the exhibit.

Rule 24. Signing of Pleadings, Motions, and Other Papers; Sanctions

(a) Every pleading, motion, and other paper 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, telephone number, and, if available, telecopier number. A party not represented by an attorney shall sign his pleadings, state his address, telephone number, and, if available telecopier number.

[Current Rule: Tex. R. Civ. P. 57].
[Original Source: Federal Rule 11, first two sentences, unchanged].
[Official Comments]:

Change by amendment effective January 1, 1981. Rule changed to require statement on pleadings of attorney's State Bar of Texas identification number and telephone number and the telephone number of a party not represented by a lawyer.

Change by amendment effective September 1, 1990. To supply attorney telecopier information with other identifying information on pleadings. Documents telephonically transferred are permitted to be filed under changes in Rule 45.

(b) By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, motion, or other paper, an attorney or unrepresented party is certifying that to the best of the presenter's knowledge, information, and belief, formed after reasonable inquiry, the instrument is not groundless and presented in bad faith or groundless and presented for the purpose of harassment.

(c) Courts shall presume that pleadings, motions, and other papers are presented in good faith. "Groundless" for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law. A general denial does not constitute a violation of this rule. The amount requested for damages does not constitute a violation of this rule.

(d) Any party adversely affected by a violation of this rule may file a motion seeking relief or sanctions. The procedure, compliance, and review provisions of Rule ____ (currently Rule 166d) shall govern motions and proceedings under this rule, except that motions under this rule shall be served at least twenty-one (21) days before being filed or presented to the

court; if the challenged pleading, motion, or other paper is withdrawn or corrected within that twenty-one (21) day period, the motion under this rule shall not be filed or presented to the court.

(e) Upon finding a violation of this rule, the court may award relief and sanctions as provided in Rule ___ and ___ (currently Rule 215).

[Current Rule: Tex. R. Civ. P. 13].
[Original Source: Texas Rule 51 (for District and County Courts)].
[Official Comments]:

Change by amendment effective September 1, 1990. To require notice and hearing before a court determines to impose sanctions, to specify that any sanction imposed be appropriate, and to eliminate the 90-day ''grace'' period provided in the former version of the rule.

[Task Force Comment: This draft rule was taken from the report of the Sanctions' Task Force].

Rule 25. Presentation of Defenses; Plea or Motion Practice

(a) When presented. 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 twenty days after the date of service thereof. An additional 10 days shall be added to this period if the defendant files a dilatory plea in a separate instrument that is overruled.

[Current Rule: Tex. R. Civ. P. 99].
[Original Source: Federal Rule 12b)].
[Official Comments]:

Change: The rule authorizes the clerk to issue as many citations for the defendant or defendants as the plaintiff may request, without the delay of securing a return on any prior citation.

(b) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a petition, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) lack of jurisdiction over the subject matter;

(2) lack of jurisdiction over the person;

(3) improper venue;

(4) insufficiency of process;

(5) insufficiency of service of process;

(6) failure to join a party under Rule ____ (currently Rule 39);

(7) formal or substantive defects in a pleading.

(c) Hearings. The defendant in his answer may plead as many several matters, whether of law or fact, as he may think necessary for his defense, and which may be pertinent to the cause, and such matters shall be heard in such order as may be directed by the court, special appearance and motion to transfer venue, and the practice thereunder being excepted herefrom.

[Current Rule: Tex. R. Civ. P. 84].
[Original Source: Arts. 2006 (part) and 2012 (combined with mionr textural changes)].
[Official Comments]:

Change: These two articles have been combined with minor textual change. See also Rule 92 for balance of Art. 2006.

Change by amendment effective March 1, 1950. The requirement that defensive matters must be filed at the same time and in due order of pleading has been eliminated, and the provisions of the last clause have been changed to allow pleas to be heard in such order as the court may direct, excepting a plea of privilege.

Change by amendment effective September 1, 1962. Words ''special appearance and'' inserted before ''plea of privilege.''

Change by amendment effective September 1, 1983. To conform to S.B. 898, 68th Legislature, 1983.

Rule 26. Counterclaim and Cross-claim

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim within the jurisdiction of the court, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction; provided, however, that a judgment based upon a settlement or compromise of a claim of one party to the transaction or occurrence prior to a disposition on the merits shall not operate as a bar to the transaction or

occurrence unless the latter has consented in writing that said judgment shall operate as a bar.

(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against a opposing party whether or not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount of different in kind from that sought in the pleading of the opposing party, so long as the subject matter is within the jurisdiction of the court.

(d) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after filing his pleading may be presented as a counterclaim by amended pleading.

(e) Cross-Claim Against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(f) Additional Parties. Persons other than those made parties to the original action may be made parties to a third party action, counterclaim or cross-claim in accordance with the provisions of Rules _____ (currently Rules 38, 39 and 40).

(g) Tort shall not be the subject of set-off or counterclaim against a contractual demand nor a contractual demand against tort unless it arises out of or is incident to or is connected with same.

(h) Separate Trials; Separate Judgments. If the court orders separate trials as provided in Rule ____ (currently Rule 174), judgment on a counterclaim or cross-claim may be rendered when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

[Current Rule: Tex. R. Civ. P. 97].
[Original source: Federal Rule 13].
[Official Comments]:

Change: Subdivisions (d) and (f) of the Federal Rule have been omitted and the subdivisions relettered. Subdivisions (d), (e), (f) in part, and (h) above, correspond to

subdivisions (e), (g), (h), and (i) respectively of the Federal Rule. In (a) above, the compulsory counter-claim has been limited to a claim within the jurisdiction of the court. In (c), a similar limitation has been embodied. Other subdivisions have minor textual changes.

Change by amendment of March 31, 1941. The proviso in subdivision (f) takes the place of the last sentence of subdivision (f) in the original Rule 97, and subdivision (g) has been added. Subdivision (in original Rule 97 has been changed to (h).

Change by amendment effective January 1, 1971. Proviso concerning effect of judgment based upon settlement or compromise of claim of one party to a transaction has been added to subdivision (a).

Change by amendment effective April 1, 1984. Subdivision (f) is rewritten.

Rule 27. Third-Party Practice

(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a citation and petition to be served upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party petition not later than thirty (30) days after he serves his original answer. Otherwise, he must obtain leave on motion upon notice to all parties to the action. The person served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim under the rules applicable to the defendant, and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants a provided in Rule ____ (currently Rule 97). The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses and his counterclaims and cross-claims. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or who may be liable to

him or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant.

(b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

(c) This rule shall not be applied, in tort cases, so as to permit the joinder of a liability or indemnity insurance company, unless such company is by statute or contract liable to the person injured or damaged.

(d) This rule shall not be applied so as to violate any venue statute, as venue would exist absent this rule.

[Current Rule: Tex. R. Civ. P. 38].
[Original Source: Federal Rule 14, with minor textural change].
[Official Comments]:

Change by amendment effective April 1, 1984. The rule removes the need to get leave of court to begin third-party action; makes textual changes to clarify terminology.

Rule 28. Amended and Supplemental Pleadings

(a) Amendment Defined. The object of an amendment, as contra-distinguished from a supplemental petition or answer, is to add something to, or withdraw something from, that which has been previously pleaded so as to perfect that which is or may be deficient, or to correct that which has been incorrectly stated by the party making the amendment, or to plead new matter, additional to that formerly pleaded by the amending party, which constitutes an additional claim or defense permissible to the suit.

[Current Rule: Tex. R. Civ. P. 62].
[Original Source: Texas Rules 12 and 15 (for District and County Courts) combined, with minor textural changes].

Unless the substituted instrument shall be set aside on exceptions, the instrument for which it is substituted shall no longer be regarded as a part of the pleading in the record of the cause, unless some error of the court in deciding upon the necessity of the amendment, or otherwise in superseding it, be complained of, and exception be taken to the action of the court, or unless it be necessary to look to the superseded pleading upon a question of limitation.

[Current Rule: Tex. R. Civ. P. 65].

[Original Source: Texas Rule 14 (for District and County Courts) with minor textural changes].

(b) When to Amend; Amended Instrument. 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 opposite party; provided, that any 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 _____ (currently 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 filing will operate as a surprise to the opposite party.

[Current Rule: Tex. R. Civ. P. 63].
[Original Source: Arts. 2001, subdivisions 1 and 2].
[Official Comments]:

Change: This rule authorizes amendment without leave of court when filed seven days or more before the date of trial. It requires leave to amend thereafter, which may be granted by the judge instead of by the court. Subdivision 3 of Article 2001 is superseded by Rules 66 and 67.

Change by amendment effective January 1, 1961. Language "or after such time as may be ordered by the judge under Rule 166" added.

Change by amendment effective September 1, 1990. 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.

The party amending shall point out the instrument amended, as "original petition," or "plaintiff's first supplemental petition," or as "original answer," or "defendant's first supplemental answer" or other instrument filed by the party and shall amend by filing a substitute therefor, entire and complete in itself, indorsed "amended original petition," or amended "first supplemental petition," or "amended original answer," or "amended first supplemental answer," accordingly as said instruments of pleading are designated.

[Current Rule: Tex. R. Civ. P. 64].
[Original Source: Texas Rule 13 (for District and County Courts)].

(c) Trial Amendments. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleading, or if during the trial any defect, fault or omission in

a pleading, either of form or substance, is called to the attention of the court, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the allowance of such amendment would prejudice him in maintaining his action or defense upon the merits. The court may grant a postponement to enable the objecting party to meet such evidence.

[Current Rule: Tex. R. Civ. P. 66].
[Original Source: Federal Rule 15(b) (last two sentences) with minor textural change].

(d) Trial by Consent. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. In such case such amendment of pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made by leave of court upon motion of any party at any time up to the submission of the case to the Court or jury, but failure so to amend shall not affect the result of the trial of these issues; provided that written pleadings, before the time of submission, shall be necessary to the submission of questions, as is provided in Rules ____ and ____ (currently Rules 277 and 279).

[Current Rule: Tex. R. Civ. P. 67].
[Original Source: Federal Rule 15(b)].

SECTION 4
Parties

Rule 30. Parties Plaintiff and Defendant

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest, except as provided by law. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is sought. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) Capacity to Sue or Be Sued in Assumed Name. Any partnership, unincorporated association, private corporation, or

individual doing business under an assumed name may sue or be sued in its partnership, assumed or common name for the purpose of enforcing for or against it a substantive right, but on a motion by any party or on the court's own motion the true name may be substituted.

[Current Rule: Tex. R. Civ. P. 28].
[Original Source: Part of Federal Rule 17(b)].
[Official Comments]:

Change: Addition of ''an individual doing business under an assumed name,'' and partnership or common name.

Change by amendment effective January 1, 1971. Language has been added to make the rule applicable to a private corporation and authorize the true name of the party to be substituted on motion.

(c) Next Friends and Guardians Ad Litem.

(1) A minor or incompetent person who does not have a legal guardian may sue and be represented by "next friend" who shall have the same rights as guardians have, but shall give security for costs, or affidavits in lieu thereof, when required.

(2) The court will appoint a guardian ad litem to represent a minor or incompetent person when such person is a defendant to a suit and has no guardian, or when such person is a party to a suit and is represented by a guardian or next friend who appears to the court to have an interest adverse to such minor or incompetent person. The court shall allow the guardian ad litem a reasonable fee for his services to be taxed as a part of the costs.

[Current Rule: Tex. R. Civ. P. 44, 173].
[Original Source: Art. 2159].
[Official Comments]:

Change: Addition of ''an individual doing business under an assumed name,'' and partnership or common name.

Change by amendment effective January 1, 1971. Language has been added to make the rule applicable to a private corporation and authorize the true name of the party to be substituted on motion.

Rule 31. Joinder of Claims and Remedies

(a) Joinder of Claims. A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or alternative claims, as

many claims, legal or equitable, as the party has against an opposing party.

(b) Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. This rule shall not be applied in tort cases so as to permit the joinder of a liability or indemnity insurance company, unless such company is by statute or contract directly liable to the person injured or damaged.

[Current Rule: Tex. R. Civ. P. 51].
[Original Source: Federal Rule 18].
[Oficial Comments].

Change: Reference to the right of plaintiff to join an action upon a claim for money and an action to set aside a fraudulent conveyance is omitted as unnecessary in view of the decisions of this state.

Change by amendment effective December 31, 1941. The last sentence has been added.

Change by amendment effective January 1, 1961. The word ''statute'' substituted for the word ''law'' in last sentence of subdivision (b).

Rule 32. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process shall be joined as party in the action if (1) in his absence complete relief cannot be accorded among those already parties; or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.

(b) Determination by Court Whenever Joinder Not Feasible. If a person described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent party thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the

person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule _____ (currently Rule 42).

[Current Rule: Tex. R. Civ. P. 39].
[Original Source: Federal Rule 19, with textural change].
[Official Comments]:

Change by amendment effective January 1, 1971. The rule has been completely rewritten to adopt, with minor changes, the provisions of Federal Rule 19 as amended.

Rule 33. Permissive Joinder of Parties

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

[Current Rule: Tex. R. Civ. P. 40].

[Original Source: Federal Rule 20, unchanged].

Rule 34. Misjoinder and Nonjoinder of Parties

Misjoinder of parties is not grounds for dismissal of an action. Parties may be dropped and added, or suits filed separately may be consolidated, or actions which have been improperly joined may be severed and each ground of recovery improperly joined may be docketed as a separate suit between the same parties, by order of the court on motion of any party or on its own initiative at any stage of the action, before the time of submission to the jury or to the court if trial is without a jury, on such terms as are just. Any claim against a party may be severed and proceeded with separately.

[Current Rule: Tex. R. Civ. P. 41].
[Original Source: Federal Rule 21].
[Task Force Comments:].

Change: Addition of provision for adding and dropping parties and for consolidation of suits and for severing actions in case of misjoinder of parties or causes.

Rule 35. Interpleader

Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which the claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in any other rules.

[Current Rule: Tex. R. Civ. P. 43].
[Original Source: Federal Rule 22(1), with minor textural change].

Rule 36. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims and defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Action Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole; or

(3) where the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(4) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulty likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained: Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall, after hearing, determine by order whether it is to be so maintained. This determination may be altered, amended, or withdrawn at any time before final judgment. The court may order the naming of additional parties in order to insure the adequacy of representation.

(2) After the court has determined that a class action may be maintained it shall order the party claiming the class action to direct to the members of the class the best notice

practicable under the circumstances including individual notice to all members who can be identified through reasonable effort. In all class actions maintained under subdivision (b)(1), (b)(2), and (b)(3), this notice shall advise the members of the class (A) the nature of the suit, (B) the binding effect of the judgment, whether favorable or not, and (C) the right of any member to appear before the court and challenge the court's determinations as to the class and its representatives. In all class actions maintained under subdivision (b)(4) this notice shall advise each member of the class (A) the nature of the suit; (B) that the court will exclude him from the class if he so requests by a specified date; (C) that the judgment, whether favorable or not, will include and bind all members who do not request exclusion by the specified date; and (D) that any member who does not request exclusion may if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivisions (b)(1), (b)(2), and (b)(3), whether or not favorable to the class, shall include, describe, and be binding upon all those whom the court finds to be members of the class and who received notice as provided in subdivision (c)(2). The judgment in an action maintained as a class action under subdivision (b)(4), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(d) **Actions Conducted Partially as Class Actions.** When appropriate (1) an action may be brought or maintained as a class action with respect to particular issues, or (2) a class be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall be construed and applied accordingly.

(e) **Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice shall be given to all members of the class in such manner as the court directs.

(f) **Discovery.** Unnamed members of a class action are not to be considered as parties for purposes of discovery.

(g) **Effective Date.** This rule shall be effective only with respect to actions commenced on or after September 1, 1977.

[Current Rule: Tex. R. Civ. P. 42].
[Original Source: Federal Rule 23].
[Official Comments]:

Change by amendment effective September 1, 1977. Rule 42 is completely rewritten. Subdivision (a) is copied from revised

Federal Rule 23(a). Subdivision (b)(1) is copied from revised Federal Rule 23(b)(2). Subdivision (b)(2) is copied from revised Federal Rule 23(b)(2). Subdivision (b)(3 is taken from present Texas Rule 42(a)(3), omitting the reference to the character of the right as ''several.'' Subdivision (b)(4) is adopted from revised Federal Rule 23(b)(3). Subdivision (c)(1 is adopted from revised Federal Rule (c)(1) with little change except in the choice of words. The second sentence in proposed (c)(1) is not found in the Federal Rule although the idea is implied therein. Subdivision (d) is copied from revised Federal Rule 23(c)(4). Subdivision (e) is copied from revised Federal Rule 23(e).

Change by amendment effective April 1, 1984. The paragraph concerning a derivative suit is added to subdivision (a).

Rule 37. Derivative Suits

In a derivative suit brought pursuant to article 5.14 of the Texas Business Corporation Act, the petition shall contain the allegations (1) that the plaintiff was a record or beneficial owner of shares, or of an interest in a voting trust for shares at the time of the transaction of which he complains, or his shares or interest thereafter devolved upon him by operation of law from a person who was the owner at that time, and (2) with particularity, the efforts of the plaintiff to have suit brought for the corporation by the board of directors, or the reasons for not making any such efforts. The derivative suit may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders similarly situated in enforcing the right of the corporation. The suit shall not be dismissed or compromised without the approval of the court, and notice in the manner directed by the court of the proposed dismissal or compromise shall be given to shareholders.

[Current Rule: Tex. R. Civ. P. 42(a)].
[Original Source: Federal Rule 23(a)].

Rule 38. Intervention

(a) Intervenor's Pleadings. Any party may intervene by filing a pleading subject to being stricken out by the court for sufficient cause on the motion of any party.

(b) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to

protect that interest, unless the applicant's interest is adequately protected by existing parties.

(c) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(d) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided by these rules. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

[Current Rule: Tex. R. Civ. P. 60, 61].
[Original Source: Art. 1998 and Texas Rule 30 (for District and County Courts)].
[Official Comments]:

Rule 60, Change: Intervention is authorized without leave of court, regardless of whether the court is in session or in vacation.

Rule 60, Change by amendment effective September 1, 1990. Rules 21 and 21a control notice and service of pleadings of intervenors.

Rule 39. Substitution of Parties

(a) Death of Party. Where the cause of action is one which survives, no suit shall abate because of the death of any party thereto, but such suit may continue as hereinafter provided. Upon death of a party, the heirs, administrator or executrix of such decedent may appear and upon suggestion of death in open court may proceed as a party in his own name, Absent a timely appearance and suggestion, upon application by an opposing party, the clerk shall issue a scire facias for the heirs, administrator or executrix of such decedent, requiring him to appear and prosecute such suit. An opposing party may have the suit dismissed upon failure of the heirs, administrator or executrix of such decedent to respond to the scire facias in a timely manner.

[Current Rule: Tex. R. Civ. P. 150-153].
[Original Source: Arts. 2078, 2079, 2080, 2081, with minor textural changes].
[Official Comments]:

Rule 151, Change by amendment effective April 1, 1984. Textual changes.

Rule 153, Change by amendment effective April 1, 1984. Textual changes.

(b) **Requisites of Scire Facias.** The scire facias and returns thereon, provided for herein, shall conform to the requisites of citations and the returns thereon, under the provisions of these rules.

[Current Rules: Tex. R. Civ. P. 154].
[Original Source: Art. 2091, with minor textural changes].

(c) **Surviving Parties.** Where there are two or more plaintiffs or defendants, and one or more of them die, upon suggestion of such death being entered upon the record, the suit shall at the instance of either party proceed in the name of the surviving plaintiffs or against the surviving defendants, as the case may be.

[Current Rule: Tex. R. Civ. P. 155].
[Original Source: Art. 2082, unchanged].

(d) **Death After Verdict or Close of Evidence.** When a party in a jury case dies between verdict and judgment, or a party in a non-jury case dies after the evidence is closed and before judgment is pronounced, judgment shall be rendered and entered as if all parties were living.

[Current Rule: Tex. R. Civ. P. 156].
[Original Source: Art. 2083, unchanged].
Official Comments]:

Change by amendment effective January 1, 1978. The rule is made applicable to non-jury as well as jury cases.

(e) **Suit for the Use of Another.** When a plaintiff suing for the use of another shall die before verdict, the person for whose use such suit was brought, upon such death being suggested on the record in open court, may prosecute the suit in his own name, and shall be responsible for costs as if he brought the suit.

[Current Rule: Tex. R. Civ. P. 158].
[Original Source: Art. 2085, unchanged].

(f) **Suit for Injuries Resulting in Death.** In cases arising under the provisions of the title relating to injuries resulting in death, the suit shall not abate by the death of either party pending the suit, but in such case, if the plaintiff dies, where there is only one plaintiff, some one or more of the parties

entitled to the money recovered may be substituted and the suit prosecuted to judgment in the name of such party or parties, for the benefit of the person entitled; if the defendant dies, his executor, administrator or heir may be made a party, and the suit prosecuted to judgment.

[Current Rule: Tex. R. Civ. P. 159].
[Original Source: Art. 2086, unchanged].

SECTION 5
Discovery and Pretrial Procedure

A. DISCOVERY

Rule 40. General Provisions Regarding Discovery; Scope

(a) **Forms of Discovery.** Permissible forms of discovery are (1) oral or written depositions of any party or non-party, (2) written interrogatories to a party, (3) requests of a party for admission of facts and the genuineness or identity of documents or things, (4) requests and motions for production, examination, and copying of documents or other tangible materials, (5) requests and motions for entry upon and examination of real property and (6) motions for a mental or physical examination of a party or person under the legal control of a party.

[Current Rule: Tex. R. Civ. P. 166b(1)].
[Original Source: New Rule, combining provisions of old Rules 167, 186a and 186b].
[Official Comments]:

Rule 166(b), Change: Subdivision 1[(a)] has been added. The court has been given the power to compel the appearance of the parties or their agents as well as the attorneys. Reference to an auditor is also authorized.

Change by amendment effective January 1, 1961. Requirement that court's order at pre-trial conference allowing amendments show ''the time within which same may be filed.''

Change by amendment effective September 1, 1990. To broaden the scope of the rule and to confirm the ability of the trial courts at pretrial hearings to encourage settlement.

(b) **Scope of Discovery.** Except as provided in Rule 41 (currently Paragraph 3 of Rule 166b) or otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows

(1) **In general.** Parties may obtain discovery regarding any matter, not privileged, that is relevant to the

subject matter involved in the pending action whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. It is not ground for objection that the information sought will be inadmissible at the trial if it appears reasonably calculated to lead to the discovery of admissible evidence.

[Current Rule: Tex. R. Civ. P. 166b(2)(a)].
[Original Source: Fed.R.Civ.P. 26(b)].
[Task Force Comments: The references to the scope of discovery for particular discovery devices has been moved to the appropriate rule.]

(2) **Potential Parties and Witnesses.** A party may obtain discovery of, and nothing in these rules shall render nondiscoverable, the identity and location (name, address and telephone number) of any potential party and of persons having knowledge of relevant facts. A person has knowledge of relevant facts when he or she has or may have knowledge of any discoverable matter. The information need not be admissible in order to satisfy the requirements of this subsection and personal knowledge is not required.

[Current Rule: Tex. R. Civ. P. 166b(2)(d) and last paragraph of Rule 166b(3)(e)].
[Original Source: New Rule].

(3) **Insurance and Settlement Agreements.** A party may obtain discovery of the following:

(A) The existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment that may be rendered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(B) The existence and contents of any settlement agreement. Information concerning the settlement agreement is not by reason of disclosure admissible in evidence at trial.

[Current Rule: Tex. R. Civ. P. 166b(2)(f)].
[Original Source: New Rule].

Rule 41. Exemptions and Privileges from Discovery

(a) **Work Product.** A party may not obtain discovery of the work product of an attorney, subject to the exceptions of Civil

Evidence Rule 503(d), which shall govern as to work product as well as to attorney-client privilege.

(b) Experts.

(1) A party may not obtain discovery of the facts known, identity, mental impressions and opinions of experts, acquired or developed in anticipation of litigation, if the expert has been informally consulted or 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 an expert witness and the expert's opinions or impressions have not been reviewed by a testifying expert.

(2) Nothing in these rules shall prevent a party from obtaining discovery of the identity and location (name, address and telephone number) of an expert who may be called as an 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 an expert witness at trial is required if the consulting expert's opinion or impressions have been reviewed by a testifying expert. The trial judge has discretion to compel a party to determine and disclose whether an expert may be called to testify within a reasonable and specific time before the date of trial.

[Current Rule: Tex. R. Civ. P. 166b(3)(b); 166b(2)(3)].
[Original Source: New Rule].

(c) 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 if the consulting expert's opinions or impressions have been reviewed by a testifying expert. If the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert who will be called as an 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.

[Current Rule: Tex. R. Civ. P. 166b(2)(e)(2) & (4)].
[Original Source: New Rule].

(d) **Witness Statements.** A party may not discover the written statements of potential witnesses and parties 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 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 purposes of this paragraph a photograph is not a statement. A party may obtain discovery of a communication that is otherwise privileged, however, 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.

[Current Rule: Tex. R. Civ. P. 166b(2)(g) and 166b(3)(c)].
[Original Source: New Rule].

(e) **Party Communications.** A party may not discover 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, 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 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. A party may obtain discovery of a communication that is otherwise privileged, however, 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.

[Current Rule: Tex. R. Civ. P. 166b(3)(d)].
[Original Source: New Rule].

(f) **Other Privileged Information.** A party may not discover any matter protected from disclosure by any other privilege.

[Current Rule: Tex. R. Civ. P. 166b(3)(a) through (e), 166b(2)(e)].
[Original Source: New Rule].

Rule 42. Discovery Disputes

(a) Grounds for Objection to Requested Discovery. A party may object to discovery propounded to it on the grounds that such discovery requests information beyond the scope of discovery as defined by Rule _____ (current Rule 166b(4)); requests information that is privileged or exempt from discovery as defined by Rule ____ (current Rule 166b(2),(3)); constitutes an undue burden, unnecessary expense, harassment, or annoyance; or invades personal, constitutional or property rights. 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.

[Current Rule: new provision].
[Original Source: New Rule].

(b) Objection or Motion for Protective Orders. On objection made in a party's response to a discovery request or motion specifying the grounds, the court may make any order in the interest of justice necessary to protect any person against or from whom discovery is sought from discovery. Objections, motions, or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents. Specifically, the court's authority as to such orders extends to, although it is not necessarily limited by, any of the following:

(1) ordering that requested discovery not be sought in whole or in part, or that the extent or subject matter of discovery be limited, or that it not be undertaken at the time or place specified.

(2) ordering that the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court.

(3) ordering that for good cause shown results of discovery be sealed or otherwise adequately protected, that its distribution be limited, or that its disclosure be restricted. Any order under this subparagraph shall be made in accordance with the provisions of Rule _____ (current Rule 76a) with respect to all court records subject to that rule.

[Current Rule: Tex. R. Civ. P. 166b(5): Objections to discovery appropriate as alternative method].
[Original Source: New Rule].

(c) Presentation of Objections to Discovery. Either an objection made in a party's response to a discovery request or a

motion for protective order shall preserve that party's objection to requested discovery without further support or action 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 objecting to an appropriate discovery request, a party 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 support such claim either in the form of affidavits served at least seven days before the hearing or by testimony. If the trial court determines that an in camera inspection and review by the court of some or all of the requested discovery is necessary, the objecting party must segregate and produce the discovery to the court in a sealed wrapper or by answers made in camera to deposition questions, to be transcribed and sealed in event the objection is sustained. 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 and review of the particular discovery before ruling on the objection.

[Current Rule: Tex. R. Civ. P. 166b(4)].
[Original Source: New Rule].
[Task Force Comments: Presumably subject to work of Discovery Task Force].

(d) Certificate of Conference. Before any discovery objections or motion can be set for hearing before the court, the party setting the hearing shall file a certificate that efforts to resolve the discovery dispute without the necessity of court intervention have been attempted and failed.

[Current Rule: Tex. R. Civ. P. 166b(7)].
[Original Source: New Rule].
[Task Force Comments: Certificate now required before motion is set for hearing].

Rule 43. 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 to reasonably supplement his response if he obtains information upon the basis of which:

(1) he knows that the response was incorrect or incomplete when made;

(2) he knows that the response though correct and complete when made is no longer true and complete and the circumstances are such that failure to amend the answer is in substance misleading; or

(b) If the party expects to call an expert witness when the identity or the subject matter of such expert witness' testimony has not been previously disclosed in response to an appropriate inquiry directly addressed to these matters, such response must be supplemented to include the name, address and telephone number of the expert witness and the substance of the testimony concerning which the expert witness is expected to testify, as soon as is practical, but in no event less than thirty (30) days prior to the beginning of trial except on leave of court.

(c) In addition, a duty to supplement answers may be imposed by order of the court or agreement of the parties, or at any time prior to trial through new requests for supplementation of prior answers.

[Current Rule: Tex. R. Civ. P. 166b(6)].
[Original Source: New Rule].
[Task Force Comment: Presumably part of Discovery Task Force report].

Rule 44. Stipulations regarding Discovery Procedures

Unless the court orders otherwise, the parties may by written agreement modify the procedures provided by these rules for all methods of discovery. Any such agreement varying the procedures provided by these rules for depositions, however, may be set forth on the record in the text of the deposition transcript, set forth in a separate exhibit to the transcript and signed by all parties, or approved by prior written order of the court.

[Current Rule: Tex. R. Civ. P. 166c].
[Original Source: New Rule].
[Official Comments]:

Change by amendment effective January 1, 1988. This is a new rule which allows the parties to modify the existing procedures concerning depositions to fit the facts and

situations of the individual case.

[Task Force Comments: The redraft of current Rule 166c has been adapted from the current language of Tex. R. Civ. P. 206(4) regarding agreeing to different procedures for submitting depositions to witnesses and delivery].

Rule 45. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(a) Scope.

(1) Documents and Tangible Things. A party may obtain discovery of the existence, description, nature, custody, condition, location and contents of any and all documents, (including papers, books, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, and any other data compilations from which information can be obtained and translated, if necessary, by the person from whom production is sought, into reasonably usable form) and any other tangible things which constitute or contain matters relevant to the subject matter in the action.

[Current Rule: Tex. R. Civ. P. 166b(2)(b)].
[Original Source: New Rule].

(2) Medical Records and Medical Authorization. Any party alleging physical or mental injury and damages arising from the occurrence which is the subject of the case shall be required, upon written request, to produce, or furnish an authorization permitting the full disclosure of, medical records not theretofore furnished to the requesting party which are reasonably related to the injury or damages asserted. Copies of all medical records, reports, x-rays or other documentation obtained by virtue of an authorization furnished in response, shall be furnished by the requesting party, without charge, to the party who furnished the authorization in response to the request and copies of all medical records, reports, x-rays or other documentation obtained by virtue of the written request or by virtue of the authorization shall be made available by the requesting party for inspection and photographing and/or copying to all parties to the action under reasonable terms and conditions. If such information, so obtained, is to be used or offered in evidence upon trial, it shall be furnished by the requesting party to the party who furnished the authorization and made available for inspection by all parties not less than thirty (30) days prior to trial, except as may be excused by a showing of good cause. The mailing of written notice by the requesting party that he has obtained medical records, reports, x-rays or other documentation by virtue of the written request or by virtue of an authorization furnished in response constitutes making them available if the mailing is done thirty (30) days prior to trial

and if it prescribes reasonable terms and conditions for inspection of them.

[Current Rule: Tex. R. Civ. P. 166b(2)(h)]..
[Original Source: New Rule].

(3) Land. A party may obtain a right of entry upon designated land or other property when the designated land or other property is relevant to the subject matter in the action.

[Current Rule: Tex. R. Civ. P. 166b(2)(c)].
[Original Source: New Rule].

(4) Possession, Custody or Control. Unless otherwise provided in these rules, a person is not required to produce a document or tangible thing or permit entry upon land or other property unless it is within the person's possession, custody or control. Possession, custody or control includes constructive possession such that the person need not have actual physical possession. As long as the person has a superior right to compel the production from a third party (including an agency, authority or representative), the person has possession, custody or control. If a person has a superior right to compel a third person to permit entry upon land or other property, the person with the right has possession or control.

[Current Rule: Tex. R. Civ. P. 166b(2)(b)].
[Original Source: New Rule].

(b) Requests and Responses.

(1) Any party may serve on any other party a request to produce and permit the party making the request, or someone acting on his behalf, to inspect, sample, test, photograph and/or copy, any designated documents or tangible things which constitute or contain matters within the scope of this rule; or to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon within the scope of this rule.

[Current Rule: Tex. R. Civ. P. 167(a), (b)].
[Original Source: Federal Rule 34].
[Official Comments]:

Change: The provision of the Federal rule regarding land surveying is omitted. The proviso is added to limit the scope of the discovery authorized.

Change by amendment effective September 1, 1957. Provision is added authorizing entry on land of party for inspecting, surveying, etc.

Change by amendment effective January 1, 1971. An exception has been added to the proviso to permit discovery of information relating to the identity and location of any potential party or witness.

Change by amendment effective February 1, 1973. Language has been added and the proviso has been rewritten to permit discovery of certain insurance contracts, papers, and other tangible things calculated to lead to the discovery of material evidence, the identity and location of any potential witness, and the reports of an expert who will be called as a witness. Provision is also made for a person to obtain a copy of any statement he has previously made concerning the action or its subject matter and which is in the possession of a party.

Change by amendment effective January 1, 1981. The rule is entirely rewritten to provide for more precise procedures.

Change by amendment effective April 1, 1984. Portions of the former rule are deleted and have been incorporated into revised Rule 166b, except for the last sentence of subdivision 3 concerning unreasonable requests or responses. Discovery abuse is dealt with in revised Rule 215. The addition to the rule in subdivision 1(c) provides that a request may identify the items requested by ''category'' but with ''reasonable particularity.'' This language is adapted from current Federal Rule 34, upon which the 1981 revisions to Texas Rule 167 were largely modeled. The other changes in Rule 167 serve to conform it to revised Rule 166b.

Change by amendment effective January 1, 1988. Paragraph 3 is new; paragraph 4 is former paragraph 3; and paragraph 5 is former paragraph 4.

Change by amendment effective September 1, 1990. To require that requests and responses be filed and served on all parties, but that documents produced should not be filed without leave of court. Former subdivision 3 is deleted and the succeeding subdivisions 4 and 5 are renumbered as subdivisions 3 and 4.

(2) The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place and manner for making the inspection and performing the related acts.

(3) The party upon whom the request is served shall serve a written response which shall state, with respect to each item or category of items, that inspection or other requested action will be permitted as requested, and he shall thereafter comply with the request, except only to the extent that he makes objections in writing to particular items, or categories of items, stating specific reasons why such discovery should not be allowed.

(4) A true copy of the request and response, together with proof of the service thereof on all parties as provided in Rule 21a, shall be filed promptly in the clerk's office by the party making it, except that any documents produced in response to a request need not be filed.

(5) A party who produces documents for inspection shall produce them as they are kept in the usual course of business, or shall organize and label them to correspond with the categories in the request.

(6) Testing or examination shall not extend to destruction or material alteration of an article without notice, hearing, and prior approval by the court.

(c) Time. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the citation and petition upon that party. The request shall be then served upon every party to the action. The party upon whom the request is served shall serve a written response and objections, if any, within 30 days after the service of the request, except that if the request accompanies citation, a defendant may serve a written response and objections, if any, within 50 days after service of the citation and petition upon that defendant. The time for making a response may be shortened or lengthened by the court upon a showing of good cause.

[Current Rule: Tex. R. Civ. P. 167(2)].
[Original Source: Federal Rule 34].
[Official Comments]:

Change by amendment effective January 1, 1988.] Paragraph 4, Presentation of Objections, is new. Paragraph 5, Protective Orders, is former paragraph 4. Subparagraphs 5(a) is former paragraph 4(a) with no change. Subparagraph 5(b) is former paragraph 4(b) with no change. Subparagraph 5(c) is former paragraph 4(c) with changes. Paragraph 6, Duty to Supplement, is former paragraph 5 with no changes. Subparagraphs 6(a)-(c) are former subparagraphs 5(a)-(c) with no changes.

Change by amendment effective September 1, 1990. 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 to make discoverable the impressions and opinions of a consulting expert if a testifying expert has reviewed those opinions and material, regardless of whether the opinions and material form a basis for the opinion of the testifying expert. The amendments to subdivision 3 standardize language and provide that matters exempt under subdivision 3(c) are not made discoverable solely because the consultant may or is to be a fact witness only. The amendments to subdivision 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, but information withheld may not be used in evidence at trial by the withholding party absent supplementation. The last sentence added to subdivision 4 was previously the second sentence of Rule 168(6) and was moved because it applies to all discovery objections. Subdivision 5(c) is amended to reference the requirements of new Rule 76a. New subdivision 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.

[Task Force Comments: Tex. R. Civ. P. 167(3) deleted].

(d) Nonparties. Upon the filing of a motion setting forth with specific particularity the request and necessity therefor, and after and hearing, a court may order a person, organizational entity, governmental agency or corporation not a party to this suit to produce in accordance with this rule. All parties and the nonparty shall have the opportunity to assert objections at the hearing.

[Current Rule: Tex. R. Civ. P. 167(4)].
[Original Source: Federal Rule 34].
[Task Force Comments: This may be deleted since the deposition and subpoena duces tecum from non-parties is a much better alternative].

Rule 46. Physical and Mental Examinations of Persons

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody, conservatorship or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental

examination by a physician or psychologist or to produce for examination the person in his custody, conservatorship or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. Except as provided in subparagraph (d) of this rule, an examination by a psychologist may be ordered only when the party responding to the motion has identified a psychologist as an expert who will testify. For the purpose of this rule, a psychologist is a person licensed or certified by a State or the District of Columbia as a psychologist.

(b) Report of Examining Physician or Psychologist.

(1) If requested by the party against whom an order is made under this rule or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician or psychologist setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician or psychologist fails or refuses to make a report the court may exclude his testimony if offered at the trial.

(2) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or psychologist or the taking of a deposition of the physician or psychologist in accordance with the provisions of any other rule.

(c) Effect of No Examination. If no examination is sought either by agreement or under the provisions of this rule, the party whose mental or physical condition is in controversy shall not comment to the court or jury on his willingness to submit to an examination, on the right of any other party to request an examination or move for an order, or on the failure of such other party to do so.

(d) Cases Arising Under Title II, Family Code. In cases arising under Title II, Family Code, on the court's own motion or on the motion of a party, the court may appoint:

(1) one or more psychologists to make any and all appropriate mental examinations of the children who are the subject of the suit or any other parties irrespective of whether a psychologist has been listed by any party as an expert who will testify.

(2) non-physician experts who are qualified in paternity testing to take blood, body fluid or tissue samples and to conduct such tests as ordered by the court.

[Current Rule: Tex. R. Civ. P. 167a].
[Original Source: Federal Rule 35].
[Official Comments]:

Change by amendment effective September 1, 1990. To provide for court-ordered examination by certain psychologists.

[Task Force Comments: 167a(e) has been moved to Rule 42(1).]

Rule 47. Interrogatories to Parties

(a) Scope, Use at Trial.

Interrogatories may relate to any matters which can be inquired into under Rule _____ (current Rule 166b), but the answers, subject to any objections as to admissibility, may be used only against the party answering the interrogatories. It is also not ground for objection that an interrogatory propounded pursuant to Rule ____ (current Rule 43) involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

[Current Rule: Tex. R. Civ. P. 168(2)].
[Original Source: Federal Rule 33, with changes].
[Official Comments]:

Change by amendment effective January 1, 1967. Provisions have been added to permit, when there are more than four adverse parties, the filing of four copies of interrogatories or answers with the clerk in lieu of service on ''all other parties.'' The third and fourth paragraphs have also been added.

Change by amendment effective February 1, 1973. Language authorizing answers to be signed by attorney has been eliminated. The sentence concerning identification of expert witnesses and the subject matter of their testimony, and the paragraph concerning answers that may be ascertained from

business records, have been added.

Change by amendment effective January 1, 1978. Time to answer enlarged to 30 days; time to object to interrogatories enlarged to 15 days; answers should follow each question.

Change by amendment effective January 1, 1981. The rule is wholly rewritten to provide for procedures and scope. It limits the number of interrogatories to thirty questions, except on court order.

Change by amendment effective April 1, 1984. Subdivision 7 of former Rule 168, concerning duty to supplement interrogatories, has been moved to Rule 166b and revised to apply generally to the discovery process. Sanctions imposable for violating the duty to supplement are stated in new Rule 215(4).

Subdivision 2b, regarding the identification of individual documents contained in former Rule 168(2), was proposed at the federal level in 1978 by the Advisory Committee on Civil Rules of the Judicial Conference of the United States but was withdrawn after it received criticism. SEE Schroeder & Frank, THE PROPOSED CHANGES IN THE DISCOVERY RULES, 1978 Arizona St. L. Rev. 475, 491 (1978). The revision to Rule 168 corresponds with the language of the current federal rule "... to locate and to identify as readily as can the party served the records ...." The provisions in this rule concerning sanctions have been deleted, because the subject is covered by Rule 215.

Change by amendment effective September 1, 1990. The previous second sentence in subdivision 6 was, and is, applicable to all discovery objections and therefore has been moved to Rule 166b.4, last sentence.

[Task Force Comments: The language concerning contention interrogatories is taken from current Rule 166b(2)(a)].

(b) Interrogatories and Responses.

(1) Serving Interrogatories. Any party may serve upon any other party written interrogatories to be answered by the party served, or, if the party served is a public or private corporation or a partnership or association, or governmental agency, by an officer or agent who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after the service of the citation and petition upon that party. A true copy of the interrogatories and the written answers or objections, together

with proof of service thereof as provided in Rule ____ (current Rule 21a), shall be filed promptly in the clerk's office by the party making them, except that when an interrogatory is answered by reference to records as permitted by paragraph ___, the records so referenced need not be filed. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice requires.

[Current Rule: Tex. R. Civ. P. 168].
[Original Source: Federal Rule 33, with changes].

(2) Option to Produce Records. Where the answer to an interrogatory may be derived or ascertained from public records or from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served; it is sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and, if applicable, to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. The specification of records provided shall include sufficient detail to permit the interrogating party to locate and to identify as readily as can the party served, the records from which the answers may be ascertained.

[Current Rule: Tex. R. Civ. P. 168(2)(a),(b)].
[Original Source: Federal Rule 33, with changes].
[Official Comments]:

Change by amendment effective January 1, 1967. Provisions have been added to permit, when there are more than four adverse parties, the filing of four copies of interrogatories or answers with the clerk in lieu of service on ''all other parties.'' The third and fourth paragraphs have also been added.

Change by amendment effective February 1, 1973. Language authorizing answers to be signed by attorney has been eliminated. The sentence concerning identification of expert witnesses and the subject matter of their testimony, and the paragraph concerning answers that may be ascertained from business records, have been added.

Change by amendment effective January 1, 1978. Time to answer enlarged to 30 days; time to object to interrogatories enlarged to 15 days; answers should follow

each question.

Change by amendment effective January 1, 1981. The rule is wholly rewritten to provide for procedures and scope. It limits the number of interrogatories to thirty questions, except on court order.

Change by amendment effective April 1, 1984. Subdivision 7 of former Rule 168, concerning duty to supplement interrogatories, has been moved to Rule 166b and revised to apply generally to the discovery process. Sanctions imposable for violating the duty to supplement are stated in new Rule 215(4).

Subdivision 2b, regarding the identification of individual documents contained in former Rule 168(2), was proposed at the federal level in 1978 by the Advisory Committee on Civil Rules of the Judicial Conference of the United States but was withdrawn after it received criticism. SEE Schroeder & Frank, THE PROPOSED CHANGES IN THE DISCOVERY RULES, 1978 Arizona St. L. Rev. 475, 491 (1978). The revision to Rule 168 corresponds with the language of the current federal rule "... to locate and to identify as readily as can the party served the records ...." The provisions in this rule concerning sanctions have been deleted, because the subject is covered by Rule 215.

Change by amendment effective September 1, 1990. The previous second sentence in subdivision 6 was, and is, applicable to all discovery objections and therefore has been moved to Rule 166b.4, last sentence.

(3) Time. The party upon whom the interrogatories have been served shall serve answers on the party submitting the interrogatories within the time specified by the party serving the interrogatories, which specified time shall not be less than thirty days after the service of the interrogatories, except that, if the request accompanies citation, a defendant may serve answers within 50 days after service of the citation and petition upon that defendant. The court, on motion and notice for good cause shown, may enlarge or shorten the time for serving answers or objections.

[Current Rule: Tex. R. Civ. P. 168(4)].
[Original Source: Federal Rule 33, with changes].

(4) Number of Interrogatories. The number of questions including subsections in a set of interrogatories shall be limited so as not to require more than thirty answers. No more than two sets of interrogatories may be served by a party to any other party, except by agreement or as may be permitted by the court after hearing upon a showing of good cause. The court

may, after hearing, reduce or enlarge the number of interrogatories or sets of interrogatories if justice so requires. The provisions of Rule ____ (currently Rule 166b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.

(5) **Responding to Interrogatories.** The interrogatories shall be answered separately and fully in writing under oath. Answers to interrogatories shall be preceded by the question or interrogatory to which the answer pertains. True copies of the interrogatories, and answers and objections thereto, shall be served on all parties or their attorneys, and copies thereof shall be provided to any additional parties upon request. The answers shall be signed and verified by the person making them and the provisions of Rule ____ (currently Rule 14) shall not apply.

[Current Rule: Tex. R. Civ. P. 168(5)].
[Original Source: Rule 33, with changes].

(6) **Objections.** On or prior to the date on which answers are to be served, a party may serve written objections to specific interrogatories or portions thereof. Answers only to those interrogatories or portions thereof, to which objection is made, shall be deferred until the objections are ruled upon and for such additional time thereafter as the court may direct. Either party may request a hearing as to such objections at the earliest possible time.

[Current Rule: Tex. R. Civ. P. 168(6)].
[Original Source: Federal Rule 33, with changes].

Rule 48. Requests for Admission

(a) **Scope.** At any time after commencement of the action, a party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule _____ (currently Rule 166b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. It is not ground for objection that a request for admission relates to mixed questions of law and fact or that the documents referred to in a request may not be admissible at trial. Copies of the documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. A true copy of a request for admission or of a written answer or objection, together with proof of the service thereof as provided in Rule ____ (currently Rule 21a), shall be filed promptly in the clerk's office by the party making it.

[Current Rule: Tex. R. Civ. P. 169(1), first paragraph].

[Original Source: Federal Rule 36, with minor textural changes].
[Official Comments]:

Change by amendment effective December 31, 1941. The method of service is explained to be delivery, etc.

Change by amendment effective March 1, 1950. The third sentence, requiring delivery of the request for admissions to the adverse party's attorney, where he is represented by an attorney of record; the fourth sentence, requiring that the request state that it is made under this rule and the effect of failure to answer; and the last sentence, requiring the filing of copies in the clerk's office, have been added.

Change by amendment effective February 1, 1973. Sentence concerning effect of admission and provisions authorizing court to determine sufficiency of answers or reasons and permit withdrawal or amendment of admission have been added.

Change by amendment effective April 1, 1984. This rule has been revised to conform it to new Rule 166b. Under the amendment to Rule 169, a party may be required to admit or deny the truth of any matters within the scope of discovery. This change follows the pattern established by the 1970 amendment to Federal Rule 36. The time for making a response has been extended to thirty days. This modification is consistent with the objective of making discovery responses generally due within thirty days. Consistent with the view that all ''sanction'' information be set forth in one rule, noncompliance information has been moved to Rule 215(3). If requests go unanswered for thirty (30) days, no court order is required to deem such requests admitted unless otherwise ordered by the court.

Change by amendment effective September 1, 1990. The rule is amended to provide that the parties may agree to extend or shorten the time to respond to a request. The rule is also amended to permit service of a request at any time after commencement of the action but extending the time to respond in such case to no less than fifty days after service of the citation and petition on the responsive party.

(b) Requests and Responses. Each matter of which an admission is requested shall be separately set forth. The matter is admitted without necessity of a court order unless, within thirty days after service of the request, or within such time as the court may allow, or as otherwise agreed by the parties, the party to whom the request is directed serves upon the party

requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of fifty days after service of the citation and petition upon that defendant. If objection is made, the reason therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons that the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or easily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission is requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Paragraph 3 of Rule ____ (currently Rule 215), deny the matter or set forth reasons why he cannot admit or deny it.

[Current Rule: Tex. R. Civ. P. 169(1), second paragraph]. [Original Source: Federal Rule 36, with minor textural changes].

(c) Effect of Admission. Any matter admitted under this rule is conclusively established as to the party making the admission unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule _____ (currently Rule 166) governing amendment of a pre-trial order, and Rule _____ (currently Rule 166b-6) governing duty to supplement discovery responses, the court may permit withdrawal or amendment of responses and deemed admissions upon a showing of good cause for such withdrawal or amendment if the court finds that the parties relying upon the responses and deemed admissions will not be unduly prejudiced and that the presentation of the merits of the action will be subserved thereby. Any admission made by a party under this rule is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

[Current Rule: Tex. R. Civ. P. 169(2)]. [Original Source: Federal Rule 36, with minor textural changes].

Rule 49. Deposition to Perpetuate Testimony

(a) Petition. When any person may anticipate the institution of an action in which he may be a party, and may desire to perpetuate his own testimony or that of any other person to be used in such suit, he, his agent or attorney, may file a verified petition in the proper court of any county where venue of the anticipated action may lie. The petition shall be in the name of the petitioner and shall show: (1) that petitioner anticipates the institution of an action in which he may be a party; (2) the subject matter of the anticipated action and his interest therein; (3) the names and residences, if known, or a description of the persons expected to be interested adversely to petitioner; (4) the names and addresses of the persons to be examined, the substance of the testimony which he expects to elicit from each, and petitioner's reasons for desiring to perpetuate such testimony; and (5) a request for an order of the court authorizing such petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(b) Notice and Service. The petitioner shall thereafter serve or cause to be served at least fifteen days before the date of hearing, a notice upon the witness, or witnesses, and upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court at a time and place named in such notice for the order requested in the petition, and which notice may be served as provided in Rule ____ (currently Rule 21a). If the verified petition states that the name or the residence of any expected adverse party is unknown to petitioner and his agent or attorney and cannot be ascertained after diligent inquiry, the clerk of the court or justice of the peace shall, on petitioner's request, cause the notice to any such party or parties to be published in some newspaper in the county where the petition is filed if there be a newspaper published in such county, but if no newspaper be published in such county, then in a newspaper in the nearest county where a newspaper is published, once each week for two consecutive weeks, stating the substance of the petition, the court in which it is filed and the number thereof, the name of petitioner and each of the witnesses and their addresses, the names and addresses of the expected adverse parties, if known, or a description of such parties, and that a hearing will be had on such petition at a designated time and place on or after the 14th day following the first publication of such notice. Provided, however, that in any case where justice or necessity so requires the judge or justice may permit the taking of such depositions upon shorter notice than herein prescribed, or may extend such time in order to permit service on any adverse party.

(c) Application to Probate Will. An application or petition, or an anticipated application or petition, for the

probate of a will shall be considered as a suit within the meaning and purport of this rule; and, whenever any person in this State shall desire to perpetuate testimony for use in an anticipated application for the probate of a will, the notice, accompanied by a copy of the aforesaid petition may be served by posting as prescribed by Section 33(f)(2) of the Texas Probate Code, such notice to be directed to all parties interested in the estate of the testator and to comply with the requirements of Section 33(c) of said Code insofar as they may be applicable.

(d) **Order and Manner of Taking, Etc.** If satisfied that the perpetuation of testimony may prevent a failure or delay of justice, the court or justice shall make an order authorizing the taking of such depositions and state whether such depositions shall be taken upon oral examination or written questions. The time and place at which such depositions shall be taken may be stated in such order or by means of notice as provided for depositions generally. The deposition rules not inconsistent with this rule shall apply to the taking, signing, returning, objections to, and use of such depositions. Any interested party may, after the filing in the court of any deposition taken under notice by publication under this rule, move to suppress said deposition, in whole or in part, by bill of review, such right to move to suppress to be cumulative of all other rights to attack or oppose said deposition.

[Current Rule: Tex. R. Civ. P. 187].
[Original Source: Art. 3742, unchanged].

Rule 50. Deposition upon Oral Examination

(a) When Depositions May Be Taken. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if a party seeks to take a deposition prior to the appearance day of any defendant.

[Current Rule: Tex. R. Civ. P. 200(1)].
[Original Source: Art. 3753, unchanged].
[Official Comments]:

Change by amendment effective September 1, 1962. Provision regarding subpoena duces tecum inserted.

Change by amendment effective January 1, 1971. Reference to Rule 202 has been changed to Rule 201.

Change by amendment effective February 1, 1973. Sentence providing that a corporation, partnership, association, or governmental agency may be named as the witness has been

added.

Change by amendment effective April 1, 1984. The rule is rewritten. The first sentence of subdivision 1 is taken from former Rule 186a and Fed. R. Civ. P. 30(a). The second sentence is based upon former Rule 186b and Fed. R. Civ. P. 30(a) and (b)(2). Subdivision 2 has been redrafted to provide that all parties are entitled to notice of a deposition and to conform it to the provisions of Rule 201 dealing with the subpoena duces tecum and designation of a witness by corporate deponents. The new language in subdivision 2b is a verbatim adoption of the first sentence of Federal Rule 30(b)(6).

Change by amendment effective September 1, 1990. To provide for persons who may attend deposition without notification, and to provide for reasonable notice of any party's intent to have any other persons attend.

(b) Notice of Examination.

(1) Reasonable notice must be served in writing by the party, or his attorney, proposing to take a deposition upon oral examination, to every other party or his attorney of record. The notice shall state the name of the deponent, the time and the place of the taking of his deposition, and if the production of documents or tangible things is desired, a designation of the items to be produced by the deponent in compliance with Rule _____ (currently Rule 201) [production of documents and things]. The notice shall also state the identity of persons who will attend other than the witness, parties, spouses of parties, counsel, employees of counsel, and the officer taking the deposition. If any party intends to have any other persons attend, that party must give reasonable notice to all parties of the identity of such other persons.

(2) A party may in his notice name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested.

(3) Any party intending to make a non-stenographic recording shall give five days' notice to all other parties by certified mail, return receipt requested, and shall specify in said notice the type of non-stenographic recording which will be used. After the notice is given, any party may make a motion for relief under Rule _____ (currently Rule 166b). If a hearing is not held prior to the taking of the deposition, the non-stenographic recording shall be made subject to the court's ruling at a later time.

[Current Rule: Tex. R. Civ. P. 200(2), 202(1)].
[Original Source: Art. 3753 and New Rule].
[Task Force Comments: Combines notice provisions from rules 200(2), and 202(1)].

(c) Examination, Cross-Examination and Objections.

(1) **Written Cross-Questions on Oral Examination.** At any time before the expiration of ten days from the date of the service of the notice, any party, in lieu of participating in the oral examination may serve written questions on the party proposing to take the deposition who shall cause them to be transmitted to the officer authorized to take the deposition who shall propound them to the witness and record the answers verbatim.

(2) **Oath.** Every person whose deposition is taken upon oral examination shall be first cautioned and sworn to testify the truth, the whole truth and nothing but the truth.

(3) **Examination.** The witness shall be carefully examined, his testimony shall be recorded at the time it is given and thereafter transcribed by the officer taking the deposition, or by some person under his personal supervision.

(4) **Objections to Testimony.** The officer taking an oral deposition shall not sustain objections made to any of the testimony or fail to record the testimony of the witness because an objection is made by any of the parties or attorneys engaged in taking the testimony. Any objections made when the deposition is taken shall be recorded with the testimony and reserved for the action of the court in which the cause is pending. Absent express agreement recorded in the deposition to the contrary:

(A) objections to the form of questions or the nonresponsiveness of answers are waived if not made at the taking of an oral deposition and;

(B) except as provided in (1) above, or unless otherwise provided by agreement of the parties recorded by the officer in the deposition transcript, the court shall not be confined to objections made at the taking of the testimony.

[Current Rule: Tex. R. Civ. P. 204].
[Original Source: Art. 3758, unchanged].
[Official Comments]:

Change by amendment effective December 31, 1947. The previous rule has been almost completely redrafted and the procedure, as to cross-interrogatories, has been materially altered.

Change by amendment effective January 1, 1971. The requirement that written interrogatories be filed with the clerk and the reference to the commission have been eliminated; the word ''questions'' has been substituted for ''interrogatories''; and a provision has been added requiring the party proposing to take the deposition to cause written questions to be presented to the officer.

Change by amendment effective April 1, 1984. Subdivision 1 is former Rule 204 revised; subdivision 2 comes from former Rule 205; subdivision 3 from former Rule 206; subdivision 4 from former Rule 207. A major change is the waiver of objections to form of questions and responsiveness of answers if not made at taking of oral deposition.

(d) Record and Transcript of Examination.

(1) Submission to Witness, Changes, Signing. When the testimony is fully transcribed the deposition officer shall transmit or provide the original deposition transcript to the witness or if the witness is a party with an attorney of record, to the attorney of record, for examination and signature, by the witness before any officer authorized to administer an oath, unless such examination and signature are waived by the witness and by the parties. No erasures or obliterations of any kind are to be made to the original testimony as transcribed by the deposition officer. Any changes in form or substance which the witness desires to make shall be furnished to the deposition officer by the witness, together with a statement of the reasons given by the witness for making such changes. The changes and the statement of the reasons for the changes shall be attached to the deposition by the deposition officer. The deposition transcript and any changes shall then be subscribed by the witness under oath, before any officer authorized to administer an oath, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the witness does not sign and return the original deposition transcript within twenty days of its submission to him or his counsel of record, the deposition officer shall sign a true copy of the transcript and state on the record the fact of the waiver of examination and signature or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor. The copy of the deposition transcript may then be used as fully as though signed, unless on motion to suppress, made as provided in Rule ____ (currently Rule 207), the Court determines that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

[Current Rule: Tex. R. Civ. P. 205].
[Original Source: New Rule].
[Official Comments]:

Change by amendment effective January 1, 1988. The amendments to this rule are to update the rule to conform to the usual practices used in finalizing the deposition.

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

(A) that the witness was duly sworn by the officer;

(B) that the transcript is a true record of the testimony given by the witness;

(C) the amount of charges for the officer's preparation of the completed deposition transcript and any copies of exhibits;

(D) that the deposition transcript was submitted on a specified date to the witness or to the attorney of record for a party who was the witness for examination, signature and return to the officer by a specified date;

(E) that changes, if any made by the witness, in the transcript and otherwise are attached thereto or incorporated therein;

(F) that the witness returned or did not return the transcript;

(G) 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, 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;

(H) that a copy of the certificate was served on all parties pursuant to Rule ____ (currently Rule 21a).

The officer shall file with the court in which the cause is pending a copy of said certificate, and the clerk of the court where such certification is filed shall tax as costs the charges for preparing the original deposition transcript and making and attaching copies of all exhibits to the original deposition.

[Current Rule: Tex. R. Civ. P. 206(1), (4)].
[Original Source: New Rule].
[Official Comments]:

New rule effective April 1, 1984. The former Rule 206 is incorporated into Rule 204. This rule revises and

incorporates former Rules 208, 208a, and 210.

(3) Delivery. Unless otherwise requested or agreed to by the parties on the record in the deposition transcript, the officer, after certification, shall securely seal the original deposition transcript, or a copy thereof in the event the original is not returned to the officer, and copies of all exhibits in a wrapper endorsed with the title of the action and marked "Deposition of (here insert name of witness)," and shall thereafter deliver, or mail in a postpaid, properly addressed wrapper, certified with return receipt requested, such deposition transcript and copies of all exhibits to the attorney or party who asked the first question appearing in the transcript, and shall give notice of delivery to all parties. The custodial attorney shall, upon reasonable request, make the original deposition transcript available for inspection or photocopying by any other party to the suit.

The deposition officer shall give notice to all parties of delivery of the deposition transcript and copies of exhibits. It shall be sufficient notice of delivery for the officer to serve on each party a copy of the officer's certification pursuant to Tex.R.Civ.P. ____ (currently Rule 21a).

[Current Rule: Tex. R. Civ. P. 206(2) and (6)].
[Original Source: New Rule].

(4) Exhibits. Original documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to the deposition transcript and may be inspected and copied by any party, except that the person producing the materials may (a) offer copies to be marked for identification and annexed to the deposition transcript and to serve thereafter as originals if he affords to all parties fair opportunity at the deposition to verify the copies by comparison with the originals, or (b) offer the originals to be marked for identification, in which event the materials may then be used in the same manner as if annexed to the deposition transcript. In the event that original exhibits rather than copies are marked for identification, the deposition officer shall make copies of all original exhibits to be annexed to the original deposition transcript for delivery, and shall thereafter return the originals of the exhibits to the witness or party producing them, and such witness or party shall thereafter maintain and preserve the original exhibits and shall produce any such original exhibits for hearing or trial upon seven (7) days notice from any party. Copies annexed to the original deposition transcript may be used for all purposes.

[Current Rule: Tex. R. Civ. P. 206(3)].
[Original Source: New Rule].

(5) Copies. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition transcript to any party or to the deponent.

[Current Rule: Tex. R. Civ. P. 206(5)].
[Original Source: New Rule].

Rule 51. Deposition Upon Written Questions

(a) Serving Questions; Notice. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. Leave of court, granted with or without notice, must be obtained only if a party seeks to take a deposition prior to the appearance day of any defendant. Attendance of witnesses and the production of designated items may be compelled as provided in Rule ___ (currently Rule 201).

A party proposing to take a deposition upon written questions shall serve them upon every other party with a written notice in compliance with Rule ____ (currently Rule 201 a reasonable time before the deposition is to be taken.

(b) Cross-Questions, Redirect Questions, Re-Cross Questions and Formal Objections. Any party may serve cross-questions upon all other parties within ten days after the notice and direct questions are served. Within five days after being served with cross-questions a party may serve redirect questions upon all other parties. Within three days after being served with redirect questions a party may serve recross questions upon all other parties. Objections to the form of written questions are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within five days after service of the last questions authorized. The court may for cause shown enlarge or shorten the time.

(c) Deposition Officer; Interpreter. Any person authorized to administer oaths including notaries public (whether or not the person is a certified shorthand reporter), is an officer who is authorized to issue a subpoena or subpoena duces tecum for a written deposition as provided in Rule ____ (currently Rule 201) and is an officer before whom a written deposition may be taken. An officer who is authorized to take a written deposition shall have authority, when he deems it expedient, to summon and swear an interpreter to facilitate the taking of the deposition.

(d) Officer to take Responses and Prepare Record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly to administer an oath to the witness, to take the testimony of the

witness in response to the questions and to prepare, certify and deliver the deposition, in the manner provided by Rule _____ (currently Rule 204), attaching thereto the copy of the notice and questions.

[Current Rule: Tex. R. Civ. P. 208].
[Original Source: New Rule].
[Official Comments: New rule effective April 1, 1984. Former rule 208 is incorporated into Rule 206. This new rule revises and consolidates the written deposition practice as formerly stated in Rules 189, 190, 191, 192, 196, 197, and 198 except that the use of written depositions in court proceedings is covered by new Rule 207.

Section 4 states that a person authorized to administer oaths, such as a notary public, may take written depositions, even though that person is not a certified shorthand reporter.

Subdivision 5, by reference to new Rules 205 and 206, conforms the taking of the written deposition, its filing and other procedures to the oral deposition practice.

Change by amendment effective September 1, 1990. Rule 208 is modified to conform to Rule 200 and permit the deposition on written questions of a defendant prior to appearance date with permission of the court. Rule 208 is also amended to provide for persons who may attend deposition without notification, and to provide for reasonable notice of any party's intent to have any other persons attend].

[Task Force Comments: Requirements of notice (Rule 201(1)) deleted, with reference to Rule 46(2) substituted therefor. Rule 201(2), "Notice by Publication," deleted].

Rule 52. Use of Depositions in Court Proceedings

(a) Use of Deposition Transcripts in Same Proceeding.

(1) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition taken in the same proceeding, insofar as admissible under the Texas Rules of Civil Evidence, may be used by any person for any purpose against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof. Further, the Texas Rules of Civil Evidence shall be applied to each question and answer as though the witness were then present and testifying. Depositions shall include the original transcripts or any certified copies thereof. Unavailability of the deponent is not a requirement for admissibility.

(2) **Included Within Meaning of "Same Proceeding."** Substitution of parties pursuant to these rules does not affect the right to use depositions previously taken; and, when a suit has been brought in a court of the United States or of this or any other state and another suit involving the same subject matter is brought between the same parties or their representatives or successors in interest, all depositions lawfully taken in each suit may be used in the other suit(s) as if originally taken therefor.

(3) **Parties Joined After Deposition Taken.** If one becomes a party after the deposition is taken and has an interest similar to that of any party described in a. or b. above, the deposition is admissible against him only if he has had a reasonable opportunity, after becoming a party, to redepose the deponent, and has failed to exercise that opportunity.

(b) **Use of Deposition Transcripts Taken in Different Proceeding.** At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition taken in a different proceeding may be used subject to the provisions and requirements of the Texas Rules of Civil Evidence. Further, the Texas Rules of Civil Evidence shall be applied to each question and answer as though the witness were then present and testifying.

(c) **Motions to Suppress.** When a deposition transcript has been delivered by the deposition officer pursuant to Rule ____ (currently Rule 206) and notice of delivery given at least one entire day before the day on which the case is called for trial, errors and irregularities in the notice of delivery, and errors in the manner in which the testimony is transcribed or the deposition transcript is prepared, signed, certified, sealed, endorsed, delivered, or otherwise dealt with by the deposition officer under Rules _____ and _____ (currently Rules 205 and 206) are waived, unless a motion to suppress the deposition transcript or some part thereof is made and notice of the written objections made in the motion is given to every other party before the trial commences.

(d) Retention and Disposition of Deposition Transcripts and Depositions upon Written Questions.

In the event deposition transcripts and depositions upon written questions are filed with the court, the clerk shall retain and dispose of same as directed by the Supreme Court.

SUPREME COURT ORDER RELATING TO RETENTION AND DISPOSITION OF DEPOSITION TRANSCRIPTS AND DEPOSITIONS UPON WRITTEN QUESTIONS

In compliance with the provisions of Rule ____ (currently Rule 209), the Supreme Court hereby directs that deposition transcripts and depositions upon written questions be retained and disposed of by the clerk of the court in which the same are filed upon the following basis.

This order shall apply only to: (1) those cases in which judgment has been rendered on service of process by publication and in which no motion for new trial was filed within two years after judgment was signed; and, (2) all other cases in which judgment has been signed for one year and in which no appeal was perfected or in which a perfected appeal was dismissed or concluded by a final judgment as to all parties and the issuance of the appellate court's mandate such that the case is no longer pending on appeal or in the trial court.

After first giving all the attorneys of record written notice that they have an opportunity to claim and withdraw the same, the clerk, unless otherwise directed by the court, may dispose of them thirty days after giving such notice. If any such document is desired by more than one attorney, the clerk shall make the necessary copies and prorate the cost among all the attorneys desiring the document.

[Current Rule: Tex. R. Civ. P. 207 and 209].
[Original Source: See Tex. Civ. P. Rem. C. §20.001].
[Official Comments]:

Rule 207, New rule effective April 1, 1984. Former Rule 207 is incorporated into Rule 204. This rule replaces former Rules 211, 212, and 213.

Rule 53. Compelling Appearance at Depositions

(a) Subpoena. Any person may be compelled to appear and give testimony by deposition in a civil action. Upon proof of service of a notice to take a deposition, written or oral, the clerk or any officer authorized to take depositions and any certified shorthand reporter shall immediately issue and cause to be served upon the witness a subpoena directing him to appear before the officer at the time and place stated in the notice for the purpose of giving his deposition.

(b) Party. When the deponent is a party, service of the notice upon the party or his attorney shall have the same effect as a subpoena served on the party. If the deponent is an agent or employee who is subject to the control of a party, notice to take the deposition which is served upon the party or the party's attorney of record shall have the same effect as a subpoena served on the deponent.

(c) Organizations. When the deponent named in the subpoena or notice is a public or private corporation, a partnership, association or governmental entity, the subpoena or notice shall direct the deponent named to designate the person or persons to testify in the deponent's behalf, and, if the deponent so desires, the matters on which each person designated will testify, and shall further direct that the person or persons designated by the deponent will testify and the notice shall further direct that the person or person designated by the deponent appear before the officer at the time and place stated in the subpoena or notice for the purpose of giving their testimony.

(d) Production. Any deponent may be compelled by subpoena duces tecum or notice to produce items or things within his care, custody or control. The subpoena duces tecum or notice shall be in compliance with Rule ____ (currently Rule _____) [production of documents and things].

(e) Time and Place. The time and place designated shall be reasonable. The place of taking a deposition shall be in the county of the witness' residence, or where he is employed or regularly transacts business in person or at such other convenient place as may be directed by the court in which the cause is pending; provided, however, the deposition of a party or the person or person designated by a party under paragraph 3 above may be taken in the county of suit. A nonresident or transient person may be required to attend in the county where he is served with a subpoena, or within one hundred miles from the place of service, or at such other convenient place as the court may direct. The witness shall remain in attendance from day to day until such deposition is begun and completed.

[Current Rule: Tex.R.Civ.P. 201].
[Original Source: Arts. 3754, 3755, and 3756].
[Official Comments]:

Change by amendment effective February 1, 1973. Sentence concerning subpoena where witness is a corporation, partnership, association, or governmental agency and not a party to the suit has been added.

Change by amendment effective January 1, 1981. The rule is completely rewritten.

Change by amendment effective April 1, 1984. Statutory references concerning persons authorized to take depositions have been deleted from subdivision 1. A change has been made to limit the coverage of current Rule 201(5) so that the county of suit principle applies only to persons designated by organizations, etc., who are parties.

Rule 54. Depositions in Foreign Jurisdictions

(a) Whenever the deposition, written or oral, of any person is to be taken in a sister state or a foreign country, or in any other jurisdiction, foreign or domestic, for use in this state, such deposition may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the State of Texas, or (2) before a person commissioned by the court in which the action is pending, and such person shall have the power, by virtue of such person's commission, to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory or a letter of request, or (4) pursuant to the means and terms of any applicable treaty or convention.

A commission, a letter rogatory, or a letter of request shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission, a letter rogatory or a letter of request that the taking of the deposition in any other manner is impracticable or inconvenient; and a commission, a letter rogatory or a letter of request may all be issued in proper cases.

(b) Upon the granting of a commission to take the oral deposition of a person under paragraph (a) above, the clerk of the court in which the action is pending shall immediately issue a commission to take the deposition of the person named in the application at the time and place set out in the application for the commission. The commission issued by the clerk shall be styled: "The State of Texas." The commission shall be dated and attested as other process; and the commission shall be addressed to the several officers authorized to take depositions as set forth in Section 20.001, Civil Practice and Remedies Code. The commission shall authorize and require the officer or officers to whom the commission is addressed immediately to issue and cause to be served upon the person to be deposed a subpoena directing that person to appear before said officer or officers at the time and place named in the commission for the purpose of giving that person's deposition.

Upon the granting of a commission to take the deposition of a person on written questions under paragraph 1 above, the clerk of the court in which the action is pending shall, after the service of the notice of filing the interrogatories has been completed, issue a commission to take the deposition of the person named in the notice. Such commission shall be styled, addressed, dated and attested as provided for in the case of an oral deposition and shall authorize and require the officer or officers to whom the same is addressed to summon the person to be deposed before the officer or officers forthwith and to take that person's answers under oath to the direct and cross interrogatories, if any, a copy of which shall be attached to

such commission, and to return without delay the commission, the interrogatories and the answers of the person thereto to the clerk of the proper court, giving his official title and post office address.

(c) Upon the granting of a letter rogatory under paragraph 1 above, the clerk of the court in which the action is pending shall issue a letter rogatory to take the deposition of the person named in the application at the time and place set out in the application for the letter rogatory. The letter rogatory issued by the clerk shall be styled, dated and attested as provided for in the case of a commission. The letter rogatory shall be addressed: "To the Appropriate Authority in [here name the state, territory or country]." The letter rogatory shall authorize and request the appropriate authority to summon the person to be deposed before the authority forthwith and to take that person's answers under oath to the oral or written questions which are addressed to that person; the letter rogatory shall also authorize and request that the appropriate authority cause the deposition of the person to be reduced to writing, annexing to the writing any items marked as exhibits and to cause the written deposition, with all exhibits, to be returned to the clerk of the proper court under cover duly sealed and addressed.

(d) Upon the granting of a letter of request, or any other device pursuant to the means and terms of any other applicable treaty or convention, to take the deposition, written or oral, of any person under paragraph 1 above, the clerk of the court in which the action is pending shall issue a letter of request or other device to take the deposition of the person named in the application at the time and place set out in the application for the letter of request or other device. The letter of request or other device shall be styled in the form prescribed by the treaty or convention under which the deposition is to be taken, such form to be presented to the clerk by the party seeking the deposition. Any error in the form of the letter of request or other device shall be waived unless objection thereto is filed and served on or before the time fixed in the order granting the letter of request or other device.

(e) Evidence obtained in response to a letter rogatory or a letter of request need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements of depositions taken within the State of Texas under these rules.

[Current Rule: Tex. R. Civ. P. 188].
[Original Source: New Rule, effective April 1, 1984].

Rule 55. Abuse of Discovery; Sanctions

(a) Motion for Sanctions or Order Compelling Discovery. A party, upon reasonable notice to other parties and all other persons affected thereby, may apply for sanctions or an order compelling discovery as follows:

(1) **Appropriate Court.** On matters relating to a deposition, an application for an order to a party may be made to the court in which the action is pending, or to any district court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken. As to all other discovery matters, an application for an order will be made to the court in which the action is pending.

(2) **Motion.**

(A) If a party or other deponent which is a corporation or other entity fails to make a designation under Rules _____, _____, or ____ (currently Rules 200-2b, 201-4 or 208); or

(B) if a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails:

(i) to appear before the officer who is to take his deposition, after being served with a proper notice; or

(ii) to answer a question propounded or submitted upon oral examination or upon written questions; or

(C) if a party fails:

(i) to serve answers or objections to interrogatories submitted under Rule ____ (currently Rule 168), after proper service of the interrogatories; or

(ii) to answer an interrogatory submitted under Rule 168; or

(iii) to serve a written response to a request for inspection submitted under Rule ____ (currently Rule 167), after proper service of the request; or

(iv) to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection submitted under Rule ____ (currently Rule 167); the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or

inspection or production in accordance with the request, or apply to the court in which the action is pending for the imposition of any sanction authorized by Paragraph (b)(2)(currently subparagraph (2)(b) herein without the necessity of first having obtained a court order compelling such discovery.

When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion pursuant to Rule ____ (currently Rule 166b).

(3) Evasive or Incomplete Answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) Disposition of Motion to Compel: Award of Expenses. If the motion is granted, the court shall, after opportunity for hearing, require a party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay, at such time as ordered by the court, the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or attorney advising such motion to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

In determining the amount of reasonable expenses, including attorney fees, to be awarded in connection with a motion, the trial court shall award expenses which are reasonable in relation to the amount of work reasonably expended in obtaining an order compelling compliance or in opposing a motion which is denied.

(5) Providing Person's Own Statement. If a party fails to comply with any person's written request for the person's own statement as provided in Paragraph ____ of Rule _____ (currently Rule 166b), the person who made the request may move for an order compelling compliance with Paragraph ___ of Rule ____ (currently Rule 166b). If the motion is granted, the movant may recover the expenses incurred in obtaining the order, including attorney fees, which are reasonable in relation to the amount of work reasonably expended in obtaining the order.

(b) Failure to Comply with Order or with Discovery Request.

(1) Sanctions by Court in District Where Deposition is Taken. If a deponent fails to appear or to be sworn or to answer a question after being directed to do so by a district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rules ____, ____, or ____ (currently Rules 200-2b, 201-4 or 208) to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under paragraph 1 of this rule or Rule ____ (currently Rule 167a), the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:

(A) An order disallowing any further discovery of any kind or of a particular kind by the disobedient party;

(B) An order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;

(C) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(D) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(E) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(F) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(G) When a party has failed to comply with an order under Rule ____ (currently Rule 167a(a)) requiring him to appear or produce another for examination, such orders as are listed in Paragraphs ___, ____, ____, ____ or ____ (currently Paragraphs (1), (2), (3), (4) or (5)) of this subdivision, unless

the person failing to comply shows that he is unable to appear or to produce such person for examination.

(H) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

(3) Sanction Against Nonparty for Violation of Rule ____ (currently Rule 167). If a nonparty fails to comply with an order under Rule ____ (currently Rule 167), the court which made the order may treat the failure to obey as contempt of court.

(c) Abuse of Discovery Process in Seeking, Making, or Resisting Discovery. If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may, after notice and hearing, impose any appropriate sanction authorized by Paragraphs (1), (2), (3), (4), (5), and (8) of paragraph (b)(2) of this rule. Such order of sanction shall be subject to review on appeal from the final judgment.

(d) Failure to Comply with Rule ____ (currently Rule 169).

(1) Deemed Admission. Each matter of which an admission is requested shall be deemed admitted unless, within the time provided by Rule ____ (currently Rule 169), the party to whom the request is directed serves upon the party requesting the admissions a sufficient written answer or objection in compliance with the requirements of Rule ____ (currently Rule 169), addressed to each matter of which an admission is requested. For purposes of this subdivision an evasive or incomplete answer may be treated as a failure to answer.

(2) Motion. The party who has requested the admission may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of Rule ____ (currently Rule 169), it may order either that the matter is admitted or that an amended answer be served. The provisions of paragraph d of subdivision 1 of this rule apply to the award of expenses incurred in relation to the motion.

(3) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule ____ (currently Rule 169) and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule ____ (currently Rule 169(1), or (2)) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(e) Failure to Respond to or Supplement Discovery. A party who fails to respond to or supplement his response to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in a response or supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter, unless the trial court finds that good cause sufficient to require admission exists. The burden of establishing good cause is upon the party offering the evidence and good cause must be shown in the record.

(f) Exhibits to Motions and Responses. Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents.

[Current Rule: Tex. R. Civ. P. 215].
[Original Source: Art. 3768, unchanged].
[Task Force Comment: But see Report of Texas Supreme Court Task Force on Sanctions].
[Official Comments]:

New rule effective April 1, 1984. Rule 170 is deleted because this rule covers conduct in violation of Rule 167. The revisions to Rule 168, the deletion of Rule 170, and the provisions of new Rule 215 are intended to clarify under what circumstances the most severe sanctions authorized under the rules are imposable. New Rule 215 retains the conclusion reached in LEWIS V. ILLINOIS EMPLOYERS INS. CO. OF WAUSAU, 590 S.W.2d 119 (Tex. 1979), and extends such rule to cover all discovery requests, except requests for admissions. New Rule 215 leaves to the discretion of the court whether to impose sanctions with or without an order compelling discovery, so that the court will be free to apply the proper sanction or order based upon the degree of the discovery abuse involved.

This rule is rewritten to gather all discovery sanctions into a single rule. It includes specific provisions concerning the consequences of failing to comply with Rule 169, and spells out penalties imposable upon a party who fails to supplement discovery responses. It provides for sanctions for those who seek to make discovery in an abusive manner.

Change by amendment effective January 1, 1988. This amendment states that the party offering the evidence has the burden of establishing good cause for any failure to supplement discovery before trial and provides a manner for making a record for discovery hearings.

Change by amendment effective September 1, 1990. To require notice and hearing before an imposition of sanctions under subdivision 3, and to specify that such sanctions be appropriate.

B. PRETRIAL PROCEDURE

Rule 60. Scheduling and Pretrial Conferences

(a) As soon as practicable but in no event more than one hundred and twenty (120) days after the filing of a petition, the court, after a hearing with the attorneys for the parties and any unrepresented parties at an attended conference or by telephone conference, shall enter a scheduling order that establishes the times for

(1) Joinder of additional parties;

(2) Amending or supplementing pleadings;

(3) Filing and hearing motions and special exceptions;

(4) Designating testifying experts;

(5) Taking of experts' depositions;

(6) Completion of discovery;

(7) Discovery problems conference;

(8) Initial and final pretrial hearings;

(9) Trial on the merits; and

(10) Such other matters which the Court determines should be scheduled.

(b) The initial pretrial conference is to assist in the preparation and disposition of the case without undue expense or burden to the parties and for the purpose of establishing early and continuing control so that the case will not be protracted for lack of management, expediting the disposition of the action, discouraging wasteful pretrial activities, improving the quality of the trial through more thorough preparation and facilitating the settlement of the case.

(c) **Matters to Be Considered at the Conference.** The participants at any conference under this rule shall consider and may take action with respect to

(1) All pending dilatory pleas, motions and exceptions;

(2) The necessity of desirability of amendments to the pleadings;

(3) A discovery schedule and consideration of discovery problems;

(4) Requiring written statements of the parties' contentions;

(5) Identification of fact and simplification of the issues;

(6) The possibility of obtaining stipulations of fact;

(7) The identification of legal matters to be ruled on or decided by the court;

(8) 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 addressees and telephone number, and the subject of the testimony of each such witness;

(9) 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 proffered by each expert witnesses;

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

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

(12) 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;

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

(14) 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;

(15) The settlement of the case, and to aid such consideration, the court may encourage settlement.

(16) Such other matters as may aid in the disposition of the action.

(d) At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so on motion by the attorney for any party and following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

(e) Final Pretrial Conference. Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(f) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent courts of the action unless modified by the court.

(g) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule _____ (currently Rule 215(2)(B), (C), (D)). In lieu of or in addition to any other sanction, the judge shall require the party

or the attorney representing any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expense unjust.

[Current Rule: Tex. R. Civ. P. 166].
[Original Source: New Rule effective Mar. 1, 1950].
Official Comments]:

Change by amendment effective March 1, 1952. The last sentence is added to subdivision (a).

Change by amendment effective January 1, 1967. Fourth sentence of subdivision (c) was added.

Change by amendment effective January 1, 1971. The first sentence of subdivision (c) has been added, and the words "answers to interrogatories" have been inserted in the fifth sentence of subdivision (c).

Change by amendment effective January 1, 1978. The time requirements in subdivision (c) are changed. The third, fourth, and fifth sentences of subdivision (c) are new. The last sentence of subdivision (c) is new.

Change by amendment effective January 1, 1981. The second sentence adds the words "with notice to opposing counsel," and "and any supporting affidavits," and "filed and." Third sentence adds the words, "file and."

Change by amendment effective April 1, 1984. Subdivision (c) is changed to include stipulations and authenticated and certified public records as matters in support of a summary judgment.

Change by amendment effective September 1, 1990. This amendment provides a mechanism for using previously non-filed discovery in summary judgment practice. Such proofs must all be filed in advance of the bearing in accordance with Rule 166a. Subdivisions (d) through (g) are renumbered as subdivisions (e) through (h).

[Proposed Official Comment: This proposed rule is an amalgamation of Tex. R. Civ. P. 166 as amended in 1988 and Fed. R. Civ. P. 16 as amended in 1982. It also includes a portion of Federal Rule 26. The most significant change is the requirement for a mandatory scheduling order to be made "as soon as practicable but in no event more than 120 days after filing the petition" and mandatory pretrial. Other changes include the addition of language embracing the Texas

Supreme Court's decision in Koslow's v. Mackie, 796 S.W.2d 700, 705 (Tex. 1990)].

[Task Force Comment: This draft rule is being considered by the Committee on Court Rules].

(h) Issue of Law and Dilatory Pleas. When a case is called for trial in which there has been no pretrial hearing as provided by Rule ____ (currently Rule 166), the issue of law arising on the pleadings, all pleas in abatement and other dilatory pleas remaining undisposed of shall be determined; and it shall be no cause for postponement of a trial of the issues of law that a party is not prepared to try the issues of fact.

[Current Rule: Tex. R. Civ. P. 175].
[Original Source: Art. 2166, with minor textural changes].

Rule 61. Dismissal for Want of Prosection

(a) Failure to Appear. A case may be dismissed for want of prosecution on failure of any party seeking affirmative relief to appear for any hearing or trial of which the party had notice. Notice of the court's intention to dismiss and the date and place of the dismissal hearing shall be sent by the clerk to each attorney of record, and to each party not represented by an attorney and whose address is shown on the docket or in the papers on file, by posting same in the United States Postal Service. The clerk shall note affirmatively on the docket sheet the fact of mailing the notice of dismissal. At the dismissal hearing, the court shall dismiss for want of prosecution unless there is good cause for the case to be maintained on the docket. If the court maintains the case on the docket, it shall render a pretrial order assigning a trial date and setting deadlines for joinder, discovery, pleading, and all other pretrial matters. The case may be continued thereafter only for valid and compelling reasons specifically determined by court order. Notice of the signing of the order of dismissal shall be given as provided in Rule ____ (currently Rule 306a). Failure to mail notices as required by this rule shall not affect any of the periods mentioned in Rule ____ (currently Rule 306a) except as provided in that rule.

(b) Non-Compliance with Time Standards. Any case not disposed of within time standards promulgated by the Supreme Court under its Administrative Rules may be placed on a dismissal docket.

(c) Reinstatement. A reinstatement motion shall set forth the grounds and be verified by the movant or his attorney. It shall be filed with the clerk within 30 days after the signing of the dismissal order or within the period provided by Rule ____ (currently Rule 306a). A copy of the motion shall be served on

each attorney of record and each party not represented by an attorney whose address is shown on the docket or in the papers on file. The clerk shall deliver a copy of the motion to the judge, who shall set a hearing on the motion as soon as is practicable. The court shall notify all parties or their attorneys of record of the date, time, and place of the hearing.

After the hearing and upon finding that the prior failure to appear was not intentional or the result of conscious indifference but was due to accident or mistake or that the failure has been otherwise reasonably explained, the court shall reinstate the case.

If for any reason the reinstatement motion is not decided by a signed written order within seventy-five days after the judgment is signed, or within such other time as may be allowed by Rule ____ (currently Rule 306a), the motion shall be deemed overruled by operation of law. If a timely reinstatement motion is filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to reinstate the case until 30 days after all such timely filed motions are overruled, either by written and signed order or by operation of law, whichever occurs first.

(d) **Cumulative Remedies.** This dismissal and reinstatement procedure shall be cumulative of the rules and laws governing any other procedures available to the parties in such cases. The same reinstatement procedures and timetable are applicable to all dismissals for want of prosecution including cases which are dismissed pursuant to the court's inherent power, whether or not a motion to dismiss has been filed.

[Current Rule: Tex. R. Civ. P. 165a].
[Original Source: New Rule effective February 1, 1973].
[Official Comments]:

Change by amendment effective January 1, 1976. The words ''or docket call'' are deleted after the word ''trial'' in the first sentence.

Change by amendment effective January 1, 1984. The rule is rewritten to provide a statewide rule for dismissal and reinstatement of cases.

Rule 62. Masters and Auditors

(a) **Masters in Chancery.** The court may, in exceptional cases, for good cause appoint a master in chancery, who shall be a citizen of this State, and not an attorney for either party to the action, nor related to either party, who shall perform all of the duties required of him by the court, and shall be under orders of the court, and have such power as the master of chancery has in a court of equity.

The order of reference to the master may specify or limit his powers, and may direct him to report only upon particular issues, or to do or perform particular acts, or to receive and report evidence only and may fix the time and place for beginning and closing the hearings, and for the filing of the master's report. Subject to the limitations and specifications stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient production before him of evidence upon all matters embraced in the reference, including the production of books, papers, vouchers, documents and other writings applicable thereto. He may rule upon the admissibility of evidence, unless otherwise directed by the order of reference and has the authority to put witnesses on oath, and may, himself, examine them, and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner as provided for a court sitting in the trial of a case.

The clerk of the court shall forthwith furnish the master with a copy of the order of reference.

The parties may procure the attendance of witnesses before the master by the issuance and service of process as provided by law and these rules.

The court may confirm, modify, correct, reject, reverse or recommit the report, after it is filed, as the court may deem proper and necessary in the particular circumstances of the case. The court shall award reasonable compensation to such master to be taxed as costs of suit.

[Current Rule: Tex. R. Civ. P. 171].
[Original Source: Art. 2320 and Federal Rule 53 (part)].

(b) Audit. When an investigation of accounts or examination of vouchers appears necessary for the purpose of justice between the parties to any suit, the court shall appoint an auditor or auditors to state the accounts between the parties and to make report thereof to the court as soon as possible. The auditor shall verify his report by his affidavit stating that he has carefully examined the state of the account between the parties, and that his report contains a true statement thereof, so far as the same has come within his knowledge. Exceptions to such report or of any item thereof must be filed within 30 days of the filing of such report. The court shall award reasonable compensation to such auditor to be taxed as costs of suit.

[Current Rule: Tex. R. Civ. P. 172].
[Original Source: Art. 2292, unchanged].

Rule 63. Special Appearance

(a) In General. A special appearance may be made by any party either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant on the ground that such party or property is not amenable to process issued by the courts of this State. A special appearance may be made as to an entire proceeding or as to any severable claim involved therein. Such special appearance shall be made by sworn motion filed prior to motion to transfer venue or any other plea, pleading or motion; provided however, that a motion to transfer venue and any other plea, pleading, or motion may be contained in the same instrument or filed subsequent thereto without waiver of such special appearance; and may be amended to cure defects. The issuance of process for witnesses, the taking of depositions, the serving of requests for admissions, and the use of discovery processes, shall not constitute a waiver of such special appearance. Every appearance, prior to judgment, not in compliance with this rule is a general appearance.

(b) Motions to Challenge Jurisdiction Shall be Heard Before Other Motions. Any motion to challenge the jurisdiction provided for herein shall be heard and determined before a motion to transfer venue or any other plea or pleading may be heard. No determination of any issue of fact in connection with the objection to jurisdiction is a determination of the merits of the case or any aspect thereof.

(c) Determination of Special Appearance. 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 or she cannot for reasons stated present by affidavit facts essential to justify his or her 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 such affidavits are presented in violation of Rule ____ (currently Rule 13), the court shall impose sanctions in accordance with that rule.

(d) Objection to Jurisdiction Sustained. 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.

[Current Rule: Tex. R. Civ. P. 120a].
[Original Source: New Rule effective September 1, 1962].
[Official Comments]:

Change by amendment effective January 1, 1976. Words are added in the third sentence which permit amendments to the special appearance motion.

Change by amendment effective September 1, 1983. To conform to S.B. 898, 68th Legislature, 1983.

Change by amendment effective September 1, 1990. 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.

Rule 64. Venue

(a) Change of Venue by Consent. Upon the written consent of the parties filed with the papers of the cause, the court, by an order entered on the minutes, may transfer the same for trial to the court of any other county having jurisdiction of the subject matter of such suit. A written consent of the parties to transfer the case to another county may be filed with the clerk of the court at any time.

(b) Motion to Transfer Venue.

(1) Filing.

(A) Time to File. An objection to improper venue is waived if not made by written motion filed prior to or concurrently with any other plea, pleading or motion except a special appearance motion provided for in Rule ____ (currently Rule 53).

(B) How to File. The motion objecting to improper venue may be contained in a separate instrument filed concurrently with or prior to the filing of the movant's first responsive pleading or the motion may be combined with other objections and defenses and included in the movant's first responsive pleading.

(C) Requisites. The motion, and any amendments to it, shall state that the action should be transferred to another specified county of proper venue because:

(i) The county where the action is pending is not a proper county; or

(ii Mandatory venue of the action in another county is prescribed by one or more specific statutory provisions which shall be clearly designated or indicated.

The motion shall state the legal and factual basis for the transfer of the action and request transfer of the action to a specific county of mandatory or proper venue. Verification of the motion is not required. The motion may be accompanied by supporting affidavits as provided in section (2)(C)(1) of this rule.

(D) Service. A copy of any instrument filed pursuant to this rule shall be served in accordance with Rule ____ (currently Rule 21a).

(E) Response. A response to the motion to transfer is not required, except as provided in section (2)(c)(1) of this rule.

(2) Determination of Motion to Transfer.

(A) Consideration of Motion. The determination of a motion to transfer venue shall be made promptly by the court and such determination must be made in a reasonable time prior to commencement of the trial on the merits. The movant has the duty to request a setting on the motion to transfer. Except on leave of court each party is entitled to at least 45 days notice of a hearing on the motion to transfer.

Except on leave of court, any response or opposing affidavits shall be filed at least 30 days prior to the hearing of the motion to transfer. The movant is not required to file a reply to the response but any reply and any additional affidavits supporting the motion to transfer must, except on leave of court, be filed not later than 7 days prior to the hearing date.

(B) Burden of Establishing Venue.

(i) Maintenance of Action in a Particular County. A party who seeks to maintain venue of the action in a particular county in reliance upon Section 15.001 (General Rule), Sections 15.011-15.017 (Mandatory Venue), Sections 15.031-15.040 (Permissive Venue), or Sections 15.061 and 15.062 (Multiple Claims), Civil Practice and Remedies Code, has the burden to make proof, as provided in section _(2)(C) of this rule, that venue is maintainable in the county of suit.

(ii) Transfer of Action to Another County. A party who seeks to transfer venue of the action to another specified county under Section 15.001 (General Rule), Sections 15.011-15.017 (Mandatory Venue), Sections 15.031-15.040

(Permissive Venue), or Sections 15.061 and 15.062 (Multiple Claims), Civil Practice and Remedies Code, has the burden to make proof, as provided in section (2)(C) of this rule, that venue is maintainable in the county to which transfer is sought.

A party who seeks to transfer venue of the action to another specified county under Sections 15.011-15.017, Civil Practice and Remedies Code on the basis that a mandatory venue provision is applicable and controlling has the burden to make proof, as provided in section (2)(C) of this rule, that venue is maintainable in the county to which transfer is sought by virtue of one or more mandatory venue exceptions.

(iii) Cause of Action. It shall not be necessary for a claimant to prove the merits of a cause of action, but the existence of a cause of action, when pleaded properly, shall be taken as established as alleged by the pleadings. When the defendant specifically denies the venue allegations, the claimant is required, by prima facie proof as provided in section (2)(C) of this rule, to support such pleading that the cause of action taken as established by the pleadings, or a part of such cause of action, accrued in the county of suit. If a defendant seeks transfer to a county where the cause of action or a part thereof accrued, it shall be sufficient for the defendant to plead that if a cause of action exists, then the cause of action or part thereof accrued in the specific county to which transfer is sought, and such allegation shall not constitute an admission that a cause of action in fact exists. But the defendant shall be required to support his pleading by prima facie proof as provided in section (2)(C) of this rule, that, if a cause of action exists, it or a part thereof accrued in the county to which transfer is sought.

(C) Proof.

(i) Affidavits and Attachments. All venue facts, when properly pleaded, shall be taken as true unless specifically denied by the adverse party. When a venue fact is specifically denied, the party pleading the venue fact must make prima facie proof of that venue fact; provided, however, that no party shall ever be required for venue purposes to support by prima facie proof the existence of a cause of action or part thereof, and at the hearing the pleadings of the parties shall be taken as conclusive on the issues of existence of a cause of action. Prima facie proof is made when the venue facts are properly pleaded and an affidavit, and any duly proved attachments to the affidavit, are filed fully and specifically setting forth the facts supporting such pleading. Affidavits 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.

(ii) The Hearing. The court shall determine the motion to transfer venue on the basis of the pleadings, any stipulations made by and between the parties and such affidavits and attachments as may be filed by the parties in accordance with section (b)(2)(C)(1) of this rule or section (c) of this rule.

All venue challenges shall be determined by the court without the aid of a jury.

(iii) Prima Facie Proof Provided. If a claimant has adequately pleaded and made prima facie proof that venue if proper in the county of suit as provided in section (b)(2)(C)(1) of this rule, then the cause of action shall not be transferred but shall be retained in the county of suit, unless the motion to transfer is based on the grounds that an impartial trial cannot be had in the county where the action is pending or on an established ground of mandatory venue. A ground of mandatory venue is established when the party relying upon a mandatory exception to the general rule makes prima facie proof as provided in section (b)(2)(C)(1) of this rule.

(iv) Failure to Provide Prima Facie Proof. In the event that the parties shall fail to make prima facie proof that the county of suit or the specific county to which transfer is sought is a county of proper venue, then the court may direct the parties to make further proof.

(D) Transferred if Motion Sustained. If a motion to transfer venue is sustained, the cause shall not be dismissed, but the court shall transfer said cause to the proper court; and the costs incurred prior to the time such suit is filed in the court to which said cause is transferred shall be taxed against the plaintiff. The clerk shall make up a transcript of all the orders made in said cause, certifying thereto officially under the seal of the court, and send it with the original papers in the cause to the clerk of the court to which the venue has been changed.

Provided, however, if the cause be severable as to defendant parties, and shall be ordered transferred as to one or more defendants but not as to all, the clerk, instead of sending the original papers, shall make certified copies of such filed papers as directed by the court and forward the same to the clerk of the court to which the venue has been changed. After the cause has been transferred, the clerk of the court to which the cause has been transferred shall mail notification to the plaintiff or his attorney that transfer of the cause has been completed, that the filing fee in the proper court is due and payable within thirty days from the mailing of such notification, and that the case may be dismissed if the filing fee is not timely paid; and if such filing fee is timely paid, the cause will be subject to trial at the expiration of thirty days after the mailing of notification to the parties or their attorneys by the clerk that the papers have been filed in the court to which the cause has been

transferred; and if the filing fee is not timely paid, any court of the transferee county to which the case might have been assigned, upon its own motion or the motion of a party, may dismiss the cause without prejudice to the refiling of same.

(E) Motion for Rehearing. If venue has been sustained as against a motion to transfer, or if an action has been transferred to a proper county in response to a motion to transfer, then no further motions to transfer shall be considered regardless of whether the movant was a party to the prior proceedings or was added as a party subsequent to the venue proceedings, unless the motion to transfer is based on the grounds that an impartial trial cannot be had or on the ground of mandatory venue, provided that such claim was not available to the other movant or movants.

(F) Appeals. There shall be no interlocutory appeals from such determination.

(3) Change of Venue Granted on Motion.

(A) Requisites. A change of venue may be granted in civil causes upon motion of either party, supported by his own affidavit and the affidavit of at least three credible persons, residents of the county in which the suit is pending, for any following cause:

(i) That there exists in the county where the suit is pending so great a prejudice against him that he cannot obtain a fair and impartial trial.

(ii) That there is a combination against him instigated by influential persons, by reason of which he cannot expect a fair and impartial trial.

(iii) That an impartial trial cannot be had in the county where the action is pending.

(iv) For other sufficient cause to be determined by the court.

(B) Shall be Granted. Where such motion to transfer venue is duly made, it shall be granted, unless the credibility of those making such application, or their means of knowledge or the truth of the facts set out in said application are attacked by the affidavit of a credible person; when thus attacked, the issue thus formed shall be tried by the judge; and the application either granted or refused. Reasonable discovery in support of, or in opposition to, the application shall be permitted, and such discovery as is relevant, including deposition testimony on file, may be attached to, or incorporated

by reference in, the affidavit of a party, a witness, or an attorney who has knowledge of such discovery.

(C) Transferred To What County. If the motion to transfer is granted, the cause shall be removed:

(i) If from a district court, to any county of proper venue in the same or an adjoining district;

(ii) If from a county court, to any adjoining county of proper venue;

(iii) If (i) or (ii) are not applicable, to any county of proper venue;

(iv) If a county of proper venue (other than the county of suit) cannot be found, then if from

(1) A district court, to any county in the same or an adjoining district or to any district where an impartial trial can be had;

(2) A county court, to any adjoining county or to any district where an impartial trial can be had; but the parties may agree that venue shall be changed to some other county, and the order of the court shall conform to such agreement.

(D) Transcript on Change. When a change of venue has been granted, the clerk shall immediately make out a correct transcript of all the orders made in said cause, certifying thereto officially under the seal of the court, and send the same, with the original papers in the cause, to the clerk of the court to which the venue has been changed.

(c) Discovery and Venue. Discovery shall not be abated or otherwise affected by pendency of a motion to transfer venue. Issuing process for witnesses and taking depositions shall not constitute a waiver of a motion to transfer venue, but depositions taken in such case may be read into evidence in any subsequent suit between the same parties concerning the same subject matter in like manner as if taken in such subsequent suit. Deposition transcripts, responses to requests for admission, answers to interrogatories and other discovery products containing information relevant to a determination of proper venue may be considered by the court in making the venue determination when they are attached to, or incorporated by reference in, an affidavit of a party, a witness, or an attorney who has knowledge of such discovery.

[Current Rule: Tex. R. Civ. P. 86-89, 255, 257-259, 261].

[Original Source: Arts. 2007 (as amended), 2164, 2170, 2171, 2172, 2174, and modified to conform to S.B. 898, 68th Legislature, 1983].
[Official Comments]:

Rule 86, Change: The plea of privilege is required to state the post office address of the defendant or his attorney. The time allowed for filing a controverting affidavit has been increased to ten days.

Rule 86, Change by amendment of March 31, 1941. The word ''or'' changed to read ''of'' between ''service'' and ''process.''

Rule 86, Change by amendment effective December 31, 1943. Controverting affidavit required to be filed within ten days after appearance day if plea of privilege is filed in vacation, otherwise within ten days after appearance day or after the filing of the plea of privilege, whichever is the later date.

Rule 86, Change by amendment effective January 1, 1955. Copy of plea of privilege required to be served on the adverse party or his attorney by delivery to him in person or by registered mail, and requiring filing of controverting affidavit within ten days after receipt thereof.

Rule 86, Change by amendment effective September 1, 1962. Requisites of plea of privilege to be sued in county other than the county of one's residence prescribed, and note regarding 1943 amendment rewritten.

Rule 86, Change by amendment effective September 1, 1983. To conform to S.B. 898, 68th Legislature, 1983.

Rule 87, Change by amendment effective September 1, 1983. This rule is completely rewritten to conform to S.B. 898, 68th Legislature, 1983.

Rule 87, Change by amendment effective September 1, 1990. To clarify that no proof of any kind is required of any party to establish any element of a cause of action or part thereof; proof is restricted to place, if any, and the pleadings establish all other elements and may not be controverted for venue purposes as to the existence of a cause of action or part thereof.

Rule 88, Change by amendment effective September 1, 1983. To conform to S.B. 898, 68th Legislature, 1983.

Rule 89, Change by amendment effective September 1, 1983.

To conform to S.B. 898, 68th Legislature, 1983.

Rule 257, Change by amendment effective September 1, 1983. To conform to S.B. 898, 68th Legislature, 1983.

Rule 258, Change by amendment effective September 1, 1983. To conform to S.B. 898, 68th Legislature, 1983.

Rule 259, Change: The venue is not required to be changed to the adjoining county with the courthouse nearest to the courthouse in the county where the suit is pending.

Rule 259, Change by amendment effective September 1, 1983. To conform to S.B. 898, 68th Legislature, 1983.

Rule 65. Plea in Abatement

(a) **In General.** A plea in abatement is used to allege facts arising outside of the petition that set forth reasons, other than venue or jurisdiction, why the case should be suspended or dismissed.

(b) **Elements.** A plea in abatement must:

(1) State the grounds demonstrating both why the suit was improperly brought and how the suit should have been brought; and

(2) State facts rather than conclusions of law.

(3) Be specific enough to give fair notice of the defendant's claim; and

(4) Be verified.

(c) **Procedure.** A plea in abatement may be contained in a separate instrument or included in the answer. The plea may be filed before answering or may be included in the answer.

(d) **Waiver of Objection.** The plea must be brought to the court's attention so that it may be heard prior to commencement of the trial. An objection that should be raised by a plea in abatement will be waived if the plea is not made or if there is an undue delay in making it, at least when the party who failed to assert the plea actively engaged in pursuing the case on the merits before asserting the dilatory plea. However, if the court is made aware of circumstances justifying abatement, it may order abatement on its own motion.

(e) **Determination of Plea in Abatement.**

(1) Hearing. Either party may request a jury to hear and decide disputed issues of fact.

(2) Burden. When determining the plea, the trial court must accept the facts alleged in the plaintiff's petition as true unless they are disproved.

The moving party has the burden to prove the relevant facts by a preponderance of the evidence. The moving party must be prepared to introduce evidence at the hearing to support his or her contentions.

If the moving party fails to submit evidence in support of the plea, or fails to prove the relevant facts by a preponderance of the evidence, the court should not sustain the plea.

(f) Effect of Sustained Plea.

(1) Abatement. If a plea in abatement is sustained, the court will abate the cause of action until the obstacle to its prosecution is removed. When a case is abated, the parties are prohibited from taking any further action until the matter is revived. If a suit is only partially abated, some procedures, such as discovery, may continue.

(2) Dismissal. The court will not dismiss a suit that has been abated until the plaintiff has been given a reasonable opportunity to remove the obstacle that prevented the proper prosecution of the action. Even if the case is dismissed, the claimant may revive the action or may bring another action on the same cause.

[Task Force Comments: This is an entirely new rule].

Rule 66. Continuance

(a) In General. A continuance is a postponement or delay of the trial of a case that has been set for trial. A continuance shall be granted only for sufficient cause supported by affidavit, or by consent of the parties, or by operation of law. An application for a continuance shall not be heard before the defendant files his defense.

(b) Continuance on Motion of Party.

(1) Discretionary or Mandatory. Ordinarily, the ruling on a motion for continuance is within the sound discretion of the trial court. However, a continuance may be mandatory if sought because a party, or an attorney is a member of the Legislature and must be in attendance during a legislative session.

(2) Requisites. A party must show both that the reason a continuance is necessary is not due to fault or lack of diligence on his or her part or that of his or her counsel, and

that failure to grant a continuance will result in substantial harm or prejudice to him or her in the presentation of his or her case or defense.

(3) Grounds for Continuance.

(A) Want of Testimony. A motion for continuance based on want of testimony must include an affidavit that such testimony is material, stating the materiality thereof. The affidavit must also state the diligence used to procure the testimony; the cause of failure, if known; the reason the testimony cannot be procured from any other source; and, if it be for the absence of a witness, the name and residence of the witness, and what is expected to be proven by him or her.

(B) Absence of Counsel. Except as provided elsewhere in these rules, absence of counsel will not be good cause for a continuance or postponement of the cause when called for trial, except it may be allowed in the discretion of the court, upon cause shown or upon matters within the knowledge or information of the judge to be stated on the record.

(C) Attendance on Legislature. A motion for continuance on the basis of absence of a party or attorney who is a member of the Legislature is mandatory if sought during, or within 30 days before, a legislative session, provided no harm is done to the rights of the opposing party. However, the continuance is within the court's discretion when the attorney for whom continuance is sought was employed in the case within 10 days of the trial date. The affidavit accompanying the motion for continuance must show that either the party or the party's attorney is a member of the Legislature and that he or she will be or is in actual attendance on a session or constitutional convention. The affidavit should also include a declaration by the attorney, a member for whom continuance is sought, that the attorney intends to participate actively in the preparation or presentation of the case. Where a party to any cause, or an attorney for any party to a cause, is a member of the legislature, his affidavit need not be corroborated.

If the motion for continuance is granted, the cause will be continued until 30 days after adjournment of the legislative session, and the continuance not charged against the moving party.

[Current Rule: Tex. R. Civ. P. 251-254].
[Original Source: Arts. 2167 and 2168 (unchanged), Texas Rule 49 (for District and County Courts), and Art. 2168a, with minor textural changes].
[Official Comments]:

Rule 252, Change by amendment effective April 1, 1984. The second paragraph is added to the former rule.

Rule 253, Change: Addition of the wording to the first comma.

Rule 254, Change by amendment effective January 1, 1981. The rule was amended to conform with Article 2168a.

Rule 67. Consolidation; Separate Trials; Severance

(a) **Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) **Separate Trials.** The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counter-claim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third-party claims, or issues.

(c) **Severance.**

(1) **In General.** Severance may be ordered at the discretion of the trial court in order to avoid prejudice to a party on such terms as are just, such as prevention of confusion, prevention of delay, improper venue, or misjoinder of parties.

(2) **Motion to Transfer Venue.** When one or more defendant files a motion to transfer venue in an action and the motion is sustained, if the cause of action against the several defendants is joint and several the court should sever and retain jurisdiction over the action insofar as it concerns the defendants whose motions have not been sustained, and should transfer the suit insofar as it concerns the defendant whose motion is sustained. However, if the cause of action is a joint action growing out of joint liability, there can be no severance and the suit must be transferred as an entirety to the county of the residence of the defendant whose motion is sustained.

(3) **Misjoinder of Parties.** Actions which have been improperly joined may be severed and each ground of recovery improperly joined may be docketed as a separate suit between the same parties, by order of the court on motion of any party or on its own initiative at any stage of the action, before the time of submission to the jury or to the court if trial is without a jury, on such terms as are just. Any claim against a party may be severed and proceeded with separately.

[Current Rule: Tex. R. Civ. P. 41, 174].
[Original Source: Federal Rule 21, and Federal Rule 42 (unchanged)].
[Official Comments]:

Rule 41, Change: Addition of provision for adding and dropping parties and for consolidation of suits and for severing actions in case of misjoinder of parties or causes.

SECTION 6
Trial

A. SCHEDULING CASES FOR TRIAL; GENERAL RULES

Rule 70. Assignment of Cases for Trial

(a) Assignment for Trial. The court may set contested cases on written request of any party, or on the court's own motion, with reasonable notice of not less than forty-five days to the parties of a first setting for trial, or by agreement of the parties; provided, however, that when a case previously has been set for trial, the Court may reset said contested case to a later date on any reasonable notice to the parties or by agreement of the parties. Noncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time.

A request for trial setting constitutes a representation that the requesting party reasonably and in good faith expects to be ready for trial by the date requested, but no additional representation concerning the completion of pretrial proceedings or of current readiness for trial shall be required in order to obtain a trial setting in a contested case.

[Current Rule: Tex. R. Civ. P. 245].
[Original Source: Federal Rule 40, with minor textural change].
[Official Comments]:

Change by amendment effective January 1, 1976. The rule is rewritten to require notice of settings in county and district courts.

Change by amendment effective April 1, 1984. The last sentence of former Rule 245 is deleted and is included in Rule _____ (currently Rule 306a).

Change by Amendment effective September 1, 1990. First paragraph, to harmonize a first time nonjury setting with the time for jury demand, and to set a more realistic notice

for trial. Second paragraph, to standardize the readiness requirement to obtain a trial setting.

(b) Notice of Settings. The clerk shall keep a record in his office of all cases set for trial, and it shall be his duty to inform any non-resident attorney of the date of setting of any case upon request by mail from such attorney, accompanied by a return envelope properly addressed and stamped. Failure of the clerk to furnish such information on proper request shall be sufficient ground for continuance or for a new trial when it appears to the court that such failure has prevented the attorney from preparing or presenting his claim or defense.

[Current Rule: Tex. R. Civ. P. 246].
[Original Source: New Rule].

(c) Agreed Method of Trial. The parties may agree to submit the case upon an agreed statement of facts filed of record. With leave of court, the parties may agree to present all evidence by videotape recording. The manner of taking and preserving the testimony and paying for the costs shall be set forth in a written agreement approved by the court. A party may withdraw from the agreement only upon leave of court and on such conditions for payment of costs as the court may impose.

[Current Rule: Tex. R. Civ. P. 263-264].
[Original Source: Art. 2177, unchanged, and New Rule].

Rule 71. Order of Trial

(a) Order of Proceedings. The trial of cases shall proceed in the following order unless the court should, for good cause stated in the record, otherwise direct:

(1) The party upon whom rests the burden of proof on the whole case shall state briefly the nature of his claim or defense and what said party expects to prove and the relief sought. Immediately thereafter, the adverse party may make a similar statement, and intervenors and other parties will be accorded similar rights in the order determined by the court.

(2) The party upon whom rests the burden of proof on the whole case shall then introduce his evidence.

(3) The adverse party shall briefly state the nature of his claim or defense and what said party expects to prove and the relief sought unless he has already done so.

(4) He shall then introduce his evidence.

(5) The intervenor and other parties shall make their statement, unless they have already done so, and shall introduce their evidence.

(6) The parties shall then be confined to rebutting testimony on each side.

(7) But one counsel on each side shall examine and cross-examine the same witness, except on leave granted.

[Current Rule: Tex. R. Civ. P. 265].
[Original Source: Art. 2180].
[Official Comments]:

Change by amendment of March 31, 1941. The above Article is unchanged except that the last subdivision above has been added. Its source is Texas Rule 43 (for District and County courts), unchanged.

Change by amendment effective January 1, 1967. The Rule has been rewritten to permit each party, at his option, either to read his pleading or state the nature of his claim or defense to the jury, but not do both.

Change by amendment effective January 1, 1978. The rule is amended by eliminating the provisions in (a), (c), and (e) concerning the reading of pleadings.

(b) **Open and Close -- Admission.** Except as provided in Rule ___ (currently Rule 269) the plaintiff shall have the right to open and conclude both in adducing his evidence and in the argument, unless the burden of proof on the whole case under the pleadings rests upon the defendant, or unless the defendant or all of the defendants, if there should be more than one, shall, after the issues of fact are settled and before the trial commences, admit that the plaintiff is entitled to recover as set forth in the petition, except so far as he may be defeated, in whole or in part, by the allegations of the answer constituting a good defense, which may be established on the trial; which admission shall be entered of record, whereupon the defendant, or the defendants, if more than one, shall have the right to open and conclude in adducing the evidence and in the argument of the cause. The admission shall not serve to admit any allegation which is inconsistent with such defense, which defense shall be one that defendant has the burden of establishing, as for example, and without excluding other defenses: accord and satisfaction, adverse possession, arbitration and award, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, release, res judicata, statute of frauds, statute of limitations, waiver, and the like.

[Current Rule: Tex. R. Civ. P. 266].

[Original Source: Texas Rule 31 (for District and County Courts].
[Official Comments]:

Change by amendment of March 31, 1941. The above article is unchanged except that the last subdivision above has been added. Its source is Texas Rule 43 (for District and County courts), unchanged.

Change by amendment effective January 1, 1967. The rule has been rewritten to permit each party, at his option, either to read his pleading or state the nature of his claim or defense to the jury, but not do both.

Change by amendment effective January 1, 1978. The rule is amended by eliminating the provisions in subdivisions (a), (c), and (e) concerning the reading of pleadings.

(c) Order of Argument.

(1) After the evidence is concluded and the charge is read, the parties may argue the case. The party having the burden of proof on the whole case, or on all matters which are submitted by the charge, shall be entitled to open and conclude the argument; where there are several parties having separate claims or defenses, the court shall prescribe the order of argument between them.

(2) In all arguments, and especially in arguments on the trial of the case, the counsel opening shall present his whole case as he relies on it, both of law and facts, and shall be heard in the concluding argument only in reply to the counsel on the other side.

(3) Counsel for an intervenor shall occupy the position in the argument assigned by the court according to the nature of the claim.

[Current Rule: Tex. R. Civ. P. 269].
[Original Source: Subdivision (a): Art. 2183; Subdivisions (b) through (h), see below].
[Official Comments]:

Change: Addition, in second sentence, of words "or on all matters which are submitted by the charge, whether upon special issues or otherwise."

Change by amendment of March 31, 1941. Source of Subdivisions (b) through (h); Texas Rules 36 through 42 (for District and County Courts).

(d) **Additional Testimony.** When it clearly appears to be necessary to the due administration of justice, the court may permit additional evidence to be offered at any time; provided that in a jury case no evidence on a controversial matter shall be received after the verdict of the jury.

[Current Rule: Tex.R.Civ.P. 270].
[Original Source: Art. 2181].
[Official Comments]:

Change by amendment effective April 1, 1984. Textual changes.

Rule 72. Subpoenas

(a) **Witnesses Subpoenaed.** The clerk of the district or county court, or justice of the peace, as the case may be, at the request of any party to a suit pending in his court, or of any agent or attorney, shall issue a subpoena for any witness or witnesses who may be represented to reside within one hundred miles of the courthouse of the county in which the suit is pending or who may be found within such distance at the time of trial; provided that any clerk, justice of the peace or other officer issuing a subpoena pursuant to the provisions of this rule, or of any other rule or statute, shall issue a separate subpoena, together with a copy thereof, for each witness subpoenaed.

[Current Rule: Tex. R. Civ. P. 176].
[Original Source: Acts 1939, 46th Leg., p. 323, Sec. 1, amending Art. 3704].
[Official Comments]:

Change by amendment effective September 1, 1957. Witnesses residing within one hundred miles of courthouse made subject to subpoena; officer required to issue separate subpoena for each witness.

Change by amendment effective February 1, 1973. Words "male or female" have been deleted.

(b) **Form of Subpoena.** The style of the subpoena shall be "The State of Texas." It shall state the style of the suit, the court in which the same is pending, the time and place at which the witness is required to appear, and the party at whose instance the witness is summoned. It shall be dated and attested by the clerk or justice, but need not be under the seal of the court, and the date of its issuance shall be noted thereon. It may be made returnable forthwith, or on any date for which trial of the cause may be set. It shall be addressed to any sheriff or constable of the State of Texas or other person authorized to serve and execute subpoenas as provided in Rule 178.

[Current Rule: Tex. R. Civ. P. 177].
[Original Source: Acts 1939, 46th Leg., p. 323, Sec. 2, amending Art. 3705].
[Official Comments]:

Change by amendment effective December 31, 1941. Instead of the words "names of the parties to" the words "style of" have been supplied; and the last sentence has been added.

Change by amendment effective September 1, 1957. Subpoena directed to any sheriff or constable of the State of Texas instead of to sheriff or any constable of county in which suit is pending.

Change by amendment effective January 1, 1978. Last sentence is changed to conform to the change in Rule 178].

(c) **Subpoena for Production of Documentary Evidence.** A subpoena may also command the person to whom it is directed to produce the books, papers, documents or tangible things designated therein; but the court, on motion made seasonably and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion to quash or modify upon the advancement by the person in whose behalf the subpoena is issued, of the reasonable costs of producing the books, papers, documents or tangible things.

[Current Rule: Tex. R. Civ. P. 177a].
[Original Source: Federal Rule 45(b)].
[Task Force Comments: Note: New Rule].

(d) **Service of Subpoenas.** Subpoenas may be executed and returned at any time by the sheriff or constable, or by any other person who is not a party and is not less than eighteen years of age, and shall be served by delivering a copy of such subpoena to the witness; and service thereof may be accepted by any witness by a written memorandum, signed by such witness, attached to the subpoena.

[Current Rule: Tex. R. Civ. P. 178].
[Original Source: Acts 1939, 46th Leg., p. 323, Sec. 3, amending Art. 3706].
[Official Comments]:

Change by amendment effective September 1, 1957. Subpoena served by delivering copy instead of reading to witness.

Change by amendment effective January 1, 1978. States who may serve a subpoena.

(e) **Witness Shall Attend.** Every witness summoned in any suit shall attend the court from day to day, and from term to term, until discharged by the court or party summoning such witness. If any witness, after being duly summoned, shall fail to attend, such witness may be fined by the court as for contempt of court, and an attachment may issue against the body of such witness to compel the attendance of such witness; but no such fine shall be imposed, nor shall such attachment issue in a civil suit until it shall be shown to the court, by affidavit of the party, his agent or attorney, that all lawful fees have been paid or tendered to such witness.

[Current Rule: Tex. R. Civ. P. 179].
[Original Source: Acts 1939, 46th Leg., p. 323, Sec. 4, amending R.C.S. Art. 3707, unchanged].
[Official Comment: Note: This act took effect prior to the Rule Making Act].
[Task Force Comments: Tex. R. Civ. P. 180 and 181 have been omitted; see Tex. R. Civ. Evid.].

(f) **Application for Continuance.** The failure to obtain the deposition of any witness residing within 100 miles of the courthouse of the county in which the suit is pending shall not be regarded as want of diligence when diligence has been used to secure the personal attendance of such witness under the rules of law, unless by reason of age, infirmity or sickness, or official duty, the witness will be unable to attend the court, or unless such witness is about to leave, or has left, the State or county in which the suit is pending and will not probably be present at the trial.

[Current Rule: Tex. R. Civ. P. 252 (2nd paragraph)].
[Original Source: Art. 2168, unchanged].
[Official Comments]:

Change by amendment effective April 1, 1984. The second paragraph is added to the former rule.

B. JURY TRIAL; JURY SELECTION

Rule 73. Preserving Right to Jury Trial

(a) **Request.** No jury trial shall be had in any civil suit, unless a written request for a jury trial is filed with the clerk of the court a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than thirty days in advance.

(b) **Jury Fee.** Unless otherwise provided by law, a fee of ten dollars if in the district court and five dollars if in the county court must be deposited with the clerk of the court within the time for making a written request for a jury trial. The

clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet.

[Current Rule: Tex. R. Civ. P. 216].
[Original Source: Arts. 2124 and 2125].
[Official Comments]:

Change: The fee must be paid ten days or more before the case is set upon the non-jury docket.

Change by Amendment effective September 1, 1990. Additional fees for jury trials may be required by other law, e.g., Texas Government Code § 51.604.

(c) Oath of Inability. The deposit for a jury fee shall not be required when the party shall within the time for making such deposit, file with the clerk his affidavit to the effect that he is unable to make such deposit, and that he can not, by the pledge of property or otherwise, obtain the money necessary for that purpose; and the court shall then order the clerk to enter the suit on the jury docket.

[Current Rule: Tex. R. Civ. P. 217].
[Original Source: Art. 2127, unchanged].

(d) Withdrawing Cause from Jury Docket. When any party has paid the fee for a jury trial, he shall not be permitted to withdraw the cause from the jury docket over the objection of the parties adversely interested. If so permitted, the court in its discretion may by an order permit him to withdraw also his jury fee deposit. Failure of a party to appear for trial shall be deemed a waiver by him of the right to trial by jury.

[Current Rule: Tex. R. Civ. P. 220].
[Original Source: Art. 2130, with minor textual change].
[Official Comments]:

Change by amendment effective December 31, 1947. The words "any party" have been substituted for "one party"; "the cause" for "such cause"; and "over the objection" for "without the consent."

Change by amendment effective January 1, 1971. Sentence has been added providing that failure of a party to appear for trial shall be deemed a waiver of jury trial.

Rule 74. Challenging the Assembly of the Jury Panel

Any party that will be tried to a jury may challenge the jury panel on the ground that the jurors summoned were not selected randomly or according to law. This challenge must be made either in writing or orally on the record before peremptory

challenges are exercised, setting forth distinctly the grounds for the challenge. When such a challenge is made, the court shall hear evidence and make a decision without delay. If the challenge is sustained, the challenged jury panel shall be discharged, and other jurors shall be summoned according to law.

[Task Force Comments: The source of this proposed rule is current Rules 221 and 222. As written, these rules provide a procedure allowing parties to challenge the method by which persons were chosen for jury lists and summoned to be on the panel for the week "upon the ground that the officer summoning the jury has acted corruptly, and has willfully summoned jurors known to be prejudiced . . . or biased." The Government Code (§ 62.001-014) provide the methods for making up the jury pool and assembling jury lists from that pool. It makes sense to allow a challenge to the method by which the jury list is assembled, but it does not make sense to limit the challenge to the grounds set forth in the current rule].

Rule 75. Seating the Jury Panel

The jury panel for a particular case shall be listed and be seated in the order in which the names are chosen from the jury list. Upon demand by any party prior to examination of the jury panel, the judge of the court to which the panel is assigned may have the names of the members of the jury panel redrawn at random, and the jury panel shall be relisted and reseated in the order in which the names are redrawn. This can be done only once in each case [for each jury chosen???].

[Task Force Comments: Current Rules 223, 224, and 225 are concerned with assembling the jury panel (although the titles of Rules 223 and 224 mistakenly indicate that they concern assembling the "jury list"). Gov't Code §§ 62.015, .016, and .017 actually cover the method whereby jury panels are chosen. Therefore, the references in the Rules to these procedures are deleted here. The statutes do not deal with the "jury shuffle, however." Interestingly, the rules allow a shuffle only in counties governed by the laws providing for interchangable juries. The proposed rule allows a jury shuffle in all counties. Rule 225 concerning summoning talesman should be deleted because it is covered in the statutes].

Rule 76. Swearing In, Instructing, and Examining the Jury Panel

(a) Oath. Before examination of the jury panel, the jurors shall be administered this oath: "Do you solemnly swear or affirm that you will give true answers to all questions asked you about your qualifications as a juror?"

(b) **Instructions.** After the members of the panel have been sworn and before they are examined, the judge shall instruct them, with the modifications that the circumstances of the case may require, as follows:

[insert instructions from L. Hughes draft]

(c) **Examination.** The court shall permit the parties to examine and may itself examine the members of the jury panel to elicit facts that will enable the parties to challenge jurors in accordance with these rules and applicable law.

[Task Force Comments: Current rule 226, with minor changes. Part 3 is a new rule. There is currently no Texas rule describing the voir dire examination. Current Rule 230 concerns voir dire examination, but seems unnecessary].

Rule 77. Challenges for Cause

Any party may orally challenge a panel member for cause alleging some fact that by law disqualifies that juror to serve as a juror, or that in the opinion of the court renders that juror unfit to sit on the jury. In deciding the challenge, the court shall consider the juror's answers to questions asked as well as other evidence. If the challenge is sustained, the juror shall be discharged from the case. If successful challenges reduce the number of prospective jurors to less than twenty-four in the district court or twelve in the county court, additional jurors shall be summoned.

[Task Force Comments: This proposed rule combines current Rules 227, 228, 229, and 231].

Rule 78. Peremptory Challenges

(a) **Grounds.** Upon completion of the court's determination of challenges for cause, any party may make peremptory challenges to a juror by striking that juror's name from a list furnished by the clerk. A peremptory challenge is made to a juror without assigning any reason therefor. After the exercise of peremptory challenges, the parties shall deliver their completed lists to the clerk. The clerk shall identify the first twelve names on the panel in the district court, or six in the county court, that have not been struck by any party, who shall constitute the jury.

(b) **Number and Apportionment.** Each side (plaintiff and defendant) to a civil case shall be entitled to six peremptory challenges in a case tried in the district court, and to three in the county court. If there are multiple parties on any one side, the trial court shall determine before the exercise of peremptory challenges whether the parties on the same side are antagonistic with respect to any issue to be submitted to the jury. Each

antagonistic party is entitled to its own peremptory challenges. Upon the motion of any party made prior to the exercise of peremptory challenges, the trial judge shall use its discretion to apportion the number of peremptory challenges so that no party or side is given unfair advantage as a result of the the alignment of the litigants, the determination of antagonism, and the award of peremptory challenges.

(c) **Challenges based on race prohibited.** After the clerk has announced to the parties the composition of the jury, but before the remainder of the jury panel has been dismissed and the jury is sworn, any party may object to any other party's peremptory challenges on the ground that they were made on the basis of race. The party making the objection must present prima facie evidence of facts tending to show that the challenges were made on the basis of race. If the objecting party satisfies its burden of prima facie proof, the party that excercised the challenges may present evidence of a racially neutral explanation for the challenges. The party objecting to the peremptory challenges has the burden of proving by a preponderance of the evidence that the challenges were made on the basis of race. The court shall use its discretion in sustaining or overruling the challenge. Upon sustaining the challenge, the court within its discretion may reinstate the juror stricken on the basis of race or call a new jury panel.

[Task Force Comments: Parts 1 and 2 of this rule are simplified versions of current Rules 233 and 234. Part 3 is new, and codifies the Batson procedure. There are two issues addressed in the proposed rule: (1) when error must be preserved; and (2) the standard of review on appeal. The proposal requires the objection be made before the panel is dismissed, so that it gives the trial judge the choice of reinstating the stricken juror or calling a new panel. See Henry v. State, 729 S.W.2d 732 (Tex.Cr.App. 1987) (coming to the opposite decision before the Code was amended). The Code of Criminal Procedure requires the judge to call a new panel, and thus allows the objection to be made anytime before the jury is sworn. The proposal contains an abuse of discretion standard of review. The cases use the federal "clearly erroneous" standard, which really has no place in Texas civil procedure. See Lott v. City of Fort Worth, 840 S.W.2d 146 (Tex. App. -- Ft. Worth 1992)].

Rule 79. Oath and Instructions to Jury

(a) **Oath.** The jury shall be administered this oath: "Do you solemnly swear or affirm that you will return a verdict according to the law in the court's instructions and to the evidence admitted before you?"

(b) Instructions. After the jury has been sworn, the judge shall instruct them, with the modifications that the circumstances of the case may require, as follows:
[Insert admonitory instructions from L. Hughes draft here]

[Task Force Comments: Current Rule 236 and 226a have been combined with minor changes].

C. THE JURY CHARGE

[INSERT JURY CHARGE RULES BASED ON THE REPORT OF JURY CHARGE TASK FORCE].

D. JURY DELIBERATIONS AND VERDICTS

Rule 85. Deliberations

(a) Presiding Juror. The jury shall select one juror as the presiding juror.

[Current Rule: Texas Rule 280].
[Original Source: Art. 2192, unchanged].
[Official Comments]:

Change by amendment effective April 1, 1984. The word ''foreman'' is changed to ''presiding juror.''

(b) Separation. When the jury retires for deliberation, the jury shall be kept together under the supervision of a bailiff, except as the court may permit them to separate in its discretion.

[Current Rule: Texas Rule 282].
[Original Source: Art. 2194, unchanged].

(c) Bailiff. The court will appoint a bailiff to supervise the jury during its deliberation. The bailiff may only make or permit communications to the jury as ordered by the court, except to inquire whether they have reached a verdict. The bailiff shall not disclose the state of the deliberations except to report to the court that a verdict has been reached.

[Current Rule: Texas Rule 283].
[Original Source: Art. 2195, unchanged].

(d) Charge and Exhibits. The jury must take with them on retiring for deliberation, without request from a juror or counsel, the court's charge and all of the exhibits admitted into evidence, except where physically impractical.

[Current Rule: Texas Rule 281].
[Original Source: Art. 2193, unchanged].

Rule 86. Communication

(a) Generally. The court may on its own motion communicate with the jury. The jury may communicate with the court by the presiding juror telling the bailiff that the jury has a message to the court. The presiding juror shall communicate on behalf of the jury. All communications with the jury must be either written and filed or oral in open court.

[Current Rule: Texas Rules 285, 286].
[Original Source: Arts. 2197 and 2198].
[Official Comments]:

Rule 285, Changed by amendment effective April 1, 1984. The word ''foreman'' is changed to ''presiding juror.''

Rule 286, Change: Authorizing court to give additional instructions on his own motion where deemed proper, and requiring the jury to make its request in writing.

Rule 286, Change by amendment effective April 1, 1984. The word ''foreman'' is changed to ''presiding juror.''

(b) Disagreements.

(1) Testimony. When the jury disagree about a specific point of testimony of a witness, the jury will notify the court of the dispute. The court will have that part of the witness's testimony read to the jury. If the reporter's notes cannot be read, the court may recall the witness and direct the witness to repeat the testimony as nearly as possible.

(2) Deposition. If the jury disagree about part of a deposition, the court may permit the disputed portion to be read to the jury again.

[Current Rule: Tex. R. Civ. P. 287].
[Original Source: Arts. 1939, 46th Legislature, p. 213, Sec. 1, being Art. 2198, as amended, with minor textural change].

Rule 87. Verdict

(a) Defined. A verdict is a written declaration by a jury of its decision under the charge submitted by the court.

[Current Rule: Tex. R. Civ. P. 290].
[Original Source: Art. 2202, reworded].
[Official Comments:].

Change by amendment effective April 1, 1984. The word ''foreman'' is changed to ''presiding juror.''

(b) Form. A verdict will be in the form of written responses to the general or special questions submitted by the

court in the charge. A judgment is sustainable if there has been substantial compliance with this rule.

[Current Rule: Tex. R. Civ. 291].
[Original Source: Art. 2203, unchanged].
[Official Comments]:

Change by amendment effective February 1, 1973. Sentence requiring concurrence of all members of the jury in the verdict has been deleted.

(c) Requirements.

(1) Signing. A verdict must be signed by the presiding juror for a unanimous jury or by every concurring juror for a non-unanimous jury or for a jury reduced from its original size.

(2) Number. A verdict may be returned by the agreement of ten of a twelve-member jury or by the agreement of five of a six-member jury. A twelve-member jury reduced in size may return a unanimous verdict as long as at least nine jurors remain.

(d) Receipt. When the jury agrees on a verdict, they notify the bailiff. The court will then order the jury to the courtroom and ask whether the jury has agreed on a verdict. If the presiding juror answers yes, the court will read the verdict. If the verdict is in proper form and no party requests a poll, the court receives the verdict by ordering that the verdict be filed.

[Current Rule: Tex. R. Civ. P. 293].
[Original Source: Art. 2205, modified by eliminating the requirement that the jurors' names be called by the clerk].
[Official Comments]:

Change by amendment effective February 1, 1973. The words ''objects to its accuracy, no juror represented as agreeing thereto'' have been inserted, and other minor textual changes have been made in the second sentence.

(e) Polling.

(1) Polling. On the request of a party, the court will poll the jury, by its asking each juror whether the verdict as read by the court is his verdict in every particular.

(2) Effect. Where the verdict rendered was unanimous and a juror dissents from it or where the verdict has been rendered by a partial jury and a concurring juror dissents, the court will either retire the jury for further deliberation or discharge the jury.

[Current Rule: Tex. R. Civ. P. 294].

[Original Source: Art. 2206, modified by eliminating the words "which is done by" and adding the language of the second sentence through "And then"].
[Official Comments]:

Change by amendment effective February 1, 1973. The last sentence has been rewritten to provide that the jury shall be retired for further deliberation if any juror answers in the negative where the verdict is returned as a unanimous verdict or if any juror shown by his signature to agree to the verdict answers in the negative.

Change by amendment effective April 1, 1984. The word ''foreman'' is changed to ''presiding juror.''

(f) Defects.

(1) A verdict is defective if material questions are unanswered, answers do not respond to the questions, or answers conflict. The court may reform a defective verdict by further written instructions in open court explaining to the jury how to cure the defect and sending them to deliberate further.

(2) A question is material if its answer cannot be found elsewhere in the charge and if the answer can alter the effect of the verdict on the judgment.

[Current Rule: 295].
[Original Source: Art. 2207].
[Official Comments]:

Change: Addition of words, ''in writing.''

Change by amendment effective January 1, 1988. The amendment makes it clear that the court may direct a complete yet defective verdict to be reformed. The amendment also makes it clear that in the event the verdict is incomplete or otherwise improper, the court is limited to giving the jury additional instructions in writing.

(g) Discharge.

(1) Verdict. On ordering the verdict filed, the court will discharge the jury.

(2) Failure to Agree. If the jury cannot agree, it may be discharged by the court when they have deliberated long enough that, in the court's discretion, renders reaching an agreement improbable.

(3) Shortage. The court will discharge the jury when the number of jurors is reduced below the minimum number required for a verdict.

(4) Effect. If the jury is discharged before rendering a verdict, the case will be set for another trial.

[Current Rule: 289].
[Original Source: Art. 2200, reworded with minor textural changes].
[Official Comments]:

Change by amendment effective April 1, 1984. Textual changes.

PART D. Nonjury Trials

Rule 88. Findings by the Court; Judgment on Partial Findings

(a) Findings of Fact. In all cases tried without a jury, the court has the mandatory duty to find the facts specially and state separately its conclusions of law. Requests for findings of fact are not necessary for purposes of review. It is sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision signed and filed by the court. If written, the court shall cause a copy of its findings and conclusions to be mailed to each party to the action.

When findings of fact are made in actions tried by the court without a jury, 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 presumed finding upon any ground of recovery or defense, no element of which has been included in the findings of fact; but when one or more elements thereof have been found by the trial court, omitted unrequested elements, 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.

[Current Rule: Tex. R. Civ. P. 298, 299].
[Original Source: Federal Rule 52(a), (b)].

(b) Judgment on Partial Findings. If during a trial without a jury a party has been fully heard with respect to an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party on any claim, counterclaim, cross-claim or third-party claim that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

[Current Rule: New Rule].

[Original Source: Federal Rule 52(c)].
[Official Comments]:

Change by amendment effective September 1, 1957. Provision added requiring that notice of request be given to opposite party.

Change by amendment effective September 1, 1990. To revise the practice and times for findings of fact and conclusions of law. SEE ALSO Rules 296 and 297.

[Task Force Comments: Adoption of the current federasl practice is recommended].

SECTION 7
Judgments; Motions for Judgment; New Trials

Rule 100. Motion for Judgment as a Matter of Law; Modification of Judgments or Findings and Correction of Clerical Mistakes.

(a) Motion for Judgment As a Matter of Law. A party may move for judgment in its favor at the close of the adverse party's evidence and at the close of all the evidence on any or all issues. If there is no legally sufficient basis for a reasonable jury to have found for the nonmovant with respect to an issue, the court may grant a motion for judgment as a matter of law against the nonmovant on any claim, counterclaim, cross-claim or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue. A motion for judgment as a matter of law may also be made for the first time after verdict or judgment and if made after the judgment has been rendered may include a motion for new trial in the alternative.

[Current Rules: Tex. R. Civ. P. 268, 300, 301].
[Original Source: Arts. 2209, with minor textural change, and 2211; Federal Rules 50(a)(last sentence) and 51].
[Task Force Comments: This proposal is adapted from federal Rule 50].

(b) Motion for Modification of Judgment or Findings. A motion to modify may include any basis for modifying, correcting, or reforming the judgment in any respect, for disregarding a jury finding on an issue or issues, or for adding findings of fact or for disregarding or amending findings of fact in a nonjury case. or a motion to modify, correct, or reform a judgment or finding (as distinguished from a motion to correct the record of a judgment under paragraph (c) of this rule), if filed, shall be filed within the time prescribed by Rule ____ (currently Rule 329b). Each such motion shall be in writing and signed by the party or his attorney and shall specify the relief or order that is sought. The overruling of a motion to modify shall not preclude the filing of a motion for new trial, nor shall the

overruling of a motion for new trial preclude the filing of a motion to modify.

[Current Rule: Tex. R. Civ. P. 329b(g)].
[Original Source: New Rule effective January 1, 1955, derived from Art. 2092].

(c) Motion to Correct Judgment Record. Clerical mistakes in the record of any judgment may be corrected by the judge in open court according to the truth or justice of the case after notice of the motion has been given to the parties interested in such judgment, as provided in Rule ___ (currently Rule 21a), and thereafter the execution shall conform to the judgment as amended.

[Current Rule: Rule 316].
[Original Source: Art. 2228, including 1943 Amendment adding last sentence].

Rule 101. Judgments, Decrees and Orders; Effective Dates

(a) Definition; Form and Substance. "Judgment" as used in these rules includes a decree and any order that disposes of a claim. A judgment shall contain the full names of the parties, for and against whom the judgment is rendered and for what recovery. A judgment shall not contain a recital of the pleadings, the record of prior proceedings, findings of fact or jury findings or a recitation of any other matter that is otherwise shown of record. Only one final judgment shall be rendered in any cause except where it is otherwise specially provided by law.

[Current Rule: Tex. R. Civ. P. 306, 301].
[Original Source: s 63 and 64 (for District and County Courts)(combined); Art. 2211; and Federal Rule 54].
[Official Comments]:

Rule 306, Change by amendment effective January 1, 1971. Language requiring judgment to recite findings of the jury on which it is based has been eliminated.

(b) Proposed Judgments. Any party may prepare and submit a proposed judgment to the court for signature.

[Current Rule: Tex. R. Civ. P. 305].
[Original Source: Arts. 2218, 2219, unchanged].
[Official Comments]:

Change by amendment effective September 1, 1990. To clarify the practice for proposed judgments and notice to other parties.

(c) Judgment for Personal Property. Where the judgment is for personal property, and it is shown by the pleadings and evidence and the verdict, if any, that such property has an especial value to the plaintiff, the court may award a special

writ for the seizure and delivery of such property to the plaintiff; and in such case may enforce its judgment by attachment, fine and imprisonment.

[Current Rule: Tex. R. Civ. P. 308, 309].
[Original Source: Arts. 2217, 2218, unchanged].

(d) Judgments in Foreclosure Proceedings. Judgments for the foreclosure of mortgages and other liens shall provide: that the plaintiff recover his debt, damages, and costs, with a foreclosure of the plaintiff's lien on the property subject to the lien; except in judgments against personal representatives, that an order of sale shall issue for the property as under execution; and, that if the property cannot be found or if the proceeds of the sale are insufficient to satisfy the judgment, then the balance remaining unpaid shall be taken out of other property of the defendant, as in case of ordinary executions. An order foreclosing a lien on real estate has the force and effect of a writ of possession and the order shall so provide and direct the sheriff or other officer to place the purchaser of the property in possession within thirty days after the date of the foreclosure sale.

[Current Rule: Tex. R. Civ. P. 309, 310].
[Original Source: Arts. 2218, 2219, unchanged].
[Official Comments]:

Rule 309, Change: The order of sale is to be directed to the sheriff or constable of any county of the State, in harmony with the rules relating to executions.

Rule 309, Change by amendment effective January 1, 1967. The order of sale is to be directed to any sheriff or any constable within the State of Texas, in harmony with the rules relating to executions.

(e) Judgments Against Personal Representatives. A judgment for the recovery of money against an executor, administrator, or guardian, shall state that it is to be paid in the due course of administration. No execution shall issue, but it shall be certified to the county court, sitting in probate, to be enforced under the law, but a judgment against an executor under a will dispensing with the action of the county court shall be enforced against the property of the testator in the hands of the executor, by execution, as in other cases.

[Current Rule: Tex. R. Civ. P. 313].
[Original Source: Art. 2222, unchanged].

(f) Effective Dates: Periods to Run from Signing of Judgment.

(1) Beginning of Periods. The date an order is signed as shown of record determines the beginning of the periods for the court's plenary power to grant a new trial or to vacate,

modify, correct or reform an order and for filing in the trial court documents that a party may file within those periods, including motions for new trial, motions to modify, motions to reinstate a case dismissed for want of prosecution, motions to vacate a judgment.

(2) **Date to be Shown.** All judgments, decisions, and orders of any kind shall be reduced to writing and signed by the trial judge with the date of signing stated expressly in it. If the date of signing is not recited in the order, it may be shown in the record by a certificate of the judge or otherwise; the absence of a showing of the date in the record shall not invalidate an order.

(3) **Notice of Judgment.** When an appealable order is signed, the clerk of the court shall immediately give notice to the parties by first-class mail advising them that the order was signed. Failure to comply with this rule shall not affect the periods mentioned in paragraph (1), except under paragraph (4).

(4) **No Notice of Judgment.** If within twenty days after the judgment or other appealable order is signed, a party adversely affected by it has neither received the notice required by paragraph (3) nor acquired actual knowledge of the order, then for that party the periods in paragraph (1) shall begin on the date that party received notice or acquired actual knowledge of the signing, whichever occurred first, but in no event shall those periods begin more than ninety days after the original appealable order was signed.

(5) **Motion, Notice, and Hearing.** To establish the application of paragraph (4), the party adversely affected is required to prove in the trial court, on sworn motion and notice, elements of paragraph (4) the date on which the party or his attorney first either received a notice of the judgment or acquired actual knowledge of the signing and that this date was more than twenty days after the judgment was signed. The trial court shall find the date on which the party or his attorney first either received or acquired actual knowledge of the signing of the judgment at the conclusion of the hearing and include this finding in the court's order.

(6) **Nunc Pro Tunc Order.** When a corrected judgment has been signed after expiration of the court's plenary power, the periods in subparagraph (1) of this paragraph shall run from the date of signing the corrected judgment for complaints that would not apply to the original document.

(7) **Process by Publication.** For a motion for new trial filed more than thirty days after the judgment was signed when process has been served by publication, the periods in subparagraph (1) shall be computed as if the judgment were signed on the date of filing the motion.

[Current Rule: Rule 306a].

[Original Source: New Rule].
[Official Comments]:

Change by amendment effective January 1, 1981. The rule is rewritten to eliminate the use of the term, ''rendition of judgment,'' and to make period begin with the date the judgment is signed. A certificate by the judge is permitted to establish the date of signing. Reference to the notice of appeal and filing the statement of facts in the trial court has been deleted in view of amendments which omit these requirements.

Change by amendment effective April 1, 1984. The rule collects all provisions concerning the beginning of post-judgment periods that ordinarily run from the date the judgment is signed.

Paragraph 1 is the second paragraph of former Rule 306a, with the addition of the period of the court's plenary power as defined by paragraphs (d) and (e) of Rule 329b.

Paragraph 2 is the first paragraph of former Rule 306a.

Paragraph 3 changes former Rule 307d by requiring notice by mail and incorporates that rule into this rule.

Paragraphs 4 and 5 are new and apply when actual notice of the signing of the judgment is not received within twenty days after the judgment was signed.

Paragraph 6, with respect to nunc pro tunc orders, comes from former Rule 306b and makes clear that paragraphs 1 and 4 of this Rule 306a do not revive the court's expired plenary power with respect to complaints that could have been made to the original judgment.

Paragraph 7 conforms Rule 329 to the 1981 amendments to the appellate rules and eliminates the discrepancy created by those amendments in apparently providing for appeal that may expire before the time for filing a motion for new trial in cases of citation by publication.

Change by amendment effective September 1, 1986. Amended to delete any reference to appellate procedure.

The phrase ''in connection with an appeal, including but not limited to an original or amended motion for new trial, an appeal bond, certificate of cash deposit, or notice or affidavit in lieu thereof, and bills of exception, and for filing of the petition for writ of error if review is sought by writ of error, and for filing in the appellate court of the transcript and statement of facts'' is deleted from subdivision 1; the phrase, ''except the period for filing a petition for writ of error'' is deleted from subdivision 4; and the words ''thirty days before'' are deleted from

subdivision 7.

Change by amendment effective January 1, 1988. Amended to reflect repeal of Rule 317.

Rule 102. Summary Judgment

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaims, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motions and Proceedings Thereon.** The motion for summary judgment shall state the specific grounds therefore. [Each party shall, in the motion for summary judgment or in the response thereto, specifically refer to any portions of depositions relied upon; copies of said deposition excerpts shall be attached to the motion for summary judgment or response.] Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one [forty-five] days before the time specified for hearing. Except on leave of court [for good cause shown], the adverse party, not later than seven days prior to the day of hearing [shall] file and serve [a] written response. No oral testimony shall be received at the hearing. The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. [Amendment to pleadings at any time subsequent to a motion for summary judgment may be made only with leave of court and for good cause shown.] Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered an appeal as grounds for reversal. A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the matter of tact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

(d) **Burdens of Movant and Non-Movant.** A party moving for summary judgment, on an issue upon which the movant would have the burden of proof at trial, shall have the burden to present evidence sufficient to establish facts which, if proved at trial, would entitle the movant to an instructed verdict. If the motion is based upon the absence of proof of an issue upon which the non-movant has the burden to proof, the non-movant must respond with evidence sufficient to entitle the non-movant to submission of the issue to a jury.

(e) **Appendices, References and Other Use of Discover Not Otherwise on File.** Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence or a notice containing specific references to the discovery or specific references to other instruments are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least twenty-one [forty-five] days before the hearing if such proofs are to be used to support the summary judgment; or (ii) at least seven days before the hearing if such proofs are to be used to oppose the summary judgment.

(f) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings on that action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be deemed established, and the trial shall be conducted accordingly.

(g) **Form of Affidavits; Further Testimony.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached hereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

(h) What Affidavits Are Unavailable. Should it appear from the [by] affidavits of [that] a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his [that party's] opposition, [and if the affidavit sufficiently describes the expected proof], the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions be taken or discovery to be had or may make such other order as is just.

(i) Affidavits Made in Bad Faith. 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 [such other party] to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

[Current Rule: Tex. R. Civ. P. 166a].
[Original Source: Federal Rule 56, as originally promulgated, except that the following wording in subdivision (a) has been eliminated: "pleading in answer thereto has been served"; and in its place the following language has been submitted: "Adverse party has appeared or answered."].
[Official Comments]:

Change by amendment effective March 1, 1952. The last sentence is added to subdivision (a).

Change by amendment effective January 1, 1967. Fourth sentence of subdivision (c) was added.

Change by amendment effective January 1, 1971. The first sentence of subdivision (c) has been added, and the words ''answers to interrogatories'' have been inserted in the fifth sentence of subdivision (c).

Change by amendment effective January 1, 1978. The time requirements in subdivision (c) are changed. The third, fourth, and fifth sentences of subdivision (c) are new. The last sentence of subdivision (e) is new.

Change by amendment effective January 1, 1981. The second sentence adds the words ''with notice to opposing counsel,'' ''and any supporting affidavits,'' and ''filed and.'' Third sentence adds the words,''file and.''

Change by amendment effective April 1, 1984. Subdivision (c) is changed to include stipulations and authenticated and certified public records as matters in support of a summary judgment.

Change by amendment effective September 1, 1990. This amendment provides a mechanism for using previously non-filed discovery in summary judgment practice. Such proofs must all be filed in advance of the hearing in accordance with Rule 166a. Subdivisions (d) through (g) are renumbered as subdivisions (e) through (h).

[Task Force Comments: This proposal is based on the Proposed Summary Judgment Rule recommended to the Supreme Court by the Committee on Court Rules].

Rule 103. Default Judgment

(a) When Available. At any time after a defendant is required to answer, appear, or otherwise defend as provided by these rules, the plaintiff may take judgment by default; provided that the citation with the officer's return thereon shall have been on file with the clerk for the length of time required by Rule ____ (currently Rule 107). No default judgment shall be rendered against a defendant in a removed action remanded from federal court if the defendant filed an answer in federal court during removal.

[Current Rule: Tex. R. Civ. P. 237a, 239].
[Original Source: Art. 2154, with minor textural changes; Federal Rule 55].
[Oficial Comments]:

Rule 237a, Change by amendment effective April 1, 1984. Minor change.

Rule 237a, Change by amendment effective September 1, 1990. To expressly provide, consistent with existing law, that a default judgment cannot be taken in a case remanded from federal court if an answer was filed in federal court during removal.

Rule 239, Change: ''In term time!' added.

Rule 239, Change by amendment effective September 1, 1962. Final clause beginning with the words ''and provided that'' added.

(b) Interlocutory Judgment. An interlocutory judgment by default may be rendered as follows:

(1) As to a defendant's liability pending a determination of unliquidated damages; or,

(2) As to a certain defendant in an action who is in default under subsection (a) of this Rule where there are several defendants in the action, some of whom are not in default.

[Current Rule: Tex. R. Civ. P. 240.
[Original Source: Art. 2155, with textural change].

(c) Damages.

(1) Liquidated Demands. Damages shall be assessed by the court against a defendant if the claim is liquidated and proved by a written instrument unless the defendant demands and is entitled to a trial by jury.

(2) Unliquidated Demands. The court shall hear evidence as to damages and shall render judgment therefor if the claim is unliquidated or not proved by written instrument unless the defendant demands and is entitled to a trial by jury. Notice of a hearing as to damages shall be given to a defendant who has either answered or appeared as provided for in these rules.

[Current Rule: Tex. R. Civ. P. 241, 243].
[Original Source: Art. 2157, unchanged].
[Official Comments]:

Change by amendment of March 31, 1941. The original rule has been amended by striking out the word ''claim'' and substituting in lieu thereof the words ''cause of action.''

(d) Notice of the Judgment. At or immediately prior to the time an interlocutory or final default judgment is rendered, the plaintiff shall certify to the clerk in writing the last known mailing address of the defendant, which shall be filed among the papers in the action. The clerk shall use this address to comply with the notice requirement of Rule _____ (currently Rule 306a(3)).

[Current Rule: Tex. R. Civ. P. 239a].
[Original Source: New Rule effective January 1, 1967].

(e) After Service by Publication. Where service has been made by publication, and no answer has been filed nor appearance entered within the prescribed time, the court shall appoint an attorney to defend the suit in behalf of the defendant, and judgment shall be rendered as in other cases; but, in every such case a statement of the evidence, approved and signed by the judge, shall be filed with the papers of the cause as a part of the record thereof. The court shall allow such attorney a reasonable fee for his services, to be taxed as part of the costs.

[Current Rule: Tex. R. Civ. P. 244].
[Original Source: Art. 2158, with minor textual change.

(f) Setting Aside Default Judgment. The court may set aside an interlocutory or final default judgment for good cause at any time before the court's plenary power expires under Rule _____ (currently Rule 329b (d) and (e)). A final default judgment also may be set aside in accordance with Rule ___ (currently Rule 320).

[Current Rule: Tex. R. Civ. P. 330].
[Original Source: Federal Rule 55(c)].

Rule 104. New Trials

(a) Motion for New Trials. New trials may be granted and judgment set aside for good cause, on motion or on the court's own motion on such terms as the court shall direct. New trials may be granted when the damages are manifestly too small or too large. Each motion for new trial shall be in writing and signed by the party or his attorney.

[Current Rule: Tex. R. Civ. P. 320].
[Original Source: Texas Rule 67 (for District and County Courts), unchanged].
[Official Comments]:

Change by amendment effective January 1, 1955. Subdivisions (a) and (d) of original rule eliminated as these requirements are covered in Rules 329-a and 329-b.

Changes by amendment effective January 1, 1976. The rule permits partial retrials in certain cases.

Change by amendment effective January 1, 1978. The last sentence is changed by deleting the part requiring a specification of each ground.

Change by amendment effective January 1, 1981. ''Point or points'' used in place of ''ground or grounds.'' SEE Rules 321, 418(d), 458, 469(e), and 515.

Change by amendment effective April 1, 1984. The rule is rewritten to be consistent with Rule 329b(d).

(b) Prerequisite for Complaint on Appeal.

(1) Motion for New Trial Not Required. A point in a motion for new trial is not a prerequisite to a complaint on appeal in either a jury or a nonjury case, except as provided in subdivision (2).

(2) Motion for New Trial Required. A point in a motion for new trial is a prerequisite to the following complaints on appeal:

(A) A complaint on which evidence must be heard such as one of jury misconduct or newly discovered evidence or failure to set aside a judgment by default;

(B) A complaint of factual insufficiency of the evidence to support a jury finding;

(C) A complaint that a jury finding is against the overwhelming weight of the evidence;

(D) A complaint of inadequacy or excessiveness of the damages found by the jury; or

(E) Incurable jury argument if not otherwise ruled on by the trial court.

[Current Rule: Tex. R. Civ. P. 324].
[Original Source: 71a (for District and County Courts)].
[Official Comments]:

Change: Reference to fundamental error as an exceptional situation not requiring motion for new trial eliminated. Proviso added authorizing appellee, when judgment is rendered non obstante veredicto or notwithstanding the jury finding on one or more special issues, to complain of any prejudicial error committed against him over his objection on the trial by cross-assignments of error filed in the Court of Civil Appeals without having first presented such complaint in a motion for new trial.

Change by amendment of March 31, 1941. Paragraph added providing that an assignment in a motion for new trial shall not be a prerequisite to the right to complain on appeal of the action of the court in giving an instructed verdict, rendering or refusing to render judgment non obstante veredicto, or overruling appellant's motion for judgment on the verdict.

Change by amendment effective December 31, 1941. Reference to cross-assignments of error and to motion for new trial deleted from sentence dealing with appellee's right to complain of errors committed against him on the trial. Sentence added providing that a motion for new trial shall not be necessary in behalf of appellee, except where he complains of the judgment or a part thereof. Provisions of paragraph dealing with right to complain on appeal without an assignment in a motion for new trial expanded to include action of court ''in withdrawing the case from the jury and rendering judgment.''

Change by amendment effective January 1, 1955. The rule has been largely re-written and re-arranged.

Change by amendment effective September 1, 1957. Provisions of rule dealing with cross-points of error of appellee when judgment has been rendered non obstante veredicto have been expanded to require cross-points, as to any matter, not requiring the taking of evidence, which would vitiate the verdict. The amendment is intended to modify the holding in DE WINNE V. ALLEN, 154 Tex. 316, 277 S.W.2d 95, 99.

Change by amendment effective September 1, 1962. The proviso in the first sentence has been rewritten to express more clearly its effect as declared in WAGNER V. FOSTER, 161

Tex. 333, 341 S.W.2d 887. The words ''in a case coming within the proviso of Rule 329-a,'' which formerly appeared after'''non-jury case'' in the first sentence, have been deleted. Notes regarding original change and 1941 amendments have been rewritten.

Change by amendment effective January 1, 1978. Eliminates requirement for a motion for new trial in jury cases in most (though not all) instances.

Change by amendment effective January 1, 1981. The third sentence of the rule is rewritten, and the fourth sentence is deleted.

Change by amendment effective April 1, 1984. The requirement for a motion for new trial concerning factual complaints of jury findings, excessive and inadequacy of damages, and incurable jury argument have been added.

(c) Form of Motion; Need for Affidavits. Affidavits are required when a ground of objection is predicated on facts that are outside of the facts that appear in the record. Affidavits are required for:

(1) allegations of jury misconduct;

(2) newly discovered evidence;

(3) when a defendant seeks to set aside a default judgment by excusing the default; and,

(4) when a defendant seeks to set aside a judgment following citation by publication.

When a motion for new trial is based upon affidavits, the affidavits shall be served with the motion.

[Current Rule: Tex. R. Civ. P. 321, 322].
[Original Source: 67 and 68 (for District and County Courts), unchanged].
[Official Comments]:

Rule 321, Change by amendment effective January 1, 1981. ''Point'' is substituted for ''ground.'' SEE Rules 320, 418(d), 458, 469(e),and 515.

(d) Special Rules for Complaints of Jury Misconduct.

(1) When the ground of a motion for new trial, supported by affidavit, is misconduct of the jury or of the officer in charge of them, or because of any communication made to the jury, or that a juror gave an erroneous or incorrect answer on voir dire examination, the court shall hear evidence thereof from the jury or others in open court, and may grant a new trial if such misconduct proved, or the communication made,

or the erroneous or incorrect answer on voir dire examination, be material, and if it reasonably appears from the evidence both on the hearing of the motion and the trial of the case and from the record as a whole that injury probably resulted to the complaining party.

(2) A juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict concerning his mental processes in connection therewith, except that a juror may testify whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

[Current Rule: Tex. R. Civ. P. 327].
[Original Source: Art. 2234].
[Official Comments]:

Change: Imposing burden on complaining party to show probability of injury.

Change by amendment effective January 1, 1955. Phrase ''or that a juror gave an erroneous or incorrect answer on voir dire examination'' inserted.

Change by amendment effective April 1, 1984. This codifies existing law that there must be affidavits before the trial judge need have a hearing. It incorporates the provisions of Rule 606(b), Texas Rules of Evidence.

(e) Partial New Trials; Remittiturs. If the court is of the opinion that the damages awarded to a party by the jury are excessive, the court shall indicate to such party within what time the party may file a remittitur of the excess.

[Current Rule: Tex. R. Civ. P. 320, third sentence].
[Original Source: 67 (for District and County Courts), unchanged].
[Task Force Comments: See T.R.A.P. 85(c) and Rule 320 (second sentence) concerning the subject of suggestion of remittituras].

(f) Prematurely Filed Motions. No motion for new trial or motion to modify shall be held ineffective because prematurely filed; but every such motion shall be deemed to have been filed on the date of but subsequent to the time of signing of the judgment.

[Current Rule: Tex. R. Civ. P. 306c].
[Original Source: New Rule].
[Official Comments]:

Change by amendment effective January 1, 1971. Language requiring judgment to recite findings of the jury on which it is based has been eliminated.

Rule 105. Time for Filing Motions

The following rules shall be applicable to motions for new trial and motions to modify judgments or findings (other than motions to correct the record under Rule ___ (currently Rule 316) in all district and county courts:

(a) A motion for new trial, if filed, shall be filed prior to or within thirty days after the judgment or other order complained of is signed.

(b) One or more amended motions for new trial may be filed without leave of court before any preceding motion for new trial filed by the movant is overruled and within thirty days after the judgment or other order complained of is signed.

(c) In the event an original or amended motion for new trial or a motion to modify, correct or reform a judgment is not determined by written order signed within seventy-five days after the judgment was signed, it shall be considered overruled by operation of law on expiration of that period.

(d) The trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed.

(e) If a motion for new trial is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after all such timely-filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.

(f) On expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause, filed within the time allowed by law; provided that the court may at any time correct a clerical error in the record of a judgment and render judgment nunc pro tunc under Rule ___ (currently Rule 316), and may also sign an order declaring a previous judgment or order to be void because signed after the court's plenary power had expired.

(g) A motion to modify a judgment or findings (as distinguished from motion to correct the record of a judgment under Rule ____ (currently Rule 316), if filed, shall be filed and determined within the time prescribed by this rule for a motion for new trial and shall extend the trial court's plenary power and the time for perfecting an appeal in the same manner as a motion for new trial.

(h) If a judgment is modified, corrected or reformed in any respect, the time for appeal shall run from the time the modified, corrected, or reformed judgment is signed, but if a correction is made pursuant to Rule after expiration of the period of plenary power provided by this rule, no complaint shall be heard on appeal that could have been presented in an appeal from the original judgment.

[Current Rule: Tex.R. Civ. P. 329b].
[Original Source: New Rule effective January 1, 1955].
[Official Comments]:

Change: In subdivision (b), the amount of the bond is to be fixed in accordance with the rules relating to supersedeas bonds.

Change by amendment effective January 1, 1981. The word ''rendered'' in the first sentence of subdivision (a) is changed to ''signed.''

Change by amendment effective April 1, 1984. This change conforms to the 1981 amendments to Rules 329b, 356, 386, and other rules that make the periods for appeal begin to run from the signing of the judgment rather than from overruling the motion for new trial.

(i) If a judgment is modified, corrected or reformed in any respect, the time for appeal shall run from the time the modified, corrected, or reformed judgement is signed, but if a correction is made pursuant to Rule ____ (currently Rule 316) after expiration of the period of plenary power provided by this rule, no complaint shall be heard on appeal that could have been presented in an appeal from the original judgment.

[Current Rule: Tex. R. Civ. P. 329b].
[Original Source: New Rule].

Rule 106. 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 after such 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 the motion is filed more than thirty days after the judgment was signed, the time period shall be computed pursuant to Rule ____ (currently Rule 306a(7).

[Current Rule: Tex. R. Civ. P. 329].
[Original Source: Art. 2236].
[Official Comments]:

Change: In Subdivision (b), the amount of the bond is to be fixed in accordance with the rules relating to supersedeas bonds.

Change by amendment effective January 1, 1981: The word rendered" in the first sentence of subdivision (a) is changed to "signed."

Change by amendment effective April 1, 1984. This change conforms to the 1981 amendments to Rules 329 b, 356, 386, and other rules that make the periods for appeal begin to run from the signing of the judgment rather than from overruling the motion for new trial.

SECTION ___
Counsel, Courts, Clerks, Court Reporters, Court Records & Court Costs

A. COUNSEL

Rule 110. May Appear by Attorney; Attorney in Charge; Number of Counsel Heard; Attorney to Show Authority

(a) May Appear by Attorney. Any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court.

[Current Rule: Tex. R. Civ. P. 7].
[Original Source: Art. 1993, unchanged].

(b) Attorney in Charge. On the occasion of a party's first appearance through counsel, the attorney whose signature first appears on the initial pleadings for any party shall be the attorney in charge, unless another attorney is specifically designated therein. Thereafter, until such designation is changed by written notice to the court and all other parties in

accordance with Rule ___ (currently Rule 21a), said attorney in charge shall be responsible for the suit as to such party.

All communications from the court or other counsel with respect to a suit shall be sent to the attorney in charge.

[Source: Tex. R. Civ. P. 8].
[Original Source: 45 (for District and County Courts), unchanged].

(c) **Number of Counsel Heard.** Not more than two counsel on each side shall be heard on any question or on the trial, except in important cases, and upon special leave of the court.

[Source: Tex. R. Civ. P. 9].
[Original Source: 44 (for District and County Court), unchanged].

(d) **Attorney to Show Authority.** A party in a suit or proceeding pending in a court of this state may, by sworn written motion stating that he believes the suit or proceeding is being prosecuted or defended without authority, cause the attorney to be cited to appear before the court and show his authority to act. The notice of the motion shall be served upon the challenged attorney at least ten days before the hearing on the motion. At the hearing on the motion, the burden of proof shall be upon the challenged attorney to show sufficient authority to prosecute or defend the suit on behalf of the other party. Upon his failure to show such authority, the court shall refuse to permit the attorney to appear in the cause, and shall strike the pleadings if no person who is authorized to prosecute or defend appears. The motion may be heard and determined at any time before the parties have announced ready for trial, but the trial shall not be unnecessarily continued or delayed for the hearing.

[Current Rule: Tex. R. Civ. P. 12].
[Original Source: Art. 320].
[Official Comments]:

Change: Minor textual change and the addition of the requirement that notice be served at least ten days before trial of the motion.

Change by amendment effective January 1, 1981. The existing rule is changed to permit a challenge to a plaintiff's attorney, so that all attorneys are subject to a challenge that they are in court without authority.

Rule 111. Attorney Conduct During Argument

(a) **Questions of Law; Questions on Motions; Exceptions to Evidence.** Arguments on questions of law shall be addressed to the court, and counsel should state the substance of the authorities referred to without reading more from books than is necessary to verify the statement. On a question on motions, exceptions to the evidence, and other incidental matters, the

counsel will be allowed only such argument as is necessary to present clearly the question raised, and refer to authorities on it, unless further discussion is invited by the court.

(b) Arguments on the Facts. Arguments on the facts should be addressed to the jury, when one is impaneled in a case that is being tried, under the supervision of the court. Counsel shall be required to confine the argument strictly to the evidence and to the arguments of opposing counsel.

(c) Side-Bar Remarks; Personal Attacks on Opposing Counsel. Side-bar remarks, and remarks by counsel of one side, not addressed to the court, while the counsel on the other side is examining a witness or arguing any question to the court, or addressing the jury, will be rigidly repressed by the court.

Mere personal criticism by counsel upon each other shall be avoided, and when indulged in shall be promptly corrected as a contempt of court.

(d) Objections. The court will not be required to wait for objections to be made when the rules as to arguments are violated, but should such violations not be noticed and corrected by the court, opposing counsel may ask leave of the court to rise and present his point of objection. However the court shall protect counsel from any unnecessary interruption made on frivolous and unimportant grounds.

(e) Addressing the Court. It shall be the duty of every counsel to address the court from his or her place at the bar, to rise to his or her feet when addressing the court, and to remain at his or her place at the bar while engaged in the trial of a case.

[Current Rule: Tex. R. Civ. P. 269].
[Original Source: Art. 2183].
[Official Comments]:

Change: Addition, in second sentence, of words ''or on all matters which are submitted by the charge, whether upon special issues or otherwise.''

Change by amendment of March 31, 1941. Source of subdivisions (b) through (h); s 36 through 42 (for District and County Courts).

Rule 112. Withdrawal of Attorney

An attorney may withdraw from representing a party only upon written motion for good cause shown. If another attorney is to be substituted as attorney for the party, the motion shall state: the name, address, telephone number, telecopier number, if any, 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 attorney 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; the party's last known address; and all pending settings and deadlines. 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 at the time of the withdrawal 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 another attorney remains or becomes substituted, another attorney in charge must be designated of record with notice to all other parties in accordance with Rule ___.

[Current Rule: Tex. R. Civ. P. 10].
[Original Source: 46 (for District and County Courts), unchanged].
[Official Comments]:

Change by amendment effective January 1, 1988. 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.

Change by amendment effective September 1, 1990. The amendment repeals the present rule and clarifies the requirements for withdrawal.

Rule 113. Agreements to be in Writing

Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it is in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record.

[Current Rule: Tex. R. Civ. P. 11].
[Original Source: 47 (for District and County Courts), unchanged].
[Official Comments]:

Change by amendment effective January 1, 1988. The amendment makes it clear that Rule 11 is subject to modification by any other rule of Civil Procedure.

B. COURTS

Rule 114. Effect of Vacant Judgship on Proceedings

If the office of a judge should become vacant, all pleadings, motions and proceedings shall be continued by the clerk until a judge is appointed or transferred to hold such court.

[Current Rule: Tex. R. Civ. P. 18].
[Original Source: Art. 2288].
[Task Force Comments: The substantive meaning of the former rule has not been changed. The only changes are in the phraseology.]

Rule 115. Recusal or Disqualification of Judges

(a) Filing of Motion. At least ten days before the date set for trial or other hearing in any court other than the Supreme Court, the Court of Criminal Appeals or the Court of Appeals, any party may file a motion to recuse or disqualify the judge before whom the case is pending on the grounds that such judge has either bias or prejudice either against the party or in favor of any adverse party.

If a judge is assigned to a case within ten days of the date set for trial or other hearing, the motion shall be filed at the earliest practicable time prior to the commencement of the trial or other hearing.

The motion shall be verified and must state with particularity the grounds why the judge before whom the case is pending should not sit. The motion shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence provided that facts may be stated upon information and belief if the grounds of such belief are specifically stated.

[Original Source: Art. 2288 and 28 U.S.C. § 143].

(b) Effect of Motion. Prior to any further proceedings in the case, the judge shall either recuse himself or request the presiding judge of the administrative judicial district to assign a judge to hear such motion. If the judge recuses himself, he shall enter an order of recusal and request the presiding judge of the administrative judicial district to assign another judge to sit, and shall make no further orders and shall take no further action in the case except for good cause stated in the order in which such action is taken.

If the judge declines to recuse himself, he shall forward to the presiding judge of the administrative judicial district, in either original form or certified copy, an order of referral, the motion, and all opposing and concurring statements. Except for good cause stated in the order in which further action is taken, the judge shall make no further orders and shall take no further action in the case after filing of the motion and prior to hearing on the motion. The presiding judge of the administrative judicial district shall immediately set a hearing before himself or some other judge designated by him, shall cause notice of such hearing to be given to all parties or their counsel, and shall make such other orders including orders on interim or ancillary relief in the pending cause as justice may require.

(c) Review of Judgment on Motion. If the motion is denied, it may be reviewed for abuse of discretion on appeal from the final judgment. If the motion is granted, the order shall not be reviewable, and the presiding judge shall assign another judge to sit in the case.

(d) Appointment and Assignment of Judges. The Chief Justice of the Supreme Court may also appoint and assign judges in conformity with this rule and pursuant to statute.

[Current Rule: Tex. R. Civ. P. 18a].
[Original Source: New Rule].
[Official Comments]:

Change by amendment effective April 1, 1984. Subdivision (a) is changed textually.

Change by amendment effective September 1, 1986. The words ''the Court of Criminal Appeals'' have been added in (a); and subsection ''1'' has been added to (g).

Rule 116. Grounds For Disqualification and Recusal of Judges

(a) Definitions. 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:

(A) 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;

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

(C) 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;

(D) 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) 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.

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

(1) they or lawyers they have practiced law with have served as a lawyer in the matter in controversy; or

(2) they have an interest in the subject matter in controversy either individually or as a fiduciary; or

(3) either of the parties is related to them by affinity or consanguinity within the third degree.

(c) Recusal. A judge shall recuse himself in any proceeding in which:

(1) the judge's impartially might reasonably be questioned;

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

(3) the judge or a lawyer with whom he or she previously practiced law has been a material witness concerning it;

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

(5) the judge knows that the he or she, individually or as a fiduciary, or his or her spouse or minor child residing in the same household as the judge, 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) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

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

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

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

(7) he or his spouse, or a person within the first degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding.

(d) Judge's Responsibility to Remain Apprised of His or Her Personal Affairs. 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.

(e) Waiver of Ground for Recusal. The parties to a proceeding may waive any ground for recusal after it is fully disclosed on the record.

(f) Excuse from Recusal. If a judge does not discover that he is recused under subparagraphs (c)(5) or (c)(5)(iii) until after he has devoted substantial time to the matter, he is not required to recuse himself if the judge or the person related to him divests himself of the interest that would otherwise require recusal.

[Current Rule: Tex. R. Civ. P. 18b].
[Original Source; New Rule].
[Official Comments]:

Change by amendment effective September 1, 1990. The grounds for a judge's mandatory recusal have been expanded from those in prior Rule 18b(2).

Rule 117. Interpreters

The court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

[Current Rule: Tex. R. Civ. P. 183].
[Original Source: Art. 3712, unchanged, Federal Rule 43(f)].
[Official Comments]:

Change by amendment effective September 1, 1990. To adopt procedures for the appointment and compensation of interpreters.

[Task Force Comments: Comment to 1990 change: To adopt procedures for the appointment and compensation of

interpreters. The provision regarding summoning interpreters and their conduct is deleted because it is covered by Rule 604, s of Civil Evidence].

Rule 118. Recording and Broadcasting of Court Proceedings

A trial court may permit broadcasting, televising, recording, or photographing of proceedings in the courtroom only in the following circumstances:

(a) in accordance with guidelines promulgated by the Supreme Court for civil cases, or

(b) when broadcasting, televising, recording, or photographing will not unduly distract participants or impair the dignity of the proceedings and the parties have consented, and consent to being depicted or recorded is obtained from each witness whose testimony will be broadcast, televised, or photographed, or

(c) the broadcasting, televising, recording, or photographing of investiture, or ceremonial proceedings.

[Current Rule: Tex. R. Civ. P. 18c].
[Original Source: New Rule, effective September 1, 1990].

Rule 119. Minutes Read and Signed

On the last day of the session, the minutes shall be read, corrected and signed in open court by the judge. Each special judge shall sign the minutes of such proceedings as were had by him.

[Current Rule: Tex. R. Civ. P. 20].
[Original Source: Art. 1918].
[Official Comments]:

Change: Elimination of former requirement that minutes be signed daily. Extension of the rule to judges of both district and county courts.

C. CLERKS

Rule 120. Duties of Clerk

(a) Assignment of File Numbers. The clerk shall assign suits consecutive file numbers.

[Current Rule: Tex. R. Civ. P. 23]
[Original Source: 82 (for District and County Courts)].

(b) Endorsement on Petitions. The clerk shall endorse the file number, the date and time of filing, and sign his or her name officially on each petition filed.

[Current Rule: Tex. R. Civ. P. 24].
[Original Source: Art. 1972].

(c) File Docket. The clerk shall keep a "file docket" and note thereon the file number of each suit, the names of the attorneys and the parties to the suit, and the nature of the suit.

[Current Rule: Tex. R. Civ. P. 25].
[Original Source: Art. 1973, with minor textual change].

(d) Order of Cases and Denoting File Number on Instruments. The clerk shall enter chronologically in the file docket and mark with the file number on all papers filed with the clerk, all process issued and return made thereon, all appearances, orders verdicts and judgments. The entries shall state the nature of each paper filed or writ issued and the substance of each order and judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall state the date the entry is made.

[Current Rule: Tex.R.Civ.P. 25].
[Original Source: Art. 1973, with minor textual change].

(e) Court Docket. The clerk shall keep a book known as a "court docket" that shall include in chronological order the file number of the cases, the names of the attorneys, the names of the parties to the suit, the nature of the suit, the pleas, the motions and the rulings of the court as made.

[Current Rule: Tex. R. Civ. P. 26].
[Original Source: Art. 1973, with minor textual change].

(f) Notice of Trial to Non-Resident Attorney. The clerk shall keep a record in his office of all cases set for trial, and it shall be his duty to inform any non-resident attorney of the date of setting of any case upon request by mail from such attorney, accompanied by a return envelope properly addressed and stamped. Failure of the clerk to furnish such information on proper request shall be sufficient ground for continuance or for a new trial when it appears to the court that such failure has prevented the attorney from preparing or presenting his claim or defense.

[Current Rule: Tex. R. Civ. P. 246].
[Original Source: New Rule].

(g) Exhibits. The clerk of the court in which the exhibits are filed shall retain and dispose of the exhibits as directed by the Supreme Court.

[Current Rule: Tex. R. Civ. P. 14b].
[Original Source: New Rule effective January 1, 1967].

D. COURT REPORTERS

Rule 121. Duties.

(a) General Duties. The duties of official court reporters shall be performed under supervision of the presiding judge of the court and shall include, but not be limited to:

(1) attending all sessions of court and making a full record of the evidence when requested by the judge or any party to a case, together with all objections to the admissibility of the evidence, the rulings and remarks of the court theron;

(2) making a full record of jury arguments and voir dire examinations when requested by the judge or any party to a case, together with all objections to the admissibility of the evidence, the rulings and remarks of the court thereon;

(3) filing all exhibits with the clerk;

(4) preparing official transcripts of all such evidence or other proceedings, or any portion thereof, subject to the laws of this state, these rules and the instructions of the presiding judge of the court; and

(5) performing such other duties relating to the reporter's official duties as may be directed by the judge presiding.

(b) Exhibits and Materials. Exhibits and materials used in the trial of a case and all of the records in a case are subject to such orders as the court may enter thereon.

(c) Inability to Fulfill Duties. In case of illness, press of official work, or unavoidable absence or disability of the official court reporter to perform the duties in (a) above, the presiding judge of the court may, in his discretion, authorize a deputy reporter to act in place of and perform the duties of the official reporter.

(d) Retention of Notes. When a defendant is convicted and sentenced to a term of more than two years and no appeal is taken, the court reporter shall file the nontranscribed notes of the proceeding with the district clerk within 20 days following the expiration of the time for perfecting appeal. The district clerk shall not be required to retain the notes beyond 15 years from the date of their filing.

[Current Rule: Tex. R. App. P. 11].
[Original Source: Tex. R. Civ. P. 376b and 376c].

Rule 122. Work

(a) Timeliness. It shall be the joint responsibility of the trial and appellate courts to insure that the work of the court reporter is accomplished timely.

(b) Setting Priorities. The presiding judge of the trial court shall insure that the work of the court reporter is timely accomplished by setting priorities on the various elements of the reporter's workload to be observed by the reporter in the conduct of business of the court reporter's office. Duties relating to proceedings before the court shall take preference over other work.

To aid the judge in setting the priorities in (b) above, each court reporter shall report in writing to the judge on a monthly basis the amount and nature of the business pending in the court reporter's office. A copy of this report shall be filed with the Clerk of the Court of Appeals of each district in which the court sits.

[Current Rule: Tex. R. App. P. 12].
[Original Source: Tex. R. Civ. P. 376b and 376c; See also Chapter 52 of the Government Code]

Rule 123. Filing of Exhibits by Reporter or Stenographer for Court

The reporter or stenographer for the court shall file with the clerk of the court all exhibits which were admitted in evidence or tendered on bill of exception during the course of any hearing, proceeding or trial.

[Current Rule: Tex. R. Civ. P. 75a].
[Original Source: New Rule effective January 1, 1967].

E. COURT RECORDS

Rule 124. Withdrawal, Return, Disposal and Copying of Exhibits

(a) Disposal of Exhibits. In (1) those cases in which judgment has been rendered on service of process by publication and in which no motion for new trial was filed within two years after judgment was signed, and (2) all other cases in which judgment has been signed for one year and in which no appeal was perfected or in which a perfected appeal was dismissed or concluded by a final judgment as to all parties and the issuance of the appellate court's mandate such that the case is no longer pending on appeal or in the trial court, the clerk, unless otherwise directed by the court, after first giving thirty day notice to the attorneys of record so that they have an opportunity to claim or withdraw the trial exhibits, may dispose of the exhibits.

If any exhibit is desired by more than one attorney, the clerk shall make the necessary copies and prorate the cost among all the attorneys desiring the exhibit.

If the exhibit is not a document or otherwise capable of reproduction, the party who offered the exhibit shall be entitled

to claim same; provided, however, that the party claiming the exhibit shall provide a photograph of said exhibit to any other party upon request and payment of the reasonable cost thereof by the other party.

[Current Rule: Tex. R. Civ. P. 14b, Supreme Court Order Relating to Retention and Disposition of Exhibits]

(b) Withdrawal of Exhibits by Parties. The court may by order entered on the minutes allow a filed exhibit to be withdrawn by any party only upon such party's leaving on file a certified photo, or other reproduced copy of such exhibit. The party withdrawing such exhibit shall pay the costs of such order and copy.

[Current Rule: Tex. R. Civ. P. 75b(a)].
[Original Source: New Rule effective January 1, 1967].

(c) Withdrawal of Exhibits for Appellate Purposes. The court reporter or stenographer of the court conducting the hearing, proceedings, or trial in which exhibits are admitted or offered in evidence, shall have the right to withdraw filed exhibits, upon giving the clerk proper receipt therefor, whenever necessary for the court reporter or stenographer to transmit such original exhibits to an appellate court or to otherwise discharge the duties imposed by law upon said court reporter or stenographer.

[Current Rule: Tex. R. Civ. P. 75b(b)].
[Original Source: New Rule effective January 1, 1967].

Rule 125. Inspection of Court Records and Papers

An attorney of record shall be allowed at all reasonable times to inspect the papers and records relating to any suit or other matter in which he is the attorney of record.

[Current Rule: Tex. R. Civ. P. 76].
[Original Source: Art. 318].

Rule 126. Sealing Court Records

(a) Standard for Sealing Court Records. Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed. Other court records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon a showing of all the following:

(1) a specific, serious and substantial interest which clearly outweighs:

(A) this presumption of openness;

(B) any probable adverse effect that sealing will have upon the general public health or safety;

(2) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

(b) Court Records. For purposes of this rule, court records means:

(1) all documents of any nature filed in connection with any matter before any civil court, except:

(A) documents of any nature filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents;

(B) documents in court files to which access is otherwise restricted by law;

(C) documents filed in an action originally arising under the Family Code.

(2) settlement agreements not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government.

(3) discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.

(c) Notice. Court records may be sealed only upon a party's written motion, which shall be open to public inspection. The movant shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted, stating: that a hearing will be held in open court on a motion to seal court records in the specific case; that any person may intervene and be heard concerning the sealing of court records; the specific time and place of the hearing; the style and number of the case; a brief but specific description of both the nature of the case and the records which are sought to be sealed; and the identity of the movant. Immediately after posting such notice, the movant shall file a verified copy of the posted notice with the clerk of the court in which the case in pending and with the Clerk of the Supreme Court of Texas.

(d) Hearing. A hearing, open to the public, on a motion to seal court records shall be held in open court as soon as is practicable, but not less than fourteen days after the motion is

filed and notice is posted. Any party may participate in the hearing. Non-parties may intervene as a matter of right for the limited purpose of participating in the proceedings, upon payment of the fee required for filing a plea in intervention. The court may inspect records in camera when necessary. The court may determine a motion relating to sealing or unsealing court records in accordance with the procedures prescribed for special appearances.

(e) Temporary Sealing Order. A temporary sealing order may be issued upon motion and notice to any parties who have answered in the case, upon a showing of compelling need from specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant before notice can be posted and a hearing held as otherwise provided herein. The temporary order shall set the time for the hearing required by section (d) of this rule and shall direct that the movant immediately give the public notice required in section (c) of this rule. The court may modify or withdraw any temporary order upon motion by any party or intervenor, notice to the parties, and hearing conducted as soon as is practicable. Issuance of a temporary order shall not reduce in any way the burden of proof of a party requesting sealing at the hearing.

(f) Order on Motion to Seal Court Records. A motion relating to sealing or unsealing court records shall be decided by written order, open to the public, which shall state: the style and number of the case; the specific reasons for finding whether the showing required by section (a) of this rule has been made; the specific portions of court records which are to be sealed; and the time period for which the sealed portions of the court records are to be sealed. The order shall not be included in any judgment or other order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.

(g) Continuing Jurisdiction. Any person may intervene as a matter of right at any time before or after judgment to seal or unseal court records. A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order. An order sealing or unsealing court records shall not be reconsidered on motion of any party or intervenor who had actual notice of the hearing preceding issuance of the order, without first showing changed circumstances materially affecting the order. Such circumstances need not be related to the case in which the order was issued. However, the burden of making the showing required by section (a) shall always be on the party seeking to seal records.

(h) Appeal. Any order (or portion of an order of judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party or intervenor who participated in the hearing preceding issuance of such order. The appellate court

may abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings.

(i) Application. Access to documents in court files not defined as court records by this rule remains governed by existing law. This rule does not apply to any court records sealed in an action in which a final judgment has been entered before its effective date. This rule applies to cases already pending on its effective date only with regard to:

(1) all court records filed or exchanged after the effective date;

(2) any motion to alter or vacate an order restricting access to court records, issued before the effective date.

[Current Rule: Tex. R. Civ. P. 76a].
[Original Source: New Rule effective September 1, 1990: New rule to establish guidelines for sealing certain court records in compliance with Government Code § 22.010].

Rule 127. Lost Records and Papers

When any papers or records are lost or destroyed during the pendency of a suit, the parties may, with the approval of the judge, agree in writing on a brief statement of the matters contained therein; or either party may supply such lost records or papers as follows:

(a) After three days' notice to the adverse party or his attorney, make written sworn motion before the court stating the loss or destruction of such record or papers, accompanied by certified copies of the originals if obtainable, or by substantial copies thereof.

(b) If, upon hearing, the court is satisfied that there are substantial copies of the original, an order shall be made substituting such copies or brief statement for the originals.

(c) Such substituted copies or brief statement shall be filed with the clerk, constitute a part of the cause, and have the force and effect of the originals.

[Current Rule: Tex. R. Civ. P. 77].
[Original Source: Art. 2289, unchanged, except that by Amendment effective December 31, 1943, subdivision b. has been reworded].

F. COURT COSTS

Rule 128. Parties Liable for Costs.

(a) In General. The rules of this section shall apply to any party who seeks a judgment against any other party.

[Current Rule: Tex. R. Civ. P. 147].
[Original Source: Art. 2073].
[Official Comments]:

Change by amendment effective April 1, 1984. The rules for security and rule for costs are made applicable to any party.

(b) Other Costs. Each party shall be liable for all of its costs. If costs cannot be collected from the party against whom they have been judged, execution may be issued against any other party for the uncollected amount.

[Current Rule: Tex. R. Civ. P. 127].
[Original Source: Art. 2052, unchanged].

(c) New Trial. the costs of new trial may either abide the result of the suit or may be taxed against the party to whom the new trial is granted, as the Court may adjudge when it grants a new trial.

[Current Rule: Tex. R. Civ. P. 138].
[Original Source: Art. 2063, unchanged].

Rule 129. Issuance and Service of Process

(a) Collection by Clerk. The clerk shall collect from the plaintiff a fee for services before issuing any process unless process is pursuant to section (d) of this rule.

[Current Rule: Tex. R. Civ. P. 142].
[Original Source: Art. 2067, unchanged].

(b) In-County Process. An officer receiving process to be executed shall not be entitled to demand, in advance, a fee for execution; instead, the fee shall be taxed and collected as other costs in the case.

[Current Rule: Tex. R. Civ. P. 17].
[Original Source: Art. 3911].
[Official Comment]:

Change: Addition of the matter to the first comma.

[Task Force Comment: Note that this rule is also included in the new rules as 9(c)].

(c) Out-of-County Process. No officer shall be compelled to execute any process coming from another county unless the fee for execution is paid in advance, except if process is pursuant to section (d) of this rule.

[Current Rule: Tex. R. Civ. P. 126].

[Original Source: Art. 2051 (second sentence), with minor textural change].

(d) Indigent Parties. If indigent filing is requested and the clerk officially endorses the process as "pauper oath filed," the officer receiving the process for service shall serve it.

[Current Rule: Tex. R. Civ. P. 126].
[Original Source: Art. 2051].

Rule 130. Collection

(a) How Costs are Collected. After judgment, if a responsible party fails or refuses to pay costs within ten days after demand, the clerk may certify a copy of the bill of costs, and provide the same to an officer for collection. The certified bill has the force and effect of an execution. Removal by appeal has no effect on this rule.

[Current Rule: Tex. R. Civ. P. 129].
[Original Source: Art. 2054, unchanged].
[Official Comments]:

Change by amendment effective April 1, 1984. The words ''at the end of the term'' are dropped from the last sentence.

(b) Officer to Levy. The officer may levy upon a party's property to satisfy the costs due; the officer may sell such property as under execution. When the party is a nonresident of the county in which the suit is pending, payment of costs maybe demanded of the party's attorney of record. Unless compelled to levy, the clerk shall not be allowed to charge a fee for certifying a copy of the bill of costs.

[Current Rule: Tex. R. Civ. P. 130].
[Original Source; Art. 2055, with minor textual changes].

(c) Execution for Costs. On demand of any party to whom costs are due, the officer shall issue an execution for costs at once. This rule does not apply to executors, administrators, or guardians in cases in which costs are adjudged against the estate of a deceased person or ward.

[Current Rule: Tex. R. Civ. P. 149].
[Original Source: Art. 2077, with minor textual changes].

Rule 131. Party's Recovery of Its Costs

(a) General. The successful party shall recover from its adversaries, jointly and severally, all costs incurred. The court may, for good cause, stated on the record, adjudge the costs otherwise than as provided by law or in these rules. This rule includes costs of motions and costs of new trials.

[Current Rule: Tex. R. Civ. P. 131 and 141].

[Original Source: Art. 2056 and 2066].

(b) Reduction on Demand. When the plaintiff's demand is reduced by payment to an amount not within the Court's jurisdiction, the defendant shall recover its costs.

[Current Rule: Tex. R. Civ. P. 136].
[Original Source: Art. 2061, unchanged].

(c) Assault, Battery or Defamation Claims. In suits for assault, battery, or defamation, if the verdict awards the plaintiff less than twenty dollars, each party shall pay its own costs.

[Current Rule: Tex. R. Civ. P. 137].
[Original Source: Art. 2062, unchanged].

Rule 132. Taxable Costs

(a) Taxable costs include, but are not limited to:

(1) Filing fees;

(2) Expenses for blood tests required by statute;

(3) Guardian ad litem fees;

(4) Receiver fees.

(b) Costs not taxable include:

(1) Photocopies not required by law;

(2) Attorney fees;

(3) Expert fees;

(4) Inspection and medical examination expenses;

(5) Deposition expenses

[Task Force Comment: This is a new rule and needs to be expanded].

Rule 133. Security for Costs

(a) Rule for Costs. Upon motion of a party, interested court officer, or the Court itself, a party seeking affirmative relief may be ordered to give security for costs at any time before final judgment. If so ordered, the party has twenty days after receiving notice of the order's entry to comply, or its claim shall be dismissed.

[Current Rule: Tex. R. Civ. P. 143].
[Original Source: Art. 2068].

[Official Comments]:

Change: Substitution of twenty day period for reference to next term of court.

Change by amendment effective January 1, 1971. Language has been changed to provide that any party seeking affirmative relief may be ruled for costs upon motion of any party or by the court on its own motion, and the words ''knowledge or'' formerly appearing before ''notice'' in last sentence have been deleted.

(b) Cost Bonds. All cost bonds shall authorize judgment against all obligors for the costs entered in the final judgment. No further security shall be required if the costs are secured by a bond filed by the party required to give security for costs.

[Current Rule: Tex. R. Civ. P. 144 and 148].
[Original Source: Art. 2069 and 2074, unchanged].

(c) Deposit for Costs. In lieu of a cost bond, a party may deposit with the clerk a sum as the Court from time to time may designate as sufficient to pay accrued costs.

[Current Rule: Tex. R. Civ. P. 146].
[Original Source: Art. 2071, with minor textual change].
[Official Comments: Art. 2072 and (Vernon's) Art. 2072a were not deemed procedural. These statutes deal with special provisions exempting certain parties from giving security for costs. Related articles on the same general subject will be found in Vernon's Statutes as Articles 279a, 1174, 2072a, 2276, 2276a, 3700, and 7880-126a].

(d) Deposit in Lieu of Surety Bond.

Wherever these rules provide for the filing of a surety bond, the party may in lieu of filing the bond deposit cash or other negotiable obligation of the government of the United States of America or any agency thereof, or with leave of court, deposit a negotiable obligation of any bank or savings and loan association chartered by the government of the United States of America or any state thereof that is insured by the government of the United States of America or any agency thereof, in the amount fixed for the surety bond, conditioned in the same manner as would be a surety bond for the protection of other parties. Any interest thereon shall constitute a part of the deposit.

Rule 134. Inability to Pay Costs

(a) In General. In lieu of filing security for costs of an original action, a party who is unable to afford said costs shall file an affidavit as herein described. A "party who is unable to afford costs" is defined as a person who is presently receiving a governmental entitlement based on indigency or any other person who has no ability to pay costs. Said affidavit, and the party's

action, shall be processed by the clerk in the manner prescribed by this rule.

(b) Procedure. Upon the filing of the affidavit, the clerk shall docket the action, issue citation and provide such other customary services as are provided any party. After service of citation, the defendant may contest the affidavit by filing a written contest giving notice to all parties, provided that temporary hearings will not be continued pending the filing of the contest. If the court shall find at the first regular hearing in the course of the action that the party (other than a party receiving a governmental entitlement) is able to afford costs, the party shall pay the costs of the action. Reasons for such a finding shall be contained in an order. Except with leave of court, no further steps in the action will be taken by a party who is found able to afford costs until payment is made.

If the party's action results in monetary award, and the court finds sufficient monetary award to reimburse costs, the party shall pay the costs of the action. If the court finds that another party to the suit can pay the costs of the action, the other party shall pay the costs of the action.

(c) Affidavit. The affidavit shall contain complete information as to the party's identity, the nature and amount of governmental entitlement income received by the party, the nature and amount of employment income received by the party, other income received by the party (interest, dividends, ect.), spouse's income if available to the party, property owned by the party (other than homestead), cash or checking accounts, dependents, debts, and monthly expenses. The affidavit shall contain the following statements: "I am unable to pay the court costs. I verify that the statements made in this affidavit are true and correct." The affidavit shall be sworn before a Notary Public.

(d) Attorney's Certification. If the party is represented by an attorney who is providing free legal services, without contingency, because of the party's indigency, said attorney may file an affidavit to that effect to assist the court in understanding the financial condition of the party.

[Current Rule: Tex. R. Civ. P. 145].
[Original Source: Art. 2070].
[Official Comments]:

Change by amendment effective April 1, 1984. The requirement that the contest be tried at the term of court at which the affidavit is filed is deleted.

Change by amendment effective January 1, 1988. The purpose of this rule is to allow indigents to file suit and have citation issued based solely on an affidavit of indigency filed with the suit.