LEGAL AID
BEXAR COUNTY LEGAL AID ASSOCIATION
434 SOUTH MAIN AVENUE, SUITE 300
SAN ANTONIO, TEXAS 78204 (512) 227-0111

A United Way Service

March 19, 1984

Justice James Wallace
The Supreme Court of Texas
Box 12248
Austin, Texas 78711

Re: 1984 Amendments to the Texas Rules of Civil Procedure, Rule 329.

Dear Sir:

The revision to Rule 329, Motion for New Trial on Judgment Following Citation by Publication, effective April 11, 1984, permits a motion for new trial following judgment on publication to be filed within two years after entry of the judgment, but provides that:

> d. If the motion is filed more than thirty days after the judgment was signed, all of the periods of time specified in Rule 306a(7) shall be computed as if the judgment were signed thirty days before the date of filing the motion.

As I read this new rule, and as it was explained in the videotape training provided by the State Bar of Texas, it is designed to kick these proceedings into the normal appellate timetable, which means that the motion is overruled by operation of law if not decided within 45 days after filing, appeal bond must be filed in 60 days and the record must be at the Court of Civil Appeals 70 days after filing of the motion.

This action, of course, reverses at least forty years of caselaw on the issue of when such a motion should be decided, and is probably an advance toward prompt disposition of such suits. The revision committee may, however, have overlooked the effect of failing to also amend subsection (a) of Rule 329, which states:

> (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. (emphasis added)

This last sentence has been interpreted to mean that certified mail service on the attorney of record for the publication plaintiff is not sufficient. Gilbert et al. v. Lobley, 214 SW2d 646 (Tex.Civ.App.- - Ft. Worth, 1948 writ ref'd). Personal service on the parties adversely interested and an opportunity to reply "as in other cases" has been the rule. 4 McDonald, Tex.Civ.Prac. §18.23.2 (1971). Since filing the motion tolled the two-year period this procedure was reasonable, and no time limit was imposed as to the period within which the motion had to be determined. 4 McDonald Tex.Civ.Prac., §18.23.1 (1971).

The new time limits, combined with the old practice relating to service of citation creates obvious problems. Citation as in other cases would permit the respondent to answer on "the Monday next after the expiration of 20 days" after service (Rule 101). After answering, a respondent is entitled to 10 days notice of a setting (Rule 245). Therefore, under the best possible conditions of citation and setting, movant would have 14 days or less to get an order granting new trial entered. Furthermore, since the time runs from the date of filing the motion, a respondent can effectively defeat a motion for new trial simply by evading service.

It appears to me there are two appropriate remedies to this dilemma. First, the court could allow Rule 21a service of the motion for new trial following publication upon the judgment plaintiff's attorney of record, so that issue could be joined and the matter decided as in other types of motions for new trial. This resolution seems questionable to me, since most attorneys do not maintain contact with former clients in any systematic way. It is probable, therefore, that Rule 21a service would prove ineffective to give actual notice to the parties affected, especially when the judgment may be discovered a year or longer after entry. Second, the court could compute the time limits from the date issue is joined, or from the date of service on the last respondent to be served, rather than from the date of filing the motion. The rules relating

to due diligence in issuance and service of citation which have been developed with respect to tort suits could be applied to prevent abusive delays in proceeding with such motions; it should also be made clear that respondents to such motions are not entitled to more than the minimum notice of hearing provided by Rule 21, or such time as is provided by local rules relating to other motions (in Bexar County this is normally 10 days).

In the meantime, as a senior attorney at Bexar County Legal Aid, I am advising my younger colleagues to issue citation and notice of a hearing, so that the respondent is given a setting on the motion within 45 days after filing. I have also advised them to issue certified mail notice to the attorney of record in the hope that an answer will render the service question moot.

I appreciate your time and attention in reviewing this comment. If I have misconstrued the revision or can be of any assistance in addressing the problem, please feel free to call on me.

Sincerely,

Charles G. Childress

CHARLES G. CHILDRESS
Chief of Litigation

CGC:lph

Texas
Soc
Liquids

October 1, 1986

Harry L. Tindall, Esquire
Tindall & Foster
2801 Texas Commerce Tower
Houston, Texas 77002-3094

Re: Revision of the "300 Series" Rules (actually Tex.R.Civ.P. 296 through and including crazy Rule 331)

Dear Harry,

Well, here is the "first" draft reorganizing the above referenced rules. I prepared it when we were working up the Texas Rules of Appellate Procedure. As you can see, not all of the "source" rules are covered either because of the Court Administration Act (e.g. Rule 330) or because I had already redrafted them to correspond to the TRAP package (e.g. Rules 306a and 306c).

What should we do now?

Best regards,

Bill

William V. Dorsaneo III

WVDIII:vm

enc.

cc: Luke Soules

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SCHOOL OF LAW
SOUTHERN METHODIST UNIVERSITY / DALLAS, TEXAS 75275

Rule ____. Judgment.

(a) In General. The judgment 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 parties all the relief to which they may be entitled either in law or equity. When a verdict is rendered, the court shall render judgment in conformity with the verdict unless the verdict is set aside or a new trial is granted or judgment is rendered notwithstanding the verdict or in disregard of particular jury findings as provided in Rule ____. 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.

(b) On Counterclaim. If the defendant establishes a demand against the plaintiff upon a counterclaim exceeding that established against him by the plaintiff, the court shall render judgment for defendant for such excess.

When a counterclaim is pleaded, the party in whose favor final judgment is rendered shall also recover the costs, unless it be made to appear on the trial that the counterclaim of the defendant was acquired after the commencement of the suit, in which case, if the plaintiff establishes a claim existing at the commencement of the suit, he shall recover his costs.

(c) Draft of 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.

(d) Conformity with Findings. In non-jury cases, where findings of fact and conclusions of law are requested and filed, and in jury cases, where a special verdict is returned, any party claiming that the findings of the court or the jury, as the case may be, do not support the judgment, may have noted in the record an exception to said judgment and thereupon take an appeal or writ of error, where such writ is allowed, without a statement of facts or further exceptions in the transcript, but the transcript in such cases shall contain the conclusions of law and fact or the special verdict and the judgment rendered thereon.

COMMENT: Paragraph (a) is based upon Tex. R. Civ. P. 300 and 301 (first and last two sentences). Paragraph (b) is Tex. R. Civ. P. 302 and 303. Paragraph (c) is Tex. R. Civ. P. 305. Paragraph (d) is Tex. R. Civ. P. 307.

Rule ____. Confession of Judgment.

Any person against whom a cause of action exists may, without process, appear in person or by attorney, and confess judgment therefor in open court as follows:

(a) A petition shall be filed and the justness of the debt or cause of action be sworn to by the person in whose favor the judgment is confessed.

(b) If the judgment is confessed by attorney, the power of attorney shall be filed and its contents be recited in the judgment.

(c) Every such judgment duly made shall operate as a release of all errors in the record thereof, but such judgment may be impeached for fraud or other equitable cause.

COMMENT: This proposed rule is copied from Tex. R. Civ. P. 314. This is a strange rule because before suit is brought, a person may not accept service and waive process, enter an appearance in open court or confess a judgment. C.P.R.C. § 30.001 superseding R.C.S. Art. 2224.

Rule _____. Particular Judgments; Enforcement.

(a) In General. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise.

(b) 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.

(c) Judgment Against Personal Representative. A judgment for the recovery of money against an executor, administrator or guardian, as such, shall state that it is to be paid in the due course of administration. No execution shall issue thereon, but it shall be certified to the proper court, sitting in matters of probate, to be there enforced in accordance with law, but judgment against an executor appointed and acting under a will dispensing with court action in reference to such estate shall be enforced against the property of the testator in the hands of such executor, by execution, as in other cases.

(d) Child Support Orders; Contempt. In cases where the court has ordered periodical payments for support of a child or children, as provided in the statutes relating to divorce, and it is claimed that such order has been disobeyed, the person claiming that such disobedience has occurred shall make same known to the judge of the court ordering such payments. Such judge may

thereupon appoint a member of the bar of his court to advise with and represent said claimant. It shall be the duty of said attorney, if he shall in good faith believe that said order has been contemptuously disobeyed, to file with the clerk of said court a written statement, verified by the affidavit of said claimant, describing such claimed disobedience. Upon the filing of such statement, or upon his own motion, the court may issue a show cause order to the person alleged to have disobeyed such support order, commanding him to appear and show cause why he should not be held in contempt of court. Notice of such order shall be served on the respondent in such proceedings in the manner provided in Rule 21a of the Texas Rules of Civil Procedure, not less than ten days prior to the hearing on such order to show cause. The hearing on such order may be held either in term time or in vacation. No further written pleadings shall be required. The court, the parties and the attorneys may call and question witnesses to ascertain whether such support order has been disobeyed. Upon a finding of such disobedience, the court may enforce its judgment by orders as in other cases of civil contempt.

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

(e) Judgments in Foreclosure Proceedings. Judgments for the foreclosure of mortgages and other liens shall be that the

plaintiff recover his debt, damages and costs, with a foreclosure of the plaintiff's lien on the property subject thereto, and, except in judgments against executors, administrators and guardians, that an order of sale shall issue to any sheriff or any constable within the State of Texas, directing him to seize and sell the same as under execution, in satisfaction of the judgment; and, if the property cannot be found, or if the proceeds of such sale be insufficient to satisfy the judgment, then to take the money or any balance thereof remaining unpaid, out of any other property of the defendant, as in case of ordinary executions.

When an order foreclosing a lien upon real estate is made in a suit having for its object the foreclosure of such lien, such order shall have all the force and effect of a writ of possession as between the parties to the foreclosure suit and any person claiming under the defendant to such suit by any right acquired pending such suit; and the court shall so direct in the judgment providing for the issuance of such order. The sheriff or other officer executing such order of sale shall proceed by virtue of such order of sale to place the purchaser of the property sold thereunder in possession thereof within thirty days after the day of sale.

COMMENT: Paragraph (a) of this proposed rule is based upon Tex. R. Civ. P. 308's first sentence and Tex. R. Civ. P. 621. Paragraph (b) is taken from the remainder of Tex. R. Civ. P. 308. Paragraph (c) is a slightly modified version of Tex. R. Civ. P. 313. Paragraph (d) is Tex. R. Civ. P. 308-A. Paragraph (e) is Tex. R. Civ. P. 309 and 310.

Rule ____. Findings by the Court.

(a) Request. In any case tried in the district or county court without a jury, the judge shall, at the request of either party, state in writing his findings of fact and conclusions of law. Such request shall be filed within ten days after the final judgment is signed. Notice of the filing of the request shall be served on the opposite party as provided in Rule 21a of the Texas Rules of Civil Procedure.

(b) Time to File; Need for Reminder. When demand is made therefor, the court shall prepare its findings of fact and conclusions of law and file same within thirty days after the judgment is signed. Such findings of fact and conclusions of law shall be filed with the clerk and shall be part of the record. If the trial judge shall fail so to file them, the party so demanding, in order to complain of the failure, shall, in writing, within five days after such date, call the omission to the attention of the judge, whereupon the period for preparation and filing shall be automatically extended for five days after such notification.

(c) Additional or Amended Findings. After the judge so files original findings of fact and conclusions of law, either party may, within five days, request of him specified further, additional, or amended findings; and the judge shall, within five days after such request, and not later, prepare and file such further, other or amended findings and conclusions as may be proper, whereupon they shall be considered as filed in due time. Notice of the filing of the request provided for herein

shall be served on the opposite party as provided in Rule 21a of the Texas Rules of Civil Procedure.

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

COMMENT: This proposed rule is based on Tex. R. Civ. P. 296-299.

Rule ____. Motion for Judgment N.O.V. or in Disregard of Jury Findings.

(a) Motions. Upon motion and reasonable notice, the court may render judgment non obstante veredicto if a directed verdict would have been proper. Upon like motion and notice, the court may disregard any jury finding that has no support in the evidence.

(b) Judgment Notwithstanding Jury Findings; Cross-Points. When judgment is rendered non obstante veredicto or notwithstanding the findings of a jury on one or more special issues, the appellee may bring forward by cross-point contained in his brief filed in the Court of Appeals any ground which would have vitiated the verdict or would have prevented an affirmance of the judgment had one been rendered by the trial court in harmony with the verdict, including although not limited to the ground that one or more of the jury's findings have insufficient support in the evidence or are against the overwhelming preponderance of the evidence as a matter of fact, and the ground that the verdict and judgment based thereon should be set aside because of improper argument of counsel.

The failure to bring forward by cross-points such grounds as would vitiate the verdict shall be deemed a waiver thereof; provided, however, that if a cross-point is upon a ground which requires the taking of evidence in addition to that adduced upon the trial of the cause, it is not necessary that the evidentiary hearing be held until after the appellate court determines that the cause be remanded to consider such cross-point.

COMMENT: Paragraph (a) of this proposed rule is based upon the "provisos" in the second sentence of Tex. R. Civ. P. 301. Paragraph (b) is taken from the last paragraph of current Tex. R. Civ. P. 324.

Rule ____. Remittitur.

Any party in whose favor a judgment has been rendered may remit any part thereof:

(a) In open court, and such remittitur shall be noted on the docket and entered in the minutes.

(b) In vacation, by executing and filing with the clerk a written release signed by him or his attorney of record, and attested by the clerk with his official seal. Such releases shall be a part of the record of the cause.

(c) Execution shall issue for the balance only of such judgment.

COMMENT: This proposed rule is Tex. R. Civ. P. 315. See Tex. R. Civ. P. 319.

Rule ____. Relief from Clerical Errors.

(a) Correction of Mistakes. Mistakes in the record of any judgment or decree may be amended by the judge in open court according to the truth or justice of the case after notice of the application therefor has been given to the parties interested in such judgment or decree, and thereafter the execution shall conform to the judgment as amended.

The opposite party shall have reasonable notice of an application to enter a judgment munc pro tunc.

(b) Misrecitals Corrected. Where in the record of any judgment or decree of a court, there shall be any omission or mistake, miscalculation or misrecital of a sum or sums of money, or of any name or names, if there is among the records of the cause any verdict or instrument of writing whereby such judgment or decree may be safely amended, it shall be corrected by the court, wherein such judgment or decree was rendered, or by the judge thereof in vacation, upon application of either party, according to the truth and justice of the case. The opposite party shall have reasonable notice of the application for such amendment.

(c) Correction in Vacation. The judge making such correction in vacation shall embody the same in a judgment, and certify thereto and deliver it to the clerk who shall enter it in the minutes. Such judgment shall constitute a part of the record of the cause, and any execution thereafter issued shall conform to the judgment as corrected.

COMMENT: Paragraph (a) of this proposed rule is Tex. R. Civ. P. 316. Paragraph (b) is Tex. R. Civ. P. 317. Paragraph (c) is Tex. R. Civ. P. 318. See Tex. R. Civ. P. 319.

Rule ____. New Trials.

(a) In General. 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. When it appears to the court that a new trial should be granted on a point or points that affect only a part of the matters in controversy and that such part is clearly separable without unfairness to the parties, the court may grant a new trial as to that party only, provided that a separate trial on unliquidated damages alone shall not be ordered if liability issues are contested.

(b) Form of Motion for New Trial. Each motion for new trial shall be in writing and signed by the party or his attorney.

Grounds of objections couched in general terms - as that the court erred in its charge, in sustaining or overruling exceptions to the pleadings, and in excluding or admitting evidence, the verdict of the jury is contrary to law, and the like -- shall not be considered by the court.

Each point relied upon in a motion for new trial or in arrest of judgment shall briefly refer to that part of the ruling of the court, charge given to the jury, or charge refused, admission or rejection or evidence, or other proceedings which are designated to be complained of, in such a way that the objection can be clearly identified and understood by the court.

(c) Misconduct of Jury or Officer. 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.

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 recieved for these purposes.

(d) Excessive or Inadequate Damages. New trials may be granted when the damages are manifestly too small or too large, provided that whenever the court shall direct a remittitur in any action, and the same is made, and the party for whose benefit it is made shall appeal in said action, then the party remitting shall not be barred from contending in the appellate court that said remittitur should not have been required either in whole or in part, and if the appellate court sustains such contention it

shall render such judgment as the trial court should have rendered without respect to said remittitur.

(e) Weight of the Evidence. Not more than two new trials shall be granted either party in the same cause because of insufficiency or weight of the evidence.

COMMENT: This proposed rule is based upon Tex. R. Civ. P. 320, 321, 322, 326, 327 and 328.

Rule ____. When Motion for New Trial is Prerequisite to Complaint on Appeal.

(a) Motion for New Trial Not Required. A point in a motion for a new trial is not a prerequisite to a complaint on appeal in either a jury or a nonjury case, except as provided in subdivision (b).

(b) Motion for New Trial Required. A point in a motion for a new trial is a prerequisite to the following complaints on appeal:

(1) 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;

(2) A complaint of factual insufficiency of the evidence to support a jury finding;

(3) A complaint that a jury finding is against the overwhelming weight of the evidence;

(4) A complaint of inadequacy of excessiveness of the damages found by the jury; or

(5) Incurable jury argument if not otherwise rules on by the trial court.

COMMENT: This proposed Rule is taken from the first two paragraphs of Tex. R. Civ. P. 324.

Rule ____. Time for Filing Post-Trial Motions.

The following rules shall be applicable to motions for new trial and motions to modify, correct, or reform judgments (other than motions to correct the record under Rules ___ and ___) 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 or 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 Rules 316 and 317, 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, correct, or reform a judgment (as distinguished from motion to correct the record of a judgment under Rules ___ and ___), 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. Each such motion shall be in writing and signed by the party or his attorney and shall specify the respects in which the judgment should be modified, corrected, or reformed. The overruling of such a motion shall not preclude the filing of a motion for a new trial, nor shall be overruling of a motion for a new trial preclude the filing of a motion to modify, correct, or reform.

(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 purusant to Rule ___ or ___ 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.

COMMENT: This proposed rule is based upon Tex. R. Civ. P. 3296.

Rule ____. 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 sufficient bond payable to the plaintiff in the judgment, in an amount fixed in accordance with Rule 364 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, all of the periods of time specified in Rule 306a(7) shall be computed as if the judgment were signed thirty days before the date of filing the motion.

COMMENT: This proposed rule is Tex. R. Civ. P. 329a.

TINDALL & FOSTER
ATTORNEYS AT LAW
2601 TEXAS COMMERCE TOWER
HOUSTON, TEXAS 77002-3094
(713) 229-6733
CABLE: US VISA

HARRY L. TINDALL*
CHARLES C. FOSTER**
ELLEN ELKINS GRIMES*
PATRICK W. DUGAN**
GARY E. ENDELMAN
KENNETH JAMES HARDER

BOARD CERTIFIED - TEXAS BOARD OF LEGAL SPECIALIZATION

* FAMILY LAW
** IMMIGRATION & NATIONALITY LAW

MEMORANDUM

TO: All Supreme Court Advisory Committee Members

FROM: Harry L. Tindall

DATE: October 22, 1986

RE: Rules 99 through 107, Texas Rules of Civil Procedure

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I enclose for each of you a revised set of proposed Rule changes for Rules 103 - 107, Texas Rules of Civil Procedure. Slight changes incorporate suggestions that I have received from Sam Sparks of El Paso. I also enclose proposed changes to Rules 99 - 102 incorporating suggestions of William V. Dorsaneo, III and Tom Ragland. These later changes have not been discussed by the Committee and are not necessarily connected to changes in Rules 103 - 107. I would ask that each of you review the enclosed proposed Rule changes and contact me with any comments regarding the same prior to our meeting on November 7, 1986.

Harry L. Tindall

RULE 99. PROCESS

(a) CITATION ISSUANCE: Upon the filing of the petition, the Clerk shall forthwith issue a Citation and deliver the Citation to Plaintiff or Plaintiff's attorney, who shall be responsible for the prompt service of the Citation and a copy of the petition. Upon request of the plaintiff separate or additional Citations shall issue against any defendant.

(b) FORM OF CITATION: The Citation shall be signed by the Clerk, be under the seal of the Court, contain the name of the Court, and the names of the parties, be directed to the defendant, shall state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and shall command the defendant to appear in the case by filing a written answer to the plaintiff's pleading at or before 10:00 A.M. of the Monday next after the expiration of twenty days after the date of service of Citation.

COMMENT: This rule combines Rules 99 through 101 into a single rule. It closely follows Federal Rule of Civil Procedure 4 but does not alter the substantive requirements of current Texas practice. Existing Rules 99-101 will be repealed.

Rule 102. Territorial Limits of Effective Service. Repealed

COMMENT: This rule is obsolete and does not correctly state the law. Citation may be served beyond the jurisdiction of this State and thus is not consistent with existing practice. The Rule was written before Rule 120a was added to the current Rules.

RULE 103. ~~OFFICER~~ WHO MAY SERVE

All process may be served by (1) ~~the~~ any sheriff or ~~any~~ constable ~~of any county in which the party to be served is found, or, if by mail, either of the county in which the case is pending or of the county in which the party to be served is found;~~ or (2) by any person authorized by the Court who is not less than eighteen years of age and who is authorized by written order. ~~; provided that~~ [N]o ~~officer~~ person who is a party to or interested in the outcome of the suit shall serve any process. ~~therein.~~ [S]ervice by registered or certified mail and citation by publication ~~may~~ 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.

Change: Court is permitted to authorize persons other than Sheriffs or Constables to serve Citation. Further, Sheriffs or Constables are not restricted to service in their county. Last sentence is added to avoid the necessity of motions and fees.

~~RULE 104. IF OFFICER DISQUALIFIED~~

~~If there is no officer qualified to serve the process in a particular suit in the county in which the same is to be executed, the judge of the court in which said cause is pending may enter an order in the cause directing that all process to be executed in said county shall be served by a resident citizen of such county, to be designated in said order, and thereupon such person so designated shall have full power and authority as an officer of the court to execute any such process or writ and make due return thereof as in other cases. But in every such case a certified copy of such order shall be attached to all such process or writs.~~

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.

Change: Amended to conform to Rule 103.

RULE 106. ~~SERVICE OF CITATION~~ METHOD OF SERVICE

(a) Unless the citation or an order of the court otherwise directs, the citation shall be served by any ~~officer~~ 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, with delivery restricted to addressee only, 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 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 an officer or by any disinterested adult named in the court's order~~ 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.

Change: Caption is changed to more correctly reflect substance of rule. Other changes conform 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 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.

No default judgment shall be granted in any cause until the citation with proof of service as provided by this rule, or as ordered by the court in the event citation is executed under Rule 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.

Change: Amendments are made to conform to changes in Rule 103.

LAW OFFICES

SOULES & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

STEPHANIE A. BELBER
ROBERT E. ETLINGER
PETER F. GAZDA
ROBERT D. REED
SUSAN D. REED
RAND J. RIKLIN
JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

October 24, 1986

Mr. Sam Sparks
Grambling and Mounce
P.O. Drawer 1977
El Paso, Texas 79950-1977

RE: Supreme Court Advisory Committee

Dear Sam:

Enclosed are the recommendations of the COAJ with regard to Rules 99-107. I am sending a copy to each member of your subcommittee and it will be included in our November agenda.

Very truly yours,

Luke

LUTHER H. SOULES III
Chairman

LHSIII/tat
enclosure
cc: David Beck
William Dorsaneo
Charles Morris
Tom Ragland
Harry Reasoner
Harry Tindall

Recommended by COAJ — please consider in upcoming rewrite.

Time — reduce & send to all mem… of SCAC Sub… + 1/7 agenda

RULE 99. ISSUANCE

When a petition is filed with the clerk, he shall promptly issue such citations, for the defendant or defendants, as shall be requested by any party or his attorney. Such citations shall be delivered to the plaintiff or the plaintiff's attorney, or those persons responsible for service as set forth in these Rules, as shall be requested by the plaintiff or the plaintiff's attorney.

except as prov… for service by ma… in Rule 106(a)(2)

~~RULE 103, OFFICER WHO MAY SERVE.~~

RULE 103, OFFICER OR PERSON WHO MAY SERVE.

All process may be served by the sheriff or any constable of any county in which the party to be served is found [~~or, if by mail, either of the county in which the case is pending or of the county in which the party to be served is found~~]; provided that no officer who is a party to or interested in the outcome of a suit shall serve any process therein. [~~Service by registered or certified mail and citation by publication may be made by the clerk of the court in which the case is pending.~~] Service of citation by publication may be made by the clerk of the court in which the case is pending and service by mail as contemplated by Rule 106(a)(2) may be made by the clerk of the court in which the case is pending or may be made by the party, or the attorney of the party who is seeking service.

RULE 106. SERVICE OF CITATION

(a) Unless the citation or an order of the court otherwise directs, the citation shall be served by any officer or person authorized by Rule 103 by

(1) delivering to the defendant, in person, by a sheriff or constable referred to in Rule 103, 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, with delivery restricted to addressee only, return receipt requested, a true copy of the citation with a copy of the petition attached thereto.~~]

(2) mailing a copy of the citation, with a copy of the petition attached thereto, (by first class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to the form hereinafter set out and a return envelope, postage prepaid and addressed to the sender. If no acknowledgement of service under this subdivision of this Rule is received by the sender within twenty (20) days after the date of mailing, service of such citation and petition shall be made by some other form of service provided in this rule. However, unless good cause is shown for not doing so, the court may order the payment of costs of other methods of personal service by the person served if such person does not complete and return the notice and acknowledgement of receipt within twenty (20) days after mailing. The notice and acknowledgment of receipt of citation and petition shall each be executed under oath.

10/11 This needs early implementation per COAJ since US Mail has ceased "addressee only" services. … COAJ

00000045

The notice and acknowledgment shall conform substantially to the following form.

A. B., Plaintiff)		(IN THE DISTRICT
)		(
V.)	NO.	(COURT OF
)		(
C. D., Defendant)		(COUNTY, TEXAS

TO: (Name and address of person to be served)

The enclosed citation and petition are served pursuant to Rule 106 of the Texas Rules of Civil Procedure.

You must complete the acknowledgment part of this form and return one copy of the completed form to the sender within twenty (20) days.

You must sign and date the acknowledgment. If you are served on behalf of a corporation, partnership, or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within twenty (20) days, you, (or the party on whose behalf you are being served) may be required to pay any expenses incurred in serving a citation and petition in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the petition as required by the provisions of the citation. If you fail to do so, judgment by default may be taken against you for the relief sought in the petition.

This notice and acknowledgment of receipt of citation and petition will have been mailed on (insert date).

_____
(Signature)

Date of Signature ____

SWORN TO BEFORE ME by the said (Signing party) this ____ day of _____, 19 .

_____
Notary Public, State of
( )
My commission expires:

ACKNOWLEDGMENT OF RECEIPT OF CITATION AND PETITION

I received a copy of the citation and of the petition in the above captioned matter on the day of , 19 .

Signature

(Relationship to entity or authority to receive service of process.

Date of Signature

SWORN TO BEFORE ME by the said (Signing party) on this day of , 19 .

Notary Public, State of
( )
My commission expires:

(b) 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 an officer or by any disinterested adult named in the court's order 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.

RULE 107. RETURN OF CITATION.

The return of the officer executing a citation served under Rule 106(a)(1) 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. When the officer has not served the citation, the return shall show the diligence used by the officer to execute the same and the cause of failure to execute it, and where the defendant is to be found, if he can ascertain. [When the citation was served by registered or certified mail as authorized by Rule 106, the return by the officer must also contain the return receipt with the addressee's signature.] When the citation was served by mail as authorized in Rule 106(a)(2), the person who has secured such service shall return to the clerk of the court in which the case is pending, the sworn notice and acknowledgment of receipt of the citation and petition. Such returned receipt shall be attached to the original citation issued by the clerk and the return of such citation shall be completed by the clerk of the court in which the case is pending in a manner to correctly reflect completion of service by mail.

Where citation is executed by an alternative method as authorized by Rule 106(b), proof of service shall be made in the manner ordered by the court.

No default judgment shall be granted in any cause until the citation with proof of service as provided by this rule, or ordered by the court in the event citation is executed under Rule 106(b), shall have been on file with the clerk of the court ten days, exclusive of the day of filing and the day of judgment.

BRIEF STATEMENT OF REASONS FOR REQUESTED CHANGES AND ADVANTAGES TO BE SERVED BY PROPOSED NEW RULES:

The proposed Rule changes arise from the fact that the provisions of Rule 106(a)(2) are no longer available for use. That Rule provides that service of citation may be accomplished by:

> "(2) Mailing to the defendant by registered or certified mail, with delivery restricted to addressee only, return receipt requested, a true copy of the citation with a copy of the petition attached thereto." (Emphasis added)

At the time that portion of Rule 106 was adopted, the United States Postal Service provided an "Addressee Only" service but that particular service is no longer available through the postal service. The closest approximation of such a service is now known as "Restricted Delivery" and assures delivery only to the addressee or to some agent of the addressee who has been authorized in writing to receive the mail of the addressee. It is the feeling of the Subcommittee that this Restricted Delivery may not fulfill the requirements of due process insofar as notice is concerned.

The Subcommittee feels that service by mail is a useful device and ought to be preserved if it is possible to do so. The proposed Rule changes conform closely to a method of service available under Rule 4 of the Federal Rules of Civil Procedure. The particular parts of Rule 4 that areadapted to the proposed changes to the Texas Rules of Civil Procedure are:

RULE 4. Process:

...

(c) SERVICE.
(C) A summons and complaint may be served upon a defendant of any class referred to in Paragraph (1) or (3) of Subdivision (d) of this Rule -

...

(ii) By mailing a copy of the summons and of the complaint (by First Class Mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to Form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this Rule is received by the sender within twenty (20) days after the date of mailing, service of such summons and complaint shall be maid under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

(D) Unless good cause is shown for not doing so, the Court shall order the payment of the costs of personal service by the person served if such person does not complete and return within twenty (20) days after mailing, the notice and acknowledgment of receipt of summons.

(E) The notice and acknowledgment of receipt of summons and complaint shall be executed under oath or affirmation.

While the proposed service by mail will not be used in a majority of situations, it is felt that it will be useful under a number of circumstances and that the return of the acknowledgment of receipt of service will constitute a compliance with the due process requirement of notice.

Rules 99, 103, 106 & 107
Item 2.c.

NUNN, GRIGGS, WETSEL & JONES

LAWYERS

CHAS. L. NUNN
CHAS. R. GRIGGS
ROD E. WETSEL
C. E. JONES

DOSCHER BUILDING
SWEETWATER, TEXAS 79556-0488

TELEPHONE
AREA CODE 915
236/6648
P.O. BOX 488

March 13, 1986

Tenn
SCAC Sub C
4/7 Agenda

CERTIFIED MAIL - RETURN RECEIPT REQUESTED
Receipt No. P 458 526 813

State Bar Staff Coordinator
for Administration of Justice Committee
P. O. Box 12487
Austin, Texas 78711

I enclose in final form proposed revisions of Rules 99, 103, 106 and 107 of the Texas Rules of Civil Procedure. This proposal is to be submitted to the next Administration of Justice Committee meeting, which I believe will be April 5. It is requested that this matter be circulated to members of the Committee as early as possible and that the proposal be included on the agenda for that meaeting.

If any problem arises, please contact me by telephone.

Sincerely,

Charles R. Griggs

CRG:bl
Enclosure
cc: The Honorable James Wallace
Associate Justice, Slupreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Mr. Mike Gallagher
Attorney at Law
7th Floor, Allied Bank Plaza
1000 Louisiana
Houston, Texas 77002

The Honorable John Cornyn
37th District Court
Bexar County Courthouse
San Antonio, Texas 78205

Mr. Phillip Johnson
Attorney at Law
10th Floor, First National Bank Building
Lubbock, Texas 79408

00000050

Mr. Donald O. Baker
Attorney at Law
1024 Tenth Street
Huntsville, Texas 77340

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 99. ISSUANCE

When a petition is filed with the clerk, he shall promptly issue such citations, for the defendant or defendants, as shall be requested by any party or his attorney.

END OF EXISTING RULE 99

II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parenthesis; underline proposed new wording; see example attached).

RULE 99. ISSUANCE

When a petition is filed with the clerk, he shall promptly issue such citataions, for the defendant or defendants, as shall be requested by any party or his attorney. Such citations shall be delivered to the plaintiff or the plaintiff's attorney, or those persons responsible for service as set forth in these Rules, as shall be requested by the plaintiff or the plaintiff's attorney.

END OF PROPOSED RULE 99

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

00000051

Respectfully submitted,

Date _____ 197__

_____ Name

_____

_____ Address

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 103. OFFICER WHO MAY SERVE

All process may be served by the sheriff or any constable of any county in which the party to be served is found, or, if by mail, either of the county in which the case is pending or of the county in which the party to be served is found; provided that no officer who is party to or interested in the outcome of a suit shall serve any process therein. Service by registered or certified mail and citation by publication may be made by the clerk of the court in which the case is pending.

END OF EXISTING RULE 103

II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parenthesis; underline propos new wording; see example attached).

~~RULE 103. OFFICER WHO MAY SERVE~~

RULE 103. OFFICER OR PERSON WHO MAY SERVE.

All process may be served by the sheriff or any constable of any county in which the party to be served is found [~~or, if by mail, either of the county in which the case is pending or of the county in which the party to be served is found~~]; provided that no officer who is a party to or interested in the outcome of a suit shall serve any process therein. [~~Service by registered or certified mail and citation by publication may be made by the clerk of the court in which the case is pending.~~] Service of citation by publication may be made by the clerk of the court in which the case is pending and service by mail as contemplated by Rule 106(a)(2) may be made by the clerk of the court in which the case is pending or may be made by the party, or the attorney of the party who is seeking service.

etc.

END OF PROPOSED RULE 103

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

00000052

Respectfully submitted,

Date _____ 197__

_____ Name

_____

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 106. SERVICE OF CITATION

(a) Unless the citation or an order of the court otherwise directs, the citation shall be served by any officer authorized by Rule 103 by

(1) delivering to the defendant, in person, a true copy of the citation with date of delivery endorsed thereon with a copy of the petition attached thereto, or

(2) mailing to the defendant by registered or certified mail, with delivery restricted to addressee only, 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 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

EXISTING RULE 106 CONTINUED ON NEXT PAGE

II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parentheses; underline proposed new wording; see example attached).

RULE 106. SERVICE OF CITATION

(a) Unless the citation or an order of the court otherwise directs, the citation shall be served by any officer or person authorized by Rule 103 by

(1) delivering to the defendant, in person, by a sheriff or constable referred to in Rule 103, 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, with delivery restricted to addressee only, return receipt requested, a true copy of the citation with a copy of the petition attached thereto;]~~

(2) mailing a copy of the citation, with a copy of the petition attached thereto, (by first class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to the form hereinafter set out and a return envelope, postage prepaid and addressed to the sender. If no acknowledgment of service under this subdivision of this Rule is received by the sender within twenty (20) days after the date of mailing, service of such citation and petition shall be made by some other form of service provided in this rule. However, unless good cause is shown for not doing so, the court may order the

etc.

PROPOSED RULE 106 CONTINUED ON NEXT PAGE

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

00000953

Respectfully submitted,

Date _____ 197__

_____ Name

_____

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:

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(1) by an officer or any disinterested adult named in the court's order 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.

END OF EXISTING RULE 106

II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parentnesis; underline propo new wording; see example attached).

1
2 payment of costs of other methods of personal service by the
3 person served if such person does not complete and return the
4 notice and acknowledgement of receipt within twenty (20) days
5 after mailing. The notice and acknowledgement of receipt of
6 citation and petition shall each be executed under oath.
7 The notice and acknowledgment shall conform substantially to the following form:
8
9
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etc.

A. B., Plaintiff)		(IN THE DISTRICT
)		(
V.)	NO.	(COURT OF
)		(
C. D., Defendant)		(COUNTY, TEXAS

TO: (Name and address of person to be served)

The enclosed citation and petition are served pursuant to Rule 106 of the Texas Rules of Civil Procedure.

You must complete the acknowledgment part of this form and return one copy of the completed form to the sender within twenty (20) days.

You must sign and date the acknowledgment. If you are served on behalf of a corporation, partnership, or other entity, you must indicate under your signature your

PROPOSED RULE 106 CONTINUED ON NEXT PAGE

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

00000054

Respectfully submitted,

Date _____ 197__

_____ Name

_____

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:

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II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parenthesis; underline proposed new wording; see example attached).

relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within twenty (20) days, you, (or the party on whose behalf you are being served) may be required to pay any expenses incurred in serving a citation and petition in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the petition as required by the provisions of the citation. If you fail to do so, judgment by default may be taken against you for the relief sought in the petition.

This notice and acknowledgment of receipt of citation and petition will have been mailed on (insert date).

_____
(Signature)

_____
Date of Signature

"

etc.

PROPOSED RULE 106 CONTINUED ON NEXT PAGE

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

00000055

Respectfully submitted,

Date _____ 197__

_____ Name

_____

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:

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II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parentheses; underline proposed new wording; see example attached).

1
2 SWORN TO BEFORE ME by the said (Signing party) this
3 day of , 19 .
4
5 Notary Public, State of
6 ( )
7 My commission expires:
8
9 ACKNOWLEDGMENT OF RECEIPT OF CITATION AND PETITION
10
11 I received a copy of the citation and of the petition in
12 the above captioned matter on the day of , 19 .
13
14 Signature
15
16 (Relationship to entity of
17 authority to receive service of
18 process.
19
20 Date of Signature
21
etc.

PROPOSED RULE 106 CONTINUED ON NEXT PAGE

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

00000056

Respectfully submitted,

Date _____ 197__ _____ Name

_____

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:

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II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parentheses; underline proposed new wording; see example attached).

1
2 SWORN TO BEFORE ME by the said (signing party) on the
3 day of , 19 .
4
5 Notary Public, State of
6 ( )
7 My commission expires:
8
9 (b) Upon motion supported by affidavit stating the
10 location of the defendant's usual place of business or usual
11 place of abode or other place where the defendant can
12 probably be found and stating specifically the facts showing
13 that service has been attempted under either (a)(1) or (a)(2)
14 at the location named in such affidavit but has not been
15 successful, the court may authorize service
16 (1) by an officer or by any disinterested adult named
17 in the court's order by leaving a true copy of the cita-
18 tion, with a copy of the petition attached, with anyone
19 over sixteen years of age at the location specified in
20 such affidavit, or
21 (2) in any other manner that the affidavit or other
etc. evidence before the court shows will be reasonably
effective to give the defendant notice of suit.

END OF PROPOSED RULE 106

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

00000057

Respectfully submitted,

Date _____, 197__

_____ Name

_____

_____

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 107. RETURN OF CITATION

The return of the officer 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 must be signed by the officer officially. When the citation was served by registered or certified mail as authorized by Rule 106, the return by the officer must also contain the return receipt with the addressee's signature. When the officer has not served the citation, the return shall show the diligence used by the officer 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.

No default judgment shall be granted in any cause until the citation with proof of service as provided by this rule, or as ordered by the court in the event citation is executed under Rule 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.

END OF EXISTING RULE 107

II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parentheses; underline proposed new wording; see example attached).

RULE 107. RETURN OF CITATION

The return of the officer executing a citation served under Rule 106(a)(1) 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. When the officer has not served the citation, the return shall show the diligence used by the officer to execute the same and the cause of failure to execute it, and where the defendant is to be found, if he can ascertain. ~~[When the citation was served by registered or certified mail as authorized by Rule 106, the return by the officer must also contain the return receipt with the addressee's signature.]~~ When the citation was served by mail as authorized in Rule 106(a)(2), the person who has secured such service shall return to the clerk of the court in which the cause is pending, the sworn notice and acknowledgement of receipt of the citation and petition. Such returned receipt shall be attached to the original citation issued by the clerk and the return of such citation shall be completed by the clerk of the court in which the case is pending in a manner to correctly reflect completion of service by mail.

Where citation is executed by an alternative method as authorized by Rule 106(b), proof of service shall be made in the manner ordered by the court.

etc.

PROPOSED RULE 107 CONTINUED ON NEXT PAGE

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

00000058

Respectfully submitted,

Date _____ 197__

_____ Name

_____

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:

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II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parentheses; underline proposed new wording; see example attached).

No default judgment shall be granted in any cause until the citation with proof of service as provided by this rule, or as ordered by the court in the event citation is executed under Rule 106(b), shall have been on file with the clerk of the court ten days, exclusive of the day of filing and the day of judgment.

END OF PROPOSED RULE 107

etc.

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

SEE FOLLOWING PAGE

00000059

Respectfully submitted

Date _____ 197_

Name

BRIEF STATEMENT OF REASONS FOR REQUESTED CHANGES
AND
ADVANTAGES TO BE SERVED BY PROPOSED NEW RULES:

The proposed Rule changes arise from the fact that the provisions of Rule 106(a)(2) are no longer available for use. That Rule provides that service of citation may be accomplished by:

> "(2) Mailing to the defendant by registered or certified mail, with delivery restricted to addressee only, return receipt requested, a true copy of the citation with a copy of the petition attached thereto." (Emphasis added)

At the time that portion of Rule 106 was adopted, the United States Postal Service provided an "Addressee Only" service but that particular service is no longer available through the postal service. The closest approximation of such a service is now known as "Restricted Delivery" and assures delivery only to the addressee or to some agent of the addressee who has been authorized in writing to receive the mail of the addressee. It is the feeling of the Subcommittee that this Restricted Delivery may not fulfill the requirements of due process insofar as notice is concerned.

The Subcommittee feels that service by mail is a useful device and ought to be preserved if it is possible to do so. The proposed Rule changes conform closely to a method of service available under Rule 4 of the Federal Rules of Civil Procedure. The particular parts of Rule 4 that areadapted to the proposed changes to the Texas Rules of Civil Procedure are:

RULE 4. Process.

...

(c) SERVICE.

(C) A summons and complaint may be served upon a defendant of any class referred to in Paragraph (1) or (3) of Subdivision (d) of this Rule -

...

(ii) By mailing a copy of the summons and of the complaint (by First Class Mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to Form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this Rule is received by the sender within twenty (20) days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (3)(3).

(D) Unless good cause is shown for not doing so, the Court shall order the payment of the costs of personal service by the person served if such person does not complete and return within twenty (20) days after mailing, the notice and acknowledgment of receipt of summons.

(E) The notice and acknowledgment of receipt of summons and complaint shall be executed under oath or affirmation.

While the proposed service by mail will not be used in a majority of situations, it is felt that it will be useful under a number of circumstances and that the return of the acknowledgment of receipt of service will constitute a compliance with the due process requirement of notice.

Respectfully Submitted,

CHARLES R. GRIGGS
P. O. Box 438
Sweetwater, Texas 79556

Date: March 13, 1986

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

September 18, 1985

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

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

Re: Rule 101

Dear Luke and Mike:

I am enclosing a letter in regard to the above rule.

May I suggest that this matter be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure

LOGAN, LEAR, GOSSETT, HARRISON, REESE & WILSON
ATTORNEYS AT LAW
12 NORTH ABE
P. O. DRAWER 911
SAN ANGELO, TEXAS 76902-0911

RALPH LOGAN (1913-1983)
TOM LEAR
GREG GOSSETT
GEORGE W. HARRISON
MORRIS M. REESE, JR.
CLYDE WILSON
JONATHAN R. DAVIS

TELEPHONE (915) 653-3291

September 12, 1985

Jim
with love
from
Greg

Honorable John Hill, Chief Justice
Texas Supreme Court
Supreme Court Building
Austin, Texas 78711

Re: Proposal of Amendment to the Texas Rules of Court

Dear Chief Justice Hill:

I would like to propose a change in the requisites for citation as set out in Rule 101 of the Texas Rules of Civil Procedure. Presently our citation has required the defendant "to appear by filing a written answer to plaintiff's petition at or before ten o'clock A.M. of the Monday next after the expiration of 20 days after the date of service thereof."

My objection to this anachronism is two-fold. First, the computation of the answer day can sometimes be confusing, particularly if the twentieth day falls on Monday or the Monday is a holiday. Secondly, often intelligent clients assume that they must appear in court at ten o'clock on the answer day and are confused by this terminology. Why not provide that an answer must be filed within a definite time, such as 20 days as required in federal court?

In this age of fair notice and consumer protection I would also suggest that citation might contain some simple statement to the recipient, such as: You have been sued. You have a right to retain an attorney. If you do not file a written answer with the appropriate court within the appropriate time, a default judgment may be taken against you.

Your consideration to the above will be greatly appreciated.

With warmest regards, I remain

Very truly yours,

LOGAN, LEAR, GOSSETT, HARRISON, REESE & WILSON

Greg Gossett

GG:lt

00000063

Texas Tech University

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

October 15, 1986

Mr. Luther H. Soules III
Soules & Reed
800 Milam Building
East Travis at Soledad
San Antonio, Texas 78205

In re Rules 205-09

Dear Luke:

I am attaching the committee changes to Rule 209, the Supreme Court Order relating thereto, and the corresponding revisions to Rules 205-08.

Sincerely yours,

Hadley

J. Hadley Edgar
Professor of Law

JHE/nt
Enclosure

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Rule 205. Submission to Witness; Changes; Signing

When the testimony is fully transcribed the deposition officer shall submit 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, unless such examination and signature are waived by the witness and by the parties.

Any changes in form or substance which the witness desires to make shall be entered upon the original deposition transcript by the officer with the statement of the reasons given by the witness for making such changes. The original deposition transcript shall then be signed by the witness, 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 officer shall sign it 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; and the original deposition transcript may then be used as fully as though signed; unless on motion to suppress, made as provided in Rule 207, the Court holds that the reasons given for the refusal to sign require its rejection ~~of the deposition~~ in whole or in part.

Rule 206. Certification and Filing by Officer; Exhibits; Copies; Notice of Filing

1. Certification and Filing by Officer. The officer shall certify on the deposition transcript that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. The officer shall include the amount of his charges for the preparation of the completed deposition transcript in the certification. Unless otherwise ordered by the court, he shall then securely seal the original deposition transcript in an envelope endorsed with the title of the action and marked "Deposition transcript of (here insert name of witness)" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

2. Exhibits. 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 if the person producing the materials desires to retain them he 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 to verify the copies by comparison with the originals, or (b) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition transcript. Any party may move for an order that the original be

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annexed to and returned with the deposition transcript to the court, pending final disposition of the case.

3. Copies. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition transcript to any party or to the deponent.

4. Notice of Filing. The person filing the deposition transcript shall give prompt notice of its filing to all parties.

5. Inspection of Filed Deposition Transcript. After it is filed, the deposition transcript shall remain on file and be available for the purpose of being inspected by the deponent or any party and the deposition transcript may be opened by the clerk or justice at the request of the deponent or any party, unless otherwise ordered by the court.

Rule 207. Use of Deposition Transcript in Court Proceedings

1. Use of Deposition Transcript. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition transcript, insofar as admissible under the rules of evidence applied as though the witness were then present and testifying, 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.

2. Substitution of parties pursuant to these rules does not affect the right to use deposition transcripts previously taken; and, when a suit in a court of the United States or of this or any other state has been dismissed and another suit

involving the same subject matter is brought between the same parties or their representatives or successors in interest, all deposition transcripts lawfully taken and duly filed in the former suit may be used in the latter as if originally taken therefor.

3. Motion to Suppress. When a deposition transcript shall have been filed in the court and notice given at least one entire day before the day on which the case is called for trial, errors and irregularities in the notice, and errors in the manner in which the testimony is transcribed or the deposition transcript is prepared, signed, certified, sealed, endorsed, transmitted, filed or otherwise dealt with by the deposition officer under 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.

Rule 208. Depositions Upon Written Questions

1. (No change)

2. (No change)

3. (No change)

4. (No change)

5. 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 in the manner provided in paragraph 2 of Rule 204, to

take the testimony of the witness in response to the questions in the manner provided in paragraph 3 of Rule 204 and to prepare, certify, and file or mail the deposition transcript, in the manner provided by Rules 205 and 206, attaching thereto the copy of the notice and questions received by him.

The person filing the deposition transcript shall give prompt notice of its filing to all parties.

After it is filed, the deposition transcript shall remain on file and be available for the purpose of being inspected by the witness or deponent or any party and the deposition transcript may be opened by the clerk or justice at the request of the witness or deponent or any party, unless otherwise ordered by the court.

Rule 209. Retention and Disposition of Deposition Transcripts and Depositions upon Written Questions (New Rule)

The clerk of the court in which the deposition transcripts and depositions upon written questions are filed shall retain and dispose of the same as directed by the Supreme Court.

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SUPREME COURT ORDER RELATING TO RETENTION AND DISPOSITION OF DEPOSITION TRANSCRIPTS AND DEPOSITIONS UPON WRITTEN QUESTIONS

In compliance with the provisions of 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 no motion for new trial was filed within two(2) years after judgment was rendered on service of process by publication and (2) all other cases in which judgment has been entered by the clerk for one hundred-eighty (180) days and either there was no perfection of appeal or there was perfection of appeal and order of dismissal or rendition of final judgment as to all parties and mandate issued so that the case is no longer pending or on appeal.

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 (30) 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.

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74

LAW OFFICES

SOULES & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

STEPHANIE A. BELBER
ROBERT E. ETLINGER
PETER F. GAZDA
ROBERT D. REED
SUSAN D. REED
RAND I. RIKLIN
JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

July 14, 1986

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

Dear Bill:

Enclosed is a letter from Justice Wallace regarding consideration of amendments to Rule 74 and Rule 131 of the Texas Rules of Appellate Procedure. Please draft, in proper form for Committee consideration, an appropriate Rule change for submission to the Committee and circulate it among your Standing Subcommittee members to secure their comments.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

June 27, 1986

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

Re: Rules 74 and 131
Texas Rules of Appellate Procedure

Dear Luke and Mike:

The Court requests that your committees consider amending Rules 74 and 131 of the Texas Rules of Appellate Procedure as follows:

Rule 74. Requisites of Briefs

Briefs shall be brief. In civil cases the brief shall consist of not more than 30 pages exclusive of the Table of Contents and Index of Authorities. The court may, upon motion, permit a longer brief. Briefs shall be filed ...

...

Rule 131. Requisites of Applications

The application for writ of error shall be addressed to "The Supreme Court of Texas," and shall state the name of the party or parties applying for the writ. The parties shall be

designated as "Petitioner" and "Respondent." Application for writ of error shall be as brief as possible shall consist of not more than 30 pages exclusive of the Table of Contents and the Index of Authorities. The court may upon motion permit a longer brief. The respondent should file ...

...

Sincerely yours,

James P. Wallace
Justice

JPW:fw

LAW OFFICES

SOULES & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

STEPHANIE A. BELBER
ROBERT E. ETLINGER
PETER F. GAZDA
ROBERT D. REED
SUSAN D. REED
RAND J. RIKLIN
JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

October 24, 1986

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

RE: Appellate Rules 80(a) and 90(a)

Dear Bill:

The enclosed is a recommendation from COAJ. Please circulate within your subcommittee and draft Please draft, in proper form for Committee consideration, appropriate Rule changes for submission to the Committee and circulate it among your Standing Subcommittee members to secure their comments.

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

Very truly yours,

Luke

LUTHER H. SOULES III
Chairman

LHSIII/tat
encl/as

Tina —
11/7 Agenda
Refer to SubC

Delete "Decision and" from caption

90(a)

Amend Rule 90(a) Texas Rules of Appellate Procedure as follows:

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

unanimously approved

Comment: This charge is suggested by the Supreme Court. The purpose is to require the court of appeals to address all pertinent issues rather than decide the case on one or more dispositive issues and disregard the other pertinent issues. This quite often results in a reversal and remand by the Supreme Court causing unnecessary delay in disposition of the cause along with an unnecessary second consideration of the cause by the court of appeals.

Amend 90(a)

c. Final Judgment: a

final judgment of a Court of Appeals contain a ruling on every Point of Error before the Court.

move "(c)" to "(d)"

move "(d)" to "(e)"

00000075

Unanimously approved as Co-Sd 10-11-86

LAW OFFICES

SOULES & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

STEPHANIE A. BELBER
ROBERT E. ETLINGER
PETER F. GAZDA
ROBERT D. REED
SUSAN D. REED
RAND I. RIKLIN
JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

September 25, 1986

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

Dear Bill:

Enclosed is a letter from E. Landers Vickery regarding amendment of Rule 136(a) of the Texas Rules of Appellate Procedure. Please draft, in proper form for Committee consideration, an appropriate Rule change for submission to the Committee and circulate it among your Standing Subcommittee members to secure their comments.

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

Very truly yours,

Luther H. Soules III

LUTHER H. SOULES III

LHSIII/tat
encl/as

LAW OFFICES
McCAMISH, INGRAM, MARTIN & BROWN
A PROFESSIONAL CORPORATION

PETER J. BALEGA
BYRD L. BONNER
DICK TERRELL BROWN
JAMES M. BURGER*
CURTIS W. CANNON
JAMES S. CHESLOCK
GEORGE COWDEN III
J. ANDREW CRAWFORD
ROSS S. CROSSLAND
J. PATRICK DEELY
ROBIN A. FASTENAU*
JAMES P. GALLATIN, JR.*
EILEEN M. GLEIMER*
JEFFREY A. GREEN
DAVID S. HURT
JAMES E. INGRAM
RICHARD J. KENDALL*
JACK T. KOLZE
LAWRENCE R. LINNARTZ
THOMAS A. MARTIN
DALE V. MATTHEWS
JOHN N. McCAMISH, JR.
JOHN A. McCULLOUGH*
PAULA J. McGEE
DONALD PANCOAST NOBLE
THOMAS M. O'BRIEN
JONATHAN D. PAUERSTEIN
BRUCE S. RAMO*
ROBERT A. RAPP
NANCY HAMILTON REYES
JOHN T. REYNOLDS
WILLIAM M. PORK
CHARLES W. SCHOLZ
RICHARD A. SMITH*
BRUNO SONSINO
E. LANDERS VICKERY
ANDREW S. VIGER
BOB WAGGONER
O. JERROLD WINSKI

ROBERT R. MURRAY
OF COUNSEL

*NOT ADMITTED IN TEXAS

650 MBANK TOWER
221 WEST 6TH STREET
AUSTIN, TEXAS 78701
(512) 474-6575
TELECOPIER (512) 474-1388

1200 TWO REPUBLICBANK PLAZA
175 E. HOUSTON
SAN ANTONIO, TEXAS 78205
(512) 225-5500
TELEX 910871104
TELECOPIER (512) 225-1283

McCAMISH, INGRAM, MARTIN,
BROWN & McCULLOUGH,
P.C.
2828 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20007
(202) 337-7900
TELECOPIER (202) 338-1299

September 15, 1986

Mr. Luther H. Soules, III
Chairman
Texas Supreme Court
Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, Texas 78205

Re: Tex. R. App. P. 136(a)

To the Committee:

I recently consulted Rule 136(a) to determine when to file my brief in response to my opponent's application for writ of error. This Rule prescribes filing the response fifteen days after "the filing of the application for writ of error." It is unclear whether this language refers to the filing by the petitioner (Rule 130) or to the filing by the Clerk of the Supreme Court (Rule 132(c)).

When I called the Clerk's office, I was advised that the Supreme Court interprets Rule 136(a) to refer to the filing (i.e. docketing) of the application in the Supreme Court. Nonetheless, this interpretation is not clear from the face of Rule 136(a). To help prevent high blood pressure among Texas attorneys, I would suggest that the Committee clarify this Rule the next time the Rules of Civil Procedure are amended.

Sincerely,

E. Landers Vickery

E. Landers Vickery

ELV/dsg

00000077

LAW OFFICES

SOULES & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

STEPHANIE A. BELBER
ROBERT E. ETLINGER
PETER F. GAZDA
ROBERT D. REED
SUSAN D. REED
RAND I. RIKLIN
JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

June 25, 1986

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

Dear Bill:

Enclosed is a letter from Judge Frank Douthitt regarding consideration of an amendment to Rule 356. Please draft, in proper form for Committee consideration, an appropriate Rule change for submission to the Committee and circulate it among your Standing Subcommittee members to secure their comments.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as

00000078

RAY SHIELDS
COURT REPORTER

LINDA BURLESON
COURT COORDINATOR

FRANK J. DOUTHITT
JUDGE
97TH JUDICIAL DISTRICT
ARCHER, CLAY AND
MONTAGUE COUNTIES

P. O. BOX 530
HENRIETTA, TX 76365—0530

AREA CODE 817
538-5913

May 21, 1986

Luther H. Soules, III
800 Milam Building, East Travis at Soledad
San Antonio, Texas 78205

Re: Supreme Court Advisory Committee

Dear Luke:

Thanks for your list of the members of the above committee. I was in the State Bar Center at the same time as your meeting and ran into Frank Branson. He invited me to come in and talk to the Committee about my problem, but we were so busy with Pattern Jury Charges I, I never got in.

From looking at the Committee it's obvious that very few of the Committee members practice in a multi-county district court. Because of that, I want to make one more short comment about the two matters I have brought to the Committee's attention in the past. One has to do with recusal practice and the other with time table for filing the record in appellate courts. Both are problems in rural districts. Apparently, they are not such a problem in an urban district. I believe I know why.

R182

RECUSAL PRACTICE

My original proposal was that the lawyer be required to swear to a Motion for Recusal setting forth with particularity the reasons he seeks to recuse a judge. That the rule be changed (and probably the statute) to permit the judge that the recusal is directed against to summarily deny it if it does not state a proper cause for removal.

In an urban area, there are many judges in the courthouse and a judge can simply get one of them to come hear the recusal motion. It creates no problem. In a rural area, we have to get a judge from somewhere else assigned. The recusal has to wait until that judge can be there and until the judge against whom the recusal is directed can be available in the county that the recusal is filed in. He may have to recess a jury trial in another county in order to meet the visiting judge's schedule, or make some other kind of docket change. Usually, the recusals that I see are actually made for the purposes of delay and that is obvious. If the lawyers had to swear to these, they wouldn't file them except when they were true. They would not then be summarily denied by the judge against whom they are directed.

A couple of years ago when my daughter was showing heifers, we had a show in Tucumcari, New Mexico followed by one in Cheyenne, Wyoming. Because a recusal that did not state proper grounds had been filed in a criminal case, set for jury trial the week following the calf shows, I had to make a trip from Tucumcari back to Henrietta when a visiting judge could be here so I could have the hearing on the recusal. I then went on to Cheyenne to be with my daughter showing heifers. If I had not done that, the case would not have gone to trial the week in question.

I am probably the only judge that ever had to make that kind of a trip because of a recusal practice, but it's ridiculous to have rules that permit lawyers to use recusals for continuances.

35
R 25

APPELLATE TIME TABLE

Luke, I am not going to go into any further detail about the rules themselves and the time table. From the transcript furnished me of the meeting, the Committee understands that. What they don't understand, is that the rules permit a lawyer to perfect an appeal and request the statement of facts as

little as 10 days prior to the time it's due in the Appellate Court. I don't know of any court reporter except those with a CAT who can get out a record in 10 days if he's got any business in his courthouse. It's a bigger problem in the country because if you have 30 minutes or an hour of dead time in the court, and you are in the city, the court reporter is always at his office and can simply go in and type during that time period.

In the country, my court reporter is with me in the other two counties and the office is in Clay County. If we are sitting idle for an hour in Montague, he cannot be working on that record.

There is no problem with the 60 days permitted if the lawyer has to notify the court reporter timely and there is no problem with the additional time period in the event of a motion for new trial. However, it just makes sense that a court reporter ought to have at least 30 days to get a statement of facts ready.

If the rule is not going to be changed, I think the appellate judges should quit going to the conferences and complaining about court reporter delay when the Supreme Court's own rules create some of the problem.

Luke, my feeling about these two matters is really not much different than a lot of other things. The Legislature very seldom thinks about those of us out here that have got miles and miles between courthouses. I guess those drafting the rules seldom do either. I don't know all the details of how your committee operates. However, I obviously have not been able to articulate the problem well by letter and probably haven't improved on it much with this letter. If the Committee ever takes testimony from individuals about these matters, I would certainly like to appear. Based upon the transcripts you have furnished me with respect to both of these matters, I do not think the problem that exists

for rural judges is being addressed. I know the rules should not be tailored just to fit the rural judges. However, they should not be drafted ignoring us either.

Luke, I appreciate your consideration of this matter and if I can do anything further to at least get the real issues discussed, I would appreciate hearing from you.

Sincerely,

Frank J. Douthitt

FJD:lb

352

ARCHER, CLAY AND
MONTAGUE COUNTIES

RAY SHIELDS
COURT REPORTER

FRANK J. DOUTHITT
JUDGE
97TH JUDICIAL DISTRICT

P. O. BOX 530
HENRIETTA, TEXAS 76365

AREA CODE 317
538-5913

May 1, 1986

Luther H. Soules, III
800 Milan Building
East Travis at Soledad
San Antonio, Texas 78205

Dear Luke:

Thanks for the information from the meeting of the Supreme Court Advisory Committee. This is the second suggestion that I have made that I feel the Committee has not understood. The problems we have in rural, multi-county districts are just different than the problems in San Antonio, Houston and Dallas.

Would you please send me a list of the members of this Committee. Frankly, I want to see if the Committee is just overbalanced with city folks.

The request that the Committee virtually ignored about the 90 day, 100 day problem on statement of facts and transcripts was treated as if I wanted to give more time to court reporters. What I want, is a requirement that the lawyers let the court reporter know something before there is only 10 days left. My court reporter's office is in Henrietta. The large part of our business is in Montague and the smallest part in Archer City. Court reporters in the big cities, when the court is idle, can simply go to their office and start to work. Court reporters in the country with more than one county can work only when they're in the county where their office is.

I am getting sick and tired of hearing about court reporter delay at every meeting I go to when I know that my court reporter is working nights and weekends when he has to to get a statement of facts done. He seldom takes depositions and that is not causing any problem. In fact, he seldom has to ask for an extension of time and then only when some lawyer perfects an appeal at the last minute.

I guess I just wanted to get this off my chest. But, I'd still like a list of the members of the Committee.

It has been a long time since I've seen you and perhaps we'll run together again one of these days.

Very truly yours,

Frank J. Douthitt

FJD:lb

ARCHER, CLAY AND
ONTAGUE COUNTIES

RAY SHIELDS
COURT REPORTER

FRANK J. DOUTHITT
JUDGE
97TH JUDICIAL DISTRICT

P. O. BOX 530
HENRIETTA, TEXAS 76365

AREA CODE 817
538-5913

November 14, 1985

Hon. James P. Wallace
P.O. Box 12248
Austin, Texas 78711

Dear Jim:

In the last couple of years every time we have a judges' meeting, somebody on the Supreme Court raises criticisms of court reporter delay in preparing statements of fact for appellate purposes. I may have written you about this before. I know I have commented to the Chief on the matter.

Recently, a case tried by me has had appeal perfected in a manner timely under the rules, but impossible with respect to the clerk and court reporter. It will require my court reporter to get an extension of time, which extension will probably be later cited by some appellate judge at some meeting to demonstrate "court reporter delay".

The problem is the two rules which have to do with perfecting appeal (Rule 356) and filing of the statement of facts and transcript (Rule 386). As you know Rule 386 provides that the transcript and statement of facts will be filed in the Appellate Court within 60 days of the date the judgment is signed unless there has been a motion for new trial filed in which case it must be filed within 100 days. Rule 356 provides that appeal must be perfected by the filing of a cost bond within 30 days of the date the judgment is signed, or if a motion for new trial is filed, within 90 days after the judgment is signed.

To give you an example of the problem caused, the case I mentioned above had its final judgment signed on August 12, 1985. In perfect compliance with Rule 356, the losing attorney filed a cost bond on November 12, 1985, 92 days after the judgment was signed, but the first day following a Sunday and legal holiday. He filed it late that afternoon and therefore left 7 days for the transcript and statement of facts to be prepared and filed in the Appellate Court.

In checking with the clerk with the Second Court of Appeals, I understand that it is probably 4 to 5 months after an appeal is filed with the Court of Appeals before it is actually submitted. It seems to me that there could either be more time for the court reporter to get the statement of facts ready after the appeal is perfected, or there could be a requirement that a notice to the court reporter and clerk be earlier than 90 days after judgment when a motion for new trial has been filed.

Frankly, Jim, I don't guess I have a solution. However, if you feel the court would be interested in trying to do something about this, I would put more time into a possible solution.

Very truly yours,

Frank J. Douthitt

FJD:lb

376a

Texas Tech University

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

May 1, 1986

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

Dear Bill:

As I told you this morning in our telephone conversation, I just received a copy of a partial transcript of the March 7-8 meeting of the Supreme Court Advisory Committee. On page 53 I see that the Committee voted to direct you to seek further input from me regarding my proposal to amend paragraph (g) of the Supreme Court Order following Rule 376-a. (See p. 10 of my letter to Michael Gallagher, which you referred to during your meeting.) I am afraid that no one understood what I was attempting to accomplish, but I should and do accept all the blame. While the order needs to be amended, as I shall explain, the way I proposed to do so was, on further reflection, not the best way to do it.

First, I realized all along that the Order was amended, effective April 1, 1985. The problem is it still requires the trial clerk to endorse on the transcript: "Applied for by P.S. on the _____ day of _____, A.D. 19 ___, and delivered to P.S. on the _____ day of _____, A.D. 19_____, ..." Since the clerk has a duty to prepare and deliver the transcript without the request of a party, and the clerk sends it directly to the court of appeals, not to the party, the currently required endorsement is erroneous. Parties don't apply for transcripts, and they are not delivered to parties. The enclosed proposed amendment simply requires the clerk to endorse on the transcript the date he delivered it to the court of appeals.

Second, the last sentence of paragraph (g) should be deleted because the "affirmance on certificate" practice no longer exists. Prior to the amendment to Rule 387, effective January 1, 1981, it was possible to have the judgment affirmed "on certificate" if the appellee filed in the appellate court: (1) a certified copy of the judgment and (2) a "certificate" of the trial court clerk stating the time when and how such appeal or writ of error was perfected. It was this certificate that the last sentence of the Order following Rule 387-a refers to. The 1981 amendment, however, completely rewrote Rule 387 and, among other things, deleted the certificate requirement.

00000087

I hope this clears up the matter and that the Committee can expedite this change without consuming much of its valuable time.

Sincerely yours,

Jeremy C. Wicker
Professor of Law

JCW/nt

cc: Mr. Luther H. Soules. III
Chair. Supreme Court Advisory Committee

Supreme Court Order Relating to Preparation of Transcript

(following Rule 376-a)

. . .

(g) . . .

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

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

. . .

Comment: Since the clerk of the trial court delivers the transcript directly to the clerk of the court of appeals, and not to a party, and a party no longer has a duty to request delivery of the transcript, the language of the current endorsement requirement is erroneous. The last sentence is deleted since the "affirmance on certificate" parctice was abolished by the amendment of Rule 387, effective January 1, 1981.

LAW OFFICES

SOULES & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

STEPHANIE A. BELBER
ROBERT E. ETLINGER
PETER F. GAZDA
ROBERT D. REED
SUSAN D. REED
RAND J. RIKLIN
JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

August 22, 1986

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

Dear Bill:

Our Committee receives continuing complaints about the derelicts among the court reporters and their duties to prepare transcripts. Do you and your Subcommittee believe that there is some way that we could amend Rule 376c, or some other Rule, to impose additional burdens on the court reporters. One case was dismissed after the third request for extension of time to file the record, because the court reporter would not get the record together, and the lawyer on the third "go around" missed his deadline of December 17 by more than fifteen days (the filing was January 16, 1985). At some point, should the courts impose the penalties for missed deadlines on their own officers, i.e. their own court reporters, in event the extensions are plainly caused by the officers of the court, and the missed deadlines would not have occurred had the court's officer properly prepared a record. In this case, the lawyer recognized the deadlines on two occasions, presumably he would have filed the record had it been ready on either of those two occasions, but missed the third deadline when the reporter failed to get the record the third time, and ultimately the client's case was forfeited.

Very truly yours,

LUTHER H. SOULES III

LHSIII:gc
Enclosure

cc: Mr. Frank Baker

00000090

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

TO: Justice Wallace

FROM: C. Raymond Judice

DATE: December 4, 1984

RE: Certification of transcription
Supreme Court Order following Rule 377

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

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

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

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

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

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

OCA:MEMWAL.21

ORDER OF THE COURT

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

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

I. Certification of transcriptions.

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

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

(insert description of material or document certified)

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

_____
(Signature of Reporter)

_____
(Typed or Printed Name of Reporter)

Certification Number of Reporter: _____

Date of Expiration of Current Certification: _____

Business Address: _____

_____

Telephone Number: _____

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

"THE STATE OF TEXAS
COUNTY OF _____

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

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

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

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

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

Certification Number of Reporter: . . . . . .

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

Business Address: . . . . . .

. . . . . .

Telephone Number: . . . . . .

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

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

"THE STATE OF TEXAS }
COUNTY OF _____ }

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

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

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

_____
(Signature)
Official Court Reporter"

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

"ATTORNEYS' APPROVAL

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

SIGNED this _____ day of _____, 19___.

_____
(Signature)
Attorney for Plaintiff

SIGNED this _____ day of _____, 19___.

_____
(Signature)
Attorney for Defendant

COURT'S APPROVAL

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

OFFICE OF COURT ADMINISTRATION
TEXAS JUDICIAL COUNCIL
1414 Colorado, Suite 602 • P.O. Box 12066 • Austin, Texas 78711 • 512/475-2421

TO: Chief Justice Pope

FROM: C. Raymond Judice

DATE: August 22, 1984

RE: Proposed amendments to Rules of Civil Procedure.

One of the proposed amendments to the Rules and Standards for the Court Reporters Certification Board would require that the court reporter insert in the certification of any deposition or court proceeding his or her certification number, date of expiration of current certification and his or her business address.

Presently, the Supreme Court Order Relating to the Preparation of Statement of Facts as found following Rule 377 of the Texas Rules of Civil Procedure do not require these matters to be inserted in such certification.

Attached is a draft of a proposed amendment to this order which would insert these requirements in that order.

OCA:MEMPOP.21

PROPOSED AMENDMENT TO SUPREME COURT ORDER RELATING TO THE PREPARATION OF STATEMENTS OF FACTS

Item (e) of the Supreme Court Order Relating to the Preparation of Statements of Facts (Rule 377, T.R.C.P.) is amended to read as follows:

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

"THE STATE OF TEXAS
COUNTY OF _____

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

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

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

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

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

Certification Number of Reporter: . . . . . .

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

Business Address: . . . . . .

. . . . . .

Telephone Number: . . . . . .

586

LAW OFFICES

SOULES & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

STEPHANIE A. BELBER
ROBERT E. ETLINGER
PETER F. GAZDA
ROBERT D. REED
SUSAN D. REED
RAND J. RIKLIN
JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

February 10, 1986

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

Dear Bill:

Enclosed are proposed changes to Rules 356 and 386 submitted by Judge Frank J. Douthitt. Please draft, in proper form for Committee consideration appropriate Rules changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

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

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

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

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

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

February 4, 1986

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

Re: Rule 356 (perfecting appeal) and
Rule 386 (filing of statement of facts and transcript)

Dear Luke and Mike:

I am enclosing a letter from Judge Frank J. Douthitt of Henrietta, regarding the above rules.

May I suggest that these matters be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

00600098

JPW:fw
Enclosure
cc: Honorable Frank J. Douthitt
Judge, 97th Judicial District
P. O. Box 530
Henrietta, Texas 76365

ARCHER, CLAY AND
MONTAGUE COUNTIES

RAY SHIELDS
COURT REPORTER

FRANK J. DOUTHITT
JUDGE
97TH JUDICIAL DISTRICT

P. O. BOX 530
HENRIETTA, TEXAS 76365

AREA CODE 817
538-5913

November 14, 1985

Hon. James P. Wallace
P.O. Box 12248
Austin, Texas 78711

Dear Jim:

In the last couple of years every time we have a judges' meeting, somebody on the Supreme Court raises criticisms of court reporter delay in preparing statements of fact for appellate purposes. I may have written you about this before. I know I have commented to the Chief on the matter.

Recently, a case tried by me has had appeal perfected in a manner timely under the rules, but impossible with respect to the clerk and court reporter. It will require my court reporter to get an extension of time, which extension will probably be later cited by some appellate judge at some meeting to demonstrate "court reporter delay".

The problem is the two rules which have to do with perfecting appeal (Rule 356) and filing of the statement of facts and transcript (Rule 386). As you know Rule 386 provides that the transcript and statement of facts will be filed in the Appellate Court within 60 days of the date the judgment is signed unless there has been a motion for new trial filed in which case it must be filed within 100 days. Rule 356 provides that appeal must be perfected by the filing of a cost bond within 30 days of the date the judgment is signed, or if a motion for new trial is filed, within 90 days after the judgment is signed.

To give you an example of the problem caused, the case I mentioned above had its final judgment signed on August 12, 1985. In perfect compliance with Rule 356, the losing attorney filed a cost bond on November 12, 1985, 92 days after the judgment was signed, but the first day following a Sunday and legal holiday. He filed it late that afternoon and therefore left 7 days for the transcript and statement of facts to be prepared and filed in the Appellate Court.

In checking with the clerk with the Second Court of Appeals, I understand that it is probably 4 to 5 months after an appeal is filed with the Court of Appeals before it is actually submitted. It seems to me that there could either be more time for the court reporter to get the statement of facts ready after the appeal is perfected, or there could be a requirement that a notice to the court reporter and clerk be earlier than 90 days after judgment when a motion for new trial has been filed.

Frankly, Jim, I don't guess I have a solution. However, if you feel the court would be interested in trying to do something about this, I would put more time into a possible solution.

Very truly yours,

Frank J. Douthitt

FJD:lb

OFFICE OF COURT ADMINISTRATION
TEXAS JUDICIAL COUNCIL
1414 Colorado, Suite 600 • P.O. Box 12066 • Austin, Texas 78711 • 512/475-2421

TO: Justice Jim Wallace

FROM: C. Raymond Judice

DATE: December 11, 1984

RE: Proposed amendments to Rule 423, T.R.C.P.

During the meeting of the Chief Justices of the Courts of Appeals on Friday, November 30, 1984, the assembled Chief Justices adopted a motion by Chief Justice Summers that the attached proposed amendments to Rule 423, T.R.C.P. be submitted for consideration by the Supreme Court.

I was asked to forward it to you for consideration by the Advisory Committee.

Amend Rule 423 as per attached,

OCA:LETJIM.21

SUGGESTED AMENDMENTS TO RULE 423, TEX. R. CIV. P.

Rule 423 Argument.

(a) Right to Argument. When a case is properly prepared for submission, any party who has filed briefs in accordance with the rules prescribed therefor and who has made a timely request for oral argument under (f) hereof may, upon the call of the case for submission, submit an oral argument to the court. ~~[either oral or plainly written or printed. If written or printed, six copies shall be filed with the record.]~~

(b) Unchanged.

(c) Unchanged.

(d) Time Allowed. In the argument of cases in the Court of Appeals, each side may be allowed thirty (30) minutes in the argument at the bar, with fifteen (15) minutes more in conclusion by the appellant. In cases involving difficult questions, the time allotted may be extended by the court, provided application is made before argument begins. The court may also align the parties for purposes of presenting oral argument. The Court may, in its discretion, shorten the time allowed for oral argument.

Not more than two counsel on each side will be heard, except on leave of the court.

Counsel for an amicus curiae shall not be permitted to argue except that an amicus may share time allotted to one of the counsel who consents and with leave of the court obtained prior to argument.

(e) Unchanged.

(f) A party to the appeal desiring oral argument shall file a request therefor at the time he files his brief in the case. Failure of a party to

file a request shall be deemed a waiver of his right to oral argument in the case. Although a party waives his right to oral argument under this rule, the Court of Appeals may nevertheless direct such party to appear and submit oral argument on the submission date of the case.

The Court of Appeals may, in its discretion, advance cases for submission without oral argument where oral argument would not materially aid the Court in the determination of the issues of law and fact presented in the appeal. Notice of the submission date of cases without oral argument shall be given by the Clerk in writing to all attorneys of record, and to any party to the appeal not represented by counsel, at least twenty-one (21) days prior to the submission date. The date of the notice shall be deemed to be the date such notice is delivered into the custody of the United States Postal Services in a properly addressed post-paid wrapper (envelope).

NOTE: Additions in text indicated by underline; deletions by [~~strikeouts~~].

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

July 9, 1985

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

Re: Tex. R. Civ P. 216, 439, 440, 441

Dear Luke:

Enclosed is a memo from Judge Robertson supporting deletion of Rules 439, 440 and 441. His suggestion is that all remittiturs should be eliminated.

The First Court in Houston recently handed down an unpublished opinion in First State Bank of Bellaire v. C. H. Adams, a copy of which is enclosed. To avoid the problem in the future, I suggest that Rule 216 be amended to require both a jury fee and a request for jury not less than ten days before trial.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

MEMORANDUM

TO : Judge Wallace
FROM: Judge Robertson
DATE: July 8, 1985

RE : Supreme Court Advisory Committee

It is suggested that the Supreme Court Advisory Committee consider deleting and/or abolishing Rules 439, 440 and 441 of the Texas Rules of Civil Procedure.

Court of Appeals
First Supreme Judicial District

OPINION C 4032

C.H. ADAMS, APPELLANT

NO. 01-84-0536-CV

VS.

FIRST STATE BANK OF BELLAIRE, APPELLEE

On Appeal from the 189th Judicial District Court
of Harris County, Texas
Trial Court Cause No. 78-8109

The appellant, C.H. Adams, brought this suit for damages alleging an illegal offset by the appellee, First State Bank of Bellaire, against funds that Tri-State Oil and Gas, Inc. had on deposit with the bank. The appellant was a shareholder of Tri-State Oil and Gas, Inc. and, as its successor in interest, intervened in the suit. The trial court granted a summary judgment for the appellee, and the appellant now asserts three points of error on appeal. He alleges that the trial court based its judgment on issues not expressly set out in the appellant's motion for summary judgment; that the four-year statute of limitations is applicable to his cause of action, not the two-year statute of limitations; and he asserts that the doctrines of res judicata and estoppel prevent a recovery by the appellee.

Tri-State's relationship with the appellee was as a depositor and a borrower. It maintained four bank accounts with the appellee, and on January 16, 1976, borrowed $100,000 from appellee. The loan was evidenced by a note which was secured by warehouse receipts. On February 20, 1976, Tri-State borrowed another $30,000 from the appellee, executed a second note and secured that note by an assignment of oil leases.

On March 1, 1976, the State of Texas filed suit against Tri-State and some of its officers and stockholders, alleging irregularities in Tri-State's operations and prayed for a receiver to be appointed. The state court, after an ex parte hearing, granted the state's request and appointed a receiver.

On March 3, 1976, because of an article in a Houston newspaper concerning the state's activities against Tri-State, the appellee became aware of the state court action. Although the appellant's notes had not matured, the appellee declared itself to be insecure, and offset $102,000 of the appellant's deposits against the $100,000 note. Thereafter, numerous checks which Tri-State had issued were dishonored by the bank.

Unknown to the appellee, on March 1, 1976, Tri-State had filed with the Federal Bankruptcy Court a petition under Chapter XI of the Federal Bankruptcy Act, seeking an arrangement to pay off and satisfy the debts it owed to its creditors. The appellee became aware of the bankruptcy action about two or three days after it was filed.

On March 31, 1976, the bankruptcy court entered its order appointing a receiver and authorizing the receiver to operate the business and manage the property of Tri-State until further order of that court. The bankruptcy court also ordered the appellee to set up a special trust account and place the $102,000, which it had offset against Tri-State's note, in that account. Funds could not be withdrawn except by order of the bankruptcy court. The appellee protested the setting up of this special account and appealed to the Federal District Court.

On appeal, the district court reversed the judgment of the bankruptcy court. That order also noted that the appellant had reached an arrangement with its creditors, that the issue of the special trust account was then moot, and dismissed the appeal. The appellant then appealed to the 5th Circuit Court of Appeals, which dismissed that appeal as being moot.

The appellants filed the present lawsuit on March 2, 1978. The trial court's docket sheet reflects that the appellee filed two motions for summary judgment which were denied. In May of 1983, the case was certified as being ready for trial, was placed on the non-jury docket of the civil district courts of Harris County, Texas, and in April of 1984, the case was assigned to trial in another district court.

After briefly discussing the issues of the case with

the attorneys, the trial judge stated as follows:

> The court, as a matter of judicial economy, is going to reconsider the defendant's motions for summary judgment and the Plaintiff's responses to them and all of the attachments, affidavits and documents furnished with them.

The parties apparently acquiesced in this procedure because no objections were made, and the court's action is not raised as a point of error on appeal.

After the court made its announcement, the parties presented their marked exhibits to the court. The parties also made several stipulations to the court. After a discussion between the court and the attorneys, the court announced its ruling.

Although the court's reasons for granting the summary judgment are not shown on the face of its final judgment, the record made at the summary judgment hearing reveals that the court stated its reasons as follows:

> My holding is that in any event the checks were presented after the filing and the property not then being the property of the drawer but the property of the estate of the bankrupt, they were lawfully dishonored.

The appellant's complaint in its first point of error is that the trial court erred in granting a summary judgment on issues that were not expressly set out in a motion, answer, or any other response.

The appellee's amended motion for summary judgment stated that the appellee was entitled to a summary judgment as there was no genuine issue of material fact and no disputed issue of fact in the instant case: (1) because appellee had fully complied with the orders of the court (bankruptcy court); and, (2) that the appellant's cause of action was barred by the Texas two-year statute of limitations. See Tex. Rev. Civ. Stat. Ann. art. 5526 (Vernon Supp. 1985).

It is manifest that the trial court's judgment was not based upon the two grounds set forth in the appellee's motion for summary judgment. However, the appellee contends that although the question of lawful dishonor was not raised in its written motion for summary judgment, the parties orally agreed at the

summary judgment hearing to consider the question of the dishonoring of the checks. We have reviewed the record made at the summary judgment hearing, and we find nothing in that record to substantiate the appellant's contention.

Texas Rules of Civil Procedure 166-A(c) requires that a motion for summary judgment must state the specific grounds therefor. If the trial court finds there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in the answer or other response, the court must then render summary judgment for the moving party. City of Houston v. Clear Creek Basin Authority, 589 S.W.2d 671 (Tex. 1979).

Thus, since the basis of the trial court's judgment was not on either of the two grounds expressly set forth in the appellee's motion for summary judgment, the basis for its judgment must be contained in appellant's response or answer to the motion, or the judgment cannot stand. Tex. R. Civ. P. 166A(c).

The appellant's response and answer to appellee's amended motion for summary judgment initially reiterates the facts set forth in its petition. It then asserts the defenses of res judicata, estoppel, and asserts that the four-year statute of limitations is applicable, not the two-year statute. These defenses do not raise the issue of the bankruptcy court having the appellant's deposits in custodia legis at the time the appellee made its offset against the appellant's accounts, which was the basis of the trial court's summary judgment.

We find that the summary judgment granted by the trial court was not based on issues expressly presented to it by written motion, answer or other response. We hold that such action is prohibited by Rule 166-A(c), and sustain the appellant's first point of error.

We also hold that the record would not support a summary judgment on the grounds asserted by the appellee in its motion for summary judgment. The appellee asserts that the two-year statute of limitations bars a recovery by the appellant.

As heretofore stated, the parties agreed that the checks which were dishonored were dishonored after March 4, 1976. The docket sheet reflects that this law suit was filed on March 2, 1978. Thus, the present suit was filed within the two-year statute.

The appellee's second basis for summary judgment was that it had fully complied with all the orders of the bankruptcy court and accordingly had the legal right to dishonor the Tri-State checks. The record indicates that the first order of the bankruptcy court was dated March 31, 1976. The appellant introduced into evidence approximately seventy checks that were dishonored by the appellee after March 4, 1976. Because of the numerous stamped endorsements on the back of each of the checks, we cannot ascertain how many of the checks were dishonored between the dates of March 4 and March 31. We assume, as the appellee asserts, that it did follow all the bankruptcy court's orders, but the issue, as we understand it, is whether the appellee wrongfully offset Tri-State's debts prior to the bankruptcy court accepting jurisdiction over the assets and liabilities of Tri-State. This issue requires a legal determination of when the bankruptcy court's jurisdiction attached. It also requires a factual determination of when the appellee became aware of the bankruptcy action and whether it applied the offset before or after it became aware of the bankruptcy action. Also, there is the issue of whether the appellee was justified in making the offset when all of its loans were secured by collateral which it had deemed adequate just a few weeks before it declared itself insecure and applied the offset. Further, there is the issue of what checks were dishonored and when the dishonor occurred. Since there were factual issues to be determined, appellee was not entitled to a summary judgment on the basis it had complied with the bankruptcy court's orders.

We do not reach the issue of whether the trial was correct in its holding that Tri-State's bank accounts were in custodia legis at the time its checks were dishonored by appellee. The reason for this is that the issue was not raised

in the party's pleadings in the summary judgment proceedings.

The judgment of the trial court is reversed and this cause of action is remanded to the trial court.

/s/ JACK SMITH
Jack Smith
Associate Justice

Associate Justices Bass and Levy sitting.

No Publication. Tex. R. Civ. P. 452.

JUDGMENT RENDERED AND OPINION DELIVERED FEBRUARY 14, 1985.

TRUE COPY ATTEST;

Kathryn Cox
KATHRYN COX
CLERK OF THE COURT

LAW OFFICES
DIBRELL & GREER
ONE MOODY PLAZA
GALVESTON, TEXAS 77550

GALVESTON (409) 765-5525
HOUSTON (713) 331-2442

W E GREER
CHARLES BROWN
JAMES R FOUTCH
IRWIN M HERZ, JR., P C
JERRY L ADAMS
FRANK T CREWS, JR.
THOMAS P HEWITT
RONALD M GIPSON
CHARLES M JORDAN
STEPHEN G SCHULZ, P C

THOMAS W MCQUAGE
SIMONE S LEAVENWORTH
DEBRA G JAMES
CHARLES A DAUGHTRY
I NELSON HEGGEN
BENJAMIN R BINGHAM
RICHARD B DREYFUS
JOHN A BUCKLEY, JR

June 26, 1984

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

Dear Mr. Chief Justice:

This letter is meant to call your attention to a problem that has become apparent with current practice under the Texas Rules of Civil Procedure, specifically Rules 456 and 457. This problem does not involve a case currently pending before any court. As you are aware, these rules require several notices of judgment to go to the attorneys involved in a case at the Court of Appeals. Rule 457 requires immediate notice of the disposition of the case. Rule 456 additionally requires a copy of the opinion to be sent out within three (3) days after rendition of the decision, in addition to a copy of the judgment to be mailed to the attorneys within ten (10) days after rendition of the decision. As you can see, the Rules contemplate three (3) separate notices to be mailed out by first class letter, which should, in this most perfect of all possible worlds, result in at least one of them getting through to an attorney to give him notice of the Court of Appeal's decision.

The problem arises when, as has been done, the office of the Clerk of a Court of Appeals decides to mail a copy of the judgment and the opinion together in one envelope to, in their minds at least, satisfy the combined requirements of Rules 456 and 457. With this as a regular practice, it takes very little in the way of a slip-up by a clerk or the post office to result in no notice at all being sent to an unsuccessful party.

The combination of Rules 21c and 458 as interpreted by the Supreme Court make jurisdictional the requirement that any Motion for Extension of Time to File a Motion for Rehearing be filed within thirty (30) days of the rendition of judgment. It can happen, and has happened, that because of failure of the Clerk of the Court to mail notice of the rendition of judgment the party can be foreclosed from pursuing Application for Writ of Error to the Texas Supreme Court.

While strict adherence to the requirements of the Rules for three (3) separate notices would go far to eliminate the problem, there are no adequate sanctions or protections for the parties when the clerks fail to provide the proper notices. One possible solution that may create some additional burden upon the staff of the Clerk of the Courts of Appeals, but would go far to protect the appellate attorney from clerical missteps, would be to amend the Rules to require at least one of the notices to be sent registered mail, return receipt requested. The second step could take one of two forms. One method would be to require proof of delivery of the notice by registered mail before the time limits for the Motion for Rehearing would be used to foreclose a party from further pursuant of their appeal. A second alternative would require the clerk of the court to follow up by telephone call if the green card is not returned within, say, fifteen (15) days. An amendment to the rules along these lines would help to push towards the goal expressed by the Supreme Court in B.D. Click Co. v. Safari Drilling Corp., 638 S.W.2d 8680 (Tex. 1982), when it said that the Texas Rules of Civil Procedure had been amended "to eliminate, insofar as practical, the jurisdictional requirements which have sometimes resulted in disposition of appeals on grounds unrelated to the merits of the appeal."

A second, more unwieldy alternative would be to make it explicit that Rule 306a(4) also applies to judgments by the Courts of Appeals. This would allow an attorney to prove lack of notice of the judgment of the Court of Appeals to prevent being foreclosed from filing a motion for rehearing and subsequent appeal to the Supreme Court.

Because of the problem outlined in this letter, we have now made it a practice, as a part of our appellate work, to call the clerk's office every week, after oral argument, to see if a decision has been rendered. If this becomes standard practice by all attorneys, it will add significantly to the work load of our already overburdened clerks.

We certainly appreciate your consideration of these suggestions made above.

Yours very truly,

Charles M. Jordan

I. Nelson Heggen

:tt

483

LAW OFFICES

SOULES, CLIFFE & REED

800 MILAM BUILDING · EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

(512) 224-9144

STEPHANIE A. BELBER
JAMES R. CLIFFE
ROBERT E. ETLINGER
ROBERT D. REED
SUSAN D. REED
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III

BINZ BUILDING, SIXTH FLOOR
1001 TEXAS AT MAIN
HOUSTON, TEXAS 77002
(713) 224-8122

1605 SEVENTH STREET
BAY CITY, TEXAS 77414
(409) 245-1122

WILLIAM A. BRANT, P. C.
1605 SEVENTH STREET
BAY CITY, TEXAS 77414
(409) 245-1122

January 9, 1986

Mr. Russell McMains
Edwards, McMains & Constant
P. O. Drawer 480
Corpus Christi, Texas 78403

Dear Rusty:

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

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

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

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

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

00000114

92, 376a
492, 758, 109

TO Justice Hecht.

Texas Tech University

School of Law

April 30, 1984

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

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

Dear Justice Pope:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I hope my comments and suggestions have been helpful.

Respectfully yours,

Jeremy C. Wicker
Professor of Law

JCW:tm

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

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

"The State of Texas,
County of _____

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

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

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

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

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

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

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

_____

Clerk _____ Court, _____ County, Texas.

By _____ Deputy."

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

"TRANSCRIPT

No. _____
District Court No. _____

_____
Appellant___
v.
_____
Appellee___

_____ _____

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

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

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

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

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

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

_____
Chief Justice.

_____
Associate Justice.

_____
Associate Justice.

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

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

TO: Justice Wallace

FROM: C. Raymond Judice

DATE: December 4, 1984

RE: Certification of transcription
Supreme Court Order following Rule 377

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

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

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

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

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

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

OCA:MEMWAL.21

ORDER OF THE COURT

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

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

I. Certification of transcriptions.

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

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

(insert description of material or document certified)

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

_____
(Signature of Reporter)

_____
(Typed or Printed Name of Reporter)

Certification Number of Reporter: _____

Date of Expiration of Current Certification: _____

Business Address: _____

_____

Telephone Number: _____

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

"THE STATE OF TEXAS
COUNTY OF _____

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

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

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

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

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

Certification Number of Reporter: . . . . . .

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

Business Address: . . . . . .

. . . . . .

Telephone Number: . . . . . .

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

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

"THE STATE OF TEXAS }
COUNTY OF _____ }

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

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

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

_____
(Signature)
Official Court Reporter"

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

"ATTORNEYS' APPROVAL

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

SIGNED this _____ day of _____, 19___.

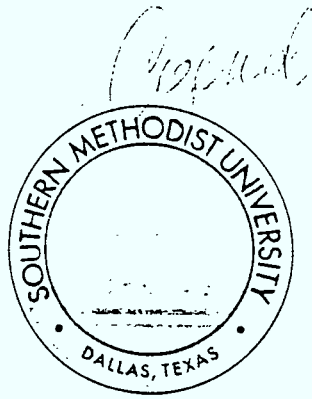
_____
(Signature)
Attorney for Plaintiff

SIGNED this _____ day of _____, 19___.

_____
(Signature)
Attorney for Defendant

COURT'S APPROVAL

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



September 29, 1986

Professor Newell H. Blakely
University of Houston Law Center
Houston, TX 77004

Re: Tex.R.Civ.P. 182
(Testimony of Adverse
Parties in Civil Suits)

Dear Newell,

The enclosure indicates why I think that Tex.R.Civ.P. 182 should be repealed.

Best regards,

Bill

William V. Dorsaneo III

WVDIII:vm

Enc.

cc: Luke Soules

September 29, 1986

SOUTHERN METHODIST UNIVERSITY
DALLAS, TEXAS

Harry L. Tindall, Esquire
Tindall & Foster
2801 Texas Commerce Tower
Houston, Texas 77002-3094

Re: Supreme Court Advisory Committee

Dear Harry,

I believe that your suggested revisions for Rules 103-107 are satisfactory. But I suggest that more could be done to improve this part of the Rulebook. Why not combine Rules 99-101 into a new Rule 100 and give new Rule 100 the title "Ordinary Citation" or something like that? I believe that Tex. R. Civ. P. 102 could and should be repealed. Also, Rule 108 should be retitled "Nonresident Notice" and the clumsy language "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 106 hereof" should be replaced with

> Nonresident notice may be served by any disinterested person by the same methods of service prescribed for service of citation on resident defendants in Rule 106.

I would either eliminate the requirement for an oath or include it in the next sentence.

I have located the draft I did of the 300 series rules when we were working on the Texas Rules of Appellate Procedure. I am having it retyped and will send it soon.

Best regards,

Bill

William V. Dorsaneo III

WVDIII:vm

cc: Luke Soules

00000128

SCHOOL OF LAW
SOUTHERN METHODIST UNIVERSITY / DALLAS, TEXAS 75275

LAW OFFICES

SOULES & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

TELEPHONE
(512) 224-9144

STEPHANIE A. BELBER
ROBERT E. ETLINGER
PETER F. GAZDA
ROBERT D. REED
SUSAN D. REED
RAND J. RIKLIN
JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

April 14, 1986

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

Dear Judge Thomas:

Enclosed is a letter from Michael D. Schattman regarding consideration of a new rule relative to clients and cases that have been abandoned by their attorneys. Please draft, in proper form for Committee consideration, appropriate Rule changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as

MICHAEL D. SCHATTMAN
DISTRICT JUDGE
348TH JUDICIAL DISTRICT OF TEXAS
TARRANT COUNTY COURT HOUSE
FORT WORTH, TEXAS 76196-0281
(817) 877-2715

December 4, 1985

Justice James P. Wallace
Supreme Court of Texas
P. O. Box 12248 Capitol Station
Austin, Texas 78711

Re: Rules of Civil Procedure

Dear Justice Wallace:

Enclosed is a copy of a year-old memo. It generated no activity from the bar. However, I think that we need to have some kind of mechanism for dealing with cases that lawyers abandon due to illness or withdrawal from practice.

I hesitate to wait for the Legislature to act and the Disciplinary Rules are not the place for it. That leaves me thinking that the subject could be covered thoroughly and without controversy in the Rules of Civil Procedure. I will broach the subject with the Committee on the Administration of Justice, but it would be nice to get some guidance "from above."

Very truly yours,

Michael D. Schattman

MDS/lw

xc with encl.: Luther H. Soules, III
Supreme Court Advisory Committee
Soules & Cliffe
1235 Milam Bldg.
San Antonio, Texas 78205

Michael T. Gallagher
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, Texas 77010

00000128

MICHAEL D. SCHATTMAN
DISTRICT JUDGE
348TH JUDICIAL DISTRICT OF TEXAS
TARRANT COUNTY COURT HOUSE
FORT WORTH, TEXAS 76196-0281

January 12, 1984

Honorable Charles Murray
Presiding Judge
8th Administrative District

Dear Judge:

I have some cases in which Marshall Gilmore is attorney of record. I understand he has moved to "Oregon" and given up the practice of law. Apparently, he made no prior arrangements for anyone to succeed him or to take over his practice. David Whaley is attempting to facilitate his withdrawal in some cases and, I assume, will replace him for a particular client. That does not solve the problem of what to do about the clients and cases of an attorney (especially a sole practitioner) who abandons his practice or becomes disabled mentally or physically (as with Larry Parnass of Irving).

This would seem to be an appropriate area for rules to be adopted as part of our local practice until the Supremes can be persuaded to fashion a set themselves. I do not know whether the Tarrant County Board of District Judges should attempt this or whether it should be attempted for the whole Administrative District or, frankly, whether anyone cares. However, I do think it would be useful for us to discuss it and get some local bar participation.

Very truly yours,

Mike

Michael D. Schattman

MDS/lw

xc: Honorable Harold Valderas, Chmn., Board of District Judges
Allan Howeth, Pres., Tarrant County Bar Assoc.
James B. Barlow, Pres.-Elect, Tarrant County Bar Assoc.

LAW OFFICES

SOULES & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

STEPHANIE A. BELBER
ROBERT E. ETLINGER
PETER F. GAZDA
ROBERT D. REED
SUSAN D. REED
RAND J. RIKLIN
JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

September 25, 1986

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

Dear Judge Thomas:

Enclosed is a letter from John H. Cochran regarding an amendment to Rule 13. Please draft, in proper form for Committee consideration, an appropriate Rule change for submission to the Committee and circulate it among your Standing Subcommittee members to secure their comments.

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

Very truly yours,

Luther H. Soules III

LUTHER H. SOULES III

LHSIII/tat
encl/as

00000130

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

September 8, 1986

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

Re: Rule 13 (Penalty for Fictitious Suits or Pleading
and
Rule 215 (Abuse of Discovery; Sanctions)

Dear Luke and Mike:

I am enclosing a letter from John H. Cochran of Dallas, regarding the above rules.

May I suggest that these matters be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. John H. Cochran
P. O. Box 141104
Dallas, Tx 75214

COCHRAN PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
5838 LIVE OAK
DALLAS, TEXAS 75214
(214) 828-4444

MAILING ADDRESS
POST OFFICE BOX 141104
DALLAS, TEXAS 75214

TELEX, 203041 ACTD-U

August 27, 1986

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

Attention: Rules of Civil Procedure Revision Committee

Gentlemen:

The next time the Supreme Court gets ready to rewrite the Rules of Civil Procedure, I think that Rule 13 should be amended to include frivolous lawsuits and motions and that the sanctions of Rule 215 A should be applicable.

Yours truly,

John H. Cochran

3995A/mp

LAW OFFICES

SOULES & REED

800 MILAM BUILDING · EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

STEPHANIE A. BELBER
ROBERT E. ETLINGER
PETER F. GAZDA
ROBERT D. REED
SUSAN D. REED
RAND J. RIKLIN
JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

October 27, 1986

Mr. Anthony J. Sadberry
Sullivan, King & Sabom
5005 Woodway
Suite 300
Houston, Texas 77056

RE: Proposed Change to Rule 166b(3)(d)
Justice James P. Wallace

Dear Tony:

Enclosed is a request from Justice Wallace regarding Rule 166b(3)(d). I have included same in our package for discussion during our November meeting.

Very truly yours,

Luke

LUTHER H. SOULES III
Chairman

LHSIII/tat
enclosures

Tina - to SupC E
SCAC Agenda

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

October 16, 1986

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Professor J. Patrick Hazel, Chairman
Administration of Justice Committee
University of Texas School of Law
727 E. 26th Street
Austin, TX 78705

Re: Rule 166b(3)(d)

Dear Luke and Pat:

I am enclosing herewith copies of the Court's per curiam opinions in Stringer v. Eleventh Court of Appeals and Turbodyne v. The Honorable Wyatt H. Heard. The Motions for Rehearing on both cases are still under consideration by the Court. I am also enclosing copies of the briefs of the parties and amicus curiae briefs filed in these cases. The problem which needs addressing is the last phrase of Rule 166b(3)(d) which states: "and made in connection with the prosecution, investigation or defense of the claim or the investigation of the occurrence or transaction out of which the claim has arisen;"

The Stringer and Turbodyne opinions were obviously based on Allen v. Humphries, 559 S.W.2d 78 (Tex. 1977). The above rule was promulgated in 1984, yet the opinions obviously do not follow the rule. The Court's problem is that a majority of the Court seems to disapprove of the above quoted portion of the rule and prefer that it be changed as soon as possible.

Your Committees help and suggested change of the rule, if you feel that it should be changed, is appreciated. If you could also place this on your November meeting Agenda, the Court would be appreciative.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosures
cc: Evelyn Avent, Secretary to Committee
7303 Wood Hollow Drive, #208
Austin, Texas 78731

IN THE SUPREME COURT OF TEXAS

NO. C-5329

VIKKI B. STRINGER, ADMINISTRATRIX OF THE ESTATE OF RICKY DOWD STRINGER, DECEASED, Relator	§	ORIGINAL MANDAMUS PROCEEDING
v.	§	
THE ELEVENTH COURT OF APPEALS, Respondent.	§	

PER CURIAM

This is an original mandamus action. Relator, Vikki Stringer, seeks a writ of mandamus directing the Court of Appeals for the Eleventh Supreme Judicial District to rescind its mandamus orders which found information obtained in a post-accident investigation privileged under TEX. R. CIV. P. 166b(3)(d) and also reversed the trial court's discovery sanctions order against defendant, the Atchison, Topeka and Santa Fe Railway Company. Atchison, Topeka & Santa Fe Railway Company v. Kirk, 705 S.W.2d 829. We hold the information is discoverable because it was not obtained at a time when Santa Fe had good cause to believe suit would be filed. The court of appeals abused its discretion by granting mandamus relief from the sanctions order, because there was an adequate remedy by appeal. Therefore, the writ is conditionally granted.

The underlying lawsuit arose as the result of a collision between an Atchison, Topeka and Santa Fe Railway Company freight train and a Missouri-Pacific freight train in which R.D. Stringer, head brakeman of the Santa Fe train, was killed. Stringer's wife, Vikki, filed suit against Santa Fe.

Santa Fe Special Agent John Holem conducted an investigation of the accident. At his deposition Santa Fe permitted Holem to testify regarding information he obtained on the day

of the accident. However, Santa Fe asserted that information Holem obtained thereafter, including his interview with the Santa Fe train conductor the day after the accident and his investigation notebook, were privileged under TEX. R. CIV. P. 166b(3)(d). The trial court rendered an order requiring disclosure of this information and later signed an order imposing sanctions of $200 as attorney's fees based on Santa Fe's failure to disclose.

In Robinson v. Harkins & Company, 29 Tex. Sup. Ct. J. 414 (June 11, 1986), we held the investigation privilege embodied in TEX. R. CIV. P. 166b(3)(d) is still governed by the rule established in Allen v. Humphreys, 559 S.W.2d 798 (Tex. 1977). Only information obtained by a party after there is good cause to believe a suit will be filed or after the institution of a lawsuit is privileged.

We disagree with the Court of Appeals' holding that Santa Fe had good cause to believe a suit would be filed at the time of Agent Holem's investigation. The mere fact that an accident has occurred is not sufficient to clothe all post-accident investigations, which frequently uncover fresh evidence not obtainable through other sources, with a privilege.

In Street v. Second Court of Appeals, 29 Tex. Sup. Ct. J. 456 (June 25, 1986), we held that a court of appeals abused its discretion by granting mandamus relief from a trial court's award of attorney's fees as discovery sanctions, because such awards are reviewable on appeal after final judgment under TEX. R. CIV. P. 215(2)(b)(8) and 215(3). For the same reason, we hold that the court of appeals' mandamus judgment requiring rescission of the sanctions order against Santa Fe was an abuse of discretion.

The court of appeals abused its discretion by issuing writs of mandamus in this case. The holdings conflict with our opinions in Robinson v. Harkins & Company, supra, and Street v. Second Court of Appeals, supra, as well as TEX. R. CIV. P. 166b(3)(d), 215(2)(b)(8) and 215(3). Therefore, without hearing oral argument, we conditionally grant the writ of mandamus pursuant to TEX. R. CIV. P. 483. If the court of appeals fails to vacate its orders, a writ of mandamus will issue.

OPINION DELIVERED: July 2, 1986.

IN THE SUPREME COURT OF TEXAS

NO. C-5364

TURBODYNE CORPORATION ET AL., Relators	§	
v.	§	ORIGINAL MANDAMUS PROCEEDING
THE HONORABLE WYATT H. HEARD, Respondent	§	

Per Curiam

Turbodyne Corporation, et al. filed this original mandamus action in this court to order Judge Hyatt Heard of the 190th District Court of Harris County to rescind his order denying discovery of 39 documents from Travelers Insurance Company. The Fourteenth Court of Appeals in Harris County denied mandamus relief in Turbodyne Corp. v. Heard, 698 S.W.2d 203 (Tex. App. - Houston [14th] 1985, orig. proceeding). Travelers contends that these documents are privileged under TEX. R. CIV. P. 166b. We hold that the trial court abused its discretion in denying discovery, and conditionally grant the writ.

On November 1, 1979, a fire and explosion occurred at Texas City Refining, Inc. Turbodyne was the manufacturer of a part of a catalytic cracking unit involved in that fire. Texas City's casualty insurer, Travelers Insurance Company, initiated an investigation into the causes and damages of the accident. Approximately nine months after the accident, on July 30, 1980, Travelers and Texas City reached a settlement on the coverage. On October 30, 1981, Travelers and Texas City filed a subrogation suit against Turbodyne and other manufacturers in the 190th District Court of Harris County. Turbodyne filed a motion to compel production of 39 documents prepared by employees of

Travelers contends that its documents prepared by non-testifying experts are privileged because two experts employed by Travelers to investigate the accident filed affidavits stating that they were employed to investigate the cause of the accident and that immediately after the accident there was good cause to believe a subrogation suit should be filed. The mere fact that an accident has occurred is not sufficient to clothe all post-accident investigations with privilege. Stringer v. The Eleventh Court of Appeals, 29 Tex. Sup. Ct. J. ___ (July 2, 1986). The affidavits filed do not affirmatively state that these documents were prepared in connection with or in anticipation of a subrogation suit. The burden is on the party resisting discovery to prove that evidence is acquired or developed in anticipation of litigation. Lindsey v. O'Neill, 689 S.W.2d 400 (Tex. 1985). Travelers has failed to prove this.

Because we hold that the trial court's order denying discovery conflicts with our opinion in Robinson, pursuant to TEX. R. CIV. P. 483 we conditionally grant the writ without hearing oral argument. All the documents prepared prior to July 30, 1980, are discoverable. The trial court shall examine all documents prepared after July 30, 1980 to determine whether they are discoverable. If the trial court fails to vacate the order, the mandamus will issue.

Opinion delivered: July 9, 1986

Travelers contends that its documents prepared by non-testifying experts are privileged because two experts employed by Travelers to investigate the accident filed affidavits stating that they were employed to investigate the cause of the accident and that immediately after the accident there was good cause to believe a subrogation suit should be filed. The mere fact that an accident has occurred is not sufficient to clothe all post-accident investigations with privilege. Stringer v. The Eleventh Court of Appeals, 29 Tex. Sup. Ct. J. ___ (July 2, 1986). The affidavits filed do not affirmatively state that these documents were prepared in connection with or in anticipation of a subrogation suit. The burden is on the party resisting discovery to prove that evidence is acquired or developed in anticipation of litigation. Lindsey v. O'Neill, 689 S.W.2d 400 (Tex. 1985). Travelers has failed to prove this.

Because we hold that the trial court's order denying discovery conflicts with our opinion in Robinson, pursuant to TEX. R. CIV. P. 483 we conditionally grant the writ without hearing oral argument. All the documents prepared prior to July 30, 1980, are discoverable. The trial court shall examine all documents prepared after July 30, 1980 to determine whether they are discoverable. If the trial court fails to vacate the order, the mandamus will issue.

Opinion delivered: July 9, 1986

LAW OFFICES

SOULES & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

STEPHANIE A. BELBER
ROBERT E. ETLINGER
PETER F. GAZDA
ROBERT D. REED
SUSAN D. REED
RAND J. RIKLIN
JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

October 29, 1986

Mr. Anthony J. Sadberry
Sullivan, King & Sabom
5005 Woodway
Suite 300
Houston, Texas 77056

RE: Proposed Change to Rule 166b(4)(c)
Justice James P. Wallace

Dear Tony:

Enclosed is a request from Justice Wallace regarding Rule 166b(4)(c). I have included same in our package for discussion during our November meeting.

Very truly yours,

LUTHER H. SOULES III
Chairman

LHSIII/tat
enclosures

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

October 28, 1986

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Professor J. Patrick Hazel, Chairman
Administration of Justice Committee
University of Texas School of Law
727 E. 26th Street
Austin, TX 78705

Re: Rule 166b(4)(c)

Dear Luke and Pat:

I have been requested to suggest that your committees explore amending Rule 166b(4)(c) so as to alleviate the problem in some areas of discovery of "smoking guns" evidence in product liability cases. The problem as related to me is that excessive attorney's and judge's time and expense is incurred in an effort to discover memoranda and test results which are not trade secrets but are alleged to be.

Sincerely,

James P. Wallace
Justice

JPW:fw
cc: Evelyn Avent, Secretary to C.O.A.J.
7303 Wood Hollow Drive, #208
Austin, Texas 78731

LAW OFFICES

SOULES & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

STEPHANIE A. BELBER
ROBERT E. ETLINGER
PETER F. GAZDA
ROBERT D. REED
SUSAN D. REED
RAND J. RIKLIN
JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

October 29, 1986

Mr. Anthony J. Sadberry
Sullivan, King & Sabom
5005 Woodway
Suite 300
Houston, Texas 77056

RE: Proposed Changes to Rules 167 and 168
John Howie

Dear Tony:

Enclosed is a request from John Howie regarding Rules 167 and 168 that was originally sent to the COAJ. I have included same in our package for discussion during our November meeting.

Very truly yours,

LUTHER H. SOULES III
Chairman

LHSIII/tat
enclosures

00000144

Rules 167 and 168
Item 5.j.

LAW OFFICES OF

WINDLE TURLEY, P. C.

ATTORNEYS

WINDLE TURLEY
CERTIFIED-PERSONAL INJURY TRIALS
JOHN HOWIE
CERTIFIED-PERSONAL INJURY TRIALS
RANDALL MOORE
CERTIFIED-PERSONAL INJURY TRIALS
PAULA FISETTE-SWEENEY
FRANK GIUNTA
LINDA TURLEY
JAMES E ROOKS, JR
DARRELL PANETHIERE
MARK TOBEY
THOMAS J STUTZ
PAUL PEARSON

TOM SLEETH
EDWARD H MOORE, JR
STEPHEN MALOUF
LEON RUSSELL
JOHNANNA GREINER
JOHN TIPPIT
CHARLES W McGARRY
KURT CHACON
JEANMARIE BEISEL

D.C. & MA BAR
MO, IL & TX BAR
AR & TX BAR
MO & TX BAR

DALLAS, TEXAS
1000 UNIVERSITY TOWER
6440 N CENTRAL EXPRESSWAY
75206
214-691-4025
TELE-FAX 214-361-5802

WASHINGTON D C
4801 MASSACHUSETTS AVENUE, NW
SUITE 400
20016
202-966-5340

August 6, 1986

Professor Pat Hazel
University of Texas
School of Law
727 East 26th Street
Austin, Texas 78705

RE: State Bar of Texas Administration of Justice Committee

Dear Pat:

I would like to propose the following changes to the Texas Rules of Civil Procedure:

1. Rule 167 - Rule 167 should be amended to provide, as in the Federal Rules, that 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 summons and complaint upon that party. [Refer to FRCP 34(b)]

2. Rule 168 - Rule 168(1) should be amended to provide that interrogatories 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 summons and complaint upon that party. [Refer to FRCP 33(a)]

These proposed changes would permit the plaintiff to serve discovery with the original petition. This would allow us to move our cases along at a faster pace and would contribute to the efforts to reduce the backlog in our courts.

Please present these proposed changes to the committee or advise me of the procedure that I need to follow to insure that these changes are presented to the committee. By copy of this letter, I have provided copies of the recommendations to certain members of your committee.

Thank you for your consideration.

With kind regards,

LAW OFFICES OF WINDLE TURLEY, P.C.

John Howie

JH/dh

cc: Justice Cynthia Hollingsworth
John Collins
Richard Clarkson
Jan W. Fox
Frank Herrera, Jr.
Guy Hopkins
Russell McMains
William O. Whitehurst, Jr.
Doak Bishop
Charles R. "Bob" Dunn
John R. Feather

LAW OFFICES

SOULES & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

STEPHANIE A. BELBER
ROBERT E. ETLINGER
PETER F. GAZDA
ROBERT D. REED
SUSAN D. REED
RAND J. RIKLIN
JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

September 9, 1986

Mr. Anthony J. Sadberry
Sullivan, King & Sabom
5005 Woodway
Suite 300
Houston, Texas 77056

RE: Proposed Change to Rule 169
by Timothy M. Sulak

Dear Tony:

Enclosed is a new request from Timothy Sulak regarding Rule 169. I have included same in our package for discussion during our September meeting.

Very truly yours,

LUTHER H. SOULES III
Chairman

LHSIII/tat
enclosures

MORRIS, CRAVEN & SULAK
ATTORNEYS AT LAW
2350 ONE AMERICAN CENTER
600 CONGRESS AVENUE
AUSTIN, TEXAS 78701

CHARLES MORRIS
BOARD CERTIFIED--
PERSONAL INJURY TRIAL LAW
JOHN W. CRAVEN
TIMOTHY M. SULAK

512 • 478-9535

Tina
Xc to SupC chair
+ 40 Xc to SC AC

September 2, 1986

Professor Pat Hazel
UT School of Law
727 East 26th Street
Austin, Texas 78705

Mr. Luther H. Soules, III
800 Milam Building
San Antonio, Texas 78205

Re: Proposed Changes In Rule 169, Texas Rules of Civil Procedure

Gentlemen:

I am writing to you as Chairs of the Administration of Justice Committee and the Supreme Court Advisory Committee regarding Proposed Changes In Rule 169, Texas Rules of Civil Procedure.

Paragraph 2 of Rule 169 provides that "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 him in maintaining his action or defense on the merits."

It appears to me that this improperly places the burden upon the party who obtained the admission to show prejudice. All of the recent amendments to the rules seem to place the burden on the party who seeks to avoid, modify or defeat the specific provisions of the rules. For example, if a party seeks to disclose additional witnesses within thirty days of trial, that party must show good cause and it is not incumbent on the opposing party to show surprise or prejudice. See, Yeldell vs. Holiday Hills Retirement and Nursing Center, 701 S.W. 2d 243 (Tex. 1985); Rule 215, Paragraph 5, T.R.C.P.; Kilgarlin, "What To Do With The Unidentified Expert?" Texas Bar Journal 1192 (November 1985).

I would propose that Rule 169, Paragraph 2 be amended to provide that a party seeking to withdraw or amend admissions must show that the opposing party will not be prejudiced by such, that the merits of the action will subserved and that good cause for withdrawal or amendment exists.

Sincerely,

Timothy M. Sulak

TMS:blk

LAW OFFICES

SOULES & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

STEPHANIE A. BELBER
ROBERT E. ETLINGER
PETER F. GAZDA
ROBERT D. REED
SUSAN D. REED
RAND I. RIKLIN
JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

October 24, 1986

Mr. Anthony J. Sadberry
Sullivan, King & Sabom
5005 Woodway
Suite 300
Houston, Texas 77056

RE: Proposed Change to Rules 184, 184a, and 329
by Professor Jeremy C. Wicker

Dear Tony:

Enclosed is a request from Professor Jeremy Wicker regarding Rules 184, 184a, and 329. I have included same in our package for discussion during our November meeting.

Very truly yours,

Luke

LUTHER H. SOULES III
Chairman

LHSIII/tat
enclosures

Texas Tech University

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

October 13, 1986

Professor Patrick Hazel, Chairman
Administration of Justice Committee
University of Texas
School of Law
727 E. 26th Street
Austin, TX 78705

Re: Proposed amendments to Rules 184, 184a and 329

Dear Pat:

Enclosed are my proposed amendments to Rules 184, 184a and 329.

Rule 184 was amended, effective April 1, 1984, to contain the same language as Evidence Rule 202. Similarly, Rule 184a was amended to contain the same language as Evidence Rule 203. Evidence Rules 202 and 203, however, were amended, effective November 1, 1984. Since it is the intention that Rules 184 and 184a contain the identical language of Evidence Rules 202 and 203, respectively, Rules 184 and 184a need to undergo conforming amendments.

Rule 329 contains a reference to Rule 364, which was repealed, effective September 1, 1986. The problem can be cured simply by deleting "Rule 364" and substituting therefor "Appellate Rule 47."

Please add these proposed amendments to the agenda of our November 22 meeting. I am prepared to discuss them with the committee at that time.

Sincerely,

Jeremy C. Wicker

Jeremy C. Wicker
Professor of Law

JCW/nt
Enc.

cc: Ms. Evelyn A. Avent
Mr. Luther Soules

00000151

Rule 184. Determination of Law of Other States

[~~The judge upon the motion of either party shall take judicial notice of the common law, public statutes, rules, regulations, and ordinances and court decisions~~]. A court upon its own motion may, or upon the motion of a party may, take judicial notice of the constitutions, public statutes, rules, regulations, ordinances, court decisions, and common law of every other state, territory, or jurisdiction of the United States. [~~Any~~] A party requesting that judicial notice be taken of such matter shall furnish the [~~judge~~] court sufficient information to enable [~~him~~] it properly to comply with the request, and shall give [~~each adverse party~~] all parties such notice, if any, as the [~~judge~~] court may deem necessary, to enable [~~the adverse party~~] all parties fairly to prepare to meet the request. [~~The ruling of the judge on such matters shall be subject to review.~~] A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. Judicial notice of such matters may be taken at any stage of the proceeding. The court's determination shall be subject to review as a ruling on a question of law.

Comment: The change is necessary to conform Rule 184 to the amendment to Rule 202 of the Rules of Evidence, effective November 1, 1984.

Rule 134a. Determination of the Laws of Foreign Countries

A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice, and at least 30 days prior to the date of trial such party shall furnish all parties [~~to the opposing party or counsel~~] copies of any written materials or sources that he intends to use as proof of the foreign law. If the materials or sources were originally written in a language other than English, the party intending to rely upon them shall furnish all parties [~~to the opposing party or counsel~~] both a copy of the foreign language text and an English translation. The court, in determining the law of a foreign nation, may consider any material or source, whether or not submitted by a party or admissible under the rules of evidence, including but not limited to affidavits, testimony, briefs, and treatises. If the court considers sources other than those submitted by a party, it shall give [~~the~~] all parties notice and a reasonable opportunity to comment on the sources and to submit further materials for review by the court. The court, and not a jury, shall determine the laws of foreign countries. [~~Its~~] The court's determination shall be subject to review [~~on appeal~~] as a ruling on a question of law.

Comment: The change is necessary to conform Rule 184a to the Amendment to Rule 203 of the Rules of Evidence, effective November 1, 1984.

184

LAW OFFICES

SOULES & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

STEPHANIE A. BELBER
ROBERT E. ETLINGER
PETER F. GAZDA
ROBERT D. REED
SUSAN D. REED
RAND J. RIKLIN
JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

July 14, 1986

Mr. Sam Sparks
Grambling, Mounce, Sims,
Galatzan & Harris
P.O. Drawer 1977
El Paso, Texas 79950

Dear Sam:

Enclosed are proposed changes to Rule 184 and 184a, submitted by Professor Jeremy Wicker. Please draft, in proper form for Committee consideration, appropriate Rule changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as

00000154

Fwd to Sub C of Orgnzd

Texas Tech University

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

March 7, 1986

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

Re: Proposed Amendments to Rules 184 & 184a

Dear Mike:

Enclosed are my proposed amendments to Rules 184 and 184a.

Rule 184 was amended, effective April 1, 1984, to contain the same language as Evidence Rule 202. Similarly, Rule 184a was amended to contain the same language as Evidence Rule 203. Evidence Rule 202 and 203, however, were amended, effective November 1, 1984. Since it is the intention that Rules 184 and 184a contain the identical language of Evidence Rules 202 and 203, respectively, Rules 184 and 184a need to be amended to conform to Evidence Rules 202 and 203.

Please add these proposed amendments to the agenda of the next meeting.

Respectively,

Jeremy C. Wicker
Professor of Law

JCW/nt
Enc.

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

Rule 184. Determination of Law of Other States

[~~The judge upon the motion of either party shall take judicial notice of the common law, public statutes, rules, regulations, and ordinances and court decisions~~]. A court upon its own motion may, or upon the motion of a party may, take judicial notice of the constitutions, public statutes, rules, regulations, ordinances, court decisions, and common law of every other state, territory, or jurisdiction of the United States. [~~Any~~] A party requesting that judicial notice be taken of such matter shall furnish the [~~judge~~] court sufficient information to enable [~~him~~] it properly to comply with the request, and shall give [~~each adverse party~~] all parties such notice, if any, as the [~~judge~~] court may deem necessary, to enable [~~the adverse party~~] all parties fairly to prepare to meet the request. [~~The ruling of the judge on such matters shall be subject to review.~~] A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. Judicial notice of such matters may be taken at any stage of the proceeding. The court's determination shall be subject to review as a ruling on a question of law.

Comment: The change is necessary to conform Rule 184 to the amendment to Rule 202 of the Rules of Evidence, effective November 1, 1984.

Rule 184a. Determination of the Laws of Foreign Countries

A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice, and at least 30 days prior to the date of trial such party shall furnish all parties [~~to the opposing party or counsel~~] copies of any written materials or sources that he intends to use as proof of the foreign law. If the materials or sources were originally written in a language other than English, the party intending to rely upon them shall furnish all parties [~~to the opposing party or counsel~~] both a copy of the foreign language text and an English translation. The court, in determining the law of a foreign nation, may consider any material or source, whether or not submitted by a party or admissible under the rules of evidence, including but not limited to affidavits, testimony, briefs, and treatises. If the court considers sources other than those submitted by a party, it shall give [~~the~~] all parties notice and a reasonable opportunity to comment on the sources and to submit further materials for review by the court. The court, and not a jury, shall determine the laws of foreign countries. [~~Its~~] The court's determination shall be subject to review [~~on appeal~~] as a ruling on a question of law.

Comment: The change is necessary to conform Rule 184a to the Amendment to Rule 203 of the Rules of Evidence, effective November 1, 1984.

LAW OFFICES

SOULES & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

STEPHANIE A. BELDER
ROBERT E. ETLINGER
PETER F. GAZDA
ROBERT D. REED
SUSAN D. REED
RAND J. RISLEY
JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

July 16, 1986

Mr. Sam Sparks
Grambling, Mounce, Sims,
Galatzan & Harris
P.O. Drawer 1977
El Paso, Texas 79950

Dear Sam:

Enclosed is a proposed change to Rule 202, submitted by Jack Gulledge. Please draft, in proper form for Committee consideration, an appropriate Rule change for submission to the Committee and circulate it among your Standing Subcommittee members to secure their comments.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as

UNIVERSITY OF HOUSTON LAW CENTER
HOUSTON, TEXAS

R 202
SubC
SCAC
& agenda

UNIVERSITY OF HOUSTON
LAW CENTER

July 14, 1986

Hon. James P. Wallace, Justice
The Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Dear Justice Wallace:

On September 25, 1985, an attorney, Jack Gulledge, wrote to Chief Justice Hill (copy of letter enclosed) regarding article 3737h V.A.T.S. and rule 202 of the Texas Rules of Civil Procedure. On October 10, 1985 you replied for Chief Justice Hill to Mr. Gulledge (copy of letter enclosed), sending a copy of the reply to me for consideration by the State Bar Rules of Evidence Committee. You also sent copies to Mr. Luke Soules and Mr. Mike Gallagher, so that Mr. Gulledge's letter might be considered by the Supreme Court's advisory committee and by the Committee on Administration of Justice.

On April 4, 1986, the State Bar Rules of Evidence Committee considered whether 3737h should be made part of the Rules of Evidence and decided in the negative. I believe the primary reason for the decision was that the evidence rules are limited to "admissibility" questions and do not deal with "sufficiency" questions. Art. 3737h is a "sufficiency" rule. To open the evidence rules to sufficiency questions would certainly open a floodgate.

The Committee also considered whether to recommend legislative changes that would have a counter-affidavit under 3737h merely go to weight rather than to the admissibility of the initial affidavit. Again, the Committee decided in the negative.

As you know, the 1985 legislature paid much attention to 3737h. The statute was rewritten and made a part (sec. 18.001) of the new Civil Practice and Remedies Code. Further, the legislature amended 3737h to require that the counter-affiant be a "person who is qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit." Presumably this stiffening of the qualifications of the counter-affiant was intended to make the counter-affidavit, if filed, a serious contesting of the initial affidavit. No longer, if the amendment serves its purpose, will 3737h be an impotent procedure.

The Rules of Evidence Committee also decided that Mr. Gulledge's suggestion regarding rule 202 of the Rules of Civil Procedure is properly a matter for the Committee on Administration of Justice and the Supreme Court Advisory Committee rather than an evidence rules matter.

Respectfully yours,

Newell H. Blakely, Chairman
1985-86 Committee on Rules of Evidence

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

Mr. Michael T. Gallagher, Chairman
Committee on Administration of Justice
7000 Allied Bank Plaza
1000 Louisiana St.
Houston, TX 77002

NHB:vcg

JACK GULLEDGE
ATTORNEY AT LAW
2404 S. Buckner Blvd.
Dallas, Texas 75227
Area Code 214
388-7451

September 25, 1985

Mr. John Hill
Chief Justice
Supreme Court of Texas
Austin, Texas 78711

Re: Unnecessary costs of proof

Dear Justice Hill:

In your projected changes relating to litigation, please consider the following proposals.

First: place Article 3737h V.A.T.S. in the New Rules of Evidence and amend Subsection (b) thereof, so that a counter to an affidavit will merely go to the weight not the admissibility thereof. Time should be given for the party controverting the affidavit to obtain any necessary discovery in his controversion. As it stands at this time, affidavits that are submitted under Subsection 1(a) of 3737h are routinely controverted, thereby wasting time and materials that have to be subsequently duplicated by expensive deposition testimony or subpoenas duces tecum, for purposes of trial.

Second: Rule 202 of the Texas Rules of Civil Procedure should be amended to allow non-stenographic recording without necessity of getting a Court Order to dispense with stenographic transcription. Each law office dealing with these matters has trained personnel who can competently reduce the non-stenographic recording to a stenographic transcript without having to pay a court reporter to do so.

It is duplicitous and expensive to purchase video equipment or to hire video equipment for the purpose of depositions and also to pay for stenographic accompaniment at said deposition. The expense has doubled rather than reduced, in that instance.

The premise of these proposals is that the reliability of the proof is not subject to serious question. Further, it is this writer's opinion that if any lawyer be found to have intentionally attempted to deceive the court or other counsel or parties in the case then he should forthwith be disbarred.

This letter represents the viewpoint of the writer and the colleagues with whom in depth discussions have been had and does not purport to represent any formal organization in the Bar.

Thank you very much and with warm regards and due respect I am,

Yours truly,

Jack Gulledge

JG:lg

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

October 10, 1985

Mr. Jack Gulledge
Attorney at Law
2404 S. Buckner Blvd.
Dallas, Tx 75227

Dear Mr. Gulledge:

Your suggestions to Chief Justice Hill regarding Article 3737h being placed in the Rules of Evidence and an amendment to Rule 202 of the Texas Rules of Civil Procedure have been referred to Dean Newell Blakely, the Chairman of the Committee on the Rules of Evidence, Mr. Luke Soules, the Chairman of the Supreme Court Advisory Committee and Mr. Mike Gallagher, the Chairman of the Committee on Administration of Justice.

This is the procedure ordinarily followed by our Court in passing along all suggestions from members of the bench and bar as to improvements that could be made in the rules. Your suggestions will be assigned to an appropriate subcommittee and considered by each of the above named committees who will then make recommendations for consideration by the entire Court.

Thank you for your continued interest in our rules.

Sincerely,

Jim Wallace

James P. Wallace
Justice

JPW:fw
cc: Dean Newell Blakely
Mr. Luke Soules
Mr. Mike Gallagher

00000162

AFFILIATED REPORTERS

805 West 10th, Suite 301
Austin, Texas 78701
(512) 478-2752

R 206

June 5, 1986

Mr. Sam Sparks
GRAMBLING & MOUNCE
P.O. Drawer 1917
El Paso, Texas 79950-1917

Re: Supreme Court Advisory Committee

Dear Mr. Sparks,

I am writing in regard to your position as Committee Chairman over Rules 15 to 215. These rules include those pertaining to depositions which in turn control the activities of freelance court reporters. The reporting community needs your help in solving a problem which exists in our field.

Freelance court reporters have historically had a problem in determining who is responsible for the costs of depositions. The large majority of attorneys assume the responsibility of deposition costs and therefore pay the court reporters fees from their escrow accounts. The problem lies with a small minority of attorneys who have claimed, as agents for their clients, they are not responsible for these costs and suggest pursuing their clients for payment. This tact has been taken as a defense in court on many occasions but is always used after the completion and delivery of the deposition when the reporter has no real recourse. The reporters are contacted by the attorneys and often never have contact with the clients in order to discuss payment.

The concensus of most court reporters and attorneys is that the attorneys retain their services for oral and written depositions and therefore should be responsible for those fees. If there is a special situation required for payment, a written notification in advance would allow the reporter to deal with the responsible party directly.

We believe the solution would be an addition to the appropriate rule that states:

> " The costs of oral and written depositions shall be the responsibility of the attorneys in the case unless written notice is provided prior to the deposition as to who will be responsible for such costs. "

Rule 354(e) was recently added through the aid of Chief Justice Pope which provided clarification for the official reporters, but no rules exist as to the work product of the freelance reporter. The bad debt and carrying costs of these few attorneys are being borne by higher costs to the responsible legal community.

We hope that the committee can find a way to solve this inequity through the statues. Thank you for all the hard work and long hours that you and the entire committee have generously donated. Please call on me if I can be of assistance to you.

Sincerely,

Duke Weidmann

cc. Chairman Luther H. Soules
Justice James P. Wallace
Texas Shorthand Reporters Association

July 30, 1985

Mr. Luther H. Soules, III
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Re: Rule 216. Request and
Fee for Jury Trial

Dear Luke,

At your request, I have redrafted Rule 216. I hope this draft is a satisfactory starting point.

Best wishes,

Bill

William V. Dorsaneo, III
Professor of Law

WVD:vm

enc.

Rule 216. Request and Fee for Jury Trial

a. Request. No jury trial shall be had in any civil suit, unless (~~application be made therefor and unless a fee of five dollars if in the district court, and three dollars if in the county court, be deposited by the applicant with the clerk to the use of the county on or before appearance day or, if thereafter,~~) 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 (~~ten~~) thirty days in advance.

b. Jury Fee. A fee of five dollars if in the district court and three 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.

COMMENT: This rule has been clarified, reorganized and modernized. The time for making the required request and fee deposit has been changed from ten to thirty days.

JOHNSON & SWANSON

ATTORNEYS AND COUNSELORS

A Partnership Including Professional Corporations

Founders Square
Suite 100
900 Jackson Street
Dallas, Texas 75202-4499
214-977-9000

Telex: 55 1172
Telecopy: 214-977-9004

Writer's Direct Dial Number

977-9077

April 9, 1985

216/204

Ms. Evelyn A. Avent
Executive Assistant
State Bar of Texas
Box 12487, Capitol Station
Austin, Texas 78711

Re: Committee on Administration of Justice

Dear Evelyn:

Please find enclosed a proposed rule change that should be distributed as you see fit to the other members of the committee.

Sincerely yours,

Charles R. Haworth

CRH/cmr
enclosure

00000188

4800 InterFirst Two
1201 Elm Street
Dallas, Texas 75270
214-977-9800

1200 Pacific Place
1910 Pacific Avenue
Dallas, Texas 75201
214-977-9700

2200 One Galleria Tower
13355 Noel Road
Dallas, Texas 75240
214-851-5000

1000 Norwood Tower
114 West 7th Street
Austin, Texas 78701
512-474-4829

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:

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R

NONE

II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parentnesis; underline proposed new wording; see example attached).

New Rule 216.

Rule 216. Stipulations Regarding Discovery Procedure.

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery.

etc.

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

(see attached comment)

Respectfully submitted,

Charles R. Haworth
Name

Charles R. Haworth
900 Jackson St., Dallas, TX
Address

19 85

00000159

COMMENT

The proposed Rule 216 is basically Federal Rule 29, which provides in full that:

> Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may be made only with the approval of the court.

It should initially be noted that the underlined portion of Federal Rule 29 is not recommended for adoption in Texas.

The proposed rule is submitted in response to an expressed desire for more flexibility in the rules to acommodate proposed agreements among parties to litigation during discovery, especially in the manner of taking depositions upon oral examination. Texas practitioners have historically entered into stipulations regarding many aspects of discovery without question of their authority to do so. Recently, concerns have been expressed that because the Texas Rules of civil Procedure do not contain express authorization to vary the terms of the rules, the rules may not be varied by agreement. In paticular, concerns have been expressed that objections to the form of questions or nonresponsiveness of answers required by Texas Rule 204-4 may not be reserved until time of trial. This proposed rule change will clearly allow that reservation.

It could perhaps be argued that Rule 11 would apply to stipulations under Rule 216. Caution may dictate, therefore, that an additional sentence be added to the proposed Rule 216 to the effect that "an agreement affecting a deposition upon oral examination is enforceable if the agreement is recorded in the transcript of deposition."

The provision of Federal Rule 29 regarding court approval for stipulations extending the time limits regarding Interrogatories to Parties (Rule 33), Production of Documents (Rule 34), and Requests for Admission (Rule 36) is not recommended for adoption. Under the proposed Rule 216 the court may always override the parties' stipulation. See C. Wright and A. Miller, Federal Practice and Procedure § 2092, at 359 (1970). The order required by Federal Rule 29 is a nuisance to the court and almost always approved. Thus, some juge-time could be saved by eliminating requirement contained in the exception.

216,458

June 7, 1985

Justice James P. Wallace
Supreme Court of Texas
P. O. Box 12248, Capitol Station
Austin, Texas 78711

AND

Honorable Luke Soules
800 Milam Building
San Antonio, Texas 78205

Gentlemen:

At the meeting of the Supreme Court Advisory Committee last week it was suggested that I transmit in writing the request for an amendment to Rule 216 of the Texas Rules of Court, and I am accordingly transmitting same.

It appears that the multi-county districts have difficulty in arranging their dockets, especially for jury trials when a demand and payment of a jury fee can be done "not less than ten days in advance." I can understand their predicament and the suggestion is that the requirement of the rule be that the request and payment of a demand for jury in a civil case be 30 to 45 days in advance.

Another suggestion for a change that had been made to me concerned a time limit on the Court of Appeals in ruling on a "motion for rehearing." Some time limit should be placed on it that if it is not ruled on, it is automatically overruled by operation of law.

I trust that the Committee will find these suggestions favorable to recommend to the Supreme Court.

Sincerely,

Solomon Casseb, Jr.

SCJR:dng

cc: Judge Robert R. Barton
216th District Court
Kerr County Courthouse
Kerrville, Texas 78028

216

McGOWAN & McGOWAN, P. C.
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
119 SOUTH 6TH STREET
BROWNFIELD, TEXAS 79316-0071

MAIL
P O BOX 71
BROWNFIELD, TEXAS 79316-0071

J. McGOWAN
1904-1978

BILL McGOWAN
WM J. McGOWAN II
BRADFORD L. MOORE

KELLY G. MOORE

AREA CODE 806
PHONE 637-7585

September 22, 1983

Mr. George W. McCleskey
Attorney at Law
P. O. Drawer 6170
Lubbock, Texas 79413

Dear George:

It is my understanding that you may be a current member of the Rules Committee. If you are not on the committee, then I assume you would know where to channel this letter.

For some time, I have been concerned about the fact that in Texas a party may pay a jury fee at any time, and I have even had that happen up to the day before trial was scheduled to begin and the Judge go ahead and remove the case to the jury docket. It seems this happens more frequently with defense attorneys, but I have had about equal experience on both sides of the case. What I would like to see happen is for the Supreme Court to go ahead and make a rule change that would allow either party to have a jury trial upon payment of the jury fee at any time within six months from the date the case is filed. Although this does not conform to the federal rules, I believe that it would give ample opportunity for each side to evaluate the case and to decide whether in fact a jury was needed to hear the facts. Hopefully, this would avoid the problems which I have been having regarding being on the non-jury docket for 1 1/2-2 years, finally getting to trial, then having the other party pay a jury fee and having the case removed to the jury docket for an additional 2 1/2-3 years before we could possibly get to trial. I do not see anything fair about this type of tactics since I see they are done only for delay purposes. Further, it seems it is a great inconvenience and hindrance to the Court in scheduling cases, and I would ask that you present this proposal, or in the alternative forward it on for consideration.

I appreciate your cooperation and consideration regarding this matter.

Sincerely yours,

Bradford L. Moore

OFFICE: 512-257-5945
RESIDENCE: 512-895-3636

COUNTIES:
BANDERA
GILLESPIE
KENDALL
KERR

ROBERT R. BARTON
DISTRICT JUDGE
216TH JUDICIAL DISTRICT COURT
KERR COUNTY COURTHOUSE
KERRVILLE, TEXAS 78028

KERR COUNTY DISTRICT CLERK:
MARY BROOKS
OFFICE: 512-257-4396
RESIDENCE: 512-367-5513

COURT REPORTER: ADERLE HERRIN
OFFICE: 915-446-3353
RESIDENCE: 915-446-2101
P. O. BOX 423
JUNCTION, TEXAS 76849

June 19, 1985

Hon. Solomon Casseb, Jr.
District Judge
Casseb, Strong & Pearl
127 East Travis Street
San Antonio, Texas 78205

Dear Judge Casseb:

Thank you for the copy of your letter of June 7, 1985, concerning the recommended amendment to Rule 216 by the Supreme Court Advisory Committee.

This amendment will not only assist the multi-county District Courts in making jury settings, but will reduce the incidence of non-jury trials being obstructed by dilatory jury demands.

Sincerely yours,

ROBERT R. BARTON

RRB/fsj

LAW OFFICES

SOULES & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

STEPHANIE A. BELBER
ROBERT E. ETLINGER
PETER F. GAZDA
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SUSAN D. REED
RAND I. RIKLIN
JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

August 7, 1986

Mr. Franklin Jones, Jr.
Jones, Jones, Baldwin,
Curry & Roth, Inc.
P.O. Drawer 1249
Marshall, Texas 75670

Dear Mr. Jones:

Enclosed is a proposed addition to Rule 224, submitted by Judge Michael Schattman. Please circulate it among your Standing Subcommittee members to secure their comments and make a report at the September meeting.

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

Very truly yours,

LUTHER H. SOULES III
Chairman

LHSIII/tat
encl/as

MICHAEL D. SCHATTMAN
DISTRICT JUDGE
348TH JUDICIAL DISTRICT OF TEXAS
TARRANT COUNTY COURT HOUSE
FORT WORTH, TEXAS 76196-0281
(817) 877-2715

July 30, 1986

Luther H. Soules, III
Soules, Cliff & Reed
800 Milam Building
San Antonio, Texas 78205

Re: Committee on Administration of Justice, SB07

Dear Luke:

In Tarrant County we are experimenting with a number of things to speed up voir dire, including juror information cards. Enclosed is a copy of one I have been using. It probably needs to be changed to include family law matters in questions 6 and 8. Do you think it would be desirable to have uniform cards of some kind used throughout the state? If so, is this something the committee should consider?

Very truly yours,

Michael D. Schattman

MDS/lw

xc

encl.

JUROR INFORMATION CARD ★ TARRANT COUNTY, TEXAS

PLEASE PRINT – USE PENCIL OR BLACK INK – PLEASE PRINT

1. a) Name: [illegible]
   b) Residence Address: [illegible]
   City: [illegible]
2. a) Date of Birth: [illegible]
   b) Place of Birth: [illegible]
3. How long have you resided in Tarrant County? [illegible]
4. Current employment information or employment from which retired
   a) Employer's Name: Irving Community Hospital
   b) Employer's Address: MacArthur, Irving
   c) Position: [illegible]
   d) Number of years with employer: [illegible] years
   e) Previous employer: [illegible]
   f) Position: [illegible]
5. General information
   a) Registered to vote? Yes ✓ No ____
   b) Political affiliation, if any? none
   c) Religious preference, if any? Missouri Synod Lutheran
   d) Own home? Yes ____ No ✓
   e) Own car? Yes ✓ No ____
   f) Education completed (check if applicable)
      i) High School ✓
      ii) College ☐ Name [illegible] Degree [illegible]
      iii) Graduate School ☐ Name: ____ Degree: ____
   g) Do you have any handicap, disease or defect that would render you unfit for jury service? If so, explain. no
6. Prior jury service.
   a) Have you served before on a jury? Yes ____ No ✓
   b) When?
   c) Where?
   d) Civil? Yes ____ No ____
   Criminal? Yes ____ No ____
   Both? Yes ____ No ____
7. Legal, investigative or medical training
   a) Do have any background or training in law, law enforcement, damage or claim adjustment or accident investigation? Yes ____ No ✓
   b) If so, what?
   c) Do you have any background or training in medicine, nursing or the [illegible] treatment of injuries? Yes ✓ No ____
   d) If so, what? [illegible]
8. Have you ever been a complainant, witness or party in:
   a) Civil suit? Yes ____ No ✓ Type?
   b) Criminal prosecution? Yes ____ No ✓ Type?
9. Marital and family information
   a) Check one: Married ✓ Single ☐ Widowed ☐ Divorced ☐
   b) Spouse's name: [illegible]
   c) Spouse's employer: [illegible]
   d) Spouse's position: [illegible]
   e) Number of children: [illegible] Ages of children: [illegible]
10. Affirmation to the Court and Parties: The above information is true and correct.

[illegible signature]

Juror's Signature

DJ-3 – GPC-0429

JUROR INFORMATION CARD ★ TARRANT COUNTY, TEXAS

PLEASE PRINT – USE PENCIL OR BLACK INK – PLEASE PRINT

1. a) Name: Paula Jean Potts
   b) Residence Address: [illegible]
   City: Ft Worth
2. a) Date of Birth: [illegible]
   b) Place of Birth: Wichita Falls TX
3. How long have you resided in Tarrant County? [illegible]
4. Current employment information or employment from which retired
   a) Employer's Name:
   b) Employer's Address:
   c) Position:
   d) Number of years with employer:
   e) Previous employer:
   f) Position:
5. General information
   a) Registered to vote? Yes ✓ No ____
   b) Political affiliation, if any? Republican
   c) Religious preference, if any? [illegible]
   d) Own home? Yes ____ No ✓
   e) Own car? Yes ✓ No ____
   f) Education completed (check if applicable)
      i) High School ☐
      ii) College ✓ Name T.C.U. Degree: PR/Advertising
      iii) Graduate School ☐ Name: ____ Degree: ____
   g) Do you have any handicap, disease or defect that would render you unfit for jury service? If so, explain.
6. Prior jury service.
   a) Have you served before on a jury? Yes ____ No ✓
   b) When?
   c) Where?
   d) Civil? Yes ____ No ____
   Criminal? Yes ____ No ____
   Both? Yes ____ No ____
7. Legal, investigative or medical training
   a) Do have any background or training in law, law enforcement, damage or claim adjustment or accident investigation? Yes ____ No ✓
   b) If so, what?
   c) Do you have any background or training in medicine, nursing or the [illegible] treatment of injuries? Yes ____ No ✓
   d) If so, what?
8. Have you ever been a complainant, witness or party in:
   a) Civil suit? Yes ____ No ✓ Type?
   b) Criminal prosecution? Yes ____ No ✓ Type?
9. Marital and family information
   a) Check one: Married ✓ Single ☐ Widowed ☐ Divorced ☐
   b) Spouse's name: [illegible] Potts
   c) Spouse's employer: [illegible]
   d) Spouse's position: [illegible]
   e) Number of children: 0 Ages of children: —
10. Affirmation to the Court and Parties: The above information is true and correct.

Juror's Signature

DJ-3 – GPC-0429

JUROR INFORMATION CARD ★ TARRANT COUNTY, TEXAS

PLEASE PRINT – USE PENCIL OR BLACK INK – PLEASE PRINT

1. a) Name: [illegible]
   b) Residence Address: [illegible]
   City: [illegible]
2. a) Date of Birth: [illegible]
   b) Place of Birth: [illegible] TX
3. How long have you resided in Tarrant County? [illegible] yrs
4. Current employment information or employment from which retired
   a) Employer's Name: [illegible]
   b) Employer's Address: [illegible]
   c) Position: [illegible]
   d) Number of years with employer: [illegible]
   e) Previous employer: [illegible]
   f) Position: [illegible]
5. General information
   a) Registered to vote? Yes ✓ No ____
   b) Political affiliation, if any? —
   c) Religious preference, if any? —
   d) Own home? Yes ✓ No ____
   e) Own car? Yes ✓ No ____
   f) Education completed (check if applicable)
      i) High School ✓
      ii) College ☐ Name ____ Degree: ____
      iii) Graduate School ☐ Name: ____ Degree: ____
   g) Do you have any handicap, disease or defect that would render you unfit for jury service? If so, explain. [illegible]
6. Prior jury service.
   a) Have you served before on a jury? Yes ____ No ✓
   b) When?
   c) Where?
   d) Civil? Yes ____ No ____
   Criminal? Yes ____ No ____
   Both? Yes ____ No ____
7. Legal, investigative or medical training
   a) Do have any background or training in law, law enforcement, damage or claim adjustment or accident investigation? Yes ____ No ✓
   b) If so, what?
   c) Do you have any background or training in medicine, nursing or the [illegible] treatment of injuries? Yes ____ No ✓
   d) If so, what?
8. Have you ever been a complainant, witness or party in:
   a) Civil suit? Yes ____ No ____ Type?
   b) Criminal prosecution? Yes ____ No ____ Type?
9. Marital and family information
   a) Check one: Married ☐ Single ☐ Widowed ☐ Divorced ✓
   b) Spouse's name
   c) Spouse's employer
   d) Spouse's position
   e) Number of children ____ Ages of children [illegible]
10. Affirmation to the Court and Parties: The above information is true and correct.

[illegible signature]

Juror's Signature

DJ-3 – GPC-0429

247a

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

January 11, 1985

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

Re: Rules 3a, 8, 10, 10a, 10b, 27a, 27b, 27c, 165a, 166f, 247, 247a, 250, 305a.

Dear Luke:

I am enclosing herewith copies of amendments to the Rules of Civil Procedure as recommended by the Committee on Local Rules of the Council of Administrative Judges. I am also enclosing a copy of that Committee's report to Judge Pope which sets out the reasons for the proposed changes.

If you would like a copy to go to each member of the Advisory Committee at this time, please call Flo in my office (512/475-4615) and we will take care of it.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosures

To: Jack Pope, Chief Justice, Supreme Court of Texas

Re: Report of Committee on Local Rules

Little vacuum exists is case processing; necessity, inventiveness and the skill of the martinette will rush in to plug gaps in any system of rules, wherever adopted.

Your committee was furnished copies of all Local Rules filed by District and County Courts with the Supreme court by April 1, 1984. Our work was divided, with Judges Ovard and Thurmond reviewing Criminal case processing and Judges McKim and Stovall civil case processing. Our approach was to group Local Rules by function, so each could be compared for likenesses and differences. Most Local rules addressed these functions:

1. Division of work load in overlapping districts.
2. Schedules for sitting in multi-county districts.
3. Procedures for setting cases: Jury, non-jury, ancillary and dilatory, preferential.
4. Announcements, assignments, pass by agreements, and continuances.
5. Pre-trial methods and procedures.
6. Dismissal for Want of Prosecution.
7. Notices - lead counsel.
8. Withdrawal/Substitution of Counsel.
9. Attorney vacations.
10. Engaged counsel conflicts.
11. Courtroom decorum - housekeeping.
12. Exhortatory suggestions about good-faith settlement efforts.

The Committee found three broad groups of Local Rules and offer the following comments:

Group One: General Administrative Rules

Most courts have general administrative rules, particularly those who serve more than one county, setting out terms of court in each county, types of setting calendars and information about who to call for settings, what kind of notice is to be given others in the case and general housekeeping provisions, subject to change, depending on circumstances.

Comment: The Committee notes that terms of court are governed by statute, usually when the court was created or in a reconstituting statute, making most, if not all, continuous term courts. This language is probably not needed in a Local Rule. Calendars setting out the "who, when, what and where" are useful and must be flexible, to fit court needs, such as illness, vacations and the unexpected long case or docket collapse. Our recommendation: place this information in a "broadside", post it in all courthouses in the District and instruct the clerk to send a copy to all out-of-district attorneys and pro se who file papers, when the first appearance is made. The local Bar can be copied when the schedule is first made and notified of any changes. We note that many multi-county Judicial

districts serve overlapping counties and the division of work load is governed by statute or agreement of the affected Judges. All the above could be covered by a "Court Information Bulletin", spelling out the manner of getting a setting on motions, pre-trial and trial matters.

Recommendation: Adopt as a statewide Rule the following:

LOCAL RULES: NOTICE TO COUNSEL AND PUBLIC

Local Schedules and Assignments of Court shall be mailed by each District or County Clerk upon receipt of the first pleading or instrument filed by an attorney or pro se party not residing within the county. The clerk shall not be required to provide more than one copy of the rules during a given year to each attorney or litigant who resides outside of the county in which the case is filed. It shall be the attorney and litigant's responsibility to keep informed of amendments to local rules, which shall be provided by the clerk on request for out of county residents. Local Rules and Amendments thereto shall be printed and available in the clerks office at no cost, and shall be posted in the Courthouse at all times.

Group Two: State Rules of Procedure

Many of Local Rules address functions which could best be served by a statewide uniform rule. These are suggested, as examples.

_____ 36th, 156th

Rule 247. Tried When Set

Every suit shall be tried when it is called, unless continued or postponed to a future day, unless continued under the provisions of Rule 247a, or placed at the end of the docket to be called again for trial in its regular order. No cause which has been set upon the trial docket for the date set except by agreement of the parties or for good cause upon motion and notice to the opposing party.

CA:RULE15(69th)

247

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

January 11, 1985

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

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Group Two: State Rules of Procedure

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56th, 156th

Rule 247a (new). Trial Continuances

Motions for continuance or agreements to pass cases set for trial shall be made in writing, and shall be filed not less than 10 days before trial date or 10 days before the Monday of the week set for trial, if no specific trial date has been set. Provided however, that agreed motions for continuance may be announced at first docket call in courts utilizing docket-call court setting methods. Emergencies requiring delay of trial arising within 10 days of trial or of the Monday preceding the week of trial shall be submitted to the court in writing at the earliest practicable time. Agreements to pass shall set forth specific legal, procedural or other grounds which require that trial be delayed. The court shall have full discretion in granting or denying delay in the trial of a case. Upon motion or agreement granted, the court shall reset the date for trial.

CA:RULE16(69tm)

250

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

January 11, 1985

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

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00000186

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Group Two: State Rules of Procedure

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36th, 156th

Rule 250 (new).. Cases Set for Trial; Announcement of Ready

Cases set for trial on the merits shall be considered ready for trial, and there shall be no need for counsel to declare ready the week, month, or term prior to trial date after initial announcement of ready has occurred. Cases not tried as scheduled due to court delay shall be considered ready for trial at all times unless informed otherwise by motion, and such cases shall be carried over to the succeeding term for trial assignment until trial occurs or the case is otherwise disposed. In all instances it shall be the attorney's or pro se party's responsibility to know the status of a case set for trial.

CA:RULE14(69th)

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 264. Appeal Tried De Novo.

A Cases brought up from inferior courts shall be tried de novo.
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II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parenthesis; underline propo new wording; see example attached).

1 Rule 264. ~~Appeal Tried De Novo~~. Videotape Trial.
2 ~~Cases brought up from inferior courts shall be tried de novo~~.
3 By agreement of the parties, the trial court may allow that all
4 testimony and such other evidence as may be appropriate be pre-
5 sented at trial by videotape. The expenses of such videotape re-
6 cordings shall be taxed as costs. If any party withdraws agreement
7 to a videotape trial, the videotape costs that have accrued will
8 be taxed against the party withdrawing from the agreement.
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etc.

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

00000189

Respectfully submitted,

AREA CODE 512 220-2525

Judge Hecht - This letter was sent to J. P.

JAMES C. ONION
JUDGE 73RD DISTRICT COURT
BEXAR COUNTY COURTHOUSE
SAN ANTONIO, TEXAS 78205

June 14, 1983

Hon. Jack Pope
Chief Justice
Supreme Court of Texas
Courts Building
Austin, Texas 78711

In re: Rule 265(a)

Dear Judge Pope:

As I understand, this Rule was amended in 1978 to eliminate the requirement of having to read the pleadings to the jury. The Rule was intended to have the attorneys summarize their pleadings in everyday language rather than reading a lot of legal words which most pleadings contain and which meant nothing to most jurors. I thought this was a great improvement. However, unfortunately, it did not work out that way. The trial attorneys, good and bad, are using the same as a tool to completely argue the entire facts of their case, often witness by witness. Hence, they do not summarize their pleadings but their entire case.

I attempt to control this problem, but many trial judges do not because of the wording of the Rule, and hence, when the lawyers come to my court, they want to do the same thing they have done in other courts. The net result is that we hear the facts from all sides during voir dire, then again in opening statements to the jury, then again from the witness stand, and then again during closing arguments. So in every jury case we hear the facts four times. This is a waste of judicial time.

Rule 265(a) in part says, ". . . shall state to the jury briefly the nature of his claim or defense and what said party expects to prove and the relief sought . . ."

Attorneys not only state what they expect to prove, but go into the qualification and the credibility of each and every witness and into many immaterial and irrelevant facts and conclusions. In addition, most attorneys do not know how to be brief. I would suggest that Rule 265(a) be amended to read, ". . . shall

state to the jury a brief summary of his pleadings." And eliminate the phrase, "what the parties expect to prove and the relief sought." I feel that this would be in line with the committee's intention just prior to 1978, according to my reading of the record made by the committee. Right now we have two closing arguments to the jury.

I fully realize that it will be sometime before any attention can be given to this matter. However, I hope it will be properly filed in order to be considered at the proper time by the proper committee.

Very truly yours,

James C. Onion

James C. Onion

JCO/ebt

July 29, 1985

Mr. Luther H. Soules III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
300 Milam Building
San Antonio, TX 78205

Re: COAJ Proposals for Amendment to Rules 296, 297 and 306c.

Dear Luke,

In response to your letter of July 15, 1985, enclosed please find redrafted versions of proposals for amendment to Rules 296, 297 and 306c. Please note that although Rules 296 and 297 are not included in the current draft of the Proposed Appellate rules, current rule 306c is included in paragraph (c) of proposed rule 31.

Best regards,

Bill

William V. Dorsaneo, III
Professor of Law

WVD:vm

enc.

00000192

SCHOOL OF LAW
SOUTHERN METHODIST UNIVERSITY / DALLAS, TEXAS 75275

Rule 296. Conclusions of Fact and Law

In any case tried in the district or county court without a jury, the judge shall, at the request of either party, state in writing his findings of fact and conclusions of law. Such request shall be filed within ten days after the final judgment (~~is signed~~.) or order overruling motion for new trial is signed or the motion for new trial is overruled by operation of law. Notice of the filing of the request shall be served on the opposite party as provided in Rule 21a.

COMMENT: This proposed rule change negates the change last made in Rule 296 effective April 1, 1984. The reason for recommending a restoration of the former rule is that no purpose is served in requiring a party to request findings of fact and conclusions of law at a time before motions for new trial have been dealt with by the trial judge.

Rule 297. Time to File Findings and Conclusions

When demand is made therefor, the court shall prepare its findings of fact and conclusions of law and file same within thirty days after the judgment (~~is signed. Such findings of fact and conclusions of law shall be filed with the clerk and shall be part of the record.~~) or order overruling the motion for new trial is signed, or the motion is overruled by operation of law. If the trial judge shall fail (~~se~~) to so file them, the party so demanding(,) in order to complain of the failure, shall, in writing, within five days after such date, call the omission to the attention of the judge, whereupon the period for preparation and filing shall be automatically extended for five days after such notification.

COMMENT: This proposed rule change corresponds to the change in Tex. R. Civ. P. 296.

Rule 306c. Prematurely Filed Documents

No motion for new trial, request for findings of fact and conclusions of law, appeal bond or affidavit in lieu thereof, notice of appeal, or notice of limitation of appeal shall be held ineffective because prematurely filed ~~(;-but-every-such-motion)~~. Every such prematurely filed document shall be deemed to have been filed on ~~(the-date-of-but-subsequent-to-the-date-of-signing of-the-judgment-the-motion-assails;-and-every-such-request-for findings-of-fact-and-conclusions-of-law-and-every-such-appeal bond-or-affidavit-or-notice-of-appeal-or-notice-of-limitation-of appeal-shall-be-deemed-to-have-been-filed-on-the-date-of-but subsequent-to-the-date-of-signing-of-the-judgment-or-the-date-of the-overruling-of-motion-for-new-trial;-if-such-a-motion-is-filed.)~~ time on the first date of the period during which the document may be filed as prescribed by the applicable rule or rules.

COMMENT: This proposed version of Rule 306c is intended to accomplish two purposes. First, it eliminates language in the current rule that treats prematurely filed requests for findings of fact and conclusions of law, appeal bonds, affidavits in lieu thereof, notices of appeal and notices of limitation of appeal as being filed "on the date of but subsequent to the date of signing of the judgment or the date of the overruling of motion for new trial, if such a motion is filed." Under current appellate practice, the times for perfecting appeals and/or limiting the scope of an appeal are not keyed to the overruling of motions for new trial. If the Committee's recommendations concerning Rules 296 and 297 are adopted, the last sentence of this proposed rule should

be interpreted to mean that a premature request for findings of fact and conclusions of law should be deemed filed on the date of but subsequent to the signing of the order overruling the motion for new trial or the overruling of the motion by operation of law.

R. 29

TAYLOR, HAYS, PRICE, McCONN & PICKERING
ATTORNEYS AT LAW
400 TWO ALLEN CENTER
HOUSTON, TEXAS 77002
(713) 654-1111

May 14, 1984

Mr. Hubert Green
Attorney at Law
900 Alamo National Bldg.
San Antonio, TX 78205

RE: Rule 296

Dear Hubert:

Pursuant to your request to send this letter to you with a copy to Justice Wallace, I am writing to point out the question I had with respect to the new Rule 296, Tex. R.Civ.P.

There is a discrepency between the amended Rule 296 as it appears in the pocket part in Vernon's and the Rule as it appears in the pull-out to the February, Texas Bar Journal. As Garson Jackson and Justice Wallace's office have informed me, the pocket part version is incorrect.

My question is whether there are any published explanations or bar comments as to the change in Rule 296? Under the prior Rule 296, it applied to hearings over motions to set aside default judgments. As you know, the Court often conducts an oral hearing in which testimony is presented. Thereafter, the motion to set aside a default judgment may be overruled by operation of law seventy-five (75) days after the default judgment was signed. Under the case law the Appellate Court might review the trial court's findings of fact and conclusions of law as to this hearing. See Dallas Heating Co., Inc. v. Pardee, 561 S.W.2d. 16 (Tex.Civ. App.-Dallas, 1977, ref.n.r.e.). Now that the new rule has eliminated the "by operation of law" wording, does it mean that the Appellate Courts do not need findings of fact and conclusions of law on these matters, or that the "signing" in Rule 296 also applies to the operation of law time period? See Int'l. Specialty Products, Inc. v. Chem-Clean Products, Inc., 611.S.W.2d. 481 (Tex.Civ.App.-Waco, 1981, no writ).

In Guaranty Bank v. Thompson, 632 S.W.2d. 338, 340 (Tex. 1982), the Court held that a motion to set aside a default judgment "should not be denied on the basis of counter-

testimony." Accordingly, the dropping of the language in Rule 296 may have been done because findings of fact and conclusions of law are no longer necessary for appellate review.

Sincerely,

TAYLOR, HAYS, PRICE, McCONN & PICKERING

David R. Bickel

DRB/lmm

cc: Justice James P. Wallace
Supreme Court of Texas
P. O. Box 12248
Capital Station
Austin, TX 78711

TK - send to R 296 Sub C SCAC

HUGHES & LUCE
1000 DALLAS BUILDING
DALLAS, TEXAS 75201

(214) 760-5500
TELECOPIER (214) 651-0561
TELEX 730936

1300 TWO LINCOLN CENTRE
DALLAS, TEXAS 75240
(214) 386-7000
TELECOPIER (214) 934-3226

1500 UNITED BANK TOWER
AUSTIN, TEXAS 78701
(512) 474-6050
TELECOPIER (512) 474-4258

WRITER'S DIRECT DIAL NUMBER

214/760-5421

February 27, 1985

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

Re: Committee on the Administration of Justice

Dear Mike:

Enclosed are proposed changes in Rules 296, 306a, and 306c. I will be ready to report on these proposals at the March 9, 1985 meeting. Please note that if the proposed addition to Rule 296 is made, there will be no need to amend Rule 306c. If, however, Rule 296 is not amended as proposed, then Rule 306c should be amended as set out in the attachment to this letter.

Respectfully,

R. Doak Bishop

RDB/ls
Enclosures

cc: Ms. Evelyn Avent
State Bar of Texas

Rule 296. Conclusions of Fact and Law

In any case tried in the district or county court without a jury, the judge shall, at the request of either party, state in writing his findings of fact and conclusions of law. Such request shall be filed within ten days after the final judgment or order overruling motion for new trial is signed or the motion for new trial is overruled by operation of law. Notice of the filing of the request shall be served on the opposite party as provided in Rule 21a.

recommend no change

Rule 306a. Periods to Run From Signing of Judgment

1. Beginning of periods. The date a judgment or order is signed as shown of record shall determine the beginning of the periods prescribed by these rules for the court's plenary power to grant a new trial or to vacate, modify, correct or reform a judgment or order and for filing in the trial court the various documents in connection with an appeal, including, but not limited to an original or amended motion for new trial, a motion for reinstatement of a case dismissed for want of prosecution, a request for findings of fact and conclusions of law, findings of fact and conclusions of law, an appeal bond, certificate of casn 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, but this rule shall not determine what constitutes rendition of a judgment or order for any purpose.

Rule 306c. Prematurely Filed Documents

No motion for new trial, request for findings of fact and conclusions of law, appeal bond or affidavit in lieu thereof, notice of appeal, or notice of limitation of appeal 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 of signing of the judgment the motion assails, and every such request for findings of fact and conclusions of law and every such appeal bond or affidavit or notice of appeal or notice of limitation of appeal shall be deemed to have been filed on the date of but subsequent to the date of signing of the judgment, ~~or the date of the overruling of motion for new trial, if such a motion is filed~~.

Recommends adoption

Rules 296
306c

Justice H: Please con- Prof. Wicker & write J.P.

Texas Tech University

School of Law

August 6, 1984

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

Re: Apparent unintended anomoly in amendment to the Texas Rules of Civil Procedure, effective April 1, 1984

Dear Justice Pope:

I have recently discovered an apparent anomoly created by the amendments to Rules 296 and 306c, effective April 1, 1984. The problem is created where a premature request for findings of fact and conclusions of law is made and a motion for new trial is filed.

Rule 306c was broadened to include prematurely filed requests for findings of fact and conclusions of law. If such a request is prematurely filed and a motion for new trial is filed, the request is deemed to have been filed on the date of (but subsequent to) the date of the overruling of the motion for new trial. This amendment would have created no problem had Rule 296 not also been amended to require a request for findings and conclusions to be filed within ten days after the final judgment is signed, regardless of whether a motion for new trial is filed. The pre-1984 version permitted a request to be filed within ten days after a motion for new trial is overruled.

Reading both the amended rules together, if a premature request for findings and conclusions is made and a timely motion for new trial is filed, the request will be deemed to have been filed too late if the motion for new trial is overruled more than ten days after the judgment is signed. This is quite possible, of course, since Rule 329b(c) allows the trial court 75 days to rule on a motion for new trial before it is overruled as a matter of law.

If this result was intended, please excuse my having taken up your valuable time. If it was not intended, I hope that I have been of some assistance to the Court.

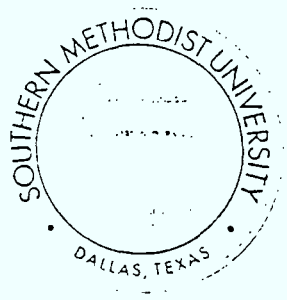
Respectfully,

Jeremy C. Wicker

Jeremy C. Wicker
Professor of Law

JCW/nt

00000203



June 3, 1985

Ms. Evelyn Avent
State Bar of Texas
P. O. Box 12487
Capitol Station
Austin, Texas 78711

Re: COAJ Proposals for
Amendment to Rules
296, 297 and 306c

Dear Evelyn,

Enclosed please find the proposed changes to Rules 296, 297 and 306c. I would appreciate it if you would place them on the agenda for the next meeting.

Respectfully,

Bill

William V. Dorsaneo, III
Professor of Law

WVD:vm
enc.
cc: Michael T. Gallagher
Judge James P. Wallace
Luther H. Soules, III
R. Doak Bishop
Charles R. Haworth
Guy E. "Buddy" Hopkins

COAJ recommends following Bishop's scheme

00000204

SCHOOL OF LAW
SOUTHERN METHODIST UNIVERSITY / DALLAS, TEXAS 75275

Rule 296. Conclusions of Fact and Law

In any case tried in the district or county court without a jury, the judge shall, at the request of either party, state in writing his findings of fact and conclusions of law. Such request shall be filed within ten days after the final judgment or order overruling motion for new trial is signed or the motion for new trial is overruled by operation of law. Notice of the filing of the request shall be served on the opposite party as provided in Rule 21a.

Comment: This proposed rule change negates the change last made in Rule 296 effective April 1, 1984. The reason for recommending a restoration of the former rule is that no purpose is served in requiring a party to request findings of fact and conclusions of law at a time before motions for new trial have been dealt with by the trial judge.

COA) "

"No Dg

Rule 297. Time to File Findings and Conclusions

When demand is made therefor, the court shall prepare its findings of fact and conclusions of law and file same within thirty days after the judgment or order overruling the motion for new trial is signed, or the motion is overruled by operation of law. If the trial judge shall fail to so file them, the party so demanding in order to complain of the failure, shall, in writing, within five days after such date, call the omission to the attention of the judge, whereupon the period for preparation and filing shall be automatically extended for five days after such notification.

Comment: This proposed rule change corresponds to the change in Tex. R. Civ. R. 296.

Rule 306c. Prematurely Filed Documents

No motion for new trial, request for findings of fact and conclusions of law, appeal bond or affidavit in lieu thereof, notice of appeal, or notice of limitation of appeal shall be held ineffective because prematurely filed. Every such prematurely filed document shall be deemed to have been filed on time on the first date of the period durng which the document may be filed as prescribed by the applicable rule or rules.

Comment: This proposed version of Rule 306c is intended to accomplish two purposes. First, it eliminates language in the current rule that treats prematurely filed requests for findings of fact and conclusions of law, appeal bonds, affidavits in lieu thereof, notices of appeal and notices of limitation of appeal as being filed "on the date of but subsequent to the date of signing of the judgment or the date of the overruling of motion for new trial, if such a motion is filed." Under current appellate practice, the times for perfecting appeals and/or limiting the scope of an appeal are not keyed to the overruling of motions for new trial. If the Committee's recommendations concerning Rules 296 and 297 are adopted, the last sentence of this proposed rule should be interpreted to mean that a premature request for findings of fact and conclusions of law should be deemed filed on the date of but subsequent to the signing of the order overruling the motion for new trial or the overruling of the motion by operation of law.

CO A J - appeal Dock
Bishop's not flus.

305a

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

January 11, 1985

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

Re: Rules 3a, 8, 10, 10a, 10b, 27a, 27b, 27c, 165a, 166f, 247, 247a, 250, 305a.

Dear Luke:

I am enclosing herewith copies of amendments to the Rules of Civil Procedure as recommended by the Committee on Local Rules of the Council of Administrative Judges. I am also enclosing a copy of that Committee's report to Judge Pope which sets out the reasons for the proposed changes.

If you would like a copy to go to each member of the Advisory Committee at this time, please call Flo in my office (512/475-4615) and we will take care of it.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosures

00000208

To: Jack Pope, Chief Justice, Supreme Court of Texas

Re: Report of Committee on Local Rules

Little vacuum exists is case processing; necessity, inventiveness and the skill of the martinette will rush in to plug gaps in any system of rules, wherever adopted.

Your committee was furnished copies of all Local Rules filed by District and County Courts with the Supreme court by April 1, 1984. Our work was divided, with Judges Ovard and Thurmond reviewing Criminal case processing and Judges McKim and Stovall civil case processing. Our approach was to group Local Rules by function, so each could be compared for likenesses and differences. Most Local rules addressed these functions:

1. Division of work load in overlapping districts.
2. Schedules for sitting in multi-county districts.
3. Procedures for setting cases: Jury, non-jury, ancillary and dilatory, preferential.
4. Announcements, assignments, pass by agreements, and continuances.
5. Pre-trial methods and procedures.
6. Dismissal for Want of Prosecution.
7. Notices - lead counsel.
8. Withdrawal/Substitution of Counsel.
9. Attorney vacations.
10. Engaged counsel conflicts.
11. Courtroom decorum - housekeeping.
12. Exhortatory suggestions about good-faith settlement efforts.

The Committee found three broad groups of Local Rules and offer the following comments:

Group One: General Administrative Rules

Most courts have general administrative rules, particularly those who serve more than one county, setting out terms of court in each county, types of setting calendars and information about who to call for settings, what kind of notice is to be given others in the case and general housekeeping provisions, subject to change, depending on circumstances.

Comment: The Committee notes that terms of court are governed by statute, usually when the court was created or in a reconstituting statute, making most, if not all, continuous term courts. This language is probably not needed in a Local Rule. Calendars setting out the "who, when, what and where" are useful and must be flexible, to fit court needs, such as illness, vacations and the unexpected long case or docket collapse. Our recommendation: place this information in a "broadside", post it in all courthouses in the District and instruct the clerk to send a copy to all out-of-district attorneys and pro se who file papers, when the first appearance is made. The local Bar can be copied when the schedule is first made and notified of any changes. We note that many multi-county Judicial

00000209

districts serve overlapping counties and the division of work load is governed by statute or agreement of the affected Judges. All the above could be covered by a "Court Information Bulletin", spelling out the manner of getting a setting on motions, pre-trial and trial matters.

Recommendation: Adopt as a statewide Rule the following:

LOCAL RULES: NOTICE TO COUNSEL AND PUBLIC

Local Schedules and Assignments of Court shall be mailed by each District or County Clerk upon receipt of the first pleading or instrument filed by an attorney or pro se party not residing within the county. The clerk shall not be required to provide more than one copy of the rules during a given year to each attorney or litigant who resides outside of the county in which the case is filed. It shall be the attorney and litigant's responsibility to keep informed of amendments to local rules, which shall be provided by the clerk on request for out of county residents. Local Rules and Amendments thereto shall be printed and available in the clerks office at no cost, and shall be posted in the Courthouse at all times.

Group Two: State Rules of Procedure

Many of Local Rules address functions which could best be served by a statewide uniform rule. These are suggested, as examples.

36th, 156th

Supreme Court Advisory Committee
Rules 523-591 Subcommittee
Proposed Amendment
3-08-86

NOTE: Problems arising from the application of Rule 525 (Oral Pleadings in Justice Court) in forcible entry and detainer actions require this subcommittee to recommend changes in section 2 of Rules Relating to Special Proceedings (Forcible Entry and Detainer, Rules 738-755).

Rule 749 - May Appeal

No motion for a new trial shall be necessary to authorize an appeal.

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 (5) 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 that this rule has been substantially complied with.

COMMENT: The last paragraph has been added.

The purpose of this proposed 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. The present rules on forcible entry and detainer do not require that any notice of appeal be given to the appellee. A defendant/appellee who did not file a written answer in justice court is subject to default judgment for not filing one in the county court even though that party was not aware that an appeal had been perfected.

The language of the proposed amendment is taken from Rule 571, which governs appeal bonds and notice thereof in other types of actions in the justice courts. Due to the accelerated nature of appeals in forcible entry and detainer suits, though, this proposed rule requires only substantial compliance with Rule 21a.

The proposed amendment prevents the taking of a default judgment against an adverse party who had no notice of the appeal. It also affords the appealing party protection from dismissal of the appeal due to technical

defects or irregularities in a notice which otherwise effectively alerts an adverse party that an appeal is being prosecuted.

Approved _____ Approved with Modifications _____

Disapproved _____ Deferred _____

DJ:jk .004

Supreme Court Advisory Committee
Rules 523-591 Subcommittee
Proposed Amendment
3-08-86

NOTE: Problems arising from the application of Rule 525 (Oral Pleadings in Justice Court) in forcible entry and detainer actions require this subcommittee to recommend changes in Section 2 of Rules Relating to Special Proceedings (Forcible Entry and Detainer, Rules 738-755).

Rule 751 - Transcript

When an appeal has been perfected, the justice shall stay all further proceedings on the judgment, and immédiately 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, 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 where 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: The second paragraph has been added.

00000215

The purpose of this proposed amendment is to notify the parties of the date from which time for trial began to run and the docket number for the case in county court. The amendment provides due process to pro se defendants by advising them of the necessity of filing a written answer in the county court if they did not file one in justice court. (See Rules 525 and 753).

Approved _____ Approved with Modifications _____

Disapproved _____ Deferred _____

DJ:jk .004

Supreme Court Advisory Committee
Rules 523-591 Subcommittee
Proposed Amendment
3-08-86

NOTE: Problems arising from the application of Rule 525 (Oral Pleadings in Justice Court) in forcible entry and detainer actions require this subcommittee to recommend changes in section 2 of Rules Relating to Special Proceedings (Forcible Entry and Detainer, rules 738-755).

Rule 753 - Judgment by Default

Said cause shall be subject to trial at any time after the expiration of ~~[five]~~ eight full days after the day the transcript if filed in the county court. If the defendant has filed a written answer in the justice court, the same shall be taken to constitute his appearance and answer in the county court, and such answer may be amended as in other cases. If the defendant made no answer in writing in the justice court, and if he fails to file a written answer within ~~[five]~~ eight full days after the transcript is filed in the county court, the allegations of the complaint may be taken as admitted and judgment by default may be entered accordingly.

COMMENT: The word "five" has been deleted and replaced with "eight."

The purpose of this proposed amendment is to extend the time periods for trial date and filing a written answer in county court. The extension is required for due

process considerations, in order to give a pro se defendant the opportunity to receive notice of the appeal and file a written answer where he or she has pleaded orally in the justice court.

Approved _____ Approved with Modifications _____

Disapproved _____ Deferred _____

DJ:jk .004

As far as the Bar in general, I believe that Blake Tartt has the experience and expertise to insure that the Bar has outstanding legislative advisors for the next legislative session.

Sincerely yours,

NELSON & WILLIAMSON

John Williamson

JW:lw

Enclosures

cc: The Honorable Blake Tartt, President
The Honorable Rene O. Oliveira
Mrs. Evelyn A. Avent

NELSON, WILLIAMSON & YAÑEZ
ATTORNEYS-ABOGADOS
10 EAST ELIZABETH STREET
BROWNSVILLE, TEXAS 78520

A. C. NELSON
JOHN WILLIAMSON
LINDA REYNA YAÑEZ

TELEPHONE
(512) 546-7[illegible]3

June 2, 1983

Mr. Jack Eisenberg, Chairman
Committee of Administration of Justice
P. O. Box 4917
Austin, Texas 78785

RE: Rule 792

Dear Jack:

This letter is written as a report on the action of the subcommittee you appointed in response to a letter from a Texas attorney concerning Rule 792. This rule requires the opposite party in a trespass to try title action, upon request, to file an abstract of title within twenty days or within such further time as the court may grant. If he does not, he can give no evidence of his claim or title at trial. The attorney suggests that the the obtaining of an abstract of title in a trespass to try title action should done under the discovery rules which govern other civil cases.

The subcommittee noted that bringing the action as a declaratory judgment or simple trespass action, would have such an effect.

The attorney who requested the change was contacted. It seems that his real concern is that Rule 792 operates as an automatic dismissal of the opposite party's claim or title unless the abstract of title is filed within twenty days or an extension is obtained. In Hunt v. Heaton, 643 S.W.2d 677 (Tex.1982), the defendant in a trespass to try title action answered the petition by answering not guilty and demanded that the plaintiff file an abstract of the title he would rely on at trial. The plaintiff did not request an extension of time to file the abstract. Five years after the demand and 39 days before the trial, the plaintiff filed an abstract. The supreme court upheld the trial court's refusal to allow the plaintiff any evidence of his claim or title.

The concern is that in a trespass to try title action Rule 792 operates to cause an automatic dismissal of the opposite parity's claim or title unless the abstract of title is filed within twenty day or an extension is obtained.

The subcommittee believes that the harshness of Rule 792 can be eliminated if, prior to the beginning of the trial, there must be notice and a hearing. Then the court may order that no evidence of the claim or title of such opposite party be given at trial, due to the failure to file the abstract. The following amendment is suggested for consideration:

Rule 792. Time To File Abstract
Such abstract of title shall be filed with the papers of the cause within [~~twenty~~] thirty days after service of the notice or within such further time as the court on good cause shown may grant; and in default thereof after notice and hearing prior to the beginning of the trial, the court may order that no evidence of the claim or title of such opposite party [~~shall~~] be given on trial.

The attorney who wrote the letter requesting the changes would welcome the opportunity to address the committee in person.

Sincerely yours,

John Williamson

JW:ps

cc: Evelyn Avent
Jeffery Jones
Orville C. Walker

DYCHE & WRIGHT
ATTORNEYS AT LAW
815 WALKER AVENUE
1600 MELLIE ESPERSON BUILDING
HOUSTON, TEXAS 77002

TELEPHONE (713) 223-[illegible]
CABLE: DYCHWRIGHT HOU
TELEX: 792184
TELECOPIER 224-3824
(DIRECT LINE AFTER HOURS)

KARL C. HOPPESS

January 27, 1983

Honorable Jack Pope, Chief Justice
Supreme Court of Texas
Supreme Court Building
Post Office Box 12248
Austin, Texas 78711

Re: Rule 792 - Abstracts of Title

Dear Judge Pope:

Due to my active participation in the trial of land litigation matters, it has become apparent over the past years that in certain counties in Texas today the obtaining of an abstract of title is impossible unless prepared by the attorney himself. As an example, in Brazos County the Clerk no longer has the capability or the time to aid in the compiling of an abstract of title without the attorney having to personally pull all records, set up special dates, remove the records in the presence of the Clerk, make copies at his own location, and thereafter obtain the various indices of said documents and the appropriate certification, after having presented each of those documents and the recording legends to the Clerk. For this reason, although Rule 792, of course, expands the time for which an abstract can be filed in a trepass to try title case from twenty days to that which the Court finds reasonable, it appears to me that serious consideration should be given to the question of putting this discovery under the same rules as that related to other discovery. I am fully aware of the reason for Rule 792; however, in my opinion, the rule is more and more frequently used not for the purposes of discovery, but where the defense counsel is aware that the availability of the County Clerk's books and records are almost nonexistent and there are no abstract services available to plaintiff's counsel, especially if it involves issues of title of minerals, to harass and put undue pressure on plaintiff's counsel. This can be especially unjust and onerous when the defendant is a trespasser with little or no indicia of title. I am certainly in agreement that no one should be able to prosecute a trespass to try title action without proper facts and circumstances surrounding his right of title and that he should be prepared to prove that title to the exclusion

COAs & SCBC

THE SUPREME COURT OF TEXAS

ADDRESS
MAIL

December 13, 1983

Honorable Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Cliffe
1235 Milam Building
San Antonio, Texas 78205

Dear Luke:

I have had complaints-suggestions concerning several rules so I will pass them on to you for your committee's consideration.

Rule 272:

Some members of the court as well as several lawyers have expressed concern that present Rule 272 is unduly restrictive and results in an injustice in instances where specific objections are made to the court's charge but the trial court does not specificall rule on the objection. The most common suggestion is that the rule be amended to require only that a specific objection be made in the record. The trial judge would thus be made aware of the objection but he could not refuse to rule and thus avoid having his decision reviewed on appeal.

Rule 296 and 297:

Professor Wicker's letter is enclosed.

Rule 373:

It has been suggested that Rule 373 and Rules of Evidence 103 are inconsistent, i.e., under the Rules of Evidence the attorney could tell the judge in narrative form what his witness would testify to and thus preserve his point for appellate review. Rules of Procedure 373 requires a bill of exception setting out the proffered testimony. The committee may have suggestion as to which if either of these rules should be amended.

Rule 749:

This rule provides that in a forceable entry and detainer suit an appeal bond must be filed within five days of judgment. The rules of practice in justice courts, specifically Rule 569, provides five days for filing a motion for new trial in the justice court and Rule 567 provides that the justice of the peace has ten days to act on the motion for new trial. In a recent motion for leave to file a petition for a writ of mandamus we were presented with a situation where the defendant filed a motion for new trial five days after judgment, the next day the justice of the peace overruled the motion, but it was too late to file an appeal bond under Rule 749.

The question presented is whether forcible entry and detainer actions should be an express exception to the rules of practice in justice courts so as to clarify the procedural steps such as occurred in the above case.

As usual I leave further action on these matters to your and the committee's good judgment.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosures

P.S.
I am enclosing a letter from John O'Quinn concerning Rules 127 and 131. Ray Hardy's correspondence has been previously forwarded to you.

Texas Tech University

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

January 2, 1986

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

Re: Administration of Justice Committee

Dear Mike:

Enclosed are my proposed amendments to Rules 748 and 755, made necessary by the 1985 amendments of the Property Code.

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

Sincerely,

Jeremy C. Wicker
Professor of Law

JCW/tm

Enclosures

cc: Ms. Evelyn Avent, State Bar Staff Liaison
Mr. Luther H. Soules, III
Justice James P. Wallace

00000238

Rule 748. Judgment and Writ

If the judgment or verdict be in favor of the plaintiff, the justice shall give judgment for plaintiff for [~~restitution~~] possession of the premises, costs, and damages; and he shall award his writ of [~~restitution~~] 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 [~~restitution~~] possession shall issue until the expiration of five days from the time the judgment is signed, unless a possession bond has been filed under the Texas Rules of Civil Procedure and judgment for possession is thereafter granted by default.

Comment: The amendment is necessary to conform Rule 748 to the 1985 amendments adding section 24.0061 to the Property Code.

Rule 755. Writ of [~~Restitution~~] Possession

The writ of [~~restitution~~] possession, or execution, or both, shall be issued by the clerk of the county court according to the judgment rendered, and the same shall be executed by the sheriff or constable, as in other cases; and such writ of [~~restitution~~] possession shall not be suspended or superseded in any case by appeal from such final judgment in the county court, unless the premises in question are being used for residential purposes only.

Comment: The amendment is necessary to conform Rule 755 to the 1985 amendment of section 24.007 of the Property Code.

LAW OFFICES

SOULES & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

STEPHANIE A. BELBER
ROBERT E. ETLINGER
PETER F. CAZDA
ROBERT D. REED
SUSAN D. REED
RAND I. RIKLIN
JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

February 10, 1986

Mr. W. James Kronzer
1001 Texas Avenue
Suite 1030
Houston, Texas 77002

Dear Jim:

Enclosed are proposed changes to Rules 748 and 755. Please draft, in proper form for Committee consideration appropriate Rules changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

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

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

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

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

Recommended by Co #1
2-8-86
except last clause

Rule 748. Judgment and Writ

If the judgment or verdict be in favor of the plaintiff, the justice shall give judgment for plaintiff for ~~[restitution]~~ possession of the premises, costs, and damages; and he shall award his writ of ~~[restitution]~~ 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 ~~[restitution]~~ possession shall issue until the expiration of five days from the time the judgment is signed, unless a possession bond has been filed under the Texas Rules of Civil Procedure and judgment for possession is thereafter granted by default.

Comment: The amendment is necessary to conform Rule 748 to the 1985 amendments adding section 24.0061 to the Property Code.

Recommended (C of A)
2-8-86

Rule 755. Writ of [~~Restitution~~] Possession

The writ of [~~restitution~~] possession, or execution, or both, shall be issued by the clerk of the county court according to the judgment ~~rendered,~~ and ~~the~~ same shall be executed by the sheriff or constable, as in other cases; and such writ of [~~restitution~~] possession shall not be suspended or superseded in any case by appeal from such final judgment in the county court, unless the premises in question are being used ~~for residential purposes only~~ as the principal residence of [illegible] a party.

Comment: The amendment is necessary to conform Rule 755 to the 1985 amendment of section 24.007 of the Property Code.

MATTHEWS & BRANSCOMB
ATTORNEYS AT LAW
ONE ALAMO CENTER
106 S. ST. MARY'S STREET
SAN ANTONIO, TEXAS 78205-3692
TELEPHONE 512-226-4211
TELECOPIER 512-226-0521

WILBUR L. MATTHEWS
MARVIE BRANSCOMB, JR.
H. SWEARINGEN, JR.
WIS T. TARVER, JR.
W. BAKER
RICHARD E. GOLDSMITH
G. RAY MILLER, JR.
W. H. NOWLIN
FERD C. MEYER, JR.
JOHN O. FISCH
JON C. WOOD
GEORGE P. PARKER, JR.
JAMES M. DOYLE, JR.
C. M. MONTGOMERY
W. ROGER WILSON
HOWARD P. NEWTON
C. J. MULLER
JOHN M. PINCKNEY III
RICHARD C. DANYSH
CHARLES J. FITZPATRICK
MARSHALL T. STEVES, JR.
MICHAEL W. STUKENBERG
JUDITH REED BLAKEWAY
A. CHRIS HEINRICHS
KENTON E. McDONALD
JAMES L. WALKER
CRAIG L. WILLIAMS
GILBERT F. VAZQUEZ
CHARLES D. HOULIHAN, JR.
ROBERT D. ROONEY
MARK S. HELMKE
MARY ELLA McBREARTY
CYNTHIA N. MILNE
RAUL M. CALDERON
DOUGLAS L. GIBLEN
RUBEN PEREZ
JAMIE M. WILSON
THOMAS A. MORRIS
RICHARD M. GREEN
PATRICK H. AUTRY
LEO D. FIGUEROA
JOHN S. HOWELL
CHERRY D. WILLIAMS
ALLAN F. SMITH
J. A. CARSON
FRANK Z. RUTTENBERG
GERALD E. THORNTON, JR.
CAROL E. MILORD
ARTHUR G. UHL III
LESLIE WHARTON

GRADY BARRETT
KIP McKINNEY ESPY
GARY BUSHELL
OF COUNSEL

CORPUS CHRISTI OFFICE
1800 FIRST CITY BANK TOWER
CORPUS CHRISTI, TEXAS 78477-0129
512-888-9261

April 23, 1985

Mr. Tom B. Ramey, Jr.
P. O. Box 8012
Tyler, Texas 75711

RE: Adoption of F.R.A.P. 10
and F.R.A.P.11 in Texas

Dear Tom:

I have followed with interest the efforts to curb litigation costs and delay. Today I am responding to your invitation to submit suggestions that may aid in solving these problems.

The adoption of rules similar to F.R.A.P.10 and F.R.A.P.11 (copies enclosed) would save countless hours and dollars in those very common situations where court reporters fail to transcribe the statement of facts for timely filing in an appeal.

The federal system recognizes that courts-not lawyers-control court reporters. Clients there no longer pay for lawyer time expended in interviewing court reporters, preparing affidavits and filing motions for extension.

I have been forced to file as many as five motions for extension in one state case. I have had appellate courts invite writs of mandamus. The client could not understand the reason for the expense nor the delay, much less the uncertainty of an extension.

I am taking the liberty of sharing these thoughts not only with you as President of the State Bar of Texas, but as well with some members of the Committee on Proposed Uniform Rules of Appellate Procedure.

They are proposals that would seem appropriate for civil rules to be promulgated by the Supreme Court regardless of what the legislature may do with the criminal rules.

Cordially,

Frank

F. W. Baker

FWB:bv
6FWBaak

cc: Hon. Clarence A. Guittard
Hon. Sam Houston Clinton
Hon. James Wallace
Hon. Shirley Butts
Mr. Hubert Green
Mr. Luke Soules
Mr. Ed Coultas

which appellant was convicted; the date and terms of sentence.

Concise statement of the question or questions involved on the appeal, with a showing that such question or questions are not frivolous. Counsel shall set forth sufficient facts to give the essential background and the manner in which the question or questions arose in the trial court.

Certificate by counsel, or by appellant if acting pro se, that the appeal is not taken for delay.

Factual showing setting forth the following factors as to appellant with particularity:

nature and circumstances of offense charged,

weight of evidence,

family ties,

employment,

financial resources,

character and mental condition,

length of residence in the community,

record of conviction,

record of appearances or flight,

danger to any other person or the community,

such other matters as may be deemed pertinent.

A copy of the district court's order denying bail, containing the written reasons for denial, shall be appended to the application. If the movant questions the factual basis of the order, a transcript of the proceedings had on the motion for bail made in the district court shall be lodged with this Court. If the movant is unable to obtain a transcript of these proceedings, he shall state in an affidavit the reasons why he has not obtained a transcript.

If the transcript is not lodged with the motion, the movant shall also attach to this motion a certificate of the court reporter certifying that the transcript has been ordered and that satisfactory financial arrangements have been made to pay for it, together with the estimated date of completion of the transcript.

The government shall file a written response to all motions for bail pending appeal within 7 days after service thereof.

Also, upon receipt of the application for bail, the Clerk shall request that the Clerk of the District Court obtain from the probation officer a copy of the presentence report, if one is available, and it shall be attached to the application for bail. The report shall not, however, be disclosed to the applicant. See Rule 32(c)(3) Fed.R.Crim.Proc.

THE RECORD ON APPEAL

FRAP 10.

(a) Composition of the Record on Appeal. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

(b) The Transcript of Proceedings: Duty of Appellant to Order: Notice to Appellee if Partial Transcript Is Ordered.

(1) Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary, subject to local rules of the courts of appeals. The order shall be in writing and within the same period a copy shall be filed with the clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order shall so state. If no such parts of the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.

(2) If the appellant intends to urge an appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) Unless the entire transcript is to be included the appellant shall, within the 10 days time provided in (b)(1) of this Rule 10, file a statement of the issues he intends to present on the appeal and shall serve on the appellee a copy of the order or certificate and of the statement. If the appellee deems a transcript of other parts of the proceedings to be necessary, he shall, within 10 days

court of appeals such parts of the original record as any party shall designate.
(As amended Apr. 30, 1979, eff. Aug. 1, 1979.)

Loc. R. 11

11.1. Duties of Court Reporters—Extensions of Time. The court reporter shall, in all cases in which transcripts are ordered, furnish the following information, on a form to be prescribed by the Clerk of the Court:

acknowledge receipt of the order for the transcript,

the date of receipt of the order for the transcript,

whether adequate financial arrangements under CJA or otherwise, have been made,

the number of trial or hearing days involved in the transcript, and an estimate of the number of pages,

the estimated date on which the transcript is to be completed,

a certificate that he or she expects to file the trial transcript with the District Court Clerk within the time estimated.

A request by a court reporter for enlargement of the time for filing the transcript beyond the 30 day period fixed by FRAP 11(b) shall be filed with the Clerk and shall specify in detail (a) the amount of work that has been accomplished on the transcript, (b) a list of all outstanding transcripts due to this and other courts, including the due dates of filing, and (c) verification that the request has been brought to the attention of, and approved by, the district judge who tried the case.

[I.O.P.—The monitoring of all outstanding transcripts, and the problems of delay in filing, will be done by the Clerk. Counsel will be kept informed when extensions of time are allowed on requests made by the court reporters.

On October 11, 1982 the Fifth Circuit Judicial Council adopted a resolution requiring each district court in the Fifth Circuit to develop a court reporter management plan that will provide for the day-to-day management and supervision of an efficient court reporting service within the district court. The plan is to provide for the supervision of court reporters in their relations with litigants as specified in the Court Reporter Act, including fees charged for transcripts, adherence to transcript format prescriptions and delivery schedules. The plan must also provide that supervision be exercised by a judge of the court, the clerk of court, or some other person designated by the Court.]

11.2. Duty of the Clerk. It is the responsibility of the Clerk of the District Court to determine when the record on appeal is complete for purposes of the appeal. Unless the record on appeal can be transmitted to this Court within 15 days from the filing of the notice of appeal or 15 days after the filing of the transcript of trial proceedings if one has been ordered, whichever is later, the Clerk of the District Court shall advise the Clerk of this Court of the reasons for delay and request an enlarged date for the filing thereof.

DOCKETING THE APPEAL; FILING OF THE RECORD

FRAP 12.

(a) Docketing the Appeal. Upon receipt of the copy of the notice of appeal and of the docket entries, transmitted by the clerk of the district court pursuant to Rule 3(d), the clerk of the court of appeals shall thereupon enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant, his name, identified as appellant, shall be added to the title.

(b) Filing the Record, Partial Record, or Certificate. Upon receipt of the record transmitted pursuant to Rule 11(b), or the partial record transmitted pursuant to Rule 11(e), (f), or (g), or the clerk's certificate under Rule 11(c), the clerk of the court of appeals shall file it and shall immediately give notice to all parties of the date on which it was filed.

(c) [Dismissal for Failure of Appellant to Cause Timely Transmission or to Docket Appeal.] [Abrogated]
(As amended Apr. 1, 1979, eff. Aug. 1, 1979.)

REVIEW OF DECISIONS OF THE TAX COURT

FRAP 13.

(a) How Obtained; Time for Filing Notice of Appeal. Review of a decision of the United

of such defect by the exercise of reasonable diligence?

Answer: "We do" or "We do not"

Answer: We do

The evidence revealed that when the Bains moved into the house they noticed a bulge under one window, a crack in the kitchen wall, and a sticking door. Within six or seven months after occupying the house, they noticed a foundation crack near the patio. Karen Bain testified that during the spring or summer of 1977 she was told there might be a slab problem with the house.

The Bains presented some evidence to the contrary. They consulted with a foundation expert in April, 1978, who informed them that there was not a substantial foundation defect. Also, they argue the flaws in the house could have been indicative of problems other than a foundation defect, such as ordinary subsidence problems common to the Houston area, or the effects of age, dampness and weathering on a 20-year-old house.

On appeal, the Bains asserted that the jury finding that they were on constructive notice of the foundation defect was against the great weight and preponderance of the evidence. The court of appeals reversed the trial court's judgment and remanded the cause, holding the flaws and evidence of defects in the house "do not point unerringly to a substantial foundation defect." This is not the correct standard of review for a challenge to the sufficiency of the evidence.

When reviewing a jury verdict to determine the factual sufficiency of the evidence, the court of appeals must consider and weigh all the evidence, and should set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Dyson v. Olin Corp.*, 692 S. W. 2d 456, 457 (Tex. 1985); *In Re King's Estate*, 150 Tex. 662, 664-65, 244 S. W. 2d 660, 661 (1951).

The court of appeals imposed a different standard—that the evidence supporting the jury's finding must point "unerringly" to the conclusion found by the jury. The court also held the evidence was "much too slight and indefinite" to support the jury verdict. The jury's task is to decide a fact issue based on the preponderance of the evidence. We hold that the court of appeals has decided this case under an inappropriate standard of law. There is some evidence to support the jury verdict. Therefore, we reverse the judgment of the court of appeals and remand the cause to that court to consider the insufficiency points of error under the proper test.

OPINION DELIVERED: February 12, 1986.

EX PARTE HECTOR SANCHEZ

No. C-4829

Original Habeas Corpus Proceeding.

Writ of habeas corpus granted December 30, 1985 and the cause submitted on January 15, 1986.

Relator is remanded to the custody of the Sheriff of Nueces County, Texas. (Opinion by Justice Kilgarlin.)

For Relator: Thomas G. White, Corpus Christi, Texas.

For Respondent: Larry Ludka and Tom Greenwell, Corpus Christi, Texas.

Hector Sanchez, official court reporter for the 103rd Judicial District Court of Cameron County, was held in contempt by the Court of Appeals for the Thirteenth Supreme Judicial District for failing to file, as ordered, a statement of facts in a cause on appeal in that court. His punishment was a $500 fine and thirty days in jail, and he was further ordered confined until he purged himself of contempt by completing and filing the statement of facts.

Sanchez has sought a writ of habeas corpus from this court, asserting four reasons why his restraint is unlawful. Pending disposition of this case, we released Sanchez from the Nueces County jail upon his posting a proper bond as ordered by this court. Now, having concluded that the order of the court of appeals holding Sanchez in contempt was proper, we deny the writ of habeas corpus and order Sanchez remanded to the custody of the Nueces County Sheriff.

The underlying cause in the court of appeals is *Lee Ross Puckett v. Grizzard Sales, Inc.* The record on appeal was due October 11, 1985. Sanchez received a request for the statement of facts on October 3, 1985, and signed an affidavit in support of Puckett's motion to extend the time for filing the record on appeal. Sanchez's affidavit stated "[t]he Statement of Facts can be prepared by December 11, 1985." In that affidavit, Sanchez estimated that the statement of facts would be 350 pages in length. The court of appeals, in an order dated November 14, 1985, extended the time for filing the record but specifically ordered Sanchez to prepare and file the statement of facts by December 11, 1985. A copy of the order was received by Sanchez on November 19, 1985.

Sanchez was already under order to prepare and file a statement of facts in a criminal case on appeal in the same court. In that case, *Domingo Gonzalez, Jr. v. The State of Texas*, a statement of facts had been requested from Sanchez on October 10, 1984. The court of appeals ordered Sanchez to complete and file the statement of

facts in Gonzalez by August 30, 1985. That statement of facts was not timely filed, and, after two hearings on contempt, Sanchez was incarcerated in the Nueces County jail on November 26, 1985.[1]

Sanchez did not file a statement of facts in *Puckett* by December 11, 1985. Accordingly, on December 12, 1985, the court of appeals ordered Sanchez to appear on December 23, 1985 and show cause why he should not be held in contempt for failing to file the statement of facts in *Puckett* by the date ordered. Sanchez, still in the Nueces County jail as a result of the contempt holding in *Gonzalez*, was promptly served with that show cause order.

The attorney for Sanchez in this habeas corpus proceeding was also his attorney in the last *Gonzalez* contempt hearing, November 7, 1985.[2] On December 4, 1985, the attorney, Thomas G. White, who serves without compensation by appointment from the court of appeals, met with Sanchez in the Nueces County jail. White discussed Sanchez's needs for securing his court reporting equipment, notes, and other matters necessary for the preparation of the statement of facts in *Puckett*.

White concedes in argument before this court that Sanchez did not attempt to obtain his notes and equipment until December 15, 1985, because he was under the mistaken belief that he would be released from the Nueces County jail on the basis of two for one credit. Sanchez's testimony admits much the same, except he places the date as December 13, 1985. Upon realizing his mistake, Sanchez testified that he requested the equipment be delivered to him. However, he received notes from another case, rather than notes from *Puckett*.

In any event, from about December 15, 1985 until the hearing on contempt on December 23, 1985, Sanchez still had not completed the statement of facts in *Puckett*. Moreover, in addition to *Puckett*, Sanchez owed statements of fact in at least six criminal appeals and two civil appeals in the Corpus Christi court. The records of that court reflect that it became necessary on December 31, 1985 for the court, on its own motion, to extend the filing of the statements of facts in those other eight cases and in *Puckett* until further order. By December 31, 1985, Sanchez had completed and filed the statement of facts in *Gonzalez*.

Sanchez's four grounds for habeas corpus relief are: (1) he was not granted a ten-day delay of the contempt hearing as requested in a motion for continuance; (2) because he was in jail as a result of the *Gonzalez* contempt, and without equipment and cooperation from the Nueces County Sheriff's Office, there was impossibility of compliance with the November 14, 1985 order; (3) if he were sentenced for contempt in each of the additional cases in which he owed statements of facts, his punishment could exceed six months, entitling him to a jury trial, and thus it was error to overrule his motion to consolidate all causes in which statements of facts were due; and (4) civil contempt (the coercive aspect of the order) and criminal contempt (the thirty days confinement and $500 fine punishment aspect) cannot be combined in the same order of contempt.

The last two contentions do not require much discussion. It is true that the United States Supreme Court has said that where a court may impose a sentence in excess of six months, a contemner may not be denied a right of trial by jury. *Bloom v. Illinois*, 391 U.S. 194, 198-202 (1967). It is also true that even when offenses are separate and the sentence for each contempt is less than six months, the contemner is nevertheless entitled to a trial by jury if the offenses are aggregated to run consecutively, so as to result in punishment exceeding six months. *Ex Parte McNemee*, 605 S.W. 2d 353, 356 (Tex. Civ. App.—El Paso 1980, habeas granted).

However, Sanchez asks us to assume that he will fail to timely file the statements of facts in the eight additional cases; that this will result in a show cause order from the court of appeals; that this will next result in a holding of contempt; that this will further result in punishment for each separate offense; and, that such combined punishment will exceed a total of six months confinement. We cannot possibly make all of these assumptions, nor could the court of appeals in passing upon Sanchez's motion for consolidation of all of the various causes. There was no error in the court of appeals overruling the motion to consolidate causes.

As to combining criminal contempt and civil contempt (punishment and coercion) into one order, Sanchez cites no cases. Moreover, Sanchez offers no policy argument as to why the two types of contempt should not be combined in the same order and we can think of no reason why the orders should be separate. Separate orders would only tend to confuse jailers. A judgment combining punishment and coercion was found not to be in violation of a predecessor contempt statute. *Ex parte Klugs-*

[1] For an explanation of facts and proceedings in that cause, *see* In Re Hector Sanchez, 698 S.W. 2d 462 (Tex. App.—Corpus Christi 1985).

[2] Sanchez remained out of jail on bond in *Gonzalez*, from November 7, 1985 until November 26, 1985 while seeking habeas corpus relief from the Court of Criminal Appeals, which was denied.

berg, 126 Tex. 225, 229, 87 S. W. 2d 465, 468 (1935). The enactment of Tex. Rev. Civ. Stat. Ann. art. 1911a[3] does not change the permissiveness of incorporating the two forms of contempt into one order.

In respect to Sanchez's continuance argument, all parties agree that attorney White was informally advised four days prior to the December 23 contempt hearing that he would again represent Sanchez. However, the order appointing White to represent Sanchez was not signed until the date of the hearing. Arguing that a continuance should have been granted, Sanchez cites Tex. Code Crim. Proc. art. 26.04(b), which states: "The appointed counsel is entitled to ten days to prepare for trial, but may waive the time by written notice, signed by the counsel and the accused."

We recognize that contempt proceedings are quasi-criminal in nature. *Ex Parte Cardwell*, 416 S. W. 2d 382, 384 (Tex. 1967). Further, we acknowledge that proceedings in contempt cases should conform as nearly as practicable to those in criminal cases. *Ex Parte Scott*, 133 Tex. 1, 10, 123 S. W. 2d 306, 311 (1939). It is because of our eagerness to guarantee that Sanchez's rights of due process be protected and that he not be deprived of his liberty except by due course of law that we do not consider as waiver of this point that the motion for continuance was orally made and was unsworn. It is set out in the statement of facts of the contempt hearing.

It is now settled law in this state that if a contemner requests, he is entitled to be represented by counsel in a contempt proceeding. *Ex Parte Hiester*, 572 S. W. 2d 300, 302 (1978). However, it is a unique situation that would allow the appointment of counsel for a court reporter, whom we would ordinarily assume to have sufficient funds to retain an attorney. Nevertheless, upon Sanchez's request, the Corpus Christi Court of Appeals appointed counsel, and that counsel was entitled to a reasonable time to prepare his defense of Sanchez. We concede, as did the United States Supreme Court in *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964), that the right to counsel can be rendered an empty formality if counsel is denied a justifiable request for delay. But, as the Supreme Court said in that case, "[t]he answer [to whether the case should be delayed] must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Id.*

The sole reason given by White to the court of appeals in support of his motion for continuance was so that he could secure witnesses who would testify in support of the impossibility of compliance defense. He identified those witnesses as jail personnel and the person who furnished the wrong notes and diskettes to Sanchez.

Under the rule announced in *Ungar v Sarafite*, and in consideration of the circumstances of this case, we conclude attorney White had adequate time to prepare for the contempt hearing. The hearing on contempt in *Gonzalez* was already completed when White counseled Sanchez in the Nueces County jail on December 4, 1985 about completing the *Puckett* statement of facts. White admits that he was informally told on December 19, 1985 that he would again be Sanchez's counsel. He came to court armed with a written motion for consolidation. Jail personnel who could testify as to any restrictions placed upon Sanchez's use of his equipment and preparation of the statement of facts were readily available for subpoena in the same courthouse complex in which the contempt hearing was held. Sanchez's testimony as to receiving the wrong notes and diskettes was not disputed. The other relevant facts of the impossibility defense were likewise not disputed, only the legal conclusions to drawn therefrom.

We hold that the time requirements of the Code of Criminal Procedure are not hard and fast rules to be adopted in contempt cases insofar as motions for continuance are concerned. Rather, due process requires only that the judge consider the reasons given for delay in context with the circumstances of the particular case. Sanchez's rights to due process were protected. The ingenuity of attorney White and the able defense he rendered is apparent from the record. Minimally, White had four days to prepare a defense. Based on the grounds asserted in his motion for continuance, that was adequate. The motion for continuance was properly denied.

Finally, we turn to the impossibility of compliance argument. Sanchez testified that the sheriff's office would only allow him to work in preparation of the *Puckett* record from 7 o'clock a.m. until 3 o'clock p.m. (but not during two meal breaks and two roll call breaks). He also testified as to his having received the wrong notes on *Puckett*. He further testified that he needed to compare his notes with certain records of the District Clerk of Cameron County. None of this was disputed. What is in dispute is whether Sanchez voluntarily put himself in a position where it would be impossible for him to comply with the court order.

In this regard, it will be noted that Sanchez knew on November 19, 1985 that he

[3]Now Tex. Gov't Code Ann. § 21.001.

was under order to have the statement of facts prepared and filed by December 11, 1985. Sanchez admitted that the preparation of the *Puckett* statement of facts would consume no more than thirty hours. While it is true that the court had ordered Sanchez to simultaneously prepare the *Puckett* statement of facts and the *Gonzalez* statement of facts, the testimony reveals that Sanchez undertook to do much of the legal preparation and leg work for the *Gonzalez* habeas corpus petition, rather than prepare the *Puckett* statement of facts.

Certainly until his incarceration on November 26, 1985, Sanchez was free to work on the *Puckett* statement of facts. All parties concede that after his incarceration, the sheriff's office, at least as early as December 4, 1985, made it possible for Sanchez to work on the *Puckett* statement of facts. That he elected not to do so until about December 15, 1985 was a decision that Sanchez voluntarily made. Thus, his impossibility of compliance defense must fall. As we said in *Ex Parte Helms*, 152 Tex. 480, 482, 259 S. W. 2d 184, 186 (1953), it is only involuntary inability to perform a judgment or comply with a court's order that is a good defense in a contempt proceeding.

The requested habeas corpus relief by Hector Sanchez is denied. He is ordered remanded to the custody of the sheriff of Nueces County to comply with the order of contempt of the court of appeals.

WILLIAM W. KILGARLIN
Justice

OPINION DELIVERED: February 12, 1986.

RAILROAD COMMISSION OF TEXAS vs. COMMON CARRIER MOTOR FREIGHT ASSOCIATION, INC. ET AL.

No. C-4883

From Tarrant County, Third District.

Opinion of CA, 699 S. W. 2d 291.

Under the provisions of Rule 483, T.R.C.P., the application for writ of error is granted and without hearing oral argument the judgment of the court of appeals is reversed and the cause is dismissed and the order of the Railroad Commission is final. (Per Curiam Opinion.)

For Petitioner: Jim Mattox, Attorney General, Stephen J. Davis, Assistant Attorney General, Austin, Texas.

For Respondents: Brooks and Brooks, Barry Brooks, Dallas, Texas. Robinson, Felts, Starnes, Angenend and Mashburn, John R. Whisenhunt, Phillip Robinson and Mert Starnes, Austin, Texas. Jerry Prestridge, Austin, Texas.

PER CURIAM

This case involves an appeal by the Common Carrier Motor Freight Association, Inc. and its members from an order of the Texas Railroad Commission relating to line-haul rates and minimum charges. The question before us is whether the Association's appeal from the Commission's final order was timely filed in the District Court of Travis County. We hold that it was not and, without hearing oral argument, reverse the judgment of the court of appeals and dismiss the cause. Tex. R. Civ. P. 483.

The Railroad Commission issued its final order regarding the requested rate increase on September 20, 1982. The Commission's order stated that "an imminent peril to the public welfare requires that this order have immediate effect" and that the "order shall be final and appealable on the date issued." Section 19(b) of the Administrative Procedure and Texas Register Act (TEX. REV. CIV. STAT. ANN. art 6252-13a) requires that proceedings for review of an agency order be instituted by filing a petition within 30 days after the decision complained of is final and appealable. Under the Commission's final order, then, the Association was required to file its appeal to the District Court of Travis County by October 20, 1982. The appeal was not filed until November 24, 1982, some 35 days after the required time.

The Association contends that the time for filing its appeal was tolled by its motion for rehearing to the Commission's final order, which was not overruled until November 1, 1982. Generally, a motion for rehearing to the appropriate agency is a prerequisite to a judicial appeal. A.P.T.R.A. § 13(a)(e). However, § 16(c) of the Act specifically provides that if an agency finds the existence of an imminent peril to the public health, safety, or welfare and notes that finding on its final order, a motion for rehearing is not required. The Association acknowledges § 16(c) but contends that this provision merely relieves them of the *necessity* of filing a motion for rehearing, it does not *prevent* them from doing so if they so choose.

Clearly, the purpose of the "imminent peril" clause is to shorten the time frame for the appellate process to preserve the public health, safety, or welfare. Were we to allow a prospective appellant to unilaterally lengthen that process, the "imminent peril" clause would be rendered virtually meaningless. We therefore hold that when a regulatory agency designates a final order as constituting an imminent peril to the public, a party wishing to contest that order must file an appeal to the district

LAW OFFICES

SOULES & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

STEPHANIE A. BELBER
ROBERT E. ETLINGER
PETER F. GAZDA
ROBERT D. REED
SUSAN D. REED
RAND I. RIKLIN
JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

October 29, 1986

Professor Newell Blakely
University of Houston Law Center
4800 Calhoun Road
Houston, Texas 77004

RE: Amendment of Texas Rule of Evidence 613
Judge Michael Schattman

Dear Newell:

Enclosed is a copy of a letter that I received from the COAJ with regard to Texas Rule of Evidence 613. It is currently on their agenda, and I have included same in our agenda for November 7-8, 1986.

Very truly yours,

LUTHER H. SOULES III
Chairman

LHSIII/tat
enclosure

00000257

Rule 267 - 6
Item 5 i

MICHAEL D. SCHATTMAN
DISTRICT JUDGE
348TH JUDICIAL DISTRICT OF TEXAS
TARRANT COUNTY COURT HOUSE
FORT WORTH, TEXAS 76196-0281
(817) 877-2715

February 28, 1986

Professor Newell H. Blakely
University of Houston Law Center
4800 Calhoun
Houston, Texas 77004

Re: Texas Rules of Evidence

Dear Professor Blakely:

Thank you for letter of February 4, 1986. In fact, I am on the Administration of Justice Committee and Professor Pat Hazel and I have asked to look at a conflict between Rule 267, Tex. R. Civ. P., and Rule 613, Tex. R. Ev., concerning the exclusion of witnesses.

What we will probably recommend is that the mandatory language of Rule 613 be incorporated into an amended Rule 267 and that the Evidence Rule then be repealed.

I will give some thought to problems encountered in court with the Evidence Rule and send you a further response, but thought you would want to be advised of what Pat and I were doing.

Very truly yours,

Michael D. Schattman

MDS/lw

xc: Professor Pat Hazel
University of Texas School of Law
727 East 26th Street
Austin, Texas 78705

00000258

MATERIALS FROM COAJ AGENDA

FEATHER AND SUMNER
ATTORNEYS AT LAW
TWO TURTLE CREEK VILLAGE
SUITE 402
DALLAS, TEXAS 75219
(214) 559-3203

January 31, 1986

Mr. Michael T. Gallager
7th Floor, Allied Bank Plaza
1000 Louisiana
Houston, TX 77002

Re: Committee on Administration of Justice
Rules 207 and 208

Déar Mike:

Enclosed is my formal submission of a revised Rule 207 in compliance with the Committee's vote on January 11, 1986. It should be ready for final adoption.

The other of my current responsibilities was certain divisions to Rule 208 which were tabled by the Committee.

Best personal regards.

Sincerely,

John Feather

JF/js
Encl.

cc: Ms. Evelyn Avent
Committee on Administration of Justice
State Bar of Texas
P. O. Box 12487, Capitol Station
Austin, TX 78711

Rule 207. USE OF DEPOSITIONS IN COURT PROCEEDINGS.

1. (Unchanged)

2. 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 ~~has been dismissed~~ and another suit involving the same subject matter is [afterward] brought between the same parties or their representatives or successors in interest, all depositions lawfully taken ~~and duly filed~~ in the former suit may be used in the latter [, upon written notice to counsel of record for all parties at least thirty (30) days prior to trial,] as if originally taken therefor.

3. (Unchanged)

made in the motion is given to every other party before the trial commences.

(Added by order of Dec. 5, 1983, eff. April 1, 1984.)

This is a new rule effective April 1, 1984. Former Rule 207 is incorporated into Rule 204. This rule replaces former Rules 211, 212, and 213.

Rule 208. Depositions Upon Written Questions

1. 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. The attendance of witnesses and the production of designated items may be compelled as provided in Rule 201.

A party proposing to take a deposition upon written questions shall serve them upon every other party or his attorney with a written notice ten days before the deposition is to be taken. The notice shall state the name and if known, the address of the deponent, the suit in which the deposition is to be used, the name or descriptive title and address of the officer before whom the deposition is to be taken, and if the production of documents or tangible things in accordance with Rule 201 is desired, a designation of the items to be produced by the deponent either by individual item or by category and which describes each item and category with reasonable particularity.

A party may in his notice name as the witness 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. In that event, the organization so named shall designate one or more officers, directors or managing agents, or other persons to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The person so designated shall testify as to matters known or reasonably available to the organization. This paragraph does not preclude taking a deposition by any other procedure authorized in these rules.

2. Notice by Publication. In all civil suits where it shall be shown to the court, by affidavit, that a party is beyond the jurisdiction of the court, or that he cannot be found, or has died since the commencement of the suit, and such death has been suggested at a prior term of court, so that the notice and copy of written questions cannot be served upon him for the purpose of taking depositions, and such party has no attorney of record upon whom they can be served, or if he be deceased and all the persons entitled to claim by or through such deceased defendant have not made themselves parties to the suit, and are unknown, the party wishing to take depositions may file his written questions in the court where the suit is pending, and the clerk of such court or justice of the peace shall thereupon cause a notice to be published in some newspaper in the county where the suit is pending, if there be a newspaper published in said county, but if not, then in the nearest county where a newspaper is published, once each week for two (2) consecutive weeks, stating the number of the suit, the names of the original parties, in what court the suit is pending, name and residence of the witness to whom the written questions are propounded, and that a deposition will be taken on or after the fourteenth day after the first publication of such notice.

In suits where service of citation has been made by publication, and the defendant has not answered within the time prescribed by law, service of notice of depositions upon written questions may be made at any time after the day when the defendant is required to answer, by filing the notice and questions among the papers of the suit at least twenty days before such depositions are to be taken.

3. Cross-Questions, Redirect Questions, Recross 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

...en for the refusal to sign require ... of the deposition in whole or in part. ... order of Dec. 5, 1983, eff. April 1, 1984.)

... new rule effective April 1, 1984. Former Rule ...orated into Rule 204. This new rule is former ... with modification. The modification gives the ...ter authority to file an unsigned deposition for ... and non-party witnesses.

Rule 206. Certification and Filing by Officer; Exhibits; Copies; Notice of Filing

1. **Certification and Filing by Officer.** ...er shall certify on the deposition that ... witness was duly sworn by him and that ...sition is a true record of the testimony ... by the witness. The officer shall include ...count of his charges for the preparation ...completed deposition in the certification. ...ss otherwise ordered by the court, he shall ...n securely seal the deposition in an en...lope endorsed with the title of the action and ...rked "Deposition of (here insert name of ...ess)" and shall promptly file it with the ...rt in which the action is pending or send it ... registered or certified mail to the clerk ...reof for filing.

2. **Exhibits.** Documents and things pro...ced for inspection during the examination of ...e witness, shall, upon the request of a party, ...e marked for identification and annexed to ...e deposition and may be inspected and copied ...y any party, except that if the person produc...ing the materials desires to retain them he ...ay (a) offer copies to be marked for identifi...cation and annexed to the deposition and to ...serve thereafter as originals if he affords to all ...parties fair opportunity to verify the copies by ...comparison with the originals, or (b) offer the ...originals to be marked for identification, after ...iving to each party an opportunity to inspect ...and copy them, in which event the materials ...may then be used in the same manner as if ...annexed to the deposition. Any party may ...move for an order that the original be annexed ...to and returned with the deposition to the ...court, pending final disposition of the case.

3. **Copies.** Upon payment of reasonable ...charges therefor, the officer shall furnish a ...copy of the deposition to any party or to the ...deponent.

4. **Notice of Filing.** The person filing the deposition shall give prompt notice of its filing to all parties.

5. **Inspection of Filed Deposition.** After it is filed, the deposition shall remain on file and be available for the purpose of being inspected by the deponent or any party and the deposition may be opened by the clerk or justice at the request of the deponent or any party, unless otherwise ordered by the court.

(Added by order of Dec. 5, 1983, eff. April 1, 1984.)

This is a 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.

Rule 207. Use of Depositions in Court Proceedings

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, insofar as admissible under the rules of evidence applied as though the witness were then present and testifying, 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.

2. Substitution of parties pursuant to these rules does not affect the right to use depositions previously taken; and, when a suit in a court of the United States or of this or any other state has been dismissed 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 and duly filed in the former suit may be used in the latter as if originally taken therefor.

3. **Motion to Suppress.** When a deposition shall have been filed in the court and notice given at least one entire day before the day on which the case is called for trial, errors and irregularities in the notice, and errors in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed or otherwise dealt with by the deposition officer under Rules 205 and 206 are waived, unless a motion to suppress the deposition or some part thereof is made and notice of the written objections

Judge Walker -- Evaluate, please J.P. Rule 201

January 25, 1984

Hon. Jack Pope
Chief Justice
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Re: Rule 201, Texas Rules of Civil Procedure

Dear Judge Pope:

It may be too late to say so and I'm not sure where I missed the boat earlier, but there is a change which I suggest is needed in Rule 201.

Subdivision 3 as amended maintains the rule that notice to the attorney of record dispenses with the necessity of a subpoena if the witness is a party who is represented by counsel. It has been my experience that there is no advantage to serving a subpoena with all of its attendant expense and delay even in cases where the party is representing himself and does not have counsel of record. Once a party is before the court, it seems to me that a subpoena to a party should not be necessary to require the attendance of a party at his own deposition. I suggest that Subdivision 3 be amended to read:

> "When the deponent is a party, [after the filing of a pleading in the party's behalf by an attorney of record,] 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."

Travis County, for example, now charges $50.00 for service of a subpoena. High court costs are another topic, but if they continue to be a fact of life, then it seems it does not serve the ends of justice to require expenditure of substantial amounts of court costs money unnecessarily.

Sincerely yours,

Don

DON L. BAKER

DLB:lg

Law Offices of Baker & Price A PROFESSIONAL CORPORATION SUITE 500 314 WEST 11TH ST. AUSTIN, TEXAS 78701-2186 512-476-6003

Rules 204(4), 206(3), 207(2) & 208(a)

MEMO

TO: Judge Wallace
FROM: Judge Barrow March 6, 1984

RE: 1984 Amendments - Texas Rules of Civil Procedure

It has come to my attention that the amendments due to take effect April 1 may need slight revision. Specifically, there are four different rules that need to be pointed out as possible sources of confusion.

(1) Amended Rule 204(4) requires a party to make objections to the form of questions or the nonresponsiveness of answers at the time a deposition is taken or such objections are waived. One problem that could arise because of this change is that the party noticing and taking the deposition will be unable to object at trial if his opponent introduces the deposition into evidence. The party who took the deposition generally will lead the adverse witness, and he waives the "leading" objection by failing to raise it at the deposition. Thereafter, when his opponent seeks to use the deposition at trial, including the leading question, no objection may be made, since the deposition is considered to be the evidence of the party introducing it.

It is possible that the rules should provide that an objection to the form of questions is not required if the party has no reason to make it at the time the deposition is taken. Also, should the parties be permitted to agree to waive objections.

(2) Rule 206(3) provides that the deposition officer shall furnish a copy of a deposition to any party upon payment of reasonable charges therefor. Nowhere in the new rules is there a provision as to who must pay for the cost of the original transcription of a deposition. Old Rule 208a, which has been repealed, stated that the clerk shall tax as costs the charges for preparing the original copy of the deposition. If the Court wishes to bypass the court clerk in this matter, some provision should be included in the rules to clear up this situation.

(3) Rule 207(2), which deals with the use of depositions in a susequent suit between the same parties, states that such depositions may be used in a later suit only if the original suit was dismissed. This rule originally was taken from Federal Rule 32(a)(4), but the federal rule has since been amended to do away with the requirement that the first case have been "dismissed." The federal rules advisory committee concluded that the "dismissed" language was an "oversight" that had been ignored by the courts. This language is included in the Texas rules, and it may be that it should be deleted.

(4) Rule 208(a) allows a party to notice a written deposition at any time "after commencement of the action," which presumably means the day the original petition is filed. Thereafter, cross-questions are due within ten days. It would be possible that the time limit for cross-questions could lapse before the defendant is required to answer. This problem is taken care of in the oral deposition rule, Rule 200, because it requires leave of court if a party wishes to take an oral deposition prior to the appearance day of his opponent. A similar requirement should be provided for in the case of a deposition on written questions.

Rule 263
Item 5i

MICHAEL D. SCHATTMAN
DISTRICT JUDGE
348TH JUDICIAL DISTRICT OF TEXAS
TARRANT COUNTY COURT HOUSE
FORT WORTH, TEXAS 76196-0281
(817) 877-2715

February 28, 1986

Professor Newell H. Blakely
University of Houston Law Center
4800 Calhoun
Houston, Texas 77004

Re: Texas Rules of Evidence

Dear Professor Blakely:

Thank you for letter of February 4, 1986. In fact, I am on the Administration of Justice Committee and Professor Pat Hazel and I have asked to look at a conflict between Rule 267, Tex. R. Civ. P., and Rule 613, Tex. R. Ev., concerning the exclusion of witnesses.

What we will probably recommend is that the mandatory language of Rule 613 be incorporated into an amended Rule 267 and that the Evidence Rule then be repealed.

I will give some thought to problems encountered in court with the Evidence Rule and send you a further response, but thought you would want to be advised of what Pat and I were doing.

Very truly yours,

Michael D. Schattman

MDS/lw

xc: Professor Pat Hazel
University of Texas School of Law
727 East 26th Street
Austin, Texas 78705

Rules 167 and 168
Item 5j.

LAW OFFICES OF

WINDLE TURLEY, P. C.

ATTORNEYS

WINDLE TURLEY
CERTIFIED-PERSONAL INJURY TRIALS
JOHN HOWIE
CERTIFIED-PERSONAL INJURY TRIALS
RANDALL MOORE
CERTIFIED-PERSONAL INJURY TRIALS
PAULA FISETTE-SWEENEY
FRANK GIUNTA
LINDA TURLEY
JAMES E. ROOKS, JR.*
DARRELL PANETHIERE**
MARK TOBEY
THOMAS J. STUTZ
PAUL PEARSON***

TOM SLEETH
EDWARD H. MOORE, JR.
STEPHEN MALOUF
LEON RUSSELL
JOHNANNA GREINER
JOHN TIPPIT
CHARLES W. McGARRY
KURT CHACON
JEANMARIE BEISEL****

*D.C. & MA BAR
**MO, IL & TX BAR
***AR & TX BAR
****MO & TX BAR

DALLAS, TEXAS
1000 UNIVERSITY TOWER
6440 N. CENTRAL EXPRESSWAY
75206
214-691-4025
TELE-FAX: 214-361-5802

WASHINGTON, D.C.
4801 MASSACHUSETTS AVENUE, NW
SUITE 400
20016
202-966-5340

August 6, 1986

Professor Pat Hazel
University of Texas
School of Law
727 East 26th Street
Austin, Texas 78705

RE: State Bar of Texas Administration of Justice Committee

Dear Pat:

I would like to propose the following changes to the Texas Rules of Civil Procedure:

1. Rule 167 - Rule 167 should be amended to provide, as in the Federal Rules, that 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 summons and complaint upon that party. [Refer to FRCP 34(b)].

2. Rule 168 - Rule 168(1) should be amended to provide that interrogatories 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 summons and complaint upon that party. [Refer to FRCP 33(a)]

These proposed changes would permit the plaintiff to serve discovery with the original petition. This would allow us to move our cases along at a faster pace and would contribute to the efforts to reduce the backlog in our courts.

Please present these proposed changes to the committee or advise me of the procedure that I need to follow to insure that these changes are presented to the committee. By copy of this letter, I have provided copies of the recommendations to certain members of your committee.

Thank you for your consideration.

With kind regards,

LAW OFFICES OF WINDLE TURLEY, P.C.

John Howie

JH/dh

cc: Justice Cynthia Hollingsworth
John Collins
Richard Clarkson
Jan W. Fox
Frank Herrera, Jr.
Guy Hopkins
Russell McMains
William O. Whitehurst, Jr.
Doak Bishop
Charles R. "Bob" Dunn
John R. Feather

Rules 15 and 215 Item 5 b)

AFFILIATED REPORTERS

805 West 10th, Suite 301
Austin, Texas 78701
(512) 478-2752

June 5, 1986

Mr. Sam Sparks
GRAMBLING & MOUNCE
P.O. Drawer 1917
El Paso, Texas 79950-1917

Re: Supreme Court Advisory Committee

Dear Mr. Sparks,

I am writing in regard to your position as Committee Chairman over Rules 15 to 215. These rules include those pertaining to depositions which in turn control the activities of freelance court reporters. The reporting community needs your help in solving a problem which exists in our field.

Freelance court reporters have historically had a problem in determining who is responsible for the costs of depositions. The large majority of attorneys assume the responsibility of deposition costs and therefore pay the court reporters fees from their escrow accounts. The problem lies with a small minority of attorneys who have claimed, as agents for their clients, they are not responsible for these costs and suggest pursuing their clients for payment. This tact has been taken as a defense in court on many occasions but is always used after the completion and delivery of the deposition when the reporter has no real recourse. The reporters are contacted by the attorneys and often never have contact with the clients in order to discuss payment.

The concensus of most court reporters and attorneys is that the attorneys retain their services for oral and written depositions and therefore should be responsible for those fees. If there is a special situation required for payment, a written notification in advance would allow the reporter to deal with the responsible party directly.

We believe the solution would be an addition to the appropriate rule that states:

> " The costs of oral and written depositions shall be the responsibility of the attorneys in the case unless written notice is provided prior to the deposition as to who will be responsible for such costs. "

Rule 354(e) was recently added through the aid of Chief Justice Pope which provided clarification for the official reporters, but no rules exist as to the work product of the freelance reporter. The bad debt and carrying costs of these few attorneys are being borne by higher costs to the responsible legal community.

We hope that the committee can find a way to solve this inequity through the statues. Thank you for all the hard work and long hours that you and the entire committee have generously donated. Please call on me if I can be of assistance to you.

Sincerely,

Duke Weidmann

cc. Chairman Luther H. Soules
✓ Justice James P. Wallace
Texas Shorthand Reporters Association

Tape Recorders in Courtroom

Law Offices of
DOUGLAS WEITZEL
400 North Third
LONGVIEW, TEXAS
75606

DOUGLAS WEITZEL

P.O. BOX 1022
(214) 753-0217

June 6, 1986

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

RE: Administrative Rules for Texas Trial Courts

Dear Judge Hill:

In order to more accurately and speedily prepare temporary orders and judgments, especially in family law matters, many attorneys have locally frequently utilized portable tape recorders to record stipulations, agreements and orders of the court for use as a guideline in preparing and drafting the instruments reflecting such stipulations, agreements and orders.

However, some trial judges absolutely forbid the presence of tape recorders in the courtroom for such purposes, stating that the reporter is the individual to furnish such materials. As you may know, especially in view of the speedy trial amendment, many court reporters have got more to do than they can say grace over. On many occasions, to obtain the exact wording, as much as a month may go by before the reporter can furnish an abstract of what was said, not to mention the added expense.

I have checked with our local court reporters and for limited purposes, I do not believe they would object to such practice if it was permitted under the proposed administrative rules. I customarily draw the agreement or order and mail my draft of the same together with a transcript of the tape to the attorney on the other side so that he can also refresh his memory in approving or modifying the instrument in question. It saves a great deal of time and ensures that items that were discussed and agreed to, or intricacies of a court's order, will not be omitted through oversight.

Since I will not be able to be at the bar convention in Houston this year, I would deeply appreciate it if the task force would be requested to make some statement that would permit tape recordings in very limited instances so as to facilitate the speedy preparation of instruments of the above nature. Hoping that my thoughts will be deemed to be constructive and with kindest personal regards, I am,

Very truly yours,

Douglas Weitzel

RULE 103. ~~OFFICER~~ WHO MAY SERVE

All process may be personally served by: ~~(1)~~ ~~the~~ any sheriff, ~~or any~~ constable, ~~of any county in which the party to be served is found~~, or by any person authorized by written order of the Court who is not less than eighteen years of age, ~~or, if by mail, either of the county in which the case is pending or of the county in which the party to be served is found; provided that~~ No ~~officer or authorized~~ person who is a party to or interested in the outcome of a suit shall serve any process ~~therein~~. Service by registered or certified mail and citation by publication may be made by the clerk of the court in wich 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.

In addition to the above,

(note: mailing is not historically personal service)

See Rule 106: Method of Service

strike officer + replace w/ person;

(b)(1) strike 1st line; begin w/ "...By leaving..."

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 ~~Any~~ return 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 must also contain the return receipt with the addressee's signature. When the officer has not served the citation, the return shall show the diligence used by the officer 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.

No default judgment shall be granted in any cause until the citation with proof of service as provided by this rule, or as ordered by the court in the event citation is executed under Rule 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.

Nov: 7-8 Fri. & Sat. 8:30-1:30 / 8:30-6:30

8:30-5:30 Fri.
8:30-12:30 Sat.

SUPREME COURT OF TEXAS ADVISORY COMMITTEE
AGENDA

September 12-13, 1986

Westlaw — are rules in this?

1. Report of Ad Hoc Committee composed of Spivey, Morris, McConnico and Reasoner regarding their work with the Supreme Court and their space requirements during the upcoming remodeling of the Court building.

2. Report of Judge Linda Thomas regarding the revision of Rules 8 and 10; Ray Hardy's letter regarding disposition of exhibits and Judge Frank Douthitt's proposal regarding 18a.

3. Discussion of Order of the District Court of Bexar County; Rule 165a.

4. Report of Sam Sparks (El Paso) regarding final form of Rules 103, 106, 107 and 145 and drafting of a rule permitting ruling on written motions if neither party asks for a hearing and permitting of telephone hearings if either party asks for a hearing. Sam Sparks also to report on Doak Bishop's input regarding Rule 188a.

5. Report of Professor J. Hadley Edgar on Rule 209.

6. Report on Rule changes addressed by the Standing Subcommittee on Trial Rules 216-314: Franklin Jones, Jr.

7. Report of David Beck's subcommittee regarding Rules 277 - 295.

8. Report of the Standing Subcommittee on Post Trial Rules 315-331: Harry Tindall

9. Report and final action on Rule changes addressed by the Standing Subcommittee on Court of Civil Appeals Rules 342-472 and Supreme Court Rules 474-515: Professor William Dorsaneo and Russell McMains

10. Report of the Standing Subcommittee on Justice Court Rules 523-591: Broadus Spivey

11. Report of the Standing Subcommittee on Special Procedures Rules 737-813: James Kronzer

Effective Date for new rules

12. Discussion of F.R.A.P. 10 proposed by Frank W. Baker

limit rule 10 to 25 is the goal!

David Beck 25
Justice Wallace 1
Chief Justice Pope 2
Luke Soules 3
Bill Dorsaneo 4
Franklin Jones 5
Judge Thomas 6
Rusty McMains 7
Harry Reasoner 8
Judge Sinks 9
Broadus Spivey 10
Lefty Morris 11
Tom Ragland 12
Hadley Edgar 13
Prof. Blakely 14
Gilbert Adams 15
Sam (San Ant) Sparks 16
Frank Branson 17
Nix 18
Buddy Lowe 19
Harry Tindall 20
Orville Walker 21
Hughes 22
Sam (El P.) Sparks 23
[illegible] 24

General suggestions considered by Comm. as proposed by the Court

→ limit briefs to 50 pp. 8½ by 11, double spaced (28(g)) Fed. Rules 50 (both sides) + 25 for reply (both sides) UNLESS COURT GRANTS PERMISSION FOR MORE LENGTH

→ whether points of error raised but not ruled upon by Ct. of Ap. will be considered as a matter of law by S. Ct.? overruled by

Rule 8. Attorney in Charge

On the occasion of the first appearance of a party through counsel, an attorney in charge for such party shall be designated in writing by such party and filed with the court. Thereafter, until such designation is changed by written notice to the court and written notice to all other parties in accordance with Rules 21a and 21b, said attorney in charge shall be responsible for the suit as to such party. If an attorney in charge is not so designated, the attorney signing the original pleading of the party shall be the attorney in charge.

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

Rule 10. Withdrawal of Counsel.

Withdrawal of an attorney may be effected (a) upon motion showing good cause and under such condition imposed by the court; or (b) upon presentation by such attorney of a notice of substitution designating the name, address, telephone number, and State Bar Number of the substitute attorney, with the signature of the attorney to be substituted, and an averment that such substitution has the approval of the client and that such withdrawal is not sought for delay only. The attorney so substituted becomes the attorney in charge

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 to recuse the judge before whom the case is pending.

(b) The motion to recuse shall be verified and must state with particularity the grounds why the judge before whom the case is pending should be recused. The grounds for recusal shall be limited to those set out in Canon 3C, Code of Judicial Conduct, Art. V, Sec. 11 Texas Constitution, Art. 15 V.A.T.S. or C.C.P. Art. 30.01.

Rule 14b. Retention and Disposition of Exhibits

The clerk of the court in which the exhibits are filed shall retain and dispose of the same as directed by the Supreme Court.

SUPREME COURT ORDER RELATING TO RETENTION AND DISPOSITION OF EXHIBITS

In compliance with the provisions of Rule 14b, the Supreme Court hereby directs that exhibits offered or admitted into evidence shall be retained and disposed of by the clerk of the court in which the exhibits are filed upon the following basis.

Exhibits offered or admitted into evidence which are of unmanageable size (such as charts, diagrams and posters) will be withdrawn immediately upon completion of the trial and reduced reproductions substituted therefor. Model exhibits (such as machine parts) will be withdrawn upon completion of trial, unless otherwise ordered by the Judge.

In all cases in which judgment has been entered by the clerk for one hundred and eighty (180) days and either there is no perfection of appeal as provided by Rule 356 or there is perfection of appeal and dismissal ordered or final judgment as to all parties has been rendered and mandate issued, so that the case is no longer pending or on appeal, the clerk may dispose of all exhibits, unless otherwise directed by the trial court, by use of the following procedure.

The clerk shall mail the exhibits to the attorney introducing or offering same. If the attorney cannot be located, the clerk shall send written notice to the attorney's last available mailing address. If there is no response requesting the exhibits within thirty (30) days thereafter, the clerk may dispose of same.

LAW OFFICES

SOULES & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

STEPHANIE A. BELBER
ROBERT E. ETLINGER
PETER F. GAZDA
ROBERT D. REED
SUSAN D. REED
RAND J. RIKLIN
JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

October 29, 1986

Mr. Pat Beard
Beard & Kultgen
P.O. Box 529
Waco, Texas 76702-2117

Dear Pat:

Enclosed is a letter regarding Rule 685 from David Keltner, that I received from the COAJ. It is on their agenda and I have placed it on our November agenda as well.

Very truly yours,

Luke

LUTHER H. SOULES III
Chairman

LHSIII/tat
encl/as

1417

FISHER, GALLAGHER, PERRIN & LEWIS
ATTORNEYS AT LAW
70th FLOOR
ALLIED BANK PLAZA
1000 LOUISIANA
HOUSTON, TEXAS 77002
(713) 654-4433

MICHAEL T. GALLAGHER
BOARD CERTIFIED
PERSONAL INJURY TRIAL LAW

January 24, 1986

Re: COAJ

Mr. John Collins
3500 Oak Lawn, Suite 220
Dallas, Texas 75219

Dear John:

Enclosed is a copy of a letter from David Keltner regarding Rule 685. I would apprciate your looking into this.

Thanks.

Sincerely,

Michael T. Gallagher

MTG:mam

Enclosure

LAW OFFICES
SHANNON, GRACEY, RATLIFF & MILLER
2200 FIRST CITY BANK TOWER
201 MAIN STREET
FORT WORTH, TEXAS 76102-3191
817 336-9333

DAVID E. KELTNER
BOARD CERTIFIED PERSONAL INJURY TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

DIRECT DIAL 817 877-8116
TELEX 203991
TELECOPIER 817 336-3735

January 13, 1986

Michael T. Gallagher
7000 Allied Bank Plaza
1000 Louisiana
Houston TX 77002

Re: Administration of Justice Committee

Dear Mike:

A recent case has demonstrated a possible problem with TEX.R. CIV.P. 685, "Filing and Docketing" (temporary restraining orders).

In Fort Worth, as in Houston, the normal practice has been to file the temporary restraining order petition, take an assignment to the court, and then approach that court about granting the temporary restraining order. I believe that this practice is common in almost all multi-court districts. My checks with Fort Worth, Dallas, and San Antonio indicate that they all follow the same practice, both by local rules and by practice.

However, in reviewing Rule 685, it is obvious that that practice is contrary to the actual rules. In pertinent part, Rule 685 states, "on the grant of a temporary restraining order or an order fixing time for hearing upon application for a temporary injunction, the party to whom the same is granted shall file his petition therefor,...."

In other words, the Rule states that the temporary restraining order should be granted first, and then the case filed. The evils of this practice are obvious. It allows parties who are seeking temporary restraining orders to forum shop and pick a judge who is less cautious in granting the orders. Likewise, once the judge signs the order and the case is filed, the lottery system may dictate that the case is filed in another court. Therefore, a court who did not sign the temporary restraining order will actually hear the case.

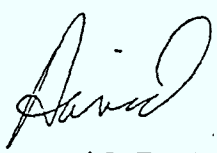
Yet another evil exists. Suppose that one judge is approached on a temporary restraining order and refuses to grant it. Instead of there being a docket entry in the case, the party seeking the order can simply go to another court and try again. This can lead to inconsistent results and jealousy among courts.

Therefore, I would suggest that the language of the first sentence of the Rule be changed to read as follows, "Upon the filing of a petition for a temporary restraining order or an order fixing time for a hearing on an application for a temporary injunction, a party may approach the judge to have either motion granted. If the judge grants the motion, the order shall be filed with the clerk of the proper court. If such orders do not pertain to a pending suit in said court, the cause should be entered on the docket of the court in its regular order and the name of the party applying for the writ as plaintiff and the opposite party as defendant."

I must admit that this letter is being dictated rather hastily, and the language might be improved. However, I will be delighted to do any research you wish to clarify this matter. In reviewing Rule 685 and its predecessor statute, Articles 4650, I found that there are no cases actually attacking a temporary restraining order for being improperly filed. However, as you well know, courts have routinely held that there are no technicalities in this practice in any error in granting temporary restraining order can be used to overturn the order at the temporary injunction phase of the trial.

The temporary restraining order and temporary injunction practice is extremely important to commercial law practitioners and even more important to domestic law practitioners. As a result, I have discussed this rule with some local people, and they agree that the change would be in order. Again, let me know if I can be of assistance in further researching this.

Sincerely yours,



David E. Keltner

mer

Texas Tech University

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

August 22, 1986

Mr. Luther H. Soules III
Soules & Reed
800 Milam Building
East Travis at Soledad
San Antonio, Texas 78205

Dear Luther:

I received a letter from you today notifying me that the Supreme Court Advisory Committee had rejected my proposal to amend Rule 621a, which was contained in my letter of October 14, 1985, to Mike Gallagher. That proposal was merely a housekeeping change that reference to "Article 3773, V.A.T.S." be deleted and "section 34.001 of the Texas Civil Practice and Remedies Code" be substituted therefor.

The portion of the transcript you included in your letter, however, refers not to my proposal, rather to a proposal by a John Pace for substantive changes in Rule 621a. Mr. Pace's proposal had already been rejected by my committee (Administration of Justice) at our meeting September 14, 1985. (Ironically, Mike had assigned the Pace proposal to me and Tom Phillips and the Committee unanimously adopted our recommendation to reject Pace's proposal.)

In any event, please be aware that Rule 621a needs to be corrected, as discussed above.

Sincerely,

Jeremy C. Wicker
Professor of Law

JCW/nt

COAJ Ltr

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

October 14, 1985

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

Re: Administration of Justice
Committee, State Bar of Texas

Dear Mike:

Enclosed are my proposed amendments to Rules 18a, 30, 72, 87, 111, 112, 113, 161, 163, 165a, 182a, 188, 239a, 360, 363, 385a, 447, 469, 483, 496, 499a, 621a, 657, 696, 741, 746, 772, 806, 807, 808, 810 and 811. Also enclosed are suggested amendments to several Supreme Court orders that accompany two other rules.

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

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

Respectfully,

Jeremy C. Wicker
Professor of Law

JCW:tm

Enclosure

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

Rule 499a. Direct Appeals

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

section 22.001(c) of the Texas Government Code

Rule 621a. Discovery in Aid of Enforcement of Judgment

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

section 34.001 of the Texas Civil Practice and Remedies Code

Rule 657. Judgment Final for Garnishment

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

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

B. Briefs and Argument in the Courts of Appeals.

Rule 74. Requisites of Briefs; Briefs shall be brief. Briefs shall be filed with the Clerk of the Court of Appeals. They shall be addressed to "The Court of Appeals" of the correct Supreme Judicial District. In civil cases the parties shall be designated as "Appellant" and "Appellee", and in criminal cases as "Appellant" and "State";

(a) Names of All Parties. A complete list of the names of all parties shall be listed at the beginning of the appellant's brief, so the members of the court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of the case.

(b) Table of Contents and Index of Authorities. The brief shall contain at the front thereof a table of contents with page references where the discussion of each point relied upon may be found and 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 shall 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 by permission of the court, or as specified by local rule of the court of appeals, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, index of authorities and any addendum containing statutes, rules, regulations, etc. 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 appro-

priate findings and recommendations. For this purpose the trial judge shall conduct such hearings as may be necessary, make appropriate findings and recommendations, and prepare a record of the proceedings. If the appellant is indigent, the judge shall take such measures as may be necessary to assure effective representation of counsel, which may include the appointment of new counsel. The record so made, including any orders and findings of the trial judge, shall be sent to the appellate court, which may take appropriate action to insure that the appellant's rights are protected, including contempt proceedings against counsel. If the trial judge finds that the appellant no longer desires to prosecute the appeal, or that he is not indigent but has failed to make necessary arrangements for filing a brief, the appellate court may consider the appeal without briefs, as justice may require.

(m) Appellee's Filing Dates. Appellee shall file his brief within twenty-five days after the filing of appellant's brief. In civil cases, when appellant has failed to file his brief as provided in this rule, the appellee may, prior to the call of the case, file his

brief, which the court may in its discretion regard as a correct presentation of the case, and upon which it may, in its discretion, affirm the judgment of the court below without examining the record.

(n) Modifications of Filing Time. Upon written motion showing a reasonable explanation of the need for more time, the court may grant either or both parties further time for filing their respective briefs, and may extend the time for submission of the case. The court may also shorten the time for filing briefs and the submission of the cause in case of emergency, when in its opinion the needs of justice require it.

(o) Amendment or Supplementation. Briefs may be amended or supplemented at any time when justice requires upon such reasonable terms as the court may prescribe, and if the court shall strike or refuse to consider any part of a brief, the court shall on reasonable terms allow the same to be amended or supplemented.

(p) Briefing Rules to be Construed Liberally. The purpose of briefs being to acquaint the court with the points relied upon, the manner in which they arose, together with such argument of facts and law as will enable the court to decide the same, a substantial compliance with these rules will suffice in the interest of justice; but for a flagrant violation of this rule the court may require the case to be rebriefed.

COMMENT: This proposed rule is based largely on Tex. R. Civ. P. 414 and former rule 418. Paragraph (e) is, however, taken from Tex. R. Civ. P. 420. The last sentence of paragraph (f) is taken from Tex. R. Civ. P. 419. Paragraph (p) is taken from Tex. R. Civ. P. 422. Textual modifications have been made throughout for clarity and simplification. Proposed paragraph (l) deals with the same problem as CCP Art. 44.33(b).

Section Six. Judgments, Opinions and Rehearing.

A. Judgment

Rule 80. Judgment of Court of Appeals.

(a) Time. When a case has been submitted, the court of appeals shall render its judgment promptly.

(b) Types of Judgment. The court of appeals may: (1) affirm the judgment of the court below, (2) modify the judgment of the court below by correcting or reforming it, (3) reverse the judgment of the court below and dismiss the case or render the judgment or decree that the court below should have rendered, or (4) reverse the judgment of the court below and remand the case for further proceedings.

(c) Final Judgment. The final judgment of a court of appeals shall contain a ruling on every point of error before the court.

~~(c)~~ (d) Other Orders. In addition, the court of appeals may make any other appropriate order, as the law and the nature of the case may require.

~~(d)~~ (e) Presumptions in Criminal Cases. The court of appeals shall presume that the venue was proved in the court below; that the jury was properly impaneled and sworn; that the defendant was arraigned; that he pleaded to the indictment or other charging instrument; that the court's charge was certified by the judge and filed by

the clerk before it was read to the jury, unless such matters were made an issue in the court below, or it otherwise affirmatively appears to the contrary from the record.

COMMENT: The sources of this proposed Rule are Tex. R. Civ. P. 433, and CCP Art. 44.24(a) and (b).

Rule 90. Opinions, Publication and Citation.

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

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

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

recur in future cases; (2) involves a legal issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority.

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

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

(f) Rehearing. If a rehearing is granted, no opinion shall be published until after the decision on rehearing is issued.

(g) Action of Court En Banc. The court en banc may modify or overrule a panel's decision with regard to the signing or publication of the panel's opinion or opinions in a particular case. A majority of justices

shall determine whether written opinions handed down by the court en banc shall be signed by a justice or issued per curiam, and whether they shall be published.

(h) Order of the Supreme Court. Upon the grant or refusal of an application for writ of error, whether by outright refusal or by refusal no reversible error, an opinion previously unpublished shall forthwith be released for publication, if the Supreme Court so orders.

(i) Unpublished Opinions. Unpublished opinions shall not be cited as authority by counsel or by a court.

COMMENT: The sources of this proposed rule are Tex. R. Civ. P. 452 and Criminal Appellate Rule 207(a). (a) This change is suggested by the Supreme Court. The purpose is to require the court of appeals to address all pertinent issues rather than decide the case on one or more dispositive issues and disregard the other pertinent issues. This quite often results in a reversal and remand by the Supreme Court causing unnecessary delay in disposition of the cause along with an unnecessary second consideration of the cause by the court of appeals.

Rule 131. Requisites of Applications. The application for writ of error shall be addressed to "The Supreme Court of Texas," and shall state the name of the party or parties applying for the writ. The parties shall be designated as "Petitioner" and "Respondent." Applications for writs of error shall be as brief as possible. The respondent should file a brief in response. The application shall contain the following:

(a) Names of All Parties. A complete list of the names of all parties shall be listed on the first page of the application, so the members of the court may at once determine whether they are disqualified to serve or should recuse themselves from participation in the decision of the case.

(b) Table of Contents and Index of Authorities. The application shall contain at the front thereof a table of contents with page references where the discussion of each point relied upon may be found and also an index of authorities alphabetically arranged, together with reference to the pages of the application where the same are cited. The subject matter of each point or group of points shall be indicated in the table of contents.

(c) Statement of the Case. The application should contain a brief general statement of the nature of the suit, -- for instance, whether it is a suit for damages, on

a note, or in trespass to try title, and that the statement as contained in the opinion of the court of appeals is correct, except in the particulars pointed out. Example: "This is a suit for damages in excess of $1000.00 for personal injuries growing out of an automobile collision. The opinion of the court of appeals correctly states the nature and results of the suit, except in the following particulars: (If any.)" Such statement should seldom exceed one-half page. The details of the case should be reserved to be stated in connection with the points to which they are pertinent.

(d) Statement of Jurisdiction. Except in those cases in which the jurisdiction of the court depends on a conflict of decisions under subsection (a)(2) of section 22.001 of the Government Code, the petition should merely state that the Supreme Court has jurisdiction under a particular subsection of section 22.001 of the Government Code. Example: "The Supreme Court has jurisdiction of this suit under subsection (a)(6) of section 22.001 of the Government Code." When jurisdiction of the Supreme Court depends on a conflict of decisions, the conflict on the question of law should be clearly and plainly stated.

(e) Points of Error. A statement of the points upon which the application 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. Whether the matter complained of originated in the trial court or in the court of appeals, it shall be assigned as error in the motion for rehearing in the court of appeals. Points will be sufficient if they direct the attention of the court to the error relied upon. Complaints about several issues or findings relating to one element of recovery or defense may be combined in one point, if separate record references are made.

(f) Brief of the Argument. The brief of the argument may present separately, or grouped if germane, the points of error relied upon for reversal, the argument to include such pertinent statements from the record as may be requisite, together with page references and such discussion of the authorities as is deemed necessary to make clear the points of error complained of. The opinion of the court of appeals will be considered with the application, and statements therein, if accepted by counsel as correct, need not be repeated.

(g) Prayer for Relief. Ths nature of the relief sought by the application should be clearly stated.

(h) Amendment. The application or brief in support thereof may be amended at any time when justice requires upon such reasonable terms as the court may prescribe.

(i) Length of Application. Except by permission of the court, an application and any brief in support thereof shall not exceed a total of 50 pages in length, exclusive of pages containing the table of contents, index of authorities and any addendum containing statutes, rules, regulations, etc.

~~(i)~~ (j) Court May Require Application Redrawn. If any brief or application for writ of error is unnecessarily lengthy or not prepared in conformity with these rules, the Supreme Court may require same to be redrawn.

COMMENT: This proposed rule is Tex. R. Civ. P. 469 as to paragraphs (a) through (g) and paragraph (j). Paragraph (h) is taken from Tex. R. Civ. P. 481. Some minor textual changes have been made. See, e.g., subparagraph (b). Paragraph (i) is new.

Rule 136. Briefs of Respondents and Others.

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

(b) Form. Briefs of the respondent or other party shall comply with the provisions of the rules prescribed for an application for writ of error and particularly with the provisions of Rule 131(b), (c), (e), (f), (g), and (h).

(c) Objections to Jurisdiction. If the petitioner fails to assert valid grounds for jurisdiction by the Supreme Court, the respondent shall state in the brief the reasons that the Supreme Court has no jurisdiction.

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

(e) Length of Briefs. Except by permission of the court, a brief in response to the application, a brief of an amicus curiae as provided in Rule 20 and any other principal brief shall not exceed 50 pages in length, exclusive of pages containing the table of contents,

R.O.E.

index of authorities and any addendum containing statutes, rules, regulations, etc.

~~(e)~~ (f) Reliance on Prior Brief. If respondent relies upon his brief in the court of appeals, respondent shall file with the Clerk of the Supreme Court twelve legible copies of such brief.

~~(f)~~ (g) Amendment. The brief in response may be amended at any time when justice requires upon such reasonable notice as the court may prescribe.

COMMENT: Paragraphs (a-d) and (f) of this proposed rule are Tex. R. Civ. P. 496. Subtitles have been added. Paragraph (e) is new. Paragraph (g) is based on Tex. R. Civ. P. 481 (first sentence).

Trina
X2 to Sup C chair
+ 40 X cc to SC, 12 9/12 fil

MORRIS, CRAVEN & SULAK
ATTORNEYS AT LAW
2350 ONE AMERICAN CENTER
600 CONGRESS AVENUE
AUSTIN, TEXAS 78701

CHARLES MORRIS
BOARD CERTIFIED—
PERSONAL INJURY TRIAL LAW
JOHN W. CRAVEN
TIMOTHY M. SULAK

512 • 478-9535

September 2, 1986

Professor Pat Hazel
UT School of Law
727 East 26th Street
Austin, Texas 78705

Mr. Luther H. Soules, III
800 Milam Building
San Antonio, Texas 78205

Re: Proposed Changes In Rule 169,
Texas Rules of Civil Procedure

Gentlemen:

I am writing to you as Chairs of the Administration of Justice Committee and the Supreme Court Advisory Committee regarding Proposed Changes In Rule 169, Texas Rules of Civil Procedure.

Paragraph 2 of Rule 169 provides that "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 him in maintaining his action or defense on the merits."

It appears to me that this improperly places the burden upon the party who obtained the admission to show prejudice. All of the recent amendments to the rules seem to place the burden on the party who seeks to avoid, modify or defeat the specific provisions of the rules. For example, if a party seeks to disclose additional witnesses within thirty days of trial, that party must show good cause and it is not incumbent on the opposing party to show surprise or prejudice. See, Yeldell vs. Holiday Hills Retirement and Nursing Center, 701 S.W. 2d 243 (Tex. 1985); Rule 215, Paragraph 5, T.R.C.P.; Kilgarlin, "What To Do With The Unidentified Expert?" Texas Bar Journal 1192 (November 1985).

I would propose that Rule 169, Paragraph 2 be amended to provide that a party seeking to withdraw or amend admissions must show that the opposing party will not be prejudiced by such, that the merits of the action will subserved and that good cause for withdrawal or amendment exists.

Sincerely,

Timothy M. Sulak

TMS:blk

UNIVERSITY OF HOUSTON LAW CENTER
UNIVERSITY PARK
HOUSTON, TEXAS 77004
713/749-1422

UNIVERSITY OF HOUSTON LAW CENTER

TO: Luther H. Soules, III, Chairman
Supreme Court Advisory Committee

All members, Supreme Court Advisory Committee

Justice James P. Wallace, Rules Member,
Supreme Court of Texas

FROM: Evidence Rules Subcommittee
Newell H. Blakely, Chairman

DATE: September 3, 1986

RE: REPORT ON QUESTION OF POSSIBLE TRANSFER OF RULES 176 THROUGH 185, TEXAS RULES OF CIVIL PROCEDURE, TO THE RULES OF EVIDENCE

At the March 7-8, 1986 meeting of the Advisory Committee, it was requested that the Evidence Subcommittee consider whether Rules of Civil Procedure 176 through 185 should be repealed and incorporated in the Rules of Evidence.

At the March 7-8, 1986 meeting of the Advisory Committee, the Committee itself decided to recommend to the Court the repeal of Rule 184, Determination of Law of Other States, and of Rule 184a, Determination of the Laws of Foreign Countries, because those two rules already appear as Rules 202 and 203 in the Texas Rules of Evidence. It is assumed that respecting those two rules no action by the Evidence Subcommittee is called for.

With respect to the remaining rules under consideration by the Evidence Subcommittee, the Subcommittee recommends that no change be made. This attitude seems to stem largely from the belief that attorneys using these rules are accustomed to finding them in the Rules of Procedure, that if we leave things where they are now, it takes away all arguments based on the significance of change, and finally that there is no need for change.

The Subcommittee voted on the following propositions:

(a) That 176, 177, 177a, 178, 179 and 180 are purely procedural and should be left in the Rules of Civil Procedure. Vote result: 5 for status quo; 0 for change; 1 abstention; 1 not yet voting.

(b) That 185 involves sufficiency of evidence and pleading; that the Rules of Evidence deal with admissibility and have, by and large, avoided matters of sufficiency and pleading; that 185 be left in the Rules of Procedure. Vote result: 5 for status quo; 0 for change; 1 abstention; 1 not yet voting.

(c) That 181 and 182 can either be left alone or put into the Rules of Evidence. If the latter, a possibility would be to set them up as 610(d) and add to the title of 610 "Adverse Parties." Vote result: 4 for status quo; 1 for change; 1 abstention; 1 not yet voting.

(d) That 182a could be left alone or could be made the last sentence in Rules of Evidence 601(b). Vote result: 4 for status quo; 1 for change; 1 abstention; 1 not yet voting.

(e) That 183 could be left alone or could be made the first sentence of Rules of Evidence 604. Vote result: 4 for status quo; 1 for change; 1 abstention; 1 not yet voting.

NB: Tom Ragland suggests that the Court recommend to publishers that they employ cross-referencing between the Procedure rules and the Evidence rules.

SULLIVAN, KING & SABOM
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
5005 WOODWAY
HOUSTON, TEXAS 77056
(713) 871-1185

MAILING ADDRESS
POST OFFICE BOX 2482
HOUSTON, TEXAS 77252
TELECOPIER (713) 960-1741

CHARLES J. SULLIVAN
JOHN J. KING
ROBERT T. SABOM
WILLIAM F. HENRI
ANTHONY J. SADBERRY
DOUGLAS R. DRUCKER
PAUL R. DUPLECHAIN*
MELINDA WINN
JAMES T. MAHONEY
STEPHEN E. TOOMEY
MARGARET ANN KICKLER
PHILLIP R. LIVINGSTON

*BOARD CERTIFIED - COMMERCIAL REAL ESTATE LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

September 3, 1986

FILE NO.:

MEMBERS OF THE STANDING SUBCOMMITTEE ON
PRE-TRIAL AND DISCOVERY RULES 15-215A

Gentlemen:

This letter is for the purpose of addressing the requests pertaining to discovery rules which were passed on to me by the Chairman of the Supreme Court Advisory Committee, Luke Soules. I am pleased to have been appointed as a new member of the Advisory Committee and I look forward to attending my first meeting with you on September 12. Also, I have accepted the responsibility of working with Mr. Sam Sparks of El Paso with regard to the discovery rules. I understand that Chairman Soules will appoint a standing subcommittee on discovery rules at the September meeting.

Pending that meeting, I would like to pass on to you copies of the material that I have received from Luke in order that you may study it for the purpose of that meeting. Since I am unfamiliar with the committee procedures, I am not certain of the extent to which a report on these items will be expected but I would imagine the floor might be open to plenary discussion at the appropriate time.

Some of this material appears to have come from the State Bar Committee on Administration of Justice on which I served for a number of years. Other material appears to be direct requests which might need to travel through the C.O.A.J. prior to consideration by the Advisory Committee. Certainly, given the time element and the lack of a standing subcommittee on discovery, it does not appear that this material has been considered by a subcommittee of the Advisory Committee which might be the appropriate course of action. For the time being, I am passing it on to you for your review and comments, if any, prior to next week's meeting.

I welcome any input and suggestions and guidance that any of you might wish to offer to me as a freshman member of the committee. I certainly look forward to working with Chairman Soules, Mr. Sparks and you in the future.

Yours sincerely,

Anthony ("Tony") Sadberry

Anthony J. Sadberry

cc: Luther H. Soules, III
(w/o enclosures)

MEMBERS OF THE STANDING SUBCOMMITTEE ON
PRE-TRIAL AND DISCOVERY RULES 15-215A

Mr. Sam Sparks
GRAMBLING & MOUNCE
P. O. Drawer 1977
El Paso, Texas 79950-1977

David J. Beck
FULBRIGHT & JAWORSKI
1301 McKinney Street
Houston, Texas 77002

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

Charles Morris
MORRIS, CRAVEN & SULAK
1010 Brown Building
Austin, Texas 78701

Tom L. Ragland
CLARK, GORIN, RAGLAND & MANGRUM
P. O. Box 239
Waco, Texas 76703

Harry M. Reasoner
VINSON & ELKINS
3000 First City Tower
Houston, Texas 77002-6760

Steve McConnico
SCOTT, DOUGLASS & LUTON
12th Floor
First City Bank Building
Austin, Texas 78701