SUPPLEMENT TO

MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

June 26-27, 1987

INDEX TO SUPPLEMENT

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June 18, 1987

FEDERAL EXPRESS

Mr. Luke Soules
Soules, Reed & Butts
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San Antonio, Texas 78205

In Re: Report of the Subcommittee on T.R.A.P. Rules 47, 48 and 49

Dear Luke:

On June 17, 1987, our subcommittee had a telephone conference. Pat Beard, Elaine Carlson, Bill Dorsaneo, Harry Reasoner, Marie Yeates and I participated.

First, we discussed the House and Senate resolution requesting that the specific House and Senate committees study the area of supersedeas bonds. A copy of this resolution is attached. This resolution was signed by Gov. Clements on June 10, 1987.

Next, all participants agreed that we should consider amending our rules to give the trial court discretion in setting the amount of supersedeas bonds.

We then discussed how closely any Texas change should follow Fed. R. Civ. P. 62. Pat Beard, Elaine Carlson, Harry Reasoner and I supported the concept that any Texas change should be broadly written like the Federal rule. Bill Dorsaneo supported the concept of a rule which gave more specific instructions to the trial court.

Elaine Carlson is going to draft proposed rule changes and circulate those drafts to the subcommittee members by June 22, 1987. The subcommittee will then meet at my firm's Austin office at 3:00 p.m. on June 25, 1987, to discuss

Elaine's drafts. Following that meeting, we will have another draft of our proposed changes to present to the Advisory Committee at its meeting on June 26, 1987.

Very truly yours,

Steve McConnico

Steve McConnico

CD2:69/dp
Enclosure
cc: Mr. Pat Beard
Prof. Elaine Carlson
Mr. Bill Dorsaneo
Mr. Tom Ragland
Mr. Harry Reasoner

SCR 122
AS FINALLY PASSED AND
SENT TO THE GOVERNOR

9-18--305

SENATE CONCURRENT RESOLUTION

WHEREAS, The Texas Constitution provides a right of access to the appellate courts for a meaningful appeal through due course of law; and

WHEREAS, Texas's statutes and rules currently provide no method by which judgment liens may be superseded pending exhaustion of all appeals; and

WHEREAS, The current security for judgment procedure may not afford judicial discretion as to the amount and type of security available to supersede a money judgment; and

WHEREAS, The constitutionality of the Texas security for judgment procedure has been questioned as a denial of the due process and equal protection guarantees of the Fourteenth Amendment to the United States Constitution; and

WHEREAS, The worldwide surety bonding capacity under the most optimistic conditions is estimated to be less than $1 billion; and

WHEREAS, The current security for judgment procedures in Texas are in conflict, are ambiguous, and are not under the administration of a single branch of government, and the importance of issues involved make this a matter requiring thoughtful and informed legislative action; now, therefore, be it

RESOLVED, That the 70th Legislature of the State of Texas hereby establish a special interim committee to study Texas law and procedure relating to security for judgments in order to clarify the law and afford equity, while preserving the right of persons to

00000003

obtain appropriate relief and access through the appellate processes in the court system; and, be it further

RESOLVED, That the study address: (1) the need to clarify the law to confirm that the courts have flexibility and discretion in determining the amount of bond required to supersede a judgment; (2) the desirability of providing that the posting of a bond in the required amount shall also supersede the right to obtain abstracts of judgments and full judgment liens; and (3) whether a maximum level of bond should be established consistent with the availability of surety bonding capacity and the Texas constitutional policy of ensuring open access to the courts; and, be it further

RESOLVED, That the interim study committee be named the Joint Special Committee on Security for Judgments; and, be it further

RESOLVED, That the committee be composed of 10 members: five members of the senate, to be appointed by the lieutenant governor; and five members of the house of representatives, to be appointed by the speaker of the house; that the lieutenant governor and speaker each designate one of their appointees as a cochair; and that the committee shall subsequently hold meetings and public hearings at the call of the cochairs; and, be it further

RESOLVED, That the committee have the power to issue process as provided in the senate and house rules of procedure and in Section 301.024, Government Code; and, be it further

RESOLVED, That the committee have all other powers and duties provided to special committees by the senate and house rules of

procedure, by Subchapter B, Chapter 301, Government Code, and by policies of the committees on administration; and, be it further

RESOLVED, That from the contingent expense fund of the senate and the contingent expense fund of the house equally, the members of the committee be reimbursed for their expenses incurred in carrying out the provisions of this resolution in accordance with the senate and house rules of procedure and the policies of the committees on administration, and that other necessary expenses of operation be paid from the contingent expense fund of the senate and the contingent expense fund of the house equally; and, be it further

RESOLVED, That the interim study committee make a complete report, including findings and recommendations and drafts of any legislation considered necessary, to the 71st Legislature when it convenes in January, 1989; five copies of the completed report shall be filed in the Legislative Reference Library; five copies shall be filed with the Texas Legislative Council; two copies shall be filed with the secretary of the senate; and two copies shall be filed with the speaker of the house; following official distribution of the committee report, all remaining copies shall be deposited with the legislative reference librarian.

S.C.R. No. 122

President of the Senate

Speaker of the House

I hereby certify that S.C.R. No. 122 was adopted by the Senate on May 23, 1987; and that the Senate concurred in House amendment on May 31, 1987, by a viva-voce vote.

Secretary of the Senate

I hereby certify that S.C.R. No. 122 was adopted by the House, with amendment, on May 30, 1987, by a non-record vote.

Chief Clerk of the House

Approved:

Date

Governor

00000006

Texas Rules of Civil Procedure

Rule 13. ~~Penalty for Fictitious Suits or Pleading~~ [Effect of Signing of Pleadings, Motions and Other Papers; Sanctions]

[The signature of any attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is not groundless and brought in bad faith or groundless and brought for the purpose of harrassment.] Any attorney [or party] who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading ~~presenting a state of case~~ which he knows to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt[.] ~~; and the court, of its own motion, or at the instance of any party, will direct an inquiry to ascertain the fact.~~ [If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose sanctions available under Rule 215 upon the person who signed it, a represented party, or both.

Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction's order. "Groundless" for purposes of this rule means no basis in law or fact. The court may not

impose sanctions for violation of this rule if, before the 90th day after the court makes a determination of such violation, the offending party withdraws or amends the pleading, motion, or other paper, or offending portion thereof to the satisfaction of the court. A general denial does not constitute a violation of this rule. The amount requested for damages does not constitute a violation of this rule.]

[SB No. 5, Article 2. Trial; Judgment, Section 2.01. Subtitle A, Title 2, Civil Practice and Remedies Code, Chapter 9 "Frivolous Pleadings and Claims" otherwise to be effective September 2, 1987, is repealed pursuant to Tex. Const. Art. 5 §31, and Tex. Gov. Code §22.004(c).]

Rule 13

Agreed

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June 19, 1987

BAS.092

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

Re: Supreme Court Advisory Committee
Subcommittee - Texas Version of Federal Rule 11

Dear Luke:

In response to your letter of June the 10th, and pursuant to our conversations recently, I have had a telephonic conference with every member of our subcommittee except Elaine Carlson, whom I was unable to contact. David Beck and I were not able to reach a decision as to a recommendation, but the balance of the subcommittee agreed with me that we should report favorably the proposed "amendment" attached to your letter of June the 10th, with the specific reservation that all parties, including the subcommittee, will debate this rule fully and freely at the time it is considered.

It was our consensus that we should use that proposed rule as a blueprint upon which to work, and we all felt that we could definitely improve the legislative attempt (legislative compromise). As I indicated to you, especially Gilbert, Lefty and I feel prepared to discuss this fully since we played a rather involved role in the legislative attempt at "tort reform."

Sincerely,

Broadus

Broadus A. Spivey
BAS/msh

cc: Mr. Gilbert T. Adams, Jr.
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Rule 13

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Houston
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Austin
San Antonio
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June 19, 1987

Re: Supreme Court Advisory Committee

Mr. Broadus A. Spivey
Spivey, Grigg, Kelly & Knisely, P.C.
1111 W. 6th St.
Austin, Texas 78768-2011

Dear Broadus:

I tried to reach you by telephone yesterday and today without success. Since I will be out of the country at the time of our meeting on June 26th, I wanted to pass on a few general comments with respect to the current draft of the proposed "sanctions" rule:

1. The imposition of sanctions under the current draft is predicated on a bad faith/good cause standard which is similar the pre-1983 Fed. R. Civ. P. 11 standard. As you know, the use of the "bad faith" standard caused considerable problems in the federal courts and was the subject of considerable criticism. See, e.g., Roadway Express, Inc. v. Piper, 447 U.S. 752, 757 n.4, (1980). See also Rosenberg & Kling, Curbing Discovery Abuse in Civil Litigation: Enough is Enough, 1981 B.Y.U.L. Rev. 579 (1981); Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 Vand. L. Rev. 1295 (1978); Kirkham, Complex Civil Litigation -- Have Good Intentions Gone Awry?, 70 F.R.D. 199 (1976). Since we have some experience upon which to draw, I question whether the use of such a standard would work in Texas when it obviously did not work when used by the federal courts.

2. When discussing the available sanctions, I believe that it is confusing to merely refer generally to Rule 215. I would suggest that

we be specific and expressly state, for example, that attorney's fees and other related costs are available as sanctions. As you know, Fed. R. Civ. P. 11 now does precisely that.

3. The current draft appears in the first instance to make the imposition of sanctions mandatory, i.e., "shall impose sanctions." [Emphasis added]. However, the draft also allows a 90 day grace period in which the violation may be corrected. Since court delay is arguably a problem in some areas of Texas, wouldn't it be easier to simply make sanctions discretionary with the trial judge?

Very truly yours,

David J. Beck

DJB/st
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Gilbert T. Adams, Jr., Esq.
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All Subcommittee Members

order to reform the civil justice system of this state, enacts this legislation for the purpose of reforming the civil justice system of Texas. To this end, this Act revises appropriate procedural and substantive provisions of the Civil Practice and Remedies Code applicable to actions for personal injury, property damage, or death and other civil actions based on tortious conduct.

ARTICLE 2. TRIAL; JUDGMENT

SECTION 2.01. Subtitle A, Title 2, Civil Practice and Remedies Code, is amended by adding Chapter 9 to read as follows:

CHAPTER 9. FRIVOLOUS PLEADINGS AND CLAIMS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 9.001. DEFINITIONS. In this chapter:

(1) "Claimant" means a party, including a plaintiff, counterclaimant, cross-claimant, third-party plaintiff, or intervenor, seeking recovery of damages. In an action in which a party seeks recovery of damages for injury to another person, damage to the property of another person, death of another person, or other harm to another person, "claimant" includes both that other person and the party seeking recovery of damages.

(2) "Defendant" means a party, including a counterdefendant, cross-defendant, or third-party defendant, from whom a claimant seeks relief.

(3) "Groundless" means:

(A) no basis in fact; or

(B) not warranted by existing law or a good faith argument for the extension, modification, or reversal of

existing law.

(4) "Pleading" includes a motion.

Sec. 9.002. APPLICABILITY. (a) This chapter applies to an action in which a claimant seeks:

(1) damages for personal injury, property damage, or death, regardless of the legal theories or statutes on the basis of which recovery is sought, including an action based on intentional conduct, negligence, strict tort liability, products liability (whether strict or otherwise), or breach of warranty; or

(2) damages other than for personal injury, property damage, or death resulting from any tortious conduct, regardless of the legal theories or statutes on the basis of which recovery is sought, including libel, slander, or tortious interference with a contract or other business relation.

(b) This chapter applies to any party who is a claimant or defendant, including but not limited to:

(1) a county;

(2) a municipality;

(3) a public school district;

(4) a public junior college district;

(5) a charitable organization;

(6) a nonprofit organization;

(7) a hospital district;

(8) a hospital authority;

(9) any other political subdivision of the state; and

(10) the State of Texas.

(c) In an action to which this chapter applies, the provisions of this chapter prevail over all other law to the extent of any conflict.

Sec. 9.003. TEXAS RULES OF CIVIL PROCEDURE. This chapter does not alter the Texas Rules of Civil Procedure or the Texas Rules of Appellate Procedure.

Sec. 9.004. APPLICABILITY. This chapter does not apply to the Deceptive Trade Practices-Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code) or to Chapter 21, Insurance Code.

[Sections 9.005-9.010 reserved for expansion]

SUBCHAPTER B. SIGNING OF PLEADINGS

Sec. 9.011. SIGNING OF PLEADINGS. The signing of a pleading as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry, the pleading is not:

(1) groundless and brought in bad faith;

(2) groundless and brought for the purpose of harassment; or

(3) groundless and interposed for any improper purpose, such as to cause unnecessary delay or needless increase in the cost of litigation.

Sec. 9.012. VIOLATION; SANCTION. (a) At the trial of the action or at any hearing inquiring into the facts and law of the action, after reasonable notice to the parties, the court may on

its own motion, or shall on the motion of any party to the action, determine if a pleading has been signed in violation of any one of the standards prescribed by Section 9.011.

(b) In making its determination of whether a pleading has been signed in violation of any one of the standards prescribed by Section 9.011, the court shall take into account:

(1) the multiplicity of parties;

(2) the complexity of the claims and defenses;

(3) the length of time available to the party to investigate and conduct discovery; and

(4) affidavits, depositions, and any other relevant matter.

(c) If the court determines that a pleading has been signed in violation of any one of the standards prescribed by Section 9.011, the court shall, not earlier than 90 days after the date of the determination, at the trial or hearing or at a separate hearing following reasonable notice to the offending party, impose an appropriate sanction on the signatory, a represented party, or both.

(d) The court may not order an offending party to pay the incurred expenses of a party who stands in opposition to the offending pleading if, before the 90th day after the court makes a determination under Subsection (a), the offending party withdraws the pleading or amends the pleading to the satisfaction of the court or moves for dismissal of the pleading or the offending portion of the pleading.

(e) The sanction may include one or more of the following:

(1) the striking of a pleading or the offending portion thereof;

(2) the dismissal of a party; or

(3) an order to pay to a party who stands in opposition to the offending pleading the amount of the reasonable expenses incurred because of the filing of the pleading, including costs, reasonable attorney's fees, witness fees, fees of experts, and deposition expenses.

(f) The court may not order an offending party to pay the incurred expenses of a party who stands in opposition to the offending pleading if the court has, with respect to the same subject matter, imposed sanctions on the party who stands in opposition to the offending pleading under the Texas Rules of Civil Procedure.

(g) All determinations and orders pursuant to this chapter are solely for purposes of this chapter and shall not be the basis of any liability, sanction, or grievance other than as expressly provided in this chapter.

Sec. 9.013. REPORT TO GRIEVANCE COMMITTEE. (a) If the court imposes a sanction against an offending party under Section 9.012, the offending party is represented by an attorney who signed the pleading in violation of any one of the standards under Section 9.011, and the court finds that the attorney has consistently engaged in activity that results in sanctions under Section 9.012, the court shall report its finding to an appropriate grievance

committee as provided by the State Bar Act (Article 320a-1, Vernon's Texas Civil Statutes) or by a similar law in the jurisdiction in which the attorney resides.

(b) The report must contain:

(1) the name of the attorney who represented the offending party;

(2) the finding by the court that the pleading was signed in violation of any one of the standards under Section 9.011;

(3) a description of the sanctions imposed against the signatory and the offending party; and

(4) the finding that the attorney has consistently engaged in activity that results in sanctions under Section 9.012.

Sec. 9.014. PLEADINGS NOT FRIVOLOUS. (a) A general denial does not constitute a violation of any of the standards prescribed by Section 9.011.

(b) The amount requested for damages in a pleading does not constitute a violation of any of the standards prescribed by Section 9.011.

SECTION 2.02. The heading of Chapter 33, Civil Practice and Remedies Code, is amended to read as follows:

CHAPTER 33. COMPARATIVE RESPONSIBILITY ~~[NEGLIGENCE]~~

SECTION 2.03. The heading of Subchapter A, Chapter 33, Civil Practice and Remedies Code, is amended to read as follows:

SUBCHAPTER A. COMPARATIVE RESPONSIBILITY ~~[NEGLIGENCE]~~

SECTION 2.04. Section 33.001, Civil Practice and Remedies

Texas Rules of Civil Procedure

Rule 164. Non-Suit

[Repealed]

Advisory Committee Comment: Rule is rendered unnecessary due to inclusion of pertinent language in amended Rule 162, effective January 1, 1988.

175A

June 18, 1987

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Re: Proposed Rule 175A

Dear Subcommittee Members,

I have prepared a report concerning the above referenced rule for our June meeting. Please review the same and let me have your comments.

Best regards,

Bill

William V. Dorsaneo III

Enc.

cc: Honorable Luther H. Soules, III

SCHOOL OF LAW
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Report on Proposed Rule

175A (Offers of Judgment)

Proposed Rule 175A is modeled upon Fed. R. Civ. P. 68. The purpose of Rule 68 when it was adopted in 1938 was to promote settlement. However, as explained in the First Circuit Court's opinion in Crossman v. Marcoccio, 806 F.2d 329, 331 (1st Dir. 1986):

> This rule, designed to encourage the settlement of private disputes, has long been among the most enigmatic of the Federal Rules of Civil Procedure because it offers imprecise guidance regarding which post-offer costs become the responsibility of the plaintiff. Opinions differ sharply on the issue of whether Rule 68 compels plaintiffs to pay defendants' post-offer costs or simply operates to deny prevailing plaintiff's recovery of their own post-offer costs.

In addition to this problem, Rule 68 has other related ones. The federal rule lacks teeth because the term "costs" does not include post-offer attorney's fees, unless attorney's fees "are properly awardable under the relevant substantive statute or other authority," Marek v. Chesny, 473 U.S. 1, 105 S.Ct. 3012, 3017, 87 L.Ed. 2d 1 (1985). In Marek, the Supreme Court held that a prevailing civil rights plaintiff, who recovers less than the defendant's Rule 68 offer of judgment, cannot recover his post-offer attorney's fees pursuant to 42 U.S.C. § 1988. The Court reasoned that "costs" included attorney's fees because § 1988 permits a prevailing plaintiff to recover them. But the Court did not reach the question whether the defendant should be able to recover its post-offer attorney's fees from the

plaintiff-offeree under the same circumstances. The defendants in Marek failed to appeal the portion of the district court's order denying their request for post-offer attorney's fees. But see Crossman v. Marcoccio, 806 F.2d at 334 (holding that recovery of defendant's post-offer attorney's fees not permissible because fees are not "properly awardable" to defendants in civil rights suit "unless the trial court determines that the plaintiff's action was 'frivolous, unreasonable or without foundation.'")

In addition, the Supreme Court has also held that the reference to a "judgment finally obtained by the offeree" in Rule 68 precludes an offeror from recovering its post-offer "costs" when the offeree suffers a take-nothing judgment. Delta Airlines, Inc. v. August, 450 U.S. 346, 101 S.Ct. 1146, 67 L.Ed.2d 287 (1981). Under this holding, federal Rule 68 is confined to cases in which the plaintiff has obtained a judgment but for an amount less favorable than the defendant's settlement offer.

Another problem concerning the proper interpretation of Rule 68 has involved the question of whether a defendant's offer must itemize the respective amounts being tendered for settlement of the underlying substantive claim and for costs (including attorney's fees, when appropriate). See Marek v. Chesny, 105 S.Ct. at 3015-3016 (holding that "[a]s long as the offer does not implicitly or explicitly provide that the judgment not include costs, a timely offer will be valid.")

I have evaluated proposed Rule 175A's redraft of Fed. R.

Civ. P. 68 against this procedural background. These are my comments.

Comment No. 1. The first sentence should be changed by adding the words "and attorneys' fees" after the word "costs." Otherwise the entire phrase beginning with "including" could be deleted.

Comment No. 2. The fourth sentence should be modified by replacing the words "finally obtained by the offeree" with "judgment finally rendered" or "finally obtained by or against the offeree." This modification would specifically reject the result reached by the Supreme Court in Delta Airlines, Inc. v. August, disc'd above.

Comment No. 3. The fifth sentence should be modified to add the words "to the offeror" after the word "awarded."

Obviously, other adjustments may be needed. I have redrafted a second version of Proposed Rule 175A to reflect my comments. Please see attachment "A". I have also appended a copy of Fed. R. Civ. P. 68 as attachment "B" and a copy of a proposal for revision of the federal rule that is labeled attachment "C". The latter attachment takes a different approach that is somewhat like Tex. R. App. P. 84.

Supplement Analysis of Proposed Rule 175A

Proposed new Rule 175A differs from Federal Rule 68 in the following respects.

First, proposed new Rule 175A permits plaintiffs as well as defendants to make offers of judgment as a prerequisite to recovery of costs and attorney's fees from an adverse party. In contrast, Federal Rule 68 permits "a party defending against a claim" to make an offer of judgment.

Second, proposed new Rule 175A makes the offeree liable for both costs and attorneys's fees incurred by the offeror after the offer is made when a judgment is rendered that is not more favorable than the rejected offer. Federal Rule 68 does not address attorney's fees and refers only to "costs incurred after the making of the offer." However, in a civil rights action the United States Supreme Court has held that because the underlying statute defines costs to include attorney's fees, they are included. Marek v. Chesny, supra.

Third, new Rule 175A restricts the award of attorney's fees in favor of the offeror to cases in which the trial court determines that the offeree has acted unreasonably in refusing the offer. This issue is not addressed in federal Rule 68 and was not addressed in Marek. The First Circuit has stated that the Marek opinion limits the scope of Rule 68 to cases in which costs are "properly awardable" under the relevant statute. Crossman v. Marcoccio, 806 F.2d 329, 333 (1st Cir. 1986). Applying this interpretation of Marek, the Crossman court held that defendant's attorney's fees were not properly awardable under 42 U.S.C. § 1988 because the statute awards costs only to a "prevailing party" and caselaw limits recovery of attorney's fees

by defendants to cases in which the plaintiff's claims are found to be frivolous, unreasonable or without foundation. In Crossman "there [was] absolutely no reason to believe that appellants case was frivolous or meritless; indeed appellants 'prevailed' at trial. It follows from this that appellee's attorney's fees were not 'properly awardable' costs as defined by section 1988." Crossman, 806 F.2d at 334. In contrast, proposed Rule 175A has unreasonableness as its primary standard and gives the court discretion as to what factors it may take into account in deciding the issue.

Attachment "A"

Dorsaneo's Draft

NEW RULE 175A

OFFER OF JUDGMENT

At any time more than 10 days before the trial begins, a party may serve upon the adverse party an offer of judgment, including costs and attorney's fees then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally rendered is not more favorable than the offer, the offeree must pay the costs and attorneys' fees incurred after the making of the offer. Attorneys' fees will not be awarded to the offeror unless the court in its discretion determines that the losing party did not act reasonably in refusing the offer. In making that decision, the court may consider among other factors the differential between the offer and the judgment and the importance of the issues involved. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, either party may make an offer of judgment, which

shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Attachment "B"

RULE 68

Offer of Judgment

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Feb. 28, 1966,

eff. July 1, 1966.)

Notes of Advisory Committee on Rules

See 2 Minn.Stat. (Mason, 1927) § 9323; 4 Mont.Rev. Codes Ann. (1935) § 9770; N.Y.C.P.A. (1937) § 177.

For the recovery of costs against the United States, see Rule 54(d).

1946 Amendment

Note. The third sentence of Rule 68 has been altered to make clear that evidence of an unaccepted offer is admissible in a proceeding to determine the costs of the action but is not otherwise admissible.

The two sentences substituted for the deleted last sentence of the rule assure a party the right to make a second offer where the situation permits -- as, for example, where a prior offer was not accepted but the plaintiff's judgment is nullified and a new trial ordered, whereupon the defendant desires to make a second offer. It is implicit, however, that as long as the case continues -- whether there be a first, second or third trial -- and the defendant makes no further offer, his first and only offer will operate to save him the costs from the time of that offer if the plaintiff ultimately obtains a judgment less than the sum offered. In the case of successive offers not accepted, the offeror is saved the costs incurred after the making of the offer which was equal to or greater than the judgment ultimately obtained. These provisions should serve to encourage settlements and avoid protracted litigation.

The phrase "before the trial begins," in the first sentence of the rule, has been construed in Cover v. Chicago Eye Shield Co., C.C.A.7, 1943, 136 F.2d 374, certiorari denied 64 S.Ct. 53, 320 U.S. 749, 88 L.Ed. 445.

1966 Amendment

This logical extension of the concept of offer of judgment is suggested by the common admiralty practice of determining liability before the amount of liability is determined.

Attachment "C"

AMERICAN BAR ASSOCIATION

SECTION OF TORT AND INSURANCE PRACTICE

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, That the American Bar Association recommends that Rule 68 of the Federal Rules of Civil Procedure be amended as follows:

OFFERS OF SETTLEMENT

a. Service. At any time more than 60 days after service of the summons and complaint upon a party but not less than 60 days before trial, any party may serve upon any adverse party or parties (but shall not file with the court) a written offer, denominated as an offer under this Rule, to settle a claim for the money, property or other relief specified in the offer, and to enter into a stipulation dismissing the claim or allowing judgment to be entered according to the terms of the offer.

b. Time For Acceptance. The offer shall remain open for 45 days unless sooner withdrawn by a writing served on the offeree before the offer is accepted by the offeree. An offer that is neither withdrawn nor accepted within 45 days shall be deemed rejected.

c. Subsequent Offers; Admissibility. The fact that an offer is made but not accepted does not preclude a subsequent offer. Evidence of an offer is not admissible for any purpose except in proceedings to enforce a settlement, execute upon a judgment or determine sanctions or costs under these Rules.

d. Exemptions. At any time before judgment is entered, upon its own motion or upon motion of any party, the courts upon express findings may exempt from this Rule any case or count that presents novel and important questions of law or

fact or that presents issues substantially affecting non-parties. If a case or count is exempted from this Rule, all past and pending offers made by any party under the Rule shall be void and of no effect.

e. Sanctions for Rejections. (1) If an offer is rejected and the judgment finally entered (exclusive of post-offer costs, expenses, and attorneys' fees) appears not more favorable to the offeree than the rejected offer, the offeror may file the offer with the court (together with a bill of costs incurred after the making of the offer) in support of a motion for sanctions pursuant to this Rule.

(2) If the court finds that the judgment finally entered is not more favorable to the offeree than the rejected offer, the offeree shall not recover any costs taxable under 28 U.S.C. Section 1920 incurred after the date the offer was made, and the court shall order the offeree or his attorney or both to pay the offeror a sum certain of money no less than three times the costs taxable under 28 U.S.C. Section 1920 (excluding attorneys' fees and expert witnesses' fees), and no greater than seven times such costs, incurred by the offeror after the date the offer was made, unless the court upon express findings concludes that the imposition of such sanction would be manifestly unjust.

f. Bifurcated Proceedings. When the liability of one party to another has been determined by verdict, order, or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of settlement that shall have the same effect as an offer made before trial if it is served not less than 60 days before the actual commencement of further proceedings. If an offer is served less than 60 days before the anticipated commencement of further proceedings, the court may upon motion order a continuance to allow a timely response before the commencement of further proceedings.

REPORT

The express purpose of Rule 68 when adopted in 1938 was to promote settlements. Since then there have been minor amendments, but the Rule is seldom used by parties; and thus has not achieved its original goal of encouraging resolution of cases. Although much has been written on why Rule 68 is not effective, in the last analysis, it "lacks teeth" in its sanction provisions since the "costs incurred after the making of an offer" are usually insignificant compared to the dollar amount at issue. Moreover, the Rule is available only to defendants and not plaintiffs.

The urge to amend the Rule has recently been given greater impetus by the decision in Marek v. Chesny, 105 S.Ct. 3012 (1985), which awarded attorneys' fees as "costs."

Many commentators have discussed the philosophical and practical issues involved in providing the Rule some bite and in maintaining judicial discretion for its implementation. It is felt the presently proposed amendment balances these two competing goals by incorporating the established law relating to taxable costs as a base and by also giving a court discretion to exempt the application of the Rule "upon express findings," and further discretion as to the multiplier to be used (between 3 and 7 times taxable costs).

(a) Service. This section expands the applicability of the Rule to allow an initial offer to be made by any party, whether making or defending against the claim under which the offer is made. In cases with multiple parties or multiple claims, the revised Rule comtemplates that an offer may be made as to any of the claims or parties in any combination. However, no defending party may be served with an offer until at least 60 days after service of the summons and complaint on that party. The triggering act is necessarily service of the pleadings not the filing of the complaint, since the latter may precede the former by as much as 120 days under the Rules. The 60 day period is specifically intended to afford the defendant an opportunity to come to grips with the matter so that it may make an informed response to the offer of judgment. The proposed Rule would also require a defending party intending to serve an offer upon a complaining party to wait at least 60 days after the adverse party's complaint or claim is served upon it before serving an offer on the complaining party. Since defendants under some circumstances have up to 60 days after service of a complaint in which to file an answer or other responsive pleading, this would prevent a defendant's offer being submitted before its answer so that the complainant would be forced to respond before being able to evaluate the legal and factual position taken by the defending party in its responsive pleading. The revision specifically requires the offer to be in writing, and denominated as an offer under this Rule, to prevent collateral litigation over whether a rejected offer of settlement should bring into play the sanctions contemplated by the Rule. Further, the revision does not restrict the offeror to an offer to allow judgment to be taken against it, but provides that the offer may be one to dismiss the claim or allow any other form of judgment to be entered according to the terms of the offer. Since the parties of their own accord have no power to either dismiss the claim or enter judgment, the rule specifically provides that regardless of the form of final disposition of the claim, the parties' agreement formed by acceptance of the offer shall consist of a stipulation, subject to the enforcement power of the court.

(b) Time For Acceptance. The 45 day period in which the offeree may make a response before the offer is withdrawn or automatically deemed rejected is intended to represent an interweaving of the needs of defendants, particularly where insurance companies are involved, and of plaintiffs in multiparty situations such as mass torts or class actions, to undertake a review of the matter and make a response, with the parallel need of all parties to have time upon rejection of an offer to prepare the case for trial. Regardless of other time factors, all parties should have at least 15 days in which to undertake trial preparation after an offer expires or has been rejected.

(c) Subsequent Offers; Admissibility. The first sentence of this section tracks the existing language of the Rule. The second sentence parallels the existing language but specifies additional proceedings in which the making of an offer may be admissible in evidence. Under the language of the existing Rule, a court could be hamstrung in efforts to enforce a settlement or execute upon a judgment entered pursuant to this Rule. The revised Rule does not specify that such evidence is admissible; it simply enlarges the exception provided to the general rule that evidence of an offer is not admissible, requiring the court to make the final determination of admissibility of particular evidence in a particular proceeding.

(d) Exemptions. The language of this section is new. This section allows the court upon express findings to exempt certain individual cases from the operation of this Rule. It is contemplated that the discretion granted the court by this section will be exercised sparingly, with each case or count examined individually to determine if it presents novel and important questions of law or fact or presents issues substantially affecting non-parties. This section is not intended to act as a blanket exemption of any category of action, such as class actions or derivative actions, from the operation of the Rule.

(e) Sanctions for Rejection. The reference to "judgment finally obtained by the offeree" in the former Rule is changed to "judgment finally entered" to make clear that the Rule continues to apply if the offeree has been denied any relief, specifically overturning Delta Airlines, Inc., v. August, 450 U.S. 346 (1981). This section parallels the language of the existing Rule but provides that the amount of the sanction shall be in a range three to seven times that contemplated by the present Rule. The trigger criterion remains the same, with sanctions to be imposed automatically in the event the offeree obtains a less favorable result. The revised Rule provides, however, that the court does not impose sanctions on its own motion, but only upon motion of an offeror for sanctions pursuant to this Rule. This obviates the necessity of the court's making a determination of whether the relief taken was

more or less favorable than the offer where the question is a close one; it is contemplated that where the litigation costs for this collateral issue (in cases where other than a money judgment was sought) would exceed the available sanction, an offeror may choose not to pursue a motion. The court is required to make specific findings of fact upon such a motion if made, and if it finds that sanctions are triggered, the court's discretion in imposition of the sanction is limited to the range of three to seven times taxable costs, specifically excluding attorneys' and expert witnesses' fees from the term "costs." This specifically overturns Marek v. Chesny, 105 S.Ct. 3012 (1985), while preserving each party's entitlement to attorneys' fees if provision for award of fees is made by any statute. The intent of the enhanced sanctions over that in the existing Rule is to provide a greater incentive than that provided by the existing Rule to both make and accept offers of settlement under the Rule, while preserving the relative certainty and ease of determination achieved by using a multiple of taxable costs as the measure of the sanction. In exercising its discretion within the range of allowable sanctions, the court may consider any facts or circumstances that would either mitigate or aggravate the amount of appropriate sanction in a particular case, and no attempt is made in the revised Rule to limit the areas into which the court may inquire in making this determination.

(f) Bifurcated Proceedings. This section tracks the existing language of the Rule, changing the time limits for offer and acceptance in a bifurcated proceeding to those which generally apply under the revised Rule. The revision adds language specifically acknowledging that the court has discretion to grant a continuance to allow a timely response if a late offer is served, but it is contemplated that this discretion will be sparingly exercised and only in circumstances where the time interval between entry of the verdict, order, or judgment of liability and anticipated commencement of further proceedings is so short as not to allow the normal sequence of 45 days in which to contemplate the offer, followed by at least 15 days to prepare for trial as generally contemplated by the Rule. Again, the court may consider all relevant facts and circumstances in determining whether to allow a late offer to be made and to require a response, although under no circumstances should the deadline for a response be less than 15 days before commencement of further proceedings.

Where a claim or count is concluded by settlement outside the framework of this Rule, even after rejection of a prior offer under the Rule and regardless of the stage of proceedings, it is clear that no sanctions under this Rule should apply. The avowed purpose of the Rule is to promote settlement; and the parties having reached an agreement to conclude the action as to any count or claim may be presumed to have taken in to account all of the vested or inchoate rights and obligations concerning the subject matter which they would surrender by entering a settlement. The parties may well, however, negotiate a settlement factoring in the amount of sanctions to be received if the cause were to proceed to final judgment.

Respectfully submitted,

T. Richard Kennedy
Chairperson
Section of Tort and Insurance Practice

0374I

August, 1936

General Information Form

To Be Appended to Reports with Recommendations

No. _____
(Leave Blank)

Submitting Entity: Section of Tort and Insurance Practice

Submitted By: T. Richard Kennedy
Chairperson, Section of Tort and Insurance Practice

1. Summary of Recommendation(s).

The proposed revised rule changes the time periods, provides that any party may file an offer, allows the court to exempt certain cases or counts, and increase the sanction for rejection to a range between three and seven times the taxable cost exclusive of attorneys' and expert witnesses' fees.

2. Approval by Submitting Entity.

This recommendation was approved by the Section of Tort and Insurance Practice at its Council meeting in May, 1986.

3. Background.

The Association does not currently have a position on this matter. At the February, 1986 Midyear meeting, the Sections of Tort and Insurance Practice and Litigation co-sponsored a recommendation to oppose the amendment to Federal Rule of Civil Procedure 68 as currently proposed by the Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure. The House deferred action, requesting the Sections develop an alternative proposal to overcome the objections which caused the opposition.

4. Need for Action at This Meeting.

The Committee on Rules and Procedure of the Judicial Conference of the United States has been considering this proposed amendment for several months, and the statement of a position by the Association at this time would be extremely helpful to them in their continuing deliberations.

5. Status of Legislation.

There are currently bills pending in both the House and Senate which would determine whether attorneys' fees would be included in the sanctions for rejection of a settlement offer. Two bills under consideration in the House address whether Marek v. Chesny should be specifically incorporated into Rule 68 or overturned, and a similar issue is pending in the Senate as part of a proposed amendment to the Danforth product liability bill.

6. Financial Information.

No funds will be required.

7. Conflict of Interest.

None.

8. Referrals.

Copies of this report with recommendations will be circulated to all Sections and Divisions prior to the 1986 Annual Meeting.

9. Contact Person. (Prior to meeting)

William E. Rapp
211 South Broad Street
Philadelphia, Pennsylvania 19107
215/875-4089

10. Contact Person. (Who will present the report to the House)

Donald M. Haskell
Suite 1800
11 South LaSalle Street
Chicago, Illinois 60603
312/781-9393

0374I/p7-8

Texas Rules of Civil Procedure

Rule 204. Examination, Cross-examination and Objections

1. No Change

2. No Change

3. No Change

4. Objections to Testimony. The officer taking an oral deposition shall not sustain objections made to any of the testimony or fail to record the testimony of the witness because an objection is made by any of the parties or attorneys engaged in taking the testimony. Any objections made when the deposition is taken shall be recorded with the testimony and reserved for the action of the court in which the cause is pending. Absent express agreement recorded in the deposition to the contrary:

(a) objections to the form of questions or the nonresponsiveness of answers are waived if not made at the taking of an oral deposition and;

(b) [except as provided in (a) above, or] unless otherwise ~~agreed between the parties or attorneys~~ [provided] by agreement [of the parties] recorded by the officer [in the deposition transcript,] ~~.--T~~[t]he court shall not be confined to objections made at the taking of the testimony.

Advisory Committee Comment: By this change, the grammar has been corrected in paragraph 4.

Rule 206

RAY HARDY
DISTRICT CLERK
P.O. Box 4651
Houston, Texas 77210

June 16, 1987

Mr. Luther Soules
Attorney at Law
Soules and Reed
800 Milam Building
SAN ANTONIO, TEXAS 78205

SUBJECT : DEPOSITIONS

Dear Mr. Soules :

Attached is the documentation that you requested covering items previously submitted to the Advisory Committee concerning the filing of depositions. As you know the County and District Clerk's Association requested Senator Green to sponsor Senate Bill 415 in the 70th Legislative Assembly. Senate Bill 415 addressed possession, filing, certification and disposition of certain instruments pertaining to civil suits in the district courts. The documents addressed were discovery documents covered dispositions, interrogatories, medical records and other discovery material relating to civil suits in district court. Senate Bill 415 would have prohibited the filing of these instruments with the District clerk unless the Court determined that they are relevant and to be introduced into the record at trial. Senator Green filed similar legislation in 1981 and 1983.

Ray Hardy had written to Justice Wallace in September 1983 regarding the consideration of adopting the Rule 5(d) of the Federal Rules of Civil Procedure, which describes documents not to be filed with the clerk. The bills and letter referred to above are all attached.

In discussion with you I pointed out some verbage problems in the proposed Rule 206 at which time you requested that I send the attached documentation to you.

The County and District clerk's Association met at their annual conference in Longview and adopted a resolution covering Rule 206. That resolution is attached. I am also attaching a copy of the proposed verbage to Rule 206. What we ask is that the only document filed with the District Clerk, by the officer deposing the witness, is a certification stating that: (1) the deposition was taken, (2) date taken, (3) name of witness deposed; and, (4)

who has possession of the original and copies of such deposition.

My apologies for the delay in sending this information, I hope that it has not caused you any inconvenience. Please contact me or Ray if we can be of further assistance.

Very truly yours,

ROBERT H. HUSKY, JR., Chief Deputy
for RAY HARDY, District Clerk,
HARRIS COUNTY, T E X A S

Ref:RH/rhH/sab:

00000040

RAY HARDY
DISTRICT CLERK
P.O. Box 4651
Houston, Texas 77210

R E S O L U T I O N

WHEREAS the Supreme Court of the State of Texas has adopted amendments to the Texas Rules of Civil Procedure by order dated March 10, 1987 to become effective January 1 1988.

AND WHEREAS the county and district clerk's association of the state of Texas has reviewed these amended rules.

AND WHEREAS rule 206 certification and filing by officer exhibits, copies, notice of filing is unclear and does not delineate the responsibilities of the deposing officer and the clerk of the court clearly.

BE IT THEREFORE RESOLVED that the County and District Clerks Association of the State of Texas petition the Supreme Court of the State of Texas to amend Rule 206 paragraph 1 as follows :

1. Certification and filing by officer, the officer shall certify on the deposition transcript that the witness was duly sworn by him, and that it is a true record of the testimony given by the witness. The officer shall include :

   a. the witness deposed

00000041

b. the date deposed

c. the cost charged for the original

d. the names and addresses of the parties, having possession of the original.

e. the name and addresses of all other parties having possession of copies of the deposition and

f. the amount charged for the preparation of the completed deposition transcript.

The clerk of the court, where such certificate is filed, shall tax as costs the charges for preparing the original deposition transcript. Unless otherwise ordered by the court the officer shall then securely seal the deposition transcript in an envelope endorsed with the title of the action, and marked "deposition of (here insert name of witness)" and shall promptly mail the original to the party requesting the witness to be deposed, and a copy to the adverse party by registered or certified mail.

SIGNED this the 12th day of June 1987 in Longview, Gregg County, TEXAS.

Signed by Jane Adams, Chairperson,
COUNTY AND DISTRICT CLERK
Archer County Texas.

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 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 in the certification. Unless otherwise ordered by the court, he shall then securely seal the deposition in an envelope endorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly file it with the court in which the party 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 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 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 given 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.** DEPOSITION. The OFFICER TAKING person filing the deposition shall give prompt notice of its filing to all parties, AND FILE WITH THE CLERK OF THE COURT IN WHICH THE ACTION IS PENDING A CERTIFICATE DESCRIBING: 1) THE WITNESS DEPOSED; 2) DATE THE

5. **Inspection of Filed Deposition.** After it is filed, the deposition shall (remain delete 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.

AT THE ~~OFFICE~~ LOCATION WHERE THE ORIGINAL DEPOSITION

DEPOSITION WAS TAKEN; (3) PARTY IN POSSESSION OF THE ORIGINAL AND ~~ANY~~ COPIES; AND, (4) THE COST CHARGED FOR THE ORIGINAL DEPOSITION.

RAY HARDY
DISTRICT CLERK
HOUSTON, TEXAS 77002

September 15, 1983

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

Dear Justice Wallace:

I am writing to you again regarding the consideration of adopting several State Rules to delineate the following areas:

(1) Clarification of Lead Counsel and Attorney of Record

There appears to be some inconsistancy with respect to which attorney is attorney of record and lead counsel, and which are recorded only as attorneys of record. According to State Rules 8 and 10, lead counsel is the first attorney employed (does this mean just employed, or the attorney whose signature appears on the first instrument filed by a party to a suit?), and remains such until he designates another attorney in his stead. Does State Rule 65, substitution of amended instrument for the original, act to substitute the lead counsel automatically? Or simply to remove the superceded instrument? If lead counsel remains such until a separate designation is made, of record, by the counsel substituting "out", then is it necessary to provide notice under State Rule 165a of dismissal for want of prosecution to all attorneys of record, or only to lead counsel? If the intent of the rule is to insure notification be made to the party, then notification to lead counsel should suffice; if, however, the notice is intended to protect every attorney connected to the suit (multiple attorneys representing one party, potentially), then the Rule would be left as written.

Below is Rule 1.G. (1) and (4), of the Local Rules Of The United States District Court for the Southern District of Texas, amended May, 1983, effective July 1, 1983, which appears to adequately answer these questions:

1.G. Attorney in Charge.

(1) Designation and Responsibility. Unless otherwise ordered, in all actions filed in or removed to the Court, each party shall, on the occasion of his first appearance through counsel, designate as "attorney in charge" for such party an attorney who is a member of the Bar of this Court or is appearing under the terms of paragraph E of this rule. Thereafter, until such designation is changed by notice pursuant to Local Rule 1.G.(4), said attorney in charge shall be responsible for the action as to such party and shall attend or send a fully authorized representative to all hearings, conferences and the trial.

1.G.(4) Withdrawal of Counsel. Withdrawal of counsel in charge may be effected (a) upon motion showing good cause and under such conditions imposed by the presiding judge; or (b) upon presentation by such attorney in charge of a notice of substitution designating the name, address and telephone number of the substitute attorney, the signature of the attorney to be substituted, the approval of the client, and an averment that such substitution will not delay any setting currently in effect.

Regarding the problem of appropriate attorney notification, the same Rule, 1.G.(5), regarding Notices, specifies:

All communications from the Court with respect to an action will be sent to the attorney in charge who shall be reponsible for notifying his associate or co-counsel of all matters affecting the action.

(2) Attorney responsibility for the preparation and submission of a Bill of Costs:

Originally legislation was proposed to place the responsibility on each party to maintain a record and cause to have included in the judgment their recoverable costs. This legislation was not adopted. We recommend consideration of a State Rule which would require that each attorney be responsible for the inclusion of the recoverable cost in the Judgment submitted to the court. This might be attached to either State Rule 127 or State Rule 131, or be a separate rule, such as:

Rule: Parties Responsible for Accounting of Own Costs.

Each party to a suit shall be responsible for the accurate recordation of all costs incurred by him during the course of a law suit, and such shall be presented to the court at the time the Judgment is submitted.

(3) Removal of the Filing of All Depositions and Exhibits:

It is recommended that in an effort to save the counties from increasing space requirements to provide library facilities for case files, that a limit be set on the depositions, interrogatories, answers to interrogatories, requests for production or inspection and other discovery material so that only those instruments to be used in the course of the trial are filed. Again, the United States District Court for the Southern District of Texas has adopted this rule:

Rule 10. Filing Requirements.

F. Documents Not to be Filed. Pursuant to Rule 5(d), Fed. R. Civ. P., depositions, interrogatories, answers to interrogatories, requests for production or inspection, responses to those requests and other discovery material shall not be filed with the Clerk. When any such document is needed in connection with a

pretrial procedure, those portions which are relevant shall be submitted to the Court as an exhibit to a motion or answer thereto. Any of this material needed at trial or hearing shall be introduced in open court as provided by the Federal Rules. (Added May, 1983).

and

Rule 12. Disposition of Exhibits.

A. 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.

B. Exhibits offered or admitted into evidence will be removed by the offering party within 30 days after final disposition of the cause by the Court without notice if no appeal is taken. When an appeal is taken, exhibits returned by the Court of Appeals will be removed by the offering party within 10 days after telephonic notice by the Clerk. Exhibits not so removed will be disposed of by the Clerk in any convenient manner and any expenses incurred taxed against the offering party without notice.

C. Exhibits which are determined by the Judge to be of a sensitive nature so as to make it improper for them to be withdrawn shall be retained in the custody of the Clerk pending disposition on order of the Judge.

Yours very truly,

Ray Hardy, District Clerk
Harris County, Texas

RH/ba

Rule 3a. Rules by Other Courts

Each administrative judicial district, each district court, and each county court may, from time to time, make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made shall before their promulgation be furnished to the Supreme Court of Texas for approval.

(Renumbered from former rule 817 and amended by order of Dec. 5, 1983, eff. April 1, 1984; amended by order of April 10, 1986, eff. Sept. 1, 1986.)

Change by amendment effective April 1, 1984: Moves Rule 817 to Rule 3a to emphasize the superiority of the general rules over local rules of procedure and requires Supreme Court approval so as to achieve uniformity.

COMMENT: Amended to delete any reference to appellate procedure. The words "Court of Appeals, each" have been deleted.

Rule 4. Computation

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor a legal holiday.

(Amended by order of July 26, 1960, eff. Jan. 1, 1961.)

Source: Federal Rule 6(a).

Change: Omission of the Federal provision excluding intermediate Sundays or holidays when the period of time is less than seven days and the Federal reference to half-holidays.

Change by amendment effective January 1, 1961: The word "Saturday" added in last sentence.

Rule 5. Enlargement

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (a) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or (b) upon motion permit the act to be done after the expiration of the specified period where good cause is shown for the failure to act; but it may not enlarge the period for taking any action under the rules relating to new trials except as stated in these rules; provided, however, if a motion for new trial is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail one day or more before the last day for filing same, the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and be deemed filed in time; provided, however, that a legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing.

(Amended by orders of Oct. 12, 1949, eff. March 1, 1950; July 21, 1970, eff. Jan. 1, 1971; Oct. 3, 1972, eff. Feb. 1, 1973; July 22, 1975, eff. Jan. 1, 1976; April 10, 1986, eff. Sept. 1, 1986.)

Source: Federal Rule 6(b).

Change: The second clause in the Federal rule requires a showing that the failure to act "was the result of excusable neglect." Also, specific reference is made in this rule to the time limitations relating to motions for new trial and for rehearings and to appeals and writs of error, while in the Federal rule the cross reference to such subjects is by rule number.

Change by amendment effective March 1, 1950: The first proviso was added at the end of the rule.

Change by amendment effective January 1, 1971: The language of the first proviso has been changed to eliminate the requirement that the date of mailing be shown by a postmark on the envelope and an additional proviso has been added to make a legible postmark conclusive as to the date of mailing.

Change by amendment effective February 1, 1973: The words "affixed by the United States Postal Service" have been inserted in the final proviso.

Change by amendment effective January 1, 1976: A legible postmark shall be prima facie, not conclusive, evidence of date of mailing.

COMMENT: Amended to delete any reference to appellate procedure.

The phrase "or motions for rehearing or the period for taking an appeal or writ of error from the trial court to any higher court or the period for application for writ of error in the Supreme Court" and the phrase "motion for rehearing, any matter relating to taking an appeal or writ of error from the trial court to any higher court, or application for writ of error" have been deleted.

Rule 6. Suits Commenced on Sunday

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

(Amended by order of Oct. 3, 1972, eff. Feb. 1, 1973.)

Source: Art. 1974, unchanged.

Change by amendment effective February 1, 1973: Proviso concerning publication of citation on Sunday has been added.

Rule 7. May Appear by Attorney

Any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court.

Source: Art. 1993, unchanged.

Rule 8. Leading Counsel Defined

The attorney first employed shall be considered leading counsel in the case, and, if present, shall have control in the management of the cause unless

a change is made by the party himself, to be entered of record.

Source: Texas Rule 45 (for District and County Courts), unchanged.

Rule 9. Number of Counsel Heard

Not more than two counsel on each side shall be heard on any question or on the trial, except in important cases, and upon special leave of the court.

Source: Texas Rule 44 (for District and County Courts), unchanged.

Rule 10. Attorney of Record Defined

An attorney of record is one who has appeared in the case, as evidenced by his name subscribed to the pleadings or to some agreement of the parties filed in the case; and he shall be considered to have continued as such attorney to the end of the suit in the trial court, unless there is something appearing to the contrary in the record.

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

Rule 11. Agreements To Be in Writing

No agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record.

Source: Texas Rule 47 (for District and County Courts), unchanged.

Rule 12. Attorney to Show Authority

A party in a suit or proceeding pending in a court of this state may, by sworn written motion stating that he believes the suit or proceeding is being prosecuted or defended without authority, cause the attorney to be cited to appear before the court and show his authority to act. The notice of the motion shall be served upon the challenged attorney at least ten days before the hearing on the motion. At the hearing on the motion, the burden of proof shall be upon the challenged attorney to show sufficient authority to prosecute or defend the suit on behalf of the other party. Upon his failure to show such authority, the court shall refuse to permit the attorney to appear in the cause, and shall strike the pleadings if no person who is authorized to prosecute or defend appears. The motion may be heard and determined at any time before the parties have announced ready for trial, but the trial shall not be unnecessarily continued or delayed for the hearing.

(Amended by order of June 10, 1980, eff. Jan. 1, 1981.)

Source: Art. 320.

Change by amendment effective January 1, 1981: The existing rule is changed to permit a challenge to a plaintiff's attorney, so that all attorneys are subject to a challenge that they are in court without authority.

Rule 13. Penalty for Fictitious Suits or Pleading

Any attorney who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading presenting a state of case which he knows to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt; and the court, of its own motion, or at the instance of any party, will direct an inquiry to ascertain the fact.

Source: Texas Rule 51 (for District and County Courts), unchanged.

Rule 14. Affidavit by Agent

Whenever it may be necessary or proper for any party to a civil suit or proceeding to make an affidavit, it may be made by either the party or his agent or his attorney.

Source: Art. 24, unchanged.

Rule 14a. Repealed by order of April 10, 1986, eff. Sept. 1, 1986

Rule 14b. Return or Other Disposition of Exhibits

In all hearings, proceedings or trials in which exhibits have been filed with or left in the possession of the clerk, such clerk or any party to the proceeding may, after the judgment has become final and times for appeal, writ of error, bill of review under Rule 329 when applicable, and certiorari have expired without the same having been perfected, or after mandate which is finally decisive of such matter has been issued, move such court, on written notice to all parties, for the return of any or all of such exhibits to the party or parties originally introducing or offering the same, or may move for their destruction or such other disposition as the court may direct.

(Added by order of July 20, 1966, eff. Jan. 1, 1967.)

Note: This is a new rule, effective January 1, 1967.

Rule 14c. Deposit in Lieu of Surety Bond

Wherever these rules provide for the filing of a surety bond, the party may in lieu of filing the bond deposit cash or other negotiable obligation of the government of the United States of America or any agency thereof, or with leave of court, deposit a negotiable obligation of any bank or savings and

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A BILL TO BE ENTITLED

AN ACT

relating to possession, filing, certification, and disposition of certain instruments pertaining to civil suits in the district courts.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. DEFINITION. In this Act, "discovery instrument" means a deposition, interrogatory, medical record, or other discovery material that relates to a civil case in a district court.

SECTION 2. INSTRUMENT MAY BE FILED ONLY IF RELEVANT AND INTRODUCED. A discovery instrument may not be filed with the district clerk unless the court has determined that it is relevant and it has been introduced into the record at trial.

SECTION 3. PERSON REQUESTING RETAINS INSTRUMENT. The person who requests the discovery instrument shall retain the instrument until it is filed.

SECTION 4. DISPOSITION OF INSTRUMENTS INTRODUCED. The district clerk shall retain with the papers of the case any discovery instrument introduced into the record during trial until time for appeal, writ of error, bill of review, or certiorari has expired without being perfected or until after mandate that is finally decisive of the matter has been issued. The clerk then shall notify the person who introduced the instrument that the person may claim the instrument not later than the 15th day after the day notice was sent and that if the instrument is not claimed

it may be destroyed or disposed of as the court directs. If a discovery instrument is not claimed within that period, the clerk may destroy the instrument or dispose of it in another way that the court directs.

SECTION 5. EFFECTIVE DATE. This Act takes effect September 1, 1987, and applies only to the filing of discovery instruments related to cases filed on or after that date.

SECTION 6. EMERGENCY. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

UNIVERSITY OF HOUSTON LAW CENTER
UNIVERSITY PARK
HOUSTON, TEXAS 77004
713/749-1422

Rule 267

Tina Arguello

UNIVERSITY OF HOUSTON
LAW CENTER

June 17, 1987

Mr. Luther H. Soules III
Chairman, Supreme Court Advisory Committee
Soules, Reed & Butts
800 Milam Building
East Travis at Soledad
San Antonio, Texas 78205

Dear Luke:

Herewith the proposal from Jeremy Wicker.

Yours truly,

Newell H. Blakely, Chairman
Evidence Subcommittee

NB:jb

Enclosure

TEXAS RULES OF CIVIL PROCEDURE

Rule 267. Witnesses Placed Under Rule

At the request of either party, in a civil case, the witnesses on both sides may be sworn and removed out of the courtroom to some place where they cannot hear the testimony as delivered by any other witness in the cause. This is termed placing witnesses under the rule. Neither party to the suit shall be placed under the rule. Where a corporation is a party to the suit, the court may exempt from the rule an officer or other representative of such party. Witnesses, when placed under Rule [~~613~~] 614 of the Texas Rules of Civil Evidence, shall be instructed by the court that they are not to converse with each other or with any other person about the case other than the attorneys in the case, except by permission of the court, and that they are not to read any report of or comment upon the testimony in the case while under the rule. Any person violating such instructions may be punished for contempt of court.

COMMENT. Professor Jeremy C. Wicker has submitted the above housekeeping amendments to Texas Rule of Civil Procedure 267, explaining:

> "Rule 267, Tex.R.Civ.P., was amended, effective January 1, 1988, to include language expressly referring to Rule 613 of the Texas Rules of Evidence. The latter, however, was amended, effective January 1, 1988, and renumbered as Rule 614. Also, the "Texas Rules of Evidence" were renamed the "Texas Rules of Civil Evidence." Accordingly, the enclosed suggested amendment to Rule 267, Tex.R.Civ.P., is offered to conform it to the amendments to the Texas Rules of Evidence."

These two changes have not been submitted to the Evidence Subcommittee members (except the chairman), but they are clearly housekeeping and not controversial.

REPEALER

The Supreme Court of Texas having Texas Rule of Civil Procedure 103 on the subject of officers authorized to serve civil process, it is accordingly ordered that HB 386, the same being " An Act Relating To The Jurisdiction Of Constables," amending Article 6889, Revised Statutes, effective September 1, 1987, is repealed pursuant to Tex. Const. Art. 5 §31, and Tex. Gov. Code §22.004(c).

Insofar as it conflicts with this rule

§ 30. Judges of courts of county-wide jurisdiction; criminal district attorneys

Notes of Decisions

1. In general

The provision in Vernon's Ann.Civ.St. art. 1970–339A fixing the full term of four years of judges of County Courts at Law to run from the General Election of 1968 was unconstitutional, being in violation of this section and Art. 16, § 65. Op.Atty.Gen.1970, No. M–566.

§ 31. Court administration and rule-making authority

Sec. 31. (a) The Supreme Court is responsible for the efficient administration of the judicial branch and shall promulgate rules of administration not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts.

(b) The Supreme Court shall promulgate rules of civil procedure for all courts not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts.

(c) The legislature may delegate to the Supreme Court or Court of Criminal Appeals the power to promulgate such other rules as may be prescribed by law or this Constitution, subject to such limitations and procedures as may be provided by law.

Adopted Nov. 5, 1985.

Amendment adopted in 1985 was proposed by Acts 1985, 69th Leg., S.J.R. No. 14, § 8.

ARTICLE VI

SUFFRAGE

Sec.
2a. Voting for Presidential and Vice Presidential electors and statewide offices; qualified persons except for residence requirements.

§ 1. Classes of persons not allowed to vote

Cross References

Ineligibility to be candidate for public office, see V.T.C.A. Election Code, § 141.001.

Law Review Commentaries

Expansion of equal protection clause as challenge to state laws disenfranchising felons. 5 St. Mary's L.J. 227 (1973).

Literacy tests and the Fifteenth Amendment. Alfred Avins, 12 South Texas L.J. 24 (1970).

United States Supreme Court

Felons as voters, see Richardson v. Ramirez, 1974, 94 S.Ct. 2655, 418 U.S. 24, 41 L.Ed.2d 551.

Voting or registration by persons detained waiting trial, see O'Brien v. Skinner, 1974, 94 S.Ct. 740, 41 U.S. 524, 38 L.Ed.2d 702.

Notes of Decisions

Jurisdiction 7
Validity ½

½. Validity

Neither provision of this section, barring a person convicted of a felony from voting, nor similar provision of V.A.T.S. Election Code, art. 5.01, subd. 4 are unconstitutional on their face. Hayes v. Williams (D.C.1972) 341 F.Supp. 182.

1. Right to vote in general

In determining the eligibility of voters, constitutional voting qualifications control over statutes and ordinances. Richter v. Martin (Civ. App.1960) 337 S.W.2d 134, reversed on other grounds 161 T. 323, 342 S.W.2d 1.

Legislative acts tending to abridge the citizen's franchise will be confined to their narrowest limits by liberal interpretation favoring the citizen's right to vote. Mitchell v. Jones (Civ. App.1963) 361 S.W.2d 224.

A qualified citizen is not to be denied the exercise of his suffrage except where the legislature has acted within constitutional authority and has expressly or by clear implication indicated an intention that a ballot of a qualified voter shall be void if certain prohibited conditions are shown to exist. Id.

Main design of all election laws should be to secure fair expression of popular will in speediest and most convenient manner, and failure to comply with provisions not essential to attain that object should not void the election, in absence of language clearly showing that such was

Acts 1943, 48th Leg., p. 354, ch. 232, § 1.
Acts 1967, 60th Leg., p. 1932, ch. 723, § 76.
Acts 1981, 67th Leg., p. 773, ch. 291, §§ 19, 20.

Vernon's Ann.Civ.St. arts. 1733 to 1735a, 1737.

§ 22.003. Procedure of the Court

(a) The supreme court from time to time shall promulgate suitable rules, forms, and regulations for carrying into effect the provisions of this chapter relating to the jurisdiction and practice of the supreme court.

(b) The supreme court may make and enforce all necessary rules of practice and procedure, not inconsistent with the law, for the government of the supreme court and all other courts of the state to expedite the dispatch of business in those courts.

Historical Note

Prior Law:
Rev.Civ.St.1879, arts. 1011, 1014.
Acts 1892, p. 19.
Rev.Civ.St.1895, arts. 944, 947.
G.L. vol. 10, p. 383.
Rev.Civ.St.1911, §§ 1523, 1524.
Vernon's Ann.Civ.St. arts. 1730, 1731.

Administrative Code References

Public Utility Commission, practice and procedure, rules of evidence, see 16 TAC § 21.122.

§ 22.004. Rules of Civil Procedure

(a) The supreme court has the full rulemaking power in the practice and procedure in civil actions, except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant.

(b) The supreme court from time to time may promulgate a specific rule or rules of civil procedure, or an amendment or amendments to a specific rule or rules, to be effective at the time the supreme court deems expedient in the interest of a proper administration of justice. The rules and amendments to rules remain in effect unless and until disapproved by the legislature. The clerk of the supreme court shall file with the secretary of state the rules or amendments to rules promulgated by the supreme court under this subsection and shall mail a copy of those rules or amendments to rules to each registered member of the State Bar of Texas not later than the 60th day before the date on which they become effective. The secretary of state shall report the rules or amendments to rules to the next regular session of the legislature by mailing a copy of the rules or amendments to rules to each elected member of the legislature on or before December 1 immediately preceding the session.

(c) So that the supreme court has full rulemaking power in civil actions, a rule adopted by the supreme court repeals all conflicting laws

and parts of laws governing practice and procedure in civil actions, but substantive law is not repealed. At the time the supreme court files a rule, the court shall file with the secretary of state a list of each article or section of general law or each part of an article or section of general law that in the court's judgment is repealed. The list has the same weight and effect as a decision of the court.

(d) The rules of practice and procedure in civil actions shall be published in the official reports of the supreme court. The supreme court may adopt the method it deems expedient for the printing and distribution of the rules.

(e) This section does not affect the repeal of statutes repealed by Chapter 25, page 201, General Laws, Acts of the 46th Legislature, Regular Session, 1939, on September 1, 1941.

Historical Note

Prior Law:
Acts 1939, 46th Leg., p. 201.
Vernon's Ann.Civ.St. art. 1731a.

§ 22.005. Disqualification of Justices

(a) The chief justice shall certify to the governor the following facts when they occur:

(1) at least five members of the supreme court are disqualified to hear and determine a case in the court; or

(2) the justices of the court are equally divided in opinion because of the absence or disqualification of one of its members.

(b) The governor immediately shall commission the requisite number of persons who possess the qualifications prescribed for justices of the supreme court to try and determine the case.

Historical Note

Prior Law:
Acts May 12, 1846.
P.D. 1575.
G.L. vol. 2, p. 1561.
Rev.Civ.St.1911, arts. 1516, 1517.
Acts 1981, 67th Leg., p. 772, ch. 291, § 16.
Vernon's Ann.Civ.St. art. 1717.

§ 22.006. Adjournment

(a) The supreme court may adjourn from day to day or for the periods that it deems necessary to the ends of justice and the determination of the business before the court.

(b) A suit, process, or matter returned to or pending in the supreme court may not be discontinued because a quorum of the court is not present at the commencement or on any other day of the term. If a

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AN ACT

relating to the jurisdiction of constables.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Article 6889, Revised Statutes, is amended to read as follows:

Art. 6889. JURISDICTION. (a) Every constable may execute any process, civil or criminal, throughout his county and elsewhere, as may be provided for in the Code of Criminal Procedure, or other law.

(b) A constable expressly authorized by statute to perform an act or service, including the service of civil or criminal process, citation, notice, warrant, subpoena, or writ, may perform the act or service anywhere in the county in which the constable's precinct is located.

(c) Notwithstanding the Texas Rules of Civil Procedure, all civil process may be served by a constable in his county or in a county contiguous to his county, except that a constable who is a party to or interested in the outcome of a suit may not serve any process related to the suit.

SECTION 2. This Act takes effect September 1, 1987.

SECTION 3. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

President of the Senate

Speaker of the House

I certify that H.B. No. 386 was passed by the House on April 30, 1987, by a non-record vote.

Chief Clerk of the House

I certify that H.B. No. 386 was passed by the Senate on May 18, 1987, by a viva-voce vote.

Secretary of the Senate

APPROVED: _____

Date

_____

Governor