AGENDA
JANUARY 19-20, 1996
SCAC MEETING

INDEX

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WRITER'S DIRECT DIAL NUMBER: (713) 653-7801

January 17, 1996

TO: Members of Supreme Court Advisory Committee (*By Fax*)

FROM: Steve Susman

RE: Proposed Summary Judgment Rule

Attached is a new proposed Rule 166a that has is being recommended by the Subcommittee in charge of Rule 166a. It will be the first subject of discussion this Friday.

Attachment

SDS-131358-DAD

No hearing 21 days

Rule 166a. Summary Judgment

(a) **Time for Filing.** A party may move for summary judgment on all or any part of a case at any time after the adverse party has appeared. The motion shall be filed at least twenty-one days before the hearing. The adverse party may file a written response at least seven days before the hearing. The movant may file a reply to the response. Any supporting brief must be filed with the motion, response, or reply. The judge may grant leave to alter any of these time limits, and to allow amendment or supplementation.

(b) **Motion.** The motion for summary judgment shall be in writing and shall state specifically why there is no genuine issue as to any material fact and why the moving party is therefore entitled to a judgment as a matter of law. A ground for summary judgment not expressly presented in a motion shall not be considered. Summary judgment may be sought on the pleadings for failure to state a valid claim or defense.

(c) **Supporting Materials.** Any motion or response may be supported by affidavits or any evidence admissible at trial.[1] [Excerpts from discovery responses must be specifically called to the judge's attention to be considered and need not be filed if quoted in the motion or response with the source thereof stated.][2] Affidavits shall be made on personal knowledge, shall set forth facts that would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated. Objections to the form of the affidavits or objections to the admissibility of the evidence shall not be grounds for reversal unless specifically pointed out by the responding party in its response or by the moving party in its reply to the response.

Except as to party sued 21 days 7 days

(d) **Hearing.** No oral testimony shall be received at the hearing. The court may continue the hearing pursuant to Texas Rule of Civil Procedure 251. Motions taken under advisement shall be decided within three months pursuant to Rule of Judicial Administration 7(a)(2). If judgment is not rendered upon the whole case and a trial is necessary, the judge at the hearing may examine the pleadings and the evidence on file, interrogate counsel if the hearing is oral, and ascertain what material fact issues exist, and then make an order specifying the issues that are established as a matter of law and directing such further proceedings in the action as are just.

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[1] Although the first sentence of paragraph (d) provides that "no oral testimony shall be received at the hearing" the Committee should consider whether this sentence should be amended to provide that evidence cannot be oral. The following are possible alternatives:

Any motion or response may be supported by affidavits or any written evidence admissible at trial filed with the motion.

OR

Any motion or response may be supported by affidavits or any evidence admissible at trial, other than oral evidence, filed with the motion.

[2] The Subcommittee could not agree on whether this sentence should be included in the rule.

(e) Burdens. The party moving for judgment has the burden of establishing that there is no genuine issue of material fact, except that (1) when the responding party pleads an affirmative defense to avoid judgment, then the responding party has the burden of raising a fact issue on the affirmative defense, or (2) when the response is due after any applicable Discovery Period is closed and the moving party specifically states as a ground for summary judgment that no evidence exists on an element of a claim, then the responding party has the burden of raising a fact issue on that element.

(f) Interested and Expert Testimony. A summary judgment may be based on uncontroverted testimony of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion of experts, only if the testimony is clear, credible, direct, and could have been readily controverted.

(g) Appeal. On appeal from any order under this rule, the appellate court may consider any ground set forth in the motion and is not limited to any grounds specified in the order.

or defenses)

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November 16, 1995

166-209

Mr. Luther H. Soules III
Soules & Wallace
100 West Houston Street, 15th Floor
San Antonio, Texas 78205-1457

Re: *Disposition of Inquiries Relating to Proposed Discovery Rules*

Dear Luke:

At your request, the Discovery Subcommittee convened on Saturday, October 21, 1995, in Houston, to consider the inquiries regarding discovery received by you or members of the Court since early 1992. Letters Bates-stamp numbered 8-681 and Spg. 36-409 all predate the first serious deliberations of the Discovery Subcommittee that began working in the summer of 1994. We had read all these letters when we began working our way through the discovery rules. Many of the suggestions were undoubtedly adopted, in one way or another. Others were not. In any event, the Subcommittee believes it would be a phenomenal waste of time to respond to each letter individually since none of them referred to particular features of the new proposed rules and since the new rules represent a complete rewrite and reorganization of the current ones. Instead, we propose that you send to each author of a pre-1994 letter the following response:

> "The Discovery Subcommittee considered and appreciated the thoughtful suggestions contained in your letter of _____ to _____. As you may know, the SCAC proposed an entirely new set of Discovery Rules to the Supreme Court on July 27 of this year. I am enclosing a copy for your reference. Over the next months the Court will be working on these suggestions and our Subcommittee will continue to provide input. Therefore, we urge you to review the enclosed and to let us have your suggestions. Please be as specific as you can suggesting deletions

> or changes or additions. This will assist us in considering your views and allow us to respond to them. Nothing is set in concrete and your suggestions will be given full consideration."

Our Subcommittee is willing to meet again to review any and all responses to this letter and to complete your proposed Disposition Chart as to each.

Now let me turn to letters received since May 1994. I attach hereto the Disposition Chart for Bates numbers SSp 199-392. A few words of explanation. At the extreme right edge of the chart are the initials PG, AA, etc. That signifies the member of the Subcommittee who has agreed to draft an appropriate response for your signature. There are basically three broad categories: (1) personal injury defense lawyers who object to any limitations as to time and number (Gold will respond); (2) family lawyers whose unique problems the Committee as a whole considered (Albright will respond); and (3) the State Bar Rules Committee (I will respond). While the Disposition Chart gives the impression of numerous suggestions, in fact most of the entries are duplicative.

The Subcommittee members, if you approve, will provide you with appropriate responses by December 1.

The Subcommittee also suggests the following program to make sure that our proposed rules are understood and widely, and intelligently, discussed and debated:

1. A short outline of the proposed rules is being prepared by Albright for use by Supreme Court justices as they try to understand and explain to others the rules.

2. We should encourage the Court to allow several members of the Subcommittee to provide a one-hour explanation of our changes.

3. We are going to initiate a Discussion Group on Texas Counsel Connect.

4. I intend to invite opponents of the proposed rules to debate their wisdom at various local bar functions.

5. Such debate will be kicked off in the December issue of the Texas Bar Journal. I will argue for our proposal and a member of

the Bar Rules Committee will argue against. I am hopeful that the rules will be printed in full so that the dialogue will be meaningful.

6. Members of the Subcommittee have agreed to write short pieces for each issue of the Texas Lawyer on the following general topics: Deposition Practice (Susman); Scheduling (Susman); Vehicles, Disclosures and Experts (Albright); Supplementation and Sanctions for Nondisclosure (Albright); Scope, Privileges and Objections (Gold).

7. Judge Guittard has been kind enough to edit the proposed rules for grammar, clarity, uniformity and avoidance of legalese. Once we determine how far the rules proposed on July 27 are likely to get with the Court, then we can consider suggesting these refinements before the Court finally adopts our scheme. Right now, it is premature to polish something that may be stillborn.

Please let me know if you have any questions about this letter or the attachment.

Sincerely,

Stephen D. Susman

Attachment

cc/att: Members of Discovery Subcommittee

The Honorable Nathan Hecht

SDS-128278-DAD

166a	Spg 229-236				
166b	Spg 237-355				
166c	Spg 356-359				
168	Spg 360-361				
169	Spg 362				
170	Spg 363-364				
176	Spg 365-368				
177 & 201	Spg 369				
200	Spg 370-371				
202	Spg 372-378				
204	Spg 379-380				
205 & 206	Spg 381-409	May '94			
General Comments on Proposed Discovery Rules	SSp 199-201	General objection to time limits	Send Standard Letter "PD"	Considered at time of promulgation	PB
Proposed Discovery Rule 1	SSp 202-210	30-day amendment cutoff No S.D. in most cases No survey of interest parties	Explain how rules accomplish what he wants	We've done it "FL" 25-6 2017	AA AA AA
Proposed Discovery Rule 4	SSp 211	Family Lawyer concerned about privilege	Tell him we've dealt with problem	"FL"	AA
Proposed Discovery Rule 15	SSp 212-215	Objects to Depos. Time Limits and No comments	Considered & rejected	"	SC

Proposed new Rule re: Purpose of Pretrial and Discovery	SSp 216-224	Replaced by Summary/Comments of 9/13/95			AF
166	SSp 225-238	Same as SSp 216-224			
~~166a~~	~~SSP 239-241~~				
166b	SSp 242-~~245~~ 246-50 ~~253~~ 51-52	State Bar CRC Misc. Criticisms of Fam Sec. Implements must be signed No		Have considered No	SS SS
166c	255-63 SSp 26~~8~~-69 270-274	State Bar CRC Morales Opinion Same as 246-50			SS
166d	SSp 275-~~296~~ 315	State Bar CRC			
~~166f~~	~~SSp 297-305~~				
~~166g~~	~~SSp 306-315~~				
167	SSp 31~~8~~-320 ~~335~~ 323-25	Defs' Getting Docs from Ers We have covered in Rules Concern over overly broad RPOD See Texaco v. Sanderson			PE AA
168	326-35 SSp 336-37 33~~8~~-40	State Bar CRC Overtime typed in paragraph Solved Same as 202-04			JH
170	341-43 SSp 348-~~352~~ 346	✓ ✓ 246-50			
174B	SSp 353-358	Same			
200	SSp 359-373				
202	SSp 374-378				
204	SSp 379-378				

205 & 206	SSp 384-392			

384 Court Reporter DJ

391-2 ✓ ✓ ✓

~~392 ✓ ✓~~ ✓

SSp 37 Def needs 90 days to i.d. its experts — Considered & rejected almost unanimously by full SCA C — SS

10/9/95 Irwin to Hecht PG

Jan. 19-20, 1996

REDLINE VERSION
RULES 296-331

RULE 296. REQUESTS FOR FINDINGS OF FACTS AND CONCLUSIONS OF LAW

ALTERNATIVE ONE:

(a) Entitlement to Findings of Fact. ~~In any~~ A party in a case in which the ultimate issue of fact was tried ~~in the district or county court without a jury,~~ on the merits by the judge ~~any party~~ may request the ~~court~~ judge to state in writing ~~its~~ findings of fact and conclusions of law. Trial of an issue of fact to a jury in the same case does not excuse the judge from making findings of fact on an ultimate issue tried to the judge unless the ground to which the issue is referable has been waived or an omitted element is deemed found as provided in Rule 279. Such request shall be entitled "Request for Findings of Fact and Conclusions of Law" and shall be filed within twenty days after judgment is signed with the clerk of the court, who shall immediately call such request to the attention of the judge who tried the case. The party making the request shall serve it on all other parties in accordance with Rule 21a. A request for findings of fact and conclusions of law is not proper, and has no effect, with respect to an appeal of a summary judgment.

ALTERNATIVE TWO: Okay. as modified

(a) Entitlement to Findings of Fact. In any case: (a) tried ~~in~~ to the ~~district or county~~ court without a jury; (b) tried to a jury in which ~~the~~ ultimate issues are tried to the ~~court by agreement~~; or (c) tried to a jury in which ultimate issues by law must be tried to the court, ~~any~~ a party may request the ~~court~~ judge to state in writing its findings of fact and conclusions of law. Such request shall be entitled "Request for Findings of Fact and Conclusions of Law" and shall be filed within twenty days after judgment is signed with the clerk of the court, who shall immediately call such request to the attention of the judge who tried the case. ~~The party making the request shall serve it on all other parties in accordance with Rule 21a.~~ A request for findings of fact and conclusions of law is not proper, and has no effect, with respect to an appeal of a summary judgment.

(b) Premature Filing. ~~A~~ request for findings of fact and conclusions of law ~~are~~ effective although prematurely filed. A request for findings of fact and conclusions of law ~~shall be~~ is deemed to have been filed on the date of, but subsequent to, the signing of the judgment.

RULE 297. ~~TIME TO FILE~~ FILING FINDINGS OF FACT AND CONCLUSIONS OF LAW

(a) Time to File. The ~~court~~ judge shall file its findings of fact and conclusions of

Approved as amended

law within twenty days after a timely request is filed. The ~~court~~ judge shall cause a copy of ~~its~~ the findings and conclusions to be mailed to each party in the suit.

(b) Late Filing. If the ~~court~~ judge fails to file timely findings of fact and conclusions of law, the party making the request shall, within thirty days after filing the original request, file with the clerk ~~and serve on all other parties in accordance with Rule 21a~~ a "Notice of Past Due Findings of Fact and Conclusions of Law" which the clerk shall ~~be~~ immediately called to the judge's attention ~~of the court by the clerk~~. Such notice shall state the date the original request was filed and the date the findings and conclusions were due. Upon filing this notice, the time for the ~~court~~ judge to file findings of fact and conclusions of law is extended to forty days from the date the original request was filed.

Urman approved

RULE 298. ADDITIONAL OR AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

(a) Time for Request. After the ~~court~~ judge files original findings of fact and conclusions of law, any party may file ~~with the clerk of the court~~ a request for specified additional or amended findings or conclusions with the clerk. ~~The request for these findings shall be made~~ within ~~ten~~ twenty days after the filing of the original findings and conclusions ~~by the court~~. ~~Each request made pursuant to this rule shall be served on each party to the suit in accordance with Rule 21a.~~

(b) Time for Judge's Response. The ~~court~~ judge shall file any additional or amended findings and conclusions that are appropriate within ten days after ~~such~~ the request is filed~~, and cause a copy to be mailed to each party to the suit~~.

(c) Appellate Review. ~~No findings or conclusions shall be deemed or presumed by any failure of the court to make any additional findings or conclusions.~~ Refusal of the judge to make a finding requested shall be reviewable on appeal.

Urman approved

RULE 299. OMITTED GROUNDS AND PRESUMED FINDINGS

(a) Omitted Grounds. When findings of fact are filed by the trial ~~court~~ judge they shall form the basis of the judgment upon all grounds of recovery and of defense~~, embraced therein~~. The judgment may not be supported upon appeal by a presumed finding upon any ground of recovery or defense, no element of which has been included in the findings of fact.~~; but~~

(b) Presumed Findings. ~~w~~When one or more elements ~~thereof~~ of a ground of recovery or defense have been found by the trial ~~court~~ judge, omitted unrequested elements of the ground to which the element or elements found are necessarily referable, when supported by factually sufficient 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.~~ No findings shall deemed or presumed by any failure of the judge to make additional findings.

RULE 299a. FINDINGS OF FACT TO BE SEPARATELY FILED AND NOT RECITED IN A JUDGMENT

Unless otherwise provided by law, ~~F~~findings of fact and conclusions of law shall be requested, prepared and filed with the court clerk as a document separate from the judgment. ~~not be~~ If findings of fact are recited in a judgment in violation of this rule, ~~If~~ if there is a conflict between the findings ~~of fact~~ recited in a the judgment ~~in violation of this rule~~ and the findings ~~of fact~~ made pursuant to Rules 297 and 298, the ~~latter~~ findings will control for appellate purposes. ~~Findings of fact shall be filed with the clerk of the court as a document or documents separate and apart from the judgment.~~

RULE 300. JUDGMENTS, DECREES AND ORDERS

(a) Rendition, Signing and ~~Entry~~. A judgment is rendered when the judge orally announces it in open court or, if not so announced, when it is signed by the judge. A judgment orally announced in open court shall be promptly reduced to writing and signed by the judge. A signed judgment shall be promptly filed with the clerk, ~~for entry in the minutes of the court~~. "Judgment" as used in these rules includes a decree or an order that disposes of a claim or defense.

Source: New rule; codification of existing law.

(b) Final Judgment Rule. A final judgment ~~for purposes of appeal and the trial and appellate timetables~~ is the order or series of orders, ~~that disposes~~ of all the parties and issues in the case, expressly or impliedly. When a judgment on the merits is rendered in a case regularly set for conventional trial on the merits, and no order for a separate trial has been made, it is presumed for appellate purposes that the trial judge intended the judgment to be a final and appealable judgment. A final judgment that is signed in a case tried to the court or jury shall conform to the pleadings, the nature of the case proved and the jury's verdict or the judge's findings of fact or conclusions of law, unless a judgment is rendered as a matter of law.

(c) Form And Substance: General. A judgment shall: (1) contain the names of the parties; (2) ~~specify~~ the relief ~~to which each party is entitled~~; and (3) if appropriate, direct the issuance of processes and writs as may be necessary to enforce the judgment. ~~The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict.~~

Source: Rules 300, 301, 306, 308

(d) Form and Substance: Specific.

(1) Personal Property. ~~Where the~~ A judgment ~~is~~ for personal property, ~~and if 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~~ provide for a 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~~.

Source: Rule 308, after first clause of first sentence.

(2) Foreclosure Proceedings. A judgments for ~~the~~ foreclosure of a mortgage~~s and~~ or other liens shall ~~be~~ provide for: (i) recovery of ~~that~~ the ~~plaintiff's his~~ debt, damages and costs; (ii) ~~with a~~ foreclosure of the ~~plaintiff's~~ lien on the property subject ~~thereto, and,~~ to the lien; (iii) ~~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, for~~ to sale of the property as under execution, except in judgments against ~~executors, administrators and guardians~~ personal representatives, ~~in satisfaction of the judgment~~; and (iv) ~~that~~ if the property cannot be found~~,~~ or if the proceeds of ~~such~~ the sale ~~be~~ are insufficient to satisfy the judgment, then execution ~~to take the money or any balance thereof remaining unpaid, shall be taken out of any~~ on other property of the judgment debtor ~~defendant as in the case of ordinary executions.~~ for the balance remaining unpaid. ~~When An order~~ The judgment foreclosing a ~~line~~ lien ~~upon~~ on real estate ~~is made in a suit having as its object the foreclosure of such lien, such order shall have all the~~ has the force and effect of a writ of possession as between the parties ~~to the foreclosure suite~~ and any person claiming under the judgment debtor ~~defendant to such suit~~ by ~~any~~ right acquired pending ~~such~~ suit; and the ~~court~~ judgment shall so provide ~~direct in the judgment providing for issuance of such order.~~ The judgment shall also direct the sheriff or other officer ~~executing such order of sale~~ to place the purchaser of the property ~~sold thereunder~~ in possession ~~thereof~~ within thirty days after the ~~day of~~ date of the foreclosure sale.

Sources: Rule 309, 310.

(3) Personal Representative. A judgment for the recovery of money against a personal representative, whether an executor, administrator~~,~~ or guardian, shall state that it is to be paid in the due course of administration. No ~~execution~~ enforcement shall be attempted ~~issue thereon,~~ on a judgment against a personal representative, but it shall be certified to the ~~county~~ court, sitting in ~~matters of~~ probate, to be ~~there~~ enforced ~~in accordance with~~ under the law, except that~~:~~ ~~but~~ a judgment against an independent executor ~~appointed and acting under a will dispensing with the action of the county court in reference to such estate shall~~ may be enforced against the property of the testator in the hands of the independent ~~executor, by execution, as in other cases.~~

Source: Rule 313.

RULE 301. MOTIONS BEFORE AND AFTER JUDGMENT
[In part moved to proposed TRCP 300(b)]

(a) Motion for Judgment On The Verdict. ~~Any~~ party may ~~prepare and submit~~ move for judgment on the verdict of the jury. ~~a proposed judgment to the court for signature.~~

Source: Rule 305.

(b) Motion for Judgment or to Disregard a Jury Finding on an Issue as a Matter Of Law. A party may move for judgment as a matter of law or to disregard a jury finding as a matter of law:

(1) if the evidence, at the close of the adverse party's evidence, or at the close of all of the evidence, or after the verdict in a jury case and before judgment, (A) is not legally sufficient for a reasonable jury to find against the movant on a particular issue of fact or if the evidence conclusively establishes the issue in the movant's favor; and (B) if, under the controlling law, a judgment cannot properly be rendered against the movant on any claim or defense without a finding adverse to the movant on an issue that has been disregarded, the court may grant a motion for judgment as a matter of law in the movant' favor as to the claim or defense; or

(2) if the application of controlling law to a claim or defense otherwise determines a claim or defense as a matter of law, unless the movant waived application of controlling law by failing to preserve the complaint or error in the court's charge.

Source: Rules 268, 301; FED. R. CIV. P. 50

(c) Motion to Modify Judgment or to Disregard a Jury Finding on an Issue as a Matter of Law. A party may move to modify a judgment or to disregard a jury finding on an issue as a matter of law after judgment:

(1) if the evidence is not legally sufficient to support a reasonable jury to find against the movant on a particular issue of a fact or if the evidence conclusively establishes the issue in the movant's favor;

(2) if the application of controlling law to a claim or defense otherwise determines a claim or defense as a matter of law; or

(3) if the judgement should be vacated, modified, altered or amended in any respect for any reason.

Source: Rules 301, 329b

(d) Motion for New Trial. A party may move to set aside a judgment and seek a new trial pursuant to Texas Rule of Civil Procedure 302.

Source: New rule to incorporate purposed TRCP 302 in listing of permissible motions.

(e) Motion ~~for~~ Judgment ~~Nunc Pro Tunc.~~ A party may move, with notice to all parties interested in a judgment, for correction or reformation of clerical mistakes made in reducing to writing the judgment rendered by the judge.

Source: Rule 316.

(f) Motion Practice. A motion listed in this rule must state the specific complaint or request for relief in such a way that the matter can be understood by the judge. A party may file one or more motions identified in this rule and may renew or refile an additional motion of the same type containing additional complaints and requests for relief despite the denial of any previous motion. A party may also submit a proposed judgment or order with the motion.

Source: Rule 268, 305; in part new to clarify that motions should be considered independently.

~~RULE 302. ON COUNTERCLAIM~~
RULE 302. MOTIONS FOR NEW TRIAL

~~On Counterclaim. If the defendant establishes a demand against the plaintiff upon a counterclaim exceeding that established against him by the plaintiff, the judge shall render a judgment for the defendant for the excess.~~

(a) Grounds. For good cause, a new trials, or partial new trial under paragraph (f), may be granted and a judgment may be set aside ~~for good cause~~ on motion of a party or on the judge's ~~court's~~ own motion, ~~on such terms as the court shall direct~~ in the following instances, among others:

(1) when the evidence is factually insufficient to support a jury finding;

(2) when a jury finding is against the overwhelming preponderance of the evidence;

(3) when the damages awarded by the jury are manifestly too large or too small because of the factual insufficiency or overwhelming preponderance of the evidence;

(4) when the trial judge has made an error of law that probably caused rendition of an improper judgment;

(5) when: (i) misconduct of the jury; or (ii) misconduct of the officer in charge of the jury; or (iii) improper communication to the jury; or (iv) a juror's erroneous or incorrect answer on voir dire examination—

has probably resulted in injury to the movant;

(6) when new, non-cumulative evidence has been discovered that was not available at the trial by the movant's use of reasonable diligence and its unavailability probably caused the rendition of an improper judgment;

(7) when a default judgment should be set aside upon either legal or equitable grounds;

(8) when a judgment has been rendered on citation by publication, the defendant did not appear in person or by an attorney selected by the defendant and good cause for a new trial exists;

(9) when there is a material and irreconcilable conflict in jury findings;

(10) when any improperly admitted evidence, error in the court's charge, argument of counsel, or other trial court occurrence or ruling probably caused rendition of an improper judgment;

(11) when any other ground warrants a new trial in the interest of justice.

Source: Rules 165a, 320, 327 and 329

(b) Form. Complaints in general terms shall not be considered. Each complaint in a motion for new trial shall identify the matter of which complaint is made in such a way that the complaint can be understood by the judge. ~~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 of 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.~~

Source: First sentence — Rule 322; second sentence — Rule 321.

(c) Affidavits. Supporting affidavits are required for complaints based on facts

not otherwise in the record, such as:

(1) jury misconduct;

(2) newly discovered evidence;

(3) equitable grounds to set aside a default judgment;

(4) good cause to set aside a judgment after citation by publication.

(d) **Procedure For Jury Misconduct.**

(1) Hearing. When the ground of ~~a~~ the motion for new trial, supported by affidavit, is misconduct of the jury or of the officer in charge of ~~them~~ the jury, or ~~because of any~~ improper communication made to the jury, or a juror's ~~that a juror gave an~~ erroneous or incorrect answer on voir dire examination, the judge ~~court~~ shall hear evidence ~~thereof~~ from members of 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 from the record as a whole on the trial of the case ~~and from the record as a whole~~ that injury probably resulted to the complaining party.

(2) Testimony Of Jurors. 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~~ on any ~~other~~ juror's mind or emotions or mental processes, as influencing any other juror's ~~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 a juror's ~~his~~ affidavit or ~~evidence of~~ any statement by a juror ~~him~~ concerning ~~a~~ any matter about which the juror ~~he~~ would be precluded from testifying be ~~received for~~ admitted in evidence for any of these purposes. However, a juror may testify whether any outside influence was improperly brought to bear upon any juror.

Source: Rule 327

(e) **Excessive Damages; Remittitur**

(1) Excessive Damages. If the judge is of the opinion that the damages found by the jury are not supported by factually sufficient evidence, the judge may determine the greatest amount of damages supported by the evidence and may, as a condition of overruling a motion for new trial, suggest that the party claiming such damages file a remittitur of the excess within a specified period.

(2) Remittitur By Party. Any party in whose favor a judgment has been rendered may remit any part thereof in open court, or by executing and filing with the clerk a written remittitur signed by the party or the party's attorney of record, and duly acknowledged by the party or the party's attorney. Such remittitur shall be a part of the record of the cause. Execution ~~shall~~ may issue only for the balance ~~only~~ of such judgment.

Source: Paragraph (2) — Rule 315.

(f) Partial New Trial. If the judge is of the opinion ~~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~~ that is clearly separable without unfairness to the parties, the judge ~~court~~ may grant a new trial as to that part only, but ~~provided that~~ a separate trial on unliquidated damages alone shall not be ordered if liability issues are contested.

Source: Rule 320.

~~RULE 303. ON COUNTERCLAIM FOR COSTS~~
RULE 303. PRESERVATION OF COMPLAINTS

~~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.~~

(a) General Preservation Rule. ~~In order to preserve~~ As a prerequisite to the presentation of a complaint for appellate review, ~~a party must have presented to the trial court~~ a timely request, objection, or motion must appear of record, stating the specific grounds for the ruling ~~he~~ that the complaining party desired the trial court to make if the specific grounds were not apparent from the context. No complaint shall be considered waived if the ground stated is sufficiently specific to make the judge aware of the complaint. ~~It is also necessary for the complaining party to obtain a~~ The judge's ruling upon the complaining party's request, objection or motion must also appear of record provided that the overruling by operation of law of a motion in accordance with Rule 304 is sufficient to preserve for appellate review the complaints properly made in the motion, unless the taking of evidence is necessary for proper presentation of the complaint in the trial court. A ruling may be shown in the judgment, in a signed separate order, in the statement of facts, or in a formal bill of exceptions. If the trial judge refuses to rule, an objection to the judge's ~~court's~~ refusal to rule is sufficient to preserve the complaint. ~~It is not necessary to formally except~~ Formal exceptions to rulings or orders of the trial court are not required.

Source: Texas Rule Of Appellate Procedure 52(a).

(b) When a Motion for New Trial is Required. As a prerequisite to appellate review, the following complaints shall be made in a motion for new trial:

(1) jury misconduct, newly discovered evidence, equitable grounds to set aside a default judgment, or any other complaint on which evidence must be heard; ~~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~~ the evidence is factually insufficient to support a jury finding;

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

(4) the damages awarded by the jury are manifestly too large or too small because of the factual insufficiency or overwhelming preponderance of the evidence;

(5) an incurable jury argument, if not otherwise ruled on by the trial court;

(6) a jury verdict that will not support any judgment..

Source: Rule 324(b).

~~(c) Necessity for Motion for New Trial in Civil Cases~~ Nonjury Cases: Legal and Factual Sufficiency of Evidence. ~~A point in a motion for new trial is prerequisite to appellate complaint in those instances provided in Rule 324(b) of the Texas Rules of Civil Procedure. A party desiring to complain on appeal in a nonjury case that the evidence was legally or factually insufficient to support a finding of fact, that a finding of fact was established as a matter of law or was against the overwhelming weight of the evidence, or of the inadequacy or excessiveness of the damages found by the court shall not be required to comply with paragraph (a) of this rule.~~ In a nonjury case, a complaint regarding the legal or factual insufficiency of the evidence, including a complaint that the damages found by the court are excessive or inadequate, as distinguished from a request that the judge amend a fact finding or make an additional finding of fact, may be made for the first time on appeal in the complaining party's brief.

Source: Texas Rule of Appellate Procedure 52(d).

(d) Informal Bills Of Exception And Offers Of Proof. When ~~the court excludes~~ evidence is excluded, the offering party ~~offering same~~ shall as soon as practicable, but before the ~~court's~~ charge is read to the jury, or before the judgment is signed in a nonjury case, be allowed to make, in the absence of the jury, an offer of proof in the form of a concise statement. The ~~court~~ judge may, or at the request of a party shall, direct the making of the offer in question and answer form. A transcription of the reporter's notes or of the

electronic tape recording showing the offer, whether by concise statement or question and answer, showing the objections made, and showing the ruling ~~thereon~~, when included in the ~~record~~ statement of facts certified by the reporter or recorder, shall establish the nature of the evidence, the objections and the ruling. The ~~court~~ judge may add any other or further statement ~~which shows~~ showing the character of the evidence, the form in which ~~it was~~ offered, the objection made and the ruling. No further offer need be made. No formal bills of exception ~~shall be~~ are needed to authorize appellate review of ~~the question whether the court erred in excluding the~~ exclusion of evidence. When the ~~court~~ judge hears objections to offered evidence out of the presence of the jury and rules that ~~such~~ the evidence be admitted, ~~such~~ the objections ~~shall be~~ are deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating ~~those objections~~ them.

Source: Texas Rule of Appellate Procedure 52(b).

(e) Formal Bills Of Exception. The preparation and filing of formal bills of exception shall be governed by the following rules:

(1) No particular form of words shall be required in a bill of exception, but the objection to the ruling or action of the judge ~~court~~ and the ruling complained of shall be stated with such circumstances, or so much of the evidence as may be necessary to explain, and no more, and the whole as briefly as possible.

(2) When the statement of facts contains all the evidence requisite to explain the bill of exception, evidence need not be set out in the bill; but it shall be sufficient to refer to the same as it appears in the statement of facts.

(3) The ruling of the judge ~~court~~ in giving or qualifying instructions to the jury shall be regarded as approved unless a proper and timely objection is made.

(4) Formal bills of exception shall be presented to the judge for ~~his~~ allowance and signature.

(5) The judge ~~court~~ shall submit the ~~such~~ bill to the adverse party or ~~his~~ the adverse party's counsel, if in attendance ~~on~~ at the court, and if the adverse party finds it ~~found~~ to be correct, the judge shall sign it without delay and file it with the clerk.

(6) If the judge finds the ~~such~~ bill incorrect, ~~he~~ the judge shall suggest to the parties ~~party~~ or their ~~his~~ counsel such corrections as the judge deems necessary ~~therein~~, and if they are agreed to ~~he~~ the judge shall make such corrections, sign the bill and file it with the clerk.

(7) Should the parties ~~party~~ not agree to the judge's suggested ~~such~~ corrections, the judge shall return the bill to ~~him~~ the complaining party with ~~his~~ the

judge's refusal endorsed on it ~~thereon~~, and shall prepare, sign and file with the clerk such a bill of exception as will, in ~~his~~ the judge's opinion, present the ruling of the court as it actually occurred.

(8) Should the complaining party be dissatisfied with the ~~said~~ bill filed by the judge, ~~he~~ the complaining party may, upon procuring the signature of three respectable bystanders, citizens of this State, attesting to the correctness of the bill as originally presented ~~by him~~, have it ~~the same~~ filed as part of the record of the cause.; ~~and~~ The truth of the matter ~~in reference thereto~~ may be controverted and maintained by affidavits, not exceeding five in number on each side, ~~to be~~ filed with the papers of the cause, within ten days after the filing of the ~~said~~ bill ~~and to be considered as a part of the record relating thereto~~. On appeal the truth of the ~~such~~ bill ~~of exceptions~~ shall be determined from the ~~such~~ affidavits so filed.

(9) In the event of ~~a formal bill of exceptions is filed and there is a~~ conflict between a formal bill and ~~its provisions and the provisions of~~ the statement of facts, the bill ~~of exceptions~~ shall control.

(10) Anything occurring in open court or in chambers that is reported or recorded and so certified by the court reporter or recorder may be included in the statement of facts rather than in a formal bill of exception.; ~~provided that~~ In a civil case the party requesting that all or part of the jury arguments or the voir dire examination of the jury panel be included in the statement of facts shall pay the cost thereof, which ~~cost~~ shall be separately listed in the certified bill of costs ~~certificate of costs prepared by the clerk of the trial court~~, and ~~the same~~ may be taxed in whole or in part by the appellate court against any party to the appeal.

(11) Formal bills of exception shall be filed in the trial court within sixty days after the judgment is signed ~~in a civil case or within sixty days after the sentence is pronounced or suspended in open court in a criminal case~~, or if a timely motion for new trial, motion to modify, request for findings, or motion to reinstate pursuant to Texas Rule Of Civil Procedure 165a[1] has been filed, formal bills of exception shall be filed within ninety days after the judgment is signed in a civil case ~~or within ninety days after sentence is pronounced or suspended in open court in a criminal case.~~ When a formal bills of exception ~~are~~ is filed, it ~~they~~ may be included in the transcript or in a supplemental transcript.

Source: Texas Rule of Appellate Procedure 52(c).

~~RULE 304. JUDGMENT UPON~~ RECORD [PROPOSED FOR REPEAL]

[1] ~~If a motion to reinstate is considered a motion for new trial per proposed TRCP 302(a)(11) and (c)(4), then this should be changed.~~

RULE 304. TIMETABLES

~~Judgments rendered upon questions raised upon citations, pleadings, and all other proceedings, constituting the record proper as known at common law, must be entered at the date of each term when pronounced.~~

(a) Motion for Judgment Disregarding a Jury Finding or an Issue as a Matter of Law. A party may move for a judgment as a matter of law or to disregard a jury finding on an issue as a matter of law at the close of the adverse party's evidence, or at the close of all the evidence, or after the verdict in a jury case and before judgment, or after judgment, and shall not be considered waived if not presented earlier. If presented after judgment, the motion should be presented in a motion to modify the judgment within the time allowed for filing such motions. A motion for judgment as a matter of law or to disregard a jury finding on an issue that is filed before judgment is overruled by operation of law when a judgment is signed that does not grant that relief.

Source: New rule in part; Rule 301 in part.

(b) ~~Motion For New Trial and~~ Motions .

(1) *Time to File.* A motion for new trial, a motion to modify the judgment and a postjudgment motion to disregard a jury finding on an issue as a matter of law, if filed, ~~,if filed,~~ shall be filed ~~prior to~~ before or within thirty days after the final judgment as defined in Rule 300(b) ~~or other order complained of~~ is signed. One or more amended or additional motions ~~for new trial~~ may be filed without leave of court within thirty days after the final judgment is signed regardless of whether a prior motion containing requests for the same relief has been overruled ~~before any preceding motion for new trial filed by the movant is overruled and within thirty days after the judgment or other order complained of is signed~~.

(2) *When Motion Overruled.* If ~~an original or an amended~~ a motion ~~for new trial,~~ is not determined by order signed within seventy-five days after the final judgment ~~or appealable order~~ was signed, the motion shall be considered overruled by operation of law upon the expiration of ~~the seventy five day~~ that period.

(3) In a case when judgment has been rendered by default against a party who did not participate either in person or by attorney in the actual trial of the case, a motion for new trial by the party against whom judgment was rendered shall be file within six months after the judgment was signed, unless a motion has been previously filed pursuant to paragraph (b)(1) of this rule.

NOTE: SCAC conditionally approved this subsection for recommendation to the Court on 11/17/95. In the event the Court wants to give a defaulted party additional time in resolving the writ of error controversy. See page 3126 of

transcript.

(4) In a case when judgment has been rendered on citation by publication and the defendant did not appear in person or by an attorney selected by the defendant, a motion for new trial shall be filed within two years after the judgment was signed, unless a motion has been previously filed pursuant to paragraph ~~(e)(1) or (e)(2)~~ of this rule.

Source: Rules 329, 329b; Tex.R.App. 45

(c) Motion To Correct ~~Nunc Pro Tunc~~. A motion to correct the judgment record may be filed at any time after a final judgment is signed, but if the motion is filed within thirty days after the final judgment is signed, the motion shall be considered a motion to modify a judgment filed within thirty days pursuant to paragraph (b)(1) of this rule.

Source: New rule in part; Rule 329b in part.

(d) Effective Dates And Beginning Of Periods ~~Periods to Run from Signing of Judgment.~~

(1) **Beginning of Periods.** The date a ~~of~~ final judgment or appealable order is signed as shown of record ~~shall~~ determines the ~~beginning of the periods prescribed by these rules for the court's~~ beginning of the period during which (i) the court may exercise plenary power to grant ~~a new trial or to~~ a motion to ~~vacate,~~ modify, a postjudgment motion to disregard a jury finding, a motion for new trial or a motion to correct the judgment record, a motion to reinstate a case dismissed for want of prosecution and a request for findings of fact and conclusions of law or to vacate a judgment, and (ii) a party may timely file any document necessary to preserve the rights of the party on appeal. ~~or reform a judgment or order and for filing in the trial court the various documents that these rules authorize a party to may file within such those periods, including, but not limited to, motions for new trial, motions to modify judgment, motions to reinstate a case dismissed for want of prosecution, and motions to vacate a judgment requests for findings of fact and conclusions of law. but this rule shall not determine what constitutes rendition of a judgment or order for any other purpose.~~

(2) **Date to be Shown.** ~~Judges, attorneys and clerks are directed to use their best efforts to cause all~~ All judgments, decisions, and orders of any kind ~~to~~ shall be reduced to writing and signed by the trial judge with the date of signing expressly stated ~~therein~~ in it. If the date of signing is not recited in the judgment or order, it may be shown in the record by a certificate of the judge or otherwise; ~~provided, however, that~~ the absence of a showing of the date in the record does ~~shall~~ not invalidate ~~any~~ a judgment or an order.

(3) Notice of Judgment. When ~~the final judgment or other appealable order~~ a final judgment or appealable order is signed, the clerk of the court shall immediately give notice of the signing to the parties ~~or their attorneys of record~~ by first-class mail ~~advising that the judgment or the order was signed.~~ Failure to comply with ~~the provisions of~~ this rule shall not affect the periods mentioned in paragraph (1) ~~of this rule~~, except ~~as provided in~~ under paragraph (4).

(4) **No Notice of Judgment: Additional Time.** ~~If within twenty days after the judgment or other appealable order is signed, a party adversely affected by it or his attorney has neither received the notice required by paragraph (3) nor acquired actual knowledge of the order, then with respect to that party all the periods mentioned in paragraph (1) shall begin on the date that such party or his attorney received such notice or acquired actual knowledge of the signing, whichever occurred first, but in no event shall those periods begin more than ninety days after the original judgment or other appealable order was signed.~~ If a party affected by a final judgment or appealable order has not, within twenty days after the final judgment or appealable order was signed, received the notice require by paragraph (3) and has not acquired actual knowledge of the signing of the final judgment or appealable order, then all periods provided in these rules that run from the date the final judgment or appealable order is signed shall begin for that party on the date that party received notice or acquired actual knowledge of the signing of the final judgment or appealable order, whichever occurred first; provided, however, that in no event shall the periods begin more than ninety days after the final judgment or appealable order was signed.

(5) ~~Motion, Notice, and Hearing~~. Procedure to Gain Additional Time. ~~In order to~~ To establish the application of ~~sub~~paragraph (4) ~~of this rule~~, the party adversely affected must file a motion in the trial court stating ~~is required to prove in the trial court, on sworn motion and notice,~~ the date on which the party or the party's ~~his~~ attorney first either received a notice of the final judgment or appealable order or acquired actual knowledge of the signing of the final judgment or appealable order and that this date was more than twenty days after the final judgment or appealable order was signed. The trial judge shall promptly set the motion for hearing, and after conducting a hearing on the motion, shall find the date ~~upon which~~ the party or the party's ~~his~~ attorney first either received a notice of the final judgment or appealable order or acquired actual knowledge of the signing of the final judgment or appealable order ~~at the conclusion of the hearing~~ and include this finding in a written ~~the court's~~ order.

(6) ~~Nunc Pro Tunc Order~~. Periods Affected by Modified Judgment. If a judgment is modified in any respect during the period of the trial court's plenary power, all periods provided in these rules which run from the date the judgment is signed shall run from the time the modified judgment is signed. ~~when a corrected judgment has been signed~~ If a correction to a judgment is made pursuant to Texas

Rule of Civil Procedure 301(e) after expiration of the trial court's plenary power, ~~pursuant to Rule 316 of the Texas Rules of Civil Procedure, the periods mentioned in subparagraph (b)(1) of this rule~~ all periods provided in these rules which run from the date the judgment is signed shall run from the date of the signing of the corrected judgment ~~with respect to~~ for any complaint that would not ~~be applicable~~ apply to the original judgment.

(7) ~~*When* *Process* *Served* *by Publication*~~. ~~With respect to~~ For a motion for new trial filed more than thirty days but within two years after the judgment was signed ~~pursuant to Rule 329~~ when process has been served by publication, the periods ~~provided by paragraph in subparagraph (1)~~ shall be computed as if the judgment were signed on the date of filing the motion.

(8) Premature Filing. ~~No motion for new trial or request for findings of fact and conclusions of law shall be held in effective because prematurely filed. but every such motion shall be deemed to have been filed on the date of but subsequent to the time of signing of the judgment the motion assails ; and every such request for findings of fact and conclusions of law shall be deemed to have been filed on the date of but subsequent to the time of signing of the judgment.~~ A motion for new trial is effective to preserve the complaints made in the motion and is deemed to have been overruled by operation of law on the date of, but subsequent to, the signing of the judgment the motion assails. No motion for new trial filed prior to judgment extends the trial court's plenary power as provided in Rule 305 or any timetable prescribed in the Texas Rules of Appellate Procedure.

Source: ¶¶ 1-6, Rule 306a; ¶ 7, Rule 329b(h); ¶ 8, Rule 306c.

~~RULE 305. PROPOSED JUDGMENT~~
[Moved to proposed TRCP 301(a)]

RULE 305. PLENARY POWER OF THE TRIAL COURT

(a) Duration. A trial court has plenary power:

(1) for thirty days after a final judgment is signed in all instances;

(2) for one hundred and five days after a final judgment is signed, regardless of whether an appeal has been perfected, if any party has timely filed (i) within thirty days after the final judgment is signed a motion to modify a judgment, a postjudgment motion to disregard a jury finding, a motion for new trial, a motion to correct judgment record, or (ii) within twenty days after the final judgment is signed, a request for findings of fact and conclusions of law on an issue of fact tried to a judge; and

(3) for thirty days after (i) the judge signs an order exercising judicial discretion if the judge had plenary power at the time of signing or (ii) a pending motion to exercise judicial discretion is overruled, either by a signed order or by operation of law, whichever occurs first.

Source: **New rule in part; Rule 329b.**

(b) Exercise. Regardless of whether an appeal has been perfected, the trial court has plenary power to:

(1) grant a motion to modify, a postjudgment motion to disregard a jury finding or a motion for new trial or to vacate the judgment within thirty days after the judgment is signed; and

(2) grant a motion to modify, a postjudgment motion to disregard a jury finding or a motion for new trial or to vacate the judgment until thirty days after all of those timely-filed motions are overruled, either by signed order or by operation of law, whichever occurs first.

Source: 329b(d)(e).

(c) Expiration. On expiration of the time within which the trial court has plenary power:

(1) the trial judge cannot set aside a judgment except on bill of review for sufficient cause filed within the time allowed by law; Ok

(2) the trial judge, however, may at any time, correct a clerical error in the record of a judgment and render judgment nunc pro tunc pursuant to Rule 302(f). BL AOK 302(e)

(3) the trial judge may also sign an order declaring a previous judgment or order to be void because signed after expiration of the trial court's plenary power; and

(4) the trial court may also file findings of fact and conclusions of law if within the time allowed by Rule 297.

Source: 329b(g)(h).

RULE 306. RECITATION OF JUDGMENT
[Moved to proposed TRCP 300(b)]

RULE 306a. PERIODS TO RUN FROM SIGNING OF JUDGMENT
[Moved to proposed TRCP 304(c)(1)-(6)]

RULE 306b. [PREVIOUSLY REPEALED]

RULE 306c. PREMATURELY FILED DOCUMENTS
[Moved to proposed TRCP 296 and 304(c)(8)]

RULE 306d. [PREVIOUSLY REPEALED]

~~RULE 307. EXCEPTIONS, ETC., TRANSCRIPT~~ [PROPOSED FOR REPEAL]

~~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.~~

RULE 308. COURT SHALL ENFORCE ITS DECREES
[Moved to proposed TRCP 300(b)(4), 300(c)(1)]

RULE 308a. ~~IN SUITS AFFECTING THE PARENT-CHILD RELATIONSHIP~~ [PROPOSED FOR REPEAL]

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

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

RULE 309. IN FORECLOSURE PROCEEDINGS
[Moved to proposed TRCP 300(c)(2)]

RULE 310. WRIT OF POSSESSION
[Moved to proposed TRCP 300(c)(2)]

RULE 311. ~~ON APPEAL FROM PROBATE COURT~~
~~[PROPOSED FOR REPEAL]~~

Judgment on appeal or certiorari from any county court sitting in probate shall be certified to such county court for observance.

RULE 312. ON APPEAL FROM JUSTICE COURT
[Proposed for transfer to Judge Till's subcommittee]

Judgment on appeal or certiorari from a justice court shall be enforced by the county or district court rendering the judgment.

RULE 313. AGAINST EXECUTORS, ETC.
[Moved to proposed TRCP 300(c)(3)]

~~RULE 314. CONFESSION OF JUDGMENT~~ [PROPOSED FOR REPEAL]

~~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.~~

RULE 315. REMITTITUR
[Moved to proposed TRCP 302(c)(2)]

RULE 316. CORRECTION OF CLERICAL MISTAKES
IN JUDGMENT RECORD
[Moved to proposed TRCP 301(e), 302(a)]

RULE 317 to 319 [PREVIOUSLY REPEALED]

RULE 320. MOTION AND ACTION OF COURT THEREON
[Moved to proposed TRCP 301(d), 302(a), (f)]

RULE 321. FORM
[Moved to proposed TRCP 302(a), (b)]

RULE 322. GENERALITY TO BE AVOIDED
[Moved to proposed TRCP 302(b)]

RULE 323. [PREVIOUSLY REPEALED]

RULE 324. PREREQUISITES OF APPEAL
[Moved to proposed TRCP 303(b), TRAP 74(e)]

RULE 325. [PREVIOUSLY REPEALED]

~~RULE 326. NOT MORE THAN TWO~~ [PROPOSED FOR REPEAL]

~~Not more than two new trials shall be granted either party in the same cause because of insufficiency or weight of the evidence.~~

RULE 327. FOR JURY MISCONDUCT
[Moved to proposed TRCP 302(d)]

RULE 328. [PREVIOUSLY REPEALED]

RULE 329. MOTION FOR NEW TRIAL ON JUDGMENT FOLLOWING CITATION BY PUBLICATION
[In part proposed for repeal and in part proposed for move]

~~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.

[Moved to proposed TRCP 302(a)(8), 302(c)(5)]

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

[Proposed for move to TRAP 47 and TRCP 621 et seq.]

(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.

[Proposed for move to TRCP 621 et seq.]

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

[Moved to proposed TRCP 304(c)(7)]

RULE 329a. COUNTY COURT CASES

[No change.]

RULE 329b. TIME FOR FILING MOTIONS

[Moved to proposed TRCP 304(b),(c),(d), 305 (b),(c)]

RULE 330. RULES OF PRACTICE AND PROCEDURE IN CERTAIN DISTRICT COURTS

~~[In part proposed for repeal and in part proposed for move]~~

~~The following rules of practice and procedure shall govern and be followed in all civil actions in district courts in counties where the only district court of said county vested with civil jurisdiction, or all the district court thereof having civil jurisdiction, have successive terms in said county throughout the year, without more than two days intervening between any of such terms, whether or not any one or more of such district courts include one or more other counties within its jurisdiction.~~

(a) **Appealed Cases.** In cases appealed to said district courts from inferior courts, the appeal, including transcript, shall be filed in the district court within thirty (30) days after the rendition of the judgment or order appealed from,, and the appellee shall enter his appearance on the docket or answer to said appeal on or before ten o'clock a.m. of the Monday next after the expiration of twenty (20) days from the date the appeal is filed in the district court.

[Proposed for transfer to Judge Till's subcommittee]

~~(b) Repealed by order of July 22, 1975, eff. Jan. 1, 1976.~~

(c) **Postponement or Continuance.** Cases may be postponed or continued by agreement with the approval of the court, or upon the court's own motion or for cause. When a case is called for trial and only one party is ready, the court may for good cause either continue the case for the term or postpone and reset it for a later day in the same or succeeding term.

[Proposed for move to TRCP 251-54]

(d) **Cases May Be Reset.** A case that is set and reached for trial may be postponed for a later day in the term or continued and reset for a day certain in the succeeding term on the same grounds as an application for continuance would be granted in other district courts. After any case has been set and reached in its due order and called for trial two (2) or more times and not tried, the court may dismiss the same unless the parties agree to a postponement or continuance but the court shall respect written agreements of counsel for postponement and continuance if filed in the case when or before it is called for trial unless to do so will unreasonably delay or interfere with other business of the court.

[Proposed for move to TRCP 251-54]

(e) **Exchange and Transfer.** Where in such county there are two or more district courts having civil jurisdiction, the judges of such courts may, in their discretion, exchange benches or districts from time to time, and may transfer cases and other proceedings from one court to another, and any of them may in his own courtroom try and determine any case or proceeding pending in another court without having the case transferred, or may sit in any other of said courts and there hear and determine any case there pending, and every judgment and order shall be entered in the minutes of the court in which the case is pending and at the time the judgment or order is rendered, and two (2) or more judges may try different cases in the same court at the same time, and each may occupy his own courtroom or the room of any other court. The judge of any such court may issue restraining orders and injunctions returnable to any other judge or court, and any judge may transfer any case or proceeding pending in his court to any other of said courts, and the judge of any court to which a case or proceeding is transferred shall receive and try the same, and in turn shall have the power in his discretion to transfer any such case to any other of said courts and any other judge may in his courtroom try any case pending in any other of such courts.

[Proposed for move to the Government Code]

(f) **Cases Transferred to Judges Not Occupied.** Where in such counties there are two or more district courts having civil jurisdiction, when the judge of any such court shall become disengaged, he shall notify the presiding judge, and the presiding judge shall transfer to the court of the disengaged judge the next case which is ready for trial in any of s aid courts. Any judge not engaged in his own court may try any case in any other court.

[Proposed for move to the Government Code]

(g) **Judge May Hear Only Part of Case.** Where in such counties there are two or more district courts having civil jurisdiction, any judge may hear any part of any case or proceeding pending in any of said courts and determine the same, or may hear and determine any question in any case, and any other judge may complete the hearing and

render judgment in the case.

[Proposed for move to the Government Code]

(h) **Any Judge May Hear Dilatory Pleas.** Where in such county there are two or more district courts having civil jurisdiction, any judge may hear and determine motions, petitions for injunction, applications for appointment of receivers, interventions, pleas of privilege, please in abatement, all dilatory pleas and special exceptions, motions for a new trial and all preliminary matters, questions and proceedings and may enter judgment or order thereon in the court in which the case is pending without having the case transferred to the court of the judge acting, and the judge in whose court the case is pending may thereafter proceed to hear, complete and determine the case or other matter, or any part thereof, and render final judgment therein. Any judgment rendered or action taken by any judge in any of said courts in the county shall be valid and binding.

[Proposed for move to the Government Code]

(i) **Acts in Succeeding Terms.** If a case or other matter is on trial, or in the process of hearing when the term of court expires, such trial, hearing or other matter may be proceeded with at the next or any subsequent term of court and no motion or plea shall be considered as waived or overruled, because not acted upon at the term of court at which it was filed, but may be acted upon at any time the judge may fix or at which it may have been postponed or continued by agreement of the parties with leave of the court. This subdivision is not applicable to original or amended motions for new trial which are governed by Rule 329b.

[Proposed for move to the Government Code]

RULE 331. [PREVIOUSLY REPEALED]

DISPOSITION CHART
TEXAS RULES OF CIVIL PROCEDURE 15 - 165a
(as of January 22, 1996)

RULE NO.	PAGE NO. & ACTION TAKEN	CHANGE SUGGESTED/BY	RECOMMENDED ACTION	REASON
18a No. 1	Pg 111-113 **Full SCAC rejected Subcommittee recommendation by vote of 6-to-9 on 1/20/96. No change.**	Permit late-filing of m. to disqualify/recuse based on grounds not known or upon due diligence knowable until past deadline. By Justice Charles Bleil. See his article on "Focus on Judicial Recusal: A Clearing Picture," 25 TEX. TECH L. REV. 773, 782-83 (1994).	Subcommittee unanimously recommends that disqualification can be raised at any time. Subcommittee voted 4-3 that you can file recusal up to 10 days prior to a hearing or trial, and after that can only raise matters not previously known, or upon due diligence knowable, and they will be handled in a parallel proceeding while trial judge proceeds with case.	Disqualification grounds are constitutional and already can be raised at any time. Recusal should be raised at first opportunity. Permitting recusal within 10 days of trial risks use as disguised continuance. Avoid that by permitting judge to proceed to trial, while recusal is handled in a parallel proceeding under the existing procedure of assignment to another judge.
20 No. 2	Pg 114-116 **SCAC approved eliminating TRCP 20 on 1/20/96. Changed.**	Eliminate requirement that special judge sign minutes of proceedings before him. By David Beck.	Eliminate reading and signing of minutes at end of court term, altogether, by eliminating Rule 20.	The procedure is no longer generally observed, and is unnecessary.
21 No. 3	Pg 117-129 **SCAC rejected change by vote of 11-to-4 on 1/20/96. No change.**	Require that cert. of service reflect to whom service was made, and the address, and date and manner of service. By Larry W. Wise.	Adopt suggested change. Further provide that receiving party can rebut the recital of the manner of service.	Eliminates uncertainty as to how service was effected.

21a No. 4	Pg 127-128 **On 1/20/96, SCAC voted that service should be on attorney-of-record, if there is one. Changed.**	Rule 21a permits service upon a party or his atty of record. Service should be on atty and not party. By Wendell S. Loomis.	Once party receives notice that opposing party is represented by counsel, service is upon that counsel.	Service upon the client and not the attorney creates delays, lost papers, invades privacy, etc.
No. 5	Pg 125 **SCAC rejected suggested change on 1/20/96. No change.**	Eliminate provision that service by telefax after 5 p.m. is effective next day. By Luke Soules.	Reject suggestion. Furthermore, hand-delivery after 5 pm should be effective next day.	Some offices close and lawyers leave at 5 pm. Delivery after 5 pm is tantamount to delivery next day, anyway.
No. 6	Pg 133-134 **SCAC rejected proposed change on 1/20/96. No change.**	Eliminate service by telefax. By Jose Lopez II.	Reject suggestion. Further, service should be permitted by electronic mail on parties who indicate in their initial pleading or by subsequent filing that service by E-mail is acceptable.	Telefax service is quick and effective. Also, E-mail is an efficient and quick way to transmit data. Permit service by E-mail on all parties willing to accept E-mail service.
No. 7	Pg 137-138 **SCAC rejected proposed change on 1/20/96. No change.**	Require lawyers to include on pleading a telefax no. for service, and if no telefax no. given, then no service by telefax except upon Rule 11 agreement. By Ken Fuller.	Reject suggestion.	Having the option of service by telefax is beneficial. Telefax number should be required.

21b No. 8	Pg 159-163 **SCAC voted by 16-to-1 to change rule to provide that service must be on attorney-in-charge, and to "recipient's last known address." Changed.**	This letter does not implicate Rule 21b, which relates to "Sanctions for Failure to Serve or Deliver Copy of Pleadings and Motions."	Fold Rule 21b regarding sanctions into new service rule.	Consolidate related rules.
23 No. 9	Pg 164-165 **On 1/20/96, SCAC voted unanimously to reject proposed change. However, TRCP 23 will be re-written to require random assignment and deter efforts to circumvent rule. Changed.**	Continue random case assignment by having clerks "designate the suits by regular consecutive numbers....," to help combat forum shopping. By John Appleman, Jefferson Co. Dist. Clerk.	No change.	Rule 23 provides for sequential cause numbers and not sequential assignment to courts.
26 No. 10	Pg 166-167 **On 1/20/96, SCAC agreed to reject proposed change. No change.**	Does record keeping under Rule 26 include J.P. courts or just district and county courts, since J.P. courts are covered under Rule 524? By Bill Willis	Yes, Rule 26 does apply. No change.	J.P. courts have worked successfully with existing rules.
41 No. 11	Pg 168-169 **On 1/20/96, this proposal was postponed. Postponed.**	Rules 174 and 41 are at odds. Joinder matters are within discretion of TC and subject to abuse of discretion review. TC should be able to join parties if not too expensive and not prejudicial to parties. By Professor Jack Ratliff.	This Subcommittee will study revising joinder of parties, for this and other reasons.	

46(b) No. 12	Pg 170-172 **On 1/20/96, referred to Judge Till. Referred.**	Misnomer: letter actually requests change to Rule 146.	Subcommittee recommends that this matter be referred to Judge Till's Committee.	This is within the scope of Judge Till's Committee.
47 No. 13	Pg 173-177 **On 1/20/96, SCAC rejected proposed change. No change.**	The Rule 47(b) ban against pleading the amount of unliquidated damages in an original pleading can affect the question of county court at law jurisdiction. By Broadus Spivey.	Subcommittee recommends Rule stays as it is.	This is not perceived as a problem in actual practice.
	On 1/20/96, SCAC rejected proposed change. No change.	Party can forum shop by filing a pleading seeking an indefinite amount of damages and then amend to assert a recovery in excess of the county court at law's jurisdictional limits. By Pat McMurray.	Subcommittee recommends Rule stays as it is.	This is not perceived as a problem in actual practice.
48 No. 14	Pg 178-180 **On 1/20/96, referred to Judge Till's Subcommittee. Referred.**	Misnomer: letter actually requests change to Rule 148.	Subcommittee recommends that this request be referred to Judge Till's Committee.	

63 No. 15	Pg 181-184 **On 1/20/96, proposed change was postponed. Postponed.**	Change from 7 days prior to trial to 30 days prior to trial. Court can grant leave to file amended pleadings but movant must show "good cause," and no surprise on opposing party. By Glen Wilkerson.	Change Rule to set deadline at 45 days before discovery cut off date.	
	Pg 183-184	Proposed addition to Rule 63 permitting the amendment of pleadings to include a party that has been overlooked or misidentified in the original pleadings, if certain criteria are met. By Gilbert Low.	Examine relevant statute to see what would be subject to rule-making power of Supreme Court.	Relation back doctrine is statutory.
64	Pg 185-186	Allow amendment by designating page or paragraph amended. Not necessary to replead everything. By Richard H. Sommer.	Recommend that the Rule not be changed.	This has already been debated by SCAC. Judges might have to go through several volumes.
67	Pg 187	No amendment to pleadings within 30 days of trial. Court can grant leave to file amended pleadings but movant must show "good cause," and no surprise on opposing party. By Glen Wilkerson.	Recommend no change to Rules 66 & 67, due to changes recommended to Rule 63.	We have advanced the deadline for amending pleadings, but not altered burden of proof as to good cause.

74	Pg 188-200	Permit clerks to file faxed documents, and to choose preferred method of securing payment for that service.	Recommend SCAC consider uniform electronic filing rule, yet to be prepared. This Subcommittee is preparing proposed rules.	Electronic filing will become more prevalent in the future. Uniform rules statewide will eliminate confusion, telephone calls to district clerk, etc.
75a & 75b	Pg 5-7	Exhibits are filed with the court clerk but court reporter transmits them to the appellate court. By Michael Northrup.	Will make all rules gender neutral. Reference to TRCP 379 will be changed to refer to new TRAP. Concern over exhibits has been addressed by TRAP changes.	
76a	Pg 201-203	Rule 76a(8) suggests that you can appeal from a temporary sealing order, even though based upon affidavit or verified petition. Make Rule clear that temporary sealing order is analogous to TRO and can't be appealed. By Bernard Fischman.	Recommend no change.	Temporary order should be subject to appellate review.
	Pg 204-208	1st Ct. App. ruled that Rule 76a does not apply to protective orders. No particular change suggested. By Jack J. Garland, Jr.	Change Rule 76a to provide that a confidentiality order relating to unfiled discovery is not a Rule 76a order unless the order is contested on the basis of Rule 76a.	Clarification is needed. Recommend new Rule 76a(2)(a)(4) that would exclude from "court records": "unfiled discovery for which a protective order is sought and, there is no claim that the provisions of 76a2(c) apply."

86	Pg 211	Rule does not specify time to file motion to transfer venue based on inability to obtain fair trial. Case law says motion can be filed on day of trial. By J. Hadley Edgar.	Subcommittee recommends that this and all venue rules be consolidated and caused to conform to existing venue statutes, while remaining general enough to minimize future rule changes based upon further legislative activity.	Legislature has put itself in the middle of venue rights. Rules need to provide a procedure to implement legislative mandates, but not so closely that every legislative change requires a rule change.
87	Pg 212-216	If venue is challenged, a determination based on a preponderance of the evidence should be made to be certain that the resident defendant is the real defendant. By William J. Wade.	Subcommittee will evaluate new venue rules.	Addressed in new statute.
90	Pg 217-221	Special exception needs to be presented to the trial court prior to trial to avoid waiver. By J. Hadley Edgar.	Prof. Dorsaneo is rewriting Rules 90-91. See Dallas Local Rule 1.10.a. Recommend general pretrial rule requiring disposition of motions/exceptions before trial.	Court Rules Committee suggests that 30 days before trial be the deadline for resolving special exceptions. Subcommittee would tie the deadline to the end of the discovery period, as recommended with deadline for amending pleadings.

91	Pg 222-225	Letter does not relate to R 91. By Wendell Loomis.	Prof. Dorsaneo is rewriting Rules 90-91.	
	Pg 226-229	Special exceptions should be filed 10 days prior to trial. By Broadus Spivey.	Subcommittee recommends counting back from end of discovery period.	Amended pleadings can impact scope of discovery.
	Pg 228-229	Special exceptions must be filed 30 days prior to trial if pertinent pleading has been on file for 30 days. Court may allow for good cause exceptions at any time. By unknown party; submitted by Broadus Spivey, who disagreed with the amendment.	Subcommittee recommends counting back from end of discovery period.	Amending pleadings can impact scope of discovery.
	Pg 230-231	This letter relates to TRAP 91, not TRCP 91. By Bruce Pauley.		
93	Pg 232-235	Notes and Comments should be changed to reflect the correct numbered paragraphs instead of letter paragraphs. By Bill Willis.	Fix the comments to reflect proper letters.	Achieves consistency.
98a	Pg 236-239	Comments on proposed "offer of judgment rule." No proposed rule was enclosed. Presume this would be like Federal Rule.	Subcommittee will consider this proposal.	The Federal rule may have beneficial effect if implemented in Texas practice.

100	Pg 240-241	$5 research fee demanded by Dist. Clerk is "one of the most stupid applications of money grubbing I have every heard." E.J. Wolt.	No action. There is no Rule 100.	Letter accomplished its purpose.

103	Pg 242	Threshold of qualifications for process servers is too low. By Robert Hurlbut.	Recommend no action. Can't solve by Rule. Legislature has declined to act on this point.	
	Pg 244	Proposed Rule 103 imposing requirement that process servers be registered with the Secretary of State. Also permit private process servers to serve writs of garnishment. By [unknown].	Recommend no action. This proposal was taken to the Legislature, but bill failed to pass. This is a legislative issue, not a rule issue.	
	Pg 245	Bexar County local rules re: private process servers, and req. of $100,000/ 300,000 liability insurance.	Recommend no action. Failed at Legislature. This is a legislative issue, not a rule issue.	
	Pg 247	Private process server advertisement.	Recommend no action. Failed at Legislature. This is a legislative issue, not a rule issue.	
	Pg 248-249	Do not allow private process servers to serve eviction notices. By Joe G. Bax.	Recommend no action. Failed at Legislature. This is a legislative issue, not a rule issue.	
	Pg 250	Allow for service by any person authorized in writing by the plaintiff and eliminate requirement of written order. Judge Louis Lopez.	Recommend no action. Recommend that court remain involved in private process serving, by approving individual who is serving process.	

105	Pg 253	To protect officer or other person, add clause that officer or person may delay execution upon request of issuing party or their attorney.	Reject change. The writ is a gov't mandate; to stop it, you should go to court and ask it to be called back.	Formal process should be handled formally and on the record. Avoid factual disputes.
106	Pg 254-255	Amend rule to permit delivery to an occupant over 16 at the defendant's place of abode.	Recommend no action. Delivery to another person in lieu of defendant should remain as substituted service, requiring prior court approval.	Court involvement desired. Critical part of litigation process, and it should remain under court control.
111	Pg 256-257	This letter does not address Rule 111. By Bruce Pauley.	Recommend no action.	Not applicable.
114	Pg 258-259	This letter does not address Trial Rule 114. It refers to Appellate Rule 114. By Bruce Pauley.	Refer to Appellate Rules Subcommittee.	Not applicable.
117(a)(6)	Pg 260-261	Delete the paragraph saying "[I]f this citation is not served within 90 days after the date of its issuance, it shall be returned unserved," so that citations do not have to be reissued. By Bexar County District Clerk, David J. Garcia.	We recommend this change.	Eliminate unnecessary expenditure of effort and needless expense.
124	Pg 262-266	Delete parenthesis. Should be Rule 21a instead of 21(a).	Okay. Make change.	Corrects an error.

145	Pg 267-273	Court clerks should be able to challenge indigency affidavit. Pro bono attys with clients referred by IOLTA programs should be able to use certificate of indigency.	Amend Rule 145 to permit clerks to contest affidavits; permit pro bono attys to establish indigency by IOLTA certificate.	Clerks should be able to contest indigency affidavits. If clients are prescreened for indigency, pro bono attorneys should not have to go through contest proceedings.
146	Pg 180	Should be able to appeal J.P. judgment by cash bond.	Refer to Judge Till's Committee.	
148	Pg 180	Should be able to appeal J.P. judgment by cash bond.	Refer to Judge Till's Committee.	
156	Pg 274	Rules 90, 156, 216(1), 307, 542 say "non-jury" and Rules 324(a) and Rule of Judicial Administration 6(b)(2) say "nonjury." Be consistent in using either "non-jury" or "nonjury." Should be consistent in all rules. By Charles Spain.	Good suggestion. Go with non-jury throughout the Rules.	Achieves consistency.
162	Pg 275	Submitted notice of amendment of Federal Rule of Civil Procedure 41, regarding terminating non-jury trials on the merits, and provided judgment on partial findings in Rule 52(c). By [unknown].	Recommend no change. The submitted language relates to directed verdict. Unrelated to TRCP 162 (non-suit).	Unclear why item was submitted.

165	Pg 276-293	Should be amended to provide that notice of dismissal be given in excess of 45 days to allow time to set the case for trial. By Howard Hasting. The word "judgment" should be replaced with the words "order of dismissal" in the first sentence in the last paragraph of 165a.3. By Prof. J. Hadley Edgar.	Committee thinks request is reasonable and will propose sixty days' notice. Subcommittee proposes to amend rule to recognize differences between the different grounds for DWOP. Subcommittee has not yet considered Prof. J. Hadley Edgar's suggestion.	Dismissal for inactivity should be handled differently from dismissal based on failure to appear, discovery sanctions, etc. Extending notice of DWOP to sixty days gives one last chance to set case for trial.
45-47	SPg 28-31	Amend Rules 45 & 47 to make parties plead constitutional, statutory, or regulatory provisions relied upon. By Richard Orsinger.	Amend Rule 47 to require pleader to state the legal basis for each claim and give a general description of the factual circumstances suff. to give fair notice.	This change conforms the rule to existing case-law and is salutory.
87	SPg 32-34	Amend Rule 87(2). Party who wishes to maintain venue in particular county has burden of proof, while party who seeks to transfer venue has burden to show venue maintainable in target county. Conflict? By Wendell Loomis.	Need to redo venue rules, in accord with statutes.	Statutory changes require changes to venue rules.

162	SPg 35	After verdict is returned in 1st phase of bifurcated trial, can plaintiff non-suit his entire case before resting in 2nd phase of trial? By Supreme Court Justice Nathan Hecht.	Provide that plaintiff can nonsuit only as to bifurcated untried issues. Write new rule for bifurcated trials.	Case law and statute require punitive damages to be tried separately, upon proper request. Need rule to provide how to conduct bifurcated trials.
18a	SSp 47-49	Where grounds for recusal not known until after 10 days before trial, motion to recuse can be filed but judge can continue to hear case and recusal hearing before other judge proceeds independently. By Jim Parker.	By 4-3 vote, adopt recommendation. See pg 1 of this Disposition Chart.	
Proposed General Rule 9, Replacing Rule 182	SSp 50-53	Combine appellate and trial rules regarding disqualification and recusal. By Clarence A. Guittard.	Recommend no action at this time. Supreme Court has almost completed its review of appellate rules.	Might delay adoption of appellate rules.
Proposed General Rule 5, Replacing Rule 21	SSp 54-58	Fold TRAP 4(e) and Rule 21 into new general Rule 5, regarding "Signing, Filing and Service." By Clarence A. Guittard.	Recommend no action at this time. Supreme Court has almost completed its review of appellate rules.	Might delay adoption of appellate rules.
21a	SSp 61-62	When constitutionality of statute, rule or ordinance is questioned, must notify AG, city attorney, or other appropriate person, or else constitutional challenge is waived. By Charles Spain.		

21a	SSp 64-65	Telefax transmissions should be effective when last page is sent, receiver's time. By Jim Parker.	Recommend that this suggestion be accepted.	You don't have the document until you have received all of the pages.
Proposed General Rule 5, to replace present Rule 21a	SSp 66-67	Fold Rule 21a "Methods of Service" into new Rule 5, which applies to trial and appellate courts. By Clarence A. Guittard.	Recommend no action at this time. Supreme Court has almost completed its review of appellate rules.	Might delay adoption of appellate rules.
Proposed General Rule 5, to replace present Rule 21b	SSp 68-69	Delete Rule 21b "Sanctions for Failure to Serve or Deliver Copy of Pleadings and Motions," and fold into new Rule 5 "Signing, Filing and Service." Use generic description rather than list. By Clarence A. Guittard.	Recommend no action at this time. Supreme Court has almost completed its review of appellate rules.	Might delay adoption of appellate rules.
63	SSp 70-79	Deadline for amending pleadings would be 30 days prior to trial, not the current 7 days prior to trial. By SBOT Rules Committee.	Full SCAC should consider the proposal. Consider also Discovery Subcommittee proposed new Rule 63. The Subcommittee recommends the Discovery Subcommittee's approach. Also, let's define how to count backwards.	The Rules Committee has trial-related deadlines, while the Discovery Subcommittee has a discovery cut-off related deadline. The SCAC needs to reconcile the two approaches. Rules 66 & 67 should stay the same.
Proposed General Rule 5, to replace present Rule 74	SSp 80-81	Delete Rule 74 "Filing With the Court Defined" and fold into new Rule 5 "Signing, Filing, and Service." By Clarence A. Guittard.	Recommend no action at this time. Supreme Court has almost completed its review of appellate rules.	Might delay adoption of appellate rules.

Proposed General Rule 12, to replace present Rule 76	SSp 82-83	Delete Rule 76 "May Inspect Papers" and fold into Rule 12 "Attorney May Inspect." By Clarence A. Guittard.	Recommend no action at this time. Supreme Court has almost completed its review of appellate rules.	Might delay adoption of appellate rules.
76a	SSp 84-123	Texas should permit audio-video cameras in courtroom. By Court Television.	Adopt uniform statewide rules. Chip Babcock is preparing draft.	Currently local rules vary. Uniform statewide rules are desirable.
86	SSp 124-127	Waiver of venue change by one defendant shouldn't waive for all defendants. By Susan S. Fortney.	Venue rules must be rewritten to conform to new statutes. New rules still under construction.	Governed by legislation passed in 1995 Session.
90	SSp 128-136	Exceptions to pleadings must be heard a reasonable time but not less than 30 days prior to trial. By SBOT Rules Committee.	Subcommittee thinks deadline for exceptions should work backward from close of discovery period.	Amended pleadings may affect scope of discovery.
103	SSp 137-186	Heard of instances where private process server served citation, interviewed defendant, and obtained admissions against interest, and was listed by plaintiff as a witness. By Larry L. Gollaher.	Subcommittee doesn't like this but doesn't think it can be effectively addressed by rule.	Impossible to micro-manage service of process.
145	SSp 187-192	Clerks should be permitted to contest affidavits of inability. Clerks should be subject to Rule 13 provisions and sanctions. By Earl Bullock.	Done. See p. 12 above.	

Proposed General Rule 145	SSp 193-195	Various edits to Rule 145, "Affidavit of Inability."	Make any appropriate changes to new version of Rule 145. See p. 12 above.	
165a	SSp 196-198	The merits of the case should be considered before it is put on the dismissal docket and subsequently dismissed. By Richard Worsham.		

Paula Sweeney Report
1 - 1920 - 1996

DISPOSITION CHART
TEXAS RULES OF CIVIL PROCEDURE 216 - 299

RULE NO.	PAGE NO.	CHANGE SUGGESTED/BY	RECOMMENDED ACTION	REASON
216	Pg 756-759	Luke Soules suggested the phrase "on the non-jury docket be deleted.	Delete the phrase.	The phrase does not add anything to the rule, but is potentially confusing.
		Require jury requests be made 30 days after service of live trial pleadings, or not later than 30 days before trial.	Do not adopt the suggestion.	No compelling reason for change at present time.
*	Spg 410	See above comments.		
221	Spg 411-414	Alex Albright suggests that 221 be amended to allow a much more expansive list of grounds on which to base challenges to the array.	Changes to the rules regarding jury selection have not been discussed fully.	NA
222	Spg 411-414	Alex Albright suggests 222 & 223 be eliminated since her proposed change to 221 would encompass them.	Changes to the rules regarding jury selection have not been discussed fully.	NA
(223) 16 to 2 Keep the shuffle	Spg 411-421	Alex Albright submitted Donna Bobbit's article which suggests that the jury shuffle be eliminated since it seems to be in conflict w/ the U.S. Supreme Ct.'s holding in Batson.	Changes regarding the jury shuffle have not yet been discussed fully.	NA
224	Spg 414-415	Alex Albright suggests 224 be deleted bc Gov. Code §§62.015-.017 cover the method whereby jury panels are chosen.	This change has not yet been considered.	NA
225	Spg 414-415	Alex Albright suggests 225 be dleted bc "summoning talesman" is covered in "the statutes."	This change has not yet been considered.	NA

* o suggestions sent to Committee: Rules 217-220

226	Pg 760-761 Spg 415 Spg 422-424	Judge William Baskette, Jr. recommends making the language less cumbersome. Patrick Hazel submitted proposed version that is a general cleaning up and modernization of the language in 226. For comments by Alex Albright, see attached. Joseph Jacobson suggests that since not every person believes in God, or even a god, that the phrase "So help you God" be removed from 226 & 236.	This rule has previously been amended and voted on. The phrase has been deleted.	The newly amended rule is the result of a compilation of a number of different suggestions. The language needs to be and has been modernized.
226a	Pg 762-793 Spg 415	Patrick Hazel submitted proposed changes made by the Supreme Court Task Force dealing with jury instructions. Jim Parker asked whether the new instructions regarding proof of jury misconduct correct and appropriate in light of TEX. CIV. EVID. 606 (b)? He also wants to know why "you are performing a significant service which only free people can perform" is being replaced w/ "civic duty" language. This shows a lack of pride in the jury system. For comments by Alex Albright, see attached.	This rule has previously been amended and voted on.	The changes are cosmetic and tend to improve the readability of the instructions.
227	Spg 416	For comments by Alex Albright, see attached.	This change has not yet been considered.	NA
228	Spg 415	For comments by Alex Albright, see attached.	This change has not yet been considered.	NA

229	Spg 415	For comments by Alex Albright, see attached.	This change has not yet been considered.	NA
230 17-0 repeal 13-5 instruct in 226a	Spg 414-418 SSp 431-436	For comments by Alex Albright, see attached. Luke Soules found a case that seems to say that 230 poses a potential conflict w/ Article XVI, §2 of the Constitution. Art. XVI states that laws shall be made to exclude convicted felons from serving on juries. Yet 230 prohibits counsel from questioning potential jurors about felony convictions during voir dire.	This change has not yet been considered.	NA
231	Spg 415	For comments by Alex Albright, see attached.	This change has not yet been considered.	NA
232	Pg 794-799 Spg 416-417	Steve Tyler recommends *Batson* be codified to establish the procedure for making a *Batson* challenge. He recommends following § 35.261 of the Code of Criminal Pro. as a model. For comments by Alex Albright, see attached.	The subcommittee has proposed a draft of 232 and is awaiting comments from the full committee.	The subcommittee agrees that a *Batson* procedure needs to be codified in order to achieve clarity and uniformity of practice.
233	Spg 416-417	For comments by Alex Albright, see attached.	This change has not yet been considered.	NA
234	Spg 416-417	For comments by Alex Albright, see attached.	This change has not yet been considered.	NA
235	Spg 416-417	For comments by Alex Albright, see attached.	This change has not yet been considered.	NA
236 *	Pg 800-801	Patrick Hazel submitted proposed version that is a general cleaning up and modernization of the language in 236.	This rule has previously been amended and voted on.	The language needs to be modernized.

No suggestions sent to Committee: Rule 237

237a *	SSp 437-440	Charles Spain suggests, when a portion of pretrial matters are conducted in federal court prior to remand, that 237a provide a 30 day post-remand window to assert privileges, claims and defenses that weren't asserted in federal court.	This change has not yet been considered.	NA
239 *	SSp 441-444	James Holmes suggests 239 be amended to make it more consistent w/ the stated goals of section III (11) of the Texas Lawyer's Creed.	This change has not yet been considered.	NA
241 Union reclose	Pg 802-805	Judge Coker suggests this rule be repealed bc it, along w/ Rule 243, creates a dichotomy in the law regarding liquidated & unliquidated damages in default judgments.	The subcommittee has not yet considered this suggestion bc it is unclear how changes to default judgment procedure relates to this subcommittee.	NA
242	Pg 806-809	Judge Coker recommends that 241 & 243 be repealed and that 242 be rewritten to govern "Evidence Needed to for Default Judgment". See Exhibit "A" for Judge Coker's suggestion.	The subcommittee has not yet considered this suggestion bc it is unclear how changes to default judgment procedure relates to this subcommittee.	NA
243 *	Pg 810-815	Bruce Miller suggests that the phrase "writ of inquiry" be removed bc the term has become obsolete. See 241 & 242 above for Judge Coker's suggestions.	The subcommittee agrees "writ of inquiry" should be deleted. A redraft will follow. See 241 & 242 above for the subcommittee's response.	The term is obsolete.

No suggestions sent to Committee: Rule 238, 239a, 240, 244-248

249 *	Pg 816	Charles Spain, Jr. suggests that the phrase "non-jury" be standardized w/ other rules that use the term bc sometimes the word appears hyphenated and other times it does not.	The subcommittee agrees with this suggestion. The language will be standardized.	This will create more uniformity among the rules.
257 Urban no change *	Pg 817	J. Hadley Edgar states there is no provision in the TRCP mandating the time for filing a motion to transfer venue based on the inability to obtain an impartial trial.	The subcommittee has not yet considered this suggestion.	NA
271-279	Pg 818-844	271 -- E.J. Wohlt suggests that proposed 271(2)(d) be changed to make it clear that the hearing is to be conducted outside the presence of the jury. 272 -- E.J. Wohlt suggests that proposed 272 (5)(b)(i) be changed to make it clear you do not have to submit your opponent's case. 273 -- E.J. Wohlt suggests proposed 273 be changed to say "The court shall not give additional oral instructions," because some judges feel the need to explain to the jury what the question means. 274 -- E.J. Wohlt suggests the following addition to part 1 & 2 of the proposed rule: ", except no evidence and against great weight points." Also, fix the typo "recovery of defense" to "or defense".	These rules have previously been amended and voted on.	The rules have been amended. The newly amended rules are the result of the compilation of a number of different suggestions.

*No suggestions sent to Committee: Rule 251-255, 258-259, 261-270

271	Pg 845-851	Jim Parker asked why percentage causation is singled out for specific attention in the proposed rule instead of addressing it generally in 271 (1)(a)(i)? Such a specific rule will only require an amendment in the future. Patrick Hazel suggests the following revisions be made to the proposed rule: 1. Emphasize in 271(1) the importance of rule 226a. 2. Emphasize in 271 (a)(i) that only questions controlling the disposition of the case shall be submitted. 3. In 271(a)(v), do not allow the submission of advisory questions. 4. In 271(a)(vi), instruct the jury that the percent of responsibility attributable to each party must equal 100%. 5. In 271(b)(ii), add statement that inferential rebuttal instructions raised by pleadings & evidence shall be submitted. Presently, that rule is only found in case law. 6. In 271(c)(i), add "question". 7. In 271(2)(a), change "order" to "request" bc "order" is meaningless since the rule has nothing to do w/ preserving error on appeal. 8. In 271(2)(b), add language indicating the court may conduct a charge conference.	This rule has previously been amended and voted on.	271 has been amended. The newly amended rule is the result of the compilation of a number of different suggestions.

272	Pg 852-862	Jim Parker suggests that the need for a request when a question or an element thereof is omitted needs to be mentioned in the actual rule, not just in the footnote.	This rule has previously been amended and voted on.	272 has been amended. The newly amended rule is the result of the compilation of a number of different suggestions.
273	Pg 863-865	Patrick Hazel recommends the following: "After ruling on all complaints to the charge and before argument is begun, the trial court shall read the entire charge to the jury in the precise words in which it is finally written."	This rule has previously been amended and voted on.	273 has been amended. The newly amended rule is the result of the compilation of a number of different suggestions.
274	Pg 866-868	See Pg 866 for the proposed rule.	This rule has previously been amended and voted on.	274 has been amended. The newly amended rule is the result of the compilation of a number of different suggestions.
276 *	SSp 445-446	Brenda Norton would like some clarification regarding 276 and preservation of error. Is the judge's written refusal required for preservation of error or can a refusal shown in the statement of facts suffice?	This rule has previously been amended and voted on.	NA
290-295	Pg 869	Rule 50 of FED. R. CIV. PRO. has been submitted, presumably to compare to TEX. R. CIV. PRO. 290-295.	This change has not yet been considered.	NA

* No suggestions sent to Committee: Rule 280-289

292 Clear approval for alternate + clarification	Pg 870-872	Evelyn Avent suggests the phrase "or be discharged from further service for any reason" be added to the 2nd sentence of 292. W. Jones Krozer states the 292 conflicts w/ itself and w/ the extra juror statute bc an extra juror is not one of the "original ten".	These changes have not yet been considered.	NA
296-299	Pg 873-878	Former District Judge Putnam Kaye Reiter suggests that the same fact finding approach be taken in both bench & jury trials. That is, at the conclusion of the evidence, whether heard by jury or judge, a charge conference would be conducted. Clarence Guittard recommends that FOFCOLs be recited in the judgment, like a jury verdict. Since FOFCOLs are the actual grounds on which judgment is rendered, requesting them after the fact is ineffective. FED. R. CIV. PRO. has been submitted, presumably to compare to TRCP 296. Lewis Kinard suggests that proposed 299a be amended to clear up the ambiguity. Does the new rule apply to both findings actually requested pursuant to 296 and to incidental findings?	These changes have not yet been considered.	NA

Rule 216: REQUEST AND FEE FOR JURY TRIAL

Existing Rule:

a. **Request.** No jury trial shall be had in any civil suit, unless a written request for a jury trial is filed with the clerk of the court a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than thirty days in advance.

b. **Jury Fee.** Unless otherwise provided by law, a fee of ten dollars if in the district court an five dollars if in the county court must be deposited with the clerk of the court within the time for making a written request for a jury trial. The clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet.

Proposed Changes:

a. None.

b. None.

Revised Rule:

a. None.

b. None.

Rule 217: (OATH) AFFIDAVIT OF INABILITY TO PAY

Existing Rule:

The deposit for a jury fee shall not be required when the party shall within the time for making such deposit, file with the clear, his affidavit to the effect that he is unable to make such deposit, and that he can not, by pledge of property or otherwise, obtain the money necessary for that purpose; and the court shall then order the clerk to enter the suit on the jury docket.

Proposed Changes:

The deposit for a jury fee shall not be required when the party, (shall) within the time for making such deposit, files an affidavit with the clerk (his) (an affidavit to the effect) stating that he or she is unable to make such deposit, and that he or she (can not) cannot, by pledge of property or otherwise, obtain the money necessary for the deposit (that purpose;), (and) The court shall then order the clerk to enter the suit on the jury docket.

Revised Rule:

The deposit for a jury fee shall not be required when the party, within the time for making such deposit, files an affidavit with the clerk stating that he or she is unable to make such deposit, and that he or she cannot, by pledge of property or otherwise, obtain the money necessary for the deposit. The court shall then order the clerk to enter the suit on the jury docket.

Rule 218: JURY DOCKET

Existing Rule:

The clerks of the district and county courts shall each keep a docket, styled, "The Jury Docket," in which shall be entered in their order the cases in which jury fees have been paid or affidavit in lieu thereof has been filed as provided in the two preceding rules.

Proposed Changes:

The clerks of the district and county courts shall each keep a docket(,) styled(,) "The Jury Docket(,)." The clerks (in which) shall enter in The Jury Docket, in order, (be entree in their order) the cases in which jury fees have been paid or in which an affidavit in lieu thereof has been filed as provided in the two preceding rules.

Revised Rule:

The clerks of the district and county court shall each keep a docket styled "The Jury Docket." The clerks shall enter in The Jury Docket, in order, the cases in which jury fees have been paid or in which an affidavit in lieu thereof has been filed as provided in the two preceding rules.

Rules 219: JURY TRIAL DAY

Existing Rule:

The court shall designate the days for taking up the jury docket and the trial of jury cases. Such order may be revoked or changed in the court's discretion.

Proposed Changes:

The court shall designate the days for (taking up the jury docket and) the trial of (jury) cases on the jury docket. Such order may be revoked or changed in the court's discretion.

Revised Rules:

The court shall designate the days for the trial of cases on the jury docket. Such order may be revoked or changed in the court's discretion.

Rule 220: WITHDRAWING CAUSE FROM JURY DOCKET

Existing Rule:

When any party has paid the fee for a jury trial, he shall not be permitted to withdraw the cause from the jury docket over the objection of the parties adversely interested. If so permitted, the court in its discretion may by an order permit him to withdraw also his jury fee deposit. Failure of a party to appear for trial shall be deemed a waiver by him of the right to trial by jury.

Proposed Changes:

When any party has paid the fee fo a jury trial, he or she shall not be permitted to withdraw the cause from the jury docket over the objection of the opposing parties (adversely interested.) (If so permitted) If there is no objection, the court in its discretion may (by an order) permit (him) the party to withdraw his or her cause from the jury docket. The court in its discretion may also permit a party to withdraw the jury fee (deposit). (Failure of a party) Failing to appear for trial shall be deemed a waiver (by him) of the right to (trial by jury) a jury trial.

Revised Rule:

When any party has paid the fee for a jury trial, he or she shall not be permitted to withdraw the cause from the jury docket over the objection of the opposing parties. If there is no objection, the court in its discretion may permit the party to withdraw his or her cause from the jury docket. The court in its discretion may also permit a party to withdraw the jury fee. Failing to appear for trial shall be deemed a waiver of the right to a jury trial.

Rule 221: CHALLENGE TO THE ARRAY

Existing Rule:

When the jurors summoned have not been selected by jury commissioners or by drawing the names from a jury wheel, any party to a suit which is to be tried by a jury may, before the jury is drawn challenge the array upon the ground that the officer summoning the jury has acted corruptly, and has wilfully summoned jurors known to be prejudiced against the party challenging or biased in favor of the adverse party. All such challenges must be in writing setting forth distinctly the grounds of such challenge and supported by the affidavit of the party or some other credible person. When such challenge is made, the court shall her evidence and decide without delay whether or not the challenge shall be sustained.

Proposed Changes:

When the jurors summoned have not been selected by a jury commissioners or by drawing the names from a jury wheel, any party to a suit which is to be tried by a jury may, before the jury is drawn challenge the array upon the ground that the officer summoning the jury has acted corruptly, and has wilfully summoned jurors known to be prejudiced against the party challenging or biased in favor of the adverse party. All such challenges must be in writing setting forth distinctly the grounds of such challenge and supported by the affidavit of the party or some other credible person. When such challenge is made, the court shall hear evidenced and decide without delay whether or not the challenge shall be sustained.

Revised Rule:

When the jurors summoned have not been selected by jury commissioners or by drawing the names from a jury wheel, any party to a suit which is to be tried by a jury may, before the jury is drawn challenge the array upon the ground that the officer summoning the jury has acted corruptly, and has wilfully summoned jurors known to be prejudiced against the party challenging or biased in favor of the adverse party. All such challenges must be in writing setting forth distinctly the grounds of such challenge and supported by the affidavit fo the party or some other credible person. When such challenge is made, the court shall hear evidence and decide without delay whether or not the challenge shall be sustained.

Rule 222: WHEN CHALLENGE IS SUSTAINED

Existing Rule:

If the challenge be sustained, the array of jurors summoned shall be discharged, and the court shall order other jurors summoned in their stead, and shall direct that the officer who summoned the persons so discharged, and on account of whose misconduct the challenge has been sustained, shall not summon any other jurors in the case.

Proposed Changes:

None.

Revised Rule:

None.

Rule 223: JURY SHUFFLE (JURY LIST IN CERTAIN COUNTIES)

Existing Rule:

> In counties governed as to juries by the laws providing for interchangeable juries, the names of the jurors shall be placed upon the general panel in the order in which they are randomly selected, and jurors shall be assigned for service from the top thereof, in the order in which they shall be needed, and jurors returned to the general panel after service in any of such courts shall be enrolled at bottom of the list the order of their respective return; provided, however, after such assignment to a particular court, the trial judge of such court, upon the demand prior to voir dire examination by any party or attorney in the case reached for trial in such court, shall cause the names of all members of such assigned jury panel in such case to be placed in a receptacle, shuffled, and drawn, and such names shall be transcribed in the order drawn on the jury list from which the juror is to be selected to try such case. There shall be only one shuffle and drawing by the trial judge in each case.

Proposed Changes:

> None.

Revised Rule:

> None.

Rule 224: PREPARING JURY LIST

Existing Rule:

> In counties not governed as to juries by the law providing for interchangeable juries, when the parties have announced ready for trial the clerk shall write the name of each regular juror entered of record for that week on separate slips of paper, as near the same size and appearance as may be, and shall place the slips in a box and mix them well. The clerk shall draw from the box, in the presence of the court, the names of twenty-four jurors, if in the district court, or so many as there may be, if there be a less number in the box; and the names of twelve jurors if in the county court, or so many as there may be, and write the names as drawn upon two slips of paper and deliver one slips to each party to the suit or his attorney.

Proposed Changes:

> None.

Revised Rule:

> None.

Rule 225: SUMMONING TALESMAN

Existing Rule:

> When there are not as many as twenty-four names drawn from the box, if in the district court, or as many as twelve, if in the county court, the court shall direct the sheriff to summon such number of qualified persons as the court deems necessary to complete the panel. The names of those thus summoned shall be placed in the box and drawn and entered upon the slips as provided in the preceding rules.

Proposed Changes:

None.

Revised Rule:

None.

January 18, 1996

To: Paula Sweeney
David Peeples
Pam Baron

From: Ann Cochran

Re: Rules 227 - 235

I have reviewed these rules, and present my recommendations to the subcommittee. Most of the recommended changes come directly from Alex Albright's thoughtful work, but I have deleted her Batson proposal (R. 228(3)), and noted that the subcommittee's earlier Batson draft should be substituted there. I have also added a subpart (4) to Rule 228, to incorporate current Rule 235. (Because there may be more than 12 total preemptory challenges in a multi-party case, I think this provision is still necessary.)

The one rule I have recommended be deleted is R. 230 (prohibiting inquiries about felony convictions.) As the case Luke Soules brought to our attention shows, felony convictions are constitutional disqualifications. Although I don't know the history behind the current rule, I can see no justification for continuing this restraint.

Some last-minute scheduling problems have made it impossible for me to come to Austin tomorrow. (As you might be aware, we have mailed this week over half a million new notice packets in the breast implant settlement, and there are some things I simply must take care of before hundreds of thousands of new forms start being filed!) If you need to talk to me about any of this, please call. My direct line is 713/951-7011. I'll be in meetings all day, but will leave instructions to interrupt if any of you call.

I'm sorry, but hope the attached is sufficient to help you conclude this part of our task.

I did call the American Judicature Society yesterday. Their editor is sending me today the articles they have that might help us with the "Be Kind to Jurors" project.

Proposed Rules 227 - 235:

Rule 227. Challenges for Cause.

Any party may orally challenge a panel member for cause alleging some fact that by law disqualifies that juror to serve as a juror, or that in the opinion of the court renders that juror unfit to sit on the jury. In deciding the challenge, the court shall consider the juror's answers to questions asked as well as other evidence. If the challenge is sustained, the juror shall be discharged from the case. If successful challenges reduce the number of prospective jurors to less than twenty-four in the district court or twelve in the county court, additional jurors shall be summoned.

Note: This proposed rule combines current Rules 227, 228, 229, and 231.

Rule 228. Peremptory Challenges.

1. Grounds. Upon completion of the court's determination of challenges for cause, any party may make peremptory challenges to a juror by striking that juror's name from a list furnished by the clerk. A peremptory challenge is made to a juror without assigning any reason. After the exercise of peremptory challenges, the parties shall deliver their completed lists to the clerk. The clerk shall identify the first twelve names on the panel in the district court, or six in the county court, that have not been struck by any party. Those twelve (or six) persons shall constitute the jury.

2. Number and Apportionment. Each side (plaintiff and defendant) to a civil case shall be entitled to six peremptory challenges in a case tried in the district court, and to three in the county court. If there are multiple parties on any one side, the trial court shall determine before the exercise of peremptory challenges whether the parties on the same side are antagonistic with respect to any issue to be submitted to the jury. Upon the motion of any party made before the exercise of peremptory challenges, the trial judge shall use its discretion to apportion the number of peremptory challenges so that no party or side is given unfair advantage as a result of the alignment of the litigants, the determination of antagonism, and the award of peremptory challenges.

3. [add Batson rule here]

4. If Jury Incomplete. If the jury is left incomplete after peremptory challenges have been made, additional jurors shall be drawn or summoned, empaneled, questioned, and selected to complete the jury.

Notes: Parts 1 and 2 of this rule are simplified versions of current Rules 232, 233, and 234. Part 3 is new and codifies the Batson procedure. Part 4 is a rewritten version of current Rule 235.

Rule 229. [Incorporated into R. 227]

Rule 230. [Repealed]

Rule 231. [Incorporated into R. 227]

Rule 232. [Original rule now incorporated into R. 228(1). Subcommittee's draft of Batson codification – now awaiting comments from the full committee - moved to R. 228(3).]

Rule 233. [Incorporated into R. 228(2)]

Rule 234. [Incorporated into R. 228(1)]

Rule 235. [Incorporated into R. 228(4). Some language changes.]

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Date: January 18, 1996

Send to:

Paula Sweeney	214/523-8888
Judge David Peeples	210/
Ann Cochran	713/951-9427

No. of Pages (Including transmittal sheet): 4

Comments/Notes:

Here are my preliminary thoughts on Rule 292. I do not propose any changes to rules 280-291 or 293-295. These rules will need to to revisited, however, in connection with the issues raised in the Arizona study. — Pam

Original will not be sent.

If you do not receive all pages or if you receive illegible pages, please contact Pamela Stanton Baron at (512) 479-8480.

Rule 292. Verdict by Portion of Original Jury

Existing Rule:

A verdict may be rendered in any cause by the concurrence, as to each and all answers made, of the same ten members of an original jury of twelve or of the same five members of an original jury of six. However, where as many as three jurors die or be disabled from sitting and there are only nine jurors remaining of an original jury of twelve, those remaining may render and return a verdict. If less than the original twelve or six jurors render a verdict, the verdict must be signed by each juror concurring therein.

Problems and Discussion:

1. **The rule conflicts with the alternate juror statute.**[1] By statute, the Legislature has authorized the impaneling of alternate jurors. Tex. Gov't Code § 62.020. The statute directs that the alternates "replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties" and that they have the same "functions, powers, and privileges" as original jurors.

Rule 292, as written, does not contemplate the use of alternate jurors. By requiring that a verdict must reflect the concurrence of "the same ten members of an original jury," the rule renders participation by alternates meaningless. *Temple Eastex, Inc. v. Old Orchard Creek*, 848 S.W.2d 724 (Tex. App.--Dallas 1992, writ denied) (when one of ten jurors concurring in the verdict was an alternate juror, verdict improper).

The subcommittee recommends revisions to the rule providing for a meaningful role for alternate jurors in participating in a less than unanimous verdict.

2. **Clearer guidance is needed as to when a juror is "disabled."**[2] The language in Rule 292 — "die or be disabled" — is identical to that found in Article V, section 13 of the Texas Constitution. While death of a juror admits of little interpretative difficulties, disablement has been the subject of many conflicting cases. Long ago, the Texas Supreme Court held that a juror excused because of the illness of a child was not "disabled." *Houston & Texas Central*

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[1] *See* comments of W. James Kronzer, page 872 of the second volume of the agenda.

[2] *See* comments of Evelyn Avent on behalf of the State Bar Committee on Rules, pages 870-71 of the second volume of the agenda.

Ry. Co. v. Waller, 56 Tex. 331 (1882); *but see, e.g., Barker v. Ash*, 194 S.W. 465 (Tex. Civ. App.--Dallas 1917, writ ref'd) (juror properly excused when showed signs of physical illness because of illness of family member). Only recently, the Supreme Court split 5-4 on whether a juror detained by flooding was disabled from serving. *McDaniel v. Yarborough*, 898 S.W.2d 251 (Tex. 1995).

The subcommittee recommends revisions to the rule to make clear that the death or severe illness of a close family member is a proper basis for determining that a juror is disabled.

3. **The rule does not address jurors impaneled but subsequently found to be disqualified.** A juror may be impaneled and then later found to be disqualified. The alternate juror statute contemplates just such an event. Tex. Gov't Code § 62.020 (alternates to replace jurors who become or are found to be unable or disqualified to sit).

The subcommittee recommends correction by providing for disqualified jurors in the rule.

Proposed Revisions:

Rule 292. Verdict by Portion of ~~Original~~ Jury.

A verdict may be rendered in any cause by the concurrence, as to each and all answers made, of the same ten members of ~~an original~~ a jury of twelve, including any alternate jurors sworn as replacements, or of the same five members of ~~an original~~ a jury of six, including any alternate jurors sworn as replacements. However, where as many as three jurors die or be disabled or disqualified from sitting and there are only nine jurors remaining of ~~an original~~ a jury of twelve, including any alternate jurors sworn as replacements, those remaining may render and return a verdict. If ~~less~~ fewer than ~~the original~~ twelve or six jurors render a verdict, the verdict must be signed by each juror concurring therein. The trial court may properly determine that a juror is disabled because of the death or severe illness of a near relative.

Revised Rule:

Rule 292. Verdict by Portion of Jury.

A verdict may be rendered in any cause by the concurrence, as to each and all answers made, of the same ten members of a jury of twelve, including any alternate jurors sworn as replacements, or of the same five members of a jury of six, including any alternate jurors sworn as replacements. However, where as many as three jurors die or be disabled or disqualified from sitting and there are only nine jurors remaining of a jury of twelve, including any alternate jurors sworn as replacements, those remaining may render and return a verdict. If fewer than twelve or six jurors render a verdict, the verdict must be signed by each juror concurring therein. The trial court may properly determine that a juror is disabled because of the death or severe illness of a near relative.