AGENDA
MAY 10-11, 1996
SCAC MEETING

INDEX

RULE 226. OATH TO JURY PANEL

(a) Oath. Before the parties or their attorneys begin examination of the jury panel, the jurors shall be given by the court or under its direction the following oath: "Do you solemnly swear or affirm that you will give true answers to all questions asked you concerning your qualifications as a juror, so help you God?"

(b) Affirmation in Lieu of Oath. If any juror refuses to take the oath as given, the court may use such other oath, affirmation or statement as is calculated to awaken to the juror's conscience and impress the juror's mind with the duty to speak the truth, and which causes the juror to acknowledge that a false statement is subject to the penalties for perjury.

RULE 226a. INSTRUCTIONS TO JURY PANEL AND JURY

The court shall give such instructions to the jury panel and to the jury as may be prescribed by the Supreme Court in an order or orders entered for that purpose.

Approved Instructions

The court shall give the following instructions to the jury panel and to the jury. If the case is tried to a six-person jury, the references to ten or eleven jurors should be changed to read "five."

PART 1 - JURY PANEL

After the members of the panel have been sworn as provided in Rule 226 and before the voir dire examination, the court shall read to the jury panel the following instructions, with such modifications as the circumstances of the particular case may require:

Members of the Jury Panel: The case that is now on trial is _____ v. _____. This is a civil lawsuit that will be tried before a jury. If you are selected to serve on the jury, your duty as jurors will be to decide the disputed facts. It is my duty as judge to see that the case is tried in accordance with the rules of law. In this case, as in all cases, the actions of the judge, parties, witnesses, attorneys and jurors must be according to law. Texas law permits proof of violations of the rules of proper jury conduct. By this I mean that jurors and others may be called upon to testify in open court about certain acts of jury misconduct. It is very important that you follow carefully all instructions that I give you now and later during the trial. If you do not obey these instructions, it may become necessary for another jury to retry this case with all the resulting waste of your time here and the expense to the litigants and the taxpayers of this county for

another trial. Your instructions are as follows:

1. Do not mingle or talk with the parties, the lawyers, the witnesses, or any other person who might be connected with or interested in this case, except for casual greetings. You may not even have casual conversations about things completely unrelated to this lawsuit with any of these people. They have to follow these same instructions, and you will understand it when they do.

2. Do not accept any favors from these people, and do not give them any favors. You must avoid even slight favors, such as rides, food, or refreshment.

3. Do not discuss this case with anyone, including your spouse. Do not let anyone discuss the case in your hearing. If anyone tries to talk about the case with you or in your hearing, tell me or the bailiff immediately.

4. The attorneys will now have an opportunity to talk with you about the case and the people involved, and to ask you some questions about your backgrounds, experiences, attitudes, and opinions. In questioning you, they are not meddling in your personal affairs, but are trying to select a fair and impartial jury in this case. Listen to the questions and give true and complete answers. Do not conceal information. If you cannot hear or understand the questions, please let me know.

5. If a question is asked of some part or all of the panel that requires a response from you, please raise your hand and keep it raised until you have responded to the question or the person asking it has indicated that you may put your hand down.

Whether you are selected as a juror for this case or not, you are performing a significant service which only free people can perform. We shall try the case as fast as possible consistent with justice, which requires a careful and correct trial. If selected on the jury, unless I instruct you differently, you will be permitted to separate at recesses and for meals, and at night.

The attorneys will now proceed with their examination.

PART 2 - JURY

Immediately after the jurors have been sworn as provided in Rule 236, the court shall give each juror a copy of the following written instructions and then read them to the jury.

Ladies and Gentlemen of the Jury: By your oath, you are now officials of this court, and active participants in the administration of justice. I now give you further instructions that you must obey throughout this trial. It is essential to the administration of fair and impartial justice that you follow these instructions:

1. You must continue to obey the instructions I gave you earlier. I will remind you of some of them again.

2. Do not talk about the case with anyone, including your spouse, and do not have any contact of any kind, no matter how brief, with the parties, attorneys, witnesses, or other interested persons outside the courtroom. Do not accept any favors from these people, and do not give them any favors. You must avoid even slight favors, such as rides, food or refreshments.

3. Do not even discuss the case among yourselves until you have heard all the evidence, the court's charge, the attorneys' arguments, and I have sent you to the jury room to begin your deliberations.

4. Do not let anyone discuss the case in your hearing. If anyone tries to talk about the case with you or in your hearing, tell me or the bailiff immediately.

5. You are the judges of the facts of this case. It is your duty to listen to and consider carefully the evidence admitted under my rulings, and to answer the specific questions about the facts that I will submit to you in writing at the end of the trial. Therefore, you must do your best to pay careful attention to the evidence and remain alert throughout the trial so that you will be able to answer the questions I will ask you at the end.

6. In answering these questions, you can consider only the evidence admitted during the trial. Do not make any investigation about the facts of the case. Do not seek out any information contained in documents, books, or records that are not in evidence. Do not make personal inspections of observations outside the courtroom. Do not let anyone else do any of these things for you. This avoids a trial based upon secret evidence.

7. Do not tell other jurors your own personal experiences or those of other persons, or relate any special information. A juror may have special knowledge of matters such as business, technical or professional matters, or the juror may have expert knowledge or opinions, or the juror may know what happened in this or some other lawsuit. To tell the other jurors any of this information is a violation of these instructions.

8. Do not consider, discuss, or speculate whether any party is or is not protected in whole or in part by insurance of any kind. [Omit when insurance is admissible.]

9. The law is determined by the legislature and courts of this state. You are obligated to follow my instructions about the law, regardless of whether you think the law is right or wrong.

10. During the presentation of evidence, the attorneys may make legal objections. If an objection to a question is sustained, disregard the question, and do not speculate about

why it was asked or what the answer might have been. If an objection to a witness's answer is sustained, disregard that answer. It is not in evidence, and should not be considered. Do not speculate about or consider for any reason the objections or my rulings on them.

I stress again that it is imperative that you follow these instructions, as well as any others that I may give you later. If you do not obey these instructions, then it may become necessary for another jury to retry this case with all the resulting waste of your time here and the expense to the litigants and the taxpayers of this county for another trial. Texas law permits proof of violations of the rules of proper jury conduct. By this I mean that jurors and others may be called upon to testify in open court about certain acts of jury misconduct.

Keep your copy of these instructions, and refer to them should any question arise about the rules that govern your conduct during this trial. A violation of any instruction must be reported to me or the bailiff as soon as possible.

PART 3 - COURT'S CHARGE

Before closing arguments begin, the court shall give to each member of the jury a copy of the charge, which shall include the following written instructions with such modifications as the circumstances of the particular case may require:

Ladies and Gentlemen of the Jury:

1. This case is submitted to you by asking question about the facts. Your answers must be based only upon the evidence, including exhibits, admitted during the trial.

2. In considering the evidence, you must follow the law set forth in this charge, as well as all instructions concerning jurors' conduct that I have given you.

3. You are the sole judges of the credibility of witnesses and the weight to be given their testimony.

4. Do not let bias, prejudice, or sympathy play any part in your deliberations.

5. Do not become a secret witness by telling other jurors about other incidents, experiences, or lawsuits. Do not tell other jurors about any special knowledge, information, or expertise you may have. You must confine your deliberations to the evidence presented in the courtroom. This avoids a trial based on secret evidence.

6. Do not discuss or consider attorneys' fees [Omit when attorneys' fees are in issue.]

7. Do not discuss or consider whether any party has insurance. [Omit when

insurance is admissible.]

8. This charge includes the legal instructions and definitions that you should use in reaching your verdict. If no definition is given, the normal meaning of words applies. Do not look up any information in law books or dictionaries.

9. Every answer required by the charge is important.

10. Do not decide who you think should win and then try to answer the questions accordingly. Simply answer the questions; and do not concern yourselves with the effect of your answers.

11. Do not decide a question by any method of chance.

12. If a question calls for a numerical answer, the figure should be one agreed to by the jurors, not one reached by adding together each juror's figure and then dividing by the number of jurors to get an average.

13. Do not do any trading on your answers. That is, one juror must not agree to answer one question a certain way if other jurors will agree to answer another question a certain way.

14. After you retire to the jury room, you will select a presiding juror. You will then deliberate upon your answers.

15. It is the duty of that presiding juror:

a. to preside during the deliberations to maintain order and compliance with all instructions given you;
b. to write, sign, and deliver to the bailiff any communication to me;
c. to conduct the vote; and
d. to write your answers in the spaces provided.

16. You may render your verdict on the vote of ten or more members of the jury. The same ten or more must agree upon each and every answer made.

17. If the verdict is reached by unanimous agreement, the presiding juror will sign the verdict on the certificate page for the entire jury.

18. If the verdict is less than unanimous, the ten or eleven jurors who agree to each and every answer will sign the verdict on the certificate page.

19. If you observe a violation of my instructions outside the jury room, by either a juror or any other person, you must report that to me or the bailiff immediately.

20. During your deliberations, any juror who observes a violation of my instructions shall point out the violation to the offending juror and caution that juror not to violate the instruction again.

21. You must not discuss the case with anyone, not even with other members of the jury, unless all of the jurors are in the jury room. If anyone other than a juror tries to talk to you about the case before you reach a verdict, tell me or the bailiff immediately.

22. When you have answered all applicable questions and signed the verdict, you should inform the bailiff before returning to the courtroom with your verdict.

[Instructions, definitions, and questions to be placed here.]

Certificate

We, the jury, have answered the questions as shown and return these answers to court as our verdict.

Signature of presiding juror if unanimous.

_____

Signatures of jurors voting for the verdict, if not unanimous.

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

_____

PART 4 - JURY RELEASE

The court shall give the jury the following oral instructions after accepting the verdict

and then release them:

Ladies and Gentlemen of the Jury: I earlier instructed you to observe strict secrecy during the trial, and not to discuss this case with anyone except other jurors while you were deliberating. I am now about to discharge you. Once I have discharged you, you are released from secrecy and from all the other orders that I gave you. You will be completely free to discuss anything about this case with anyone. You will be just as free to decline to talk about the case if that is your decision.

[Court's commendation of jurors and the importance of service they have performed may be added here.]

RULE 236. OATH TO JURY

(a) **Oath.** Before opening statements are given, the jurors shall be given by the court or under its direction the following oath: "Do you solemnly swear or affirm that you will return a true verdict, according to the law stated in the court's charge and to the evidence submitted to you under the rulings of this court, so help you God?"

(b) **Affirmation in Lieu of Oath.** If any juror refuses to take the oath as given, the court may use such other oath, affirmation or statement as is calculated to awaken to the juror's conscience and impress the juror's mind with the duty to speak the truth, and which causes the juror to acknowledge that a false statement is subject to the penalties for perjury.

RULE 271. CHARGE TO THE JURY

The court shall prepare a written charge to the jury. The court shall provide the parties written copies of the proposed charge and a reasonable opportunity to prepare their requests and objections and to present them on the record outside the presence of the jury after the conclusion of the evidence and before the charge is read to the jury. After requests and objections are made and ruled upon and any modifications to the charge are made, and before argument, the judge shall read the charge to the jury in open court precisely as written. The court shall deliver a copy of the written charge to each member of the jury. The charge shall be signed by the judge and filed with the clerk.

RULE 277. STANDARDS FOR THE JURY CHARGE

a. **General Standards.** A party is not entitled to the submission of a question, instruction or definition regarding a matter that is not affirmatively raised by the written pleadings and raised by the evidence. The court shall not directly comment on the weight of the evidence or advise the jury of the effect of its answers, but an otherwise proper

question, instruction or definition shall not be objectionable on the ground that it incidentally comments on the weight of the evidence or advises the jury of the effect of its answers.

b. Questions. The court shall submit questions about the disputed material factual issues raised by the pleadings and the evidence. The court shall, whenever feasible, submit the case by broad form questions. The court may predicate the jury's consideration of one or more questions upon specified answers to another question or questions on which the materiality of the predicated question or questions depends. The court may submit a question disjunctively when the evidence shows that only one of the matters inquired about necessarily exists. A proper disjunctive question that submits a defensive theory as an alternative to a claimants theory is not an impermissible inferential rebuttal submission. However, inferential rebuttal questions shall not be submitted.

c. Instructions and Definitions. The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict. The placing of the burden of proof may be accomplished by instructions or by inclusion in the questions.

RULE 278. PRESERVATION OF APPELLATE COMPLAINTS

a. Requests. After the close of the evidence and before or at the time of objecting, or at such earlier time as the court may require, a party shall submit to the court in writing the questions, definitions and instructions requested to be included in the charge on any contention that party was required to plead. The requests must be sufficient to provide the court reasonable guidance in fashioning the charge. Failure to comply with this paragraph shall not preclude the party from assigning error in the charge if an objection is made pursuant to paragraph (b).

b. Objections. A party may not complain of any error in the charge unless that party objects thereto before the charge is read to the jury, stating distinctly the matter objected to and the grounds of the objection. An objection must identify that portion of the charge to which complaint is made and be specific enough to enable the trial court to make an informed ruling on the objection. Objections shall be in writing or shall be made orally in the presence of the court, the court reporter, and opposing counsel. It shall be presumed, unless otherwise noted in the record, that a party making objections did so at the proper time.

c. Obscured or Concealed Objections or Requests. When an objection or request is obscured or concealed by voluminous unfounded objections or requests, minute differentiations or numerous unnecessary objections or requests, such objection or request shall not preserve appellate complaint. No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only. A judgment shall not be reversed because of the failure of the court to submit different shades of the same

question, definition, or instruction.

d. Rulings. The court shall announce its rulings on objections on the record before reading the charge to the jury. In the absence of an express ruling, any objection not cured by the charge is deemed overruled.

e. Evidentiary Sufficiency Complaints. A claim that there is no evidence to support the submission of a question, or that the answer to the question is established as a matter of law, may be made for the first time after the verdict. A claim that there is factually insufficient evidence to support the jury's answer to a question, or that the answer to a question is against the great weight and preponderance of the evidence, may be made only after the verdict. Such claims may be made regardless of whether the submission of the question was requested by the complainant.

Notes and Comments

Comment to 1996 change: Paragraph (a) provides that "failure to comply with this rule shall not preclude the party from assigning error in the charge if an objection is made pursuant to paragraph (b)," but the court may sanction a party who fails to comply with the rule.

RULE 279. OMISSIONS FROM THE CHARGE

a. Omission of Entire Ground. Any independent ground of recovery or defense which is not conclusively established under the evidence and all elements of which are omitted from the charge without preservation of appellate complaint by the party relying thereon is waived.

b. Omission of One or More Elements. When an independent ground of recovery or defense consists of more than one element, and one or more of the elements necessary to sustain such ground of recovery or defense, and necessarily referable thereto, is submitted to and found by the jury, and one or more of such elements is omitted from the charge, the court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted element or elements, if the party aggrieved by the findings has failed to preserve appellate complaint with respect to the omitted elements. If no such written findings are made, the omitted elements shall be deemed found by the court in such manner as to support the judgment if such deemed findings are supported by legally and factually sufficient evidence. The legal and factual sufficiency of the evidence to support express findings made under this rule may be challenged in the same manner as challenges to express findings in nonjury cases.

REPORT OF THE SUBCOMMITTEE

ON THE

POST-TRIAL/PRE-APPEAL RULES

RULES 296-329b

TO THE

SUPREME COURT ADVISORY COMMITTEE

10-11 May 1996

REDLINE VERSION RULES 296-331

RULE 296. REQUESTS FOR FINDINGS OF FACT S AND CONCLUSIONS OF LAW

(a) Entitlement. In any case: (a) tried ~~in~~ to the ~~district or county~~ court without a jury,; (b) tried to a jury in which one or more ultimate issues are tried to the court by agreement; or (c) tried to a jury in which one or more ultimate issues must be tried to the court, a ~~any~~ party may request the judge ~~court~~ 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 the final 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. 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. ~~The party making the request shall serve it on all other parties in accordance with Rule 21a.~~

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

Source: ¶(a), Rule 296; ¶(b), Rule 306c

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 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 shall be immediately called to the attention of the ~~court~~ judge 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.

(c) **Form.** The judge shall state the findings of fact on each ground of recovery or defense raised by the pleadings and evidence in broad form, whenever feasible, in the same manner as questions are submitted to the jury in a jury trial. The judge should make conclusions of law on each ground of recovery or defense necessary to support the judgment, but the failure to do so shall not be error. Each finding of fact and each conclusion of law should be stated by a separate numbered paragraph.

Source: ¶¶ (a), (b), Rule 297; ¶(c) new.

The text of this rule has been slightly edited pursuant to the vote of the committee at our 15-16 March 1996 meeting. This revision is noted only for your review in determining that the editing correctly expresses the will of the committee.

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 judge~~. ~~Each request made pursuant to this rule shall be served on each party to the suit in accordance with Rule 297(a).~~

(b) **Time for Judge's Response.** The ~~court~~ judge shall file any additional or amended finding and conclusions that are appropriate within ten days after ~~such~~ the request if 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.

Source: Rule 298.

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~~ or ~~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~~ Upon appeal, a ground or defense not conclusively established under the evidence, no element of which have been requested or found, is waived.

(b) **Presumed Findings.** ~~w~~When ~~one or more~~ an elements ~~thereof~~ of a ground of recovery or defense ~~have~~ has been found by the trial ~~court~~ judge, a finding is presumed in support of the judgment on an omitted ~~unrequested~~ elements of the ground to which the element found is 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 finding, however, shall be presumed on an omitted element for which an additional finding has been requested.

Source: Rule 299.

The text of this rule has been slightly edited for purposes of improving grammar per Stephen Yelenosky's request.

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 clerk of the court as a document separate from the judgment, ~~not be~~ If findings of fact are recited in a judgment in violation of this rule, and ~~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.~~

Source: Rule 299a.

RULE 300. JUDGMENTS, DECREES AND ORDERS

(a) **Rendition, Signing and Filing.** A judgment is rendered when the judge announces it in open court, or if it is not so announced, when it is signed by the judge. A

judgment orally announced shall be promptly reduced to writing and signed by the judge. A signed judgment shall be promptly filed with the clerk of the court.

Source: New rule; codification of existing law.

(b) Final Judgment.

(1) Definition. A final judgment for purposes of post-trial and appellate procedure in the same case is a signed order disposing of all parties and claims, either expressly or by implication.

(2) Disposition by Implication. A claim is disposed of by implication if a judgment is rendered on the merits after a conventional trial and no severance or separate trial of the claim has been ordered.

(3) Separate Orders, Conflicts. When different parties or separate claims are disposed of by separate orders, no one of which by its terms disposes of all parties and all claims, none of the orders is final until a judgment is signed that disposes of all parties and claims. A final judgment may incorporate by reference the provisions of an earlier signed interlocutory order, but if any provision of the earlier order conflicts with the final judgment, the final judgment controls, except that no relief previously granted may be nullified by a general provision in the final judgment that all relief not previously granted is denied.

The final clause of Rule 300(b)(3), beginning with the word "except" has been added to conform with the vote of the committee to clarify the alternative adopted at our 15-16 March 1996 meeting. Of course, the purpose of this addition was to make clear the previous relief that has been expressly granted in a prior judgment or order will not be overruled by a general "Mother Hubbard" clause.

Source: New rule.

(c) Form and Substance: General. The final judgment shall:

(1) contain the names of the parties;

(2) conform to the pleadings, the facts proved, and the verdict, if any, unless a judgment is rendered as a matter of law;

Alternative 1: Approved on 15-16 March 1996

(3) dispose of all parties and claims; and

Alternative 2: Include relief necessary for final judgment

(3) state the relief, either in law or in equity, granted or denied, to or against, each party; and

Justice Guittard and I believe that the change in the language made at the last meeting was ill advised and we propose to return to the prior language as shown in Alternative 2. Without a requirement that a judgment state that the relief given to each party, the judgment is not final pursuant to such cases as *Burleson v. City of Houston*, 07-95-0083-CV (Tex. Civ. App.—Amarillo March 20, 1996, n.w.h) (not designated for publication). The court held that the judgment was not final because it only stated that one motion for summary judgment was granted and the other denied. In other words, the trial court judgment needed to state the relief given to the winner.

(4) if appropriate, direct the issuance of process and such writs as may be necessary to enforce the judgment.

Source: Rules 300, 301, 306, 308

(d) Form and Substance: Specific.

(1) Personal Property. ~~Where the~~ A judgment ~~is~~ for personal property, ~~and it is shown by the pleadings, and evidence and the verdict~~ if any, ~~that such property has an especial value to the plaintiff, the court~~ may ~~award a special~~ 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 mortgages ~~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 sell 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 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 as a Matter of Law. A party may move for judgment as a matter of law, and include a request to disregard a jury finding as a matter of law, on a

claim or defense:

(1) if the evidence, after the adverse party rest its evidence, or at the close of all of the evidence, or after the verdict in a jury case and before judgment, (i) is legally insufficient 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 (ii) if, under the controlling law, a judgment cannot properly be rendered against the movant on that claim or defense without a finding adverse to the movant on an issue that has been disregarded, and a judgment as a matter of law should be rendered for movant as to that 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 a complaint that the court's charge fails to express controlling law.

The "unless" clause of paragraph (b)(2) has been slightly changed to more accurately express the waiver that occurs per the holding in *Allen v. American Nat'l Ins. Co.*, 380 S.W.2d 604, 609 (Tex. 1964). The "unless" clause has also been added to paragraph (c)(2) below to conform the language of the identical ground in the motion to modify.

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

(c) Motion to Modify Judgment. A party may move to modify a judgment as a matter of law, including a request to disregard a jury finding as a matter of law, after a judgment has been rendered:

(1) if the evidence is legally insufficient for 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, unless the movant waived application of controlling law by failing to preserve a complaint that the court's charge fails to express controlling law.; or

(3) if the judgment should be vacated, modified, reformed, or corrected in any respect for any reason.

A motion for judgment as a matter of law is not a prerequisite to a motion to modify a

judgment.

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 Rule 302.

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

(e) **Motion for Judgment Record Correction.** 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 identified 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 a party may file multiple motions and each 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 injury to the movant has probably resulted from: (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;

(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 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: Rule 321, 322

(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; or

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

Source: New, to codify existing requirements.

(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: (i) any outside influence was improperly brought to bear upon any juror, or (ii) the juror was qualified to serve.

The text of this rule has been slightly changed per the vote at the 15-16 March 1996 meeting. The text may need to be reconsidered to be absolutely certain that it conforms to the Evidence Subcommittee's version of TEX. R. CIV. EVID. 606(b)

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: New to codify existing law on ¶ (1); Rule 315 on ¶ (2).

(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 for new trial or a motion to modify the judgment 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) good cause to set aside a judgment after citation by publication-cation; or

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

Source: Rule 324(b), 329

(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~~ A 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 Rule 165a 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]
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 on Jury Verdict. A motion for judgment on the jury verdict may be presented at any time before a final judgment has been signed. A motion for judgment on the jury verdict is overruled by operation of law when a final judgment is signed that does not grant the motion.

(b) Motion for Judgment as a Matter of Law. A motion for judgment as a matter of law may be presented after the adverse party rest its evidence, or at the close of all the evidence, or after the verdict in a jury case and before judgment, and shall not be considered waived if not presented earlier. A motion for judgment as a matter of law shall not be presented after a final judgment has been signed. A ground in a motion for judgment as a matter of law is overruled by operation of law when a final judgment is signed that does not grant that ground.

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

(c) Motion to Modify a Judgment and Motion for New Trial.

(1) Time to File. A motion to modify a judgment and a motion for new trial~~, if filed,~~ shall be filed ~~prior to~~ within thirty days after the final judgment ~~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 by the movant is overruled and within thirty days after the judgment or other order complained of is signed~~.

(2) When Motion Overruled. ~~In the event an original or an amended~~ If a motion to modify a judgment or 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~~ any such motion shall be considered overruled by operation of law upon the expiration of ~~the seventy-five day~~ that period.

(3) Special Deadline: Publication. 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 final judgment was signed, unless a motion has been previously filed by such defendant or attorney pursuant to paragraph (c)(1).

Source: Rule 329, 329(b).

(d) Motion to Correct Judgment Record. 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 (c) (1).

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

(e) 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 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 post-judgment 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 is signed, the clerk of the court shall immediately give notice of the signing to each ~~parties~~ or the ~~pertussis 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 (e) (1) ~~of this rule~~, except ~~as provided in~~ under paragraph (e) (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, or the party's attorney, has not, within twenty days after the final judgment or appealable order was signed, received the notice require by paragraph (e) (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, or the party's attorney, 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 (e)(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 that run from the date the final 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 Rule 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**~~ **Citation** ~~Served~~ **by Publication.** ~~With respect to~~ For a motion for new trial filed more than thirty days but within two years after the final judgment was signed, ~~pursuant to Rule 329~~ under ~~sub~~-paragraph (c)(3) ~~on this~~ rule

when ~~process has been~~ citation was 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.~~

Alternative 1: Approved previously and amended 15-16 March 1996

A prematurely filed motion to modify a judgment or 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 attacks. No motion to modify a judgment or a motion for new trial filed prior to the signing of the final judgment extends the trial court's plenary power provided in Rule 305 or any timetable prescribed in the Texas Rules of Appellate Procedure. A motion filed on the same day as the judgment is signed is not prematurely filed.

Alternative 2: Conforming to TRAP 41(c)

No motion for new trial or motion to modify the judgment shall be held ineffective because prematurely filed, but every such motion shall be deemed to have been filed on the date of but subsequent to the signing of the judgment that the motion attacks.

Justice Guittard calls to our attention that Alternative 1 conflicts with TEX. R. APP. P. 41(c) as sent by the committee to the Supreme Court for approval. He suggests that we reconsider Alternative 1 by adopting Alternative 2.

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

~~RULE 305. PROPOSED JUDGMENT~~

[Moved to proposed TRCP 301(f)]

RULE 305. PLENARY POWER OF THE TRIAL COURT

Alternative 1: Present Rule with Minor Textual Changes

(a) Definition. Plenary power is the complete power of the court to act, within its jurisdiction, according to law or equity, on any issue of procedure or substance as to any party before the court. After the expiration of plenary power, a court may exercise only such power as is expressly authorized by rule or statute.

(b) Duration.

(1) ~~The trial court, r~~Regardless of whether an appeal has been perfected, the trial court has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after all such timely filed motions are overruled, either by a written and signed order or by operation of law, whichever ~~comes first~~ is sooner.

(2) Regardless of whether an appeal has been perfected, ~~I~~if a timely motion for new trial or motion to modify the judgment is ~~timely~~ filed by any party, the trial court has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after all such timely filed motions have been overruled, either by a written and signed order or by operation of law, whichever ~~comes first~~ is sooner.

(c) After Expiration. On expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause, filed within the time allowed by law; provided that the court may at any time correct a clerical error in the record of a judgment and render judgment nunc pro tunc under Rule ~~316~~ 301(e), and may also sign an order declaring a previous judgment or order to be void because signed after the court's plenary power had expired.

Source: Rule 329b, paragraphs (d), (e), and (f)

Alternative 2: Present Rule with More Comprehensive Statement of Present Practice

(a) Definition. Plenary power is the complete power of the court to act, within its jurisdiction, according to law or equity, on any issue of procedure or substance as to any party before the court. After the expiration of plenary power, a court may exercise only such power as is expressly authorized by rule or statute.

(b) Duration. Regardless of whether an appeal has been perfected, the trial court has power to modify or vacate a judgment or grant a new trial:

(1) within thirty days after the judgment is signed, or

(2) If any party has filed a timely motion for new trial, motion to modify the judgment, or motion to reinstate a judgment after dismissal for want of prosecution, thirty days after all such timely motions have been overruled, either by a signed order or by operation of law.

(c) After Expiration. After expiration of the time prescribed by paragraph (b), the trial court cannot modify or vacate the judgment or grant a new trial, but the court may, after expiration of that time:

(1) correct a clerical error in the record of the judgment and sign a corrected judgment;

(2) sign an order declaring a previous judgment or order void because signed after the court's power as prescribed in paragraph (b) had expired;

(3) issue any order or process or entertain any proceeding for enforcement of the judgment within the time allowed for execution;

(4) file findings of fact and conclusions of law if a timely request for such findings and conclusions has been filed;

(5) entertain and act for sufficient cause on any bill of review filed within the time allowed by law;

(6) grant a new trial for good cause on a motion filed within the time allowed by Rule 304(e)(5) if citation was served by publication ;

(7) grant a new trial or modify the judgment within the time allowed by Rule 304(e)(4) when the moving party did not have timely notice or knowledge of the judgment.

Alternative 3: Alternative 2 Restated but Eliminating Effect of Signed Order on Appellate Timetables in ¶ (a)(2)

(a) **Definition.** Plenary power is the complete power of the court to act, within its jurisdiction, according to law or equity, on any issue of procedure or substance as to any party before the court. After the expiration of plenary power, a court may exercise only such power as is expressly authorized by rule or statute.

(b) **Duration.** Regardless of whether an appeal has been perfected, the trial court has power to modify or vacate a judgment or grant a new trial:

(1) within thirty days after the judgment is signed, or

(2) If any party has filed a timely motion for new trial, motion to modify the judgment, or motion to reinstate a judgment after dismissal for want of prosecution, one hundred and five days after the judgment is signed.

(c) **After Expiration.** After expiration of the time prescribed by paragraph (b), the trial court cannot modify or vacate the judgment or grant a new trial, but the court may, after expiration of that time:

(1) correct a clerical error in the record of the judgment and sign a corrected judgment;

(2) sign an order declaring a previous judgment or order void because signed after the court's power as prescribed in paragraph (b) had expired;

(3) issue any order or process or entertain any proceeding for enforcement of the judgment within the time allowed for execution;

(4) file findings of fact and conclusions of law if a timely request for such findings and conclusions has been filed;

(5) entertain and act for sufficient cause on any bill of review filed within the time allowed by law;

(6) grant a new trial for good cause on a motion filed within the time allowed by Rule 304(e)(5) if citation was served by publication ;

(7) grant a new trial or modify the judgment within the time allowed by Rule 304(e)(4) when the moving party did not have timely notice or knowledge of the judgment.

Except for paragraph (a), Justice Guittard purposes consideration of the three alternatives as acceptable versions to accomplish the vote of the committee at our 15-16 March 1996 meeting to more nearly restate the current rule. Paragraph (a) has been added at the suggestion of Justice Duncan, but I alone have drafted the"definition." The inclusion of the definition may not be within the vote to restate the current rule; however, the definition is included for your consideration and can easily be removed or edited at the will of the committee.

Source: Rule 329, 329b; New Rule in Part.

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(e)(1)-(6)]

RULE 306b. [PREVIOUSLY REPEALED]

RULE 306c. PREMATURELY FILED DOCUMENTS

[Moved to proposed TRCP 304(e)(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.~~

~~Clerical mistakes in the record of any judgment may be corrected by the judge in open court according to the truth or justice of the case after notice of the motion therefor has been given to the parties interested in such judgment, as provided in Rule 21a, and thereafter the execution shall conform to the judgment as amended.~~

~~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.~~

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 REPEAL]~~

~~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)(4)]

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

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

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

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

RULE 329a. COUNTY COURT CASES
[No change.]

RULE 329b. TIME FOR FILING MOTIONS
[Moved to proposed TRCP 304, (c), (d), 305 (b), (c)]

RULE 330. RULES OF PRACTICE AND PROCEDURE IN CERTAIN DISTRICT COURTS
[No change]

RULE 331. [PREVIOUSLY REPEALED]

CLEAR VERSION RULES 296-331

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

(a) **Entitlement.** In any case: (a) tried to the court without a jury; (b) tried to a jury in which one or more ultimate issues are tried to the court by agreement; or (c) tried to a jury in which one or more ultimate issues must be tried to the court, a party may request the judge to state in writing 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 the final 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. 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 is effective although prematurely filed. A premature request for findings of fact and conclusions of law is deemed to have been filed on the date of, but subsequent to, the signing of the judgment.

Source: ¶(a), Rule 296; ¶(b), Rule 306c

RULE 297. FILING FINDINGS OF FACT AND CONCLUSIONS OF LAW

(a) **Time to File.** The judge shall file findings of fact and conclusions of law within twenty days after a timely request is filed. The judge shall cause a copy of the findings and conclusions to be mailed to each party in the suit.

(b) **Late Filing.** If the 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 a "Notice of Past Due Findings of Fact and Conclusions of Law" which shall be immediately called to the attention of the judge 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 judge to file findings of fact and conclusions of law is extended to forty days from the date the original request was filed.

(c) **Form.** The judge shall state the findings of fact on each ground of recovery or defense raised by the pleadings and evidence in broad form, whenever feasible, in the same manner as questions are submitted to the jury in a jury trial. The judge should make conclusions of law on each ground of recovery or defense necessary to support the judgment, but the failure to do so shall not be error. Each finding of fact and each conclusion of law should be stated by a separate numbered paragraph.

Source: ¶¶ (a), (b), Rule 297; ¶(c) new.

The text of this rule has been slightly edited pursuant to the vote of the committee at our 15-16 March 1996 meeting. This revision is noted only for your review in determining that the editing correctly expresses the will of the committee.

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

(a) **Time for Request.** After the judge files original findings of fact and conclusions of law, any party may file a request for specified additional or amended findings or conclusions with the clerk. within twenty days after the filing of the original findings and conclusions .

(b) **Time for Judge's Response.** The judge shall file any additional or amended finding and conclusions that are appropriate within ten days after the request if filed

(c) **Appellate Review.** . Refusal of the judge to make a finding requested shall be reviewable on appeal.

Source: **Rule 298.**

RULE 299. OMITTED GROUNDS AND PRESUMED FINDINGS

(a) **Omitted Grounds.** When findings of fact are filed by the trial judge they shall form the basis of the judgment upon all grounds of recovery or . Upon appeal, a ground or defense not conclusively established under the evidence, no element of which have been requested or found, is waived.

(b) **Presumed Findings.** When an element of a ground of recovery or defense has been found by the trial judge, a finding is presumed in support of the judgment on an

omitted element of the ground to which the element found is necessarily referable, when supported by factually sufficient evidence. . No finding, however, shall be presumed on an omitted element for which an additional finding has been requested.

Source: Rule 299.

The text of this rule has been slightly edited for purposes of improving grammar per Stephen Yelenosky's request.

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

Unless otherwise provided by law, findings of fact and conclusions of law shall be requested, prepared and filed with the clerk of the court as a document separate from the judgment. If findings of fact are recited in a judgment in violation of this rule, and if there is a conflict between the findings recited in the judgment and the findings made pursuant to Rules 297 and 298, the latter findings will control for appellate purposes.

Source: Rule 299a.

RULE 300. JUDGMENTS, DECREES AND ORDERS

(a) **Rendition, Signing and Filing.** A judgment is rendered when the judge announces it in open court, or if it is not so announced, when it is signed by the judge. A judgment orally announced shall be promptly reduced to writing and signed by the judge. A signed judgment shall be promptly filed with the clerk of the court.

Source: New rule; codification of existing law.

(b) **Final Judgment.**

(1) **Definition.** A final judgment for purposes of post-trial and appellate procedure in the same case is a signed order disposing of all parties and claims, either expressly or by implication.

(2) **Disposition by Implication.** A claim is disposed of by implication if a

judgment is rendered on the merits after a conventional trial and no severance or separate trial of the claim has been ordered.

(3) **Separate Orders, Conflicts.** When different parties or separate claims are disposed of by separate orders, no one of which by its terms disposes of all parties and all claims, none of the orders is final until a judgment is signed that disposes of all parties and claims. A final judgment may incorporate by reference the provisions of an earlier signed interlocutory order, but if any provision of the earlier order conflicts with the final judgment, the final judgment controls, except that no relief previously granted may be nullified by a general provision in the final judgment that all relief not previously granted is denied.

The final clause of Rule 300(b)(3), beginning with the word "except" has been added to conform with the vote of the committee to clarify the alternative adopted at our 15-16 March 1996 meeting. Of course, the purpose of this addition was to make clear the previous relief that has been expressly granted in a prior judgment or order will not be overruled by a general "Mother Hubbard" clause.

Source: New rule.

(c) **Form and Substance: General.** The final judgment shall:

(1) contain the names of the parties;

(2) conform to the pleadings, the facts proved, and the verdict, if any, unless a judgment is rendered as a matter of law;

Alternative 1: Approved on 15-16 March 1996

(3) dispose of all parties and claims; and

Alternative 2: Include relief necessary for final judgment

(3) state the relief, either in law or in equity, granted or denied, to or against, each party; and

Justice Guittard and I believe that the change in the language made at the last meeting was ill advised and we propose to return to the prior language as shown in Alternative 2. Without a requirement that a judgment state that the relief given to each party, the judgment is not final pursuant to such cases as *Burleson v. City of Houston*, 07-95-0083-CV (Tex. Civ. App.—Amarillo March 20, 1996, n.w.h) (not designated for publication). The court held that the judgment was not final because it only stated that one motion for summary judgment was granted and the other denied. In other words, the trial court judgment needed to state the relief given to the winner.

(4) if appropriate, direct the issuance of process and such writs as may be necessary to enforce the judgment.

Source: Rules 300, 301, 306, 308

(d) **Form and Substance: Specific.**

(1) **Personal Property.** A judgment for personal property, may provide for a writ for seizure and delivery of such property .

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

(2) **Foreclosure Proceedings.** A judgment for foreclosure of a mortgage or other lien shall provide for: (i) recovery of the debt, damages and costs; (ii) foreclosure of the lien on the property subject to the lien; (iii) an order to sell the property as under execution, except in judgments against personal representatives, ; and (iv) if the property cannot be found or if the proceeds of the sale are insufficient to satisfy the judgment, then execution on other property of the judgment debtor for the balance remaining unpaid. The judgment foreclosing a lien on real estate has the force and effect of a writ of possession as between the partiesand any person claiming under the judgment debtor by a right acquired pending suit and the judgment shall so provide The judgment shall also direct the sheriff or other officer to place the purchaser of the property r in possession within thirty days after the 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 enforcement shall be attempted on a judgment against a personal representative, but it shall be certified to the court, sitting in probate, to be enforced under the law, except that a judgment against an independent executor may be enforced against the property of the testator in the hands of the independent executor.

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. A party may move for judgment on the verdict of the jury.

Source: Rule 305.

(b) Motion for Judgment as a Matter of Law. A party may move for judgment as a matter of law, and include a request to disregard a jury finding as a matter of law, on a claim or defense:

(1) if the evidence, after the adverse party rest its evidence, or at the close of all of the evidence, or after the verdict in a jury case and before judgment, (i) is legally insufficient 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 (ii) if, under the controlling law, a judgment cannot properly be rendered against the movant on that claim or defense without a finding adverse to the movant on an issue that has been disregarded, and a judgment as a matter of law should be rendered for movant as to that 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 a complaint that the court's charge fails to express controlling law.

The "unless" clause of paragraph (b)(2) has been slightly changed to more accurately express the waiver that occurs per the holding in *Allen v. American Nat'l Ins. Co.*, 380 S.W.2d 604, 609 (Tex. 1964). The "unless" clause has also been added to paragraph (c)(2) below to conform the language of the identical ground in the motion to modify.

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

(c) **Motion to Modify Judgment.** A party may move to modify a judgment as a matter of law, including a request to disregard a jury finding as a matter of law, after a judgment has been rendered:

(1) if the evidence is legally insufficient for 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, unless the movant waived application of controlling law by failing to preserve a complaint that the court's charge fails to express controlling law.; or

(3) if the judgment should be vacated, modified, reformed, or corrected in any respect for any reason.

A motion for judgment as a matter of law is not a prerequisite to a motion to modify a judgment.

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 Rule 302.

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

(e) **Motion for Judgment Record Correction.** 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 identified 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 a party may file multiple motions and each should be considered independently.

RULE 302. MOTIONS FOR NEW TRIAL

(a) Grounds. For good cause, a new trial, or partial new trial under paragraph (f), may be granted and a judgment may be set aside on motion of a party or on the judge's own motion, 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 injury to the movant has probably resulted from: (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;

(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 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.

Source: Rule 321, 322

(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; or

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

Source: New, to codify existing requirements.

(d) Procedure For Jury Misconduct.

(1) **Hearing.** When the ground of the motion for new trial, supported by affidavit, is misconduct of the jury or of the officer in charge of the jury, or improper communication made to the jury, or a juror's erroneous or incorrect answer on voir dire examination, the judge shall hear evidence from members of the jury or others in open court and may grant a new trial 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 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 jury's deliberations, or on any juror's mind or emotions or mental processes, as influencing any other juror's assent to or dissent

from the verdict . Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes. However, a juror may testify whether: (i) any outside influence was improperly brought to bear upon any juror; or (ii) the juror was qualified to serve.

The text of this rule has been slightly changed per the vote at the 15-16 March 1996 meeting. The text may need to be reconsidered to be absolutely certain that it conforms to the Evidence Subcommittee's version of TEX. R. CIV. EVID. 606(b)

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 may issue only for the balance of such judgment.

Source: New to codify existing law on ¶ (1); Rule 315 on ¶ (2).

(f) Partial New Trial. If the judge is of the opinion that a new trial should be granted on a point or points that affect only a part of the matters in controversy that is clearly separable without unfairness to the parties, the judge may grant a new trial as to that part only, but a separate trial on unliquidated damages alone shall not be ordered if liability issues are contested.

Source: Rule 320.

RULE 303. PRESERVATION OF COMPLAINTS

(a) **General Preservation Rule.** As a prerequisite to the presentation of a complaint for appellate review, a timely request, objection, or motion must appear of record, stating the specific grounds for the ruling 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. 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 for new trial or a motion to modify the judgment 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 refusal to rule is sufficient to preserve the complaint. 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;

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

(3) a jury finding is against the overwhelming 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) good cause to set aside a judgment after citation by publication-cation; or

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

Source: Rule 324(b), 329

(c) **Nonjury Cases: Legal and Factual Sufficiency of Evidence.** 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 evidence is excluded, the offering party shall as soon as practicable, but before the 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 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 , when included in the statement of facts certified by the reporter or recorder, shall establish the nature of the evidence, the objections and the ruling. The judge may add any other or further statement showing the character of the evidence, the form in which offered, the objection made and the ruling. No further offer need be made. No formal bills of exception are needed to authorize appellate review of exclusion of evidence. When the judge hears objections to offered evidence out of the presence of the jury and rules that the evidence be admitted, the objections are deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating 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 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 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 allowance and signature.

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

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

(7) Should the parties not agree to the judge's suggested corrections, the judge shall return the bill to the complaining party with the judge's refusal endorsed on it , and shall prepare, sign and file with the clerk such a bill of exception as will, in the judge's opinion, present the ruling of the court as it actually occurred.

(8) Should the complaining party be dissatisfied with the bill filed by the judge, 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 , have it filed as part of the record of the cause. The truth of the matter may be controverted and maintained by affidavits, not exceeding five in number on each side, filed with the papers of the cause, within ten days after the filing of the bill . On appeal the truth of the bill shall be determined from the affidavits so filed.

(9) In the event of conflict between a formal bill and the statement of facts, the bill 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. A 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 shall be separately listed in the certified bill of costs , and 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 or if a timely motion for new trial, motion to

modify, request for findings, or motion to reinstate pursuant to Rule 165a has been filed, formal bills of exception shall be filed within ninety days after the judgment is signed. When a formal bill of exception is filed, it may be included in the transcript or in a supplemental transcript.

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

[PROPOSED FOR REPEAL]
RULE 304. TIMETABLES

(a) **Motion for Judgment on Jury Verdict.** A motion for judgment on the jury verdict may be presented at any time before a final judgment has been signed. A motion for judgment on the jury verdict is overruled by operation of law when a final judgment is signed that does not grant the motion.

(b) **Motion for Judgment as a Matter of Law.** A motion for judgment as a matter of law may be presented after the adverse party rest its evidence, or at the close of all the evidence, or after the verdict in a jury case and before judgment, and shall not be considered waived if not presented earlier. A motion for judgment as a matter of law shall not be presented after a final judgment has been signed. A ground in a motion for judgment as a matter of law is overruled by operation of law when a final judgment is signed that does not grant that ground.

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

(c) **Motion to Modify a Judgment and Motion for New Trial.**

(1) **Time to File.** A motion to modify a judgment and a motion for new trialshall be filed within thirty days after the final judgment is signed. One or more amended or additional motions 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 .

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

(3) **Special Deadline: Publication.** 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 final judgment was signed, unless a motion has been previously filed by such defendant or attorney pursuant to paragraph (c)(1).

Source: Rule 329, 329(b).

(d) Motion to Correct Judgment Record. 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 (c) (1).

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

(e) **Effective Dates and Beginning of Periods**

(1) **Beginning of Periods.** The date a final judgment or appealable order is signed as shown of record determines the beginning of the period during which (i) the court may exercise plenary power to grant a motion to modify, 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 post-judgment document necessary to preserve the rights of the party on appeal.

(2) **Date to be Shown.** All judgments, decisions, and orders of any kind shall be reduced to writing and signed by the trial judge with the date of signing expressly stated 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; the absence of a showing of the date in the record does not invalidate a judgment or an order.

(3) **Notice of Judgment.** When the final judgment or appealable order is signed, the clerk of the court shall immediately give notice of the signing to each or the attorney by first-class mail Failure to comply with this rule shall not affect the periods mentioned in paragraph (e) (1) , except under paragraph (e) (4).

(4) **No Notice of Judgment: Additional Time.** If a party affected by a final judgment or appealable order, or the party's attorney, has not, within twenty days after the final judgment or appealable order was signed, received the notice

require by paragraph (e) (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, or the party's attorney, 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) . **Procedure to Gain Additional Time.** To establish the application of paragraph (e)(4), the party adversely affected must file a motion in the trial court stating the date on which the party or the party's 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 the party or the party's 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 include this finding in a written order.

(6) . **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 that run from the date the final judgment is signed shall run from the time the modified judgment is signed. If a correction to a judgment is made pursuant to Rule 301(e) after expiration 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 date of the signing of the corrected judgment for any complaint that would not apply to the original judgment.

(7) **Citation by Publication.** For a motion for new trial filed more than thirty days but within two years after the final judgment was signed, under paragraph (c)(3)rule when citation was served by publication, the periods shall be computed as if the judgment were signed on the date of filing the motion.

(8) **Premature Filing.**

Alternative 1: Approved previously and amended 15-16 March 1996

A prematurely filed motion to modify a judgment or 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 attacks. No motion to modify a judgment or a motion for new trial filed prior to the signing of the final judgment extends the trial court's plenary power provided in Rule 305 or any timetable prescribed in the Texas Rules of Appellate Procedure. A motion filed on the same day as the judgment is signed is not prematurely filed.

Alternative 2: Conforming to TRAP 41(c)

No motion for new trial or motion to modify the judgment shall be held ineffective because prematurely filed, but every such motion shall be deemed to have been filed on the date of but subsequent to the signing of the judgment that the motion attacks.

Justice Guittard calls to our attention that Alternative 1 conflicts with TEX. R. APP. P. 41(c) as sent by the committee to the Supreme Court for approval. He suggests that we reconsider Alternative 1 by adopting Alternative 2.

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

[Moved to proposed TRCP 301(f)]

RULE 305. PLENARY POWER OF THE TRIAL COURT

Alternative 1: Present Rule with Minor Textual Changes

(a) **Definition.** Plenary power is the complete power of the court to act, within its jurisdiction, according to law or equity, on any issue of procedure or substance as to any party before the court. After the expiration of plenary power, a court may exercise only such power as is expressly authorized by rule or statute.

(b) **Duration.**

(1) Regardless of whether an appeal has been perfected, the trial court has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after all such timely filed motions are overruled, either by a written and signed order or by operation of law, whichever is sooner.

(2) Regardless of whether an appeal has been perfected, if a timely motion for new trial or motion to modify the judgment is filed by any party, the trial court has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after all such timely filed motions have been overruled, either by a written and signed order or by operation of law, whichever is sooner.

(c) After Expiration. On expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause, filed within the time allowed by law; provided that the court may at any time correct a clerical error in the record of a judgment and render judgment nunc pro tunc under Rule 301(e), and may also sign an order declaring a previous judgment or order to be void because signed after the court's plenary power had expired.

Source: Rule 329b, paragraphs (d), (e), and (f)

Alternative 2: Present Rule with More Comprehensive Statement of Present Practice

(a) Definition. Plenary power is the complete power of the court to act, within its jurisdiction, according to law or equity, on any issue of procedure or substance as to any party before the court. After the expiration of plenary power, a court may exercise only such power as is expressly authorized by rule or statute.

(b) Duration. Regardless of whether an appeal has been perfected, the trial court has power to modify or vacate a judgment or grant a new trial:

(1) within thirty days after the judgment is signed, or

(2) If any party has filed a timely motion for new trial, motion to modify the judgment, or motion to reinstate a judgment after dismissal for want of prosecution, thirty days after all such timely motions have been overruled, either by a signed order or by operation of law.

(c) After Expiration. After expiration of the time prescribed by paragraph (b), the trial court cannot modify or vacate the judgment or grant a new trial, but the court may, after expiration of that time:

(1) correct a clerical error in the record of the judgment and sign a corrected judgment;

(2) sign an order declaring a previous judgment or order void because signed after the court's power as prescribed in paragraph (b) had expired;

(3) issue any order or process or entertain any proceeding for enforcement of the judgment within the time allowed for execution;

(4) file findings of fact and conclusions of law if a timely request for such findings and conclusions has been filed;

(5) entertain and act for sufficient cause on any bill of review filed within the time allowed by law;

(6) grant a new trial for good cause on a motion filed within the time allowed by Rule 304(e)(5) if citation was served by publication ;

(7) grant a new trial or modify the judgment within the time allowed by Rule 304(e)(4) when the moving party did not have timely notice or knowledge of the judgment.

Alternative 3: Alternative 2 Restated but Eliminating Effect of Signed Order on Appellate Timetables in ¶ (a)(2)

(a) **Definition.** Plenary power is the complete power of the court to act, within its jurisdiction, according to law or equity, on any issue of procedure or substance as to any party before the court. After the expiration of plenary power, a court may exercise only such power as is expressly authorized by rule or statute.

(b) **Duration.** Regardless of whether an appeal has been perfected, the trial court has power to modify or vacate a judgment or grant a new trial:

(1) within thirty days after the judgment is signed, or

(2) If any party has filed a timely motion for new trial, motion to modify the judgment, or motion to reinstate a judgment after dismissal for want of prosecution, one hundred and five days after the judgment is signed.

(c) **After Expiration.** After expiration of the time prescribed by paragraph (b), the trial court cannot modify or vacate the judgment or grant a new trial, but the court may, after expiration of that time:

(1) correct a clerical error in the record of the judgment and sign a corrected judgment;

(2) sign an order declaring a previous judgment or order void because signed after the court's power as prescribed in paragraph (b) had expired;

(3) issue any order or process or entertain any proceeding for enforcement of the judgment within the time allowed for execution;

(4) file findings of fact and conclusions of law if a timely request for such findings and conclusions has been filed;

(5) entertain and act for sufficient cause on any bill of review filed within the time allowed by law;

(6) grant a new trial for good cause on a motion filed within the time allowed by Rule 304(e)(5) if citation was served by publication ;

(7) grant a new trial or modify the judgment within the time allowed by Rule 304(e)(4) when the moving party did not have timely notice or knowledge of the judgment.

Except for paragraph (a), Justice Guittard purposes consideration of the three alternatives as acceptable versions to accomplish the vote of the committee at our 15-16 March 1996 meeting to more nearly restate the current rule. Paragraph (a) has been added at the suggestion of Justice Duncan, but I alone have drafted the"definition." The inclusion of the definition may not be within the vote to restate the current rule; however, the definition is included for your consideration and can easily be removed or edited at the will of the committee.

Source: Rule 329, 329b; New Rule in Part.

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(e)(1)-(6)]

RULE 306b. [PREVIOUSLY REPEALED]

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

RULE 306d. [PREVIOUSLY REPEALED]

[PROPOSED FOR REPEAL]

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]

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

[PROPOSED FOR REPEAL]

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]

[PROPOSED FOR REPEAL]

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]

(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)(4)]

(b)

(c)

(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(e)(7)]

RULE 329a. COUNTY COURT CASES
[No change.]

RULE 329b. TIME FOR FILING MOTIONS
[Moved to proposed TRCP 304, (c), (d), 305 (b), (c)]

RULE 330. RULES OF PRACTICE AND PROCEDURE IN CERTAIN DISTRICT COURTS
[No change]

RULE 331. [PREVIOUSLY REPEALED]

SECTION NINE. PETITION FOR REVIEW AND RESPONSE IN THE SUPREME COURT

RULE 130. PETITION FOR REVIEW

(a) Method of Review. Any party seeking relief from the judgment of a court of appeals must file in the Supreme Court a petition for review addressed to "The Supreme Court of Texas."

(b) Contents of Petition. The petition for review shall, under appropriate headings and in the order here indicated, contain the following:

(1) *Identity of Parties and Counsel.* A complete list of the parties to the trial court's final judgment and the names and addresses of their counsel in the trial and appellate courts, if any. If a party is not represented by an attorney, the address of that party shall be stated. If the address is not known, the petitioner shall certify that a diligent inquiry was made to determine the address but that the petitioner has been unable to discover it. The certificate shall give any available information that might serve to identify and locate the party, including the probable county of residence of that party. If the petitioner is not represented by an attorney, the certificate shall be under oath.

(2) *Table of Contents.* A table of contents with references to the pages of the petition where the discussion of each issue or point may be found. The subject matter of each issue, point or group of issues or points shall be indicated in the table of contents.

(3) *Index of Authorities.* An index of authorities alphabetically arranged with references to the pages of the petition where the authorities are cited.

(4) *Statement of the Case.* A short and concise statement of the nature of the case (*i.e.*, whether it is a suit for damages, on a note, or in trespass to try title), and that the statement contained in the opinion of the court of appeals is correct, except in any particulars pointed out. The statement should seldom exceed one-half page. The facts should be reserved and stated in the argument in connection with the issues or points to which they are pertinent.

(5) *Statement Concerning Jurisdiction.* A statement that the Supreme Court has jurisdiction under a particular subsection of section 22.001 of the Government Code (*e.g.* "The Supreme Court has jurisdiction of this suit under Government Code section 22.001(a)(6)"), unless the jurisdiction of the Supreme Court is based on a conflict of decisions under Government Code section 22.001(a)(2), in which case, the conflict should be concisely stated.

(6) *Issues Presented.* A short and concise statement of all issues or points presented for review. The statement of an issue or point will be deemed to cover every subsidiary issue fairly included therein. The statement of issues or points must be supported by appropriate references to the record. If the matter complained of originated in the trial court, it must have been preserved for appellate review in the trial court and assigned as error in the court of appeals.

(7) *Argument.* An argument, which may address all issues or points included in the statement of issues presented, or it may be limited to particular issues or points. Any issue or point included in the statement of issues presented but not addressed in the argument may be addressed in the brief on the merits if a brief on the merits is filed in accordance with Rule 132. The argument shall briefly state the facts and authorities required to maintain the issues or points presented, and shall have appropriate references to the record. A statement of the reasons the Supreme Court should exercise jurisdiction to review the case, including a statement regarding the importance of the case to the

jurisprudence of the state and the public importance the issues presented, shall be included. It is not necessary to quote at length from any matter that is included in the appendix, and a reference to the appendix for that matter is sufficient. The opinion of the court of appeals will be considered with the petition, and statements in the opinion, if accepted as correct, need not be repeated.

(8) *Prayer.* A prayer stating clearly the relief sought.

(9) *Appendix.* An appendix containing a copy of: (1) the judgment or other appealable order of the trial court from which relief in the court of appeals was sought; (2) the charge of the court and verdict of the jury, or the court's findings of fact and conclusions of law; (3) the opinion and judgment of the court of appeals; and (4) all motions for rehearing filed in the court of appeals and the opinion of the court of appeals on rehearing, if any.

(c) Response. Any other party to the appeal may file a response to the petition for review. The response shall conform to the requirements of paragraph (b), except that:

(1) the listing of parties and counsel is not required unless necessary to supplement or correct the listing contained in the petition;

(2) a statement of the case need not be made unless the respondent is dissatisfied with the statement made in the petition;

(3) a statement of the issues presented need not be made unless: (i) the respondent is dissatisfied with the statement made in the petition; (ii) ~~the respondent is asserting grounds for affirmance of the court of appeals' judgment that were considered by the court of appeals but were not the grounds on which the court of appeals relied; or (iii)~~ the respondent is asserting grounds for a judgment that is less favorable than the judgment rendered by the court of appeals but more favorable than the judgment that might be rendered (*i.e.* a remand for a new trial rather than a rendition of judgment in favor of the petitioner);

(4) a statement of jurisdiction should be omitted unless the petition fails to assert valid grounds for jurisdiction, in which case the reasons that the Supreme Court has no jurisdiction shall be concisely stated and

(5) the respondent's argument shall be confined to the issues or points presented in the petition and those asserted by the respondent in the respondent's statement of issues presented.

(d) Points Not Considered in Court of Appeals. To obtain a remand to the court of appeals for consideration of issues or points briefed in the court of appeals but not decided by the court of appeals, or to request that the Supreme Court consider such issues or points, those issues or points may be presented:

(1) in the response to the petition for review; or

(2) in a brief in response to the petitioner's brief on the merits; or

(3) in petitioner's reply to the response; or

(4) in lieu of (2) or (3), by filing in the Supreme Court the party's brief in the court of appeals as provided in Rule 132(d); or

(5) in a motion for rehearing in the Supreme Court.

(e) **Reply.** If a response is filed that asserts independent grounds for affirmance of the court of appeals' judgment or asserts grounds for a judgment that is less favorable to the respondent than the judgment rendered by the court of appeals, the petitioner may file a reply, which shall be limited to addressing those issues or points.

(f) **Length of Petition, Response and Reply.** The petition and any response shall be no longer than fifteen pages, exclusive of pages containing the identity of parties and counsel, the table of contents, index of authorities, statement of the case, issues presented, and appendix. A reply brief may be no longer than eight pages, exclusive of the items stated above. The court may, upon motion, permit a longer petition, response, or reply.

(g) **Time and Place of Filing.**

(1) *Petition.* The petition shall be filed with the clerk of the Supreme Court within thirty days after the date the judgment of the court of appeals was rendered or, if a motion for rehearing is filed, within thirty days after the last ruling on all timely motions for rehearing. A petition filed before the filing of a motion for rehearing does not preclude the party filing the petition from filing a motion for rehearing and does not preclude the court of appeals from ruling on the motion. A petition filed before the last ruling on all timely motions for rehearing is deemed to have been filed on the date of but subsequent to the last ruling on any such motion.

(2) *Successive Petitions.* If any party files a petition for review within the time specified in paragraph (f)(1) or within the time specified by the Supreme Court in an order granting an extension of time to file a petition, any other party entitled to file a petition may do so within forty days after the date the judgment of the court of appeals was rendered or, if a motion for rehearing is filed, within forty days after the overruling of the last timely motion for rehearing, or within ten days after the filing of any preceding petition, whichever is the later date.

(3) *Extension of Time.* Upon written motion complying with Rule 19(g)(3), the Supreme Court may grant an extension of time for filing a petition for review, response or reply.

(4) *Response.* A response shall be filed with the Clerk of the Supreme Court within thirty days after the filing of the petition.

(5) *Reply.* A reply shall be filed with the Clerk of the Supreme Court within fifteen days after the filing of the response.

(h) **Amendment.** On motion for leave of court showing good cause, the petition, response or reply may be amended upon such reasonable terms as the court may prescribe.

(i) **Court May Require Additional Briefing.** If a petition is not prepared in conformity with these rules, the Supreme Court may require the petition to be redrawn or dismiss the case. If a response or reply is not prepared in conformity with these rules, the Supreme Court may require the document to be redrawn or the court may return the document to the filing party and consider the case without allowing the document to be redrawn.

RULE 131. DUTY OF CLERK ON RECEIPT OF PETITION

On receipt of the petition, the clerk of the Supreme Court will: (1) endorse on it the date of receipt; (2) collect the fee for filing the petition; (3) docket the petition; and (4) send notification of the filing of the

petition to all parties. Each case will be assigned a docket number that consists of two parts separated by hyphens: (1) the last two digits of the year in which the case is filed, and (2) the number assigned to the case. Each case will be docketed in the order of filing. If the fee for filing the petition is not paid at the time the petition is tendered for filing, the clerk will endorse "received" on the petition and send to the filing party a letter stating that the petition was received but not filed and setting deadline for payment of the filing fee. If the filing fee is paid within the time prescribed in the clerk's notice, the clerk will file the petition and it will be deemed to have been filed at the time it was first received by the clerk. If the filing fee is not paid within the time prescribed in the clerk's notice, the clerk will return the petition to the filing party.

RULE 132. BRIEFS ON THE MERITS

(a) Petitioner's Brief on the Merits. With or without granting the petition for review, the Court may request that the parties file briefs on the merits. A brief on the merits shall be confined to the issues or points stated in that party's petition for review and shall, under appropriate headings and in the order here indicated, contain the following:

(1) *Identity of Parties and Counsel.* A complete list of the parties to the trial court's final judgment and the names and addresses of their counsel in the trial and appellate courts, if any. If a party is not represented by an attorney, the address of that party shall be stated. If the address is not known, the petitioner shall certify that a diligent inquiry was made to determine the address but that the petitioner has been unable to discover it. The certificate shall give any available information that might serve to identify and locate the party, including the probable county of residence of that party. If the petitioner is not represented by an attorney, the certificate shall be under oath.

(2) *Table of Contents.* A table of contents with references to the pages of the brief where the discussion of each issue or point may be found. The subject matter of each issue, point or group of issues or points shall be indicated in the table of contents.

(3) *Index of Authorities.* An index of authorities alphabetically arranged with references to the pages of the brief where the authorities are cited.

(4) *Statement of the Case.* A concise statement of the nature of the case. The statement should seldom exceed one-half page. The facts should be reserved and stated in the argument in connection with the issues or points to which they are pertinent.

(5) *Issues Presented.* A concise statement of the issues or points presented for review. The statement of an issue or point will be deemed to cover every subsidiary issue fairly included therein. The phrasing of the issues or points need not be identical with that set forth in the petition for review, but the brief may not raise additional issues or points or change the substance of the issues or points presented in the petition. The statement of issues or points must be supported by appropriate references to the record.

(6) *Argument.* An argument, which may present separately, or grouped if germane, the issues or points presented for review and shall state the facts and authorities required to maintain those issues or points. The argument shall be supported by references to the record.

(7) *Prayer.* A prayer stating clearly the relief sought.

(b) Response. If the petitioner files a brief on the merits, any other party to the appeal may file a brief in response. The brief in response shall conform to the requirements of paragraph (a), except that:

(1) the listing of parties and counsel is not required unless necessary to supplement or correct the listing contained in the petitioner's brief;

(2) a statement of the case need not be made unless the respondent is dissatisfied with the statement made by the petitioner;

(3) the statement of the issues presented need not be made unless: (i) the respondent is dissatisfied with the statement made in the petition; or (ii) ~~the respondent is asserting grounds for affirmance of the court of appeals' judgment that were considered by the court of appeals but were not the grounds on which the court of appeals relied; or (iii)~~ the respondent is asserting grounds for a judgment that is less favorable than the judgment rendered by the court of appeals but more favorable than the judgment that might be rendered (*i.e.* a remand for a new trial rather than a rendition of judgment in favor of the petitioner); and

(4) the respondent's argument shall be confined to the issues or points presented in the petitioner's brief and those asserted by the respondent in the respondent's statement of the issues presented.

(c) Reply. If a brief in response is filed that asserts independent grounds for affirmance of the court of appeals' judgment or asserts grounds for a judgment that is less favorable to the respondent than the judgment rendered by the court of appeals, the petitioner may file a brief in reply, which shall be limited to addressing those issues or points.

(d) Reliance on Prior Brief. Instead of filing a brief on the merits or a brief in response, a party may file with the clerk of the Supreme Court twelve legible copies of the brief filed by that party in the court of appeals.

(e) Length of Briefs. A brief on the merits or brief in response shall be no longer than fifty pages if 10 cpi non-proportionally spaced Courier typeface is used, or forty-four pages if another typeface permitted by Rule 4 is used. These limits are exclusive of pages containing the identity of parties and counsel, the table of contents, index of authorities, statement of the case, and issues presented. A brief in reply may be no longer than twenty-five pages if 10 cpi non-proportionally spaced Courier typeface is used, or twenty-two pages if another typeface permitted by Rule 4 is used, exclusive of the items stated above. The court may, upon motion, permit a longer brief.

(f) Time and Place of Filing; Extension of Time. The petitioner's brief on the merits shall be filed with the clerk of the Supreme Court within thirty days after the date of the Court's request for briefs. The response shall be filed with the clerk of the Supreme Court within thirty days after the date the petitioner's brief is due. The reply, if appropriate, shall be filed with the clerk of the Supreme Court within fifteen days after the date the response is due. The Court may on its own initiative shorten or lengthen the time for filing briefs. Upon written motion complying with Rule 19(g)(3), the Supreme Court may grant an extension of time for filing a brief.

(g) Amendment. On motion for leave of court showing good cause, a brief may be amended upon such reasonable terms as the court may prescribe.

(h) Court May Require Briefs Redrawn. If a brief is not prepared in conformity with these rules, the Supreme Court may require the brief to be redrawn, return the brief to the filing party and consider the case without further briefing by that party, or, if appropriate, dismiss the case.

RULE 133. FILING THE RECORD

(a) Request for Record. With or without granting the petition for review, the Supreme Court may request that the record from the court of appeals be filed with the clerk of the Supreme Court.

(b) Duty of Clerk of Court of Appeals. Upon receipt of a request for the record from the Supreme Court , the clerk of the court of appeals, shall promptly forward to the clerk of the Supreme Court the original record and copies of: (1) the opinion and judgment of the court of appeals; (2) the motions filed in the court of appeals; and (3) any order of the court of appeals. The clerk should not forward any non-documentary exhibits unless ordered to do so by the Supreme Court.

(c) Expenses. The petitioner shall pay to the clerk of the court of appeals a sum sufficient to pay the cost of mailing or shipping the record to and from the clerk of the Supreme Court.

(d) Duty of the Clerk of the Supreme Court. Upon receipt of the record, the clerk of the Supreme Court will file it with the other papers of the case and note the filing on the docket. The clerk is not required to file the record unless the charges for mailing or shipping have been paid.

RULE 134. ORDERS ON PETITION FOR REVIEW

(a) Orders on Petition for Review. If the Supreme Court determines that the petition presents an error that requires reversal or presents an error that is of such importance to the jurisprudence of the state as to require correction, the Court may grant the petition. If the Supreme Court determines that the judgment of the court of appeals is correct and the principles of law declared in the opinion of the court of appeals are correctly determined, the Court will refuse the petition with the docket notation "Refused." If the Supreme Court is not satisfied that the opinion of the court of appeals has correctly declared the law in all respects, but determines that the petition presents no error that requires reversal or that is of such importance to the jurisprudence of the state as to require correction, the Court will deny the petition with the notation "Denied." If the Supreme Court is without jurisdiction, the Court will dismiss the petition with the notation "Dismissed for Want of Jurisdiction." When the petition has been on file in the Supreme Court for ten days, the court may deny, refuse or dismiss the petition, whether or not a response has been filed. The order of the Court may be accompanied by explanatory comments.

(b) Moot Cases. If a case is moot, the Supreme Court may, in its discretion and after notice to the parties, grant the petition and, without hearing argument, dismiss the case or the appealable portion of it without reference to the merits of the appeal.

(c) Settled cases. If a case is settled by agreement of the parties, on motion by all parties the Supreme Court may grant the petition and without hearing argument or considering the merits, may enter a judgment in accordance with the agreement. The judgment may set aside the judgments of the court of appeals or the trial court or both, and may remand the case to the trial court for entry of a judgment in accordance with the agreement. but will not vacate the opinion of the court of appeals.

(d) Notice to Parties. When the Supreme Court grants, denies, refuses or dismisses a petition for review, the Clerk of the Supreme Court will send a written notice to all parties to the trial court's final judgment, stating the disposition made by the Court.

(e) Return of Documents to Court of Appeals. When the Supreme Court refuses, denies or dismisses the petition, the clerk will retain the petition, together with the record and accompanying papers, for

fifteen days after rendition of the judgment. At the end of that time, if no motion for rehearing has been filed, the clerk will transmit to the court of appeals a certified copy of the judgment and return all filed papers to the clerk of the court of appeals, except the petition for review, and any other documents filed in the Supreme Court. If a timely motion for rehearing is filed, it will be disposed of as any other motion for rehearing.

RULE 135. ORAL ARGUMENT

If the Supreme Court decides that oral argument would aid the Court in the determination of the issues presented in the briefs, the Court may, after granting the petition, set the case for argument.Notice of the submission date and the time allotted for argument will be given to the all parties by the clerk.

RULE 136.

[Repealed]

INQUIRY DISPOSITION CHART
TEXAS RULES OF CIVIL PROCEDURE 296-331

Rule No.	Page No.	Change Suggested	Recommended Action	Reason
296-299a	Pg 873-878	Former District Judge Putnam Kaye Reiter suggests that at the conclusion of the case tried to a judge a charge conference be conducted as if it were a jury trial.	Not yet considered.	N/A
296-299a	Pg 873-878	Justice Clarence Guittard recommends that findings and conclusions be requested and found before judgment and then recited in the judgment.	SCAC rejected suggestion at January 1996 meeting.	Too many old dogs that can't learn new tricks (*i.e.*, old dogs voted against it).
299a		Lewis Kinard suggests that Rule 299a be amended to eliminate ambiguity of application to findings requested, findings made and presumed findings.	None.	Proposed Rule 299 and 299a cure the ambiguity.
301	Pg 879-882	Harry L. Tindall and John W. Harris complain that proposed amendment of 4/90, eff. 9/90, saying that a judgment was not rendered until signed, would be a disaster.	None.	Amendment was withdrawn on 9/4/90, eff. 9/1/90; complaint already cured.
306	Pg 883	Duncan F. Wilson makes the same complaint as shown for Rule 301 but he thinks amendment should be made to Rule 306; *i.e.*, same complaint, wrong number.	None.	Real complaint as to Rule 301 already cured.
306a	Pg 884	Unknown recommends that Rule 306a(4) [now proposed Rule 304(c)(3)] be amended to say that a party may give notice of a judgment in addition to the clerk.	None.	No one believes such an amendment would be helpful or necessary.
307	Pg 885	Charles A. Spain, Jr. comments that the Texas rules use "non-jury" and "nonjury" in a number of rules. He suggests the rules should be uniform.	None.	Proposed TRAP rules uniformly use "nonjury". *See* proposed TRCP 296(a).

324	Pg 886-900	Chief Justice Max N. Osborn (now retired) inquires if TRCP 324(a) conflicts with TRAP 52(a). He also suggests reduced time limits on appeal.	None. None.	This has been cured by proposed amendments to TRAP 52(a). No one believes such a reduction will be helpful.
324(a)	Pg 901	Same as on Rule 307.	None.	See Rule 307.
329b	Pg 902-905	Martin L. Peterson suggests that Rule 329b be rewritten to eliminate confusion on "vacating" a judgment.	None	This is being cured by proposed Rule 300(c), Rule 304(c), Rule 304(e)(1) and Rule 305(b).
329(b)	Spg 425-427	Charles A. Spain, Jr. suggests that date motion for new trial overruled as a matter of law be changed from 75 to 60 days to cure *Casebolt* problem.	None.	No one believes such an amendment is necessary.
320	S Sp 447-449	Damon Ball requests amendment requiring motion for entry of default judgment.	None.	No one believes such an amendment is necessary.
329b	S Sp 450-451	Martin L. Peterson resubmits his suggestion shown at Pg 902-905.	Same as Pg 902-905.	See Pg 902-905
329b	S Sp 452-454	Charles A. Spain, Jr., suggests a new, general rule on TC's plenary power and when it expires.	None.	This has been cured by purposed TRCP 305.
330	S Sp 452-454	Charles A. Spain, Jr., suggests broader rule needed on terms of court.	None.	No one believes such an amendment is necessary.

330	S Sp 455-57	Thomas B. Alleman suggests that new rules needed on control of visiting judges.	None.	Does not come within purview of Rule 330.

SOUTHERN
METHODIST
UNIVERSITY

May 8, 1996

TO: Members, Supreme Court Advisory Committee

FROM: William V. Dorsaneo, III

RE: Subcommittee for Rules 15-165a.

Here is a redraft of the procedural rules concerning Claims and Parties. This redraft is based on the Report of the Task Force on Revision of the Rules of Civil Procedure. Currently, the SCAC Subcommittee for Rules 15-165a is working on the remainder of the Task Force's report. A redrafted version of the civil procedure rules on pleadings is next on the subcommittee's agenda. It should be completed by the subcommittee by the July meeting of the Advisory Committee.

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SECTION 4
Claims and Parties

Rule 30. Parties

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest, except as provided by law. An executor, administrator, guardian, bailee, trustee of an express trust, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is sought. An assignee or subrogee may prosecute an action in the name of an assignor or subrogor provided that the identity of the real party in interest and the basis for the interest is set forth in the party's pleadings. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution

(b) Capacity to Sue or Be Sued in Assumed Name. Any partnership, unincorporated association, private corporation, other legal entity or individual doing business under an assumed name may sue or be sued in its partnership, assumed or common name for the purpose of enforcing for or against it a substantive right, but on a motion by any party or on the court's own motion the true name may be substituted.

[Current Rule: Tex. R. Civ. P. 28].
[Original Source: Part of Federal Rule 17(b)].
[Official Comments]:

Change: Addition of "an individual doing business under an assumed name," and partnership or common name.

Change by amendment effective January 1, 1971. Language has been added to make the rule applicable to a private corporation and authorize the true name of the party to be substituted on motion.

(c) **Next Friends and Guardians Ad Litem.**

(1) Next Friends. A minor or incompetent person who does not have a legal guardian may sue and be represented by a "next friend" who shall have the same rights as guardians have, but shall give security for costs, or affidavits in lieu thereof, when required. A next friend may not dismiss or compromise an action brought in behalf of a minor or incompetent person without court approval. Any money or property obtained by a next friend must be managed or invested in accordance with Chapter 142 of the Property Code.

(2) Guardians Ad Litem. The court must appoint a guardian ad litem to represent a minor or incompetent person who is a defendant and has no guardian, or who is represented by a guardian or next friend who appears to the court to have an interest adverse to the minor or incompetent person. The court shall allow the guardian ad litem a reasonable fee for services to be taxed as a part of the costs.

[Current Rule: Tex. R. Civ. P. 44, 173].
[Original Source: Parts 1 and 2 of Art. 1994; Art. 2159].
[Official Comments]:

Change: Addition of "an individual doing business under an assumed name," and partnership or common name.

Change by amendment effective January 1, 1961. Language has been added to make the rule applicable to a private corporation and authorize the true name of the party to be substituted on motion.

Rule 31. Joinder of Claims

(a) Joinder of Claims. A party asserting a claim for relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or alternative claims, as many claims, legal or equitable, as the party has against an opposing party.

(b) Joinder of Contingent Claims. If a claim is contingent on the determination of another claim, the claims may be joined in the same action. This rule does not permit the joinder of a liability or indemnity insurance company,

unless such company is by statute or contract directly liable to the claimant.

[Current Rule: Tex. R. Civ. P. 51].
[Original Source: Federal Rule 18].
[Official Comment]:

Change: Reference to the right of plaintiff to join an action upon a claim for money and an action to set aside a fraudulent conveyance is omitted as unnecessary in view of the decision of this state.

Change by amendment effective December 31, 1941. The last sentence has been added.

Change by amendment effective January 1, 1961. The word "statute" substituted for the word "law" in last sentence of subdivision (b).

Rule 32. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process shall be joined as party in the action if **(1)** in the person's absence complete relief cannot be accorded among those already parties; or **(2)** the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may **(A)** as a practical matter impair or impede the person's ability to protect that interest or **(B)** leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff.

(b) Determination by Court Whenever Joinder Not Feasible. If a person described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent party thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the

judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non joinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 36.

[Current Rule: Tex. R. Civ. P. 39].
[Original Source: Federal Rule 19, with textural change].
[Official Comments]:

Change by amendment effective January 1, 1971. The rule has been completely rewritten to adopt, with minor changes, the provisions of Federal Rule 19 as amended.

Rule 33. Permissive Joinder of Parties

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

[Current Rule: Tex. R. Civ. P. 40].

[Original Source: Federal Rule 20, unchanged].

(b) **Misjoinder of Parties.** Misjoinder of parties is not grounds for dismissal of an action. Any claim against a party who has not been properly joined may be severed and proceeded with separately.

[Current Rule: Tex. R. Civ. P. 41].
[Original Source: Federal Rule 21].
[Comments: The second sentence has been deleted].

Change: Addition of provision for adding and dropping parties and for consolidation of suits and for severing actions in case of misjoinder of parties or causes.

Rule 34. Consolidation, Separate Trials and Severance

(a) **Consolidation**. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all of the matters in issue in the actions; it may order the actions consolidated; and it may make such orders concerning proceedings as may tend to avoid unnecessary costs or delay.

(b) **Separate Trials.** The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against the party, and may order separate trials or make other orders to prevent delay or prejudice. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

[Current Rule: Tex. R. Civ. P. 40(b) and 174].
[Original Source: Federal Rules 20(b) and 42].

(c) **Severance.** The court may order a severance (1) if the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim

is not so interwoven with the remaining action that they involve the same facts and issues. A severance divides the lawsuit into two or more separate and independent causes.

Source: State Dept. of Highways v. Cotner, 845 S.W.2d 818, 819 (Tex. 1993); Hall v. City of Austin, 450 S.W.2d 836, 837-38 (Tex. 1970).

Rule 35. Interpleader

Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which the claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in any other rules.

[Current Rule: Tex. R. Civ. P. 43].
[Original Source: Federal Rule 22(1), with minor textual change].

Rule 36. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if **(1)** the class is so numerous that joinder of all members is impracticable, **(2)** there are questions of law or fact common to the class, **(3)** the claims or defenses of the representative parties are typical of the claims and defenses of the class, and **(4)** the representative parties will fairly and adequately protect the interests of the class.

(b) Class Action Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of **(A)** inconsistent or varying adjudications with

respect to individual members of the class that would establish incompatible standards of conduct for the party opposing the class, or **(B)** adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: **(A)** the interest of members of the class in individually controlling the prosecution or defense of separate actions; **(B)** the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; **(C)** the desirability or undesirability of concentrating the litigation of the claims in the particular forum; **(D)** the difficulty likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained: Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall, after hearing, determine by order whether it is to be so maintained. This determination may be altered, amended, or withdrawn at any time before final judgment. The court may order the naming of additional parties in order to insure the adequacy of representation.

(2) After the court has determined that a class action may be maintained it shall order the party claiming the class action to direct to the members of the class the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort. In all class actions maintained under subdivision (b)(1), and (b)(2), this notice shall advise the members of the class **(A)** the nature of the suit, **(B)** the binding effect of the judgment, whether favorable or not, and **(C)** the right of any member to appear

before the court and challenge the court's determinations as to the class and its representatives. In all class actions maintained under subdivision (b)(3) this notice shall advise each member of the class **(A)** the nature of the suit; **(B)** that the court will exclude him from the class if he so requests by a specified date; **(C)** that the judgment, whether favorable or not, will include and bind all members who do not request exclusion by the specified date; and **(D)** that any member who does not request exclusion may if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivisions (b)(1), and (b)(2), whether or not favorable to the class, shall include, describe, and be binding upon all those whom the court finds to be members of the class and who received notice as provided in subdivision (c)(2). The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(d) Actions Conducted Partially as Class Actions. When appropriate **(1)** an action may be brought or maintained as a class action with respect to particular issues, or **(2)** a class be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall be construed and applied accordingly.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice shall be given to all members of the class in such manner as the court directs.

(f) Discovery. Unnamed members of a class action are not to be considered as parties for purposes of discovery.

[Current Rule: Tex. R. Civ. P. 42].
[Original Source: Federal Rule 23].
[Official Comments]:

Change by amendment effective September 1, 1977. Rule 42 is completely rewritten. Subdivision (a) is copied from revised Federal Rule 23(a). Subdivision (b)(1) is copied from revised Federal Rule 23(b)(2). Subdivision (b)(2) is copied from revised Federal Rule 23(b)(2). Subdivision

(b)(3 is taken from present Texas Rule 42(a)(3), omitting the reference to the character of the right as "several." Subdivision (b)(4) is adopted from revised Federal Rule 23(b)(3). Subdivision (c)(1 is adopted from revised Federal Rule (c)(1) with little change except in the choice of words. The second sentence in proposed (c)(1) is not found in the Federal Rule although the idea is implied therein. Subdivision (d) is copied from revised Federal Rule 23(c)(4). Subdivision (e) is copied from revised Federal Rule 23(e).

Change by amendment effective April 1, 1984. The paragraph concerning a derivative suit is added to subdivision (a).

Rule 37. Derivative Suits

In a derivative suit brought pursuant to article 5.14 of the Texas Business Corporation Act, the petition shall contain the allegations **(1)** that the plaintiff was a record or beneficial owner of shares, or of an interest in a voting trust for shares at the time of the transaction of which he complains, or his shares or interest thereafter devolved upon him by operation of law from a person who was the owner at that time, and **(2)** with particularity, the efforts of the plaintiff to have suit brought for the corporation by the board of directors, or the reasons for not making any such efforts. The derivative suit may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders similarly situated in enforcing the right of the corporation. The suit shall not be dismissed or compromised without the approval of the court, and notice in the manner directed by the court of the proposed dismissal or compromise shall be given to shareholders.

[Current Rule: Tex. R. Civ. P. 42(a)].
[Original Source: Federal Rule 23(a)].

Rule 38. Intervention

(a) Intervention as a Matter of Right. Upon timely motion anyone shall be permitted to intervene in an action (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is

adequately protected by existing parties.

(b) **Permissive Intervention.** Upon timely motion anyone may be permitted to intervene in an action: (1) when a statute confers a permissive or a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) **Procedure.** A person desiring to intervene shall serve a motion to intervene upon the parties as provided by these rules. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

[Current Rule: Tex. R. Civ. P. 60, 61].
[Original Source: Art. 1998 and Texas Rule 30 (for District and County Courts)].
[Official Comments]:

Rule 60, Change: Intervention is authorized without leave of court, regardless of whether the court is in session or in vacation.

Rule 60, Change by amendment effective September 1, 1990. Rules 21 and 21a control notice and service of pleadings of intervenors.

Rule 39. Substitution of Parties

(a) **Death of Party.** Where the cause of action is one that survives, no suit shall abate because of the death of any party, but may continue as hereinafter provided. Upon death of a party, the heirs, administrator or executrix may appear and upon suggestion of death in open court may proceed as a party. Absent a timely appearance and suggestion, upon application by an opposing party, the clerk shall issue a scire facias requiring the heirs, administrator or executrix to appear and prosecute or defend the action. An opposing party may have the suit dismissed for want of prosecution upon failure of the heirs, administrator or executrix to respond to the scire facias in a timely manner.

[Current Rule: Tex. R. Civ. P. 150-153].
[Original Source: Arts. 2078, 2079, 2080, 2081, with minor textural changes].
[Official Comments]:

Rule 151, Change by amendment effective April 1, 1984. Textual changes.
Rule 153, Change by amendment effective April 1, 1984. Textual changes.

(b) Requisites of Scire Facias. The scire facias and return of service, shall conform to the requisites of citations and returns under these rules.

[Current Rules: Tex. R. Civ. P. 154].
[Original Source: Art. 2091, with minor textural changes].

(c) Surviving Parties. Where there are two or more plaintiffs or defendants, and one or more of them die, upon suggestion of such death being entered upon the record, the suit shall at the instance of either party proceed in the name of the surviving plaintiffs or against the surviving defendants, as the case may be.

[Current Rule: Tex. R. Civ. P. 155].
[Original Source: Art. 2082, unchanged].

(d) Death After Verdict or Close of Evidence. When a party in a jury case dies between verdict and judgment, or a party in a non-jury case dies after the evidence is closed and before judgment is pronounced, judgment shall be rendered and entered as if all parties were living.

[Current Rule: Tex. R. Civ. P. 156].
[Original Source: Art. 2083, unchanged].
Official Comments]:

Change by amendment effective January 1, 1978. The rule is made applicable to non-jury as well as jury cases.

(e) Suit for the Use of Another. When a plaintiff suing for the use of another shall die before verdict, the person for whose use such suit was brought, upon such death being suggested on the record in open court, may prosecute the suit an shall be responsible for costs.

[Current Rule: Tex. R. Civ. P. 158].
[Original Source: Art. 2085, unchanged].

(f) Suit for Injuries Resulting in Death. In cases arising under the provisions of the chapter relating to injuries resulting in death, the suit shall not abate by the death of either party pending the suit, but in such case, if the plaintiff dies, where there is only one plaintiff, some one or more of the parties entitled to the money recovered may be substituted and the suit prosecuted to judgment in the name of such party or parties, for the benefit of the person entitled; if the defendant dies, his executor, administrator or heir may be made a party, and the suit prosecuted to judgment.

[Current Rule: Tex. R. Civ. P. 159].
[Original Source: Art. 2086, unchanged].

Rule ___. Voluntary Dismissals and Nonsuits.

(a) In General. At any time before the plaintiff has introduced all of the plaintiff's evidence other than rebuttal evidence, the plaintiff may dismiss an entire case or dismiss the action as to one or more of several parties. Omission of a party from the pleadings does not result in a dismissal of the action as to the omitted party. notice of the voluntary dismissal of an entire case or as to one or more of the parties must be filed separately from the pleadings provided that a party who abandons any part of a claim or defense contained in the pleadings may have that fact entered of record during a hearing or trial to show that the matter was not tried.

(b) Avoidance of Prejudice. Any dismissal pursuant to this rule does not prejudice the right of another party to be heard on a pending claim for affirmative relief, excuse the payment of costs taxed by the clerk or authorize a party to prosecute an action without the joinder of a principal obligor, except as provided by statute.

(c) Effect on Sanctions' Motions. A dismissal under this rule has no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal, as determined by the court. Any dismissal pursuant to this rule which terminates the case authorizes the clerk to tax court costs against the dismissing party unless otherwise ordered by the court.

Source; Tex.R.Civ.P. 162, 163., 165.

SOUTH TEXAS
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MEMORANDUM

November 6, 1995

TO: Mr. Luther Soules, Chair

FROM: Professor Elaine A. Carlson, Chair
Sub-Committee, TRCP 737-813

FINAL REPORT OF SUBCOMMITTEE ON TRCP 737-813

1. APPLICATION OF RULE 4 TO RULES 739 & 744

Suggestion: Rule 744 should be exempted from the operation of Rule 4, so that Saturdays, Sundays and holidays will be counted in computing five day periods. Currently, the use of overlapping time periods due to the use of distinctive counting methods creates concern as to the timeliness of demanding a jury. (See letter of Judge Tom Lawrence - Item 4, Page 952). It has been suggested Rule 739 should also be exempted from the operation of Rule 4 to be consistent. (See attached letter from Judge Till)

2. SERVICE OF CITATION AND FE&D PAPERS BY "AUTHORIZED PERSON"

Rules 742 and 742a provide for service of citation of forcible entry and detainer complaints and return of service thereof. Currently these rules only provide for service by an "officer" and are silent as to the propriety of service by other "authorized persons" as allowed in other j.p. and district and county court civil proceedings.

Suggestion: Modify rules as recommended (see pages 961 & 964) to delete word "officer" and substitute words "sheriff, constable or other authorized person."

3. UNAUTHORIZED PRACTICE OF LAW BY AGENT REPRESENTATION IN FORCIBLE ENTRY & DETAINER ACTIONS

Provisions of civil rule 747a and section 24.011 of the Texas Property Code allow parties to forcible entry and detainer actions to represent themselves and to "be represented by their authorized agent" "who need not be attorneys." Concern has been expressed as to whether agent representation by a non-attorney constitutes the unauthorized practice of law. (See letter of Judge Baker pp. 960A-960D).

Suggestion: Clarify by comment to Rule 747a apparent intent of rule: "Authorized agent" for purposes of the landlord should be construed to mean owner, employee of owner, managing company hired by owner or realtor retained by owner. For purposes of the tenant "authorized agent" should be construed to

mean tenant, employee of the tenant or occupant of the premises as defined in the lease. (See attached letter from Judge Till)

4. CORRECT TYPOGRAPHICAL ERROR IN RULE 749a

Suggestion: The first paragraph to Rule 749a should be corrected to read: "When a pauper's affidavit is timely contested by APPELLEE" ... and delete appellant.

5. PROPOSAL TO MODIFY RULE 749b

A suggestion has been made to modify rule 749b to provide for "payment of fair market value of rent" by a tenant seeking to remain in possession of leased premises while appealing an unsuccessful forcible entry & detainer judgment. The proponent of this change suggests that without such clarifying language, courts are allowing tenants who receive assistance from government housing authorities to remain in possession pending appeal without having to tender rents into the registry of the court. The proponent suggests the adoption of a presumption to be incorporated in the rules that "the rental amount as provided by a lease agreement is the fair market value of the rent for the purpose of determining an appropriate rent deposit."

Suggestion: Add the following sentence to the end of 749b(2): "The rental amount as provided by a lease agreement is the fair market value of the rent for the purpose of determining an appropriate rent deposit."

6. MODIFY RULE 749b

Suggestion: Modify Rule 749b to delete "writ of restitution" and replace with "writ of possession" to be consistent with other rules pertaining to appropriate forcible entry and detainer relief.

7. CLARIFYING COMMENT TO RULE 749c

Suggestion: Include clarifying comment to rule 749c that although a right of appeal from an unsuccessful forcible entry and detainer judgment may exist without the necessity of making a rent deposit into the registry of the court, a tenant has no right to remain in possession pending such appeal without appropriate tender of rent.

Proposed comment: "The requirements of Rule 749b(1) must be met by an unsuccessful tenant seeking to retain possession of the premises pending appeal and are not affected by Rule 749c."

8. PROPOSAL TO MODIFY RULE 751

Clarify the type of notice clerks are required to give pursuant to TRCP 751. Some clerks erroneously interpret notice to be the equivalent of service of process and charge a service of process fee for an appeal de novo to county court.

Suggestion: After last sentence in second paragraph add: "Notification is sufficient by first class mail. No service of process fee shall be charged."

9. PROPOSAL TO MODIFY RULES 814-822

Delete as Rules 814-822, modify rules as recommended by Justice Guittard and renumber as part of new proposed general procedural rules 13-20 (aka "GRP").

JUDGE PAUL HEATH TILL
JUSTICE COURT PRECINCT 5/1
SMALL CLAIMS COURT PRECINCT 5/1
HARRIS COUNTY, TEXAS

0 CHIMNEY ROCK, SUITE 102
HOUSTON, TEXAS 77081

713 661-8278

November 17, 1993

Professor Elaine A. Carlson
Attorney at Law
1303 San Jacinto
Houston, Texas 77002

Dear Professor Carlson:

The following are comments on some of the rules.

On the application of Rule 4 to Rule 739 and 742, if you are going to exempt 744 from Rule 4, you are going to have to exempt 739 as well. Since the citation in 739 would inform the parties that they could pay the jury fee no later than five days, Rule 744 demanding a jury on or before the five days from the date of service should be made consistent.

On the rule concerning representation in justice court on Forcible Detainer and Forcible Entry and Detainer, Rule 747a and §24.011 of the Property Code have to be read as a unit before you get total understanding of what can or cannot be done by a non-attorney representation. I do not believe either or both or the combination of this rule and statute was intended for a paralegal to make an appearance in court as a non-lawyer lawyer on behalf of his client. I believe it was intended that these people were to represent themselves directly and did not have to have pseudo-legal counsel. My understanding is that this is the procedure that has been followed or attempted to be followed in Dallas in several of the justice courts there, where the legal aid for that particular county are sending paralegals to represent tenants in justice court. It presents a serious problem to the judge of that court of trying to sort out just what's what. In any event, rule 747a deals with Forcible Entry and Detainer for non-payment of rent and holding over only. You would need then to go to §24.011 of the Property Code to find that only in <u>Forcible Detainer</u> for non-payment of rent and holding over beyond the rental term, the parties can represent themselves. Further, it adds that in Forcible Detainer and Forcible Entry and Detainer, the parties can get a default judgment without legal representation regardless of the grounds. This is not to be found in the Rules of Civil Procedure.

The wisdom with the chance for confusion and ambiguity of having both a rule of civil procedure and a statute covering precisely

the same subject matter or proporting to cover exactly the same subject matter and not in effect having the same language escapes me. One rule should cover all that is necessary and all that is intended for non-lawyer representation.

I would hope that somewhere we would be able to take up the point of seeing about drafting a completely different set of rules of procedure for the justice court. And by a different set of rules I would mean one that would take into consideration the unique and unusual position of the judge of justice court dealing primarily with pro se plaintiffs and defendants, as well as trial de novo.

Much of the confusion and difficulty is to be found in the "bellwether" Rule 523 for the justice courts. It informs the justice court judge that in as far as they can be applied, the rules of district and county courts will also govern the justice courts. But further that, except when otherwise specifically provided by law are these rules. Meaning: if you have a question start with the district and county court rules, then look at the justice court rules to see if there is an exception and how it is to be applied.

This level of mental dexterity is not required for other levels of courts and I would hope that the general precept of having a set of rules for the justice court written with the justice court in mind will be considered. Of course, if this is not the appropriate time, then let me know when and where and I'll bring up the subject then.

Sincerely,

Paul Heath Till

Paul Heath Till
Justice of the Peace 5/1

PHT/cdc

ATTACHMENT "A"

MEMORANDUM

TO: Professor Elaine A. Carlson
FROM: Kristin A. Parker
DATE: 10/25/95
RE: Texas Rule of Civil Procedure 747a

Issue

Through case law, it is evident that the Supreme Court of Texas has primary constitutional governance over the practice of law. See, e.g., *Banales v. Jackson*, 601 S.W.2d 508 (Tex.Ct.App.-Beaumont), motion to reverse den'd, 610 S.W.2d 732 (Tex.1980); *Bryant v. State*, 457 S.W.2d 72 (Tex.Ct.App.-Eastland 1970, writ ref'd nre); *Grievance Comm. v. Dean*, 190 S.W.2d 126 (Tex.Ct.App.-Austin 1945, no writ). In addition, scholars have opined that the power to regulate the legal profession is vested with the courts and the courts view legislative enactments pertaining to the legal profession as infringements on the judiciary's inherent power to regulate the bar. Gregory S.C. Huffman, Unauthorized Practice of Law: A Texas Review, 47 Texas Bar J.1220, 1221 (1984); Ryan J. Talamonte, We Can't All be Lawyers...or Can We? Regulating the Unauthorized Practice of Law in Arizona, 34 Ariz.L.Rev. 873, 876 (1992). This being the case, does TX.PROP.CODE §24.011 violate the Supreme Court's right to regulate the practice of law or TX.GOV'T.CODE §§81.101-.102, thus rendering TX.PROP.CODE §24.001 unconstitutional?

Discussion

Rule 7 of the Texas Rules of Civil Procedure states,

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

Texas Rule 7 has a federal counterpart, 28 U.S.C.A. §1654 which states,

> In all courts of the United States, the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

There is much case law to support the notion that corporations must have counsel represent them in legal matters because the corporation is a legal fiction that is incapable of representing itself. To allow a president or other non-lawyer agent to represent the corporation would be in direct violation of T.R.C.P. 7 as well as 28 U.S.C.A. §1654. See e.g., *Globe Leasing, Inc. v. Engine Supply and Machine Service*, 437 S.W.2d 43, 45 (Tex.Ct.App.-Houston (1st Dist.) 1969, no writ); *American Express Company. v. Monfort Food Distributing Company.*, 545 S.W.2d 49, 52

(Tex.Ct.App.-Houston (14th Dist.) 1976, no writ); *Dennett v. First Continental Investment Company.*, 559 S.W.2d 384 (Tex.Ct.App.-Dallas 1977, no writ).

In April 1982, Rule 747a was promulgated as somewhat of an extension or an exception to Rule 7. The intent of the Supreme Court of Texas in promulgating this new rule could not be ascertained; therefore, any attempt to interpret the rule must be achieved through the plain meaning of the rule on its face. Rule 747a states,

> In forcible entry and detainer cases for non-payment of rent or holding over beyond the rental term, the parties may represent themselves or be represented by their authorized agents in justice court.

On its face the rule appears to say that in this limited circumstance the parties in a landlord tenant suit can be represented by non-attorneys in justice court. If this is what the rule means, then landlords and tenants may represent themselves or authorize an agent to do so. If this agent need not be an attorney, then it appears that through Rule 747a the Supreme Court, in this limited instance, is allowing non-lawyers to appear in justice court on behalf of themselves or someone else. It also appears that in this limited circumstance that a landlord or tenant corporation, too, may designate an authorized agent who need not be an attorney.

In 1985, the legislature enacted TX.PROP.CODE §24.011 which closely parallels Rule 747a and states,

> In forcible detainer suits in justice court for non-payment of rent or holding over beyond a rental term, the parties may represent themselves or be represented by their authorized agents, who need not be attorneys. In any forcible detainer or forcible entry and detainer suit in justice court, an authorized agent requesting or obtaining a default judgment need not be an attorney.

As mentioned earlier, the Supreme Court has the inherent authority to regulate the practice of law. This being the case, if the rule and statute are in conflict then the rule will prevail. However, in this case, the rule and the statute closely model each other, thus producing no conflict. Therefore, TX.PROP.CODE §24.011 is not unconstitutional with respect to the powers granted the judiciary by the Texas Constitution regarding the authority to regulate the practice of law.

The contrary, but weaker argument, has been expressed in Attorney General Opinion No. JM-56. The Attorney General opines that what is meant by "authorized agents" as stated in Rule 747a is "attorney agents." He cites Article V, section 25 of the Texas Constitution (repealed and presently section 31) to support the basis for the Supreme Court's authority to promulgate procedural rules:

> The Supreme Court shall have power to make and establish rules of procedure not inconsistent with the laws of the State for the government of said court and other courts of this State to expedite the dispatch of business therein.

Is this Rule 747a a procedural rule for efficient judicial administration, or in promulgating Rule 747a is the Supreme Court exercising its inherent power to regulate the practice of law? The Attorney General believes this to be merely a procedural rule and cites case law to the effect that, when a procedural rule and a statute are in conflict, the statute prevails. See e.g., *Few v. Charter Oak Fire Insurance Company.*, 463 S.W.2d 424. This advisory opinion is not binding and the stronger argument is that the Supreme Court is acting under its inherent power to regulate the practice of law in promulgating Rule 747a. However, in the event that one is persuaded by the weaker argument this area must be explored.

If the Supreme Court's authority in promulgating this rule lies in Article V section 31, then case law supports the notion that when a rule and statute conflict, the rule must yield to the statute. Ibid. TX.GOV'T.CODE §81.102 states,

> (a) Except as provided by subsection (b), a person may not practice law in this state unless the person is a member of the state bar.
> (b) The Supreme Court may promulgate rules prescribing the procedure for limited practice of law by:
> (1) attorneys licensed in another jurisdiction;
> (2) bona fide law students; and
> (3) unlicensed graduate students who are attending or have attended a law school approved by the Supreme Court. V.T.C.A., Government Code §81.102.

and TX.GOV'T.CODE §81.101 defines the practice of law as

> In this chapter the practice of law means the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client as well as service rendered out of court...V.T.C.A., Government Code §81.101.

Rule 747a conflicts with TX.GOV'T.CODE §§81.101-102 (which prohibits persons not admitted to the bar to proceed on behalf of a client in front of a judge in court) to the extent that "authorized agents" in Rule 747a refers to someone other than: (1) attorneys licensed in another jurisdiction, (2) bona fide law students, and (3) unlicensed graduate students who are attending or who have attended a law school approved by the Supreme Court. If "authorized agents" in 747a means anything other than attorneys, the Attorney General believes that Rule 747a would necessarily have to yield to the statute. TX.GOV'T.CODE §81.102 was enacted in 1987 to define non-members of the bar who could practice law in certain circumstances. However, this statute was passed after the Attorney General Opinion was written, hence explaining why the Attorney General believed "authorized agents" could only mean "attorney agents." Nevertheless, it is apparent from the opinion that based on the Attorney General's rationale if "authorized agents" means anything other than the groups of people listed in §81.102, then the rule must yield to the statute. As expressed earlier, this is a much weaker argument than the Supreme Court having the inherent authority to regulate the bar, this being the only source found to indicate the contrary.

So, does TX.PROP.CODE §24.001 violate §§81.101-.102 rendering it unconstitutional? It depends on the meaning given to the phrase "need not be an attorney" in TX.PROP.CODE §24.011 and the term "authorized agents" in T.R.C.P. 747a. The Supreme Court made an exception to, or an extension of, T.R.C.P. 7 by promulgating T.R.C.P. 747a. They went from stating in T.R.C.P. 7 that in court one can represent oneself or obtain counsel, to stating in T.R.C.P. 747a that one can represent oneself or appoint an agent, but only in this limited landlord tenant circumstance in justice court. TX.GOV'T.CODE §81.101 lays a foundation for what the practice of law is, one portion being,"...proceeding on behalf of a client before a judge in court..." An exception is made by TX.PROP.CODE §24.011 allowing, in this particular situation, for a portion of TX.GOV'T.CODE §81.101 to be executed by a non-lawyer. In this respect, I believe the two statutes can coexist. The Supreme Court has two rules--Rule 7 being the primary one and Rule 747a being the exception in limited circumstances; and, the legislature has two statutes--TX.GOV'T.CODE §81.101 being the primary governing one and TX.PROP.CODE §24.011 being the exception in limited circumstances. The Supreme Court has primary governance over the courts and interpretation of the laws, and the legislature's power to regulate the practice of law is only secondary and in the aid of the judiciary's power. Gregory S.C. Huffman, Unauthorized Practice of Law: A Texas Review, 47 Texas Bar J. 1220 (1984). Also, as long as "authorized agents" in Rule 747a and "need not be an attorney" in TX.PROP.CODE §24.011 do not go beyond the scope of TX.GOV'T.CODE §81.102(b), then there are no constitutional problems or conflicts between TX.GOV'T.CODE §81.102 and TX.PROP.CODE §24.011.

Conclusion

It is clear that the prevailing view is that the Supreme Court has the inherent authority to regulate the practice of law. Therefore, they have the power to promulgate the rules concerning the practice of law. To circumvent the aforementioned conflicts between the rules of the judiciary and the statutes of the legislature, the court has the power to correct the problem and shape the rules to regulate the practice of law in whatever way it deems appropriate. It seems to be a matter of choice--1) the rule can be modified to better explain the court's intent (defining "authorized agent"), 2) the rule can be repealed, or 3) the rule can be left as is causing unanswered questions to continually arise.

PROPOSED CHANGES

RULE 4. COMPUTATION OF TIME

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday. Saturdays, Sundays and legal holidays shall not be counted for any purpose in any time period of five days or less in these rules, except that Saturdays, Sundays and legal holidays shall be counted for purposes of the three-day periods in Rules 21 and 21a, extending other periods by three days when service is made by registered or certified mail or by telephonic document transfer, and for purposes of the five-day periods provided for under Rules 739, 744, 748, 749, 749a, 749b, and 749c.

RULE 742. SERVICE OF CITATION

The ~~officer~~ sheriff, constable or authorized person receiving such citation shall execute the same by delivering a copy of it to the defendant, or by leaving a copy thereof with some person over the age of sixteen years, at his usual place of abode, at least six days before the return day thereof; and on or before the day assigned for trial he shall return such citation, with his action written thereon, to the justice who issued same.

(Amended Aug. 18, 1947, eff. Dec. 31, 1947).

RULE 742a. FORCIBLE ENTRY AND DETAINER

If the sworn complaint lists all home and work addresses of the defendant which are known to the person filing the sworn complaint and if it states that such person knows of no other home or work addresses of the defendant in the county where the premises are located, service of citation may be by delivery to the premises in question as follows:

If the ~~officer~~ sheriff, constable or authorized person receiving such citation under Rule 742, the ~~officer~~ sheriff, constable or authorized person shall no later than five days after receiving such citation execute a sworn statement that the officer has made diligent effort to serve such citation on at least two occasions at all addresses of the defendant in the county where the premises are located as may be shown on the sworn complaint, stating the times and places of attempted service. Such sworn statement shall be filed by the officer with the justice who shall promptly consider the sworn statement of the officer. The justice may then authorize service according to the following:

(a) The ~~officer~~ sheriff, constable or authorized person shall place the citation inside the premises by placing it through a door mail chute or by slipping it under the front door; and if neither method is possible or practical, the officer shall securely affix the citation to the front door or main entry to the premises.

(b) The ~~officer~~ sheriff, constable or authorized person shall that same day or the next day deposit in the mail a true copy of such citation with a copy of the sworn complaint attached thereto, addressed to the defendant at the premises in question and sent by first class mail;

(c) The ~~officer~~ sheriff, constable or authorized person shall note on the return of such citation the date of delivery under (a) above and the date of mailing under (b) above; and

(d) Such delivery and mailing to the premises shall occur at least six days before the return day of the citation; and on or before the day assigned for trial he shall return such citation with his actions written thereon, to the justice who issued the same.

It shall not be necessary for the aggrieved party or his authorized agent to make request for or motion for alternative service pursuant to this rule. (Added April 15, 1982, eff. Aug. 15, 1982

This is a new rule.

RULE 747a. REPRESENTATION BY AGENTS

In forcible entry and detainer cases for non-payment of rent or holding over beyond the rental term, the parties may represent themselves or be represented by their authorized agents in justice court.
(Added April 15, 1982, eff. Aug. 15, 1982.)

Comment: "Authorized agent" for purposes of the landlord should be construed to mean owner, employee of owner, managing company hired by owner or realtor retained by owner. For purposes of tenant, "authorized agent" shall be construed to mean tenant, employee of the tenant or occupant of the premises as defined in the leade.

RULE 749a. PAUPER'S AFFIDAVIT

If appellant is unable to pay the costs of appeal, or file a bond as required by Rule 749, he shall nevertheless be entitled to appeal by making strict proof of such inability within five days after the judgment is signed, which shall consist of his affidavit filed with the justice of the peace stating his inability to pay such costs, or any part thereof, or to give security, which may be contested within five days after the filing of such affidavit and notice thereof to the opposite party o r his attorney of record by any officer of the court or party to the suit, whereupon it shall be the duty of the justice of the peace in whose court the suit is pending to hear evidence and determine the right of the party to appeal, and h e shall enter his finding on the docket as part of the record. Upon the filing of a pauper's affidavit the justice of the peace or clerk of the court shall notice the opposing party of the filing of the affidavit of inability within one working day of its filing by written notification accomplished through first class mail. It will be presumed prima facie that the affidavit speaks the truth, and, unless contested within five days after the filing and notice thereof, the presumption shall be deemed conclusive; but if a contest is filed, the burden shall then be on the appellant to prove his alleged inability by competent evidence other than by the affidavit above referred to. When a pauper's affidavit is timely contested by the appellee, the justice shall hold a hearing and rule on the matter within five days.

If the justice of the peace disapproves the pauper's affidavit, appellant may, within five days thereafter bring the matter before the county judge for a final decision, and, on request, the justice shall certify to the county judge appellant's

affidavit, the contest thereof, and all documents, and papers thereto. The county judge shall set a day for hearing, not later than five days, and shall h ear the contest de novo. If the pauper's affidavit is approved by the county judge, he shall direct the justice to transmit to the clerk of the county court, the transcript, records and papers of the case.

A pauper's affidavit will be considered approved upon one of the following occurrences: (1) the pauper's affidavit is not contested by the other party; (2) the pauper's affidavit is contested by the other party and upon a hearing the justice determines that the pauper's affidavit is approved; or (3) upon a hearing by the justice disapproving of the pauper's affidavit the appellant appeals to the county judge who then, after a hearing, approves the pauper's affidavit.

No writ of possession may issue pending the hearing by the county judge of the appellant's right to appeal on a pauper's affidavit. If the county judge disapproves the pauper's affidavit, appellant may perfect his appeal by filing an appeal bond in the amount as required by Rule 749 within five days thereafter. If no appeal bond is filed within five days, a writ of possession may issue.

Comment to 1990 change: Proceedings on pauper affidavits are revised. The term writ of restitution is corrected to writ of possession.

RULE 749b. PAUPER'S AFFIDAVIT IN NONPAYMENT OF RENT APPEALS

In a nonpayment of rent forcible detainer case a tenant/appellant who has appealed by filing a pauper's affidavit under these rules shall be entitled to stay in possession of the premises during the pendency of the appeal, by complying with the following procedure:

(1) Within five days of the date that the tenant/appellant files his pauper's affidavit, he must pay into the justice court registry one rental period's rent under the terms of the rental agreement.

(2) During the appeal process as rent becomes due under the rental agreement, the tenant/appellant shall pay the rent into the county court registry within five days of the due date under the terms of the rental agreement. <u>The rental amount as provided by a lease agreement is the fair market value of the rent for the purpose of determining an appropriate rent deposit</u>.

(3) If the tenant/appellant fails to pay the rent into the court registry within the time limits prescribed by these rules, the appellee may file a notice of default in county court. Upon sworn motion by the appellee and a showing of default to the judge, the court shall issue a writ of ~~restitution~~ <u>possession</u>.

(4) Landlord/appellee may withdraw any or all rent in the county court registry upon a) a sworn motion and hearing, prior to final determination of the case, showing just cause, b) dismissal of the appeal, or c) order of the court upon final hearing.

(5) All hearings and motions under this rule shall be entitled to precedence in the county court.
(Added May 9, 1977, eff. Sept. 1, 1977).

Notes and Comments
This is a new rule.

RULE 749c. APPEAL PERFECTED

When an appeal bond has been timely filed in conformity with Rule 749 or a pauper's affidavit approved in conformity with Rule 749 or a pauper's affidavit approved in conformity with Rule 749a, the appeal shall be perfected.

Comment: The requirements of Rule 749b(1) must be met by an unsuccessful tenant seeking to retain possession of the premises pending appeal and are not affected by Rule 749c.

TRCP 751. TRANSCRIPT

When an appeal has been perfected, the justice shall stay all further proceedings on the judgment, and immediately make out a transcript of all the entries made on his docket of the proceedings had in the case; and he shall immediately file the same, together with the original papers and any money in the court registry, including sums tendered pursuant to Rule 749b(1), with the clerk of the county court of the county in which the trial was h ad, or other court having jurisdiction of such appeal. The clerk shall docket the cause, and the trial shall be de novo.

The clerk shall immediately notify both appellant and the adverse party of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court. Notification is sufficient by first class mail. No service of process fee shall be charged.

The trial, as well as all hearings and motions, shall be entitled to precedence in the county court.

DISPOSITION CHART
TEXAS RULES OF CIVIL PROCEDURE 737-822

RULE	PAGE NUMBER	CURRENT RULE	CHANGE SUGGESTED BY	RECOMMENDED CHANGE	REASON	SUB-COMMITTEE ACTION
737		No change suggested				
738		No change suggested				
739	Pg 952	TRCP 739. CITATION When the party aggrieved or his authorized agent shall file his written sworn complaint with such justice, the justice shall immediately issue citation directed to the defendant or defendants commanding him to appear before such justice at a time and place named in such citation, such time being not more than ten days nor less than six days from the date of service of the citation. The citation shall inform the parties that, upon timely request and payment of a jury fee no later than five days after the defendant is served with citation, the case shall be heard by a jury.	Judge Paul Heath Till	Exempt Rule 739 from Rule 4, so that Saturdays, Sundays and holidays will be used in computing five day periods.	The use of overlapping time periods due to the use of distinctive counting methods creates concern as to the timeliness of demanding a jury.	Adopt
740		No change suggested				

Drafted by: Kristin Parker

RULE	PAGE NUMBER	CURRENT RULE	CHANGE SUGGESTED BY	RECOMMENDED CHANGE	REASON	SUB-COMMITTEE ACTION
741		No change suggested				
742	Pg 961	RULE 742. SERVICE OF CITATION The officer receiving such citation shall execute the same by delivering a copy of it to the defendant, or by leaving a copy thereof with some person over the age of sixteen years, at his usual place of abode, at least six days before the return day thereof; and on or before the day assigned for trial he shall return such citation, with his action written thereon, to the justice who issued the same.	[?]	Change "officer" to: "sheriff, constable or authorized person."	Currently this rule only provides for service by an "officer" and is silent as to the propriety of service by other "authorized persons" as allowed in other j.p., district and county court civil proceedings. The change will make the rule consistent with Rule 536.	Adopt
742	Pg 965-968	RULE 742. (See above)	Larry Niemann	Change "officer" to "person."	To make it consistent with TRCP 536	Reject
742a	Pg 962-964	RULE 742a. SERVICE BY DELIVERY TO PREMISES If the sworn complaint lists all home and work addresses of the defendant which are known to the person filing the sworn complaint and if it states	[?]	Change "officer" to "sheriff, constable or authorized person."	Currently this rule only provides for service by an "officer" and is silent as to the propriety of service by other "authorized persons" as allowed In other j.p., district and county court civil proceedings. The change will	Adopt

RULE	PAGE NUMBER	CURRENT RULE	CHANGE SUGGESTED BY	RECOMMENDED CHANGE	REASON	SUB-COMMITTEE ACTION
		that such person knows of no other home or work address of the defendant in the county where the premises are located, service of citation may be by delivery to the premises in question as follows: If the officer receiving such citation is unsuccessful in serving such citation under Rule 742, the officer shall no later than five days after receiving such citation execute a sworn statement that the officer has made diligent efforts to serve such citation on at least two occasions at all addresses of the defendant in the county where the premises are located as may be shown on the sworn complaint, stating the times and places of attempted service. Such sworn statement shall be filed by the officer with the justice who shall promptly consider the sworn			make the rule consistent with Rule 536.	

RULE	PAGE NUMBER	CURRENT RULE	CHANGE SUGGESTED BY	RECOMMENDED CHANGE	REASON	SUB-COMMITTEE ACTION
		statement of the officer. The justice may then authorize service according to the following: (a) The officer shall place the citation inside the premises by placing it through a door mail chute or by slipping it under the front door; and if neither method is possible or practical, the officer shall securely affix the citation to the front door or main entry to the premises. (b) The officer shall that same day or the next day deposit in the mail a true copy of such citation with a copy of the sworn complaint attached thereto, addressed to defendant at the premises in question and sent by first class mail; (c) The officer shall note on the return of such citation the date of delivery under (a) above and the date of mailing under (b) above;				

RULE	PAGE NUMBER	CURRENT RULE	CHANGE SUGGESTED BY	RECOMMENDED CHANGE	REASON	SUB-COMMITTEE ACTION
		and (d) Such delivery and mailing to the premises shall occur at least six days before the return day of the citation; and on or before the day assigned for trial he shall return such citation with his action written thereon, to the justice who issued the same. It shall not be necessary for the aggrieved party or his authorized agent to make request for or motion for alternative service pursuant to this rule.				
742a	Pg 965-968	RULE 742a. (See above)	Larry Niemann	Change "officer" to "person."	To make it consistent with TRCP 536	Reject
743		No change suggested				
744	Pg 952, 753, Pg 970	TRCP 744. DEMANDING JURY Any party shall have the right of trial by jury, by making a request to the court on or before five days from the date the defendant is served with citation, and by paying the jury fee of	Judge Tom Lawrence Judge Paul Heath Till	Exempt Rule 744 from Rule 4, so that Saturdays, Sundays and holidays will be used in computing five day periods.	The use of overlapping time periods due to the use of distinctive counting methods creates concern as to the timeliness of demanding a jury.	Adopt

RULE	PAGE NUMBER	CURRENT RULE	CHANGE SUGGESTED BY	RECOMMENDED CHANGE	REASON	SUB-COMMITTEE ACTION
		five dollars. Upon such request, a jury shall be summoned as in other cases in justice court.				
745		No change suggested				
746		No change suggested				
747		No change suggested				
747a	Pg 960a-960g	TRCP 747a. REPRESENTATION BY AGENTS In forcible entry and detainer cases for non-payment of rent or holding over beyond the rental term, the parties may represent themselves or be represented by their authorized agents in justice court.	Judge Keith Baker Judge Paul Heath Till	Clarify by comment as to the meaning of "authorized agent." Proposed comment: "Authorized agent" for purposes of the landlord should be construed to mean owner, employee of owner, managing company hired by owner or realtor retained by owner. For purposes of the tenant "authorized agent" should be construed to mean tenant, employee of the tenant or occupant of the premises as defined in the lease. (See attached letter from Judge Till.)	Concern has been expressed as to whether agent representation by a non-attorney constitutes the unauthorized practice of law.	Adopt
748		No change suggested				
749		No change suggested				
749a	Pg 978, 980-982	TRCP 749a. PAUPER'S AFFIDAVIT	Bill Willis	The first paragraph to Rule 749a should be corrected to	Correct typographical error.	Appears to be corrected in

RULE	PAGE NUMBER	CURRENT RULE	CHANGE SUGGESTED BY	RECOMMENDED CHANGE	REASON	SUB-COMMITTEE ACTION
		If appellant is unable to pay the costs of appeal, or file a bond as required by Rule 749, he shall nevertheless be entitled to appeal by making strict proof of such inability within five days after the judgment is signed, which shall consist of his affidavit filed with the justice of the peace stating his inability to pay such costs, or any part thereof, or to give security, which may be contested within five days after the filing of such affidavit and notice thereof to the opposite party or his attorney of record by any officer of the court or party to the suit, whereupon it shall be the duty of the justice of the peace in whose court the suit is pending to hear evidence and determine the right of the party to appeal, and he shall enter his finding on the docket as a		read "When a pauper's affidavit is timely contested by appellee"...and delete appellant.		West's Texas Rules of Court book.

RULE	PAGE NUMBER	CURRENT RULE	CHANGE SUGGESTED BY	RECOMMENDED CHANGE	REASON	SUB-COMMITTEE ACTION
		part of the record. Upon the filing of a pauper's affidavit, the opposing party of the justice of the peace or clerk of the court shall notice the opposing party of a pauper's affidavit of the opposing party of the filing of the affidavit of inability within one working day of its filing by written notification accomplished through first class mail. It will be presumed prima facie that the affidavit speaks the truth, and, unless contested within five days after the filing and notice thereof, the presumption shall be deemed conclusive; but if a contest is filed, the burden shall then be on the appellant to prove his alleged inability by competent evidence other than by the affidavit above referred to. When a pauper's affidavit is timely contested by the appellee,				

RULE	PAGE NUMBER	CURRENT RULE	CHANGE SUGGESTED BY	RECOMMENDED CHANGE	REASON	SUB-COMMITTEE ACTION
		the justice shall hold a hearing and rule on the matter within five days. If the justice of the peace disapproves the pauper's affidavit, appellant may, within five days thereafter bring the matter before the county judge for a final decision, and, on request, the justice shall certify to the county judge appellant's affidavit, the contest thereof, and all documents, and papers thereto. The county judge shall set a day for hearing, not later than five days, and shall hear the contest de novo. If the pauper's affidavit is approved by the county judge, he shall direct the justice to transmit to the clerk of the county court, the transcript, records and papers of the case. A pauper's affidavit will be considered approved upon one of the following				

RULE	PAGE NUMBER	CURRENT RULE	CHANGE SUGGESTED BY	RECOMMENDED CHANGE	REASON	SUB-COMMITTEE ACTION
		occurrences: (1) the pauper's affidavit is not contested by the other party; (2) the pauper's affidavit is contested by the other party and upon a hearing the justice determines that the pauper's affidavit is approved; or (3) upon a hearing by the justice disapproving of the pauper's affidavit the appellant appeals to the county judge who then, after a hearing, approves the pauper's affidavit. No writ of possession may issue pending the hearing by the county judge of the appellant's right to appeal on a pauper's affidavit. If the county judge disapproves the pauper's affidavit, appellant may perfect his appeal by filing an appeal bond in the amount as required by Rule 749 within five days thereafter. If no appeal				

RULE	PAGE NUMBER	CURRENT RULE	CHANGE SUGGESTED BY	RECOMMENDED CHANGE	REASON	SUB-COMMITTEE ACTION
		bond is filed within five days, a writ of possession may issue.				
749b	Pg 971-972; 976-978; 980-982	TRCP 749b. PAUPER'S AFFIDAVIT IN NONPAYMENT OF RENT APPEALS In a nonpayment of rent forcible detainer case a tenant/appellant who has appealed by filing a pauper's affidavit under these rules shall be entitled to stay in possession of the premises during the pendency of the appeal, by complying with the following procedure: (1) Within five days of the date that the tenant/appellant files his pauper's affidavit, he must pay into the justice court registry one rental period's rent under the terms of the rental agreement. (2) During the appeal process as rent becomes due under the rental agreement,	Lynn Sanders	Modify rule 749b to provide for "payment of fair market value of rent" by a tenant seeking to remain in possession of leased premises while appealing an unsuccessful forcible entry and detainer judgment. Add the following sentence to the end of 749b(2): "The rental amount as provided by a lease agreement is the fair market value of the rent for the purpose of determining an appropriate rent deposit."	Without such clarifying languages courts are allowing tenants who receive assistance from government housing authorities to remain in possession pending appeal without having to tender rents into the registry of the court.	Adopt

RULE	PAGE NUMBER	CURRENT RULE	CHANGE SUGGESTED BY	RECOMMENDED CHANGE	REASON	SUB-COMMITTEE ACTION
		the tenant/appellant shall pay the rent into the county court registry within five days of the due date under the terms of the rental agreement. (3) If the tenant/appellant fails to pay the rent into the court registry within the time limits prescribed by these rules, the appellee may file a notice of default in county court. Upon sworn motion by the appellee and a showing of default to the judge, the court shall issue a writ of restitution. (4) Landlord/appellee may withdraw any or all rent in the county court registry upon a) sworn motion and hearing, prior to final determination of the case, showing just cause, b) dismissal of the appeal, or c) order of the court upon final hearing. (5) All hearings and motions under this rule shall				

RULE	PAGE NUMBER	CURRENT RULE	CHANGE SUGGESTED BY	RECOMMENDED CHANGE	REASON	SUB-COMMITTEE ACTION
		be entitled to precedence in the county court.				
749b	Pg 976 Pg 980-982	TRCP 749b. PAUPER'S AFFIDAVIT IN NONPAYMENT OF RENT APPEALS (See above)	Brian Sanford	Change "writ of restitution" to "writ of possession."	To be consistent with other rules pertaining to appropriate forcible entry and detainer relief.	Adopt
749c	Pg 978 Pg 980-982	TRCP 749c. APPEAL PERFECTED When an appeal bond has been timely filed in conformity with Rule 749 or a pauper's affidavit approved in conformity with Rule 749a, the appeal shall be perfected.	Bill Willis	Include clarifying comment to Rule 749c that although a right of appeal from an unsuccessful forcible entry and detainer judgment may exist without the necessity of making a rent deposit into the registry of the court, a tenant has no right to remain in possession pending such appeal without appropriate tender of rent. Proposed comment: "The requirements of Rule 749b(1) must be met by an unsuccessful tenant seeking to retain possession of the premises pending appeal and are not affected by Rule 749c."	To make clear the meaning of 1990 comment: "To dispense with the appellate requirement of payment of any rent into the court registry."	Adopt
750		No change suggested				
751	Pg 974;	TRCP 751. TRANSCRIPT	Leslie	Clarify type of notice	Some clerks erroneously	Adopt

RULE	PAGE NUMBER	CURRENT RULE	CHANGE SUGGESTED BY	RECOMMENDED CHANGE	REASON	SUB-COMMITTEE ACTION
	Pg 978; Pg 980-981	When an appeal has been perfected, the justice shall stay all further proceedings on the judgment, and immediately make out a transcript of all the entries made on his docket of the proceedings had in the case; and he shall immediately file the same, together with the original papers and any money in the court registry, including sums tendered pursuant to Rule 749b(1), with the clerk of the county court of the county in which the trial was had, or other court having jurisdiction of such appeal. The clerk shall docket the cause, and the trial shall be de novo. The clerk shall immediately notify both appellant and the adverse party of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity	Sanchanowicz, Bexar County DA	clerks required to give pursuant to TRCP 751. Add the following sentences to the end of the second paragraph: "Notification is sufficient by first class mail. No service of process fee shall be charged."	interpret notice to be the equivalent of service of process and chargea service of process fee for an appeal de novo to county court.	

RULE	PAGE NUMBER	CURRENT RULE	CHANGE SUGGESTED BY	RECOMMENDED CHANGE	REASON	SUB-COMMITTEE ACTION
		for filing a written answer in the county court when the defendant has pleaded orally in the justice court. The trial, as well as all hearings and motions, shall be entitled to precedence in the county courts.				
752-755		No change suggested				
Proposed General Rule 814	SSp 510 SSp 524-525 SSp 536	TRCP 814. EFFECTIVE DATE These rules shall take effect on September 1st, 1941. They shall govern all proceedings in actions brought after they take effect, and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure shall apply. All things properly done under any previously existing rule	Clarence Guittard	Delete as Rule 814, modify rule as recommended and renumber as part of new proposed general procedural rules (aka "GRP").	GRP 13. The original Texas Rules of Civil Procedure took effect on September 1st, 1941, and the Texas Rules of Appellate Procedure took effect on September 1st, 1986. These General Rules shall take effect on _____. All rules govern proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure shall apply. All things properly done under any previously existing rule or statutes prior to the taking	Adopt

RULE	PAGE NUMBER	CURRENT RULE	CHANGE SUGGESTED BY	RECOMMENDED CHANGE	REASON	SUB-COMMITTEE ACTION
		or statutes prior to the taking effect of these rules shall be treated as valid. Where citation or other process is issued and served in compliance with existing rules or laws prior to the taking effect of these rules, the party upon whom such citation or other process has been served shall have the time provided for under such previously existing rules or laws in which to comply therewith.			effect of rules shall be treated as valid. Where citation or other process is issued and served in compliance with existing rules or laws prior to the taking effect of rules, the party upon whom such citation or other process has been served shall have the time provided for under such previously existing rules or laws in which to comply therewith.	
Proposed General Rule 815	SSp 511-512 SSp 524-525 SSp 536	TRCP 815. SUBSTANTIVE RIGHTS UNAFFECTED These rules shall not be construed to enlarge or diminish any substantive rights or obligations of any parties to any civil action.	Clarence Guittard	Delete as Rule 815, modify rule as recommended and renumber as part of new proposed general procedural rules (aka "GRP").	GRP 14. SUBSTANTIVE RIGHTS UNAFFECTED No rule of procedure shall be construed to enlarge or diminish any substantive rights or obligations of any party.	Adopt
Proposed General Rule 816	SSp 513-514 SSp 524-525 SSp 536	TRCP 816. JURISDICTION AND VENUE UNAFFECTED These rules shall not be construed to extend or limit the jurisdiction of the courts	Clarence Guittard	Delete as Rule 816, modify rule as recommended and renumber as part of new proposed general procedural rules (aka "GRP").	GRP 15. JURISDICTION AND VENUE UNAFFECTED No rule of procedure shall be construed to extend or limit the jurisdiction of the courts of the State of Texas or the venue of	Adopt

RULE	PAGE NUMBER	CURRENT RULE	CHANGE SUGGESTED BY	RECOMMENDED CHANGE	REASON	SUB-COMMITTEE ACTION
		of the State of Texas nor the venue of actions therein.			lawsuits in them.	
Proposed General Rule 818	SSp 515-516 SSp 524-525 SSp 536	TRCP 818. REFERENCE TO FORMER STATUTES Wherever any statute or rule refers to any practice or procedure in any law, laws, statute or statutes, or to a title, chapter, section, or article of the statutes, or contains any reference of any such nature, and the matter referred to has been supplanted in whole or in part by these rules, every such reference shall be deemed to be to the pertinent part or parts of these rules.	Clarence Guittard	Delete as Rule 818, modify rule as recommended and renumber as part of new proposed general procedural rules (aka "GRP").	GRP 16. REFERENCE TO FORMER STATUTES Whenever any statute or rule refers to any practice or procedure in any law, laws, statute or statutes or to a title, chapter, or section, or article of the statutes, or contains any reference of any such nature.	Adopt
Proposed General Rule 819	Ssp 517-518 SSp 524-525 SSp 537	TRCP 819. PROCEDURE CONTINUED All procedure prescribed by statutes of the State of Texas not specifically listed in the accompanying enumeration of repealed articles shall, insofar as the same is not inconsistent with the provisions of these rules,	Clarence Guittard	Delete as Rule 819, modify rule as recommended and renumber as part of new proposed general procedural rules (aka "GRP").	GRP 17. PROCEDURE CONTINUED All procedure prescribed by statutes of the State of Texas not specifically listed in the enumeration of repealed articles accompanying the order of the Supreme Court as Court of Criminal Appeals adopting any rules of	Adopt

RULE	PAGE NUMBER	CURRENT RULE	CHANGE SUGGESTED BY	RECOMMENDED CHANGE	REASON	SUB-COMMITTEE ACTION
		continue in accordance with the provisions of such statutes as rules of court. In case of inconsistency between the provisions of these rules and any statutory procedure not specifically listed as repealed, these rules shall apply.			procedure or amendment of the rules shall, insofar as the same is not inconsistent with the provisions of any pertinent rule of procedure, continue in accordance with the provisions of such statutes as rules of court. In case of inconsistency between the provisions of any rule of procedure and any statutory procedure not specifically listed as repealed, the pertinent rule of procedure shall apply.	
Proposed General Rule 820	SSp 519-520 SSp 524-525 SSp 537	TRCP 820. WORKERS' COMPENSATION LAW All portions of the Workers' Compensation Law, Articles 8306-8309-1, Revised Civil Statutes, and amendments thereto, which relate to matters of practice and procedure are hereby adopted and retained in force and effect as rules of court.	Clarence Guittard	Delete as Rule 820, modify rule as recommended and renumber as part of new proposed general procedural rules (aka "GRP").	GRP 18. WORKERS COMPENSATION LAW All portions of the Workers' Compensation Law, Articles _____, Revised Civil Statutes, and amendments thereto, which relate to matters of practice and procedure are hereby adopted and retained in force and effect as rules of court.	Adopt
Proposed General Rule 821	SSp 521-522 SSP 524-	TRCP 821. PRIOR COURT RULES REPEALED These rules shall	Clarence Guittard	Delete as Rule 821, modify rule as recommended and renumber as part of new	GRP 19. PRIOR COURT RULES REPEALED These General Rules,	Adopt

RULE	PAGE NUMBER	CURRENT RULE	CHANGE SUGGESTED BY	RECOMMENDED CHANGE	REASON	SUB-COMMITTEE ACTION
	525 SSP 537-538	supersede all Court Rules heretofore promulgated for any court; and all of said prior Court Rules are hereby repealed; provided, however, any rules of procedure heretofore adopted by a particular county or district court or by any Court of Appeals which were not of general application but were solely to regulate procedure in the particular court promulgating such rules are to remain in force and effect insofar as they are not inconsistent with these rules.		proposed general procedural rules (aka "GRP").	together with the Texas Rules of Civil Procedure, as most recently amended, and the Texas Rules of Appellate Procedure, as most recently amended, supersede all prior rules promulgated for any court, and all prior rules are hereby repealed, except that local rules promulgated in accordance with Rule 3a of the Texas Rules of Civil Procedure or Rule 1(b) of the Texas Rules of Appellate Procedure that are not of general application but are solely to regulate procedure in the particular court promulgating such rules shall remain in force and effect insofar as they are not inconsistent with these General Rules or any provision of the Texas Rules of Civil Procedure or the Texas Rules of Appellate Procedure.	
Proposed General	SSp 523 Ssp 523-	TRCP 822. TITLE These rules may be known	Clarence Guittard	Delete as Rule 822, modify rule as recommended and	GRP 20. TITLE These rules may be known	Adopt

RULE	PAGE NUMBER	CURRENT RULE	CHANGE SUGGESTED BY	RECOMMENDED CHANGE	REASON	SUB-COMMITTEE ACTION
Rule 822	525 SSp 538	and cited as the Texas Rules of Civil Procedure.		renumber as part of new proposed general procedural rules (aka "GRP").	and cited as the Texas General Rules of Procedure. Note: A similar provision should probably be added to TRAP as Rule 1b.	

DISPOSITION CHART
TEXAS RULES OF CIVIL PROCEDURE 737-822

RULE	PAGE NUMBER	CHANGE SUGGESTED BY	RECOMMENDED CHANGE	REASON	SUB-COMMITTEE ACTION
737					
738					
739	Pg 952	Judge Paul Heath Till	Exempt Rule 739 from Rule 4, so that Saturdays, Sundays and holidays will be used in computing five day periods.	The use of overlapping time periods due to the use of distinctive counting methods creates concern as to the timeliness of demanding a jury.	Adopt
740					
741					
742	Pg 961	[?]	Change "officer" to: "sheriff, constable or authorized person."	Currently this rule only provides for service by an "officer" and is silent as to the propriety of service by other "authorized persons" as allowed in other j.p., district and county court civil proceedings. The change will make the rule consistent with Rule 536.	Adopt
742	Pg 965-968	Larry Niemann	Change "officer" to "person."	To make it consistent with TRCP 536	Reject
742a	Pg 962-964	[?]	Change "officer" to "sheriff, constable or authorized person."	Currently this rule only provides for service by an "officer" and is silent as to the	Adopt

RULE	PAGE NUMBER	CHANGE SUGGESTED BY	RECOMMENDED CHANGE	REASON	SUB-COMMITTEE ACTION
				propriety of service by other "authorized persons" as allowed In other j.p., district and county court civil proceedings. The change will make the rule consistent with Rule 536.	
742a	Pg 965-968	Larry Niemann	Change "officer" to "person."	To make it consistent with TRCP 536	Reject
743					
744	Pg 952, 753, Pg 970	Judge Tom Lawrence Judge Paul Heath Till	Exempt Rule 744 from Rule 4, so that Saturdays, Sundays and holidays will be used in computing five day periods.	The use of overlapping time periods due to the use of distinctive counting methods creates concern as to the timeliness of demanding a jury.	Adopt
745					
746					
747					
747a	Pg 960a-960g	Judge Keith Baker Judge Paul Heath Till	Clarify by comment as to the meaning of "authorized agent." Proposed comment: "Authorized agent" for purposes of the landlord should be construed to mean owner, employee of owner, managing company hired by owner or realtor retained by owner. For purposes of the	Concern has been expressed as to whether agent representation by a non-attorney constitutes the unauthorized practice of law.	Adopt

RULE	PAGE NUMBER	CHANGE SUGGESTED BY	RECOMMENDED CHANGE	REASON	SUB-COMMITTEE ACTION
			tenant "authorized agent" should be construed to mean tenant, employee of the tenant or occupant of the premises as defined in the lease. (See attached letter from Judge Till.)		
748					
749					
749a	Pg 978, 980-982	Bill Willis	The first paragraph to Rule 749a should be corrected to read "When a pauper's affidavit is timely contested by appellee"...and delete appellant.	Correct typographical error.	Appears to be corrected in West's Texas Rules of Court book.
749b	Pg 971-972; 976-978; 980-982	Lynn Sanders	Modify rule 749b to provide for "payment of fair market value of rent" by a tenant seeking to remain in possession of leased premises while appealing an unsuccessful forcible entry and detainer judgment. Add the following sentence to the end of 749b(2): "The rental amount as provided by a lease agreement is the fair market value of the rent for the purpose of	Without such clarifying languages courts are allowing tenants who receive assistance from government housing authorities to remain in possession pending appeal without having to tender rents into the registry of the court.	Adopt

RULE	PAGE NUMBER	CHANGE SUGGESTED BY	RECOMMENDED CHANGE	REASON	SUB-COMMITTEE ACTION
			determining an appropriate rent deposit."		
749b	Pg 976 Pg 980-982	Brian Sanford	Change "writ of restitution" to "writ of possession."	To be consistent with other rules pertaining to appropriate forcible entry and detainer relief.	Adopt
749c	Pg 978 Pg 980-982	Bill Willis	Include clarifying comment to Rule 749c that although a right of appeal from an unsuccessful forcible entry and detainer judgment may exist without the necessity of making a rent deposit into the registry of the court, a tenant has no right to remain in possession pending such appeal without appropriate tender of rent. Proposed comment: "The requirements of Rule 749b(1) must be met by an unsuccessful tenant seeking to retain possession of the premises pending appeal and are not affected by Rule 749c."	To make clear the meaning of 1990 comment: "To dispense with the appellate requirement of payment of any rent into the court registry."	Adopt
750					
751	Pg 974; Pg 978;	Leslie Sanchanowicz,	Clarify type of notice clerks required to give	Some clerks erroneously interpret notice to be the	Adopt

RULE	PAGE NUMBER	CHANGE SUGGESTED BY	RECOMMENDED CHANGE	REASON	SUB-COMMITTEE ACTION
	Pg 980-981	Bexar County DA	pursuant to TRCP 751. Add the following sentences to the end of the second paragraph: "Notification is sufficient by first class mail. No service of process fee shall be charged."	equivalent of service of process and chargea service of process fee for an appeal de novo to county court.	
752-755					
Proposed General Rule 814	SSp 510 SSp 524-525 SSp 536	Clarence Guittard	Delete as Rule 814, modify rule as recommended and renumber as part of new proposed general procedural rules (aka "GRP").	GRP 13. The original Texas Rules of Civil Procedure took effect on September 1st, 1941, and the Texas Rules of Appellate Procedure took effect on September 1st, 1986. These General Rules shall take effect on _____. All rules govern proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure shall apply. All things properly done under	Adopt

RULE	PAGE NUMBER	CHANGE SUGGESTED BY	RECOMMENDED CHANGE	REASON	SUB-COMMITTEE ACTION
				any previously existing rule or statutes prior to the taking effect of rules shall be treated as valid. Where citation or other process is issued and served in compliance with existing rules or laws prior to the taking effect of rules, the party upon whom such citation or other process has been served shall have the time provided for under such previously existing rules or laws in which to comply therewith.	
Proposed General Rule 815	SSp 511-512 SSp 524-525 SSp 536	Clarence Guittard	Delete as Rule 815, modify rule as recommended and renumber as part of new proposed general procedural rules (aka "GRP").	GRP 14. SUBSTANTIVE RIGHTS UNAFFECTED No rule of procedure shall be construed to enlarge or diminish any substantive rights or obligations of any party.	Adopt
Proposed General Rule 816	SSp 513-514 SSp 524-525 SSp 536	Clarence Guittard	Delete as Rule 816, modify rule as recommended and renumber as part of new proposed general procedural rules (aka "GRP").	GRP 15. JURISDICTION AND VENUE UNAFFECTED No rule of procedure shall be construed to extend or limit the jurisdiction of the courts of the State of Texas or the venue of lawsuits in them.	Adopt
Proposed	SSp 515-	Clarence	Delete as Rule 818, modify	GRP 16. REFERENCE TO	Adopt

RULE	PAGE NUMBER	CHANGE SUGGESTED BY	RECOMMENDED CHANGE	REASON	SUB-COMMITTEE ACTION
General Rule 818	516 SSp 524-525 SSp 536	Guittard	rule as recommended and renumber as part of new proposed general procedural rules (aka "GRP").	FORMER STATUTES Whenever any statute or rule refers to any practice or procedure in any law, laws, statute or statutes or to a title, chapter, or section, or article of the statutes, or contains any reference of any such nature.	
Proposed General Rule 819	Ssp 517-518 SSp 524-525 SSp 537	Clarence Guittard	Delete as Rule 819, modify rule as recommended and renumber as part of new proposed general procedural rules (aka "GRP").	GRP 17. PROCEDURE CONTINUED All procedure prescribed by statutes of the State of Texas not specifically listed in the enumeration of repealed articles accompanying the order of the Supreme Court as Court of Criminal Appeals adopting any rules of procedure or amendment of the rules shall, insofar as the same is not inconsistent with the provisions of any pertinent rule of procedure, continue in accordance with the provisions of such statutes as rules of court. In case of inconsistency between the provisions of any rule of procedure and any statutory procedure not	Adopt

RULE	PAGE NUMBER	CHANGE SUGGESTED BY	RECOMMENDED CHANGE	REASON	SUB-COMMITTEE ACTION
				specifically listed as repealed, the pertinent rule of procedure shall apply.	
Proposed General Rule 820	SSp 519-520 SSp 524-525 SSp 537	Clarence Guittard	Delete as Rule 820, modify rule as recommended and renumber as part of new proposed general procedural rules (aka "GRP").	GRP 18. WORKERS COMPENSATION LAW All portions of the Workers' Compensation Law, Articles _____, Revised Civil Statutes, and amendments thereto, which relate to matters of practice and procedure are hereby adopted and retained in force and effect as rules of court.	Adopt
Proposed General Rule 821	SSp 521-522 SSP 524-525 SSP 537-538	Clarence Guittard	Delete as Rule 821, modify rule as recommended and renumber as part of new proposed general procedural rules (aka "GRP").	GRP 19. PRIOR COURT RULES REPEALED These General Rules, together with the Texas Rules of Civil Procedure, as most recently amended, and the Texas Rules of Appellate Procedure, as most recently amended, supersede all prior rules promulgated for any court, and all prior rules are hereby repealed, except that local rules promulgated in accordance with Rule 3a of the Texas Rules of Civil Procedure	Adopt

RULE	PAGE NUMBER	CHANGE SUGGESTED BY	RECOMMENDED CHANGE	REASON	SUB-COMMITTEE ACTION
				or Rule 1(b) of the Texas Rules of Appellate Procedure that are not of general application but are solely to regulate procedure in the particular court promulgating such rules shall remain in force and effect insofar as they are not inconsistent with these General Rules or any provision of the Texas Rules of Civil Procedure or the Texas Rules of Appellate Procedure.	
Proposed General Rule 822	SSp 523 Ssp 523-525 SSp 538	Clarence Guittard	Delete as Rule 822, modify rule as recommended and renumber as part of new proposed general procedural rules (aka "GRP").	GRP 20. TITLE These rules may be known and cited as the Texas General Rules of Procedure. Note: A similar provision should probably be added to TRAP as Rule 1b.	Adopt

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.

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 determine that a juror is disabled because of the severe illness of the juror or the death or severe illness of a near relative of the juror.

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What we sent to the Committee

September 13, 1995

TO: Supreme Court Advisory Committee

Dear Committee Members:

Enclosed is a current working draft of the Batson proposal from our subcommittee. Please let us know your comments.

Best regards,

Paula Sweeney

PS/dsa
Enclosure

Rule 232 Making Peremptory Challenges

(1) Number and Apportionment

[Unless alternate jurors are to be seated,] each side to a civil case shall be entitled to six peremptory challenges in a case tried in the district court, and three for a case tried in 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 are antagonistic with respect to an issue to be submitted to the jury. Each antagonistic party is entitled to its own peremptory challenges. Upon the timely motion of any party, made prior to the exercise of peremptory challenges, the trial judge shall use its discretion to apportion the number of peremptory challenges so that no party or side is given an unfair advantage as a result of the alignment of the litigants, the determination of antagonism, and the award of peremptory challenges.

(2) Grounds

After the court determines any challenges for cause and motions pertaining to apportionment, and within a reasonable time, the parties must exercise their peremptory challenges by striking through a prospective juror's name from a list furnished by the clerk. A peremptory challenge made without the necessity of assigning any reason therefor. The list of jury panelists with peremptory strikes noted shall be given to the clerk, the court, and counsel.

(3) Procedure For Determining Validity of Proposed Peremptory Challenges

Any party may, outside the hearing of the panel and before the juror's names are announced, object to another party's peremptory strike on the ground it is improperly motivated. The objecting party must present prima facie evidence of facts tending to show the challenge was motivated substantially by race, ethnicity, gender, or other unconstitutional basis. Upon such prima facie proof, the party seeking to uphold the peremptory challenge must present evidence of a neutral explanation sufficiently specific and related to the case that supports the strike. If no such explanation is offered, the court shall disallow the strike. If a neutral explanation is established by the evidence, the objecting party bears the burden to demonstrate, by the preponderance of the evidence, that a proposed peremptory strike is improperly urged to purposefully discriminate against a prospective juror due to race, ethnicity, gender, or other unconstitutional basis. The trial court is the trier of fact on any challenges to peremptory strikes.

A hearing upon a challenged peremptory strike is evidentiary. Only matters admitted into evidence, or the subject of stipulation, admission, judicial notice, or a bill of exception made at the time of the hearing, will be considered in ruling upon a challenged peremptory strike. Documents should be admitted as exhibits, if appropriate, including juror information cards, strike lists, any written responses to juror questionnaires, and notes of counsel. Testimony is to be given under oath. Jurors' oral voir dire responses to questioning under oath may be considered by the court, but need not be repeated.

If the party objecting to the peremptory challenge sustains its burden of proof, the trial court is to disallow the peremptory strike, and the strike shall be removed from the prospective juror's name. A party that makes any of its peremptory challenge on improper grounds waives any right to make any additional peremptory strikes to replace those found to have been improper.

(4) Petit Jury Called By The Clerk After Peremptory Challenge Rulings

The trial court is to retain the list of prospective jurors, reflecting the court's ruling on any challenges to peremptory strikes. [Unless alternate jurors are to be seated,] the clerk shall, if in district court, call the first twelve names on the lists not stricken; or, if the case is in county court, call the first six names on the lists not stricken. Those whose name are called shall constitute the petit jury.