AGENDA
SEPTEMBER 20, 1996
SCAC MEETING

INDEX

REPORT OF
SUBCOMMITTEE ON
TEXAS RULES OF CIVIL EVIDENCE
SEPTEMBER 20, 1996

CHART SHOWING ACTION TAKEN
BY SUPREME COURT ADVISORY COMMITTEE
NO. 2

RULE NO.	ACTION TAKEN BY SUPREME COURT ADVISORY COMMITTEE
509(d)(6) - CIV 510(d)(6) - CIV	Delete (6) from both rules so that the following is deleted: "when the disclosure is relevant in any suit affecting the parent-child relationship."
509(d) - CIV 510(d) - CIV	Make both rules consistent and add to 510(d) the exact language in 509(d) so that (d) now reads: Exceptions. Exceptions to confidentiality or privilege in court or administrative proceedings. (Underline language added)
New rule to limit compensation paid to expert witnesses	Proposal was voted down. There will be no new rule on this.
New rule allowing court to appoint experts	Proposal was voted down. There will be no new rule on this.

CHART SHOWING ACTION TAKEN BY SUPREME COURT ADVISORY COMMITTEE ON MATTERS PREVIOUSLY CONSIDERED BY TEXAS STATE BAR AREC COMMITTEE NO. 1

RULE NO	CHANGE SUGGESTED	RECOMMENDATION OF AREC	ACTION TAKEN BY SUPREME COURT ADVISORY COMMITTEE
412 - CRIM	Apply rule concerning evidence of previous sexual conduct to cases of prosecution for indecency of a child	No change	No change
503 - CIV & CRIM	Proposal whether to include with joint clients "common interest privilege"	No change	No change
705(b) - CIV	Proposal whether to give party right to voir dire expert	No change	No change
New Rule 1009 - CIV & CRIM	Translation of foreign materials	Draft rule	Made changes to AREC draft. Evidence Subcommittee met and drew new rule which should be discussed generally and will be discussed in today's agenda.
407 - CIV & CRIM	Proposal of self-critical analysis	Voted in favor and submitted rule	Voted against proposal - no change

702, 703, 704 & 705 - CIV & CRIM	Whether to add comment in keeping with Dupont v. Robinson	Voted in favor of comment	Voted against adding comment - general discussion of possible new rule and procedure on today's agenda

DISPOSITION CHART
TEXAS RULES OF CIVIL EVIDENCE
(AGENDA SEPTEMBER 20, 1996)

RULE NO	HISTORY	THINGS RECOMMENDED BY EVIDENCE SUBCOMMITTEE	REASON
606 - CIV & CRIM	SCAC voted to amend rule and follow amendment to Rule 327	Follow Rule 327 with two changes	Rule 327 unclear - draft attached
702 - CIV	SCAC voted to table this at first meeting. At second meeting voted not to have comment on rule.	No rule be drawn. However, if committee wishes then floor will be open to discussion for guidelines and possible draft of rule and even procedural rule	To get views of full committee. Attached is preliminary draft of rule and preliminary draft of procedure if committee wants to discuss it.
503(a)(2) - CIV	At first meeting tabled by SCAC - AREC voted for amendment. Proposal: Extend control group test	2 voted against any change to rule. 2 voted in favor of amendment to rule as proposed by AREC.	Draft attached
504 - CRIM	SCAC voted to follow Code of Criminal Procedure as amended. Delete privilege as witness against spouse with regard to crimes against spouse.	Follow Article 38.10 of Code of Criminal Procedure as amended	Consistency - attached is copy of rule as included in Unified Rule. Also attached is copy of amendment to 38.10 of Code of Criminal Procedure.

New Rule 1009 - CIV & CRIM	AREC made draft of new rule. Last meeting SCAC made changes to AREC draft.	Subcommittee met and drew new rule consistent with suggested changes - draft attached for discussion	Clarify rule and allow for more flexibility to the court
CIV & CRIM UNIFIED RULES	Lee and people on his staff went back and made certain corrections, some grammatical and some gender corrections and also made certain changes to show what would be applicable to civil only or criminal only.	Approve as drafted	Draft attached - unification of rules

REVISED - 4-15-96 - CONSISTENT WITH TRCP 327

RULE 606 OF THE RULES OF PROCEDURE
(BOTH CRIMINAL AND CIVIL)

RULE 606. COMPETENCY OF JUROR AS A WITNESS

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the 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.

(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.

Source: Rule 327

RULE 702 - CIV and CRIM - SSp0709-711

CHANGE SUGGESTED/BY: Michael Paul Graham

Limit testimony to that based upon well-founded methodology.

RECOMMENDED ACTION:

None.

REASON:

duPont v. Robinson sets forth standard.

RULE 702. TESTIMONY OF EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. However, such testimony must be relevant and based upon a reliable foundation. The trial court shall make the threshold determination of admissibility, considering the following factors, as well as other factors relevant thereto, focusing on the underlying principles and methodology: (1) The extent to which the theory has been or can be tested; (2) The extent to which the technique relies upon the subjective interpretation of the expert; (3) Whether the theory has been subjected to peer review and/or publication; (4) The techniques potential rate of error; (5) Whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; (6) The non-judicial uses which have been made of the theory or technique.

After determining that the testimony is relevant and reliable, the court must then determine whether to exclude the testimony considering the following factors, as well as other factors relevant thereto: (1) Whether the probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or potential for misleading the jury; (2) Considerations of undue delay; (3) Needless presentation of cumulative evidence.

The decision whether to admit this evidence rests within the discretion of the trial court. Review will be governed by the abuse of discretion standard.

ADD THE FOLLOWING AS THE THIRD PARAGRAPH TO TRCE 702:

A party desiring to contest the opinions of a person designated as an expert on the above grounds may do so only upon motion supported by affidavit. The motion and the affidavit must be filed within seven days after receiving the general substance of the proposed expert testimony either through report or through deposition of the expert. Said motion shall be heard without delay. The motion will be determined by the court upon examination of only the following:

1. Deposition testimony of the person so designated or if deposition is not available then a report of such person;

2. Affidavits of the moving party;

3. Deposition testimony taken in the case as of the date the motion is filed; and

4. Affidavits provided by the party proposing the motion.

If the court sustains the motion, the party proposing to call such witness shall have the option of an automatic continuance for sixty days within which to designate another person as an expert, or to proceed to trial. If such person designated within the sixty days is also disqualified, no further designation shall be permitted. The court's ruling on the motion shall preserve appellate complaint under Texas Rules Appellate Procedure, Rule 52.

A party desiring to contest the opinion of a person designated as an expert on the above grounds may do so only upon motion supported by affidavit. The motion must be filed within seven days after receiving notice that the expert will testify and heard without delay. The motion will be determined upon examination of the deposition testimony of the person so designated and affidavits of the moving party. If the court sustains the motion, the party proposing to call such person shall have the option of an automatic continuance for sixty days within which to designate another person as an expert or proceed to trial. If such other person is also disqualified, no further designation shall be permitted. The court's ruling on the motion shall preserve appellate complaint under Texas Rules Appellate Procedure, Rule 52.

RULE 503. LAWYER-CLIENT PRIVILEGE

(a) **Definitions.** As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from that lawyer.

(2) A representative of a client other than a legal entity is one having authority either to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client. If the client is a legal entity other than a natural person, a representative of such client is:

(A) a partner, officer, director, or employee having authority either to obtain professional legal services or to act on advice rendered pursuant thereto on behalf of the entity; or

(B) an agent or employee of the entity who has been requested by such partner, officer, director, or such superior employee to communicate with a lawyer on a subject matter within the scope of the employee's or agent's duties in connection with securing legal advice by the entity. The term "agent" as used in this Rule does not include an independent contractor.[1]

(3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) A "representative of the lawyer" is:

(A) one employed by the lawyer to assist the lawyer in the rendition of professional legal services; or

(B) an accountant who is reasonably necessary for the lawyer's rendition of professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) **General Rule of Privilege.** A client has a privilege to refuse to disclose and

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[1] This proposed revision of Rule 502(a)(2) was adopted as recommendation of the SBOT Evidence Committee in May 1994. This is a significant change in the law.

to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(1) between the client or a representative of the client and the lawyer or a representative of the lawyer,

(2) between the lawyer and the lawyer's representative;

(3) by the client or a representative of the client or a lawyer or a representative of the lawyer to a lawyer, or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(4) between representatives of the client or between the client and a representative of the client;

(5) among lawyers and their representatives representing the same client; or

(6) In criminal cases, a client has a privilege to prevent the lawyer or lawyer's representative from disclosing any other fact which came to the knowledge of the lawyer or the lawyer's representative by reason of the attorney-client relationship.

(c) **Who May Claim the Privilege.** The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) **Exceptions.** There is no privilege under this rule:

(1) **Furtherance of Crime or Fraud.** If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) **Claimants Through Same Deceased Client.** As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by *inter vivos* transactions;

(3) **Breach of Duty by a Lawyer or Client.** As to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer;

(4) **Document Attested by a Lawyer.** As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness: or

(5) **Joint Clients.** As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

Notes and Comments

This rule contains the language used in both the prior civil and prior criminal rules. Court decisions, both before and after the adoption of the Tex. Crim. R. Evid. in 1986, indicate that the scope of the lawyer-client privilege is the same in civil and criminal cases. *See, e.g., Ballew v. State*, 640 S.W.2d 237 (Tex. Cr. App. 1980) and *Manning v. State*, 766 S.W.2d 551 (Tex. App. -- Dallas 1989), *aff'd.*, 773 S.W.2d 568 (Tex. Crim. App. 1989). To avoid confusion, the vestigial language of the last sentence of the prior Criminal Rule 503(b) is omitted.

This rule governs only the lawyer/client privilege. It does not restrict the scope of the work product doctrine. *See* Tex. R. Civ. P. 166b. The language of former paragraph (d) was deleted because it was deemed unnecessary. This deletion was not intended to change the common law rule that communications privileged under this rule do not lose their privileged status by reason of the termination of the lawyer/client relationship.

(3) *Breach of Duty by a Lawyer or Client.* As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer;

(4) *Document Attested by a Lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(5) *Joint Clients.* As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

Notes and Comments

Comment: This rule governs only the lawyer/client privilege. It does not restrict the scope of the work product doctrine.

RULE 504. HUSBAND-WIFE PRIVILEGES

(1) Confidential Communication Privilege.

(a) *Definition.* A communication is confidential if it is made privately by any person to his spouse and it is not intended for disclosure to any other person.

(b) *General Rule of Privilege.* A person, whether or not a party, or the guardian or representative of an incompetent or deceased person, has a privilege during their marriage and afterwards to refuse to disclose and to prevent another from disclosing a confidential communication made to his spouse while they were married.

(c) *Who May Claim the Privilege.* The privilege may be claimed by the person or his guardian or representative, or by the spouse on his behalf. The authority of the spouse to do so is presumed.

(d) *Exceptions.* There is no privilege under this rule:

(1) Furtherance of Crime or Fraud. If the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or fraud.

(2) In a proceeding in which an accused is charged with a crime against the person of any minor child or any member of the household of either spouse, except in a proceeding where the accused is charged with a crime committed during the marriage against the spouse.

(2) Privilege Not to Be Called as a Witness Against Spouse.

(a) *General Rule of Privilege.* The spouse of the accused has a privilege not to be called as a witness for the state. This rule does not prohibit the spouse from testifying voluntarily for the state, even over objection by the accused. A spouse who testifies on behalf of an accused is subject to cross-examination as provided in Rule 610(b). Failure by an accused to call his spouse as a witness, where other evidence indicates that the spouse could testify to relevant matters, is a proper subject of comment by counsel.

(b) *Exceptions.* Except in a proceeding where the accused is charged with a crime committed during the marriage against the spouse, there is no privilege under this rule (1) in a proceeding in which an accused is charged with a crime against the person of any minor child or any member of the household of either spouse; or (2) as to matters occurring prior to the marriage.

RULE 505. COMMUNICATIONS TO CLERGYMEN

(a) Definitions. As used in this rule:

(1) A "clergyman" is a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization or an individual reasonably believed so to be by the person consulting him.

(2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General Rule of Privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.

(c) Who May Claim the Privilege. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The person who was the clergyman at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

RULE 506. POLITICAL VOTE

Every person has a privilege to refuse to disclose the tenor of his vote at a political election conducted by secret ballot unless the vote was cast illegally.

RULE 507. TRADE SECRETS

A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

not reversible error in aggravated assault of minor prosecution. Kopanski v. State (App. 13 Dist.1986) 713 S.W.2d 188.

Jurors' reference to defendant's failure to testify is misconduct mandating new trial if reference amounts to discussion by jurors or was used as circumstance against defendant. Reyna v. State (App. 13 Dist.1993) 846 S.W.2d 498.

Uncontroverted testimony by four jurors, that defendant's failure to testify was taken into consideration, mandated reversal of conviction and new trial; testimony indicated that jury as a group considered defendant's failure to testify. Reyna v. State (App. 13 Dist.1993) 846 S.W.2d 498.

Uncontroverted evidence that juror considered defendant's failure to testify as circumstance against defendant was misconduct mandating new trial. Reyna v. State (App. 13 Dist.1993) 846 S.W.2d 498.

144. Instructions as to failure to testify generally

At punishment stage of heroin possession trial, defendant preserved for review trial court's alleged error in failing to instruct jury that no adverse inference may be drawn from defendant's failure to testify, where defendant orally requested such instruction and trial court expressly refused to give it. De La Paz v. State (App. 8 Dist. 1995) 901 S.W.2d 571.

Trial court's error in failing to instruct jury that no adverse inference may be drawn from defendant's failure to testify was not harmless in punishment stage of heroin possession trial; two punishment witnesses who testified about defendant only raised jury's expectation to hear similar evidence directly from defendant, increasing risk he was penalized for his silence, and holding error harmless would have increased chance that trial court would refuse to instruct jury regarding defendant's right not to testify in future. De La Paz v. State (App. 8 Dist. 1995) 901 S.W.2d 571.

Where request is made to trial court to add to its charge at punishment stage of trial instruction on failure of defendant to testify, or objection is made to admission of such charge, it is reversible error if trial court fails to honor that request or objection. Brown v. State (Cr.App.1981) 617 S.W.2d 234.

In prosecution for burglary, trial court committed reversible error where, over objection, it refused to charge jury at punishment stage of trial on defendant's failure to testify, even though it so charged jury at guilt-innocence stage of trial. Brown v. State (Cr.App.1981) 617 S.W.2d 234.

Instruction, to effect, that failure of defendant to testify was not to be considered as a circumstance against him was substantially the same as the provisions of this article on subject and was not erroneous on ground that the word "failure" was prejudicial. Vidaurri v. State (Cr.App.1981) 626 S.W.2d 749.

Trial court's charge to jury, that law provided that defendant could testify in his own behalf if he elected to do so, tracked this section and was not comment on defendant's failure to testify. Rodgers v. State (App. 2 Dist.1987) 744 S.W.2d 281, review refused.

146. Review, generally

If defendant chooses to testify at punishment stage of trial, but not at guilt-innocence stage, he may waive, for appellate purposes, evidentiary objections made during guilt-innocence stage of trial, including right to complain on appeal of in or out-of-court identification, sufficiency of evidence, and illegal search and seizure. Brown v. State (Cr. App.1981) 617 S.W.2d 234.

Art. 38.09. Repealed by Texas Rules of Criminal Evidence effective September 1, 1986 [Acts 1985, 69th Leg., ch. 685, § 9(b)]

Historical and Statutory Notes

By order of the Court of Criminal Appeals dated December 18, 1985, effective September 1, 1986 adopting the Texas Rules of Criminal Evidence, these articles are deemed to be repealed as they relate to criminal cases and criminal law matters pursuant to Acts 1985, 69th Leg., ch. 685, effective August 26, 1985, classified as Vernon's Ann.Civ.St. art. 1811f. The repeal is effective simultaneously with the effective date of the comprehensive body of rules of evidence promulgated by the Court of Criminal Appeals.

See, now, Rules Crim. Evidence, rule 503.

Notes of Decisions

1. In general

Where competency of six-year-old complainant to testify had been established without objection at first trial of defendant for indecency with a child, trial court at second trial after mistrial was not required to conduct a repetitious hearing, particularly in the absence of an objection. Lujan v. State (App.1981) 626 S.W.2d 854, review refused.

Art. 38.10. Exceptions to the spousal adverse testimony privilege

The privilege of a person's spouse not to be called as a witness for the state does not apply in any proceeding in which the person is charged with a crime committed against the person's spouse, a minor child, or a member of the household of either spouse.

Added by Acts 1995, 74th Leg., ch. 67, § 2, eff. Sept. 1, 1995.

3-19-96

The following is a redraft of Rule 504 and the part that is amended to be consistent with the latest Legislative Act and with Article 38.10 of the Code of Criminal Procedure.

(b) Exceptions. The privilege of a person's spouse not to be called as a witness for the state does not apply (1) in any proceeding in which the person is charged with a crime committed against the person's spouse, a minor child, or a member of the household of either spouse; or (2) as to matters occurring prior to the marriage.

REDLINED VERSION

(b) Exceptions. ~~Except in a proceeding where the accused is charged with a crime committed during the marriage against the spouse, there is no privilege under this rule~~ The privilege of a person's spouse not to be called as a witness for the state does not apply (1) in ~~a~~ any proceeding in which ~~an accused~~ the person is charged with a crime committed against the person's spouse, ~~the person of any~~ a minor child or ~~any~~ a member of the household of either spouse; or (2) as to matters occurring prior to the marriage.

(b) Exceptions. The privilege of a person's spouse not to be called as a witness for the state does not apply (1) in any proceeding in which the person is charged with a crime committed against the person's spouse, a minor child, or a member of the household of either spouse; or (2) as to matters occurring prior to the marriage.

RULE 1009. TRANSLATION OF FOREIGN LANGUAGE RECORDS

(a) **Translation, Affidavit, and Filing.** An accurate translation of a foreign language record or set of records or photographically reproduced copies of such records which would otherwise be admissible shall be admissible in any court in this state upon the affidavit of a qualified translator setting forth the qualifications of such translator and certifying that the translation is a fair and accurate translation of such foreign language record or records.

In civil cases, such affidavit, translation, and the record or records in the foreign language translated shall be promptly served upon all parties at least sixty days prior to the day upon which the trial of said cause commences.

In criminal cases, such affidavit, translation, and the record or records in the foreign language shall be filed with the clerk of the court for inclusion with the papers in the cause in which the record or records are sought to be used as evidence at least thirty days prior to the day upon which trial of said cause commences, and the other parties to said cause shall be given prompt notice by the party filing the foreign language records and their translation.

(b) **Objections.** Any party may object to the accuracy of the translation.

In civil cases, an objection shall be served upon all parties thirty days prior to the commencement of the trial. The objection shall point out the specific inaccuracies of the original translation and what the objecting party contends would be an accurate translation.

In criminal cases, an objection shall be filed with the court at least ten days prior to the commencement of trial, pointing out the specific inaccuracies of the original translation and what the objecting party contends would be an accurate translation.

(c) **Admissibility and Failure to Object.** In a civil case, if no objection is timely served, or if no conflicting translation has been timely served in accordance with paragraph (a), the court shall admit a translation submitted under paragraph (a) without further need of proof provided that the underlying records are otherwise admissible under the Texas Rules of Civil Evidence. The time limits set forth herein may be varied by order of the court. Failure to serve a conflicting translation in accordance with paragraph (a) or failure to timely and properly object to the accuracy of a translation in accordance with paragraph (b) shall preclude a party from attacking or offering evidence contradicting the accuracy of such translation.

In a criminal case, if no objection is timely filed or if an objection is made and the trial judge after notice to all parties and a hearing has determined pursuant to TEX.R.CRIM.EVID. 107(a), that the translation is accurate, the court shall admit that translation without further need of proof at trial if the foreign language record is otherwise admissible under the Texas Rules of Criminal Evidence. The time limits set forth herein may be varied by order of the court.

(d) **Expert Testimony of Translator.** Except as provided in paragraph (c), this Rule does not prohibit the admission of an accurate translation of a foreign language record or records during trial by the testimony of a qualified translator as an expert. In a civil case, the testimony may be either live or by deposition.

(e) **Court Appointment.** The court may when necessary appoint a qualified translator, the reasonable value of whose services shall be taxed as court costs.

(f) **Objections or Conflicting Translations.** When there are either conflicting translations filed by more than one party under subparagraph (a) OR objection(s) to another party's translation filed under subparagraph (b), nothing in this rule requires or precludes the automatic admission into evidence of the conflicting translations OR requires that the issue of the correctness of a translation is an issue for the finder of fact rather than the court or for the court rather than the finder of fact.

(d) **Expert Testimony of Translator**. Except as provided in paragraph (c), this Rule does not prohibit the admission of an accurate translation of a foreign language record or records during trial by the testimony of a qualified translator as an expert. In a civil case, the testimony may be either live or by deposition.

(e) **Court Appointment**. The court may when necessary appoint a qualified translator, the reasonable value of whose services shall be taxed as court costs.

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DRAFT - ~~AUGUST 6~~ SEPTEMBER 12, 1996

PROPOSED UNIFIED "TEXAS RULES OF EVIDENCE" COMBINING PREVIOUS CIVIL AND CRIMINAL RULES

Table of Rules

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ARTICLE I. GENERAL PROVISIONS

RULE 101. TITLE AND SCOPE

(a) **Title.** These rules shall be known and cited as the Texas Rules of Evidence.

(b) **Scope.** Except as otherwise provided by statute, these rules govern civil and criminal proceedings (including examining trials before magistrates)[1] in all courts of Texas, except small claims courts.

(c) **Special Rules of Applicability in Criminal Proceedings.** In criminal proceedings:

(1) hierarchical government shall be in the following order: the Constitution of the United States, those federal statutes that control states under the supremacy clause, the Constitution of Texas, the Code of Criminal Procedure and the Penal Code, civil statutes, these rules, and the common law of England. Where possible, inconsistency is to be removed by reasonable construction.[2]

(2) these rules apply in the following proceedings to the extent matters of evidence are not provided for in the statutes which govern procedure therein or in another court rule prescribed pursuant to statutory authority:[3]

(A) sentencing or punishment assessment by the court or the jury;

(B) probation revocation;

(C) a hearing to proceed to judgment following deferred adjudication of guilt or conditional discharge;

(D) motions to suppress confessions, or to suppress illegally obtained evidence under Texas Code of Criminal Procedure article 38.23;

(E) proceedings conducted pursuant to Texas Code of Criminal Procedure Article 11.07.

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[1]This provision is from TEX. R. CRIM. EVID. 1101(a).

[2]This provision is from TEX. R. CRIM. EVID. 101(c). Does it make more sense for this paragraph to be designated paragraph (c) entitled "Hierarchial Government in Criminal Proceedings" and to renumber current paragraph (c) as (d) "Special Rules of Applicability in Criminal Proceedings" leaving (and renumbering) current subparagraphs (2) through (5) under paragraph (d)?

[3]All of subparagraph (2) is from TEX. R. CRIM. EVID. 1101(d) except that, to follow the convention followed in the remainder of the proposed rules, the first letter in each sentence of the subparagraphs is lower case and the sentence ends with a semicolon.

(3) these rules, except with respect to privileges, do not apply in the following situations:[4]

(A) *preliminary issues of fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104;

(B) *grand jury.* Proceedings before grand juries;

(C) *these miscellaneous proceedings.*

(i) application for habeas corpus in extradition, rendition, or interstate detainer proceedings;

(ii) a hearing under Texas Code of Criminal Procedure article 46.02, by the court out of the presence of a jury, to determine whether there is sufficient evidence of incompetency to require a jury determination of the question of incompetency;

(iii) proceedings regarding bail except hearings to deny, revoke or increase bail;

(iv) a hearing on justification for pretrial detention not involving bail;

(v) issuance of search or arrest warrant; or

(vi) Direct contempt determination.

(4) these rules with respect to privileges apply at all stages of all actions, cases, and proceedings.[5]

(5) evidence in hearings under the Texas Code of Military Justice, article 5788, shall be governed by that Code.[6]

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[4]All of subparagraph (3) is from TEX. R. CRIM. EVID. 1101(c), except that the same conventions on capitalization and punctuation referenced in fn. 3 are also followed here.

In addition, this is the only instance of paragraph titles at this third level in the proposed rules and of italics being used at this third level. They are left this way because italicized and titled in the prior Criminal Rule 1101(c). Should we recommend deletion of the titles altogether? Deleting the titles is really a matter for the Court of Criminal Appeals.

[5]This provision is from TEX. R. CRIM. EVID. 1101(b).

[6]This provision is from TEX. R. CRIM. EVID. 1101(e).

Notes and Comments

"Criminal proceedings" rather than "criminal cases" is used since that is the terminology in the prior criminal rules of evidence. In subpart (b), "trials before magistrates" comes from prior Criminal Rule 1101b. In the prior criminal rules, both Rule 101 and Rule 1101 dealt with the same thing, viz, the applicability of the rules. Thus, Rule 101(c) has been written to combine them and eliminate Rule 1101. Unlike the prior criminal rules, there is no "Art. XII, Miscellaneous Provisions."

RULE 102. PURPOSE AND CONSTRUCTION

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

RULE 103. RULINGS ON EVIDENCE

(a) **Effect of Erroneous Ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context. When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections.

(2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer, or additionally in criminal cases was apparent from the context within which questions were asked.

(b) **Record of Offer and Ruling.** The offering party shall, as soon as practicable, but before the court's charge is read to the jury, be allowed to make, in the absence of the jury, its offer of proof. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The court may, or at request of a party shall, direct the making of an offer in question and answer form.

(c) **Hearing of Jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) **Fundamental Error in Criminal Cases.** In criminal cases, nothing in these rules precludes taking notice of fundamental errors affecting substantial rights although they were not brought to the attention of the court.

Notes and Comments

This rule is not meant to change the harmless error doctrines in Texas civil or criminal cases as specified in the Texas Rules of Appellate Procedure. No substantive change in the law is intended.

RULE 104. PRELIMINARY QUESTIONS

(a) **Questions of Admissibility Generally.** Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination the court is not bound by the rules of evidence except those with respect to privileges.

(b) **Relevancy Conditioned on Fact.** When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) **Hearing of Jury.** In criminal cases, hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. All other civil or criminal hearings on preliminary matters shall be conducted out of the hearing of the jury when the interests of justice so require or when an accused who is a witness in a criminal case so requests.

(d) **Testimony by Accused Out of the Hearing of the Jury.** The accused in a criminal case does not, by testifying upon a preliminary matter out of the hearing of the jury, become subject to cross-examination as to other issues in the case.

(e) **Weight and Credibility.** This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

RULE 105. LIMITED ADMISSIBILITY

(a) When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly; but, in the absence of such request the court's action in admitting such evidence without limitation shall not be a ground for complaint on appeal.

(b) When evidence referred to in paragraph (a) is excluded, such exclusion shall not be a ground for complaint on appeal unless the proponent expressly offers the evidence for its limited, admissible purpose or limits its offer to the party against whom it is admissible.

RULE 106. REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS

When a writing or recorded statement or part there of is introduced by a party, an adverse party may at that time introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. "Writing or recorded statement" includes depositions.

Notes and Comments

This rule is the federal rule with one modification. Under the federal rule, a party may require an opponent to introduce evidence contrary to the latter's own case. The Committee believes the better practice is to permit the party, rather than the opponent, to introduce such evidence contemporaneously with the introduction of the incomplete evidence. This rule does not in any way circumscribe the right of a party to develop fully the matter on cross-examination or as part of the party's own case. *Cf.* Tex. Code Crim. Proc. art. 38.24. Nor does it alter the common law doctrine that the rule of optional completeness, as to writings, oral conversations, or other matters, may take precedence over exclusionary doctrines such as the hearsay or best evidence rule or the first-hand knowledge requirements. *See also* Tex. R. Evid. 611(a).

RULE 107. RULE OF OPTIONAL COMPLETENESS

When part of an act, declaration, conversation, writing or recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other, and any other act, declaration, writing or recorded statement which is necessary to make it fully understood or to explain the same may also be given in evidence, as when a letter is read, all letters on the same subject between the same parties may be given. "Writing or recorded statement" includes depositions.

Notes and Comments

This rule is the former Rule 107, Tex. R. Crim. Evid., except that the example regarding "when a letter is read" has been relocated so as to more accurately indicate the provision it explains. While this rule appeared only in the prior criminal rules, it is not so limited because it accurately reflects the common law rule of optional completeness in civil cases.

ARTICLE II. JUDICIAL NOTICE

RULE 201. JUDICIAL NOTICE OF ADJUDICATIVE FACTS

(a) **Scope of Rule.** This rule governs only judicial notice of adjudicative facts.

(b) **Kinds of Facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) **When Discretionary.** A court may take judicial notice, whether requested or not.

(d) **When mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) **Opportunity to Be Heard.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) **Time of Taking Notice.** Judicial notice may be taken at any stage of the proceeding.

(g) **Instructing Jury.** In civil cases, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In criminal cases, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

RULE 202. DETERMINATION OF LAW OF OTHER STATES

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

Notes and Comments

This rule is not intended to alter the requirements of Sections 2002.022 and 2002.054 of the Texas Government Code.

RULE 203. DETERMINATION OF THE LAWS OF FOREIGN COUNTRIES

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

RULE 204. DETERMINATION OF TEXAS CITY AND COUNTY ORDINANCES, THE CONTENTS OF THE TEXAS REGISTER, AND THE RULES OF AGENCIES PUBLISHED IN THE ADMINISTRATIVE CODE.

A court upon its own motion may, or upon the motion of a party in a criminal case or upon the motion of a party in a civil case, shall, take judicial notice of the ordinances of municipalities and counties of Texas, of the contents of the Texas Register, and of the codified rules of the agencies published in the Administrative Code. Any party requesting that judicial notice be taken of such matter shall furnish the court sufficient information to enable it properly to comply with the request, and shall give all parties such notice, if any, as the court may deem necessary, to enable all parties fairly to prepare to meet the request. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. The court's determination shall be subject to review as a ruling on a question of law.

ARTICLE III. PRESUMPTIONS

[No rules adopted at this time.]

ARTICLE IV. RELEVANCY AND ITS LIMITS

RULE 401. DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

RULE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as otherwise provided by Constitution, by statute, by these rules, or by other rules prescribed pursuant to statutory authority. Evidence which is not relevant is inadmissible.

RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON SPECIAL GROUNDS

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) **Character Evidence Generally**. Evidence of a person's character or character trait is not admissible for the purpose of proving action conformity therewith on a particular occasion, except:

(1) *Character of Accused in a Criminal Case and of a Party Accused in a Civil Case of Conduct Involving Moral Turpitude.* Evidence of a pertinent character trait offered:

(A) by an accused in a criminal case, or by the prosecution to rebut the same, or

(B) by a party accused in a civil case of conduct involving moral turpitude, or by the accusing party to rebut the same;

(2) *Character of Victim in a Criminal Case and of Alleged Victim of Assaultive Conduct in a Civil Case.* In a criminal case and subject to Rule 412, evidence of a pertinent character trait of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of peaceable character of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; or in a civil case, evidence of character for violence of the alleged victim of assaultive conduct offered on the

issue of self-defense by a party accused of the assaultive conduct, or evidence of peaceable character to rebut the same;

(3) *Character of Witness.* Evidence of the character of a witness, as provided in rules 607, 608 and 609.

(b) **Other Crimes, Wrongs or Acts.** Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon timely request by the accused in a criminal case, reasonable notice is given in advance of trial of intent to introduce in the State's case-in-chief such evidence other than that arising in the same transaction.

(c) **Character Relevant to Punishment in Criminal Cases.** In the penalty phase of a criminal trial, evidence may be offered by an accused or by the prosecution as to the prior criminal record of the accused. Other evidence of ~~his~~ **the accused's** character may be offered by an accused or by the prosecution. Nothing herein limits the provisions of Article 37.071, Code of Criminal Procedure.

RULE 405. METHODS OF PROVING CHARACTER

(a) **Reputation or Opinion.** In all cases in which evidence of a person's character or character trait ~~of a person~~ is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. In a criminal case, to be qualified to testify concerning the character or character trait of an accused, a witness must have been familiar with the reputation, or with the underlying facts or information upon which the opinion is based, prior to the day of the offense. In all cases where testimony is admitted under this rule, on cross-examination inquiry is allowable into relevant specific instances of conduct.

(b) **Specific Instances of Conduct.** In cases in which **a person's** character or character trait ~~of a person~~ is an essential element of a charge, claim or defense, proof may also be made of specific instances of that person's conduct.

RULE 406. HABIT; ROUTINE PRACTICE

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

RULE 407. SUBSEQUENT REMEDIAL MEASURES; NOTIFICATION OF DEFECT

(a) **Subsequent Remedial Measures.** When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control or feasibility of precautionary measures, if controverted, or impeachment. Nothing in this rule shall preclude admissibility in products liability cases based on strict liability..

(b) **Notification of Defect.** A written notification by a manufacturer of any defect in a product produced by such manufacturer to purchasers thereof is admissible against the manufacturer on the issue of existence of the defect to the extent that it is relevant.

RULE 408. COMPROMISE AND OFFERS TO COMPROMISE

Evidence of (1) furnishing or offering or promising to furnish or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice or interest of a witness or a party, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

RULE 409. PAYMENT OF MEDICAL AND SIMILAR EXPENSES

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

RULE 410. INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS AND RELATED STATEMENTS

Except as otherwise provided in this rule, evidence of the following is not admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) in civil cases, a plea of *nolo contendere,* and in criminal cases, a plea of *nolo contendere* which was later withdrawn;

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding, in a civil case, either a plea of guilty which was later withdrawn or a plea of *nolo contendere*, or in a criminal case, either a plea of guilty which was later withdrawn or a plea of *nolo contendere* which was later withdrawn; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which ~~do~~ **does** not result in a plea of guilty or a plea of *nolo contendere* or which ~~do result~~ **results** in a plea, later withdrawn, of guilty or *nolo contendere*. However, such a statement is admissible in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it.[7]

RULE 411. LIABILITY INSURANCE

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another issue, such as proof of agency, ownership, or control, if disputed, or bias or prejudice of a witness.

RULE 412. EVIDENCE OF PREVIOUS SEXUAL CONDUCT IN CRIMINAL CASES

(a) **Reputation or Opinion Evidence.** In a prosecution for sexual assault or aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, reputation or opinion evidence of the past sexual behavior of an alleged victim of such crime is not admissible.

(b) **Evidence of Specific Instances.** In a prosecution for sexual assault or aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, evidence of specific instances of an alleged victim's past sexual behavior is also not admissible, unless:

(1) such evidence is admitted in accordance with paragraphs (c) and (d) of this rule;

(2) it is evidence:

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[7]The SBOT Evidence Committee has included this sentence as part of paragraph (4). It is not part of paragraph (4) in the current rules and arguably applies to paragraphs (1), (2), (3) and (4). If included as part of paragraph (4), I think it clearly only applies to paragraph (4). The SBOT Evidence Committee debated the matter and was of the opinion that the sentence was never intended to apply to paragraphs (1) through (3), but was supposed to apply only to paragraph (4).

(A) that is necessary to rebut or explain scientific or medical evidence offered by the State;

(B) of past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior which is the basis of the offense charged;

(C) that relates to the motive or bias of the alleged victim;

(D) is admissible under Rule 609; or

(E) that is constitutionally required to be admitted; and

(3) its probative value outweighs the danger of unfair prejudice.

(c) **Procedure for Offering Evidence.** If the defendant proposes to introduce any documentary evidence or to ask any question, either by direct examination or cross-examination of any witness, concerning specific instances of the alleged victim's past sexual behavior, the defendant must inform the court out of the hearing of the jury prior to introducing any such evidence or asking any such question. After this notice, the court shall conduct an in camera hearing, recorded by the court reporter, to determine whether the proposed evidence is admissible under paragraph (b) of this rule. The court shall determine what evidence is admissible and shall accordingly limit the questioning. The defendant shall not go outside these limits or refer to any evidence ruled inadmissible in camera without prior approval of the court without the presence of the jury.

(d) **Record Sealed.** The court shall seal the record of the in camera hearing required in paragraph (c) of this rule for delivery to the appellate court in the event of an appeal.

Notes and Comments

Section (e) relating to the admissibility of evidence of promiscuous conduct of a child 14 years old or older has been deleted since the 1994 Texas Penal Code eliminated the former defense of promiscuity of a child.

ARTICLE V. PRIVILEGES

RULE 501. PRIVILEGES RECOGNIZED ONLY AS PROVIDED

Except as otherwise provided by Constitution, by statute, by these rules or by other rules prescribed pursuant to statutory authority, no person has a privilege to:

(1) refuse to be a witness;

(2) refuse to disclose any matter;

(3) refuse to produce any object or writing; or

(4) prevent another from being a witness or disclosing any matter or producing any object or writing.

RULE 502. REQUIRED REPORTS PRIVILEGED BY STATUTE

A person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so provides. A public officer or agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides. No privilege exists under this rule in actions involving perjury, false statements, fraud in the return or report, or other failure to comply with the law in question.

RULE 503. LAWYER-CLIENT PRIVILEGE

(a) **Definitions**. As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from that lawyer.

(2) A representative of a client is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.

(3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) A "representative of the lawyer" is:

(A) one employed by the lawyer to assist the lawyer in the rendition of professional legal services; or

(B) an accountant who is reasonably necessary for the lawyer's rendition of professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) **General Rule of Privilege.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(1) between the client or a representative of the client and the **client's** lawyer or a representative of the lawyer,

(2) between the lawyer and the lawyer's representative;

(3) by the client or a representative of the client, or **the client's lawyer or a representative of the lawyer, to** a lawyer or a representative ~~of the lawyer to a lawyer, or a representative~~ of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(4) between representatives of the client or between the client and a representative of the client;

(5) among lawyers and their representatives representing the same client; or

(6) in criminal cases, a client has a privilege to prevent the lawyer or lawyer's representative from disclosing any other fact which came to the knowledge of the lawyer or the lawyer's representative by reason of the attorney-client relationship.

(c) **Who May Claim the Privilege.** The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) **Exceptions.** There is no privilege under this rule:

(1) *Furtherance of Crime or Fraud.* If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) *Claimants Through Same Deceased Client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by *inter vivos* transactions;

(3) *Breach of Duty by a Lawyer or Client.* As to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer;

(4) *Document Attested by a Lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness: or

(5) *Joint Clients.* As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

Notes and Comments

This rule contains the language used in both the prior civil and prior criminal rules. Court decisions, both before and after the adoption of the Tex. R. Crim. Evid. in 1986, indicate that the scope of the lawyer-client privilege is the same in civil and criminal cases. *See, e.g., Ballew v. State*, 640 S.W.2d 237 (Tex. Cr. App. 1980) and *Manning v. State*, 766 S.W.2d 551 (Tex. App. -- Dallas 1989), *aff'd.*, 773 S.W.2d 568 (Tex. Crim. App. 1989). To avoid confusion, the vestigial language of the last sentence of the prior Criminal Rule 503(b) is omitted.

This rule governs only the lawyer-client privilege. It does not restrict the scope of the work product doctrine. *See* Tex. R. Civ. P. 166b. The language of former paragraph (d) was deleted because it was deemed unnecessary. This deletion was not intended to change the common law rule that communications privileged under this rule do not lose their privileged status by reason of the termination of the lawyer/client relationship.

RULE 504. HUSBAND-WIFE PRIVILEGE

(a) **Definition.** A communication is confidential if it is made privately by any person to the person's spouse and it is not intended for disclosure to any other person.

(b) **General Rules.**

(1) *Confidential Communication Privilege.* A person, whether or not a party, or the guardian or representative of an incompetent or deceased person, has a privilege during marriage and afterwards to refuse to disclose and to prevent another from disclosing a confidential communication made to the person's spouse while they were married.

(2) *Privilege Not to Testify in Criminal Cases.* In criminal cases:

(A) The spouse of the accused has a privilege not to be called as a witness for the state. This rule does not prohibit the spouse from testifying voluntarily for the state, even over objection by the accused. A spouse who testifies on behalf of an accused is subject to cross-examination as provided in rule 610(b).

(B) Failure by an accused to call the accused's spouse as a witness, where other evidence indicates that the spouse could testify to relevant matters, is a proper subject of comment by counsel.

(c) **Who May Claim the Privilege.** The confidential communication privilege may be claimed by the person or the person's guardian or representative, or by the spouse on the person's behalf. The authority of the spouse to do is presumed. The privilege not to testify may be claimed by the person or the person's guardian or representative but not by that person's spouse.

(d) **Exceptions to the Confidential Communication Privilege.** There is no confidential communication privilege:

(1) *Furtherance of Crime or Fraud.* If the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or fraud.

(2) *Proceeding Between Spouses in Civil Cases.* In (A) a proceeding brought by or on behalf of one spouse against the other spouse, or (B) a proceeding between a surviving spouse and a person who claims through the deceased spouse, regardless of whether the claim is by testate or intestate succession or by *inter vivos* transaction.

(3) *Commitment or Similar Proceeding.* In a proceeding to commit either spouse or otherwise to place that person or that person's property, or both, under the control of another because of an alleged mental or physical condition.

(4) *Proceeding to Establish Competence.* In a proceeding brought by or on behalf of either spouse to establish competence.

(e) **Exceptions to the Privilege Not to Testify in Criminal Cases.** The privilege of a person's spouse not be called as a witness for the state does not apply:

(1) in any proceeding in which the person is charged with a crime against the person's spouse, a minor child or a member of the household of either spouse; or

(2) as to matters occurring prior to the marriage.

Notes and Comments

The present rule eliminates the spousal testimonial privilege for prosecutions in which the spouse is the alleged victim of a crime by the spouse. This is intended to be consistent with Article 38.10 of the Code of Criminal Procedure, effective September 1, 1995.

RULE 505. COMMUNICATIONS TO MEMBERS OF THE CLERGY

(a) **Definitions.** As used in this rule:

(1) A "member of the clergy" is a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization or an individual reasonably believed so to be by the person consulting with such individual.

(2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) **General Rule of Privilege.** A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a member of the clergy in the member's professional character as spiritual adviser.

(c) **Who May Claim the Privilege.** The privilege may be claimed by the person, by the person's guardian or conservator, or by the personal representative of the person if the person is deceased. The member of the clergy to whom the communication was made is presumed to have authority to claim the privilege but only on behalf of the communicant.

RULE 506. POLITICAL VOTE

Every person has a privilege to refuse to disclose the tenor of the person's vote at a political election conducted by secret ballot unless the vote was cast illegally.

RULE 507. TRADE SECRETS

A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

RULE 508. IDENTITY OF INFORMER

(a) **Rule of Privilege.** The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assist in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) **Who May Claim.** The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished, except the privilege shall not be allowed in criminal cases if the state objects.

(c) **Exceptions.**

(1) *Voluntary Disclosure; Informer a Witness.* No privilege exists under this rule if the identity of the informer or the informer's interest in the subject matter of the communication has been disclosed to those who would have cause to resent the

communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the public entity.

(2) *Testimony on Merits.* If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of a material issue on the merits in a civil case to which the public entity is a party, or on guilt or innocence in a criminal case, and the public entity invokes the privilege, the court shall give the public entity an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavit. If the court finds that there is a reasonable probability that the informer can give the testimony, and the public entity elects not to disclose the informer's identity, the court in a civil case may make any order that justice requires, and in a criminal case shall, on motion of the defendant, and may, on the court's own motion, dismiss the charges as to which the testimony would relate. Evidence submitted to the court shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the public entity. All counsel and parties shall be permitted to be present at every stage of proceedings under this subdivision except a showing in camera, at which no counsel or party shall be permitted to be present.

(3) *Legality of Obtaining Evidence.* If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the court is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, it may require the identity of the informer to be disclosed. The ~~judge~~ **court** shall, on request of the public entity, direct that the disclosure be made in camera. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this subdivision except a disclosure in camera, at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made in camera, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the public entity.

RULE 509. PHYSICIAN-PATIENT PRIVILEGE

(a) **Definitions.** As used in this rule:

(1) A "patient" means any person who consults or is seen by a physician to receive medical care.

(2) A "physician" means a person licensed to practice medicine in any state or nation, or reasonably believed by the patient so to be.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation,

examination, or interview, or those reasonably necessary for the transmission of the communication, or those who are participating in the diagnosis and treatment under the direction of the physician, including members of the patient's family.

(b) **Limited Privilege in Criminal Proceedings**. There is no physician-patient privilege in criminal proceedings. However, a communication to any person involved in the treatment or examination of alcohol or drug abuse by a person being treated voluntarily or being examined for admission to treatment for alcohol or drug abuse is not admissible in a criminal proceeding.

(c) **General Rule of Privilege in Civil Proceedings**. In a civil proceeding:

(1) Confidential communications between a physician and a patient, relative to or in connection with any professional services rendered by a physician to the patient are privileged and may not be disclosed.

(2) Records of the identity, diagnosis, evaluation,or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed.

(3) The provisions of this rule apply even if the patient received the services of a physician prior to the enactment of the Medical Liability and Insurance Improvement Act, TEX REV. CIV. STAT. art. 4590i (Vernon Supp. 1984).

(d) **Who May Claim the Privilege in a Civil Proceeding**. In a civil proceeding:

(1) The privilege of confidentiality may be claimed by the patient or by a representative of the patient acting on the patient's behalf.

(2) The physician may claim the privilege of confidentiality, but only on behalf of the patient. The authority to do so is presumed in the absence of evidence to the contrary.

(e) **Exceptions in a Civil Proceeding**. Exceptions to confidentiality or privilege in administrative proceedings or in civil proceedings in court exist:

(1) when the proceedings are brought by the patient against a physician, including but not limited to malpractice proceedings, and in any license revocation proceeding in which the patient is a complaining witness and in which disclosure is relevant to the claims or defense of a physician;

(2) when the patient or someone authorized to act on the patient's behalf submits a written consent to the release of any privileged information, as provided in paragraph (f);

(3) when the purpose of the proceedings is to substantiate and collect on a claim for medical services rendered to the patient;

(4) as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense;

(5) in any disciplinary investigation or proceeding of a physician conducted under or pursuant to the Medical Practice Act, TEX. REV. CIV. STAT. art. 4495b, or of a registered nurse under or pursuant to TEX. REV. CIV. STAT. arts. ~~4526~~ **4525**, 4527a, 4527b, and 4527c, provided that the board shall protect the identity of any patient whose medical records are examined, except for those patients covered under subparagraph (e)(1) or those patients who have submitted written consent to the release of their medical records as provided by paragraph (f);

[8](6) when the disclosure is relevant in any suit affecting the parent-child relationship;

(7) in an involuntary civil commitment proceeding, proceeding for court-ordered treatment, or probable cause hearing under

(A) the Texas Mental Health Code, TEX. REV. CIV. STAT. art. 5547-1 *et seq.*;

(B) the Mentally Retarded Persons Act of 1977, TEX. REV. CIV. STAT. art. 5547-300;

(C) Section 9, Chapter 411, Acts of the 53rd Legislature, Regular Session, 1953 (TEX. REV. CIV. STAT. art. 5561c);

(D) Section 2, Chapter ~~643~~ **543**, Acts of the 61st Legislature, Regular Session, 1969 (TEX. REV. CIV. STAT. art. 5561c-1);

(8) in any proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of the resident of an "institution" as defined in Sec. 1, Ch. 684, Acts of the 67th Legislature, Regular Session, 1981 (TEX. REV. CIV. STAT. art. 4442c, Sec. 2).

(f) **Consent.**

(1) Consent for the release of privileged information must be in writing and signed by the patient, or a parent or legal guardian if the patient is a minor, or a legal guardian if the patient has been adjudicated incompetent to manage personal affairs, or an attorney ad litem appointed for the patient, as authorized by the Texas Mental Health Code (TEX. REV. CIV. STAT. art. 5547-1 *et seq.*); the Mentally Retarded Persons Act of 1977 (TEX. REV. CIV. STAT. art. 5547-300); Section 9, Chapter 411, Acts of the 53rd Legislature, Regular Session, 1953 (TEX. REV. CIV. STAT. art. 5561c); Section 2, Chapter 543, Acts of the 61st Legislature, Regular Session, 1969 (TEX. REV. CIV. STAT. art. 5561c-1); Chapter 5, Texas Probate Code;

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[8]The Supreme Court Advisory Committee in 1996 recommended deletion of subparagraph (e)(6) from the prior TEX. R. CIV. EVID. 509(e)(6).

and Chapter 11, Family Code; or a personal representative if the patient is deceased, provided that the written consent specifies the following:

(A) the information or medical records to be covered by the release;

(B) the reasons or purposes for the release; and

(C) the person to whom the information is to be released.

(2) The patient, or other person authorized to consent, has the right to withdraw consent to the release of any information. Withdrawal of consent does not affect any information disclosed prior to the written notice of the withdrawal.

(3) Any person who received information made privileged by this rule may disclose the information to others only to the extent consistent with the authorized purposes for which consent to release the information was obtained.

Notes and Comments

This rule only governs disclosures of patient-physician communications in judicial or administrative proceedings. Whether a physician may or must disclose such communications in other circumstances is governed by TEX. REV. CIV. STAT. art 4495b, Sec. 5.08. Prior Criminal Rules of Evidence 509 and 510 are now in subparagraph (b) of this Rule.

RULE 510. CONFIDENTIALITY OF MENTAL HEALTH INFORMATION IN CIVIL CASES

(a) **Definitions**. As used in this rule:

(1) "Professional" means any person:

(A) authorized to practice medicine in any state or nation;

(B) licensed or certified by the State of Texas in the diagnosis, evaluation or treatment of any mental or emotional disorder;

(C) involved in the treatment or examination of drug abusers; or

(D) reasonably believed by the patient to be included in any of the preceding categories.

(2) "Patient" means any person who:

(A) consults, or is interviewed by, a professional for purposes of diagnosis, evaluation, or treatment of any mental or emotional condition or disorder, including alcoholism and drug addiction; or

(B) is being treated voluntarily or being examined for admission to voluntary treatment for drug abuse.

(3) A representative of the patient is:

(A) any person bearing the written consent of the patient;

(B) a parent if the patient is a minor;

(C) a guardian if the patient has been adjudicated incompetent to manage the patient's personal affairs; or

(D) the patient's personal representative if the patient is deceased.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the diagnosis, examination, evaluation, or treatment, or those reasonably necessary for the transmission of the communication, or those who are participating in the diagnosis, examination, evaluation, or treatment under the direction of the professional, including members of the patient's family.

(b) **General Rule of Privilege.**

(1) Communication between a patient and a professional is confidential and shall not be disclosed in civil cases.

(2) Records of the identity, diagnosis, evaluation,or treatment of a patient which are created or maintained by a professional are confidential and shall not be disclosed in civil cases.

(3) Any person who received information from confidential communications or records as defined herein, other than a representative of the patient acting on the patient's behalf, shall not disclose in civil cases the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

(4) The provisions of this rule apply even if the patient received the services of a professional prior to the enactment of TEX. REV. CIV. STAT. art. 5561h (Vernon Supp. 1984).

(c) **Who May Claim the Privilege.**

(1) The privilege of confidentiality may be claimed by the patient or by a representative of the patient acting on the patient's behalf.

(2) The professional may claim the privilege of confidentiality but only on behalf of the patient. The authority to do so is presumed in the absence of evidence to the contrary.

(d) **Exceptions**. Exceptions to the privilege in **administrative or** court proceedings exist:

(1) when the proceedings are brought by the patient against a professional, including but not limited to malpractice proceedings, and in any license revocation proceedings in which the patient is a complaining witness and in which disclosure is relevant to the claim or defense of a professional;

(2) when the patient waives the right in writing to the privilege of confidentiality of any information, or when a representative of the patient acting on the patient's behalf submits a written waiver to the confidentiality privilege;

(3) when the purpose of the proceeding is to substantiate and collect on a claim for mental or emotional health services rendered to the patient;

(4) when the judge finds that the patient after having been previously informed that communications would not be privileged, has made communications to a professional in the course of a court-ordered examination relating to the patient's mental or emotional condition or disorder, providing that such communications shall not be privileged only with respect to issues involving the patient's mental or emotional health. On granting of the order, the court, in determining the extent to which any disclosure of all or any part of any communication is necessary, shall impose appropriate safeguards against unauthorized disclosure;

(5) as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense;

[9](6) ~~when the disclosure is relevant in any suit affecting the parent-child relationship; or~~

~~(7)~~ in any proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of the resident of an institution as defined in TEX. REV. CIV. STAT. art. 4442c, Sec. 2 (Vernon Supp. 1984).

Notes and Comments

This rule only governs disclosures of patient-professional communications in judicial or administrative proceedings. Whether a professional may or must disclose such communications in other circumstances is governed by TEX. REV. CIV. STAT. art. 5561h (Vernon Supp. 1984).

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[9]The Supreme Court Advisory Committee in 1996 recommended deletion of subparagraph (d)(6) from the prior TEX. R. CIV. EVID. 510(d)(6).

RULE 511. WAIVER OF PRIVILEGE BY VOLUNTARY DISCLOSURE

A person upon whom these rules confer a privilege against disclosure waives the privilege if:

(1) the person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged; or

(2) the person or a representative of the person calls a person to whom privileged communications have been made to testify as to the person's character or ~~a~~ **character** trait ~~of the person's character~~ insofar as such communications are relevant to such character or character trait.

RULE 512. PRIVILEGED MATTER DISCLOSED UNDER COMPULSION OR WITHOUT OPPORTUNITY TO CLAIM PRIVILEGE

A claim of privilege is not defeated by a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege.

RULE 513. COMMENT UPON OR INFERENCE FROM CLAIM OF PRIVILEGE; INSTRUCTION

(a) **Comment or Inference Not Permitted.** Except as permitted in Rule 504(b)(2)(B), the claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel, and no inference may be drawn therefrom.

(b) **Claiming Privilege Without Knowledge of Jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) **Claim of Privilege Against Self-Incrimination in Civil Cases.** Paragraphs (a) and (b) shall not apply with respect to a party's claim, in the present civil proceeding, of the privilege against self-incrimination.

(d) **Jury Instruction.** In criminal cases, except as provided in Rule 504(b)(2)(B) and in paragraph (c) of this Rule, upon request any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

ARTICLE VI. WITNESSES

RULE 601. COMPETENCY AND INCOMPETENCY OF WITNESSES

(a) **General Rule.** Every person is competent to be a witness except as otherwise provided in these rules. The following witnesses shall be incompetent to testify in any proceeding subject to these rules:

(1) *Insane Persons.* Insane persons who, in the opinion of the court, are in an insane condition of mind at the time when they are offered as a witness, or who, in the opinion of the court, were in that condition when the events happened of which they are called to testify.

(2) *Children.* Children or other persons who, after being examined by the court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated.

(b) **"Dead Man Rule" in Civil actions.** In civil actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any oral statement by the testator, intestate or ward, unless that testimony to the oral statement is corroborated or unless the witness is called at the trial to testify thereto by the opposite party; and, the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent based in whole or in part on such oral statement. Except for the foregoing, a witness is not precluded from giving evidence of or concerning any transaction with, any conversations with, any admissions of, or statement by, a deceased or insane party or person merely because the witness is a party to the action or a person interested in the event thereof. The trial court shall, in a proper case, where this rule prohibits an interested party or witness from testifying, instruct the jury that such person is not permitted by the law to give evidence relating to any oral statement by the deceased or ward unless the oral statement is corroborated or unless the party or witness is called at the trial by the opposite party.

RULE 602. LACK OF PERSONAL KNOWLEDGE

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

RULE 603. OATH OR AFFIRMATION

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

RULE 604. INTERPRETERS

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

Notes and Comments

See Rule 183, Texas Rules of Civil Procedure, regarding appointment and compensation of interpreters.

RULE 605. COMPETENCY OF JUDGE AS A WITNESS

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

RULE 606. COMPETENCY OF JUROR AS A WITNESS

(a) **At the Trial.** A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) **Inquiry Into Validity of Verdict or Indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify in a civil case whether any outside influence was improperly brought to bear upon any juror, and in a criminal case as to any matter relevant to the validity of the verdict or indictment. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

RULE 607. WHO MAY IMPEACH

The credibility of a witness may be attacked by any party, including the party calling the witness.

RULE 608. EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

(a) **Opinion and Reputation Evidence of Character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

(1) the evidence may refer only to character for truthfulness or untruthfulness; and

(2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) **Specific Instances of Conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence.

RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) **General Rule.** For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record but only if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party.

(b) **Time Limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten (10) years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

(c) **Effect of Pardon, Annulment, or Certificate of Rehabilitation.** Evidence of a conviction is not admissible under this rule if:

(1) based on the finding of the rehabilitation of the person convicted, the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment;

(2) probation has been satisfactorily completed for the crime for which the person was convicted, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment; or

(3) based on a finding of innocence, the conviction has been the subject of a pardon, annulment, or other equivalent procedure.

(d) **Juvenile Adjudications.** Evidence of juvenile adjudications is not admissible under this rule unless required to be admitted by the Constitution of the United States or Texas.

(e) **Pendency of Appeal.** Pendency of an appeal renders evidence of a conviction inadmissible.

(f) **Notice.** Evidence of a conviction is not admissible if after timely written request by the adverse party specifying the witness or witnesses, the proponent fails to give to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

RULE 610. RELIGIOUS BELIEFS OR OPINIONS

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

Notes and Comments

While the rule forecloses inquiry into the religious beliefs or opinions of a witness for the purpose of showing that the witness' character for truthfulness is affected by their nature, an inquiry for the purpose of showing interest or bias because of them is not within the prohibition. Thus disclosure of affiliation with a church which is a party to the litigation would be allowable under the rule. This is prior Rule of Criminal Evidence 615.

RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION

(a) **Control by Court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) **Scope of Cross-Examination.** A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.

(c) **Leading Questions.** Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony of the witness. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Notes and Comments

The purpose of the 1988 amendment is to permit, in the court's discretion, the use of leading questions on preliminary or introductory matters, refreshing memory, questions to ignorant or illiterate persons or children, all as permitted by prior Texas practice and the common law.

The rule also conforms to tradition in making the use of leading questions on cross-examination a matter of right. The purpose of the qualification ordinarily is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the cross-examination of a party by the party's own counsel after being called by the opponent (savoring more of re-direct) or of an insured defendant who proves to be friendly to the plaintiff.

RULE 612. WRITING USED TO REFRESH MEMORY

If a witness uses a writing to refresh memory for the purpose of testifying either

(1) while testifying;

(2) before testifying, in civil cases, if the court in its discretion determines it is necessary in the interests of justice; or

(3) before testifying, in criminal cases;

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portion not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

RULE 613. PRIOR STATEMENTS OF WITNESSES: IMPEACHMENT AND SUPPORT

(a) **Examining Witness Concerning Prior Inconsistent Statement.** In examining a witness concerning a prior inconsistent statement made by the witness, whether oral or written, and before further cross-examination concerning, or extrinsic evidence of such statement may be allowed, the witness must be told the contents of such statement and the time and place and the person to whom it was made, and must be afforded an opportunity to explain or deny such statement. If written, the writing need not be shown to the witness at

that time, but on request the same shall be shown to opposing counsel. If the witness unequivocally admits having made such statement, extrinsic evidence of same shall not be admitted. This provision does not apply to admissions of a party-opponent as defined in Rule 801(e)(2).

(b) **Examining Witness Concerning Bias or Interest.** In impeaching a witness by proof of circumstances or statements showing bias or interest on the part of such witness, and before further cross-examination concerning, or extrinsic evidence of, such bias or interest may be allowed, the circumstances supporting such claim or the details of such statement, including the contents and where, when and to whom made, must be made known to the witness, and the witness must be given an opportunity to explain or to deny such circumstances or statement. If written, the writing need not be shown to the witness at that time, but on request the same shall be shown to opposing counsel. If the witness unequivocally admits such bias or interest, extrinsic evidence of same shall not be admitted. A party shall be permitted to present evidence rebutting any evidence impeaching one of said party's witnesses on grounds of bias or interest.

(c) **Prior Consistent Statements of Witnesses.** A prior statement of a witness which is consistent with the testimony of the witness is inadmissible except as provided in Rule 801(e)(1)(B).

RULE 614. EXCLUSION OF WITNESSES

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of:

(1) a party who is a natural person or in civil cases the spouse of such natural person;

(2) an officer or employee of a party in a civil case or a defendant in a criminal case that is not a natural person designated as its representative by its attorney;

(3) a person whose presence is shown by a party to be essential to the presentation of the party's cause; or

(4) the victim in a criminal case, unless the victim is to testify and the court determines that the victim's testimony would be materially affected if the victim hears other testimony at the trial.

RULE 615. PRODUCTION OF STATEMENTS OF WITNESSES IN CRIMINAL CASES

(a) **Motion for Production.** After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the state or the defendant and defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.

(b) **Production of Entire Statement.** If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the court shall order that the statement be delivered to the moving party.

(c) **Production of Excised statement.** If the other party claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion withheld over objection shall be preserved and made available to the appellate court in the event of appeal.

(d) **Recess for Examination of Statement.** Upon delivery of the statement to the moving party, the court, upon application of that party, shall recess proceedings in the trial for a reasonable examination of such statement and for preparation for its use in the trial.

(e) **Sanction for Failure to Produce Statement.** If the other party elects not to comply with an order to deliver a statement to the moving party, the court shall order that the testimony of the witness be stricken from the record and that the trial proceed, or, if it is the attorney for the state who elects not to comply, shall declare a mistrial if required by the interest of justice.

(f) **Definition.** As used in this rule, a "statement" of a witness means:

(1) a written statement made by the witness that is signed or otherwise adopted or approved by the witness;

(2) a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or

(3) a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury.

(g) **Applicability.** This rule applies only in criminal cases.

Notes and Comments

This is verbatim from prior Texas Criminal Rule of Evidence 614, except for the title and subparagraph (g) to make clear it only applies to criminal cases.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

RULE 701. OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

RULE 702. TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

RULE 703. BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Notes and Comments

Regarding the 1990 change by the Texas Supreme Court: This amendment conforms this rule of evidence to the civil rules of discovery in utilizing the term "reviewed by the expert." *See also* comment paragraph with Notes and Comments to TEX. R. CIV. PRO. 166b. While terminology is conformed between prior Civil and Criminal Rules 703, there is no change intended in meaning. The language in the prior criminal rule was "made known to" the expert. "Reviewed by" and "made known" to the expert should be interpreted the same in any given fact situation. "Perceived by or made known to" is uniform with the federal rule.

RULE 704. OPINION ON ULTIMATE ISSUE

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

(a) **Disclosure of Facts or Data.** The expert may testify in terms of opinion or inference and give the expert's reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data.

(b) **Special Rules in Criminal Cases.**

(1) *Voir Dire.* Prior to the expert giving the expert's opinion or disclosing the underlying facts or data, a party against whom the opinion is offered shall, upon request, be permitted to conduct a *voir dire* examination directed to the underlying facts or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury.

(2) *Admissibility of Opinion.* If the court determines that the expert does not have a sufficient basis for the expert's opinion, the opinion is inadmissible unless the party offering the testimony first establishes sufficient underlying facts or data.

(3) *Balancing Test; Limiting Instructions.* When the underlying facts or data would be inadmissible in evidence, the court shall exclude the underlying facts or data if the danger that they will be used for a purpose other than as explanation or support for the expert's opinion outweighs their value as explanation or support or are unfairly prejudicial. If the facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

Notes and Comments

This rule does not preclude a party in any case from conducting a *voir dire* examination into the qualifications of an expert or into the bases of the expert's opinion under Rule 703. This rule does not preclude the application of Rule 403.[10]

RULE 706. AUDIT IN CIVIL CASES

Despite any other evidence rule to the contrary, verified reports of auditors prepared pursuant to Texas Rule of Civil Procedure 172, whether in the form of summaries, opinions, or otherwise, shall be admitted in evidence when offered by any party whether or not the facts or data in the reports are otherwise admissible and whether or not the reports embrace the ultimate issues to be decided by the trier of fact. Where exceptions to the reports have been filed, a party may contradict the reports by evidence supporting the exceptions.

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[10]The prior Criminal Evidence Rule comment provided "This rule does not preclude a party from conducting a *voir dire* examination into the qualifications of an expert."

ARTICLE VIII. HEARSAY

RULE 801. DEFINITIONS

The following definitions apply under this article:

(a) **Statement.** A "statement" is (1) an oral or written verbal expression or (2) nonverbal conduct of a person, if it is intended by the person as a substitute for verbal expression.

(b) **Declarant.** A "declarant" is a person who makes a statement

(c) **Matter Asserted.** "Matter asserted" includes any matter explicitly asserted, and any matter implied by a statement, if the probative value of the statement as offered flows from declarant's belief as to the matter.

(d) **Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(e) **Statements Which Are Not Hearsay.** A statement is not hearsay if:

(1) *Prior Statement by Witness.* The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is:

(A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding except a grand jury proceeding in a criminal case, or in a deposition;

(B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive;

(C) one of identification of a person made after perceiving the person; or

(D) taken and offered in a criminal case in accordance with Article 38.071 of the Texas Code of Criminal Procedure.

(2) *Admission by Party-Opponent.* The statement is offered against a party and is:

(A) the party's own statement in either an individual or representative capacity;

(B) a statement of which the party has manifested an adoption or belief in its truth;

(C) a statement by a person authorized by the party to make a statement concerning the subject;

(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or

(E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

(3) *Depositions.* In a civil case, it is a deposition taken in the same proceeding, as same proceeding is defined in Texas Rule of Civil Procedure 207. Unavailability of deponent is not a requirement for admissibility.

Notes and Comments

Comment: The definitions in Rule 801(a), (b), (c) and (d) combined bring within the hearsay rule four categories of conduct. These are described and illustrated below.

(1) A verbal (oral or written) explicit assertion. Illustration: Witness testifies that declarant said "A shot B." Declarant's conduct is a statement because it is an oral expression. Because it is an explicit assertion, the matter asserted is that A shot B. Finally, the statement is hearsay because it was not made while testifying at the trial and is offered to prove the truth of the matter asserted.

(2) A verbal (oral or written) explicit assertion, not offered to prove the matter explicitly asserted, but offered for the truth of a matter implied by the statement, the probative value of the statement flowing from declarant's belief as to the matter. Illustration: The only known remedy for X disease is medicine Y and the only known use of medicine Y is to cure X disease. To prove that Oglethorpe had X disease witness testifies that declarant, a doctor, stated, "The best medicine for Oglethorpe is Y." The ~~testimony is to~~ **witness is testifying concerning** a statement because it was a verbal expression. The matter asserted was that Oglethorpe had X disease because that matter is implied from the statement, the probative value of the statement as offered flowing from declarant's belief as to the matter. Finally, the statement is hearsay because it was not made while testifying at the trial and is offered to prove the truth of the matter asserted.

(3) Non-assertive verbal conduct offered for the truth of a matter implied by the statement, the probative value of the statement flowing from declarant's belief as to the matter. Illustration: In a rape prosecution to prove that Richard, the defendant was in the room at the time of the rape, W testifies that declarant knocked on the door to the room and shouted, "Open the door, Richard." The testimony is to a statement because it was a verbal expression. The matter asserted was that Richard was in the room because that matter is implied from the statement, the probative value of the statement as offered flowing from declarant's belief as to the matter. Finally, the statement is hearsay because it was not made while testifying at the trial and is offered to prove the truth of the matter asserted.

(4) Nonverbal assertive conduct intended as a substitute for verbal expression. Illustration. W testifies that A asked declarant "Which way did X go?" and declarant pointed north. This nonverbal conduct was intended by the declarant as a substitute for verbal

expression and so is a statement. The matter asserted is that X went north because that is implied from the statement, and the probative value of the statement offered flows from declarant's belief that X went north. Finally, the statement is hearsay because it was not made at trial and is offered to prove the truth of the matter asserted.

RULE 802. HEARSAY RULE

Hearsay is not admissible except as provided by statute or these rules or by other rules prescribed pursuant to statutory authority. Inadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay.

RULE 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Present Sense Impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) **Excited Utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) **Then Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) **Statements for Purposes of Medical Diagnosis or Treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) **Recorded Recollection.** A memorandum or record concerning a matter about which a witness once had personal knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly, unless the circumstances of preparation cast doubt on the document's trustworthiness. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) **Records of Regularly Conducted Activity**. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. "Business" as used in this paragraph includes any and every kind of regular organized activity whether conducted for profit or not.

(7) **Absence of Entry in Records Kept in Accordance With the Provisions of Paragraph (6).** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public Records and Reports**. Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth:

(A) the activities of the office or agency;

(B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding in criminal cases matters observed by police officers and other law enforcement personnel; or

(C) in civil cases as to any party and in criminal cases as against the state, factual findings resulting from an investigation made pursuant to authority granted by law;

unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) **Records of Vital Statistics**. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) **Absence of Public Record or Entry**. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and presented by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report statement, or data compilation, or entry.

(11) **Records of Religious Organizations**. Statement of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Marriage, Baptismal, and Similar Certificates.** Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) **Family Records.** Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) **Records of Documents Affecting an Interest in Property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) **Statements in Documents Affecting an Interest in Property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in Ancient Documents.** Statements in a document in existence twenty years or more the authenticity of which is established.

(17) **Market Reports, Commercial Publications.** Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) **Learned Treatises.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or an established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) **Reputation Concerning Personal or Family History.** Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) **Reputation Concerning Boundaries or General History.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) **Reputation as to Character.** Reputation of a person's character among associates or in the community.

(22) **Judgment of Previous Conviction.** In civil cases, evidence of a judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), judging a person guilty of a felony, to prove any fact essential to sustain the judgment of conviction. In criminal cases, evidence of a judgment, entered after a trial or upon a plea of guilty or nolo contendere, adjudging a person guilty of a criminal offense, to prove any fact essential to sustain the judgment of conviction, but not including, when offered by the state for purposes other than impeachment, judgments against persons other than the accused. In all cases, the pendency of an appeal renders such evidence inadmissible.

(23) **Judgment as to Personal, Family, or General History, or Boundaries.** Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) **Statement Against Interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in declarant's position would not have made the statement unless believing it to be true. In criminal cases, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Notes and Comments

Comment on Paragraph (6): This provision rejects the doctrine of *Loper v. Andrews*, 404 S.W.2d 300, 305 (Tex. 1966), which required that an entry of a medical opinion or diagnosis meet a test of "reasonable medical certainty."

RULE 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(a) **Definition of Unavailability.** "Unavailability as a witness" includes situations in which the declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;

(3) testifies to a lack of memory of the subject matter of the declarant's statement;

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance or testimony by process or other reasonable means.

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrong-doing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay Exceptions**. The following are not excluded if the declarant is unavailable as a witness:

(1) *Former Testimony*. In civil cases, testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in the course of another proceeding, if the party against whom the testimony is now offered, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. In criminal cases, testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. In criminal cases the use of depositions is controlled by Chapter 39 of the Texas Code of Criminal Procedure.

(2) *Dying Declarations*. A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) *Statement of Personal or Family History*.

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history even though declarant had no means of acquiring personal knowledge of the matter stated; or

(B) A statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

RULE 805. HEARSAY WITHIN HEARSAY

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

RULE 806. ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT

When a hearsay statement, or a statement defined in Rule 801(e)(2) (C), (D), or (E), or in civil cases a statement defined in Rule 801(e)(3), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, offered to impeach the declarant, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

RULE 901. REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

(a) **General Provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of Witness With Knowledge.* Testimony that a matter is what it is claimed to be.

(2) *Nonexpert Opinion on Handwriting.* Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) *Comparison by Trier or Expert Witness.* Comparison by the trier of fact or by expert witness with specimens which have been found by the court to be genuine.

(4) *Distinctive Characteristics and the Like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) *Voice Identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at anytime under circumstances connecting it with the alleged speaker.

(6) *Telephone Conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if:

(A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called; or

(B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) *Public Records or Reports.* Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) *Ancient Documents or Data Compilation.* Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence twenty years or more at the time it is offered.

(9) *Process or System.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) *Methods Provided by Statute or Rule.* Any method of authentication or identification provided by statute or by other rule prescribed pursuant to statutory authority.

RULE 902. SELF-AUTHENTICATION

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) **Domestic Public Documents Under Seal.** A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) **Domestic Public Documents Not Under Seal.** A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) **Foreign Public Documents.** A document purporting to be executed or attested in an official capacity by a person, authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official

position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification. The final certification shall be dispensed with whenever both the United States and the foreign country in which the official record is located are parties to a treaty or convention that abolishes or displaces such requirement, in which case the record and the attestation shall be certified by the means provided in the treaty or convention.

(4) **Certified Copies of Public Records.** A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2) or (3) of this rule or complying with any statute or other rule prescribed pursuant to statutory authority.

(5) **Official Publications.** Books, pamphlets, or other publications purporting to be issued by public authority.

(6) **Newspapers and Periodicals.** Printed materials purporting to be newspapers or periodicals.

(7) **Trade Inscriptions and the Like.** Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) **Acknowledged Documents.** Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) **Commercial Paper and Related Documents.** Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) **Business Records Accompanied by Affidavit.**

a. *Records or Photocopies; Admissibility; Affidavit; Filing.* Any record or set of records or photographically reproduced copies of such records, which would be admissible under Rule 803(6) or (7) shall be admissible in evidence in any court in this state upon the affidavit of the person who would otherwise provide the prerequisites of Rule 803(6) or (7), that such records attached to such affidavit were in fact so kept as required by Rule 803(6) or (7), provided further, that such record or records along with such affidavit are filed with the clerk of the court for inclusion with the papers in the cause in which the record or records are sought to be used as evidence at least fourteen days prior to the day upon which trial of said cause commences, and provided the other parties to said cause are given prompt notice by the

party filing same of the filing of such record or records and affidavit, which notice shall identify the name and employer, if any, of the person making the affidavit and such records shall be made available to the counsel for other parties to the action or litigation for inspection and copying. The expense for copying shall be borne by the party, parties or persons who desire copies and not by the party or parties who file the records and serve notice of said filing, in compliance with this rule. Notice shall be deemed to have been promptly given if it is served in the manner contemplated by Rule 21a, Texas Rules of Civil Procedure, fourteen days prior to commencement of trial in said cause.

b. *Form of Affidavit.* A form for the affidavit of such person as shall make such affidavit as is permitted in paragraph (a) above shall be sufficient if it follows this form though this form shall not be exclusive, and an affidavit which substantially complies with the provisions of this rule shall suffice, to-wit:

No _____

John Doe (Name of Plaintiff)	§	IN THE _____
	§	
v.	§	COURT IN AND FOR
	§	
	§	
John Roe (Name of Defendant)	§	_____ COUNTY, TEXAS

AFFIDAVIT

Before me, the undersigned authority, personally appeared _____, who, being by me duly sworn, deposed as follows:

My name is _____, I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the custodian of the records of _____. Attached hereto are _____ pages of records from _____. These said ____ pages of records are kept by _____ in the regular course of business, and it was the regular course of business of _____ for an employee or representative of _____, with knowledge of the act, event, condition, opinion, or

diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original.

_____
Affiant

SWORN TO AND SUBSCRIBED before me on the _____ day of _____, 19 ____.

_____
Notary Public, State of Texas
Notary's printed name:

_____

My commission expires:

_____

(11) **Presumptions Under Statutes or Other Rules.** Any signature, document, or other matter declared by statute or by other rules prescribed pursuant to statutory authority to be presumptively or prima facie genuine or authentic.
(Amended Nov. 10, 1986, eff. Jan. 1, 1988.)

Notes and Comments

Paragraph (10) is based on portions of the affidavit authentication provisions of TEX. REV. CIV. STAT. art. 3737e. The most general and comprehensive language from those provisions was chosen. It is intended that this method of authentication shall be available for any kind of regularly kept record that satisfies the requirements of Rule 803(6) and (7), including X-ray, hospital records, or any other kind of regularly kept medical record.

RULE 903. SUBSCRIBING WITNESS' TESTIMONY UNNECESSARY

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

RULE 1001. DEFINITIONS

For purposes of this article the following definitions are applicable:

(a) **Writings and Recordings.** "Writings" and "recordings" consist of letters, words, or numbers or their equivalent, set down by handwriting, typewriting, printing, photostating,

photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(b) **Photographs.** "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(c) **Original.** An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an"original."

(d) **Duplicate.** A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

RULE 1002. REQUIREMENT OF ORIGINALS

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required except as otherwise provided in these rules or by law.

RULE 1003. ADMISSIBILITY OF DUPLICATES

A duplicate is admissible to the same extent as an original unless (1) a question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

RULE 1004. ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(a) **Originals Lost or Destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;

(b) **Original Not Obtainable.** No original can be obtained by any available judicial process or procedure;

(c) **Original Outside the State.** No original is located in Texas;

(d) **Original in Possession of Opponent.** At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or

otherwise, that the content would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(e) **Collateral Matters.** The writing, recording or photograph is not closely related to a controlling issue.

RULE 1005. PUBLIC RECORDS

The contents of an official record or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

RULE 1006. SUMMARIES

The contents of voluminous writings, recordings, or photographs, otherwise admissible, which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

RULE 1007. TESTIMONY OR WRITTEN ADMISSION OF PARTY

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

RULE 1008. FUNCTIONS OF COURT AND JURY

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

RULE 1009. TRANSLATION OF FOREIGN ~~LANGUAGES~~ LANGUAGE RECORDS

(a) **Translation, Affidavit, and Filing.** An accurate translation of a foreign language record or set of records or photographically reproduced copies of such records which would otherwise be admissible shall be admissible in any court in this state upon the affidavit of a qualified translator setting forth the qualifications of such translator and certifying that the translation is a fair and accurate translation of such foreign language record or records.

In civil cases, such affidavit, translation, and the record or records in the foreign language ~~translated~~ shall be promptly served upon all parties at least sixty days prior to the day upon which the trial of said cause commences.

In criminal cases, such affidavit, translation, and the record or records in the foreign language shall be filed with the clerk of the court for inclusion with the papers in the cause in which the record or records are sought to be used as evidence at least thirty days prior to the day upon which trial of said cause commences, and the other parties to said cause shall be given prompt notice by the party filing the foreign language records and their translation.

(b) **Objections.** Any party may object to the accuracy of the translation.

In civil cases, an objection shall be served upon all parties thirty days prior to the commencement of the trial. The objection shall point out the specific inaccuracies of the original translation and what the objecting party contends would be an accurate translation.

In criminal cases, an objection shall be filed with the court at least ten days prior to the commencement of trial, pointing out the specific inaccuracies of the original translation and what the objecting party contends would be an accurate translation.

(c) **Admissibility and Failure to Object.** In a civil case, if no objection is timely served, or if no conflicting translation has been timely served in accordance with paragraph (a), the court shall admit a translation submitted under paragraph (a) without further need of proof provided that the underlying records are otherwise admissible under the Texas Rules of ~~Civil~~ Evidence. The time limits set forth herein may be varied by order of the court. Failure to serve a conflicting translation in accordance with paragraph (a) or failure to timely and properly object to the accuracy of a translation in accordance with paragraph (b) shall preclude a party from attacking or offering evidence contradicting the accuracy of such translation.

In a criminal case, if no objection is timely filed or if an objection is made and the trial judge after notice to all parties and a hearing has determined ~~pursuant to Tex.R.Crim.Evid. 107(a),~~ that the translation is accurate, the court shall admit that translation without further need of proof at trial if the foreign language record is otherwise admissible under the Texas Rules of ~~Criminal~~ Evidence. The time limits set forth herein may be varied by order of the court.

(d) **Expert Testimony of Translator.** Except as provided in paragraph (c), this Rule does not prohibit the admission of an accurate translation of a foreign language record or records during trial by the testimony of a qualified translator as an expert. In a civil case, the testimony may be either live or by deposition.

(e) **Court Appointment.** The court may when necessary appoint a qualified translator, the reasonable value of whose services shall be taxed as court costs.

(f) Objections or Conflicting Translations. When there are either conflicting translations filed by more than one party under subparagraph (a) OR objection(s) to another party's translation filed under subparagraph (b), nothing in this rule requires or precludes the automatic admission into evidence of the conflicting translations OR requires that the issue of the correctness of a translation is an issue for the finder of fact rather than the court or for the court rather than the finder of fact.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CLERKS COMMITTEE REPORT TO SUPREME COURT ADVISORY COMMITTEE ON RULES 15-165

By: Bonnie Wolbrueck
Date: 9-20-96

RULE _____ DUTIES OF THE CLERK OF THE COURT

~~**Rule 23 SUITS TO BE NUMBERED CONSECUTIVELY**~~
~~It shall be the duty of the clerk to designate the suits by regular consecutive numbers, called file numbers, and he shall mark on each paper in every case the file number of the cause.~~

(a) Custodian of Record. The clerk of the court shall have custody of and shall carefully maintain, arrange and preserve the records relating to or lawfully deposited in the clerk's office.

(b) Assignment of Case Numbers Upon the commencement of a case, the clerk of the court shall assign the case a number which shall be known as the case number. Case numbers shall be assigned in consecutive order. Each document filed in every case shall bear the case number. Upon an order for severance, the clerk of the court shall assign to the severed case an entirely new case number. Unless otherwise directed by the court, upon the signing of an order to consolidate, all matters shall be consolidated under the oldest pending case number.
(New Rule from Rule 23)

COMMITTEE COMMENT: It is interesting to note that the words suits, case, cause and file are all used in Rule 23. The word "case" is only used in this new rule. The assignment of the case number in a severed or consolidated case has been added. (See Rule 41 and Rule 174)

~~**RULE 24 DUTY OF THE CLERK**~~
~~When a petition is filed with the clerk he shall indorse thereon the file number, the day on which it was file and the time of filing, and sign his name officially thereof.~~

(c) Filing. The clerk of the court shall affix the date and time of filing and clerk's name to each document received for filing.
(New Rule from Rule 24)

COMMITTEE COMMENT: Rule 24 was in the "Institution of Suit" section and the endorsement requirement was for a petition. This would clarify that all documents received by the clerk shall be file marked.

~~**RULE 25 CLERK'S FILE DOCKET**~~

~~Each clerk shall keep a file docket which shall show in convenient form the number of the suit, the names of the attorneys, the names of the parties to the suit, and the nature thereof, and, in brief form, the officer's return on the process, and all subsequent proceedings had in the case with the dates thereof.~~

~~**RULE 26 CLERK'S COURT DOCKET**~~

~~Each clerk shall also keep a court docket in a permanent record that shall include the number of the case and the names of the parties, the names of the attorneys, the nature of the action, the pleas, the motions, and the ruling of the court as made.~~

~~**RULE 27 ORDER OF CASES**~~

~~The cases shall be placed on the docket as they are filed.~~

~~**RULE 218 JURY DOCKET**~~

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

~~**RULE 656 EXECUTION DOCKET**~~

~~The clerk of each court shall keep an execution docket in which he shall enter a statement of all executions as they are issued by him, specifying the names of the parties, the amount of the judgment, the amount due thereon, the rate of interest when it exceeds six per cent, the costs, the date of issuing the execution, to whom delivered, and the return of the officer thereon, with the date of such return. Such docket entries shall be taken and deemed to be a record. The clerk shall keep an index and cross-index to the execution docket. When execution is in favor or against several persons, it shall be indexed in the name of each person. Any clerk who shall fail to keep said execution docket and index thereto, or shall neglect to make the entries therein, shall be liable upon his official bond to any person injured for the amount of damages sustained by such neglect.~~

(d) Clerk's Record. A record shall be kept by the clerk of the court for each case. The record shall include the case number, the names of the parties and their attorneys, and, in brief form including date, a chronological listing of all proceedings had in the case, including but not limited to all appearances, pleadings, motions, writs and process issued and returns made thereon, orders, verdicts, judgments, notices and taxable court costs paid or reported to the clerk of the court, stating the party or attorney paying the costs and the date of payment. Upon order of the court, the clerk shall modify the clerk's records to reflect redesignation of a plea or pleading.

(e) Index. The clerk of the court shall keep an index of the parties to all cases, including any persons that may be added in writs of execution. The index must list the parties alphabetically using their full names and must be cross-referenced to the other parties to the case.

(f) Permanent Record. The clerk of the court shall permanently preserve a record for each case reflecting the case number, the names of the parties and their attorneys, the final judgment or other court order disposing of any party, claim or case, and any writs of execution and the returns thereon. The clerk of the court also shall permanently maintain the index described in Subdivision (e) of these rules.
(New Rule from Rule 25, Rule 26, Rule 27, Rule 218, Rule 656 and Rule 71)

COMMITTEE COMMENT: This is a consolidation of Rule 25 (Clerk's File Docket), Rule 26 (Court's Docket), Rule 27 (Order of Cases), Rule 218 (Jury Docket), Rule 656 (Execution Docket). This rule requires the clerk to keep a record of all filings, issuance, pleadings, orders, etc. With consideration of the resources from county to county, the rule would allow the "record" to be kept manually in books and/or docket sheets or to be kept electronically. The last sentence of (d) is taken from Rule 71 (Misnomer of Pleading) A rule on an index was added from the statutes. If there are no statutory or rule provisions for retention, the State Library, through their advisory committee, sets retention periods for all records. This rule clarifies the information in "the record" that is required to be permanent.

(g) Issuance The clerk of the court shall issue all writs and process authorized by statute and these rules. The writs or process shall be dated and include the signature and seal of the clerk of the court. If a party is excused from paying costs pursuant to these rules or statute, the clerk of the court issuing the writ or process shall endorse thereon the words "affidavit of inability filed".

~~**RULE 261 TRANSCRIPT ON CHANGE**~~

~~When a change of venue has been granted, the clerk shall immediately make out a correct transcript of all the orders made in said cause, certifying thereto officially under the seal of the court, and send the same, with the original papers in the cause, to the clerk of the court to which the venue has been changed.~~

~~**RULE 89 TRANSFERRED IF MOTION IS SUSTAINED**~~

~~The clerk shall make up a transcript of all the orders made in said cause, certifying thereto officially under the seal of the court, and send it with the original papers in the cause to the clerk of the court to which the venue has been changed. Provided however, if the cause be severable as to parties defendant and shall be ordered transferred as to one or more defendants but not as to all, the clerk, instead of sending the original papers, shall make certified copies of such filed papers as directed by the court and forward the same to the clerk of the court to which the venue has been changed. After the cause has been transferred, as above provided for the clerk of the court to which the cause has been transferred shall mail notification to the plaintiff or his attorney that transfer of the cause has been completed, that the filing fee in the proper court is due and payable within thirty days from the mailing of such notification, and that the case may be dismissed if the filing fee is not timely paid, and if such filing fee is timely paid, the cause will be subject to trial at the expiration of thirty days after the mailing of notification to the parties or~~

~~their attorneys by the clerk that the papers have been filed in the court to which the cause has been transferred; and if the filing fee is not timely paid, any court of the transferee county to which the case might have been assigned, upon its own motion or the motion of a party, may dismiss the cause without prejudice to the refiling of same.~~

(h) Transfer or Venue Change Upon order of the court to transfer or change venue or upon filing of written consent, the clerk of the court shall send to the clerk of the court to which the venue has been changed, a transcript of all original papers in the case and certified copies of all orders entered in the case.If the order transferring or changing venue is not to all parties, instead of the original papers, the transcript shall include certified copies of such papers as directed by the court.

The clerk of the court receiving a transfer or change of venue, shall notify the plaintiff or his attorney that the transfer has been received and the amount of filing fees due. The notice shall also state that the fees are payable within thirty days from the mailing of the notice and that the case may be dismissed if the filing fee is not timely paid.
(New Rule from Rule 89 and Rule 261)

Committee Comment: This rule combines Rule 89 and Rule 261. Rule 261(Change of Venue) did not have a provision for notice to the plaintiff that the transfer was received or filing fees due. First paragraph of Rule 89 remains.

(i) Exhibits All filed exhibits admitted in evidence or tendered on bill of exception shall, until returned or otherwise disposed of as authorized by these rules ~~Rule 14b~~, remain in the custody of the clerk of court except as provided in Rule 75b.
(New Rule from Rule 75b)

(j) Disposition of Exhibits, Depositions and Discovery The clerk of the court in which the exhibits offered or admitted into evidence, deposition transcripts, ~~and~~ depositions upon written questions and other discovery are filed shall retain and dispose of ~~exhibits as directed by the Supreme Court.~~

~~**Supreme Court Order Relating to Retention and Disposition of Exhibits, Depositions and Discovery**~~

~~In compliance with the provisions of Rule _____ Rule 14b and Rule 209, the Supreme Court hereby directs that exhibits offered or admitted into evidence, deposition transcripts, and depositions upon written questions and shall be retained and disposed of by the clerk of the court in which the exhibits or depositions are filed~~ such upon the following basis.

This ~~order~~ rule shall apply only to: (1) those cases in which judgment has been rendered on service of process by publication and in which no motion for new trial was filed within two years after judgment was signed; and (2) all other cases in which judgment has been signed for one year and in which no appeal was perfected or in which a perfected appeal was dismissed or concluded by a final judgment as to all parties and the issuance of the appellate court's mandate such that the case is no longer pending on appeal or in the trial court.

~~After first giving all attorneys of record thirty days written notice that they have an opportunity to claim and withdraw (same) the trial exhibits, the clerk,~~ Unless otherwise directed by the court, the clerk of the court may without notice to the parties or their attorneys dispose of the exhibits, deposition transcripts, ~~or~~ depositions upon written questions, or other discovery after the required time periods stated in this rule. If any party requests any exhibit, deposition or other discovery, the clerk of the court may, without court order, release such to the party after the required time periods stated in this rule.

If the court has ordered or any party has requested release of any exhibit, deposition or other discovery and ~~If any~~ such ~~exhibit~~ is desired by more than one ~~attorney~~ party, the clerk shall make the necessary copies and prorate the cost among all the ~~attorneys~~ parties desiring ~~the exhibit~~ same.

If the exhibit is not a document or otherwise capable of reproduction, the party who offered the exhibit shall be entitled to claim same; provided, however, that the party claiming the exhibit shall provide a photograph of said exhibit to any other party upon request and payment of the reasonable cost thereof by the other party.
(Rule 14b and Rule 209)

COMMITTEE COMMENT: Addresses change after many years and notices mailed by the clerk after the retention periods are often returned. Frequently attorneys receiving notices must call the clerk or research their archives for information on the case because many years have passed. The notice cost is considerable for counties. This would clarify that exhibits/ depositions/ discovery may be disposed of by the clerk after the retention periods. Any party wanting the exhibits/depositions/discovery may request the court or clerk for the release of same. Should any portion of this rule be repeated in the other rules for the attorneys?

(k) Copy of Decree The(~~district~~) clerk of the court shall forthwith mail a ~~certified~~ copy of the final divorce decree ~~or order of dismissal~~ to the party signing a memorandum waiving issuance of service of process. Such divorce decree ~~or order of dismissal~~ shall be mailed to the signer of the memorandum at the address stated in such memorandum or to the office of ~~his~~ the signer's attorney of record.
(Rule 119a)

COMMITTEE COMMENT: Notice of dismissal is given under current Rule 306a(3) and a certified copy doesn't seem necessary. This should be in the Family Code.

(l) Notices

(1) Default Judgment At or ~~immediately prior to~~ before the time ~~in~~ an interlocutory or final default judgment is ~~rendered~~ signed, the party taking the ~~same or his attorney~~ judgment shall ~~certify to the clerk in writing~~ file a written certificate containing the last known mailing address of the party against whom the judgment is taken ~~which certificate shall be filed among the papers in the cause~~. Immediately upon the signing of the judgment, the clerk of the court shall give ~~mail~~ written notice by first-class mail ~~thereof~~ to the party against whom the judgment was rendered. ~~at the address shown in the certificate, and note the fact of such mailing on the docket.~~ The

notice shall state the number and style of the case, the court in which the case is pending, the names of the parties in whose favor and against whom the judgment was rendered, ~~and~~ the date of the signing of the judgment and shall be mailed to the address in the certificate. Failure to comply with the provisions of this rule shall not affect the finality of the judgment.
(Rule 239a)

COMMITTEE COMMENT: Adds "first-class" mailing. Deletes noting on the docket since this new rule requires the clerk to keep a record of notices.

(2) Appealable Order When a final judgment or appealable order is signed, the clerk of the court shall immediately give notice of the signing to the parties ~~or their attorneys of record~~ by first-class mail ~~advising that the judgment or order was signed. Failure to comply with the provisions of this rule shall not affect the periods mentioned in paragraph (1) of this rule, except as provided in paragraph (4).~~
(Rule 306a(3))

COMMITTEE COMMENT: This is a clerk's duty and the provisions on failure to provide notice should remain in Rule 306a for reference by attorneys.

(3) Disposition Notice The notices given under (1) and (2) shall also include notice that all exhibits and discovery will be disposed of by the clerk of the court according to the procedures and time periods in these rules.

COMMITTEE COMMENT: This would assure that attorneys/parties are aware of disposition of exhibits and discovery.

(4) Settings If the court on its own initiative sets a case for trial or for dismissal for want of prosecution, the clerk of the court shall notify all parties of the setting by first class mail.
(New Rule from Rule 165a and Rule 246)

COMMITTEE COMMENT: This rule clarifies that the clerk is to send notice and will be repeated in Rule 165a and Rule 245 for reference by attorneys

(5) Finding of Fact and Conclusions of Law Upon the filing of a Request for Findings and Fact and Conclusions of Law or Notice of Past Due Finding of Fact and Conclusions of Law, the clerk of the court shall immediately call such to the attention of the judge who tried the case.
(from Rule 296 and Rule 297)

RULE _____ ELECTRONICALLY TRANSMITTED COURT DOCUMENTS

A clerk of the court may elect to receive and file electronically transmitted court documents according to the following procedures:

(1) Receipt. The clerk of the court is authorized to accept for filing via electronic transmission any document which might be filed in a court action except a) returns of service on issuances; b) bonds; and c) signed order or judgments d) wills.

(2) Paper Quality. Documents electronically transmitted for filing will be received by the clerk of the court on a plain paper facsimile and printed by a laser printer, thereby rendering the copy of archival quality.

(3) Fee and Payment. No documents electronically transmitted shall be accepted by the clerk of the court for filing until court costs and fees have been paid. Court costs and fees shall be paid by a payment method authorized by the clerk of the court. Documents tendered to the clerk of the court electronically without payment of court costs and fees, or with incomplete information for payment, or which do not conform to applicable rules, will not be filed. If the clerk of the court rejects a filing, the clerk of the court will notify the sender as soon as practicable.

(4) Fee Schedule. A fee schedule for electronic filing shall be adopted annually by the clerk of the court.

(5) Original Records. An electronically transmitted document accepted for filing will be recognized as the original record of file or for evidentiary purposes when it bears the clerk of the court's official date and time file stamp.

(6) Requirements. Every document electronically transmitted for filing shall conform to the requirements for filing established by these rules, i.e., shall be on paper measuring approximately 8 ½ x 11 inches, and shall contain the individual's State Bar of Texas identification number, if any, address, telephone number and telecopier number. The quality of the original hard copy shall be clear and dark enough to transmit legibly.

(7) Original Signature. The sender shall maintain the original of the document with original signature affixed as required by Section 51.806, Texas Government Code.

(8) Cover Sheet. A cover sheet must accompany every transmission which shall: a) clearly identify the sender, the documents being transmitted, and the number of pages; b) have clear and concise instructions concerning issuance or other requests; c) have complete information on the payment authorization for court costs and fees; and d) include the senders telephone number and telecopier number.

(9) Verification. The clerk of the court upon receipt of an electronically transmitted document shall verify the completeness of the transmission.

(10) Seals. No citation or writ bearing the official seal of the court may be transmitted electronically.

(11) Filing. Electronic transmission of a document does not constitute filing. Filing is complete when the clerk of the court's official date and time file stamp is affixed to the document. Each page of any document received by the clerk of the court will be automatically imprinted with the date and time of the receipt. The date and time imprinted on the last page of the document will determine the time of receipt but not the time of filing. Transmissions completed during a

normal business day before 5:00 p.m. and accepted for filing will be filed on the day of the receipt. Transmissions completed after 5:00 p.m., on weekends or holidays will be verified and filed before 10:00 a.m. on the first business day following receipt of transmission. The sender is responsible for determining if there are any changes in normal business hours.

Committee Comment: The following provision is in many current fax filing plans: "After filing an electronically transmitted document, the clerk of the court will electronically transmit to the sender an acknowledgment of the filing, together with cost receipts, if any." The acknowledgment was placed in the original fax filing plans because fax was new and not as trusted as the technology is today. The clerks committee has deleted this procedure from this rule so that fax filing be considered as mail delivery and not require an acknowledgment. The person sending the fax will have acknowledgment from their own fax. Additionally, the acknowledgment is a cost for the counties.

RULE 15 WRITS AND PROCESS

The ~~style~~ title of all writs and process shall be "The State of Texas" and unless otherwise specially provided by law or these rules every such writ and process shall be directed to any person authorized by law or these rules to serve process and shall include a return for service. ~~sheriff or any constable within the State of Texas, shall be made returnable on the Monday next after expiration of twenty days from the date of service thereof, and shall be dated and attested by the clerk with the seal of the court impressed thereon, and the date of issuance shall be noted thereon.~~

COMMITTEE COMMENT: Writs are issued under the direction of the court's order and do not contain the "Monday next after expiration of twenty days" language. Citations contain the language and the requirement is in the citation rules. "Impressed thereon" is deleted to clarify that rubber stamps may also be used by clerks and the sentence is moved to the clerk's rule.

~~RULE 17 OFFICER TO EXECUTE PROCESS~~

~~Except where otherwise expressly provided by law or these rules, the officer receiving any process to be executed shall not be entitled in any case to demand his fee for executing the same in advance of such execution, but his fee shall be taxed and collected as other costs in the case.~~

COMMITTEE COMMENT: See Rule 126

~~**RULE 19 NON-ADJOURNMENT OF TERM**~~

~~Every term of court shall commence and convene by operation of law at the time fixed by statute without any act, order, or formal opening by a judge or other official thereof, and shall continue to be open at all times until and including the last day of the term unless sooner adjourned by the judge thereof.~~

COMMITTEE COMMENT: Delete - unnecessary

~~**RULE 20 MINUTES READ AND SIGNED**~~

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

COMMITTEE COMMENT: Delete. No longer common practice.

RULE 71 MISNOMER OF PLEADING

When a party has mistakenly designated any plea or pleading, the court, if justice so requires, shall treat the plea or pleading as if it had been properly designated. ~~Pleadings shall be docketed as originally designated~~ and it shall remain identified as originally designated, unless the court orders redesignation. ~~Upon court order filed with the clerk, the clerk shall modify the docket and all other clerk records to reflect redesignation.~~

~~**RULE 75 FILED PLEADINGS; WITHDRAWAL**~~

~~All filed pleadings shall remain at all times in the clerk's office or in the court or in the custody of the clerk, except that the court may by order entered on the minutes allow a filed pleading to be withdrawn for a limited time whenever necessary, on leaving a certified copy on file. The party withdrawing such pleading shall pay the costs of such order and certified copy.~~

COMMITTEE COMMENT: Delete - withdrawal of pleadings not common practice or necessary. Clerk as custodian of record is addressed in new rule on clerks duties.

RULE 75a ~~FILING~~ EXHIBITS: ~~COURT REPORTER TO FILE WITH CLERK~~

(a) The court reporter, recorder or stenographer shall file with the clerk of the court all exhibits which were admitted in evidence or tendered on bill of exception during the course of any hearing, proceeding or trial.

~~**RULE 75b FILED EXHIBITS: WITHDRAWAL**~~

~~All filed exhibits admitted in evidence or tendered on bill of exception shall, until returned or otherwise disposed of as authorized by Rule 14b, remain at all times in the clerk's office or in the court or in the custody of the clerk except as follows:~~

~~(a)~~(b) The court may by order ~~entered on the minutes~~ allow a filed exhibit to be withdrawn by any party only upon such party's leaving on file a certified, photo, or other reproduced copy of such exhibit. The party withdrawing such exhibit shall pay the costs of such order and copy.

~~(b)~~(c) The court reporter, recorder or stenographer of the court conducting the hearing, proceedings, or trial in which exhibits are admitted or offered in evidence, shall have the right to withdraw filed exhibits, upon giving the clerk proper receipt therefor, whenever necessary for the court reporter, recorder or stenographer to transmit such original exhibits to an appellate court under the provisions of ~~Rule 379~~ Rule 53, Texas Rules of Appellate Procedure or to otherwise discharge the duties imposed by law upon said court reporter, recorder or stenographer.

COMMITTEE COMMENT: This rule combines Rule 75a and Rule 75b. and is titled "Exhibits". The paragraph on clerk having custody of the exhibits has been added to the Duties of the Clerk rule. "Entered on the minutes" is unnecessary. Reference to TRAP rule is added.

RULE 89 TRANSFERRED IF MOTION IS SUSTAINED

If a motion to transfer venue is sustained, the cause shall not be dismissed, but the court shall transfer said cause to the proper court; and the costs incurred prior to the time such suit is filed in the court to which said cause is transferred shall be taxed against the plaintiff. ~~The clerk shall make up a transcript of all the orders made in said cause, certifying thereto officially under the seal of the court, and send it with the original papers in the cause to the clerk of the court to which the venue has been changed. Provided however, if the cause be severable as to parties defendant and shall be ordered transferred as to one or more defendants but not as to all, the clerk, instead of sending the original papers, shall make certified copies of such filed papers as directed by the court and forward the same to the clerk of the court to which the venue has been changed. After the cause has been transferred, as above provided for the clerk of the court to which the cause has been transferred shall mail notification to the plaintiff or his attorney that transfer of the cause has been completed, that the filing fee in the proper court is due and payable within thirty days from the mailing of such notification, and that the case may be~~

~~dismissed if the filing fee is not timely paid, and if such filing fee is timely paid, the cause will be subject to trial at the expiration of thirty days after the mailing of notification to the parties or their attorneys by the clerk that the papers have been filed in the court to which the cause has been transferred, and if the filing fee is not timely paid, any court of the transferee county to which the case might have been assigned, upon its own motion or the motion of a party, may dismiss the cause without prejudice to the refiling of same.~~

COMMITTEE COMMENT: Requirements for clerks moved to Duties of Clerk section.

RULE 99 ISSUANCE AND FORM OF CITATION

(a) Issuance Upon the filing of the petition and when requested, the clerk of the court, ~~when requested~~, shall ~~forthwith~~ issue a citation and deliver the citation as directed by the requesting party. The party requesting citation shall be responsible for obtaining service of the citation and a copy of the petition. Upon request, separate or additional citations shall be issued by the clerk of the court.

(b) Form The citation shall:

(1) be styled "The State of Texas," and unless otherwise specially provided by law or these rules shall be directed to any person authorized by law or these rules to serve process

(2) be signed by the clerk of the court under seal of court,

(3) contain name and location of the court,

(4) ~~show~~ contain date of filing of the petition,

(5) ~~show~~ contain date of issuance of citation,

(6) ~~show~~ contain file number,

(7) ~~show~~ contain style of case and names of parties,

(8) be directed to the defendant,

(9) ~~show~~ contain the name and address of attorney for plaintiff, otherwise the address of plaintiff,

~~(10) contain the time within which these rules require the defendant to file a written answer with the clerk who issued citation;~~

(10) ~~(11)~~ contain address of the clerk of the court, and

~~(12) shall notify the defendant that in case of failure of defendant to file an answer, judgment by default may be rendered for the relief demanded in the petition. The citation shall direct the defendant to file a written answer to the plaintiff's petition on or before 10:00 a.m. on the Monday next after the expiration of twenty days after the date of service thereof. The requirement of subsections 10 and 12 of this section shall be in the form set forth in section c of this rule.~~

(11) contain the following notice:

~~(c)Notice. The citation shall include the following notice to the defendant~~: "You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk of the court who issued this citation by 10:00 a.m. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you."

(c)~~d.~~ Copies. The party filing any pleading upon which citation is to be issued and served shall furnish the clerk of the court with a sufficient number of copies thereof for use in serving the parties to be served, and when copies are so furnished the clerk of the court shall ~~make no~~ not charge for the copies.

Comment: Rule 99 does not refer to Rule 15 on who to direct the citation for service. The change, taken from proposed Rule 15, is to clarify who the citation is directed for service. Duplication of answer information was deleted. Added style of case so parties know how to style pleadings.

RULE 108 DEFENDANT WITHOUT STATE

Where the defendant is absent from the State, or is a nonresident of the State, the defendant shall be served with citation ~~the form of notice to such defendant of the institution of the suit shall be the same as prescribed for citation to a resident defendant and such notice may be served~~ by any disinterested person competent to make oath of the fact in the same manner as provided in Rule 106 hereof. The return of service in such cases shall be endorsed on or attached to the original notice, and shall be in the form provided in Rule 107, and be signed and sworn to by the party making such service before some officer authorized by the laws of this State to take affidavits, under the hand and official seal of such officer. A defendant served with such notice shall be required to appear and answer in the same manner and time and under the same penalties as if he had been personally served with a citation within this State to the full extent that he may be required to appear and answer under the constitution of the United States in an action either in rem or in personam.

COMMITTEE COMMENT: Simplify and clarify that defendant shall be served with citation.

RULE 114 CITATION BY PUBLICATION; ~~REQUISITES~~

(a). Requisites Where citation by publication is authorized by these rules, the citation shall contain the requisites prescribed by Rules 15 and 99, unless otherwise herein stated but ~~in so far as they are not inconsistent herewith, provided that~~ no copy of the plaintiff's petition shall accompany ~~this~~ the citation, and the citation ~~shall be styled "The State of Texas" and~~ shall be directed as follows: ~~to:~~

(1) to the defendant or defendants by name, if their names are known, or to the defendant or defendants as designated in the petition, if unknown, or such other classification as may be fixed by any statute or by these rules, or

(from Rule 114)

(2) if the plaintiff, his agent, or attorney, shall make oath that the names of the heirs or stockholders against whom an action is authorized by Section 17.004, Civil Practice and Remedies Code, are unknown to the affiant, ~~the clerk shall issue a citation for service by~~

~~publication~~ such citation shall be addressed to the defendants by a concise description of their classification, as "the Unknown Heirs of A.B., deceased," or " Unknown Stockholders of _____Corporation," as the case may be, or ~~and shall contain the other requisites prescribed in Rules 114 and 115 and shall be served as provided by Rule 116~~ (Rule 111)

(3)in suits authorized by Section 17.005, Civil Practice and Remedies Code, all persons claiming under such conveyance whose names are known to plaintiff shall be made parties by name and cited to appear, in the manner now provided by law as in other suits; all other persons claiming any interest in such land under such conveyance may be made parties to the suit and cited by publication under the designation "all persons claiming any title or interest in land under deed heretofore given to _____ of _____ as grantee" (inserting in the blanks the name and residence of grantee as given in such conveyance). It shall be permissible to join in one suit all persons claiming under two or more conveyances affecting title to the same tract of land..
(Rule 112)

(b) Form. The citation shall contain the names of the parties, a brief statement of the nature of the suit (which need not contain the details and particulars of the claim) a description of any property involved and of the interest of the named or unknown defendant or defendants, and, where the suit involves land, ~~the requisites of Rule 115. In citations by publication involving land, it shall be sufficient in making the brief statement of the claim in such citation to state the kind of suit,~~ the number of acres of land involved in the suit, or the number of the lot and block, or any other plat description that may be of record if the land is situated in a city or town, the survey on which and the county in which the land is situated, and any special pleas which are relied upon in such suit.

Where there are two or more defendants or classes of defendants to be served by publication, the citation may be directed to all of them by name and classification, so that service may be completed by publication of the one citation for the required ~~number of times~~ time.
(from Rule 114 and Rule 115)

(c)Issuance. If issued from the district or county court, the citation shall command ~~such~~ the parties to appear and answer at or before 10 o'clock a.m. of the first Monday after the expiration of 42 days from the date of issuance ~~thereof~~, specifying the day of the week, the day of the month, and the time of day the defendant is required to answer. If issued from the justice of the peace court, such citation shall command such parties to appear and answer on or before the first day of the first term of court which convenes after the expiration of 42 days from the date of issue thereof, specifying the day of the week, and the day of the month, that such term will meet.
(from Rule 114)

COMMITTEE COMMENT: The citation by publication rule combines Rules 111, 112, 114 and 115. .

RULE 116 ~~SERVICE OF CITATION BY~~ PUBLICATION OF CITATION

~~The citation, when issued, shall be served by the sheriff or any constable of any county of the State of Texas or by the clerk of the court in which the case is pending, by having the same published once each week for four (4) consecutive weeks, the first publication to be at least twenty-eight (28) days before the return day of the citation. In all suits which do not involve the title to land or the partition of real estate, such publication shall be made in the county where the suit is pending, if there be a newspaper published in said county, but if not, then in an adjoining county where a newspaper is published. In all suits which involve the title to land or partition of real estate, such publication shall be made in the county where the land, or a portion thereof, is situated, if there be a newspaper in such county, but if not, then in an adjoining county to the county where the land or a part thereof is situated, where a newspaper is published.~~
(Rule 116)

The citation shall be published in the English language one time ~~a week for two weeks~~ in some newspaper published in the county

(1) where the suit is pending in all suits which do not involve the title to land or the partition of real estate and if there is no newspaper published in the county, then in an adjoining county where a newspaper is published

(2) where the land or a portion thereof is situated in all suits which involve the title to land or partition of real estate and if there is no newspaper published in the county, then in an adjoining county to the county where the land or a part thereof is situated

(3) in which the property is located in suits for delinquent ad valorem taxes and if there is no newspaper published in the county, then the publication may be made in a newspaper in an adjoining county.

~~which newspaper shall in every respect answer the requirements of the law applicable to newspapers which are employed for such a purpose.~~

~~which~~ The newspaper must have been in general circulation for at least one year immediately prior to the first publication and shall in every respect answer the requirements of the law applicable to newspapers which are employed for such a purpose, the first publication to be not less than twenty-eight days prior to the return day fixed in the citation; and the affidavit of the editor or publisher of the newspaper giving the date of publication, together with a printed copy of the citation as published, shall constitute sufficient proof of due publication when returned and filed in court.

The maximum fee for publishing the citation shall be the lowest published word or line rate of that newspaper for classified advertising. If the publication of the citation in a suit for delinquent ad valorem taxes cannot be had for this fee, chargeable as costs and payable upon sale of the property, as provided by law, and this fact is supported by the affidavit of the attorney for the plaintiff or the attorney requesting the issuance of the process, then service of the citation may be made by posting a copy at the courthouse door of the county in which the suit is pending, the citation to be posted at least twenty-eight days prior to the return day fixed in the citation. Proof of the posting of the citation shall be made by affidavit of the attorney for the plaintiff, or of the

person posting it. When citation is served as here provided it shall be sufficient, and no other form of citation or notice to the named defendants therein shall be necessary.
(New Rule from Rule 117a)

Committee Comment: The new rule combines Rule 116 and the publication part of Rule 117a. The service is removed from Rule 116 because Rule 103 states who may serve. Publication time changed to one time for consistency with the divorce citation. Old rules required the regular citation to be published four consecutive weeks and the tax citation published one time a week for 2 weeks. Rule 116 did not include the affidavit of the editor; this new rule does. Should the posting part of this rule be applicable to all citations?

RULE 117a. CITATION IN SUITS FOR DELINQUENT AD VALOREM TAXES

In all suits for collection of delinquent ad valorem taxes, the rules of civil procedure governing issuance and service of citation shall control the issuance and service of citation therein, except as herein otherwise specially provided. The process shall conform substantially to the form set out for personal service and shall contain the essential elements of the citation in Rule 99.

(1). Personal Service: Owner and Residence Known, Within State.

Where any defendant in a tax suit is a resident of the State of Texas and is not subject to citation by publication under subdivision 3 below, the process shall conform substantially to the form ~~hereinafter~~ set out for personal service and shall contain the essential elements of Rule 99 and be served and returned and otherwise regulated by the provisions ~~of Rules 99 to 107, inclusive.~~ for service in these rules.

(2). Personal Service: Owner and Residence Known, Out of State.

Where any such defendant is absent from the State or is a nonresident of the State and is not subject to citation by publication under subdivision 3 below, the process shall conform substantially to the form hereinafter set out for personal service and shall contain the essential elements of Rule 99 and be served and returned and otherwise regulated by the provisions ~~of Rule 108.~~ for service in these rules.

(3). Service by Publication: Nonresident, Absent from State, Transient, Name Unknown, Residence Unknown, Owner Unknown, Heirs Unknown,Corporate Officers, Trustees, Receivers or Stockholders Unknown, Any Other Unknown Persons Owing or Claiming or Having an Interest.

Where any defendant in a tax suit is a nonresident of the State, or is absent from the State, or is a transient person, or the name or the residence of any owner of any interest in any property upon which a tax lien is sought to be foreclosed, is unknown to the attorney requesting the issuance of process or filing the suit for the taxing unit, and such attorney shall make affidavit that

such defendant is a nonresident of the State, or is absent from the State, or is a transient person, or that the name or residence of such owner is unknown and cannot be ascertained after diligent inquiry, each such person in every such class above mentioned,together with any and all other persons, including adverse claimants, owning or claiming or having any legal or equitable interest in or lien upon such property, may be cited by publication. All unknown owners of any interest in any property upon which any taxing unit seeks to foreclose a lien for taxes, including stockholders of corporations --defunct or otherwise -- their successors, heirs, and assigns, may be joined in such suit under the designation of "unknown owners" and citation be had upon them as such; provided, however, that record owners of such property or of any apparent interest therein, including, without limitation, record lien holders, shall not be included in the designation of "unknown owners"; and provided further that where any record owner has rendered the property involved within five years before the tax suit is filed, citation on such record owner may not be had by publication or posting unless citation for personal service has been issued as to such record owner, with a notation thereon setting forth the same address as is contained on the rendition sheet made within such five years, and the sheriff or other person to whom citation has been delivered makes his return thereon that he is unable to locate the defendant. Where any attorney filing a tax suit for a taxing unit, or requesting the issuance of process in such suit, shall make affidavit that a corporation is the record owner of any interest in any property upon which a tax lien is sought to be foreclosed, and that he does not know, and after diligent inquiry has been unable to ascertain, the location of the place of business, if any, of such corporation, or the name or place of residence of any officer of such corporation upon whom personal service may be had, such corporation may be cited by publication as herein provided. All defendants of the classes enumerated above may be joined in the same citation by publication.

An affidavit which complies with the foregoing requirements therefor shall be sufficient basis for the citation above mentioned in connection with it but shall be held to be made upon the criminal responsibility of affiant.

Such citation by publication shall contain the requisites prescribed by Rule 99, in so far as they are not inconsistent herewith, provided that no copy of the plaintiff's petition shall accompany the citation and the citation shall be directed to the defendants by names or by designation as hereinabove provided, ~~and~~ shall be issued and signed by the clerk of the court in which such tax suit is pending, ~~.It shall be sufficient if it states the file number and style of the case, the date of the filing of the petition, the names of all parties by name or by designation as hereinabove provided, and the court in which the suit is pending~~; shall command such parties to appear and defend such suit at or before 10 o'clock a.m. of the first Monday after the expiration of forty-two days from the date of the issuance thereof, specifying such date when such parties are required to answer; and shall state ~~the place of holding the court,~~ the nature of the suit; ~~and the date of the issuance of the citation; and shall be signed and sealed by the clerk~~.

~~The citation shall be published in the English language one time a week for two weeks in some newspaper published in the county in which the property is located, which newspaper must have been in general circulation for at least one year immediately prior to the first publication and shall in every respect answer the requirements of the law applicable to newspapers which are employed for such a purpose, the first publication to be not less than twenty-eight days prior to the return day fixed in the citation; and the affidavit of the editor or publisher of the newspaper~~

~~giving the date of publication, together with a printed copy of the citation as published, shall constitute sufficient proof of due publication when returned and filed in court. If there is no newspaper published in the county, then the publication may be made in a newspaper in an adjoining county, which newspaper shall in every respect answer the requirements of the law applicable to newspapers which are employed for such a purpose. The maximum fee for publishing the citation shall be the lowest published word or line rate of that newspaper for classified advertising. If the publication of the citation cannot be had for this fee, chargeable as costs and payable upon sale of the property, as provided by law, and this fact is supported by the affidavit of the attorney for the plaintiff or the attorney requesting the issuance of the process, then service of the citation may be made by posting a copy at the courthouse door of the county in which the suit is pending, the citation to be posted at least twenty-eight days prior to the return day fixed in the citation. Proof of the posting of the citation shall be made by affidavit of the attorney for the plaintiff, or of the person posting it. When citation is served as here provided it shall be sufficient, and no other form of citation or notice to the named defendants therein shall be necessary.~~

Committee Comment: For consistency, this includes that all citations shall follow Rule 99 and deleted information that duplicates Rule 99. Last paragraph on publication has been moved to new publication Rule 116.

(4). Citation in Tax Suits: General Provisions.

Any process authorized by this rule may issue jointly in behalf of all taxing units who are plaintiffs or intervenors in any tax suit. The statement of the nature of the suit, to be set out in the citation, shall be sufficient if it contains a brief general description of the property upon which the taxes are due and the amount of such taxes, exclusive of interest, penalties, and costs, and shall state, in substance, that in such suit the plaintiff and all other taxing units who may set up their claims therein seek recovery of the delinquent ad valorem taxes due on said property, and the (establishment and foreclosure) of liens, if any, securing the payment of same, as provided by law; that in addition to the taxes all interest, penalties, and costs allowed by law up to and including the day of judgment are included in the suit; and that all parties to the suit, including plaintiff, defendants, and intervenors, shall take notice that claims for any taxes on said property becoming delinquent subsequent to the filing of the suit and up to the day of judgment, together with all interest, penalties, and costs allowed by law thereon, may, upon request therefor, be recovered therein without further citation or notice to any parties thereto. Such citation need not be accompanied by a copy of plaintiff's petition and no such copy need be served. Such citation shall also show the names of all taxing units which assess and collect taxes on said property not made parties to such suit, and shall contain, in substance, a recitation that each party to such suit shall take notice of, and plead and answer to, all claims and pleadings then on file or thereafter filed in said cause by all other parties therein, or who may intervene therein and set up their respective tax claims against said property. After citation or notice has been given on behalf of any plaintiff or intervenor taxing unit, the court shall have jurisdiction to hear and determine the tax claims of all taxing units who are parties plaintiff, intervenor or defendant at the time such process is issued and of all taxing units intervening after such process is issued, not only for the taxes, interest,

penalties, and costs which may be due on said property at the time the suit is filed, but those becoming delinquent thereon at any time thereafter up to and including the day of judgment, without the necessity of further citation or notice to any party to said suit; and any taxing unit having a tax claim against said property may, by answer or intervention, set up and have determined its tax claim without the necessity of further citation or notice to any parties to such suit.

(5). Form of Citation by Publication or Posting.
The form of citation by publication or posting shall be sufficient if it is in substantially the following form, with proper changes to make the same applicable to personal property, where necessary, and if the suit includes or is for the recovery of taxes assessed on personal property, a general description of such personal property shall be sufficient:
THE STATE OF TEXAS)
COUNTY OF _____)

In the name and by the authority of the State of Texas
Notice is hereby given as follows:
TO:_____
_____
and any and all other persons, including adverse claimants, owning or having or claiming any legal or equitable interest in or lien upon the following described property delinquent to Plaintiff herein, for taxes, to-wit:

_____
_____
Which said property is delinquent to Plaintiff for taxes in the following amounts:
$_____, exclusive of interest, penalties, and costs, and there is included in this suit in addition to the taxes all said interest, penalties, and costs thereon, allowed by law up to and including the day of judgment herein.

You are hereby notified that suit has been brought by _____ as Plaintiffs, against _____ as Defendants, by petition filed on the ___ day of _____, 19__, in a certain suit styled _____ v. _____ for collection of the taxes on said property and that said suit is now pending in the District Court of _____ County, Texas, _____ Judicial District, and the file number of said suit is _____, that the names of all taxing units which assess and collect taxes on the property hereinabove described, not made parties to this suit, are _____.

Plaintiff and all other taxing units who may set up their tax claims herein seek recovery of delinquent ad valorem taxes on the property hereinabove described, and in addition to the taxes all interest, penalties, and costs allowed by law thereon up to and including the day of judgment herein, and the establishment and foreclosure of liens, if any, securing the payment of same, as provided by law.

All parties to this suit, including plaintiff, defendants, and intervenors, shall take notice that claims not only for any taxes which were delinquent on said property at the time this suit was filed but all taxes becoming delinquent thereon at any time thereafter up to the day of judgment, including all interest, penalties, and costs allowed by law thereon, may, upon request therefor, be recovered herein without further citation or notice to any parties herein, and all said parties shall take notice of and plead and answer to all claims and pleadings now on file and which may hereafter be filed in said cause by all other parties herein, and all of those taxing units above named who may intervene herein and set up their respective tax claims against said property.

"You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk of the court who issued this citation by 10:00 a.m. on the ~~You are hereby commanded to appear and defend such suit on the first~~ Monday after the expiration of forty-two (42) days from and after the date of issuance hereof, the same being the ___ day of _____, A.D., 19__ (which is the return day of such citation), a default judgment may be taken against you." You are hereby commanded to appear and defend such suit before the ~~honorable~~ ____ Judicial District Court of _____ County, Texas, to be held at the courthouse thereof, then and there to show cause why judgment shall not be rendered for such taxes, penalties, interest, and costs, and condemning said property and ordering foreclosure of the constitutional and statutory tax liens thereon for taxes due the plaintiff and the taxing units parties hereto, and those who may intervene herein, together with all interest, penalties, and costs allowed by law up to and including the day of judgment herein, and all costs of this suit.

Issued and given under my hand and seal of said court in the City of _____, _____ County, Texas, this ___ day of _____, A.D., 19__.

_____
Clerk of the District Court.
_____ County, Texas,
_____ Judicial District.
Address:_____

Name and Address of Attorney for Plaintiff:
_____
_____

Committee Comment: Added the "You have been sued...", the address of the clerk and the name and address of the attorney according to Rule 99.

(6). Form of Citation by Personal Service In or Out of State.
The form of citation for personal service shall be sufficient if it is in substantially the following form, with proper changes to make the same applicable to personal property, where necessary, and if the suit includes or is for the recovery of taxes assessed on personal property, a general description of such personal property shall be sufficient:
THE STATE OF TEXAS
To _____, Defendant, GREETING:

"You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk of the court who issued this citation by 10:00 a.m. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you."

~~YOU ARE HEREBY COMMANDED to appear and answer before the Honorable District Court, _____ Judicial District, _____ County, Texas, at the Courthouse of said county in _____, Texas, at or before 10 o'clock a.m. of the Monday next after the expiration of 20 days from the date of service of this citation, then and there to answer~~
The petition of _____, Plaintiff was filed in the _____ Judicial District Court of _____ County, Texas, at the Courthouse of said county in _____, Texas, ~~said Court~~ on the ___ day of _____, A.D., 19__, against _____, Defendant, said suit being number _____ on the docket of said Court, the nature of which demand is a suit to collect delinquent ad valorem taxes on the property hereinafter described.

The amount of taxes due Plaintiff, exclusive of interest, penalties, and costs suit being number _____ on the docket of said Court, the nature of which demand is a suit to collect delinquent ad valorem taxes on the property hereinafter, is the sum of $_____, said property being described as follows, to-wit: _____
_____
_____

The names of all taxing units which assess and collect taxes on said property, not made parties to this suit, are: _____

Plaintiff and all other taxing units who may set up their tax claims herein seek recovery of delinquent ad valorem taxes on the property hereinabove described, and in addition to the taxes all interest, penalties, and costs allowed by law thereon up to and including the day of judgment herein, and the establishment and foreclosure of liens securing the payment of same, as provided by law.

All parties to this suit, including plaintiff, defendants, and intervenors, shall taken notice that claims not only for any taxes which were delinquent on said property at the time this suit was filed but all taxes becoming delinquent thereon at any time thereafter up to the day of judgment, including all interest, penalties, and costs allowed by law thereon, may, upon request therefor, be recovered herein without further citation or notice to any parties herein, and all said parties shall take notice of and plead and answer to all claims and pleadings now on file and which may hereafter be filed in this cause by all other parties hereto, and by all of those taxing units above named, who may intervene herein and set up their respective tax claims against said property.

~~If this citation is not served within 90 days after the date of its issuance, it shall be returned unserved.~~

The officer executing this return shall promptly serve the same according to the requirements of law and the mandates hereof and make due return as the law directs.

Issued and given under my hand and seal of said Court at _____, Texas, this the ___ day of _____, A.D., 19__.

_____
Clerk of the District Court of
_____ County, Texas.
By _____, Deputy.
Address:_____

Name and Address of Attorney for Plaintiff:
_____

COMMITTEE COMMENT: Added the "You have been sued...", the address of clerk and name and address of attorney according to Rule 99. Deleted the 90 day return to conform to Rule 99.

RULE 120 ENTERING APPEARANCE

The defendant may, in person, ~~or~~ by attorney, or by ~~his~~ duly authorized agent, enter an appearance in open court. Such appearance shall be noted ~~by the judge upon his docket and entered in the minutes~~ in the clerk's record, and shall have the same force and effect as if the citation had been duly issued and served as provided by law.

COMMITTEE COMMENT: Appearance shall be noted in clerk's record and entering in the minutes seems unnecessary and is not common practice.

RULE 126 FEE FOR EXECUTION OF PROCESS, DEMAND

No sheriff or constable shall be compelled to execute any process in civil cases ~~coming from any county other than the one in which he is an officer,~~ unless the fees allowed him by law for the service of such process shall be paid in advance; except when affidavit of inability ~~is~~ filed has been endorsed thereon by the clerk of the court as provided by law or these rules. ~~The clerk issuing the process shall endorse thereon the words "pauper oath filed," and sign his name officially below them; and the officer in whose hands such process is placed for service shall serve the same.~~ The clerk of the court may collect the service fee. Service fees shall be taxed as costs in the case.

COMMITTEE COMMENT: Rule 17 does not require fees in advance and Rule 126 requires fees paid in advance for an "out of county" request. The two rules seem to be in conflict. Change would require all fees be paid in advance and allow clerk to collect. Requirement of endorsement placed in duties of the clerk of the court section.

RULE 142 SECURITY FOR COSTS

~~The clerk shall require from the plaintiff fess for services rendered before issuing any process unless filing is requested pursuant to Rule 145 of these rules.~~

All statutory fees that are required to be collected by the clerk of the court shall be paid at the time of filing or the request for services.

Committee Comment: The old rule only required fees from the plaintiff. This clarifies when fees are to be paid.

RULE 216 REQUEST AND FEE FOR JURY TRIAL

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

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

COMMITTEE COMMENT: Fee is deleted to provide uniformity in where fees are located -- statute. Clerks legislative commitee will pursue placement in statute. No notation on docket to be consistent with the rule on the clerk's record.

RULE 245 ASSIGNMENT OF CASES FOR TRIAL

(a) Setting. The court may set contested cases on written request of any party, or on the court's own motion, with reasonable notice of not less than forty-five days to the parties of a first setting for trial, or by agreement of the parties; provided, however, that when a case previously has been set for trial, the Court may reset said contested case to a later date on any reasonable notice to the parties or by agreement of the parties. Noncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time.

(b) Request. A request for trial setting constitutes a representation that the requesting party reasonably and in good faith expects to be ready for trial by the date requested, but no additional representation concerning the completion of pretrial proceedings or of current readiness for trial shall be required in order to obtain a trial setting in a contested case.

~~RULE 246 — CLERK TO GIVE NOTICE OF SETTINGS~~

(c) Notice. ~~The clerk shall keep a record in his office of all cases set for trial, and it shall be his duty to inform any non-resident attorney of the date of setting of any case upon request by mail from such attorney, accompanied by a return envelope properly addressed and stamped.~~ Any party setting a case for trial shall immediately notify all other parties of the trial setting by written notice and shall file a copy of such notice with the clerk of the court. If the court on its own initiative sets the case for trial, the clerk of the court shall notify all parties of the setting by first class mail. Failure ~~of the clerk~~ to furnish ~~such information on proper request~~ notice shall be sufficient ground for continuance or for a new trial when it appears to the court that such failure has prevented ~~the attorney~~ a party from preparing or presenting ~~his~~ its claim or defense.

Comment: This rule combines Rule 245 and Rule 246. It clarifies who shall give notice of trial settings.

TRCP 18a. RECUSAL OR DISQUALIFICATION OF JUDGES

(a) Grounds for Disqualification. A judge must disqualify himself or herself in a case in which the judge:

(1) was as a lawyer;

(2) previously practiced law with another lawyer who was a lawyer in the case during the time the judge and the lawyer practiced law together;

(3) knows that[1] he or she has an interest[2] in the subject matter in controversy; or

(4) is related to a party by affinity or consanguinity within the third degree.[3]

(b) Grounds for Recusal. A judge must recuse himself or herself in a case in which:

(1) the impartiality of the judge might reasonably be questioned;

(2) the judge has a personal bias or prejudice concerning the subject matter or a party;

(3) the judge has personal knowledge of disputed evidentiary facts;[4]

(4) the judge or a lawyer with whom the judge previously practiced law is a material witness;[5]

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1 The definition of an "interest" should include having an interest either as an individual or as a fiduciary, and the phrase should be deleted here.

2 Should this be a "financial interest"? "Financial interest" is defined in subdivision ( ), but "interest" is not.

3 Some parts of this rules use "third degree of relationship." I don't know if that means third degree of consanguinity, or third degree of affinity, or both. Consanguinity is the relationship of a person to his/her blood relatives. Affinity extends to your spouses blood relatives. *I think.* I have changed all references to "third degree of affinity or consanguinity."

4 Aren't (3) and (4) the same? If the judge has "personal knowledge of disputed evidentiary facts" isn't the judge a "material witness"?

5 Should this be limited as (a)(2) is limited? Does it really mean that a judge can't hear a case that an old law partner of 20 years past happens to be a witness?

(5) the judge participated as counsel,[6] adviser or material witness[7] in the matter in controversy, or expressed an opinion concerning its merits, while acting as an attorney in government service;[8]

(6) the judge knows that he or she, or his or her spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the case, or any other interest that could be substantially affected by the outcome of the case;[9]

(7) the judge's spouse, or a person to whom the judge is related within the third degree of affinity or consanguinity, or the spouse of such a person:

(A) is a party to the case, or an officer, director, or trustee of a party;

(B) is known by the judge to have an interest that could be substantially affected by the outcome of the case;[10]

(C) is known by the judge to be likely to be a material witness in the case.

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6 Why isn't this covered by (a)(1)?

7 Isn't this the same as (4)?

8 An alternative is as follows:

> the judge expressed an opinion concerning its merits while the judge was an attorney in government service;

9 This duplicates (a)(3) in that (a)(3) requires *disqualification* is the judge has "an interest in the subject matter in controversy." This paragraph requires *recusal* if the judge, or the judge's spouse or children, have a "*financial* interest in the subject matter in controversy *or a party*" or "any other interest that could be substantially affected by the outcome of the proceeding." How do we reconcile the two?

> My suggestion is to say that a judge is *disqualified* from any case in which the judge has "an interest." Then define "an interest" (rather than "financial interest") to mean an interest in the subject matter or a party — either financial or another interest that could be affected by the outcome of the case. Clearly this is more expansive that the Constitutional grounds for disqualification. Then we would require *recusal* if the judge's spouse or relative within the third degree (which includes children) has an interest.

10 Once again, this overlaps with the previous paragraph. Again, it talks about an "interest" rather than a "financial interest."

(8) the judge or the judge's spouse, or a person to whom the judge is related within the first degree of affinity or consanguinity , or the spouse of such a person, is a lawyer in the case.

(c) Judge to be Informed About Interests. A judge should inform himself or herself about his or her personal and fiduciary financial interests, and make a reasonable effort to inform himself or herself about the personal financial interests[11] of his or her spouse and minor children residing in in the judge's household.

(d) Waiver. The parties may waive any ground for recusal[12] after it is fully disclosed on the record.

(e) Late Discovery of Interest. If a judge does not discover the grounds that would require his or her recusal under paragraph (b)(6) or subparagraph (b)(7)(B) until after the judge has devoted substantial time to the case, the judge is not required to recuse if the judge or the person related to the judge divests himself or herself of the interest that would otherwise require recusal.

(g) Procedure.

(1) *Motion.* A party may move for the disqualification or recusal of the judge before whom a case is pending by filing a motion stating with particularity the grounds for disqualification or recusal. The motion must be verified. The motion may be based on personal knowledge or on information and belief if the grounds of such belief are specifically stated.[13] Although a judge's ruling is not a ground for disqualification or recusal, it may be evidence supporting the motion.[14]

(2) *Time for filing.*

(A) A motion to disqualify may be filed at any time.

(B) A motion to recuse must be filed at least 10 days before the first

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11 Why shouldn't the judge also inform his/herself about the fiduciary interests of his/her spouse or children as well?

12 And disqualification?

13 I hope I simplified this paragraph. The phrase about admissible evidence seemed meaningless since the following phrase allowed facts based on "information and belief" which is almost certain to not be admissible. evidence.

14 This was from the previously approved Committee draft.

hearing or trial that occurs after the grounds for recusal arise, except as follows:

(i) the motion may be filed at the earliest practicable time within that 10 day period if a judge is assigned to the case within that 10 day period; or

(ii) the motion may be filed at the earliest practicable time after the grounds for disqualification or recusal arise if the grounds arise less than 10 days before the trial or hearing.[15]

(3) *Notice.* On the day the motion is filed, a copy must be served on all other parties, together with a notice that the movant expects the motion to be presented to the judge[16] three days after the filing of the motion unless otherwise ordered by the judge.[17]

(4) *Proceedings after motion filed.* After a motion to recuse or disqualify has been filed, the judge who is the subject of the motion must not — except for good cause — proceed with the case unless the motion was filed under paragraph (g)(2)(B)(ii), in which case the judge may proceed with the case until an order disqualifying or recusing the judge is made.[18]

(5) *Duty of judge who is subject to the motion.*

(A) If a motion to disqualify or recuse is filed, the judge must either disqualify or recusal himself or herself or request the presiding judge of the administrative judicial district to assign a judge to hear

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15 This merges paragraph (b) and the first sentence of (g) of the draft previously approved by the Committee. No change in substance is intended. Note that the rule is based on when the grounds of disqualification or recusal "arise." Is it really when they "arise" or when the party knew or should have known of the grounds?

16 Do we really mean "considered" by the judge. Who is going to "present" it to the judge. Is this just a notice of a hearing. I think we could delete the entire paragraph and allow Rule 21a to take care of the matter. In other words, it is incumbent on the party filing the motion to serve it and set it for a hearing under the local rules. Is this wrong?

17 The Committee deleted this sentence. I suppose it goes without saying that another party can file a response.

18 This follows paragraph (g) of the previously approved draft in that it allows the judge to continue with the case if a late motion is filed.

the motion.

(B) If the judge disqualifies or recuses himself or herself, the judge must file with the clerk an order of disqualification or recusal and request the presiding judge of the administrative judicial district to assign another judge to the case. The disqualified or recused judge must not — except for good cause — proceed with the case.

(C) If the judge declines to disqualify or recuse himself or herself, the judge must enter an order referring the matter to the presiding judge of the administrative judicial district. The judge must promptly forward to the presiding judge a certified copy ofthe order of referral, the motion to disqualify or recuse, andany response.[19]

(6) *Duty of presiding judge*. The presiding judge of the administrative judicial district must promptly designate a judge to hear the motion. The presiding judge may designate himself or herself.If the judge hearing the motion orders disqualification or recusal, the presiding judge must promptly assign another judge to the case.

(7) *Duty of judge hearing motion*. The judge designated to hear the motion must promptly set a hearing and send notice of the hearing to all parties. While the motion is pending, the judge may make any orderjustice requires, including ordering interim or ancillary relief in the pending case. The judge must, as soon as practicable after the hearing, determine whether the judge who is subject to the motion is disqualified or should recuse and file an appropriate order.

(9) *Chief Justice may appoint judge to hear motion*. The Chief Justice of the Supreme Court may also appoint and assign judges in conformity with this rule and pursuant to statute.

(h) Appellate Review. If the motion is denied, it may be reviewed for abuse of discretion on appeal from the final judgment. If the motion is granted, it is not reviewable.

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[19] The last sentence is covered by paragraph (g)(4).

(i) **Sanctions.** If a party files a motion to disqualify or recuse under this rule and the judge hearing the motion determines that the motion to disqualify or recuse was brought solely for the purpose of delay and without sufficient cause, the judge may, in the interest of justice, impose any sanction authorized by Rule 215(2)(b).[20]

(j) **Definitions.** In this rule:

(1) "proceeding" includes pretrial, trial, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes executor, administrator, trustee, guardian and other similar relationships;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(A) ownership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates in the management of the fund;

(B) an office in an educational, religious, charitable, fraternal, or civic organization is not a 'financial interest' in securities held by the organization;

(C) the proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a 'financial interest' in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(D) ownership of government securities is a 'financial interest' in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;

(E) an interest as a taxpayer or utility ratepayer, or any similar interest, is not a 'financial interest' unless the outcome of the proceeding could substantially affect the liability of the judge or a person related to him within the third degree more than other judges.

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[20] Note that this formulation of the rule allows the judge to act on his/her own initiative.

TRCP 18a. RECUSAL OR DISQUALIFICATION OF JUDGES

(~~1~~a) **Grounds for Disqualification.** A ~~Judges shall~~ judge must disqualify ~~themselves~~ himself or herself in ~~all proceedings~~ a case in which the judge:

(a1) ~~they have served~~ was as a lawyer ~~in the matter in controversy, or~~;

(2) ~~a lawyer with whom they~~ previously practiced law ~~served~~ with another lawyer who was a lawyer in the case during ~~such association as a~~ the time the judge and the lawyer ~~concerning the matter~~ practiced law together; ~~or~~

(b3) ~~they~~ knows that~~, individually or as a fiduciary, they have~~[21] he or she has an interest[22] in the subject matter in controversy; or

(c4) ~~either of the parties may be related to them~~ is related to a party by affinity or consanguinity within the third degree.[23]

(~~2~~b) **Grounds for Recusal.** A judge ~~shall~~ must recuse himself or herself in ~~any~~ ~~proceeding~~ a case in which:

(a1) ~~his~~ the impartiality of the judge might reasonably be questioned;

(b2) ~~he~~ the judge has a personal bias or prejudice concerning the subject matter or a party~~, or~~;

(3) the judge has personal knowledge of disputed evidentiary facts ~~concerning the proceeding~~;[24]

(c4) ~~he~~ the judge or a lawyer with whom ~~he~~ the judge previously practiced law

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21 The definition of an "interest" should include having an interest either as an individual or as a fiduciary, and the phrase should be deleted here.

22 Should this be a "financial interest"? "Financial interest" is defined in subdivision ( ), but "interest" is not.

23 Some parts of this rules use "third degree of relationship." I don't know if that means third degree of consanguinity, or third degree of affinity, or both. Consanguinity is the relationship of a person to his/her blood relatives. Affinity extends to your spouses blood relatives. *I think.* I have changed all references to "third degree of affinity or consanguinity."

24 Aren't (3) and (4) the same? If the judge has "personal knowledge of disputed evidentiary facts" isn't the judge a "material witness"?

~~has been~~ is a material witness ~~concerning it~~;[25]

(d5) ~~he~~ the judge participated as counsel,[26] adviser or material witness[27] in the matter in controversy, or expressed an opinion concerning ~~the~~ its merits ~~of~~ it, while acting as an attorney in government service;[28]

(e6) ~~he~~ the judge knows that he ~~or she, individually or as a fiduciary~~, or his ~~or~~ her spouse or minor child residing in ~~his~~ the judge's household, has a financial interest in the subject matter in controversy or in a party to the ~~proceeding~~ case, or any other interest that could be substantially affected by the outcome of the ~~proceeding~~ case;[29]

(f7) ~~he or his~~ the judge's spouse, or a person to whom the judge is related within the third degree of ~~relationship~~ affinity or consanguinity ~~to either of them~~, or the spouse of such a person:

(iA) is a party to the ~~proceeding~~ case, or an officer, director, or trustee of a party;

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25 Should this be limited as (a)(2) is limited? Does it really mean that a judge can't hear a case that an old law partner of 20 years past happens to be a witness?

26 Why isn't this covered by (a)(1)?

27 Isn't this the same as (4)?

28 An alternative is as follows:

> ~~he~~ the judge ~~participated as counsel, adviser or material witness in the matter in controversy, or~~ expressed an opinion concerning ~~the~~ its merits ~~of~~ it, while ~~acting as~~ the judge was an attorney in government service;

29 This duplicates (a)(3) in that (a)(3) requires *disqualification* is the judge has "an interest in the subject matter in controversy." This paragraph requires *recusal* if the judge, or the judge's spouse or children, have a "*financial* interest in the subject matter in controversy *or a party* " or "any other interest that could be substantially affected by the outcome of the proceeding." How do we reconcile the two?

> My suggestion is to say that a judge is *disqualified* from any case in which the judge has "an interest." Then define "an interest" (rather than "financial interest") to mean an interest in the subject matter or a party — either financial or another interest that could be affected by the outcome of the case. Clearly this is more expansive that the Constitutional grounds for disqualification. Then we would require *recusal* if the judge's spouse or relative within the third degree (which includes children) has an interest.

(iiB) is known by the judge to have an interest that could be substantially affected by the outcome of the ~~proceeding~~ case;[30]

(iiiC) is ~~to the judge's knowledge~~ known by the judge to be likely to be a material witness in the ~~proceeding~~ case.

(g8) ~~he or his~~ the judge or the judge's spouse, or a person to whom the judge is related within the first degree of ~~relationship~~ affinity or consanguinity to ~~either of them~~, or the spouse of such a person, is ~~acting as~~ a lawyer in the ~~proceeding~~ case.

(3c) **Judge to be Informed About Interests.** A judge should inform himself or herself about his or her personal and fiduciary financial interests, and make a reasonable effort to inform himself or herself about the personal financial interests[31] of his or her spouse and minor children residing in ~~his~~ in the judge's household.

(5d) **Waiver.** The parties ~~to a proceeding~~ may waive any ground for recusal[32] after it is fully disclosed on the record.

(6e) **Late Discovery of Interest.** If a judge does not discover ~~that he is recused~~ the grounds that would require his or her recusal under ~~sub~~paragraphs ~~(2)(e)~~ (b)(6) or ~~(2)(f)(iii)~~ subparagraph (b)(7)(B) until after ~~he~~ the judge has devoted substantial time to the ~~matter~~ case, ~~he~~ the judge is not required to recuse ~~himself~~ if ~~he~~ the judge or the person related to ~~him~~ the judge divests himself or herself of the interest that would otherwise require recusal.

(ag) **Procedure.**

(1) *Motion.* ~~At least ten days before the date set for trial or other hearing in any court other than the Supreme Court, the Court of Criminal Appeals or the court of appeals, any party may file with the clerk of the court a motion stating grounds why the~~ A party may move for the disqualification or recusal of the judge before whom ~~the~~ a case is pending ~~should not sit in the case. The grounds may include any disability of the judge to sit in the case~~ by filing a motion stating with particularity the grounds for disqualification

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30 Once again, this overlaps with the previous paragraph. Again, it talks about an "interest" rather than a "financial interest."

31 Why shouldn't the judge also inform his/herself about the fiduciary interests of his/her spouse or children as well?

32 And disqualification?

or recusal. The motion ~~shall~~ must be verified ~~and must state with particularity the grounds why the judge before whom the case is pending should not sit~~. The motion ~~shall~~ may be ~~made~~ based on personal knowledge ~~or and shall set forth such facts as would be admissible in evidence provided that facts may be stated~~ upon information and belief if the grounds of such belief are specifically stated.[33] Although a judge's ruling is not a ground for disqualification or recusal, it may be evidence supporting the motion.[34]

(2) *Time for filing.*

(A) A motion to disqualify may be filed at any time.

(B) A motion to recuse must be filed at least 10 days before the first hearing or trial that occurs after the grounds for recusal arise, except as follows:

(i) the motion may be filed at the earliest practicable time within that 10 day period if a judge is assigned to the case within that 10 day period; or

(ii) the motion may be filed at the earliest practicable time after the grounds for disqualification or recusal arise if the grounds arise less than 10 days before the trial or hearing.[35]

(b3) *Notice.* On the day the motion is filed, ~~copies~~ a copy ~~shall~~ must be served on all other parties ~~or their counsel of record~~, together with a notice that the movant expects the motion to be presented to the judge[36] three days

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33 I hope I simplified this paragraph. The phrase about admissible evidence seemed meaningless since the following phrase allowed facts based on "information and belief" which is almost certain to not be admissible. evidence.

34 This was from the previously approved Committee draft.

35 This merges paragraph (b) and the first sentence of (g) of the draft previously approved by the Committee. No change in substance is intended. Note that the rule is based on when the grounds of disqualification or recusal "arise." Is it really when they "arise" or when the party knew or should have known of the grounds?

36 Do we really mean "considered" by the judge. Who is going to "present" it to the judge. Is this just a notice of a hearing. I think we could delete the entire paragraph and allow Rule 21a to take care of the matter. In other words, it is incumbent on the party filing the motion to serve it and set it for a hearing under the local rules. Is this wrong?

after the filing of ~~such~~ the motion unless otherwise ordered by the judge. ~~Any other party may file with the clerk an opposing or concurring statement at any time before the motion is heard.~~[37]

(4) *Proceedings after motion filed.* After a motion to recuse or disqualify has been filed, the judge who is the subject of the motion must not — except for good cause — proceed with the case unless the motion was filed under paragraph (g)(2)(B)(ii), in which case the judge may proceed with the case until an order disqualifying or recusing the judge is made.[38]

(c5) *Duty of judge who is subject to the motion.*

(A) ~~Prior to any further proceedings in the case,~~ If a motion to disqualify or recuse is filed, the judge ~~shall~~ must either ~~recuse himself~~ disqualify or recusal himself or herself or request the presiding judge of the administrative judicial district to assign a judge to hear ~~such~~ the motion.

(B) If the judge disqualifies or recuses himself or herself, ~~he shall~~ the judge must ~~enter~~ file with the clerk an order of disqualification or recusal and request the presiding judge of the administrative judicial district to assign another judge to ~~sit, and shall~~ the case. The disqualified or recused judge must not ~~make no further orders and shall take no further action in~~ — except for good cause — proceed with the case ~~except for good cause stated in the order in which such action is taken~~.

(dC) If the judge declines to disqualify or recuse himself or herself, ~~he shall~~ the judge must enter an order referring the matter to the presiding judge of the administrative judicial district. The judge must promptly forward to the presiding judge ~~of the administrative judicial district, in either original form or~~ a certified copy ~~of, an~~ the order of referral, the motion to disqualify or recuse, and ~~all opposing and concurring statements~~ any response. ~~Except for good cause stated in the order in which further action is taken, the judge shall make no further orders and shall take no further action in the~~

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37 The Committee deleted this sentence. I suppose it goes without saying that another party can file a response.

38 This follows paragraph (g) of the previously approved draft in that it allows the judge to continue with the case if a late motion is filed.

~~case after filing of the motion and prior to a hearing on the motion.~~[39]

(6) *Duty of presiding judge.* The presiding judge of the administrative judicial district ~~shall immediately~~ must promptly designate a judge to hear the motion. ~~set a hearing~~ The presiding judge may designate himself or herself ~~before himself or some other judge designated by him;~~ If the judge hearing the motion orders disqualification or recusal, the presiding judge must promptly assign another judge to the case.

(7) *Duty of judge hearing motion.* The judge designated to hear the motion must promptly set a hearing and ~~shall cause~~ send notice of ~~such~~ the hearing to ~~be given to~~ all parties ~~or their counsel, and shall~~ While the motion is pending, the judge may make ~~such other~~ any orders justice requires, including ~~orders on~~ ordering interim or ancillary relief in the pending ~~cause as justice may require~~ case. The judge must, as soon as practicable after the hearing, determine whether the judge who is subject to the motion is disqualified or should recuse and file an appropriate order.

(m9) *Chief Justice may appoint judge to hear motion.* The Chief Justice of the Supreme Court may also appoint and assign judges in conformity with this rule and pursuant to statute.

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

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

~~(m) The Chief Justice of the Supreme Court may also appoint and assign judges in conformity with this rule and pursuant to statute.~~

(hi) Sanctions. If a party files a motion to disqualify or recuse under this rule and ~~it is determined by~~ the ~~presiding~~ judge ~~or the judge designated by him at the~~ hearing the motion determines ~~and on motion of the opposite party,~~ that the motion to disqualify or recuse ~~is~~ was brought solely for the purpose of delay and without sufficient cause, the judge ~~hearing the motion~~ may, in the interest of justice, impose

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39 The last sentence is covered by paragraph (g)(4).

any sanction authorized by Rule 215(2)(b).[40]

(dj) Definitions. In this rule:

(1) "proceeding" includes pretrial, trial, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes ~~such relationships as~~ executor, administrator, trustee, ~~and~~ guardian and other similar relationships;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(A) ownership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates in the management of the fund;

(B) an office in an educational, religious, charitable, fraternal, or civic organization is not a 'financial interest' in securities held by the organization;

(C) the proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a 'financial interest' in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(D) ownership of government securities is a 'financial interest' in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;

(E) an interest as a taxpayer or utility ratepayer, or any similar interest, is not a 'financial interest' unless the outcome of the proceeding could substantially affect the liability of the judge or a person related to him within the third degree more than other judges.

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[40] Note that this formulation of the rule allows the judge to act on his/her own initiative.

AN ALTERNATIVE DRAFT:

TRCP 18a. RECUSAL OR DISQUALIFICATION OF JUDGES

(a) **Grounds for Disqualification.** A ~~Judges shall~~ judge must disqualify ~~themselves~~ himself or herself in ~~all proceedings~~ a case in which the judge:

(1) [same]

(2) [same]

(~~2~~3) ~~they~~ knows that~~, individually or as a fiduciary, they have~~ he or she has an interest ~~in the subject matter in controversy~~; or

(~~3~~4) [same]

(b) **Grounds for Recusal.** A judge ~~shall~~ must recuse himself or herself in ~~any proceeding~~ a case in which:

(1) [same]

(2) [same]

(3) the judge or a lawyer with whom the judge previously practiced has personal knowledge of disputed evidentiary facts ~~concerning the proceeding~~;[41]

~~(3) he or a lawyer with whom he previously practiced law has been a material witness concerning it;~~

(4) ~~he~~ the judge participated as counsel, adviser or material witness in the matter in controversy, or expressed an opinion concerning ~~the~~ its merits ~~of it~~, while acting as an attorney in government service;

~~(5) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;~~

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41 This still suffers from the problem I noted in footnote 5 of the other document. Also, I don't really care whether we refer to them as a material witness or as someone who has knowledge of disputed facts. I think it means the same thing.

(65) ~~he or his~~ the judge's spouse, or a person to whom the judge is related within the third degree of ~~relationship~~ affinity or consanguinity ~~to either of them~~, or the spouse of such a person:

(A) [same]

(B) is known by the judge to have an interest ~~that could be substantially affected by the outcome of the proceeding~~;

(C) [same]

(~~7~~6) [same]

(c) - (__) [same]

(__) **Definitions.** In this rule:

(1) [same]

(2) [same]

(3) [same]

(4) an "~~financial~~ interest" means:

(A) either an individual or fiduciary ownership, however small, of a legal or equitable interest in a party or in the subject matter of the case, ~~however small, or except —~~

(~~A~~i) ownership in a mutual or common investment fund that holds securities is not ~~a financial~~ an "interest" in ~~such~~ the securities unless the ~~judge~~ person participates in the management of the fund;

(~~B~~ii) an officer in an educational, religious, charitable, fraternal, or civic organization ~~is~~ does not have ~~a financial~~ an "interest" in securities held by the organization;

(~~C~~iii) the proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is ~~a financial~~ an "interest" in the organization only if the outcome of the ~~proceeding~~ case could substantially affect the value of the

interest;

(~~D~~iv) ownership of government securities is ~~a "financial~~ an "interest" in the issuer only if the outcome of the ~~proceeding~~ case could substantially affect the value of the securities; and

(~~E~~v) an interest as a taxpayer or utility ratepayer, or any similar interest, is not ~~a "financial~~ an "interest" unless the outcome of the ~~proceeding~~ case could substantially affect the liability of the ~~judge or a person related to him within the third degree more than other judges~~ person.

(B) a relationship as director, adviser, or other active participant in the affairs of a party~~, except that:~~; or

(C) any other interest in a party or the subject matter of the case that could be substantially affected by the outcome of the case.