AGENDA
JANUARY 17-18, 1997
SCAC MEETING

INDEX

DISPOSITION CHART
TEXAS RULES OF CIVIL PROCEDURE 166 - 209
January 16, 1997

The comments were given substantial consideration in the development of subsequent drafts of the Proposed Discovery Rules. Some were adopted, in whole or in part, others were rejected after considerable debate. The SCAC believes that the package sent to the Supreme Court in July 1995, represents a consensus approach to discovery reform that will substantially decrease the amount and cost of pretrial discovery.

RULE NO.	PAGE NO.	CHANGE SUGGESTED/BY	RECOMMENDED ACTION	REASON
Misc. Discovery	Pg 8-10	Complains of 1) endless discovery requests, 2) requiring written expert reports too expensive, 3) medical records requests should always be authenticated, 5) witnesses not allowed to go beyond report, 6) local rules require early disclosure and prevent trial strategy. By: Lloyd M. Lunsford; South Houston, 3/9/92	See Proposed Discovery Rules	The proposed discovery rules address concerns of expense and exclusion of witnesses. For medical bills see Pg 12-13.
Misc. Discovery	Pg 11-19	Need procedure to provide inexpensive way to prove up medical bills. Defendant contest document custodian prove-ups. By: Alan Schecter, Houston, 2/7/92	None	This is an evidence issue, not discovery.
Misc. Discovery	Pg 281-293	Provides an article with his comments regarding the discovery process. By: R. Brent Keis	See Proposed Discovery Rules.	Proposed rules limit amount and expense of discovery.

Misc. Discovery	Pg. 293A-293F	Letter providing comments regarding the proposed amendments to the Discovery Rules which have already been submitted to the Supreme Court of Texas. By: Tony Lindsay	See Proposed Discovery Rules.	Adopts many of proposal made.
166	Pg 294-301	Supports COAJ recommendation scheduling expert witness designation. By: Tom Fleming. McAllen, 4/27/92	See proposed Discovery Rule 10.	Adopts schedule for expert witness disclosure, although number of days differs from COAJ proposal.
166	Pg 302	Requesting provision be added to 166 providing for telephonic conferencing. By: John F. Nichols, Houston, 4/20/92	Adopted. SCAC has proposed a general rule allowing telephone hearings.	
166	Pg 303-309	Requests the adoption of rules similar to California Rules of Civil Procedure regarding expert witnesses, reports, depositions and fees. By: David J. Nagle, Austin, 5/22/91	See proposed Discovery Rule 10	Adopts many of concepts suggested.
166	Pg 310-312	Requests the Court to take discovery rules in hand, simplify them, standardize them and make them what they were intended to be - tools with which to initiate discovery. By: Jim Foreman, Dallas, 3/20/91	See proposed Discovery Rules.	Proposed rules designed to simplify and decrease cost of discovery as suggested.

166	Pg 313-316	Wants to know if a Judge can change an agreed docket control order without a hearing or notification of the parties. By: Jose R. Lopez II, Houston, 10/3/92	No action.	Proposed Discovery Rule 2 allows judge to change discovery deadlines.
166a	Pg 317-319	Suggests adopting NY rule allowing plaintiff suing on written instrument to file Motion for Summary Judgment with complaint (NY procedure not attached as noted) By: J. Michael Weston, Dallas, 10/5/92	Not considered, but see proposed Rule 166a.	Proposed rule adopts modified Celotex standard.
166a	Pg 320-331	(1) State Bar proposed Rule 166a, 4/25/91, this is an outdated proposal (2) definitions for discovery By: Karen Johnson, State Bar, 4/25/91	None. See proposed Rule 166a None. See proposed Discovery Rule 2 and others	Adopts modified Celotex standard as suggested Many of concepts included in various discovery rules
166a(d)	Pg 332-338	Seeks to require trial judges to rule on motion for summary judgment within 60 days of hearing and no later than 30 days before trial. By: Scott D. Cunningham, Houston, 3/11/91	See proposed Rule 166a	Adopts suggestion (at least one draft did) ???
166a	Pg 339-345	State Bar Proposal for 166a, Anne Gardner, Fort Worth, 3/11/91. (Outdated)	None. See Pg. 320	
226, 226a, 236 271-279	Pg 346-373	This is in the wrong place. Proposals concerning court's charge.	None. Referred to the appropriate subcommittee.	

166a(c)	Pg 374-375	Suggests movant's briefs be filed no later than 48 hours before summary judgment hearing. By: Bruce A. Pauley, Rowlett, 9/7/90	None. See proposed Rule 166a.	Committee addressed and rejected???
166a	Pg 376-379	Recommends adoption of proposals in Keith Livesay's Bar Journal Article		
		(1) allow review of denial of motion for summary judgment	None	Jurisdictional issue, governed by statute
		(2) allow mandamus review of denial of motion for summary judgment	None	Cannot be addressed by rule
		(3) don't allow late filed responses unless good cause demonstrated	None	(resolved by caselaw now?)
		(4) do not allow amendment of pleading without leave of court after motion for summary judgment filed	None	resolved by caselaw now - SJ hearing is "trial date"?
		By: Edgar Morrison, San Antonio, 3/14/90		
	380-388	Keith C. Livesay, McAllen, 2/23/90, attaching article	None, see pgs 376-379	
166a	Pg 389-420	Concerning RICO claims in state court seeking methods for narrowing RICO claims. By: Elena Einhorn, Austin, 2/28/90 forwarding letter from Michael F. Pezzulli	None	RICO claims presenting no more problems than others. No special rules needed.

166b	Pg 421-421B	Suggests that any party should be allowed to call an expert identified by any other party. By: Justice Charles Bleil, Texarkana Court of Appeals, 10/13/93	None. See Proposed Discovery Rule 10, 6	Must identify expert if requested in discovery. But exclusion rule adds to good cause exception no unfair surprise / prejudice.
166b	Pg 421	Seeking amendment to Rule 166b concerning notice and protective orders. By: Luke Soules (no date)	None. See Proposed Discovery Rules.	General rule requires all notices to be sent by 21a method. Protective orders for non-parties addressed in Proposed Discovery Rule 22(c).
166b.2.g.	Pg 422-424	Proposed changing "and" to "or" between paragraphs (a) and (b) concerning statements. By: Walter J. Kronzer III, Houston, 7/21/93	None. See Proposed Discovery Rules	Rewritten because statements are discoverable under proposed rules.

166b	Pg 425-427	(1) Are depositions to be supplemented? Should not be, although clarification either way would help. (2) Can a party be asked to describe facts known by person with knowledge of facts? Should not. By: Robert C. Alden, Austin, 12/8/92	None. See Proposed Discovery Rule 5 None. See Proposed Discovery Rule 3(c)	Rule 5 applies only to written discovery. Rule 3 requires identification of "connection" to suit rather than fact summary.
166b(5)(b) & (c)	Pg 428	Suggests alternate to incamera inspection -opponent reviews with strong protective order. By: W. James Kronzer, Houston, 10/3/91	None	No change.
166b	Pg 429	(1) Only discovery should be depositions and ex parte interrogatories (2) Lawyer representing deponent should not be allowed to object to anything except privilege, which should then be given to the court reporter for immediate sealing. By: W. James Kronzer, Houston, 9/19/91	None. See Proposed Discovery Rules None. See Proposed Discovery Rule 15(4)	Seek to decrease amount of discovery Deposition objections curtailed.
166b	Pg 430	1991 Proposed Amendment to FRCP 44(a) concerning official records. By: John Chapin	Refer to appropriate committee.	
166b	Pg 431-432	Letter to opposing lawyer noting discovery is a mess and trial by ambush not so bad. By: Burt Berry, Dallas, 7/31/91	None	None requested.

166b	Pg 433-436	Concern for today's unbridled discovery, pricing most people out of process. Seeks major surgery such as mandatory mediation before discovery. By: Robert M. Martin, Jr., Dallas, 6/5/91	See Proposed Discovery Rules	Major surgery as requested.
166b	Pg 437-447	Seeks rule concerning disclosure of Grand Jury testimony like Federal Rule of Criminal Procedure 6. By: Judge F. Scott McCown, Austin, 1/29/91	None. This appears to be a Rule 76a issue. Refer to appropriate committee.	
166b	Pg 448-449	All parties should be deemed to have identified all witnesses identified by others. By: Richard E. Tulk, Austin, 11/14/90	No change. But see Proposed Discovery 6, adding grounds for not excluding undisclosed discovery	No exclusion of good cause or no unfair surprise/ prejudice
166b	Pg 450-453	By: Jose R. Lopez II, 10/3/90, same as Pg. 313-316		
166b(4)	Pg 454-460	Seeking change to 1990 amendment to 166b(4). By: Alex Albright, Austin, 6/29/90	None	Supreme Court withdrew amendment retroactively in 1990.
166b	Pg 461	Proposed amending the rule to expressly provide that, along with name, address and telephone number of fact witnesses, discovery may also seek a summary of facts about which they have knowledge, and of any lay opinions or impressions they have. By: Edward M. Lavin, 9/10/90	See Proposed Discovery Rule 3(c)	Allows discovery or person's "connection" with case, rather than fact summary

166b	Pg 462-469	Is complaining about change to 166b that says "any matter that is withheld from discovery pursuant to any objection or motion for protective order, whether or not ruled upon prior to trial, shall not be admitted in evidence to the benefit of the withholding party absent timely supplemental production of the matter pursuant to paragraph 6." Proposed having a pretrial order requirement and a statewide rule on what has to be in the pretrial order (such as names of witnesses, general summary of areas of testimony, listing of exhibits etc.) By: Richard E. Tulk, 8/7/90	See Pg. 454-460 See Proposed Discovery Rule 3(c)	Allows discovery of person's connection with case.
166b	Pg 470-472	Complaining of rule change regarding objections to discovery. Suggests a provision in the rule which halts an abusive discovery request when a clearly objectionable request for discovery is met by a clearly proper objection. By: Dana L. Timaeus, 5/1/90	See Pg. 454-460 See Proposed Discovery Rule 7 - Presentation of Objections	Better, 2-tiered system for objections will improve the situation

166b	Pg 473-475	(1) Party should not be required to swear to interrogatory answers outside his knowledge (2) Identify experts outside of interrogatories. (3) Requests for admissions should not be used to contravene pleadings (4) Judicial discretion should be broadened to allow introduction of undisclosed discovery. By: Pat McMurray	Proposal rejected although see Proposed Discovery Rule 12 See Proposed Discovery Rule 10 Proposal rejected. No change. See Proposed Discovery Rule 6	Although parties must verify answers, they no longer need to verify objections. SCAC disclosure through Standard Request for Disclosure Requests for admissions working well. Allowing judge additional grounds for admitting undisclosed discovery.
166b(3)	Pg 476-482	He feels that the definition of a witness statement requires some clarification. By: Stephen A. Mendel, 2/28/90	See Proposed Discovery Rule 3(h)	Clarified in proposed rule.
166b(4)	Pg 483-489	Expressed concern about the new third sentence to Rule 166b(4). The rule is too broad and too vague. Suggested deleting new sentence three in its entirety and adding something that says that the Court may impose sanctions under Rule 215 for an inappropriate or improperly used discovery request or objection. By: Dan R. Price, 8/21/90	See Pg 454-460	

166b(4)	Pg 490-491	Expressed concern about amendment to rule 166b(4) specifically language "[B]ut any matter that is withheld from discovery ... pursuant to paragraph 6. By: Jeff T. Harvey, 6/28/90	See Pg 454-460	
166b(4)	Pg 492	Proposed amending the rule to read "...but any matter that is withheld from discovery pursuant to any objection or motion for protective order based upon an exemption or immunity from discovery, whether or not ruled upon ... pursuant to paragraph 6." By: J. Patrick Hazel, 8/17/90.	See Pg 454-460	
166b(4)	Pg 493	Letter to Editor, Texas Lawyer, from Reed Jackson, Fairfield. Allow discovery of trial witnesses and exhibits.	See Proposed Discovery Rule 3(d) allowing discovery of trial witnesses. SCAC rejected discovery of exhibits.	
166b(5)(d)	Pg 494	Proposed revision to TRCP 166b(5)(d).	This is a 76a issue.	
166b(6)(b)	Pg 495-497	Recommends Rule 166b(6) be amended to provide that the identification of a person as someone having knowledge of relevant facts, or an expert witness who may be called to testify of trial, or of a document as containing relevant information, by any party in answer to discovery requests by any other party, shall be sufficient to permit any party to call the witness, or introduce the evidence, at time of trial. By: Bruce E. Anderson, 7/21/93	Same issue as 448-449.	

166b(6)(b)	Pg 498	Proposed changing Rule 166b(6)(b) from 30 days to at a minimum 60 days.	See Proposed Discovery Rule 5(2), and 10	30 days kept (except some experts) because of 45 day notice of trial rule.
166c	Pg 499	Believes 166c needs to be clarified. The last part of the rule discusses agreement in non-deposition discovery. Does Rule 166c, if read in conjunction with Rule 11, require that such an agreement be in writing, signed by the parties and filed with the court? By: Dan R. Price	Send to Rule 11 Subcommittee.	
166c	Pg 500-503	Proposed a new Rule 166c providing for a "Pre-Trial Statement of Witnesses, Experts and Documents". By: Glen Wilkerson.	See Proposed Discovery Rule 9, Standard Request for Discovery. Adopts some of these ideas.	
168	Pg 504-506	Advising that SB 1409 amends The Medical Liability and Insurance Improvement Act of Texas, by adding Subchapter M, Procedural Provisions. Sec. 13.02, Discovery Procedures, calls for the Chief Justice to appoint a "Health Care Liability Discovery Panel" which would attempt to prepare mandatory sets of interrogatories and requests for production. By: Marc J. Schnall.	We did not address this. There is another committee.	

167	Pg 507	Suggest the rule be amended to provide that if the documents are not actually produced to the requesting party, at the time required, the party's response must include at least three times when the person desiring to review the documents may come to observe the documents, although the time to review cannot be restricted to these times. By: LaDonna K. Ockinga.	See Proposed Discovery Rule 11(3) requiring responding party to set time and place for compliance.	
167	Pg 508	FRCP 34 amended to provide that a person not a party to an action may be compelled to produce documents and things or to submit to an inspection. By: John K. Chapin	See Proposed Discovery Rule 19 adopting this.	
167	Pg 509	Suggests that the Supreme Court promulgate a short set of generic interrogatories, the basics that get asked in virtually every case with the proviso that if these discovery items are propounded verbatim they are not objectionable on the investigatory and other privilege grounds. By: Edward M. Lavin	See Proposed Discovery Rule 9 adopting this.	
167	Pg 510-512	Proposed adding the language "Responses, including any objections, shall be preceded by the Request to which the Response or objection pertains" after 167(1)(d). By: John F. Younger, Jr., 9/8/89	See Proposed Discovery Rule 5(1) requires this if disk sent.	
167	Pg 513	Suggests Rule 167, 168 and 169 be redrafted so it is consistent in allowing a defendant 50 days after service of the citation to respond to any discovery requests. By: Keith S. Dubanevich, 12/8/89	Rejected by SCAC.	
167	Pg 514-515	Various suggestions to limit amount of discovery. By: Ernest Sample	See the Proposed Discovery Rules.	Address issues of wasteful discovery.

169	Pg 516-519	Suggests amending 169 to eliminate the requirement of filing requests for admission. By: Charles R. Griggs, 8/28/89	See Proposed Discovery Rule 13	All requests and responses are filed.
167a	Pg 520	FRCP 35 amended to authorize the district court to require physical or mental examinations conducted by any person who is suitably licensed or certified, rather than just by a physician or a psychologist.	Rejected. See Proposed Discovery Rule 20	
167a	Pg 521-523	Proposed a new rule that would permit a vocational rehabilitation expert to examine a party. By: Stephen A. Mendel	Rejected. See Proposed Discovery Rule 20.	
168	Pg 524-525	His problem is some lawyers serve both the first and second set of interrogatories at the same time which makes him have to respond to 60 interrogatories in 30 days instead of 30 interrogatories in 30 days. He proposes amending the rule to state that the second set of interrogatories may be served only after the responses to the first set are received or amend the rule to eliminate the distinction between the first and second sets, allow one set of sixty only and provide additional time to respond. By: Daniel L. Tatum	See Proposed Discovery Rule 1(5) generally limiting to 30 interrogatories.	
168	Pg 526-529	Proposed a bill regarding discovery procedures having to do with health care liability and promulgating a standard set of interrogatories and request for production of documents. By: Tommy Jacks	None, just a draft bill.	
168	Pg 530-532	Proposed amending the rule permitting discovery of a witness's connection with the events or occurrences involved in the lawsuit. By: Robert C. Alden	Same as Pg 425-427	

168	Pg 533-534	Proposed amending the rule to allow representatives of business entities to sign interrogatory answers without requiring them to swear that they have personal knowledge of the facts. By: Larry F. York	Same issue as Pg 473 - issue 1.	
168	Pg 535-536	Proposed the elimination of the requirement that the answers to interrogatories be preceded by the question. By: Danny C. Wash	See proposed Discovery Rule 5(1) requirement maintained if disk sent.	
168	Pg 537-538	Complaining about when supplementing answers with additional experts the rule requires that you not only provide the address, telephone number information, but also set out the substance of their testimony. Would like to see simplification and standardization of the rules. By: Jim Foreman, 3/20/91	See Proposed Rule 10.	Simplification of expert discovery.
168	Pg 539-541	Proposed adding the following language to Rule 168(5) "The party answering interrogatories who receives more than thirty interrogatories but less than sixty shall answer the interrogatories received and shall inform the proponent of the interrogatories how many interrogatories in excess of thirty the answering party has received and that the answering party shall consider such excess interrogatories to be the second set of interrogatories of the party serving the interrogatories and the party responding to such interrogatories shall not thereafter be required to answer further interrogatories except on order of the court". By: John Wright, 2/18/91.	Rejected. See proposed Discovery Rule 1, limiting interrogatories further.	Not much of a problem anymore.

168	Pg 542-546	Says there is a direct conflict b/t TRCE 703 and TRCP 168. The problem is whether an expert witness may rely on hearsay in the form of interrogatory answers filed by a non-adverse party. Proposes that Rule 168 should yield to Rule 703. By: Stephen A. Mendel	Not addressed.	
168	Pg 547	Proposed that the Supreme Court promulgate a generic set of requests for production of documents with the proviso that if these are propounded verbatim they are not objectionable on the investigatory and other privilege grounds.	Same as Pg 509.	
168	Pg 548-551	Proposed following amendments to the rule: (1) Interrogatories should be directed at the personal knowledge of the party or that of his servants and employees. A party should not be required to answer an interrogatory of which he has no personal knowledge. (2) Identity of expert witnesses should be removed from interrogatories. By: Pat McMurray	Same as Pg. 473.	
168	Pg 552-553	This letter suggests changes to Rules 167 and 169 not to Rule 168. No action required.		
168	Pg 554-557	This letter is a duplicate of the one found at Pg 516-519. No need to address it again here.		
169	Pg 558-559	Proposed amending Rule 169 to provide that in the absence of court order no answers are required within 30 days from the date of receipt of the Requests for Admissions. By: Lewin Plunkett	No action. If this occurs court order will be available to withdraw deemed admissions.	

169	Pg 560-562	Complains that requests for admission should not be directed at ultimate issues, they should not be used to contravene pleadings. Feels more discretion should be allowed the bench in admitting evidence that is technically objectionable due to noncompliance with strict interpretation of discovery rules and with respect to unanswered admissions. By: Pat McMurray	Same as Pg. 473	
169	Pg 563	Proposed amending Rule 169 to restore the pre-1984 requirement of a sworn statement when the party receiving a request for admissions either denies a request or states that he cannot truthfully admit or deny the matters requested. Also, the signature and oath should be by the party signing not by its attorney. By: Harold D. Hammett	No action. See Proposed Discovery Rule 13, which has few changes from Rule 169.	
169	Pg 564-567	Proposed amending Rule 169 to include language in paragraph 1 as follows: "Responses, including objections, shall be preceded by the request for admission to which the response or objection pertains." By: John F. Younger, Jr.	See proposed Discovery Rule 5(1) requiring this for all requests if disk sent.	
107	Pg 568-571	This rule is in the wrong place. It has been referred to the Subcommittee on TRCP 15-165a.		
170	Pg 572	Proposed New Rule 170, Motion in Limine. This letter is from Hadley Edgar to Steve McConnico putting him in charge of drafting a proposed new rule 170.	Not this subcommittee's rule.	
170	Pg 573-574	Proposed a new rule regarding Motions in Limine. By: Glen Wilkerson	Not this subcommittee's rule.	

171	Pg 575-578	Amendment to FRCP 53(e) to (1) require that a master serve notice of the filing of his or her report with the court clerk and serve a copy of the report on each party, (2) to eliminate a discrepancy with Rule ___ (dispositive matters) in measuring the 10 day period for serving and filing objections to a magistrate's action, and (3) to conform to 28 U.S.C. 2403 clarifying that it is the duty of the court to notify the attorney general of a state when an action draws into question the constitutionality of a state statute. By: John Chapin.	Not addressed.	
174(b)	Pg 579-581	Proposed change to give better guidance to the bench and bar in situations involving possible bifurcation or separation of some portions of a case for separate determination. By the Committee on Court Rules	Not addressed.	
174(b)	Pg 582-583	Proposed revision that would allow bifurcation of civil trials including a bifurcation of liability and damages and a bifurcation of punitive damage claims. By: Lewin Plunkett as President of Texas Association of Defense Counsel.	Not addressed.	
174	Pg 584-585	Proposed amendment to say that joinder matters should be within the discretion of the trial court, and therefore, not subject to an abuse of discretion review. The trial court should be able to join parties as long as there is not an inordinate amount of expense and no prejudice to the parties. By: Professor Jack Ratliff	Not addressed.	

174(b)	Pg 586-635	Several letters proposing amendments to allow the bifurcation of liability and damage issues in civil trials. By: John B. Beckworth, Frank Finn, Texas Pharmaceutical Association, American Insurance Association, Texas Association of Business, Consulting Engineers Council of Texas, Inc., Texas Chamber of Commerce, Texas Society of Professional Engineers, Texas Civil Justice League, Texas Medical Association.	Not addressed.	
176	Pg 636-641	Proposed amending Rule 176 to change the range of a subpoena from 100 miles to 150 miles. By: Harry L. Tindall June 1993	Done. See proposed Discovery Rule 22(2)(6).	
176	Pg 642-643	Proposed amending Rule 176 to track the changes to the Federal Rule 45 amended effective December 1, 1991.	See proposed Discovery Rule 22 adopted many of Federal Rule provisions.	
???	Pg 645-646	Proposed amending the rule to that there would be no automatic recusal of assigned judges unless (a) the assigned judge did not have jurisdiction over this sort of matter when he was active or (b) some exception or criterion relating to continuing legal education i.e. the assigned judge has not in last 2 yrs completed a certain number of hrs of continuing legal education in the field of law of the assigned case. Also suggests the recusal process be made in writing and hearing by the administrative judge. By: Judge James O. Mullin	This is statutory. Not addressed. Not under our rule.	

188	Pg 647-648	Says Rules 188 and 206 conflict. Rule 188 should be amended to provide that the foreign court reporter return the foreign deposition to the party who caused the issuance of same without regard to who asked the first question. By: Jess W. Young	Not addressed.	
200	Pg 649	Proposed amending Rule 200 to add a new subpart 3: Any witness, party, attorney or other person lawfully attending a deposition may designate the place where the deposition is being taken as a nonsmoking area. Such designation shall be binding upon all those in attendance during the deposition. By: Harry L. Tindall	No action. SCAC rejected.	
200	Pg 650-651	Proposed amending the rule to require the deponent to be identified the same as in the case of "a person having knowledge of relevant facts" by including his residence and business addresses and telephone numbers. By: Hardy Moore	Not addressed. See proposed Discovery Rule 14 - only name required.	
200	Pg 652-655	Proposed amending the rule to add language similar to that in Rules 168 and 168 regarding service on the attorney. Rule 200 now says "upon the party or his attorney". By: Wendall S. Loomis	General rule adopted to require service on attorney.	
201	Pg 656-661	Proposed amending Rule 201 to change the range of a subpoena from 100 miles to 150 miles. By: Harry L. Tindall	Same as Pg. 636.	
201	Pg 662-665	Proposed amending the rule to add language similar to that in Rules 168 and 168 regarding service on the attorney. Rule 201 now says "upon the party or his attorney". By: Wendall S. Loomis	Same as Pg. 652.	

202	Pg 666-671	Proposed amending the rule to do away with the requirement for a written transcript without a court reporter. By: E.J. Wohlt and Perry Archer	Adopted. See proposed Discovery Rule 18 regarding non-stenographic recording.	
206	Pg 672	No amendment requested. Letter requests the opportunity to be heard on the proposed changes to Rule 206 at the next meeting. By: Jaye Thompson		
206	Pg 673-674	Proposing removing the provision that requires the custodial attorney to make the original deposition available for photocopying by any other party to the suit. By: Charles M. Jordan	No change recommended. See proposed Discovery Rule 16(3).	
206	Pg 675-677	Proposed having a rule to cover retention of notes taken in depositions. His proposed rules are attached. By: Dan L. Stunkard, President, Texas Shorthand Reporters Assoc.	Statutory amendments proposed, not rules.	
206	Pg 678-679	Proposed amending rules regarding requiring the custodial attorney making the original deposition available for copying to any other party. By: Eddie Morris, Eddie Morris Court Reporters	No change, see proposed Discovery Rule 16(3).	
206	Pg 680-681	Says Rules 188 and 206 conflict. Rule 206 should be amended to provide that the foreign court reporter return the foreign deposition to the party who caused the issuance of same without regard to who asked the first question. By: Jess W. Young	Not addressed. Same as Pg. 647	

New Rule	Spg 1-2 and Spg 5	Proposed a new rule providing a explanation for the purpose of pretrial and discovery rules. By: Shelby Sharpe for the Court Rules Committee	See Proposed Discovery Rules	Given substantial consideration in the development of the Proposed Discovery Rules.
166	Spg 1-2 and Spg 6-10	Proposed amending Rule 166 relating to scheduling and pretrial conferences to assist the lawyers in preparing cases for trial and involving the court to the extent that the attorneys cannot work together. By: Shelby Sharpe for the Court Rules Committee	See Proposed Discovery Rules	Given substantial consideration in the development of the Proposed Discovery Rules.
166e	Spg 1-2 and Spg 11-17	New rule addressing the amendment to Article 5490i and to provide for automatic disclosure of certain information in a suit involving a health care liability claim. Per request to the Committee from President - Elect Jim Branton and Chief Justice Thomas Phillips. By: Shelby Sharpe for the Court Rules Committee.	No addressed by this committee. This is another committee.	
166f	Spg 1-2 and Spg 18	New rule on pretrial and motion dockets for the implementation of Rule 166 and to establish a uniformity throughout the State for the trial courts to maintain pretrial or motion dockets. By: Shelby Sharpe for the Court Rules Committee.	See Proposed Discovery Rules	Given substantial consideration in the development of the Proposed Discovery Rules.
166g	Spg 1-2 and Spg 19-20	New rule to provide standard definitions for use in written discovery to eliminate the necessity for numerous and different definitions to be given by the party seeking discovery; to standardize the definition in order to avoid unnecessary and time consuming objections. By: Shelby Sharpe for the Court Rules Committee.	See Proposed Discovery Rules	Given substantial consideration in the development of the Proposed Discovery Rules.

Misc. Discovery	Spg. 36-71	Copy of an article from "The Review of Litigation" entitled "Discoverectomy II" by Dan Downey sent to all members from Luke Soules.	See proposed Discovery Rules	Decreases amount of and cost of discovery.
Misc. Discovery	Spg 72-76	Is commenting on an article written by Steve Susman regarding discovery reform. Mr. Langley had the following suggestions: (1) provide for a mandatory pre-trial conference at least 30 days before trial to give an objecting party the opportunity to request the striking of inadmissible portions of depositions and to permit sanctioning counsel for abusing a witness; (2) with regard to punitive damages going to educational institutions have a jury instruction that would say "any sums awarded by way of punitive damages shall not be paid to plaintiff but shall be utilized in such a way as the Court may direct. You are not to concern yourself with the disposition of those funds"; and (3) using the old Texas vacancy statute regarding attorneys fees for recovery of punitive damages. By: Ralph Langley	Not addressed. This concerns a speech Susman made, not proposals.	
Misc. Discovery	Spg 77-80	Provides his comments, pro and con, for the proposed discovery rules. By: Jim Parker, 6/11/94	See proposed Discovery Rules - many concerns were addressed in subsequent drafts.	
Misc. Discovery	Spg 81-84	Provides his comments to the proposed discovery rules. Is strongly in favor of some type of form or mandatory discovery but strongly opposed to any type of mandatory "track" system. By: Ronald D. Wren, 11/2/93	See proposed Discovery Rules. His concerns were addressed in subsequent drafts.	

Misc. Discovery	Spg 85-211	Shelby Sharp's report to Lonny D. Morrison on his attendance at the ABA's Summit on Civil Justice Systems Improvements.	See proposed Discovery Rules - adopts many issues.	
Misc. Discovery	Spg 212-213	Article entitled "Mandatory Discovery Reform" sent to all members by Luke Soules.	No action required.	
Misc. Discovery	Spg 214-228	Letter from task force chairman to the members of the task force enclosing drafts of the proposed rules they worked on at their meeting in October 1993.	No action required.	
166a	Spg 229-236	Article forwarded by Anne Gardner setting forth the various arguments for and against change in 166a as well as the reasons for the proposed revisions. 6/91	No action required. See proposed 166a.	Adopts some of COAJ proposals.

166b	Spg 237-238	Providing comments regarding proposed changes to 166b. (1) Discovery period should not be triggered by deposition dates or document production. Recommends the discovery period commence 45 days after the appearance by answer or other pleading of the last appearing party. A reasonable extension should be provided if a new party is joined during the discovery period. (2) Six months is too short, recommends eight months. (3) A case should not be allowed to be set for trial for at least 60 days following the completion of the discovery period except by agreement. By: James D. Guess, 6/22/94	See propose Discovery Rules. More recent proposal takes comments into consideration. (1) Rejected - proposal allows parties to begin discovery at convenient times. (2) 9 months adopted. (3) Trial setting not addressed although now under consideration at Supreme Court.	
166b	Spg 239-240	Article entitled "District Court Takes Aim at Deposition Obstruction" forwarded by Luke Soules.	No action required. See proposed Discovery Rule 15 regarding deposition conduct.	

166b	Spg 241	Suggests that to have constraints on discovery the starting point is to place the burden of relevance on the requesting party. Current decisions compel discovery when the resisting party shows no relevance. By: Luke Soules	Not in Proposed Discovery Rules, although recent Supreme Court opinions can be read as moving in this direction.	
166b	Spg 242-355	Proposed new discovery rule to address discovery of mental health records of patients who are not party to the litigation. By: Deborah Hiser, Advocacy, Inc.	Addressed at SCAC, many drafts but ultimately rejected. See proposed Discovery Rule 22, 19.	
166c	Spg 356-357	Providing comments regarding proposed changes to 166c. Feels the court should not be allowed to shorten the discovery period or trial setting schedule unless all parties agree. Strongly opposes the provisions for "sides". Each party should have the same amount of time for depositions. By: James D. Guess, TADC, 6/22/94	Comments taken into account in subsequent drafts. (1) continue to allow modification by court order. See proposed Discovery Rule 2. (2) See proposed Discovery Rule 1(3)(b)(2) allowing court to modify hours so no unfair advantage.	

166c	Spg 358-359	Is there a need to amend 166c to address the issue of hiring person who are not certified shorthand reporters to take depositions, as allowed by 166c but is in violation of Sec. 52.021 of the Government Code. By: A paralegal in the Office of the Attorney General who contacted Lee Parsley on this issue.	See proposed Discovery Rule 14, 18. Allows deposition to b taken before "any officer allowed by law to take depositions." Non-stenographic recordings allowed, but used as evidence only if transcribed by certified court reporter.	
168	Spg 360-361	Suggests a provision be added allowing the party to supplement answers to interrogatories regarding designation of persons with knowledge and with regard to experts without requiring the parties verification of the supplemental answers. Recommends elimination of "contention" interrogatories. By: James D. Guess, 6/22/94	See proposed Discovery Rule 12(1) limiting use of contention interrogatories. See proposed Discovery Rule 5(2) -amended or supplemental response need not be verified.	
169	Spg 362	A lawyers should send a request for admission only on those matters which he in good faith believes may be uncontested. Suggests that a "good faith belief" requirement be added as a prerequisite to sending requests for admission. By: James S. Frost, 6/20/94	See Proposed Discovery Rule 13, Rule 169 left substantially without change.	

170	Spg 363-364	The current 60 day period and 15 day period to designate experts is not enough. Recommends the Plaintiff designate 90 days before the end of discovery period. The defendant should have the opportunity to take the deposition of the plaintiff's expert and then be required to designate his experts within 30 days of the date of the last deposition of plaintiff's expert. Is opposed to entire concept of an arbitrary number of hours for deposition discovery. By: James D. Guess	Subsequent draft of Proposed Discovery Rule 10 requires plaintiff's expert discovery 45 days before end of discovery and defendants 45 days. Deposition hour limitation remains, although increased.	
176	Spg 365-368	Proposed that each Texas State Agency promulgate a rule allowing for the issuance of notice to a party for appearing at a hearing, trial or deposition in lieu of issuance of a subpoena. By: Stephen Moss and George Petras	Not addressed. Does not appear to propose change to TRCP but to agency rules.	
177 & 201	Spg 369	A process server in Houston called Lee Parsley who believes there is a conflict between Rules 177 and 201 regarding the witness fee. The District Clerk says the $10.00 fee applies to both a subpoena for a deposition and for a court appearance. The process server thinks it only applies to a subpoena for court appearance.	See Proposed Discovery Rule 22. All subpoenas now under same rule, require tender of "any fees required by law."	
200	Spg 370-371	Believes time limitations must be the same for all parties and not be determined by "sides". By: James D. Guess, 6/22/94	See Proposed Discovery Rule 1(3)(b)(2) allowing court to modify hours so no side had unfair advantage.	

202	Spg 372-376	Proposed the rules be amended to allow a videographer to replace the certified court reporter in depositions. By: R. Eric Hirtriter, 6/21/94	No action required. See Pg. 358-359.	
202	Spg 377-378	Thinks telephonic depositions should be taken by agreement of the parties only, that the party taking a video deposition should also be required to have a stenographic record made. The video should not be part of the court costs. By: James D. Guess, 6/22/94	Rejected. Proposed Discovery Rule 18 allows video tape by notice but see 18(4)- can't use depo as evidence unless transcribed by court reporter. Rules does not address court costs.	
204	Spg 379-380	Strongly objects to Section IV of Rule 204, proper objections should be permitted without limitation. Feels that any requirement of automatic disclosure of persons with knowledge and expert witnesses should at least require a letter request from the opposing party and that only identification of persons should be required, attorney shouldn't be required to provide copies of statements and full disclosure of facts known. Identification of experts is not practical at this early stage. By: James D. Guess	(1) Rejected. Proposed Discover Rule 15(4) allows only certain deposition objections. (2) Proposed Discovery Rules do not require automatic disclosure. See Proposed Discovery Rule 9, Standard Requests.	
205 & 206	Spg 381-409	Proposed changing 205 and 206 to track Federal Rule 30(e) regarding signature by witness. Also wants to limit making the original deposition available for inspection and photocopying by any other party to the suit to protect integrity of original. By: Michael J. Domingue, 5/11/94	Not addressed. See Proposed Discovery Rule 16.	

General Comments on Proposed Discovery Rules	SSP 672	Defendant should not have to identify expert until 90 days after Plaintiff produces expert reports. By: Michael Paul Graham, Houston, 5/2/95	See Proposed Discovery Rule 10.	
General Comments on Proposed Discovery Rules	SSp 200-201	New discovery rules not needed. By: Bruce Williams, Midland, 8/11/95	Proposed Discovery Rules will limit amount and cost of discovery.	

General Comments on Proposed Discovery Rules	SSp 202-203	(1) Summary of facts known should be discoverable (2) Maintain 30 days before trial to lock-in discovery (3) Most cases don't need scheduling order (4) Doesn't like 3/6 hour deposition limit. Likes overall cap instead By: Jim Arnold, Austin, 2/23/95	(1) See Proposed Discovery Rule 3(2)(c) "connection to case" discoverable (2) See Proposed Discovery Rule 5(2) requiring "reasonably prompt" supplementation less than 30 days before trial presumed not reasonable prompt. Discovery period maintained in Proposed Discovery Rules. (3) $50,000 or less cases don't have one, others have automatic one. See Proposed Discovery Rule 1. (4) One deposition can be longer in present draft - is overall cap.	

General Comments on Proposed Discovery Rules	SSp 205-206	If have $50,000 case discovery limits, need to amend pleading rules to allow pleaded damage amount. By: Brenda Norton, El Paso	Subcommittee on pleading rules has addressed.	
General Comments on Proposed Discovery Rules	SSp 207-208	Concern for family law cases with (1) discovery cutoff and (2) deposition time limits wants exception. By: Gary Nickelson, 6/28/95	Subcommittee met with family law representatives and reached consensus. Family law cases no more complex, time sensitive than many other cases.	
General Comments on Proposed Discovery Rules	SSp 211	Concern for family law cases with new privilege rule. Fears that communications with client and staff will be discoverable. By: Jim Loveless, 6/27/95, Fort Worth	Proposed Discovery Rule 4 protects these materials.	
General Comments on Proposed Discovery Rules	SSp 213-215	Object to Proposed Discovery Rule 15, time limits and conduct limitations. By: Locke Purnell Litigation Section, 7/7/95	Much debate on this issue. Proposed Discovery Rule will decrease time and expense of discovery.	

Proposed new Rule re: Purpose of Pretrial and Discovery	SSp 216-224	Proposed a new rule providing a explanation for the purpose of pretrial and discovery rules. By: Doyle Curry for the Court Rules Committee	No action. Given substantial consideration and some idea included in Proposed Discovery Rules.	
166	SSp 225-238	Proposed amending Rule 166 to provide proposals for the Court in scheduling, conducting a status conference and the filing of a joint pre-trial statement. By: Doyle Curry for the Court Rules Committee	No action. Given substantial consideration and some idea included in Proposed Discovery Rules.	
166a	SSp 239-241	Proposed Rule 166a be amended to make it clear that any written response and opposing affidavits must be actually received at least seven (7) days prior to the hearing. By: Damon Ball	See Pg. 374 - 375 of original agenda.	
166b	SSp 242-245	The Court Rules Committee's proposed amendments to Rule 166b.	See Pg. 216.	

166b	SSp 246-250	Cherry Williams: (1) Begin discovery period after all defendants have filed answers; (2) Extend discovery period to 1 year rather than 6 months; (3) No trial setting until 30-45 days after discovery completed; (4) Court modification only on good cause without agreement of parties; (5) Doesn't like limits per side; (6) How to handle depositions with translator on time limits; (7) Allow parties to adopt other's interrogatory answers; (8) Supplementation without verification; (9) Time periods for experts too short; (10) Doesn't like provision punishing for failure to use designated expert; (11) Why is corporate rep. provision in depositions eliminated; (12) Non-stenographic recording should only be by agreement, not taxed as costs; (13) Doesn't like depo conduct limits.	(1) See Spg. 237-39 #1.; (2) Current proposal was 9 months DP (Spg 237 #2); (3) See Spg. 237-39 #3; (4) See Proposed Discovery Rule 2 - Modification for good reason; (5) See Spg 370-371; (6) Not addressed in rules. Get agreement or order under Proposed Discovery Rule 2 to deal with problem; (7) Not addressed; (8) See Proposed Discovery Rule 5(2) does not require verification; (9) See Spg 363-364; (10) Removed from subsequent draft; (11) See PDR 15(2)(c) where the provision is located; (12) See Spg 358-359; (13) See 213-215, some changes made since draft referred to here.	

166b	SSp 251-252	Suggests amending the rules to state that supplementation of any discovery responses must follow the same rules and procedures as provided for the original response. By: James L. Brister, 8/12/94	See Proposed Discovery Rule 5(2). SCAC debated and decided supplementation need not be verified.	
166b	SSp 253-263	The Court Rules Committee's proposed amendments to Rule 166b.	See 216-224.	
166c	SSp 264-269	Opinion of the Attorney General that states to the extent rule 166c permits parties to stipulate that a deposition upon oral examination be taken by a person other than a certified shorthand reporter, it must yield to the requirement of subsection (f) of section 52.021 of the Government Code that a deposition upon oral deposition must be taken by a certified shorthand reporter. Justice Hecht requested that the SCAC take a look at this.	See Spg 358-359	
166c	SSp 270-274	Letter from Cherry D. Williams providing comments regarding the proposed amendments to the Discovery Rules which have already been submitted to the Supreme Court of Texas.	See 246-250	
166d	SSp 275-296	The Court Rules Committee's proposed amendments to Rule 166d.	See 216-224.	
166f	SSp 297-305	The Court Rules Committee's proposed amendments to Rule 166f.	See 216-224.	
166g	SSp 306-315	The Court Rules Committee's proposed amendments to Rule 166g.	See 216-224	

167	SSp 316-320	Would like to see some rule changes to control the request for unnecessary documents. By: Leonard A. Cruse	New rules will decrease amount and cost of discovery.	
167	SSp 321-325	Suggests rule changes that would shift the burden in the area of discovery requests to the requesting party. By: Mike Milligan	See Spg 241	
167	SSp 326-335	The Court Rules Committee's proposed amendments to Rule 167.	See Spg 216-224.	
168	SSp 336-337	Suggests deleting the requirement that the question is to precede the answer. By: Tommy J. Turner	See Pg 564-567	
168	SSp 338-345	Letters providing comments regarding the proposed amendments to the Discovery Rules which have already been submitted to the Supreme Court of Texas.	338-340 - Same as Spg 202-203 341-345 - Same as Spg 246-250	
168	SSp 346-347	Suggests amending the rules to state that supplementation of any discovery responses must follow the same rules and procedures as provided for the original response. By: James L. Brister	Duplicate of SSp 251-252.	
170	SSp 348-352	Letter providing comments regarding the proposed amendments to the Discovery Rules which have already been submitted to the Supreme Court of Texas.	Same as Spg 246-250	
174(b)	SSp 353-358	The Court Rules Committee's proposed amendments to Rule 174(b)	Not addressed.	

200	SSp 359-363	Letter providing comments regarding the proposed amendments to the Discovery Rules which have already been submitted to the Supreme Court of Texas.	Same as Spg 246-250	
200	SSp 364-373	The Court Rules Committee's proposed amendments to Rule 200.	See Spg 216-224	
202	SSp 374-378	Letter providing comments regarding the proposed amendments to the Discovery Rules which have already been submitted to the Supreme Court of Texas.	Same as Spg 246-250	
204	SSp 379-383	Letter providing comments regarding the proposed amendments to the Discovery Rules which have already been submitted to the Supreme Court of Texas.	Same as Spg 246-250	
205	SSp 384-390	Proposed amending the rule to clarify how a deposition must be submitted to a witness for signature, i.e. can a reporter refuse to let the original out of his or her possession? By: Ken Howard	See Proposed Discovery Rule 16 - not addressed - similar to Spg 381-409	
205 & 206	SSp 391-392	Letter from the Attorney General's office declining the request for an opinion on Rules 205 and 206.	See Spg 358-359; SSp 264-69, unclear what issue is from this response.	

RULES 15-165A SUBCOMMITTEE
SUPPLEMENTAL DISPOSITION TABLE
(January 17, 1997)

Rule	Page	Requested Change/Recommendation
21a	Ssp 59-62	Charles Spain recommends requirement of notice to appropriate government attorney whenever constitutionality is challenged. **Recommend:** adopt proposal. TCP&RC § 37.006(b) requires making municipality a party to a suit involving validity of municipal ordinance or franchise, and serving attorney general if statute, ordinance or franchise is alleged to be unconstitutional.
41	168-169	Prof. Jack Ratliff wishes to broaden rules of joinder and conform language in Rules 174 and 41. **Recommend:** language for intervention and joinder should be conformed. Reject expansion of joinder standard. Continue to maintain transactional basis for joinder. Will prepare new language.
67	187	Glenn Wilkerson requests that pleadings be amended 30 days prior to trial. **Recommend:** that we count backward from close of discovery window. Table until Supreme Court decides on discovery rules.
74	188-198	Hannah Konkle offers Collin County fax filing rules for statewide use. **Recommend:** Thanks. SCAC has now adopted uniform fax filing rules.
76a	204-208	Jack Garland forwards *Chandler v. Hyundai* case. Supreme Court later reversed case. On Wednesday, 1/15/97, Supreme Court heard *General Tire v. Kepple*; is to decide difference between sealing order and confidentiality order. **Recommend:** take no action until Supreme Court rules.
	Ssp 84-123	Article by Court T.V. **Recommend:** that SCAC file majority and minority report with proposed rules. Supreme Court will no doubt permit cameras, because TRAPs permit cameras.

Rule	Page	Requested Change/Recommendation
98a	236-239	Hugh Hackney proposes offer of judgment rule. **Recommend:** Subcommittee will revisit earlier discussions regarding offer of judgment rule by prior incarnations of SCAC. Federal rule has been interpreted in an unusual manner, and we would not want to mimic language of federal rule. Subcommittee will study earlier research and propose Texas language for an offer of judgment rule.
107	569-571	Problem with taking default judgments in family violence cases prior to return of service being on file for 10 days. **Recommend:** adopt proposal recognizing Family Code exception.
165	276-279	Howard Hasting recommends sufficient time between notice of dismissal docket and date of dismissal hearing to permit trial setting. **Recommend:** require minimum 60 days' notice of setting on dismissal docket--except for general docket call under local rule saying that where plaintiffs fail to appear suit can be dismissed. That latter practice will continue.
165	280	Hadley Edgar says change "judgment" to "order of dismissal." **Recommend:** adopt change.
165	281-293	Article by Brent Keis on discovery rules. **Recommend:** refer to Discovery Subcommittee.
18	111	FRCP 63, regarding judge becoming disabled during trial, permits new judge to take over case by reviewing the record, certifying familiarity with the record, and determining that no party would be prejudiced by continuing the trial. In non-jury trial, successor judge must recall material witness upon request of party, and judge may recall any other witness. **Recommend:** no change. Not a problem in Texas at present time, and should be cautious about adopting federal rules that are not clearly needed.

Rule	Page	Requested Change/Recommendation
18a	112	Bill Willis says to change "Administrative Judicial Districts" to "Administrative Judicial Regions." **Recommend:** adopt change.
20	115-116	Bill Coker suggests that judges not have to sign minutes. **Recommend:** TRCP 20 has already been repealed by SCAC.
21	120	FRCP 5(d) regarding necessity for certificate of service, fax service, and clerk's inability to reject papers not in proper form. **Recommend:** we already require certificate of service, we already permit fax service, and no Texas rule permits clerk to reject filings due to lack of proper form.
21a	135-136	Bruce Pauley recommends that hand-delivery after 5:00 p.m. be deemed served the following day. **Recommend:** SCAC has already rejected this proposal.
21a	139-143	Dalton Tomlin suggests fax service only upon written stipulation of the attorneys filed with the Court. Additionally, Tomlin wants to prohibit service of contempt motions upon attorneys. **Recommend:** SCAC's fax service rule is fine and has been adopted. No need to specify regarding contempt motions. That law is of constitutional dimensions, trumps Rules of Procedure, and is well-understood. Can't recite in the Rules every exception.
21a	144-146	Alwin Pape wants to amend TRCP 21a to relieve government entities from having to send certified mail. **Recommend:** eliminate certified mail requirement altogether as regards notice of motions in pending cases. This works fine in federal court and certified mail costs more than it benefits.

Rule	Page	Requested Change/Recommendation
21a	147-150	Howard Hasting objects to serving notice on party where party is represented by attorney. **Recommend:** already fixed by earlier vote of SCAC. Hasting also wants to say service can be effected on last known address of authorized agent or attorney of record. **Recommend:** no change. This is micromanagement for a non-problem.
21a	151-153	Scott Brann upset about giving notice to client when client represented by attorney. **Recommend:** already fixed by earlier vote of SCAC.
21a	154-156	Wendell Loomis upset about giving notice to client when client represented by attorney. **Recommend:** already fixed by earlier vote of SCAC.
21a	157-158	Norman Kinzy finds conflict of language in permitting service on party's attorney but requiring that it be at party's last known address. **Recommend:** problem eliminated in rewrite pursuant to earlier vote of SCAC. Kinzy also dislikes reference to court order in connection with TRCP 21 and 21a. **Recommend:** drop reference to TRCP 21 from Rule 21b.
63	182	FRCP 15(c) involving relation back doctrine for amended pleadings. **Recommend:** there is no TRCP regarding the relation back doctrine as to causes of action, and we don't need to write one. Relation back insofar as it applies to inadvertently dropped parties has been fixed by previously-approved changes to pleadings rules.

Rule	Page	Requested Change/Recommendation
76a	209-210	Paul Harris dislikes TRCP 76a. **Recommend:** don't eliminate TRCP 76a, unless Supreme Court directs us to. Judge Brister's motion is still pending to drop 76a.2(c) regarding unfiled discovery. Supreme Court heard *General Tire v. Kepple* on Wednesday, 1/15/97. **Recommend:** wait on Judge Brister's motion until *Kepple* is decided, because Supreme Court may limit scope of 76a as regards unfiled discovery.
63 & 90	1-4	Gregory Enos wants to ban smoking from hearings, trials and depositions. Judges could still smoke in chambers and jurors could smoke in jury rooms where permitted. **Recommend:** no change. Discovery Subcommittee already recommended against this rule. County commissioners will set rule in many courthouses and city council will set rule in many office buildings.
103	Ssp 139-155	Suggestion that Supreme Court adopt rule requiring Secretary of State to certify private process servers statewide. **Recommend:** reject proposal. This is a highly controversial matter that has failed in the Legislature many times. Supreme Court has no power to require Secretary of State to do this, nor to appropriate funds for this.
103	Ssp 156-170	Suggestion that Supreme Court adopt rule requiring Secretary of State to certify private process servers statewide. **Recommend:** reject proposal. This is a highly controversial matter that has failed in the Legislature many times. Supreme Court has no power to require Secretary of State to do this, nor to appropriate funds for this.

Rule	Page	Requested Change/Recommendation
103	Ssp 171-172	Suggestion that Supreme Court adopt rule requiring Secretary of State to certify private process servers statewide. **Recommend:** reject proposal. This is a highly controversial matter that has failed in the Legislature many times. Supreme Court has no power to require Secretary of State to do this, nor to appropriate funds for this.
103	Ssp 173-186	Suggestion that Supreme Court adopt rule requiring Secretary of State to certify private process servers statewide. **Recommend:** reject proposal. This is a highly controversial matter that has failed in the Legislature many times. Supreme Court has no power to require Secretary of State to do this, nor to appropriate funds for this.

DAVID PEEPLES
DISTRICT JUDGE
BEXAR COUNTY COURTHOUSE
SAN ANTONIO, TEXAS 78205

224TH JUDICIAL DISTRICT

(210) 220-2132

MEMORANDUM

TO: Supreme Court Advisory Committee

FROM: David Peeples

DATE: December 31, 1996

RE: Proposed Amendment to Rule 166a

Attached are two drafts—an amendment to rule 166a, and a comment explaining the amendment. These will be on the agenda at our January meeting.

Subcommittee process. At our November 22-23 meeting, the full committee approved several additions to rule 166a. I was asked to type them up and circulate a new draft for review by any committee members who volunteered to look at the draft and comment on it. The following committee members asked to be in on this process and participated: Alex Albright, Pam Baron, Scott Brister, Elaine Carlson, Sarah Duncan, Paul Gold, Tommy Jacks, Joe Latting, Anne McNamara, and Richard Orsinger.

Amendment (i). After two or three drafts had been faxed back and forth among the subcommittee members, it was agreed that the attached clean draft represents what the full committee approved in November, modified only by nonsubstantive changes that clarify the rule and improve its wording.

Comment. The full committee approved paragraphs one and three of the comment at the November meeting. The second and fourth paragraphs of the comment are new. Although the full committee did not vote on this new language in November, the subcommittee believes that the two new paragraphs help explain how the rule will work.

Note: (1) Each subparagraph of the existing rule has a heading, and we will need to decide which subheading to use for subdivision (i). (2) The brackets on lines 6 and 7 of the rule enclose the language that the supreme court should delete if it decides not promulgate the discovery rules and time deadlines we proposed last year. If the court does adopt the discovery rules, it should simply drop the brackets and keep the language.

— PROPOSED AMENDMENT TO RULE 166a —
[changes approved by full committee on November 22-23
as modified by subcommittee]

(i) **[Motion Asserting Respondent's Inability to Raise Fact Issue after Discovery Period] or [No-Evidence Motion after Discovery Period]** In addition to motions that may be brought under paragraphs (a) and (b), without presenting summary judgment evidence a party may seek summary judgment in compliance with this paragraph on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. A motion filed under this paragraph may made be only [(1) after the expiration of any applicable discovery period, or (2) if there is no applicable discovery period,] after a period set by the court which allows adequate time for discovery. A motion filed under this paragraph shall state that there is no evidence to support one or more specified elements of claims or defenses, identify the discovery that has been completed as to the specified elements, and bear a certificate that the movant's attorney has reviewed the discovery and that, in the attorney's opinion, the discovery reveals no evidence to support the specified elements. The court shall grant the motion unless the respondent produces evidence raising a genuine issue of material fact. If a motion under this paragraph is denied, and the court finds that the motion did not have an objectively reasonable basis at the time it was filed, the court may award reasonable attorneys' fees to the respondent for defending the motion.

(j) **Appellate Review.** Except as otherwise provided by law, an order denying summary judgment is not reviewable by mandamus or appeal.

PROPOSED COMMENT — RULE 166a

Paragraph (i) authorizes a motion for summary judgment based on the assertion that, after adequate opportunity for discovery, there is no evidence to support one or more specified elements of an adverse party's claim or defense. The motion must be specific in challenging the evidentiary support for an element of a claim or defense; paragraph (i) does not authorize conclusory motions or general no-evidence challenges to an opponent's case.

Paragraph (i) does not apply to ordinary motions for summary judgment under paragraphs (a) or (b), in which the movant must prove it is entitled to judgment by establishing each element of its own claim or defense as a matter of law or by negating an element of the respondent's claim or defense as a matter of law.

To defeat a motion made under paragraph (i), the respondent is not required to marshal its proof; its response need only point out evidence that raises a fact issue on the challenged elements. The existing rules continue to govern the general requirements of summary judgment practice, such as time limits and what constitutes appropriate summary judgment evidence.

The provision for attorneys' fees is not meant to penalize every unsuccessful motion filed under paragraph (i), but to deter objectively unreasonable motions and to compensate respondents for attorneys' fees incurred in defending them.

11/13/96
4543.001
cc: LHS
orig: hhd

SCOTT A. BRISTER
JUDGE, 234TH DISTRICT COURT
CIVIL COURTS BUILDING
HOUSTON, TEXAS 77002
(713)755-6262

AHD

November 7, 1996

Mr. Luther H. Soules III
Soules & Wallace
100 West Houston, Suite 1500
San Antonio, Texas 78205

Dear Luke:

Enclosed please find my redraft of TRCP 18a and 18b regarding the disqualification and recusal of judges. Most of the changes go to form only--making the rule shorter and eliminating redundancies and gender references. The draft does suggest the following substantive changes:

all — Replaces "financial interest" with "economic interest," a term defined in the Code of Judicial Conduct from which the rule's definition is taken. The Code is a better place for this substantive definition, and this rule can just reference it.

¶(a) — The section on disqualification has been modified to track Article V, § 11 of the Texas Constitution, with three exceptions: (1) the current rule's extension to former law partners is retained; (2) the current rule's extension to acting as counsel on the "matter" (not just the "case") is retained; and (3) "interest" is stated to be a financial interest; *see , Cameron v. Greenhill*, 582 S.W.2d 775 (Tex. 1979); *A.H. Belo v. SMU*, 734 S.W.2d 720 (Tex.App.--Dallas 1987, writ denied).

¶(b)(1) — Clarifies who is questioning the judge's impartiality, consistent with *Rogers v. Bradley*, 909 S.W.2d 872 (Tex. 1995)(Enoch, J. responding).

¶(b)(2) — Bias should be limited to acts or statements by the judge other than rulings. The remedy for bad rulings ought to be appeal, not recusal. *Grider v. Boston*, 773 S.W.2d 338 (Tex. App.--Dallas 1989, writ denied).

¶(b)(4) — A judge's personal knowledge of facts should be limited to those gained before the case was filed. Judges observe a lot during a pending case.

¶(b)(7) — The current rule requires recusal because of relatives' investments only if the judge know about them. "What did the judge know and when did he know it?" thus becomes the key inquiry, leading inevitably to calling the judge as a witness, adversarial cross-examination, and a lot of problems. Further, if the judge's adult daughter stands to gain a lot from the case, the judge's claim that the interest was unknown doesn't make the conflict look any less unsavory. Potential problems from undiscovered interests ought to be handled in the cure section.

¶(b)(8) — The draft suggests extending the bar on lawyers from the first degree only to the third degree plus their firms. The current rule does not prohibit hiring the judge's son right

before trial so long as he does not appear in court. *Keene v. Rogers*, 863 S.W.2d 168 (Tex.App.--Texarkana 1993, no writ).

¶(c) The current rules allow recusal to be cured only if the judge has gotten deeply involved in the case before finding out about a relative's investments. The draft suggests allowing cure at any point, to avoid a perverse incentive to hold on to the case for a while before disclosing an interest. The draft suggests making the interim rulings "voidable;" the current rule does not indicate what happens to them.

¶(d)(1) If the Committee wants to follow the route allowing late filings but not staying the case, I suggest dropping a time requirement altogether. If it's not going to stop the case, it matters much less when it is filed. I have also added a provision that unverified motions can be ignored, per current law. *Wirtz v. Mass. Mut.*, 898 S.W.2d 414 (Tex.App.--Amarillo 1995, no writ).

¶(d)(2) Replaces "presiding judge of the administrative judicial district" with the proper title "presiding judge of the region." *Govt Code § 74.005.*

¶(d)(3) The case should not be stayed if the grounds alleged are (1) partiality, (2) bias, or (3) material witness. The latter is necessary because abusive filers often name the judge as a witness, alleging wild conspiracies, etc.

¶(d)(4) Adds a requirement that the assigned judge hear the case within 20 days of referral, for the reasons discussed at our last meeting. Also provides for use of fax copies and telephonic hearings.

¶(d)(5) Believe it or not, the provision allowing parties to pick their own judge after disqualification is in the Constitution. This is a major change from current practice, but I see no way around it.

¶(d)(6) Drops the language about abuse of discretion review. Some of the grounds for recusal clearly are not discretionary, while some are.

¶(d)(7) Is this necessary? Does the Chief Justice ever do this?

¶(e) Drops all the superfluous and redundant definitions so the rule is more manageable.

In addition to the draft, I have enclosed a side-by-side comparison with the current rule, and a copy of Article V, § 11 of the Constitution. Please circulate this draft to the members for their consideration.

Very truly yours,

Hon. Scott Brister
Judge, 234th District Court

Rule 18a. Recusal or Disqualification of Judges

(a) Grounds For Disqualification. A judge is disqualified in the following circumstances:

(1) the judge formerly acted as counsel in the matter, or practiced law with someone while they acted as counsel in the matter;

(2) the judge has an economic interest in the matter, either individually or as a fiduciary; or

(3) the judge is related to any party by consanguinity or affinity within the third degree.

(b) Grounds For Recusal. A judge must recuse in the following circumstances:

(1) the judge's impartiality might be questioned by a reasonable member of the public;

(2) the judge's actions or statements other than rulings on the case demonstrate a bias or prejudice concerning the subject matter or a party;

(3) the judge is a material witness, formerly practiced law with a material witness, or is related to a material witness or such witness's spouse by consanguinity or affinity within the third degree;

(4) the judge has personal knowledge of disputed evidentiary facts gained prior to filing;

(5) the judge expressed an opinion concerning the matter while acting as an attorney in government service;

(6) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to a party or an officer, director, or trustee of a party;

(7) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to anyone with an economic interest in the matter or a party, or any other interest that could be substantially affected by the outcome of the matter;

(8) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to a lawyer in the proceeding or a member of such lawyer's firm.

(c) **Waiver and Cure.** Disqualification cannot be waived or cured. A ground for recusal may be waived by the parties after it is fully disclosed on the record. Recusal pursuant to subparagraph (b)(7) is not required if the economic interest is divested, but any rulings made prior thereto are voidable.

(d) **Procedure.**

(1) *Motion.* A motion to disqualify or recuse a judge may be filed at any time. The motion must state in detail the grounds asserted, and must be made on personal knowledge or upon information and belief if the grounds of such belief are stated specifically. A motion to recuse must be verified; an unverified motion may be ignored.

(2) *Referral.* The judge must rule on the motion promptly, and prior to taking any other action on the case. If the judge refuses to recuse or disqualify, the judge must refer the motion to the presiding judge of the administrative region for assignment of a judge to hear the motion.

(3) *Interim Proceedings.* A judge may proceed with the case if a motion to recuse alleges only grounds listed in subparagraphs (b)(1), (b)(2), or (b)(3). If the motion alleges other grounds for recusal or

disqualification, the judge must take no further action on the case until the motion is disposed.

(4) *Hearing.* The presiding judge of the region shall immediately assign another judge to hear the motion, and shall set a hearing before such judge within twenty (20) days of the referral. The presiding judge must send notice of the hearing to all parties, and may make such other orders including interim or ancillary relief as justice may require. The hearing on the motion may be conducted by telephone, and facsimile copies of documents filed in the case may be used in the hearing.

(5) *Disposition.* If a District Court judge is disqualified, either by the original judge or the assigned judge, the parties may by consent appoint a proper person to try the case. Failing such consent, and in all other instances of disqualification or recusal, the presiding judge of the region must assign another judge to preside over the case.

(6) *Appeal.* If the motion is denied, the order may be reviewed on appeal from the final judgment. If the motion is granted, the order may not be appealed.

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

(e) Economic interest. As used in this rule, "economic interest" means the interests defined in Canon 8 of the Code of Judicial Conduct. Economic interest does not include an interest as a taxpayer, utility ratepayer, or any similar 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.

Rule 18b. Grounds For Disqualification and Recusal of Judges

(1) **Disqualification.** Judges shall disqualify themselves in all proceedings in which:

(a) they have served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter; or

(b) they know that, individually or as a fiduciary, they have an interest in the subject matter in controversy; or

(c) either of the parties may be related to them by affinity or consanguinity within the third degree.

(2) **Recusal.** A judge shall recuse himself in any proceeding in which:

(a) his impartially might reasonably be questioned;

(b) he has a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(c) he or a lawyer with whom he previously practiced law has been a material witness concerning it;

(d) he participated as counsel, adviser or material witness in the matter in controversy, or expressed an opinion concerning the merits of it, while acting as an attorney in government service;

(e) 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;

(f) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iii) is to the judge's knowledge likely to be a material witness in the proceeding.

(g) he or his spouse, or a person within the first degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding.

(3) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(4) In this rule:

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

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

(c) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(d) "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:

(i) 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;

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

(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 interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) 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;

(v) 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.

Rule 18a.Recusal or Disqualification of Judges

(a) **Grounds For Disqualification.** A judge is disqualified in the following circumstances:

(1) the judge formerly acted as counsel in the matter, or practiced law with someone while they acted as counsel in the matter;

(2) the judge has an economic interest in the matter, either individually or as a fiduciary; or

(3) the judge is related to any party by consanguinity or affinity within the third degree.

(b) **Grounds For Recusal.** A judge must recuse in the following circumstances:

(1) the judge's impartiality might be questioned by a reasonable member of the public;

(2) the judge's actions or statements other than rulings on the case demonstrate a bias or prejudice concerning the subject matter or a party;

(3) the judge is a material witness, formerly practiced law with a material witness, or is related to a material witness or such witness's spouse by consanguinity or affinity within the third degree;

(4) the judge has personal knowledge of disputed evidentiary facts gained prior to filing;

(5) the judge expressed an opinion concerning the matter while acting as an attorney in government service;

(6) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to a party or an officer, director, or trustee of a party;

(7) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to anyone with an economic interest in the matter or a party, or any other interest that could be substantially affected by the outcome of the matter;

(8) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to a lawyer in the proceeding or a member of such lawyer's firm.

[Deleted. Repeats Canon 4(D)(3), Code of Judicial Conduct]

(e) **Economic interest.** As used in this rule, "economic interest" means the interests defined in Canon 8 of the Code of Judicial Conduct. Economic interest does not include an interest as a taxpayer, utility ratepayer, or any similar 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.

(5) The parties to a proceeding may waive any ground for recusal after it is fully disclosed on the record.

(6) If a judge does not discover that he is recused under subparagraphs (2)(e) or (2)(f)(iii) until after he has devoted substantial time to the matter, he is not required to recuse himself if he or the person related to him divests himself of the interest that would otherwise require recusal.

Rule 18a. Recusal or Disqualification of Judges

(a) At least ten days before the date set for trial or other hearing in any court other than the Supreme Court, the Court of Criminal Appeals or the court of appeals, any party may file with the clerk of the court a motion stating grounds why the judge before whom the case is pending should not sit in the case. The grounds may include any disability of the judge to sit in the case. The motion shall be verified and must state with particularity the grounds why the judge before whom the case is pending should not sit. The motion shall be made on personal knowledge 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.

(b) On the day the motion is filed, copies shall be served on all other parties or their counsel of record, together with a notice that movant expects the motion to be presented to the judge three days after the filing of such 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.

(c) Prior to any further proceedings in the case, the judge shall either recuse himself or request the presiding judge of the administrative judicial district to assign a judge to hear such motion. If the judge recuses himself, he shall enter an order of recusal and request the presiding judge of the administrative judicial district to assign another judge to sit, and shall make no further orders and shall take no further action in the case except for good cause stated in the order in which such action is taken.

(d) If the judge declines to recuse himself, he shall forward to the presiding judge of the administrative judicial district, in either original form or certified copy, an order of referral, the motion, and all opposing and concurring statements. 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 case after filing of the motion and prior to hearing on the motion. The presiding judge of the administrative judicial district shall immediately set a hearing before himself or some other judge designated by him, shall cause notice of such hearing to be given to all parties or their counsel, and shall make such other orders including orders on interim or ancillary relief in the pending cause as justice may require.

(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.

(f) 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 reviewable, and the presiding judge shall assign another judge to sit in the case.

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

(h) If a party files a motion to recuse under this rule and it is determined by the presiding judge or the judge designated by him at the hearing and on motion of the opposite party, that the motion to recuse is brought solely for the purpose of delay and without sufficient cause, the judge hearing the motion may, in the interest of justice, impose any sanction authorized by Rule 215(2)(b).

(c) **Waiver and Cure.** Disqualification cannot be waived or cured. A ground for recusal may be waived by the parties after it is fully disclosed on the record. Recusal pursuant to subparagraph (b)(7) is not required if the economic interest is divested, but any rulings made prior thereto are voidable.

(d) **Procedure.**

(1) *Motion.* A motion to disqualify or recuse a judge may be filed at any time. The motion must state in detail the grounds asserted, and must be made on personal knowledge or upon information and belief if the grounds of such belief are stated specifically. A motion to recuse must be verified; an unverified motion may be ignored.

(2) *Referral.* The judge must rule on the motion promptly, and prior to taking any other action on the case. If the judge refuses to recuse or disqualify, the judge must refer the motion to the presiding judge of the administrative region for assignment of a judge to hear the motion.

(3) *Interim Proceedings.* A judge may proceed with the case if a motion to recuse alleges only grounds listed in subparagraphs (b)(1), (b)(2), or (b)(3). If the motion alleges other grounds for recusal or disqualification, the judge must take no further action on the case until the motion is disposed.

(4) *Hearing.* The presiding judge of the region shall immediately assign another judge to hear the motion, and shall set a hearing before such judge within twenty (20) days of the referral. The presiding judge must send notice of the hearing to all parties, and may make such other orders including interim or ancillary relief as justice may require. The hearing on the motion may be conducted by telephone, and facsimile copies of documents filed in the case may be used in the hearing.

(5) *Disposition.* If a District Court judge is disqualified, either by the original judge or the assigned judge, the parties may by consent appoint a proper person to try the case. Failing such consent, and in all other instances of disqualification or recusal, the presiding judge of the region must assign another judge to preside over the case.

(6) *Appeal.* If the motion is denied, the order may be reviewed on appeal from the final judgment. If the motion is granted, the order may not be appealed.

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

defendant would waive a jury, to pass on the action himself. Hays v. Housewright (Civ.App. 1911) 133 S.W. 922.

28. Questions of law or fact

Vernon's Ann.Civ.St. art. 2211 as amended in 1931 so as to authorize trial court to render judgment notwithstanding the verdict is based upon the theory that no factual issue exists and that the case presents only a question of law for trial judge, and hence does not contravene any constitutional provision for trial of fact issues by juries. Sheppard v. City and County of Dallas Levee Improvement Dist. (Civ.App. 1938) 112 S.W.2d 253.

In bill of discovery, trial court's error in denying defendant's request for jury was harmless, where there was no issue of controversial nature, tending to establish or defeat the right of discovery, to be submitted to the jury. Dallas Joint Stock Land Bank of Dallas v. State ex rel. Cobb (Civ.App.1940) 133 S.W.2d 827, affirmed 135 T. 25, 137 S.W.2d 993.

Where case involved question of validity of city ordinance, so that question was one of law for court to decide, it was proper to overrule request of defendant for a jury. Humble Oil & Refining Co. v. City of Georgetown (Civ.App 1968) 428 S.W.2d 405.

Disputed issues of fact in partition proceedings will be treated as being for the jury when a proper demand has been made for a trial by jury. Rayson v. Johns (Civ.App.1975) 524 S.W.2d 380, ref. n.r.e.

29. Summary judgment

Summary judgment did not deprive defendant of constitutional right to jury trial, where there was no genuine issues as to any material fact. Wyche v. Works (Civ.App.1963) 373 S.W.2d 558, ref. n.r.e.

§ 11. Disqualification of judges; exchange of districts; holding court for other judges

Sec. 11. No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when he shall have been counsel in the case. When the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals, or any member of either, shall be thus disqualified to hear and determine any case or cases in said court, the same shall be certified to the Governor of the State, who shall immediately commission the requisite number of persons learned in the law for the trial and determination of such cause or causes. When a judge of the District Court is disqualified by any of the causes above stated, the parties may, by consent, appoint a proper person to try said case; or upon their failing to do so, a competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law.

And the District Judges may exchange districts, or hold courts for each other when they may deem it expedient, and shall do so when required by law. This disqualification of judges of inferior tribunals shall be remedied and vacancies in their offices filled as may be prescribed by law.

As amended Aug. 11, 1891, proclamation Sept. 22, 1891.

INTERPRETIVE COMMENTARY

The common law of disqualification of judges was clear and simple: a judge was disqualified for direct pecuniary interest and for nothing else. Bracton tried unsuccessfully to incorporate into English law the view that mere "suspicion" by a party was a basis for disqualification. A judge should disqualify, said Bracton, if he is related to a party, if he is hostile to a party, if he has been counsel in a case. Nevertheless, it was Coke who, with reference to cases in which the judge's pocketbook was involved, set the standards for

Scott Brister's Proposal

Rule 18a. Recusal or Disqualification of Judges

(a) **Grounds For Disqualification.** A judge is disqualified in the following circumstances:

(1) the judge formerly acted as counsel in the matter, or practiced law with someone while they acted as counsel in the matter;

(2) the judge has an economic interest in the matter, either individually or as a fiduciary; or

(3) the judge is related to any party by consanguinity or affinity within the third degree.

(b) **Grounds For Recusal.** A judge must recuse in the following circumstances:

(1) the judge's impartiality might be questioned by a reasonable member of the public;

(2) the judge's actions or statements other than rulings on the case demonstrate a bias or prejudice concerning the subject matter or a party;

(3) the judge is a material witness, formerly practiced law with a material witness, or is related to a material witness or such witness's spouse by consanguinity or affinity within the third degree;

(4) the judge has personal knowledge of disputed evidentiary facts gained prior to filing;

(5) the judge expressed an opinion concerning the matter while acting as an attorney in government service;

(6) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to a party or an officer, director, or trustee of a party;

(7) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to anyone with an economic interest in the matter or a party, or any other interest that could be substantially affected by the outcome of the matter;

(8) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to a lawyer in the proceeding or a member of such lawyer's firm.

(c) **Waiver and Cure.** Disqualification cannot be waived or cured. A ground for recusal may be waived by the parties after it is fully disclosed on the record. Recusal pursuant to subparagraph (b)(7) is not required if the economic interest is divested, but any rulings made prior thereto are voidable.

(d) **Procedure.**

(1) *Motion.* A motion to disqualify or recuse a judge may be filed at any time. The motion must state in detail the grounds asserted, and must be made on personal knowledge or upon information and belief if the grounds of such belief are stated specifically. A motion to recuse must be verified; an unverified motion may be ignored.

(2) *Referral.* The judge must rule on the motion promptly, and prior to taking any other action on the case. If the judge refuses to recuse or disqualify, the judge must refer the motion to the presiding judge of the administrative region for assignment of a judge to hear the motion.

(3) *Interim Proceedings.* A judge may proceed with the case if a motion to recuse alleges only grounds listed in subparagraphs (b)(1), (b)(2), or (b)(3). If the motion alleges other grounds for recusal or disqualification, the judge must take no further action on the case until the motion is disposed.

(4) *Hearing.* The presiding judge of the region shall immediately assign another judge to hear the motion, and shall set a hearing before such judge within twenty (20) days of the referral. The presiding judge must send notice of the hearing to all parties, and may make such other orders including interim or ancillary relief as justice may require. The hearing on the motion may be conducted by telephone, and facsimile copies of documents filed in the case may be used in the hearing.

(5) *Disposition.* If a District Court judge is disqualified, either by the original judge or the assigned judge, the parties may by consent appoint a proper person to try the case. Failing such consent, and in all other instances of disqualification or recusal, the presiding judge of the region must assign another judge to preside over the case.

(6) *Appeal.* If the motion is denied, the order may be reviewed on appeal from the final judgment. If the motion is granted, the order may not be appealed.

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

(e) **Economic Interest.** As used in this rule, "economic interest" means the interests defined in Canon 8 of the Code of Judicial Conduct. Economic interest does not include an interest as a taxpayer, utility ratepayer, or any similar 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.

Scott Brister's Proposal

Enclosed please find my redraft of TRCP 18a and 18b regarding the disqualification and recusal of judges. Most of the changes go to form only--making the rule shorter and eliminating redundancies and gender references. The draft does suggest the following substantive changes:

all — Replaces "financial interest" with "economic interest," a term defined in the Code of Judicial Conduct from which the rule's definition is taken. The Code is a better place for this substantive definition, and this rule can just reference it.

¶(a) — The section on disqualification has been modified to track Article V, § 11 of the Texas Constitution, with three exceptions: (1) the current rule's extension to former law partners is retained; (2) the current rule's extension to acting as counsel on the "matter" (not just the "case") is retained; and (3) "interest" is stated to be a financial interest; *see , Cameron v. Greenhill*, 582 S.W.2d 775 (Tex. 1979); *A.H. Belo v. SMU*, 734 S.W.2d 720 (Tex.App.--Dallas 1987, writ denied).

¶(b)(1) — Clarifies who is questioning the judge's impartiality, consistent with *Rogers v. Bradley*, 909 S.W.2d 872 (Tex. 1995)(Enoch, J. responding).

¶(b)(2) — Bias should be limited to acts or statements by the judge other than rulings. The remedy for bad rulings ought to be appeal, not recusal. *Grider v. Boston*, 773 S.W.2d 338 (Tex. App.--Dallas 1989, writ denied).

¶(b)(4) — A judge's personal knowledge of facts should be limited to those gained before the case was filed. Judges observe a lot during a pending case.

¶(b)(7) — The current rule requires recusal because of relatives' investments only if the judge know about them. "What did the judge know and when did he know it?" thus becomes the key inquiry, leading inevitably to calling the judge as a witness, adversarial cross-examination, and a lot of problems. Further, if the judge's adult daughter stands to gain a lot from the case, the judge's claim that the interest was unknown doesn't make the conflict look any less unsavory. Potential problems from undiscovered interests ought to be handled in the cure section.

¶(b)(8) — The draft suggests extending the bar on lawyers from the first degree only to the third degree plus their firms. The current rule does not prohibit hiring the judge's son right before trial so long as he does not appear in court. *Keene v. Rogers*, 863 S.W.2d 168 (Tex.App.--Texarkana 1993, no writ).

¶(c) — The current rules allow recusal to be cured only if the judge has gotten deeply involved in the case before finding out about a relative's investments. The draft suggests allowing cure at any point, to avoid a perverse incentive to hold on to the case for a while before disclosing an interest. The draft suggests making the interim rulings "voidable;" the current rule does not indicate what happens to them.

¶(d)(1) — If the Committee wants to follow the route allowing late filings but not staying the case, I suggest dropping a time requirement altogether. If it's not going to stop the case, it matters much less when it is filed. I have also added a provision that unverified motions can be ignored, per current law. *Wirtz v. Mass. Mut.*, 898 S.W.2d 414 (Tex.App.- Amarillo 1995, no writ).

¶(d)(2) — Replaces "presiding judge of the administrative judicial district" with the proper title "presiding judge of the region." *Govt Code § 74.005.*

¶(d)(3) — The case should not be stayed if the grounds alleged are (1) partiality, (2) bias, or (3) material witness. The latter is necessary because abusive filers often name the judge as a witness, alleging wild conspiracies, etc.

¶(d)(4) — Adds a requirement that the assigned judge hear the case within 20 days of referral, for the reasons discussed at our last meeting. Also provides for use of fax copies and telephonic hearings.

¶(d)(5) — Believe it or not, the provision allowing parties to pick their own judge after disqualification is in the Constitution. This is a major change from current practice, but I see no way around it.

¶(d)(6) — Drops the language about abuse of discretion review. Some of the grounds for recusal clearly are not discretionary, while some are.

¶(d)(7) — Is this necessary? Does the Chief Justice ever do this?

¶(e) — Drops all the superfluous and redundant definitions so the rule is more manageable.

RULE 15-165a SUBCOMMITTEE'S

PROPOSAL REGARDING

RULE 18a

RECUSAL AND DISQUALFICATION OF JUDGES

January 16, 1997

RULE 18a. RECUSAL OR DISQUALIFICATION OF JUDGES

(a) 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,~~ aAny party may file with the clerk of the court a motion stating grounds why the judge before whom the case is pending should not sit in the case. The ~~grounds~~ motion may include any ~~disability~~ ground for disqualification or recusal described in Rule 18b ~~of the judge to sit in the case~~. The motion shall be verified and must state with particularity the grounds why the judge before whom the case is pending should not sit. The motion shall be made on personal knowledge 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. A judge's rulings shall not be used as the grounds for the motion but may be used as evidence supporting the motion.

(b) Time for Filing. A motion to disqualify under Rule 18b(1) may be filed at any time. A motion to recuse under Rule 18b(2) must be filed at least ten days before the first hearing or trial that occurs after the grounds for recusal arise. 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.

~~(b)~~(c) Notice. On the day the motion is filed, copies shall be served on all other parties or their counsel of record, together with a notice that movant expects the motion to be presented to the judge three days after the filing of such 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.~~

~~(c)~~(d) Prior to any further proceedings in the case, the judge shall either recuse himself or request the presiding judge of the administrative judicial district to assign a judge to hear such motion. If the judge recuses himself, he shall enter an order of recusal and request the presiding judge of the administrative judicial district to assign another judge to sit, and shall make no further orders and shall take no further action in the case except for good cause stated in the order in which such action is taken.

~~(d)~~(e) If the judge declines to recuse himself, he shall forward to the presiding judge of the administrative judicial district, in either original form or certified copy, an order of referral, the motion, and all opposing and concurring statements. 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 case after filing of the motion and prior to a hearing on the motion. The presiding judge of the administrative judicial district shall immediately set a hearing before himself or some other judge designated by him, shall cause notice of such hearing to be given to all parties or their counsel, and shall make such other orders including orders on interim or ancillary relief in the pending cause as justice may require.

~~(e)~~(f) ~~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.~~

(g) If the grounds for recusal do not arise until after the tenth day prior to a hearing or trial, then a motion based on those grounds may be filed after the deadline in paragraph (b) above. If the court denies the motion to recuse, then the recusal shall immediately be referred to the presiding judge as provided in paragraph (d) for prompt disposition, but the court may proceed with the scheduled trial or hearing. The same procedure shall apply to a motion to disqualify filed after the tenth day prior to a hearing or trial.

~~(f)~~(h) 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 reviewable, and the presiding judge shall assign another judge to sit in the case.

~~(g)~~(i) The Chief Justice of the Supreme Court may also appoint and assign judges in conformity with this rule and pursuant to statute.

~~(h)~~(j) 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 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 any sanction authorized by Rule ~~215(2)(b)~~ _____.

(Added June 10, 1980, eff. Jan. 1, 1981; amended Dec. 5, 1983, eff. April 1, 1984; April 10, 1986, eff. Sept. 1, 1986; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

This is a new rule.

Change by amendment effective April 1, 1984: Section (a) is changed textually.

Comment: The words "the Court of Criminal Appeals" have been added in (a); and subsection "1" has been added to (g).

Subcommittee's Comment

The Subcommittee unanimously adopted the amendment specifying that disqualification can be raised at any time. The Subcommittee adopted the change permitting the filing of a motion to recuse within 10 days of hearing or trial by a vote of 4-to-.

SECTION 3
Pleadings and Motions

Rule 20. Pleadings Allowed; Separate Pleas and Motions

(a) **Pleadings.** Pleadings include a complaint and an answer; a reply to an answer, including a reply to a counterclaim; an answer to a cross-claim; a third-party complaint, if a person who was not an original party is served under the provisions of Rule 27; and a third-party answer, if a third-party complaint is served.

[Current Rate: Tex. R. Civ. P. 78, 80, 85, 98].

(b) **Motions and Pleas.** An application to the court for an order, whether in the form of a motion, plea, application or other form of request, unless made orally during a hearing or trial, shall be made in writing, state the grounds for the request and set forth the relief or order sought.

[Current Rule: Tex. R. Civ. P. 21 (part of first paragraph)].

(c) **General Demurrers.** General demurrers must not be used.

[Current Rule: Tex. R. Civ. P. 90 (first sentence)].

Rule 21. General Rules of Pleading.

(a) **Claims for Relief.** A pleading which sets forth a claim for relief, whether a complaint, counterclaim, cross-claim, or third-party claim, shall contain: (1) a short statement of the claims, stating the legal theories and describing in general the factual bases of the claims sufficient to give fair notice, and (2) a demand for judgment for all of the relief sought by the claimant, provided that in all claims for unliquidated damages for more than $50,000 the demand must state only that the damages sought are within the jurisdictional limits of the court. Upon special exception, the court must require the pleader to amend and to specify the maximum amount claimed.

[Current Rule: Tex. R. Civ. P. 47].
[Source: Federal Rule 8(a)].

Change by amendment effective January 1, 1978: Textual changes in first sentence and first sentence of (c), all of (b) and proviso in (c) are new.

The SCAC has tentatively approved a Comment as follows:

Comment

Subsection (a) was amended in 1996 to provide that claims for relief should provide both the legal basis for the claim and a general description of the facts upon which liability is founded. A description of the legal basis for a claim could identify the cause of action by name, and refer to any constitutional, statutory or regulatory provision upon which the claim is founded. The factual circumstances supporting a claim may be described generally, but in sufficient detail so that the opposing party can determine from the pleading the circumstances sued upon. The claimant is not, however, required to allege specific acts or omissions giving rise to the claim for liability. Examples of stating the legal theory of a claim would include: "Plaintiff sues defendant for negligent operation of a motor vehicle," or "Plaintiff sues defendant for negligence per se for violating Section 544.008 of the Transportation Code," or "Plaintiff seeks recovery of attorney's fees under Tex. Civ. Prac. & Rem. Code, ch. 38," or "Plaintiff was contributorily negligent, and Defendant invokes the comparative responsibility provisions of Chapter 33 of the Tex. Civ. Prac. & Rem. Code," or "Defendant asserts the statute of limitations, Tex. Civ. Prac. & Rem. Code § 16.004, as a defense." An example of specifying the maximum amount of damages claimed would be: "The maximum amount of all damages claimed is

$100,000."

(b) Defenses.

(1) In General. A pleading which sets forth a defense, whether an answer, a reply to an answer or a third-party answer, may contain dilatory pleas, special exceptions, a general denial, specific denials, and an affirmative statement in plain and concise language that is sufficient to give fair notice of any affirmative defense.

[Current Rule: Tex. R. Civ. P. 85].
[Original Source: Texas Rule 7 (for District and County Courts)].

(2) General Denial. Unless a specific denial is required by law or these rules, a general denial of matters pleaded by the opposing party will be sufficient to put the same in issue. When a party has pleaded a general denial, and the claimant amends the claim, the original denial extends to all matters subsequently alleged by the claimant.

[Current Rule: Tex. R. Civ. P. 92].
[Original Source: Arts. 2006 (part) and 2012, combined without change].

(3) Specific Denials.

(A) Denials of Legal Existence or Capacity. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue, be sued or recover or the authority of a party to sue, be sued or recover in a representative capacity or as to whether another party is doing business under an assumed name or trade name as alleged, the party desiring to raise the issue must do so by a specific denial, which includes supporting particulars as are peculiarly within the pleader's knowledge.

[Comment: this subdivision is based largely on Fed. R. Civ. P. 9(a). This subdivision combines Tex. R. Civ. P. 93 (1), (2), (5), (6) and (14) into one paragraph].

(B) Denials of Execution of Written Instrument, Indorsement or Assignment. A party desiring to raise an issue as to the execution by the party or by the party's authority or by a deceased person, of any instrument in writing, upon which any pleading is founded and not alleged to be lost or destroyed or the genuineness of an indorsement or assignment of a written instrument upon which suit is brought by an indorsee or assignee, must raise the issue by a specific denial, which includes supporting particulars as are peculiarly within the pleader's knowledge. In the absence of a specific denial, the written instrument or the indorsement or assignment will be received in evidence or otherwise held as fully proved.

[Comment: This subdivision is an amalgamation of Tex. R. Civ. P. 93 (7), (8), drafted to resemble the draft of the preceding subdivision.

(C) Denials of Conditions Precedent. A party desiring to raise an issue as to whether a condition precedent has been performed or has occurred, as alleged by a claimant, must do so by a specific denial, which includes supporting particulars as are peculiarly within the pleader's knowledge. In the absence of a specific denial of a condition precedent, its performance or occurrence is presumed and no evidence to the contrary is admissible.

[Current Rule: Tex. R. Civ. P. 54].
[Original Source: Federal Rule 9(c)].
[Official Comment]:

Change by amendment of March 31, 1941. The practice on failure of specific denial is made clearer by changes in the wording of the last sentence.

(D) Denials of Notice and Proof of Loss. A party desiring to raise an issue as to whether a notice and proof of loss or a proof of claim required by law has been given, as alleged by a claimant, must make a specific denial that such notice or proof has been given. Unless such a denial is made, notice and proof shall be presumed and no evidence to the contrary is admissible.

[Comment: Current Rule. Tex. R. Civ. P. 93 (12)].

[Current Rule: Tex. R. Civ. P. 93].
[Original Source: Arts. 573, 574, 1999, 2010, 3734, and 5074].
[Official Comments]:

Change: The basic statute relating to sworn pleadings was Art. 2010. With it have been combined provisions from a number of other specific statutes requiring sworn pleas. No change of meaning has been intended in so far as the combinations, as such, are concerned. The scope of sworn denials has, however, been broadened. Subdivision (b) will, under this rule, include the plea that "the defendant has not legal capacity to be sued." Subdivision (c) has been extended to include a denial of defendant's liability in the capacity in which he is sued. In subdivision (d) the term "cause of action" has been replaced by the word "claim." Subdivisions (f) and (g) apply to allegations in any pleading, not merely to the petition as formerly stated in Art. 2010.

(4) Deemed Denials of Counterclaims or Cross-claims. When a counterclaim or cross-claim is served upon a party who has made an appearance in the action, the party so served, in the absence of a responsive pleading, is deemed to have pleaded a general denial of the counterclaim or cross-claim, but the party is not deemed to have waived any special appearance motion or motion to transfer venue. In all other respects the rules prescribed for pleadings of defensive matter are applicable to answers to counterclaims and cross-claims.

[Current Rule: Tex. R. Civ. P. 81].
[Original Source: Art. 2004, unchanged].

(5) Affirmative Defenses. Replies to Affirmative Defenses. Any matter constituting an avoidance of an opposing party's claims or defenses must be set forth affirmatively in pleading to a preceding pleading, including among other matters in avoidance, the following affirmative defenses: accord and satisfaction, arbitration and award, contributory negligence, discharge in bankruptcy, duress, estoppel, exceptions or exclusions from insurance coverage, failure of consideration, want of consideration for a written constract, fraud, fraudulent concealment, illegality, laches, payment, release, res judicata, statute of

frauds, statute of limitations, tolling of limitations, usury, and waiver.

An affirmative defense need not be denied in a responsive pleading, but an avoidance of an affirmative defense must be alleged affirmatively in pleading to a preceding pleading.

[Current Rule: Tex. R. Civ. P. 82].
[Original Source: Art. 2005, unchanged].

[Current Rule: Tex. R. Civ. P. 94 (except last sentence)].
[Original Source: Portion of Federal Rule 8(c), unchanged].

[Current Rule: Tex. R. Civ. P. 95].
[Original Source: Art. 2014].
[Official Comments]:

Change: Omission of reference to counterclaim and set off.

(c) Pleading to be Plain and Concise; Consistency

(1) Each allegation must be made in plain and concise language.

[Current Rule: Tex. R. Civ. P. 45 (first paragraph in part)].
[Original Source: This rule embraces in part Art. 1997, Texas Rules 1 and 32 (for District and County Courts), and Federal Rule 8(f)].

(2) A party may state two or more claims or defenses alternatively. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based upon legal or equitable grounds or both.

[Current Rule: Tex. R. Civ. P. 48].
[Source: Federal Rule 8(e), in part, unchanged].
[Original

(d) **Construction of Pleadings.** All pleadings shall be construed to do substantial justice. When a party has mistakenly designated any plea or pleading, the court, if justice so requires, must treat the plea or pleading as if it had been properly designated.

[Current Rule: Tex. R. Civ. P. 45 (last sentence); 71 (first sentence)].
[Original Source: Federal Rule 8(f); 8(c) (last sentence)].

(e) **Special Exceptions.**

(1) **Purpose; Form of Exceptions.** A special exception may be used to object to a pleading defect. A special exception must point out the particular pleading excepted to, be specific enough to notify the pleader of the defect or omission, and state the basis for the exception. A proper special exception must confine itself to the factual matters shown on the face of the challenged pleading and must not make factual statements not appearing in the challenged pleading. If an exception is sustained, the pleader must be given an opportunity to amend to cure the defect, if it can be cured.

[Current Rule: Tex. R. Civ. P. 91].
[Original Source: Texas Rule 18 (for District and County Courts)].

(2) **Waiver of Pleading Defects.** Every pleading defect of form or substance not made the basis of a special exception and presented to the judge at least _____ days before trial is waived. But a failure to make or present a special exception before trial does not waive an objection that a cause of action or ground of defense contained in the opposing party's pleadings has no legal basis. This paragraph may not be applied to any party against whom default judgment is rendered unless fair notice of a lawful claim has been given to the defaulted party by the allegations as a whole.

[Current Rule: Tex. R. Civ. P. 90].
[Original Source: New Rule].
[Official Comments]:

Change by amendment effective January 1, 1981. The words "motion or" before "exception" are deleted, and "rendition of

judgment" is changed to "judgment is signed."

Rule 22. Pleading Special Matters

[Current Rule: Tex. R. Civ. P. 53].
[Original Source: Art. 2000, unchanged].

Change by amendment of March 31, 1941. The practice on failure of specific denial is made clearer denial is made clearer by changes in the wording of the last sentence.

(a) Conditions Precedent. In pleading the performance of a condition precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. When such performances or occurrences have been so pleaded, the party pleading some will be required to prove only such of them as are specifically denied by the defending party.

[Current Rule: Tex. R. Civ. P. 54].
[Original Source: Federal Rule 9(c)].
[Official Comment]:

Change amendment of March 31, 1941. The practice on failure of specific denial is made clearer by changes in the wording of the last sentence.

(b) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

[Current Rule: Tex. R. Civ. P. 55].
[Original Source: Federal Rule 9(e)].
[Official Comment: No change except the substitution of it shall be" for "it is"].

(c) Special Damage. When items of special damage are claimed, they must be specifically stated.

[Current Rule: Tex. R. Civ. P. 56].
[Original Source: Federal Rule 4(g)].

Change by amendment of March 31, 1941. Subdivisions (m) and (n) (Source: Art. 5546, and Acts 1937, 45th Leg., p. 535, ch. 261, sec. 2) and (o) added.

Change by amendment effective December 31, 1941. Section (6) has been added to subdivision (n).

Change by amendment effective December 31, 1943. Section (7) and the new sentence concerning sections (1) and (7) have been added to subdivision (n), and minor textual changes have been made in the last paragraph of this subdivision.

Change by amendment effective March 1, 1950. A new subdivision, designated (o) has been added, and the subdivision formerly lettered (o) has been designated (p).

Change by amendment effective January 1, 1971. Final clause of subdivision (k) has been changed to harmonize with Rule 185 as amended. Section (8) has been added to subdivision (n).

Change by amendment effective January 1, 1976. Subdivision (p) is new and is adopted for the purpose of simplifying issues in uninsured motorist cases.

Change by amendment effective September 1, 1983. To conform to S.B. 291 and 898, 68th Legislature, 1983.

Change by amendment effective April 1, 1984. Section 10 is changed to conform to amended Rule 185.

Rule 23. Form of Pleadings, Motions and Other Papers.

(a) **Heading; Names of Parties.** Every pleading or motion must contain a heading setting forth the file number, the names of the parties, the court and

county in which the case is pending, and the title of the pleading or motion. A pleading that contains a claim for relief must state the names of the parties in the heading. In other pleadings, it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

[Current Rule: Tex. R. Civ. P. 78, 79, 83].
[Original Source: Federal Rule 10(a); Texas Rules 3 and 6 (for District and County Courts)].

(b) Paragraphs. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

[Current Rule: Tex. R. Civ. P. 50].
[Original Source: Federal Rule 10(b)].

(c) Adoption by Reference; Exhibits. Statements in a pleading or motion may be adopted by reference in a different part of the same pleading or motion or in another pleading or motion, as long as the pleading or motion containing such statements has not been superseded by an amendment. A copy of any written instrument which is an exhibit to a pleading or motion is a part thereof for all purposes.

[Current Rule: Tex. R. Civ. P. 58].
[Original Source: Federal Rule 10(c), first sentence].

Change: Addition of words after comma.

[Current Rule: Tex. R. Civ. P. 59].
[Original Source: Texas Rule 19 (for District and county Courts)].
[Official Comments]:

Change: The rule has been shortened. Provision is made for copying the exhibit into the body of the pleading. Addition of

provision making the exhibit a part of the pleading for all purposes and for supplying allegations from the exhibit.

Rule 24. Signing of Pleadings, Motions, and Other Papers; Sanctions

(a) Signature Requirement. Every pleading, motion, and other paper of a party represented by an attorney must be signed by at least one attorney of record in the attorney's individual name, with the attorney's State Bar of Texas identification number, address, telephone number, and, if available, telecopier number. A party not represented by an attorney must sign pleadings, state the party's address, telephone number, and, if available, a telecopier number.

[Current Rule: Tex. R. Civ. P. 57].
[Original Source: Federal Rule 11, first two sentences, unchanged].
[Official Comments]:

Change by amendment effective January 1, 1981. Rule changed to require statement on pleadings of attorney's State Bar of Texas identification number and telephone number and the telephone number of a party not represented by a lawyer.

Change by amendment effective September 1, 1990. To supply attorney telecopier information with other identifying information on pleadings. Documents telephonically transferred are permitted to be filed under changes in Rule 45.

(b) Sanctions. Sanctions for frivolous pleadings and motions are governed by Chapter 10 of the Civil Practice and Remedies Code.

Rule 25. Presentation of Defenses; Motion Practice

(a) When presented. An answer to a complaint, or a third-party complaint must be filed within [30] days after the date of service. An answer to a cross-claim or a reply to counterclaim must be filed within the time for filing amended pleadings as provided in Rule 28.

[Current Rule: Tex. R. Civ. P. 99].

[Original Source: Federal Rule 12(b)].

(b) How presented. The following pleas may at the option of the pleader be made in a responsive pleading or by a separate motion:

(1) lack of jurisdiction over the subject matter;

(2) lack of jurisdiction over the person;

(3) improper or inconvenient venue;

(4) change of venue because an impartial trial cannot be had where the action is pending;

(5) insufficiency of citation;

(6) insufficiency of service of process;

(7) any basis for abatement or dismissal of the action, including the failure to join a person needed for just adjudication or the pendency of a prior action involving the same parties and subject matter.

The defenses described in (2) and (3) must be made in due order as prescribed in subdivisions (c) and (d) of this rule. Any pleading or motion filed concurrently with or after the filing of a motion to dismiss for lack of personal jurisdiction or a motion to transfer venue is deemed filed subject to and without waiving the motions.

[Current Rule: None].

(c) Special Appearances to Challenge Personal Jurisdiction.

(1) Purpose of Motion. A defendant may appear specially for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant on the ground that such person or property is not amenable to process issued by the courts of this State. A special appearance may be made as to an entire proceeding or as to any severable claim involved therein.

(2) Due Order Requirements. Any motion to challenge the court's personal jurisdiction must be filed and determined prior to any other plea, pleading, or motion provided that a motion to transfer venue and any other plea, pleading or motion may be contained in the same instrument without waiving the objection to jurisdiction. The issuance of process for witnesses, the taking of depositions, the serving of requests for admissions, and the use of discovery processes in connection with the objection to the court's jurisdiction do not constitute a general appearance.

(3) Hearing of Motion. Any motion to challenge personal jurisdiction must be heard before a motion to transfer venue and before any other motion or pleading may be heard. The court shall determine the special appearance on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony. The affidavits, if any, shall be served at least seven days before the hearing, shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts to justify the opposition, the court may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Should it appear to the satisfaction of the court at any time that any of such affidavits are presented in violation of Rule _____, the court shall impose sanctions in accordance with that Chapter 10 of the The Civil Practice and Remedies Code.

(4) Orders. If the court sustains the objection to jurisdiction, an appropriate order shall be made. If the objection to jurisdiction is overruled, the objecting party may thereafter appear generally for any purpose without waiving the objection to personal jurisdiction. No determination of any issue of fact in connection with the objection to jurisdiction is a determination of the merits of the case.

[Current Rule: Tex. R. Civ. P. 120a]

(d) Improper or Inconvenient Venue.

(1) Purpose; Due Order Requirements. A motion to transfer venue because venue is improper or inconvenient must be filed prior to or concurrently with any other plea, pleading or motion, except a challenge to the court's personal jurisdiction. The determination of a motion to transfer venue shall be made promptly by the court in due order and in a reasonable time before trial. The movant has the duty to request a setting on the motion to transfer.

(2) Improper Venue: Burdens. A party seeking to maintain venue in the county of suit has the burden of proof that the county of suit is a proper venue.[1] A party seeking transfer has the burden of proof that the county specified in the motion to which transfer is sought is a proper venue. All venue facts, when properly pleaded, shall be taken as true unless specifically denied by the adverse party. When a venue fact is specifically denied, the party pleading the venue fact satisfies its burden of proof by making prima facie proof of the venue fact. Prima facie proof is made by filing and serving an affidavit and any duly proved attachments thereto that fully and specifically set forth facts that support the specifically denied venue facts. Affidavits shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify. The existence of a claim[2] when pleaded properly shall be taken as established for venue purposes, and no party shall be required to establish a claim by prima facie proof.

(3) Inconvenient Venue: Burdens. A party seeking transfer to another county of proper venue pursuant to § 15.002(b) of the Civil Practice and Remedies Code has, in addition to the burden of proving proper venue, the burden of proof that transfer is justified for the convenience of the parties and witnesses and in the interest of justice, regardless of whether the adverse party specifically

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[1] "Proper venue" is a defined term in CPRC § 15.001(b).

[2] "Claim" is used in CPRC § 15.002 instead of "cause of action" as in the old statute and current rule.

denies the movant's allegations. Proof is made by filing and serving an affidavit and any duly proved attachments thereto that fully and specifically set forth facts that support the grounds for transfer. Affidavits shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify. The nonmovant may file and serve opposing affidavits that the court shall also consider when determining whether transfer is justified.

(4) Hearings. The court shall determine the motion to transfer on the basis of the pleadings, any stipulations made by the parties, and the proof filed by the parties. No oral testimony shall be received at the hearing. If the party seeking to maintain venue in the county of suit has established that the county of suit is proper venue, the case shall not be transferred unless the party seeking transfer has established a mandatory venue in another county or the court finds, after reviewing all of the evidence filed in support of and opposing the transfer, that transfer to another proper venue for the convenience of the parties and witnesses and in the interest of justice is warranted pursuant to § 15.002(b) of the Civil Practice and Remedies Code. If the party seeking to maintain venue in the county of suit fails to establish proper venue in the county of suit, the case shall be transferred to the county to which transfer is sought if the movant has established proper venue in that county. If no county of proper venue is established, the court may direct the parties to make further proof.

(5) Transfer if Motion Granted. If a motion to transfer venue is granted, the cause shall not be dismissed, but the court shall transfer the case to the proper court as provided in Rule _____ (currently Rule 89).

(6) Subsequently Joined Defendants. If a court has ruled on a motion to transfer venue in the case, no further motions to transfer venue shall be considered except that if the prior motion was overruled, the court shall consider a motion to transfer venue filed by a defendant whose appearance date was subsequent to the venue ruling based upon grounds not asserted in the earlier motion or seeking transfer for the convenience of parties and witnesses and in the interest of justice pursuant to § 15.002(b) of the Civil Practice and Remedies Code. Timely filed motions not considered by the court will preserve the movant's objection to venue for purposes of appeal.

(7) Discovery Practice. Discovery shall not be abated or otherwise affected by pendency of a motion to transfer. Issuing process for witnesses and taking depositions shall not constitute a waiver of a motion to transfer venue, but depositions taken in such case may be read in evidence in any subsequent suit between the same parties concerning the same subject matter in like manner as if taken in such subsequent suit. Deposition transcripts, responses to requests for admission, answers to interrogatories and other discovery products containing information relevant to a determination of proper venue may be considered by the court in making the venue determination when they are attached to, or incorporated by reference in, an affidavit of a person who has knowledge of such discovery.

[Current Rule: Tex. R. Civ. P. 86-89].

[Current Rule: Tex. R. Civ. P. 86, 87 (1), 89 (first sentence)].

(e) Change of Venue; Unfair Trial; Consent

(1) Unfair Trial Grounds. A change of venue may be granted in civil cases upon motion of either party, supported by the movant's affidavit and the affidavit of at least three credible persons, residents of the county in which the suit is pending, for any of the following cause:

(A) That there exists in the county where the suit is pending so great a prejudice against the movant that a fair and impartial trial cannot be obtained there.

(B) That there is a combination against the movant instigated by influential persons, by reason of which the movant cannot expect a fair and impartial trial.

(C) That an impartial trial cannot be had in the county where the action is pending.

(D) For other sufficient cause to be determined by the court.

(2) Procedure. Where a motion to change venue is duly made, it shall be granted, unless the credibility of those making the motion, or their means of knowledge or the truth of the facts set out in the motion are attacked by the affidavit of a credible person; when thus attacked, the issue thus formed shall be tried by the judge; and the application either granted or refused. Reasonable discovery in support of, or in opposition to, the application shall be permitted, and such discovery as is relevant, including deposition testimony on file, may be attached to, or incorporated by reference in, the affidavit of a party, a witness, or an attorney who has knowledge of such discovery.

(3) Transferred To What County. If the motion to transfer is granted, the cause shall be removed:

(A) If from a district court, to any county of proper venue in the same or an adjoining district;

(B) If from a county court, to any adjoining county of proper venue;

(C) If (A) or (B) are not applicable, to any county of proper venue;

(D) If a county of proper venue (other than the county of suit) cannot be found, then if from

(i) A district court, to any county in the same or an adjoining district or to any district where an impartial trial can be had;

(ii) A county court, to any adjoining county or to any district where an impartial trial can be had; but the parties may agree that venue shall be changed to some other county, and the order of the court shall conform to such agreement.

[Current Rule: Tex. R. Civ. P. 257-259].

(4) Consent. At any time the parties may file written consent to transfer the case to any other county and the judgment order the transfer.

[Current Rule: Tex. R. Civ. P. 255].

Rule 26. Counterclaim and Cross-claim

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim within the jurisdiction of the court, not the subject of a pending action, which at the time of the filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction; provided, however, that a judgment based upon a settlement or compromise of a claim of one party to the transaction or occurrence prior to a disposition on the merits shall not operate as a bar to the transaction or occurrence unless the latter has consented in writing that said judgment shall operate as a bar.

(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against a opposing party whether or not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount of different in kind from that sought in the pleading of the opposing party, so long as the subject matter is within the jurisdiction of the court.

(d) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after filing his pleading may be presented as a counterclaim by amended pleading.

(e) Cross-Claim Against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(f) **Additional Parties.** Persons other than those made parties to the original action may be made parties to a third party action, counterclaim or cross-claim in accordance with the provisions of Rules _____ (currently Rules 38, 39 and 40).

(g) **Separate Trials; Separate Judgments.** If the court orders separate trials as provided in Rule ____ (currently Rule 174), judgment on a counterclaim or cross-claim may be rendered when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

[Current Rule: Tex. R. Civ. P. 97].
[Original source: Federal Rule 13].
[Official Comments]:

Change: Subdivisions (d) and (f) of the Federal Rule have been omitted and the subdivisions relettered. Subdivisions (d), (e), (f) in part, and (h) above, correspond to subdivisions (e), (g), (h), and (i) respectively of the Federal Rule. In (a) above, the compulsory counter-claim has been limited to a claim within the jurisdiction of the court. In (c), a similar limitation has been embodied. Other subdivisions have minor textual changes.

Change by amendment of March 31, 1941. The proviso in subdivision (f) takes place of the last sentence of subdivision (f) in the original Rule 97, and subdivision (g) has been added. Subdivision (in original Rule 97 has been changed to (h).

Change by amendment effective January 1, 1971. Provisio concerning effect of judgment based upon settlement or compromise of claim of one party to a transaction has been added to subdivision (a).

Change by amendment effective April 1, 1984. Subdivision (f) is rewritten.

Rule 27. Third-Party Practice.

(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a citation and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff or to the plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than thirty (30) days after serving the first responsive pleading. Otherwise, the third-party plaintiff must obtain leave on motion upon notice to all parties to the action. The person served, hereinafter called the third-party defendant shall make any defenses to the third-party plaintiff's claim under the rules applicable to the defendant, and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule ____ (currently Rule 97). The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defenses and any counterclaims and cross-claims. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or who may be liable to the third-party defendant or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant.

(b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, the plaintiff may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

(c) Liability Insurers. This rule does not permit the joinder of a liability or indemnity insurance company, unless such company is by statute or contract directly liable to the person injured or damaged.

[Current Rule: Tex. R. Civ. P. 38].

[Original Source: Federal Rule 14, with minor textural change]. [Official Comments]:

Change by amendment effective April 1, 1984. The rule removes the need to get leave of court to begin third-party action; makes textual changes to clarify terminology.

Rule 28. Amended Pleadings

(a) Amendment Defined. The object of an amendment is to add something to, or withdraw something from, that which has been previously pleaded so as to perfect that which is or may be deficient, or to correct that which has been incorrectly stated by the party making the amendment, or to plead new matter, additional to that formerly pleaded by the amending party, which constitutes an additional claim or defense permissible to the suit.

[Current Rule: Tex. R. Civ. P. 62]. [Original Source: Texas Rules 12 and 15 (for District and County Courts) combined, with minor textural changes].

Unless the substituted instrument shall be set aside on exceptions, the instrument for which it is substituted shall no longer be regarded as a part of the pleading in the record of the cause, unless some error of the court in deciding upon the necessity of the amendment, or otherwise in superseding it, be complained of, and exception be taken to the action of the court, or unless it be necessary to look to the superseded pleading upon a question of limitation.

[Current Rule: Tex. R. Civ. P. 65]. [Original Source: Texas Rule 14 (for District and County Courts) with minor textural changes].

(b) When to Amend; Amended Instrument. Parties may amend their pleadings, respond to pleadings on file of other parties, file suggestions of death and make representative parties, and file such other pleas as they may desire by filing such pleas with the clerk at such time as not to operate as a surprise to opposite party; provided, that any pleadings, responses or pleas offered for filing within seven days of the date of trial or thereafter, or after such time as may be

ordered by the judge under Rule ____ (currently Rule 166), shall be filed only after leave of the judge is obtained, which leave shall be granted by the judge unless there is a showing that such filing will operate as a surprise to the opposite party.

[Current Rule: Tex. R. Civ. P. 63].
[Original Source: Arts. 201, subdivisions 1 and 2].
[Official Comments]:

Change: This rule authorizes amendment without leave of court when filed seven days or more before the date of trial. It requires leave to amend thereafter, which may be granted by the judge instead of by the court. Subdivision 3 of Article 2001 is superseded by Rules 66 and 67.

Change by amendment effective January 1, 1961. Language "or after such time as may be ordered by the judge under Rule 166" added.

Change by amendment effective September 1, 1990. To require that all trial pleadings of all parties, except those permitted by Rule 66, be on file at least seven days before trial unless leave of court permits later filing.

The party amending must file a substitute pleading or motion that is entitled "first amended complaint," or "second amended answer," or "third amended motion to transfer venue."

[Current Rule: Tex. R. Civ. P. 64].
[Original Source: Texas Rule 13 (for District and County Courts)].

(c) Trial Amendments. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleading, or if during the trial any defect, fault or omission in a pleading, either of form or substance, is called to the attention o f the court, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the

allowance of such amendment would prejudice him in maintaining his action or defense upon the merits. The court may grant a postponement to enable the objecting party to meet such evidence.

[Current Rule: Tex. R. Civ. P. 66].
[Original Source: Federal Rule 15(b) (last two sentences) with minor textual change].

(d) Trial by Consent. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. In such case such amendment of pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made by leave of court upon motion of any party at any time up to the submission of the case to the Court or jury, but failure so to amend shall not affect the result of the trial of these issues; provided that written pleadings, before the time of submission, shall be necessary to the submission of questions, as is provided in Rules ____ and ____ (currently Rules 277 and 279).

[Current Rule: Tex. R. Civ. P. 67].
[Original Source: Federal Rule 15(b)].

RULE 86: Improper or Inconvenient Venue[1]

1. **Applicability.** A motion to transfer a case because venue is improper or inconvenient pursuant to Chapter 15 of the Civil Practice and Remedies Code must be filed according to the provisions of this Rule. A motion to transfer a case because an impartial trial cannot be had where the action is pending is governed by the provisions of Rule ___.

2. **Motion.** A motion to transfer must be made prior to or concurrently with the movant's first plea, pleading or motion other than a challenge to the court's personal jurisdiction, except a motion challenging a plaintiff's intervention on the ground that the intervenor cannot establish independently of any other plaintiff proper venue in the county of suit must be filed within [20] days of the intervention. The motion shall state that the case should be transferred to another specified county of proper venue, state the legal basis for the transfer, and plead venue facts establishing that the county to which transfer is sought is a proper venue.[2] The movant must request a hearing on the motion at a reasonable time prior to commencement of the trial. Except upon leave of court, each party is entitled to 45 days notice of the hearing.

3. **Response and Reply.** Any response, including proof filed in opposition to the motion, shall be filed at least 30 days prior to the hearing on the motion. Any reply to the response, including additional proof in support of the motion must be filed not later than 7 days prior to the hearing.

4. **Burden of Proof of Proper Venue.** A party seeking to maintain venue in the county of suit has the burden of proof that the county of suit is a proper venue.[3] A party seeking transfer has the burden of proof that the county specified in the motion to which transfer is sought is a proper venue. All venue facts, when properly pleaded, shall be taken as true unless specifically denied by the adverse party. When a venue fact is specifically denied, the party pleading the venue fact satisfies its burden of proof by making prima facie proof of the venue fact. The existence of a claim[4] when pleaded properly shall be taken as established for venue purposes, and no party shall be required to establish a claim by prima facie proof.

5. **Burden of Proof of Inconvenient Venue.** In addition to the burden of proof of proper venue in accordance with section 5 of this rule, a party seeking transfer to another county of proper venue for the convenience of the parties and witnesses and in the interest of justice pursuant to § 15.002(b) of the Civil Practice and Remedies Code must present

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[1] I think this rule is too long to be included in Bill Dorsaneo's Rule 25 so I have kept it as a separate rule.

[2] Under this draft, the motion challenging intervention/joinder is treated exactly like all other venue motions. Therefore, the defendant challenging venue would designate the county to which the plaintiff's case should be sent if the motion is granted. The statute does not necessarily require this result, however. An alternative procedure would be to have the defendant simply challenge the plaintiff's right to be included in the suit, and if the plaintiff cannot satisfy the burden somehow have the plaintiff designate where its part of the case should be sent

[3] "Proper venue" is a defined term in CPRC § 15.001(b)

[4] "Claim" is used in CPRC § 15.002 instead of "cause of action" as in the old statute and current rule.

proof that transfer is justified on such grounds, regardless of whether the adverse party specifically denies the movant's allegations. The nonmovant may present opposing proof that the court shall also consider when determining whether transfer is justified. The judge may transfer the case for convenience and in the interest of justice after reviewing all of the evidence filed in support of and opposing the transfer and making the findings set forth in § 15.002(b) of the Civil Practice and Remedies Code by the preponderance of the evidence.

6. **Burden of Proof for Plaintiffs or Intervenors.** A plaintiff or intervening plaintiff responding to a motion under this rule must independently of any other plaintiff satisfy the burden of proof of proper venue in accordance with section 5 of this rule or establish the requirements of subdivisions (1) through (4) of § 15.003(a) of the Civil Practice and Remedies Code. The plaintiff or intervenor seeking to establish the requirements of subdivisions (1) through (4) of § 15.003(a) of the Civil Practice and Remedies Code shall present proof relevant to the requirements, the movant may present opposing proof, and the judge shall review all of the evidence determine by the preponderance of the evidence whether to grant or deny the motion.

7. **Proof.** Proof is made by filing and serving an affidavit and any duly proved attachments thereto that fully and specifically set forth facts that support the grounds for venue. Affidavits shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify. Deposition transcripts, responses to requests for admission, answers to interrogatories and other discovery products may constitute proof when they are attached to, or incorporated by reference in, an affidavit of a person who has knowledge of such discovery.

8. **Hearing.** The court shall determine the motion to transfer on the basis of the pleadings, any stipulations made by the parties, and the proof filed by the parties. No oral testimony shall be received at the hearing. If the party seeking to maintain venue in the county of suit has established that the county of suit is proper venue, the case shall not be transferred unless the party seeking transfer has established a mandatory venue in another county or the court finds that transfer to another proper venue for the convenience of the parties and witnesses and in the interest of justice is warranted pursuant to § 15.002(b) of the Civil Practice and Remedies Code. If the party seeking to maintain venue in the county of suit fails to establish proper venue in the county of suit, the case shall be transferred to the county to which transfer is sought if the movant has established proper venue in that county, unless a plaintiff or intervenor has established the requirements of subdivisions (1) through (4) of § 15.003(a) of the Civil Practice and Remedies Code. If no county of proper venue is established, the court may direct the parties to make further proof.

9. **Transfer if Motion Granted.** If a motion to transfer is granted, the cause shall not be dismissed, but the court shall transfer the case to the proper court as provided in Rule __ [clerk rule, currently Rule 89]. If the motion to transfer is granted as to one party, but not

as to other parties, the claims by or against that party shall be severed and only the severed cause shall be transferred.

10. **Motions Filed after Ruling.** If a court has ruled on a motion to transfer venue in the case, no further motions under this rule shall be considered except that if the prior motion was overruled, the court shall consider a motion to transfer venue filed by a defendant whose appearance date was subsequent to the venue ruling based upon grounds not asserted in the earlier motion or seeking transfer for the convenience of parties and witnesses and in the interest of justice pursuant to § 15.002(b) of the Civil Practice and Remedies Code. Timely filed motions not considered by the court will preserve the movant's objection to venue for purposes of appeal.

11. **Discovery.** Discovery shall not be abated or otherwise affected by pendency of a motion to transfer. Issuing process for witnesses and taking depositions shall not constitute a waiver of a motion to transfer venue. Depositions taken in a case where a motion to transfer is pending may be read in evidence in any subsequent suit between the same parties concerning the same subject matter in like manner as if taken in such subsequent suit.

12. **Consent.** At any time the parties may file written consent to transfer the case to any other county and the judge shall order transfer accordingly.[5]

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[5] This section could be included in Dorsaneo's Rule 25. For example: "Motions to transfer or change venue shall be made pursuant to Rule __ or Rule ___. At any time the parties may file written consent to transfer the case...."

Rule 86. ~~Motion to Transfer Venue~~Improper or Inconvenient Venue.

1. Applicablility~~Time to File~~. A motion to transfer venue because an impartial trial cannot be had in the county where the action is pending is governed by the provisions of Rule ~~257~~.[1]

2. Motion. A motion to transfer must be ~~An objection to improper venue is waived if not~~ made ~~by written motion filed~~ prior to or concurrently with any the movant's first~~other~~ plea, pleading or motion other than~~except~~ a challenge to the court's personal jurisdiction, except a motion challenging a plaintiff's intervention on the ground that the intervenor cannot establish independently of any other plaintiff proper venue in the county of suit must be filed within [20] days of the intervention. ~~special appearance motion provided for in Rule 120a. A written consent of the parties to transfer the case to another county may be filed with the clerk of the court at any time.~~[2] ~~A motion to transfer venue because an impartial trial cannot be had in the county where the action is pending is governed by the provisions of Rule 257.~~[3]

~~2. How to File. The motion objecting to improper venue may be contained in a separate instrument filed concurrently with or prior to the filing of the movant's first responsive pleading or the motion may be combined with other objections and defenses and included in the movant's first responsive pleading.~~

~~3. Requisites of Motion.~~ The motion~~, and any amendments to it,~~ shall state that the case~~action~~ should be transferred to another specified county of proper venue, ~~because:~~

~~(a) The county where the action is pending is not a proper county; or~~

~~(b) Mandatory venue of the action in another county is prescribed by one or more specific statutory provisions which shall be clearly designated or indicated.~~

~~The motion shall~~ state the legal ~~and factual~~ basis for the transfer, ~~of the action~~ and plead venue facts establishing that the county to which transfer is sought is a proper venue. ~~request transfer of the action and request transfer of the action to a specific county of mandatory or proper venue. Verification of the motion is not required. The motion may be accompanied by supporting affidavits as provided in Rule 87.~~

~~4. Response and Reply. Except as provided in paragraph 3(a) of Rule 87, a response to the motion to transfer is not required. Verification of a response is not required.~~

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[1] this sentence comes directly from Rule 86(1) as shown below.
[2] this sentence moved to end of the rule
[3] this sentence moved to (1).

~~5. Service. A copy of any instrument filed pursuant to Rule 86 shall be served in accordance with Rule 21a.~~

~~Rule 87. Determination of Motion to Transfer.~~

~~1. Consideration of Motion. The determination of a motion to transfer venue shall be made promptly by the court and such determination must be made in a reasonable time prior to commencement of the trial on the merits.~~ The movant must~~has the duty~~ to request a hearing~~setting~~ on the motion ~~to transfer~~at a reasonable time prior to commencement of trial. Except upon leave of court, each party is entitled to ~~at least~~ 45 days notice of the~~a~~ hearing ~~on the motion to transfer~~.

3. Response and Reply. ~~Except on leave of court, a~~Any response, including proof filed in opposition to the motion, ~~or opposing affidavits~~ shall be filed at least 30 days prior to the hearing of the motion ~~to transfer~~. ~~The movant is not required to file a reply to the response but a~~Any reply to the response, including ~~and any~~ additional proof~~affidavits~~ in supporting of the motion ~~to transfer~~ must, ~~except on leave of court,~~ be filed not later than 7 days prior to the hearing ~~date~~.

42. Burden of Proof of Proper ~~Establishing~~ Venue.

~~(a) IN GENERAL.~~ A party ~~who~~ seekings to maintain venue in the county of suit~~of the action in a particular county in reliance upon Section 15.001 (General Rule), Sections 15.011-15.017 (Mandatory Venue), Sections 15.031-15.040 (Permissive Venue), or Sections 15.061 and 15.062 (Multiple Claims), Civil Practice and Remedies Code,~~ has the burden ~~to make~~ of proof, ~~as provided in paragraph 3 of this rule,~~ that ~~venue is maintainable in~~ the county of suit is a proper venue. A party ~~who~~ seekings ~~to~~ transfer ~~venue of the action to another specified county under Section 15.001 (General Rule), Sections 15.011-15.017 (Mandatory Venue), Sections 15.031-15.040 (Permissive Venue), or Sections 15.061 and 15.062 (Multiple Claims), Civil Practice and Remedies Code,~~ has the burden ~~to make~~of proof, ~~as provided in paragraph 3 of this rule,~~ that ~~venue is maintainable in~~ the county to which transfer is sought is a proper venue. ~~A party who seeks to transfer venue of the action to another specified county under Sections 15.011-15.017, Civil Practice and Remedies Code on the basis that a mandatory venue provision is applicable and controlling has the burden to make proof, as provided in paragraph 3 of this rule, that venue is maintainable in the county to which transfer is sought by virtue of one or more mandatory venue exceptions.~~

~~(b) CAUSE OF ACTION. It shall not be necessary for a claimant to prove the merits of a cause of action, but the existence of a cause of action, when pleaded properly, shall be taken as established as alleged by the pleadings. When the defendant specifically denies the venue allegations, the claimant is required, by prima facie proof as provided in paragraph 3 of this rule, to support such pleading that the cause of action taken as established by the pleadings, or a part of such cause of action, accrued in the county of~~

~~suit. If a defendant seeks transfer to a county where the cause of action or a part thereof accrued, it shall be sufficient for the defendant to plead that if a cause of action exists, then the cause of action or part thereof accrued in the specific county to which transfer is sought, and such allegation shall not constitute an admission that a cause of action in fact exists. But the defendant shall be required to support his pleading by prima facie proof as provided in paragraph 3 of this rule, that, if a cause of action exists, it or a part thereof accrued in the county to which transfer is sought.~~

~~(c) OTHER RULES. A motion to transfer venue based on the written consent of the parties shall be determined in accordance with Rule 255. A motion to transfer venue on the basis that an impartial trial cannot be had in the courts where the action is pending shall be determined in accordance with Rules 258 and 259.~~

~~3. Proof.~~

~~(a) AFFIDAVITS AND ATTACHMENTS.~~ All venue facts, when properly pleaded, shall be taken as true unless specifically denied by the adverse party. When a venue fact is specifically denied, the party pleading the venue fact must make prima facie proof of that venue fact. The existence of a claim when pleaded peroperly shall be taken as established for venue purposes, and no party shall ever be required ~~for venue purposes to~~ establish a claim by ~~support~~ prima facie proof. ~~the existence of a cause of action or part thereof, and at the hearing the pleadings of the parties shall be taken as conclusive on the issues of existence of a cause of action.~~

5. **Burden of Proof of Inconvenient Venue.** In addition to the burden of proof of proper venue in accordance with section 5 of this rule, a party seeking transfer to another county of proper venue for the convenience of the parties and witnesses and in the interest of justice pursuant to § 15.002(b) of the Civil Practice and Remedies Code must present proof that transfer is justified on such grounds, regardless of whether the adverse party specifically denies the movant's allegations. The nonmovant may present opposing proof that the court shall also consider when determining whether transfer is justified. The judge may transfer the case for convenience and in the interest of justice after reviewing all of the evidence filed in support of and opposing the transfer and making the findings set forth in § 15.002(b) of the Civil Practice and Remedies Code by the preponderance of the evidence.

6. **Burden of Proof for Plaintiffs or Intervenors**. A plaintiff or intervening plaintiff responding to a motion under this rule must independently of any other plaintiff satisfy the burden of proof of proper venue in accordance with section 5 of this rule or establish the requirements of subdivisions (1) through (4) of § 15.003(a) of the Civil Practice and Remedies Code. The plaintiff or intervenor seeking to establish the requirements of subdivisions (1) through (4) of § 15.003(a) of the Civil Practice and Remedies Code shall present proof relevant to the requirements, the movant may present opposing proof, and the judge shall review all of the evidence determine by the preponderance of the evidence whether to grant or deny the motion.

7. Proof. ~~Prima facie~~ proof is made by filing and serving ~~when the venue facts are properly pleaded and~~ an affidavit, and any duly proved attachments thereto that~~the~~ affidavit, ~~are filed~~ fully and specifically set~~ting~~ forth ~~the~~ facts that support~~ing~~ the grounds for venue that are properly pleaded~~such~~ ~~pleading~~. Affidavits shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify. Deposition transcripts, responses to requests for admission, answers to interrogatories and other discovery products may constitute proofwhen they are attached to, or incorporated by reference in, an affidavit of a party, a witness or an attorney who has knowledge of such discovery.[1]

8. ~~(b) THE~~ HEARING. The court shall determine the motion to transfer ~~venue~~ on the basis of the pleadings, any stipulations made by ~~and between~~ the parties and the proof ~~such affidavits and attachments as may be~~ filed by the parties ~~in accordance with the preceding subdivision of this paragraph 3 or of Rule 88~~. No oral testimony shall be received at the hearing.

~~(c)~~ If a ~~claimant has adequately pleaded and made prima facie proof~~ seeking to maintain venue has established that ~~venue is proper in~~ the county of suit is proper venue ~~as provided in subdivision (a) of paragraph 3~~, ~~then~~ the case~~cause~~ shall not be transferred ~~but shall be retained in the county of suit~~, unless the party seeking transfer has established a mandatory venue in another county or the court finds that transfer to another proper venue for the convenience of the parties and witnesses and in the interest of justice is warranted pursuant to § 15.002(b) of the Civil Practice and Remedies Code. If the party seeking to maintain venue in the county of suit fails to establish proper venue in the county of suit, the case shall be transferred to the county to which transfer is sought if the movant has established proper venue in that county, unless a plaintiff or intervenor has established the requirements of subdivisions (1) through (4) of § 15.003(a) of the Civil Practice and Remedies Code. ~~motion to transfer is based on the grounds that an impartial trial cannot be had in the county where the action is pending as provided in Rules 257-259 or on an established ground of mandatory venue. A ground of mandatory venue is established when the party relying upon a mandatory exception to the general rule makes prima facie proof as provided in subdivision (a) of paragraph 3 of this rule.~~

~~(d) In the event that the parties shall fail to make prima facie proof that the county of suit or the specific county to which transfer is sought is a~~If no ~~county~~ of proper venue is established, then the court may direct the parties to make further proof.

~~4. No Jury. All venue challenges shall be determined by the court without the aid of a jury.~~

[see section 9 below]

[1] from rule 88 with some insignificant changes

10–5. Motions Filed After Ruling for Rehearing. If a court has ruled on venue has been sustained as against a motion to transfer in the case, or if an action has been transferred to a proper county in response to a motion to transfer, then no further motions under this rule to transfer shall be considered, except that if if the prior motion was overruled, the court shall consider a motion to transfer venue filed by a defendant whose appearance date was subsequent to the venue ruling based upon grounds not asserted in the earlier motion or seeking transfer for the convenience of parties and witnesses and in the interest of justice pursuant to § 15.002(b) of the Civil Practice and Remedies Code. Timely filed motions not considered by the court will preserve the movant's objection to venue for purposes of appeal. regardless of whether the movant was a party to the prior proceedings or was added as a party subsequent to the venue proceedings, unless the motion to transfer is based on the grounds that an impartial trial cannot be had under Rules 257-259 or on the ground of mandatory venue, provided that such claim was not available to the other movant or movants.

Parties who are added subsequently to an action and are precluded by this rule from having a motion to transfer considered may raise the propriety of venue on appeal, provided that the party has timely filed a motion to transfer.

6. There shall be no interlocutory appeals from such determination.

Rule 88. Discovery and Venue.

11. Discovery. Discovery shall not be abated or otherwise affected by pendency of a motion to transfer venue. Issuing process for witnesses and taking depositions shall not constitute a waiver of a motion to transfer. venue, but dDepositions taken in asuch case where a motion to transfer is pending may be read in evidence in any subsequent suit between the same parties concerning the same subject matter in like manner as if taken in such subsequent suit. Deposition transcripts, responses to requests for admission, answers to interrogatories and other discovery products containing information relevant to a determination of proper venue may be considered by the court in making the venue determination when they are attached to, or incorporated by reference in, an affidavit of a party, a witness or an attorney who has knowledge of such discovery. [5]

Rule 89. Transferred If Motion Is Sustained.

9. Transfer if Motion is Granted. 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 as provided in Rule ___. If the motion to transfer is granted as to one party, but not as to other parties, the claims by or against that party shall be severed and only the severed cause shall be transferred.

[5] moved to section 7.

Clerk's Rule ___ [redrafted with other clerk rules -- not addressed here]

; 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.

1-6-97 Draft
Redlined from 4/14/96 draft

RULE 86: ~~Motion to Transfer~~[1] Improper or Inconvenient Venue[2]

1. **Applicability**. A motion to transfer a case because venue is improper or inconvenient pursuant to Chapter 15 of the Civil Practice and Remedies Code must be filed according to the provisions of this Rule. A motion to transfer a case because an impartial trial cannot be had where the action is pending is governed by the provisions of Rule ___.

2. **Motion~~, Response and Reply~~.** A motion to transfer must be made prior to or concurrently with ~~any other~~ the movant's first plea, pleading or motion other than a challenge to the court's personal jurisdiction~~special appearance provided for in Rule 120a and may be contained in a separate instrument or included in the movant's first responsive pleading~~, except a motion challenging a plaintiff's intervention on the ground that the intervenor cannot establish independently of any other plaintiff proper venue in the county of suit must be filed within [20] days of the intervention. The motion shall state that the case should be transferred to another specified county of proper venue, state the legal basis for the transfer, and plead venue facts establishing that the county to which transfer is sought is a proper venue.[3] ~~Verification is not required. The motion may be accompanied by supporting affidavits.~~ The movant must ~~to~~ request a hearing on the motion at a reasonable time prior to commencement of the trial. Except upon leave of court, each party is entitled to 45 days notice of the hearing.

3. **Response and Reply.** Any response, including proof filed in opposition to the motion, shall be filed at least 30 days prior to the hearing on the motion. Any reply to the response, including additional proof in support of the motion must be filed not later than 7 days prior to the hearing.

~~4~~5. **Burden of Proof of Proper Venue.** A party seeking to maintain venue in the county of suit has the burden of proof that the county of suit is a proper venue.[4] A party seeking transfer has the burden of proof that the county specified in the motion to which transfer is sought is a proper venue. All venue facts, when properly pleaded, shall be taken as true unless specifically denied by the adverse party. When a venue fact is specifically denied, the party pleading the venue fact satisfies its burden of proof by making prima facie proof of the venue fact. ~~Prima facie proof is made by filing and serving an affidavit~~

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[1] "Motion to Transfer Venue," which is used in the current rule, is really a misnomer. The case is transferred, not venue.

[2] I think this rule is too long to be included in Bill Dorsaneo's Rule 25 so I have kept it as a separate rule.

[3] Under this draft, the motion challenging intervention/joinder is treated exactly like all other venue motions. Therefore, the defendant challenging venue would designate the county to which the plaintiff's case should be sent if the motion is granted. The statute does not necessarily require this result, however. An alternative procedure would be to have the defendant simply challenge the plaintiff's right to be included in the suit, and if the plaintiff cannot satisfy the burden somehow have the plaintiff designate where its part of the case should be sent.

[4] "Proper venue" is a defined term in CPRC § 15.001(b)

~~and any duly proved attachments thereto that fully and specifically set forth facts that support the specifically denied venue facts. Affidavits shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.~~ The existence of a claim[5] when pleaded properly shall be taken as established for venue purposes, and no party shall be required to establish a claim by prima facie proof.

5. **Burden of Proof of Inconvenient Venue~~Transfer pursuant to Civil Practice & Remedies Code § 15.002(b)~~.** In addition to the burden of proof of proper venue in accordance with section 5 of this rule, a~~A~~ party seeking transfer to another county of proper venue for the convenience of the parties and witnesses and in the interest of justice pursuant to § 15.002(b) of the Civil Practice and Remedies Code must present ~~has, in addition to the burden of proof of proper venue in accordance with section 5 of this Rule, the burden of~~ proof that transfer is justified on such grounds, regardless of whether the adverse party specifically denies the movant's allegations. ~~Proof is made by filing and serving an affidavit and any duly proved attachments thereto that fully and specifically set forth facts that support the grounds for transfer. Affidavits shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.~~ The nonmovant may present~~file and serve~~ opposing proof~~affidavits~~ that the court shall also consider when determining whether transfer is justified. The judge may transfer the case for convenience and in the interest of justice after reviewing all of the evidence filed in support of and opposing the transfer and making the findings set forth in § 15.002(b) of the Civil Practice and Remedies Code by the preponderance of the evidence.

6. **Burden of Proof for Plaintiffs or Intervenors**. A plaintiff or intervening plaintiff responding to a motion under this rule must independently of any other plaintiff satisfy the burden of proof of proper venue in accordance with section 5 of this rule or establish the requirements of subdivisions (1) through (4) of § 15.003(a) of the Civil Practice and Remedies Code. The plaintiff or intervenor seeking to establish the requirements of subdivisions (1) through (4) of § 15.003(a) of the Civil Practice and Remedies Code shall present proof relevant to the requirements, the movant may present opposing proof, and the judge shall review all of the evidence determine by the preponderance of the evidence whether to grant or deny the motion.

7. **Proof.** Proof is made by filing and serving an affidavit and any duly proved attachments thereto that fully and specifically set forth facts that support the grounds for venue. Affidavits shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify. Deposition transcripts, responses to requests for admission, answers to interrogatories and other discovery products may constitute proof when they are attached to, or incorporated by reference in, an affidavit of a person who has knowledge of such discovery.

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[5] "Claim" is used in CPRC § 15.002 instead of "cause of action" as in the old statute and current rule.

86. **Hearing.** The court shall determine the motion to transfer on the basis of the pleadings, any stipulations made by the parties, and the proof filed by the parties. No oral testimony shall be received at the hearing. If the party seeking to maintain venue in the county of suit has established that the county of suit is proper venue, the case shall not be transferred unless the party seeking transfer has established a mandatory venue in another county or the court ~~finds, after reviewing all of the evidence filed in support of and opposing the transfer, that~~ finds that transfer to another proper venue for the convenience of the parties and witnesses and in the interest of justice is warranted pursuant to § 15.002(b) of the Civil Practice and Remedies Code. If the party seeking to maintain venue in the county of suit fails to establish proper venue in the county of suit, the case shall be transferred to the county to which transfer is sought if the movant has established proper venue in that county, unless a plaintiff or intervenor has established the requirements of subdivisions (1) through (4) of ~~§~~ § 15.003(a) of the Civil Practice and Remedies Code. If no county of proper venue is established, the court may direct the parties to make further proof.

9. **Transfer if Motion Granted.** If a motion to transfer is granted, the cause shall not be dismissed, but the court shall transfer the case to the proper court as provided in Rule __ [clerk rule, currently Rule 89]. If the motion to transfer is granted as to one party, but not as to other parties, the claims by or against that party shall be severed and only the severed cause shall be transferred.

10**5**. **Motions Filed after Ruling.** If a court has ruled on a motion to transfer venue in the case, no further motions under this rule~~to transfer venue~~ shall be considered except that if the prior motion was overruled, the court shall consider a motion to transfer venue filed by a defendant whose appearance date was subsequent to the venue ruling based upon grounds not asserted in the earlier motion or seeking transfer for the convenience of parties and witnesses and in the interest of justice pursuant to § 15.002(b) of the Civil Practice and Remedies Code~~CPRC~~. Timely filed motions not considered by the court will preserve the movant's objection to venue for purposes of appeal.

11**6**. **Discovery.** Discovery shall not be abated or otherwise affected by pendency of a motion to transfer. Issuing process for witnesses and taking depositions shall not constitute a waiver of a motion to transfer venue. ~~, but d~~Depositions taken in a~~such~~ case where a motion to transfer is pending may be read in evidence in any subsequent suit between the same parties concerning the same subject matter in like manner as if taken in such subsequent suit. ~~Deposition transcripts, responses to requests for admission, answers to interrogatories and other discovery products containing information relevant to a determination of proper venue may be considered by the court in making the venue determination when they are attached to, or incorporated by reference in, an affidavit of a person who has knowledge of such discovery.~~

12~~7~~. **Consent.** At any time the parties may file written consent to transfer the case to any other county and the judge shall order transfer accordingly.[6]

[6] This section could be included in Dorsaneo's Rule 25. For example: "Motions to transfer or change venue shall be made pursuant to Rule ___ or Rule ___. At any time the parties may file written consent to transfer the case ..."

Rule 86: Improper or Inconvenient Venue
1/13/97 Revision

1. **Applicability**. [no change from 1/6/97 draft]

2. **Motion~~.~~ to Transfer**.

a. **Time to file.** A motion to transfer must be made prior to or concurrently with the movant's first plea, pleading or motion other than a challenge to the court's personal jurisdiction, except a motion challenging a plaintiff's intervention on the ground that the intervenor cannot establish independently of any other plaintiff proper venue in the county of suit must be filed within [20] days of the intervention.

b. **Grounds for Motion**. The motion to transfer shall specifically deny pleaded venue facts, state that the case should be transferred to another specified county of proper venue, state the legal basis for the transfer, and plead venue facts establishing that the county to which transfer is sought is a proper venue. In a case with multiple plaintiffs, a motion to transfer may challenge a plaintiff's joinder or intervention on the ground that the ~~intervenor~~ cannot establish independently of any other plaintiff proper venue in the county of suit. The motion need not specifically deny pleaded venue facts nor seek transfer to another specified county of proper venue.

3. **Time for Hearing, Response and Reply**. The movant must request a hearing on the motion at a reasonable time prior to commencement of the trial. Except upon leave of court, each party is entitled to 45 days notice of the hearing.

~~3. **Response and Reply**.~~ Any response, including proof filed in opposition to the motion, shall be filed at lest 30 days prior to the hearing on the motion. Any reply to the response, including additional proof in support of the motion must be filed not later than 7 days prior to the hearing.

4. [same aas 1/6/97 draft]

5. [same aas 1/6/97 draft]

6. **Burden of Proof for Challenges to Joinder or Intervention~~Plaintiffs or Intervenors~~**. A plaintiff, original or intervening, ~~plaintiff~~ responding to a motion challenging a plaintiff's joinder or intervention on the ground that the plaintiff cannot establish independently of any other plaintiff proper venue in the county of suit ~~under this rule~~ must independently of any other plaintiff satisfy the burden of proof of proper venue in accordance with section 5 of this rule or establish the requirements of subdivisions (1) through (4) of @ 15.003(a) of the Civil Practice and Remedies Code. The plaintiff ~~or intervenor~~ seeking to establish the requirements of subdivisions (1) through (4) of @ 15.003(a) of the Civil Practice and Remedies Code shall present proof relevant to the requirements, the movant may present opposing proof, and the judge shall review all of the evidence and determine by the preponderance of the evidence whether to grant or deny the motion.

7. [same as 1/6/97 draft]

8. [same as 1/6/97 draft]

9. **Transfer if Motion Granted.** If a motion to transfer is granted, the cause shall not be dismissed, but the court shall transfer the case to the proper court as provided in Rule __ [clerk rule, currently Rule 89]. However, if the motion challenging an intervention is granted, the court may strike the intervention or transfer the intervenor's claim to the proper court. If the motion to transfer is granted as to one party, but not as to other parties, the claims by or against that party shall be severed and only the severed cause shall be transferred, unless @15.004 of the Civil Practice and Remedies Code applies.

10. [same as 1/6/97 draft]

11. [same as 1/6/97 draft]

12. [same as 1/6/97 draft]

RULE 622 EXECUTION

An execution is a process of the court from which it is issued. The clerk of the district or county court or the justice of the peace, as the case may be, shall tax the costs in every case in which a final judgment has been rendered and shall issue execution to enforce such judgment and collect such costs. Several writs of execution may be issued at the same time or in succession and sent to different counties to satisfy the judgment. The execution and subsequent executions shall not be addressed to a particular county, but shall be addressed to any sheriff or any constable within the State of Texas.

Comment: Allows issuance of more than one execution.

RULE 622 EXECUTION

An execution is a process of the court from which it is issued. The clerk of the district or county court or the justice of the peace, as the case may be, shall tax the costs in every case in which a final judgment has been rendered and shall issue execution to enforce such judgment and collect such costs. A subsequent execution may only be issued upon return of a previously issued execution or upon affidavit that the execution was lost. The execution and subsequent executions shall not be addressed to a particular county, but shall be addressed to any sheriff or any constable within the State of Texas.

Comment: Defines that only one execution may be issued at a time.