JACKSON
WALKER
L.L.P.

MEMORANDUM

TO: SCAC Members

FROM: Chip Babcock

DATE: October 18, 2000

RE: Documents for October SCAC Meeting

The following is a list of documents you may want to bring with you to the October meeting and coincide with the Agenda:

2.1 Voir Dire

- Report of the Jury Rules Subcommittee Proposed Voir Dire Rule dated May 15, 2000.

2.3 TRAP Rules

- Memorandum from Bill Dorsaneo dated August 31, 2000.
- Proposed Revisions Texas Rules of Appellate Procedure – Revised Draft.

2.4 Rule 191

- Rule 194A. Requests for Disclosure Under Title I and V of Texas Family Code.
- Memorandum from Georganna Simpson to Richard Orsinger dated September 8, 1999.
- Ralph Duggins' letter dated January 11, 2000 with Local Rule 7.1.

2.4 Rule 306(a)

- Orsinger letter dated November 2, 1999 enclosing Pamela Baron's amicus letter of October 27, 1999.

- Case: *Marco Bence Grodona, et al v. Joseph H. Hutton*, 991 S.W.2d 90 (Tex. Civ. App. – Austin 1998, pet. denied)

2.5 Venue in JP Courts

- January 14, 2000 Skip Watson letter re: amendments to Rules 528 and 647 Tex. R. Civ. P.

- August 31, 2000 Watson letter enclosing proposed changes to Rules 528, 647 and 742 Tex. R. Civ. P.

- November 5, 1998 Hamilton letter to Chief Justice Phillips regarding Proposed Rule Changes to Rules 528, 647 and 742 with proposed changes.

You should be in possession of most, if not all, of the above-referenced documents. However, if you are in need of a document, please contact Carrie as soon as possible so we can forward it to you. As she will be on crutches during this meeting, it is necessary that the copying and distribution of documents be taken care of prior to Friday.

Texas Parental Notification Rules and Forms
May 19-May 20, 2000

TEXAS PARENTAL NOTIFICATION RULES AND FORMS

~~*effective date January 1, 2000*~~

Revised to Reflect ~~April 18~~ May 19-May 20, 2000. Recommendations of ~~Special Subcommittee on Implementation of Family Code Chapter 33~~ Supreme Court Rules Advisory Committee

EXPLANATORY STATEMENT

Chapter 33 of the Texas Family Code, adopted by Act of May 25, 1999, 76th Leg., R.S., ch. 395, 1999 Tex. Gen. Laws 2466 (S.B. 30), provides for judicial authorization of an unemancipated minor to consent to an abortion in Texas without notice to her parents, managing conservator, or guardian. Section 2 of the Act states: "The Supreme Court of Texas shall issue promptly such rules as may be necessary in order that the process established by Sections 33.003 and 33.004, Family Code, as added by this Act, may be conducted in a manner that will ensure confidentiality and sufficient precedence over all other pending matters to ensure promptness of disposition." *See also* Tex. Fam. Code §§ 33.003(l), 33.004(c). Section 6 of the Act adds: "The clerk of the Supreme Court of Texas shall adopt the application form and notice of appeal form to be used under sections 33.003 and 33.004, Family Code, as added by this Act, not later than December 15, 1999." *See also* Tex. Fam. Code §§ 33.003(m), 33.004(d).

The following rules and forms are promulgated as directed by the Act without any determination that the Act or any part of it comports with the United States Constitution or the Texas Constitution. During the public hearings and debates on the rules and forms, questions were raised concerning the constitutionality of Chapter 33, among which were whether the statute can make court rulings secret, and whether the statute can require courts to act within the specified, short deadlines it imposes. Because such issues should not be resolved outside an adversarial proceeding with full briefing and argument, the rules and forms merely track statutory requirements of the Legislature. Adoption of these rules does not, of course, imply that abortion is or is not permitted in any specific situation. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973); Tex. Rev. Civ. Stat. Ann. art. 4495b, § 4.011 (restrictions on third trimester abortions of viable fetuses).

The notes and comments appended to the rules are intended to inform their construction and application by courts and practitioners.

RULE 1. GENERAL PROVISIONS

1.1 Applicability of These Rules. These rules govern proceedings for obtaining a court order authorizing a minor to consent to an abortion without notice to either of her parents or a managing conservator or guardian under Chapter 33, Family Code (or as amended). Other Texas court rules — including the Rules of Civil Procedure, Rules of Evidence, Rules of Appellate Procedure, Rules of Judicial Administration, and local rules approved by the Supreme Court — also apply, but when the application of another rule would be inconsistent with the general framework or policy of Chapter 33, Family Code, or these rules, these rules control.

1.2 Expedition Required.

(a) ***Proceedings.*** A court must give proceedings under these rules precedence over all other pending matters to the extent necessary to assure that applications and appeals are adjudicated as soon as possible and within the time required by Rules 2.4(a), 2.5(d), and 3.3(c).

(b) ***Prompt actual notice required.*** Without compromising the confidentiality and anonymity required by statute and these rules, courts and clerks must serve orders, decisions, findings, and notices required under these rules in a manner designed to give prompt actual notice in order that the deadlines imposed by Chapter 33, Family Code, can be met.

(c) ***Instanter.*** "Instanter" means immediately, without delay. An action required by these rules to be taken instanter should be done at the first possible time and with the most expeditious means available.

1.3 Anonymity of Minor Protected.

(a) ***Generally.*** Proceedings under these rules must be conducted in a way that protects the anonymity of the minor.

(b) ***No reference to minor's identity in proceeding.*** With the exception of the verification page required under Rule 2.1(c)(2) and the communications required under Rule 2.2(e), no reference may be made in any order, decision, finding, or notice, or on the record, to the name of the minor, her address, or other information by which she might be identified

by persons not participating in the proceedings. Instead, the minor must be referred to as "Jane Doe" in a numbered cause.

(c) ***Notice required to minor's attorney.*** With the exception of orders and rulings released under Rule 1.4(b), all service and communications from the court to the minor must be directed to the minor's attorney. This requirement takes effect when an attorney appears for the minor, or when the clerk has notified the minor of the appointment of an attorney.

1.4 Confidentiality of Proceedings Required; Exceptions.

(a) ***Generally.*** All officials and court personnel involved in the proceedings must ensure that the minor's contact with the clerk and court is confidential and expeditious. Except as permitted by law, no officials or court personnel involved in the proceedings may ever disclose to anyone outside the proceedings — including the minor's parent, managing conservator, or legal guardian — that the minor is or has ever been pregnant, or that she wants or has ever wanted an abortion.

(b) ***Documents and information pertaining to the proceeding.***

(1) *Confidentiality.*[1] As required by Chapter 33, Family Code, the application, ~~and~~ all other court documents pertaining to the proceedings, and any and all information pertaining to the proceedings are, unless expressly exempted by these rules, confidential and privileged and are not subject to disclosure under Chapter 552, Government Code, or to discovery, subpoena, or other legal process.[2]

(2) *Exceptions.*[3]

(A) Orders, rulings, opinions and certificates.

~~But a~~ An order, ruling, opinion, or clerk's certificate may be released to:

(i) the minor;

(ii) the minor's guardian ad litem;

(iii) the minor's attorney;

(iv) a person designated in writing by the minor to receive the order, ruling, opinion, or certificate;

(v) a governmental agency or governmental attorney, in connection with a criminal or administrative action seeking to assert or protect the minor's interests; or

(vi) another court, judge, or clerk in the same or related proceedings.

(B) Reporting of abuse. A court, guardian ad litem, and attorney ad litem are exempt from the requirements of Rule 1.3 and Rule 1.4(a) & (b)(1) to the extent necessary to comply with Rule 1.4(d).

(C) Orders awarding costs. A clerk[4] may confidentially transmit an order for costs to the Department of Health and Office of Court Administration, as permitted by Rule 1.9.

(D) Reporting requirements. Courts and clerks must report information concerning the proceeding under procedures established by the Texas Judicial Council for proceedings under Family Code Chapter 33.[5]

(c) ***Filing of court reporter's notes permitted.*** To

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[1] *See* Annotated Memorandum at 1.

[2] Paul Watler believes this language is unconstitutionally overbroad.

[3] The changes to this paragraph are mine alone, but they are inspired by a suggestion made by Jim Allison during the Special Subcommittee's deliberations. While the Subcommittee was debating whether to include language clarifying that minor's lawyers and ad litems could have access to the case file – concerns that ultimately were addressed in the proposed changes to comment 3, below – Jim suggested that the phrase "But an order, ruling, . . ." implied incorrectly that the six exceptions listed in Rule 1.4(b) were the sole exceptions to the general confidentiality restrictions in the rule. The above changes, as well as the proposed changes to comment 3, are intended to clarify the nature and scope of the exceptions.

Inasmuch as these exceptions also apply as against Rule 1.3 and Rule 1.4(a), should they be restructured as a stand-alone provision outside of Rule 1.4(b)? Justice McClure thought we should.

[4] No person other than the clerk will transmit these orders.

[5] Technically, it is the Judicial Council that determines the information that gets reported. But should the guidelines nonetheless be restated in the rules? Justice McClure thought they should be.

assure confidentiality, court reporter notes, in whatever form, may be filed with other court documents in the proceeding.

(d) ***Duty to report possible sexual abuse.*** A court, guardian ad litem, or attorney ad litem who reasonably believes, based on information obtained in the proceeding, that a violation of Section 22.011, 22.021, or 25.02, Penal Code, has occurred must report the information to the appropriate officials or agencies as required by Section 33.009, Family Code.

(e) ***Department of Protective and Regulatory Services to disclose certain information in proceeding.*** The Department of Protective and Regulatory Services may disclose to the court, the attorney ad litem, and the guardian ad litem any information obtained under Section 33.008, Family Code, without being ordered to do so. The trial court may order the Department to disclose such information to such persons, and the Department must comply.

1.5 Electronic Transmission of Documents; Hearings Conducted By Remote Electronic Means; Electronic Record Allowed When Necessary.

(a) ***Electronic filing.*** Documents may be filed by facsimile or other electronic data transmission. If the sender communicates directly with the clerk the time at which the transmission will occur, the clerk must take all reasonable steps to assure that the confidentiality of the received transmission will be maintained.

(b) ***Electronic transmission by court and clerk.*** The court and clerk may transmit orders, rulings, notices, and other documents by facsimile or other electronic data transmission. But before the transmission is initiated, the sender must take all reasonable steps to assure that the confidentiality of the received transmission will be maintained. The time and date of a transmission by the court is the time and date when it was initiated.

(c) ***Hearings by electronic means.*** Consistent with the anonymity and confidentiality requirements of these rules, with the court's permission, the attorney ad litem, the guardian ad litem, and any witnesses may participate in hearings under these rules by video conferencing, telephone, or other remote electronic means. The minor must appear before the court in person unless the court determines that the minor's appearance by video conferencing will allow the court to view the minor during the hearing sufficiently well to assess her credibility and demeanor.

(d) ***Record of hearing made by electronic means if necessary.*** If the court determines that a court reporter is unavailable for a hearing, the court may have a record of the hearing made by audio recording or other electronic means. If a notice of appeal is filed, the court must have the recording transcribed if possible. The person transcribing the recording must certify to the accuracy of the transcription. The court must transmit both the recording and the transcription to the court of appeals.

1.6 Disqualification, Recusal, or Objection to a Judge.

(a) ***Time for filing and ruling.*** An objection to a **trial** judge, or a motion to recuse or disqualify a **trial** judge, must be filed before 10:00 a.m. of the first business day after an application is filed or ~~notice of appeal is filed. A judge who chooses to recuse voluntarily must do so before 12:00 noon~~ **promptly after learning who will hear the case, whichever is later. An objection to an appellate judge, or a motion to recuse or disqualify an appellate judge, must be filed before 10:00 a.m.** of the first business day after ~~an application or~~ **a** notice of appeal is filed. **A judge who chooses to recuse voluntarily must do so instanter.** An objection to a judge or a motion to disqualify or recuse does not extend the deadline for ruling on the minor's application.

(b) ***Voluntary disqualification or recusal, or objection.*** A judge to whom objection is made under Chapter 74, Government Code, or a judge or justice who voluntarily does not sit, must notify instanter the appropriate authority for assigning another judge by local rules or by statute. That authority must instanter assign a judge or justice to the proceeding.

(c) ***Involuntary disqualification or recusal.*** A judge or justice who refuses to remove himself or herself voluntarily from a proceeding in response to a motion must instanter refer the motion to the appropriate judge or justice, pursuant to local rule, rule, or statute, for determination. The judge or justice to whom the motion is referred must rule on it as soon as possible and may do so with or without a hearing. If the motion is granted, the judge or justice to whom the motion was referred must instanter assign a judge or justice to the proceeding.

(d) ***Only one objection or motion to recuse permitted.*** A minor who objects to a judge assigned to the proceeding may not thereafter file a motion to recuse or disqualify, and a minor who files a motion to recuse or disqualify a judge may not thereafter object to a judge assigned to the proceeding.

(e) ***Issues on appeal.*** Any error in the denial of a motion to recuse or disqualify, or any error in the disallowance of an objection, or any challenge to a judge that a minor is precluded from making by subsections (a) or (d), may be raised only on appeal from the court's denial of the application.

1.7 Rules and Forms to be Made Available. A copy of these rules, and a copy of the attached forms in English and Spanish, must be made available to any person without charge in the clerk's offices of all courts in which applications or appeals may be filed under these rules, on the Texas Judiciary Internet site at www.courts.state.tx.us, and by the Office of Court Administration upon request. A copy of a court's local rules relating to proceedings under Chapter 33, Family Code, must be made available to any person without charge in the office of the clerk for that court where applications may be filed. Rules and forms may be copied.

1.8 Duties of Attorneys Ad Litem. An attorney ad litem must represent the minor in the trial court in the proceeding in which the attorney is assigned, and in any appeal under these rules to the court of appeals or the Supreme Court. But an attorney ad litem is not required to represent the minor in any other court or any other proceeding.

1.9 Fees and Costs.[6]

(a) ***No fees or costs charged to minor.*** No filing fee or court cost may be assessed against a minor for any proceeding in a trial or appellate court.

(b) ***State ordered to pay fees and costs.***[7] The State may be ordered to pay the reasonable and necessary fees and expenses of the attorney ad litem, the reasonable and necessary fees and expenses of the guardian ad litem, the court reporter's fee as certified by the court reporter, and filing fees and costs as certified by the clerk. The order must be directed to the Comptroller of Public Accounts but should be sent by the clerk[8] to the Director, Fiscal Division, of the Texas Department of Health. The order ~~and~~ must state the amounts to be awarded the attorney ad litem and the guardian ad litem. The order must be separate from any other order in the proceeding and must not address any subject other than the assessment of costs. A trial court may use Forms 2F.1[9] and 2F, but it is not required to do so. Except for good cause shown,[10] the order must be sent to the Director not less than 60 days from the latest of the following, if applicable[11]:

(1) the date of the final ruling on the merits in the proceeding;

(2) the date upon which the application is deemed granted;

(3) the date upon which the proceeding is dismissed or nonsuited; or

(4) the date upon which the application or appeal is filed.[12]

(c) ***~~Witness fees~~ Court Costs.*** Court costs include the expenses of a translator but do not include the fees or expenses of a witness.

(d) ***Motion to reconsider; time for filing.*** Within thirty days of actual receipt of the order, the Comptroller[13] may file a motion in the trial court to reconsider the assessment of costs. The trial court retains jurisdiction of the case to hear and determine any timely filed motion to reconsider.

(e) ***Appeal.*** The Comptroller may appeal from the trial court's ruling on the motion to reconsider as from any other final judgment of the court.

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[6] From pp. 7-8 of the annotated memo. *See also* proposed changes to comment 8.

[7] Should this paragraph be broken out into subparts? It's getting a little lengthy and obtuse. Debbie Saenz of the Subcommittee thought so.

[8] *See* note 4, above.

[9] Form 2F.1 is the form transmittal letter devised by the clerks and the Department of Health. I've included it in the attached forms.

[10] It seemed like some leeway would be necessary, especially where a proceeding ends because a minor ceases to pursue it, but no formal order or motion for dismissal or nonsuit is filed. Susan Steeg of the Department of Health questioned this view.

[11] Susan Steeg of the Department of Health urged that the cut-off be *receipt* of the order, rather than transmission, within 60 days of x.

Would "served" on the director be better? This would incorporate the mailbox rule, etc.

[12] A reference to these time requirements has been added to Forms 2F.1 and 2F.

[13] Should the Department of Health, as well as the Comptroller, have standing to challenge and appeal these orders? The Special Subcommittee's view was "no."

(f) ***Report to the Office of Court Administration.*** The court must transmit to the Office of Court Administration a copy of every order assessing costs in a proceeding under Chapter 33, Family Code. This obligation supplants the court's reporting obligations under the Texas Supreme Court's Amended Order Regarding Mandatory Reports of Judicial Appointments and Fees, Misc. Docket No. 94-9143, dated September 21, 1994.

(g) ***Confidentiality.*** When transmitting an order awarding costs to the Department of Health and Office of Court Administration, the clerk must do so confidentially.[14] The confidentiality of an order awarding costs — as prescribed by Chapter 33, Family Code — is not affected by its transmission to the Comptroller, Texas Department of Health, or the Office of Court Administration, nor is the order subject to public disclosure in response to a request under any statute, rule, or other law. But these rules do not preclude the Comptroller, Texas Department of Health, and the Office of Court Administration from disclosing summary information from orders assessing costs for statistical or other such purposes.

1.10 **Amicus Briefs.**[15] Amicus briefs may be submitted – but not filed – under either of the following sets of procedures.

(a) ***Confidential, Case-Specific Briefs.*** A non-party who is authorized to attend or participate in a particular proceeding under Chapter 33, Family Code ~~– such as a guardian ad litem or witness –~~ may submit an amicus brief addressing matters, including confidential matters, specific to the proceeding. The brief and the manner in which it is submitted must comply with Rules 1.3 and 1.4 and be directed to the court in which the proceeding is pending. The person must submit the original brief and the same number of copies required for other submissions to the court, and must serve a copy of the brief on the minor's attorney. The court to which the brief is submitted must maintain the brief as part of the confidential case file in accordance with Rule 1.4.

(b) ***Public or General Briefs.*** Any person may submit a brief addressing any matter relating to proceedings under Chapter 33, Family Code. Such a brief must not contain any information tending to reveal a particular proceeding, minor, or judge, except that the brief may contain information that has been disclosed in an opinion of the Texas Supreme Court. The original and eleven copies of the brief, plus a computer disk containing the brief, must be submitted to the Texas Supreme Court. Upon submission, the Clerk of the Supreme Court must, as soon as practicable, have the brief posted on the Texas Judiciary Internet site and make a copy of the brief available to the public for inspection and copying.

Notes and Comments

1. Rule 1.1 contemplates that other court rules of procedure and administration remain as a "default" governing matters not addressed in these rules. Thus, for example, these rules do not state a deadline for filing notices of appeal, so the ordinary 30-day deadline controls, *see* Tex. R. App. P. 26.1, but these rules control over inconsistent provisions in the appellate rules governing the docketing statement, the record, and briefing.

2. Rule 1.1 also contemplates that individual jurisdictions may enact local rules pursuant to Tex. R. Civ. P. 3a, Tex. R. App. P. 1.2, or Tex. R. Jud. Admin. 10, to the extent consistent with Chapter 33, Family Code, and with these rules, to tailor the implementation of the statute and these rules to local needs and preferences. Local rules may address, for example, the specific location or office where applications are to be filed, how applications are to be assigned for hearing, and whether an appellate court will permit or require briefing or oral argument. *See also* Rule 2, Comment 1.

3. Any judge involved in a proceeding, whether as the judge assigned to hear and decide the application, ~~or~~ **the judge assigned to hear and decide any disqualification, recusal or objection,** a judge authorized to transfer the application or assign another judge to it, or an appellate judge,[16] may have access to all information (including the verification page) in the proceeding or any related proceeding, such as a prior filing by the minor. Similarly, a minor's attorney and guardian ad litem must, of course, have access to the case file to the extent necessary to perform their respective duties.[17]

4. Section 33.008, Family Code, requires a physician who suspects that a minor has been physically or sexually abused by a person responsible for the minor's care to report the matter to the Texas Department of Protective and Regulatory Services. That section also requires the Department to investigate and to assist the minor in making an application, if appropriate. Section 33.010 makes confidential — "[n]otwithstanding any other law" — all information obtained by the Department under Section 33.008 except to the extent necessary to prove certain criminal conduct. Rule 1.4(e) construes Section 33.010 in harmony with Section 33.008. If Section 33.010 precluded the Department from disclosing information obtained under Section 33.008 to the court, the

[14] This new language seemed warranted.

[15] From p. 6 of the annotated memo.

[16] From p. 9 of the annotated memorandum.

[17] From p. 4 of the annotated memorandum.

attorney ad litem, and the guardian ad litem in proceedings under section 33.003, the Department's statutorily mandated role in such proceedings would be seriously impaired. The Department could be required by Section 33.008 to assist a minor in filing an application but prohibited by Section 33.010 from providing the court with information supporting the application. The disclosure permitted and required by Rule 1.4(e) avoids this result.

5. Rule 1.5(a) constitutes the approval required by Section 51.803, Government Code, for electronic filing of documents in proceedings under these rules. To facilitate expedition of proceedings, restrictions imposed on electronic filing in other cases are not imposed here. However, electronic filing is only permitted, not required, and Rule 1.5(a) does not necessitate the provision of means for electronic filing. A person filing by electronic means cannot, of course, expect that the document will be treated confidentiality upon receipt unless the recipient has been told the time the transmission will occur.

6. Rule 1.6 controls to the extent that it conflicts with other provisions regarding the disqualification or recusal of judges, such as Tex. R. Civ. P. 18a, Tex. R. App. P. 16, and Tex. Gov't Code 25.00255. But the rule incorporates the referral and reassignment processes otherwise applicable by local rule, rule, or statute.

7. The archival requirements relating to proceedings under Chapter 33, Family Code, and these rules is governed by Sections 441.158 and 441.185, Government Code, and the schedules promulgated by the Texas State Library and Archives Commission pursuant to those authorities.

8. Because orders awarding costs contain information made confidential by Chapter 33, Family Code, that confidentiality should not be affected by the transmission to the Texas Department of Health and the Comptroller, which is necessary to effectuate payment, or to the Office of Court Administration, which is necessary to oversee the costs associated with the proceedings. Rule 1.9(g) does not preclude either the Comptroller, Texas Department of Health, or the Office of Court Administration from disclosing total amounts paid for all proceedings, or average amount per proceeding, or other such statistical summaries or analyses which do not impair the confidentiality of the proceedings.

RULE 2. PROCEEDINGS IN THE TRIAL COURT

2.1 Where to File an Application; Court Assignment and Transfer; Application Form.

(a) ***Counties in which an application may be filed.*** An application for an order under Section 33.003, Family Code, may be filed in any county, regardless of the minor's residence or where the abortion sought is to be performed.

(b) ***Courts in which an application may be filed; assignment and transfer.***

(1) *Courts with jurisdiction.* An application may be filed in a district court (including a family district court), a county court-at-law, or a court having probate jurisdiction.

(2) *Application filed with district or county clerk.* An application must be filed with either the district clerk or the county clerk, who will assign the application to a court as provided by local rule or these rules. The clerk to whom the application is tendered cannot refuse to accept it because of any local rule or other rule or law that provides for filing and assignment of such applications but must accept the application and transfer it instanter to the proper clerk, advising the person tendering the application where it is being transferred.

(3) *Court assignment and transfer by local rule.* The courts in a county that have jurisdiction to hear applications may determine by local rule how applications will be assigned between or among them. A local rule must be approved by the Supreme Court under Rule 3a, Texas Rules of Civil Procedure.

(4) *Initial court assignment if no local rule.* Absent a local rule, the clerk that files an application — whether the district clerk or the county clerk — must assign it as follows:

(i) to a district court, if the active judge of the court, or a judge assigned to it, is then present in the county;

(ii) if the application cannot be assigned under (i), then to a statutory county or probate court, if the active judge of the court, or a judge assigned to it, is then present in the county;

(iii) if the application cannot be assigned under (i) or (ii), then to the constitutional county court, if it has probate jurisdiction, and if the active judge of the court, or a judge assigned to it, is then present in the county;

(iv) if the application cannot be assigned under (i), (ii), or (iii), then to the district court.

(5) *Judges who may hear and determine applications.* An application may be heard and determined (i) by the active judge of the court

to which the application is assigned, or (ii) by any judge authorized to sit for the active judge, or (iii) by any judge who may be assigned to the court in which the application is pending. An application may not be heard or determined, or any proceedings under these rules conducted, by a master or magistrate.

(c) *Application form.* An application consists of two pages: a cover page and a separate verification page.

(1) *Cover page.* The cover page may be submitted on Form 2A, but use of the form is not required. The cover page must be styled "In re Jane Doe" and must not disclose the name of the minor or any information from which the minor's identity could be derived. The cover page must state:

(A) that the minor is pregnant;

(B) that the minor is unmarried, is under 18 years of age, and has not had her disabilities removed under Chapter 31, Family Code;

(C) that the minor wishes to have an abortion without notifying either of her parents or a managing conservator or guardian, and the statutory ground or grounds on which she relies;

(D) whether the minor has retained an attorney, and if so, the attorney's name, address, and telephone number;

(E) whether the minor requests the court to appoint a particular person as her guardian ad litem; and

(F) whether, concerning her current pregnancy, the minor has previously filed an application that was denied, and if so, where the application was filed.

(2) *Verification page.* The verification page may be submitted on Form 2B, but use of the form is not required. The verification page must be separate from the cover page, must be signed under oath by the person completing the application, and must state:

(A) the minor's full name and date of birth;

(B) the name, address, telephone number, and relationship to the minor of any person the minor requests the court to appoint as her guardian ad litem;

(C) a telephone or pager number — whether that of the minor or someone else (such as a physician, friend, or relative) — at which the minor may be contacted immediately and confidentially until an attorney is appointed to represent her; and

(D) that all information contained in the application, including both the cover page and the verification page, is true.

(d) *Time of filing.* An application is filed when it is actually received by the district or county clerk.

2.2 Clerk's Duties.

(a) *Assistance in filing.* The clerk must give prompt assistance — in a manner designed to protect the minor's confidentiality and anonymity — to persons seeking to file an application. If requested, the clerk must administer the oath required for the verification page or provide a person authorized to do so. The clerk should also redact from the cover page any information identifying the minor. The clerk should ensure that both the cover page and the separate verification page are completed in full.

(b) *Filing procedure.* The clerk must assign the application a cause number and affix it to both the cover page and the verification page. The clerk must then provide a certified copy of the verification page to the person filing the application. The clerk must file the verification page under seal in a secure place where access is limited to essential court personnel.

(c) *Distribution.* When an application is filed, the clerk must distribute the cover page and verification page, or a copy of them, to the appropriate court instanter. If appointment of a specific person as guardian ad litem has been requested, the clerk must also communicate the information to the appropriate court instanter.

(d) *If judge of assigned court not present in county.* The clerk must determine instanter whether the judge of the court to which the application is assigned is present in the county. If that judge is not present in the county, the clerk must instanter notify the local administrative judge or judges and the presiding judge of the administrative judicial region and must send them any information requested, including the cover page and verification page.

(e) *Notice of hearing and appointments.* When the clerk is advised by the court of a time for hearing or an appointment of a guardian ad litem or attorney ad litem, the clerk must instanter give notice — as

directed in the verification page and to each appointee — of the hearing time or appointment. A court coordinator or other court personnel may give notice instead of the clerk.

(f) ***Orders.*** The clerk must provide the minor and the attorney ad litem with copies of all court orders, including findings of fact and conclusions of law.

(g) ***Certificate of court's failure to rule within time prescribed by statute.*** If the court fails to rule on an application within the time required by Section 33.002(g) and (h), Family Code, upon the minor's request, the clerk must instanter issue a certificate to that effect, stating that the application is deemed by statute to be granted. The clerk may use Form 2E but is not required to do so.

2.3 Court's Duties. Upon receipt of an application from the clerk, the court must promptly:

(a) appoint a qualified person to serve as guardian ad litem for the minor;

(b) appoint an attorney for the minor, who may be the same person appointed guardian ad litem if that person is an attorney admitted to practice law in Texas and there is no conflict of interest in the same person serving as attorney ad litem and guardian ad litem;

(c) set a hearing on the application in accordance with Rule 2.4(a); and

(d) advise the clerk of the appointment or appointments and the hearing time.

2.4 Hearing.

(a) ***Time.*** The court must conduct a hearing in time to rule on the application as required by Rule 2.5(d). But the minor may postpone the hearing by written request to the clerk when the application is filed or thereafter. The request may be submitted on Form 2C, but use of the form is not required. The request must either specify a date on which the minor will be ready for the hearing, or state that the minor will later provide a date on which she will be ready for the hearing. Once the minor determines when she will be ready for the hearing, she must notify the clerk of that time in writing. The postponed hearing must be conducted in time for the court to rule on the application as required by Rule 2.5(d).

(b) ***Place.*** The hearing should be held in a location, such as a judge's chambers, that will assure confidentiality. The hearing may be held away from the courthouse.

(c) ***Persons attending.*** Hearings must be closed to the public. Only the judge, the court reporter and any other essential court personnel, the minor, her attorney, her guardian ad litem, and witnesses on the minor's behalf may be present.

(d) ***Record.*** If the minor appeals, or if there is evidence of past or potential abuse of the minor, the hearing must be transcribed instanter.

(e) ***Hearing to be informal.*** The court should attempt to rule on the application without regard to technical defects in the application or the evidence. Affidavits of persons other than applicants are admissible. Statements in the application cannot be offered as evidence to support the application. If necessary, the court may assist the minor in remedying technical defects in the application and in presenting relevant and material facts.

2.5 Ruling.

(a) ***Form of ruling.*** The court's ruling on the application must include a signed order and written findings of fact and conclusions of law. The findings and conclusions may be included in the order. The court may use Form 2D, but it is not required to do so.

(b) ***Grounds for granting application.*** The court must grant the application if the minor establishes, by a preponderance of the evidence, that:

(1) the minor is mature and sufficiently well informed to make the decision to have an abortion performed without notifying either of the minor's parents, the minor's managing conservator, or the minor's legal guardian, as the case may be;

(2) notifying either of the minor's parents, the minor's managing conservator, or the minor's legal guardian, as the case may be, would not be in the minor's best interest; or

(3) notifying either of the minor's parents, the minor's managing conservator, or the minor's legal guardian, as the case may be, may lead to physical, sexual, or emotional abuse of the minor.

(c) ***Grounds for denying application.*** If the minor can establish none of the grounds in Rule 2.5(b) by a preponderance of the evidence, the court must deny the application. If the court, the guardian ad litem, or the attorney ad litem are unable to contact the

minor before the hearing despite diligent attempts to do so, or if the minor does not attend the hearing, the court must deny the application without prejudice.

(d) ***Time for ruling.*** The court must rule on an application as soon as possible after it is filed, subject to any postponement requested by the minor, and immediately after the hearing is concluded. Section 33.003(h), Family Code, states that a court must rule on an application by 5:00 p.m. on the second business day after the day the application is filed, or if the minor requests a postponement, after the date the minor states she is ready for the hearing, and that if the court does not rule within this time, the application is deemed to be granted.[18]

(e) ***Notification of right to appeal.*** If the court denies the application, it must inform the minor of her right to appeal under Rule 3 and furnish her with the notice of appeal form, Form 3A.

Notes and Comments

1. Section 33.003(b), Family Code, permits an application to be filed in "any county court at law, court having probate jurisdiction, or district court, including a family district court, in this state." The initial assignment of an application to specific court in a county is made by the clerk with whom the application is filed (not by the minor). Given the diversity of needs and circumstances among Texas courts, these rules allow the courts in each county to~~to~~[19] tailor the procedures for filing, handling, and assigning applications prescribed by these rules to best meet those needs and circumstances. Chapter 74, Subchapter C, Government Code, affords the presiding judge of an administrative judicial region broad discretion to assign active judges within the region, as well as visiting judges, to hear matters pending in courts within the region. *See* Tex. Govt. Code §§ 74.054, 74.056; *see also id.*, § 74.056(b) (presiding judges may request judges from other judicial regions for assignment); § 74.057 (Chief Justice may assign judges from one judicial region to another). Section 25.0022, Government Code, provides for assignment of probate judges. Furthermore, Chapter 74, Subchapter D, Government Code, authorizes district and statutory county court judges within a county to hear matters pending in any district or statutory county court in the county. *Id.*, § 74.094(a). Finally, Section 74.121, Government Code, permits courts within a county to transfer cases among courts having jurisdiction over the case. If no local rule governs assignments, then Rule 2.1(b)(4) controls.

2. Because an application is considered filed when it is actually received by the clerk, the timing provisions relating to filing by mail of Tex. R. Civ. P. 21a are inapplicable.

3. Section 33.003(f), Family Code, provides that a guardian ad litem may be (1) a person who may consent to treatment for the minor under Sections 32.001(a)(1)-(3), Family Code; (2) a psychiatrist or an individual licensed or certified as a psychologist under the Psychologist's Licensing Act, Article 4512c, Vernon's Texas Civil Statutes; (3) an appropriate employee of the Department of Protective or Regulatory Services; (4) a member of the clergy; or (5) another appropriate person selected by the court. The trial court may also consider appointing a qualified person requested by the minor. Although not directly applicable to these proceedings, the standards embodied in Chapter 107, Family Code, reflect legislative intent that competent and qualified persons be appointed to serve as ad litems and may provide general guidance concerning the nature of those qualifications. Appointment of an employee of the Department of Protective and Regulatory Services to serve as guardian ad litem may give rise to a conflict of interest not immediately apparent at the time since the Department may be involved with the minor's family due to an abuse or neglect investigation, or may be party to a suit affecting the parent-child relationship, or may already be serving as the child's managing conservator.

4. The duties of guardians ad litem are not susceptible of precise definition. Generally, a guardian ad litem should interview the minor and conduct any investigation the guardian believes to be appropriate, without violating Rules 1.3 and 1.4, to assist the court in arriving at an opinion whether the minor is mature and sufficiently well informed to make the decision to have an abortion performed without notification to either of her parents or a managing conservator or guardian, whether notification would not be in the best interest of the minor, or whether notification may lead to physical, sexual, or emotional abuse of the minor. In making these determinations, the following factors have been considered in other jurisdictions with similar parental notification statutes:

- Whether the minor has been examined by a doctor of medicine, doctor of osteopathy, or registered nurse — who is licensed to practice in Texas — and has given that health care provider an accurate and complete statement of her medical history.
- Whether the minor has been provided with information or counseling bearing on her decision to have an abortion.
- Whether the minor desires further counseling.
- Whether, based on the information or counseling provided to the minor, she is able to give informed consent.
- Whether the minor is attending school, or is or has been employed.
- Whether the minor has previously filed an application that was denied.
- Whether the minor lives with her parents.

[18] See amendments to Form 2D.

[19] This is a typo that apparently made it into the rules.

- Whether the minor desires an abortion or has been threatened, intimidated or coerced into having an abortion.
- Whether the pregnancy resulted from sexual assault, sexual abuse, or incest.
- Whether there is a history or pattern of family violence.
- Whether the minor fears for her safety.

These considerations may not be relevant in every case, are not exclusive, and may not be sufficient to discharge the guardian ad litem's responsibilities in every case. Use of these factors as a basis for civil liability or as a statement of the standard of care is contrary to their intended purpose. Nothing in this comment alters existing standards of conduct under the Texas Disciplinary Rules of Professional Conduct, the Texas Rules of Disciplinary Procedure, or the Code of Judicial Conduct.

In addition to these general guidelines, Chapter 107, Family Code, sets forth duties of guardians and attorneys ad litem appointed in suits affecting the parent-child relationship. These duties are not directly applicable to proceedings under Chapter 33, Family Code, and may be incompatible with the nature of such proceedings, but they reflect general legislative intent concerning the responsibilities of ad litems.

5. Under Rule 2.5(b), once a court concludes that an application should be granted on a single ground, it need not address other grounds. But in addressing any ground, the court should attempt to ascertain, among other factors, whether the pregnancy resulted from sexual assault, sexual abuse, or incest. The legislative history of Chapter 33, Family Code, indicates that one of the principal purposes of the statute was to screen for sexual crimes and abuse of minors so as to protect them against further victimization.

RULE 3. APPEAL FROM DENIAL OF APPLICATION

3.1 How to Appeal. To appeal the denial of an application, the minor must simultaneously file a notice of appeal with the clerk of the court that denied the application, file a copy of the notice of appeal with the clerk of the court of appeals to which an appeal is to be taken, and advise the clerk of the court of appeals by telephone that an appeal is being taken under Chapter 33, Family Code. The minor may use Form 3A but is not required to do so. The notice of appeal must:

(a) be styled "In re Jane Doe";

(b) state the number of the cause in the trial court;

(c) be addressed to a court of appeals with jurisdiction in the county in which the application was filed;

(d) state an intention to appeal; and

(e) be signed by the minor's attorney or attorney ad litem appointed by the trial court.

3.2 Clerk's Duties.

(a) ***Assistance in filing.*** The trial court clerk must give prompt assistance — in a manner designed to protect the minor's confidentiality — to persons seeking to file an appeal. Such assistance must include assuring that the notice of appeal is addressed to the proper court of appeals and that the minor's name and identifying information are not disclosed.

(b) ***Forwarding record to court of appeals.*** Upon receipt of a notice of appeal, the trial court clerk must instanter forward to the clerk of the court of appeals the notice of appeal, the clerk's record (original papers or copies) excluding the verification page, and the reporter's record. The trial court clerk must not send the record to the clerk of the court of appeals by mail but must, if feasible, deliver it by hand or transmit it by facsimile or other electronic means. If neither of these methods is feasible, then the record may be sent by overnight delivery.

(c) ***Certificate of court's failure to rule within time prescribed by statute.*** If the court of appeals fails to rule on an application within the time required by Section 33.004(b), Family Code, upon the minor's request, the clerk of the court of appeals must instanter issue a certificate to that effect, stating that the trial court's order is reversed and judgment is rendered that the application is deemed by statute to be granted. The clerk may use Form 3D but is not required to do so.

3.3 Proceedings in the Court of Appeals.

(a) ***Briefing and argument.*** A minor may request to be allowed to submit a brief and to present oral argument, but the Court may decide to rule without a brief or oral argument.

(b) ***Ruling.*** The court of appeals — sitting in a three-judge panel — must issue a judgment affirming or reversing the trial court's order denying the application. ~~If the court of appeals reverses the trial court order, it must also state in its judgment that the application is granted.~~ The court may use Form 3C but is not required to do so.

(c) ***Time for ruling.*** The court of appeals must rule on an appeal as soon as possible, subject to any postponement requested by the minor. Section 33.004(b), Family Code, states that a court must rule

on an appeal by 5:00 p.m. on the second business day after the notice of appeal is filed with the court that denied the application, or if the minor requests a postponement, after the date the minor states she is ready to proceed, and that if the court does not rule within this time, the appeal is deemed to be granted.

(d) ***Postponement by minor.*** The minor may postpone the time of ruling by written request filed either with the trial court clerk at the time she files the notice of appeal or thereafter with the court of appeals clerk. The request may be submitted on Form 3B, but use of the form is not required. The request must either specify a date on which the minor will be ready to proceed to ruling, or state that the minor will later provide a date on which she will be ready to proceed to ruling. Once the minor determines when she will be ready to proceed to ruling, she must notify the court of appeals clerk of that date in writing.

(e) ***Opinion.***

(1) *Opinion optional.* A court of appeals may issue an opinion explaining its ruling, but it is not required to do so.

(2) *Time.* Any opinion must issue not later than:

(A) ten business days after the day on which a notice of appeal is filed in the Supreme Court, if an appeal is taken to the Supreme Court; or

(B) sixty days after the day on which the court of appeals issued its judgment, if no appeal is taken to the Supreme Court.

(3) *Confidential transmission to Supreme Court.* When the court of appeals issues an opinion, the clerk must confidentially transmit it instanter to the Supreme Court and to the trial court.

Notes and Comments

1. Chapter 33, Family Code, provides for no appeal from an order granting an application.

2. A request to postpone the ruling of the court of appeals may be used in conjunction with a request for oral argument or to submit briefing.

3. Neither Chapter 33, Family Code, nor these rules prescribes the appellate standard of review.

4. Although publication of appellate court opinions is prohibited by statute, the Supreme Court may amend these rules to address issues arising from their application and interpretation.

RULE 4. APPEAL TO THE SUPREME COURT

4.1 How to Appeal to the Supreme Court. To appeal from the court of appeals to the Supreme Court, the minor must simultaneously file a notice of appeal with the Clerk of the Supreme Court, file a copy of the notice of appeal with the clerk of the court of appeals, and advise the clerk of each court by telephone that an appeal is being taken under Chapter 33, Family Code. The minor may use Form 4A but is not required to do so. The notice of appeal must:

(a) be styled "In re Jane Doe";

(b) state the number of the cause in the court of appeals;

(c) state an intention to appeal; and

(d) be signed by the minor's attorney or attorney ad litem appointed by the trial court.

4.2 Clerk's Duties.

(a) ***Assistance in filing.*** The Clerk of the Supreme Court must give prompt assistance — in a manner designed to protect the minor's confidentiality — to persons seeking to file an appeal. Such assistance must include assuring that the notice of appeal is addressed to the Supreme Court and that the minor's name and identifying information are not disclosed.

(b) ***Forwarding record to Supreme Court.*** Upon receipt of a notice of appeal to the Supreme Court, the clerks of the court of appeals and Supreme Court must instanter have forwarded to the Supreme Court the record that was before the court of appeals.

4.3 Proceedings in the Supreme Court. A minor may request to be allowed to submit a brief and to present oral argument, but the Court may decide to rule without a brief or oral argument. The Court must rule as soon as possible.

---------- COMPARISON OF FOOTNOTES ----------

-FOOTNOTE ~~*~~ 1-
~~See Memorandum from Bob Pemberton to Special Subcommittee on the Implementation of Family Code Chapter 33, April 18, 2000, with annotations (the "annotated memorandum").~~
See Annotated Memorandum at 1.

-FOOTNOTE 2-
Paul Watler believes this language is unconstitutionally overbroad.

-FOOTNOTE 3-
The changes to this paragraph are mine alone, but they are inspired by a suggestion made by Jim Allison during the Special Subcommittee's deliberations. While the Subcommittee was debating whether to include language clarifying that minor's lawyers and ad litems could have access to the case file – concerns that ultimately were addressed in the proposed changes to comment 3, below – Jim suggested that the phrase "But an order, ruling, . . ." implied incorrectly that the six exceptions listed in Rule 1.4(b) were the sole exceptions to the general confidentiality restrictions in the rule. The above changes, as well as the proposed changes to comment 3, are intended to clarify the nature and scope of the exceptions.

Inasmuch as these exceptions also apply as against Rule 1.3 and Rule 1.4(a), should they be restructured as a stand-alone provision outside of Rule 1.4(b)? Justice McClure thought we should.

-FOOTNOTE 4-
No person other than the clerk will transmit these orders.

-FOOTNOTE 5-
Technically, it is the Judicial Council that determines the information that gets reported. But should the guidelines nonetheless be restated in the rules? Justice McClure thought they should be.

-FOOTNOTE 6-
From pp. 7-8 of the annotated memo. See also proposed changes to comment 8.

-FOOTNOTE 7-
Should this paragraph be broken out into subparts? It's getting a little lengthy and obtuse. Debbie Saenz of the Subcommittee thought so.

-FOOTNOTE 8-
See note 4, above.

-FOOTNOTE 9-
Form 2F.1 is the form transmittal letter devised by the clerks and the Department of Health. I've included it in the attached forms.

-FOOTNOTE 10-
It seemed like some leeway would be necessary, especially where a proceeding ends because a minor ceases to pursue it, but no formal order or motion for dismissal or nonsuit is filed. Susan Steeg of the Department of Health questioned this view.

-FOOTNOTE 11-
Susan Steeg of the Department of Health urged that the cut-off be receipt of the order, rather than transmission, within 60 days of x.

Would "served" on the director be better? This would incorporate the mailbox rule, etc.

-FOOTNOTE 12-
A reference to these time requirements has been added to Forms 2F.1 and 2F.

-FOOTNOTE 13-
Should the Department of Health, as well as the Comptroller, have standing to challenge and appeal these orders? The Special Subcommittee's view was "no."

-FOOTNOTE 14-
This new language seemed warranted.

-FOOTNOTE 15-
From p. 6 of the annotated memo.

~~-FOOTNOTE 16-~~
~~Justice McClure questioned whether we should encourage witnesses to file amicus briefs. She would delete the reference to witnesses.~~

-FOOTNOTE ~~17~~ 16-
From p. 9 of the annotated memorandum.

-FOOTNOTE ~~18~~ 17-
From p. 4 of the annotated memorandum.

-FOOTNOTE ~~19~~ 18-
See amendments to Form 2D.

-FOOTNOTE ~~20~~ 19-
This is a typo that apparently made it into the rules.

---------- COMPARISON OF HEADERS ----------

-HEADER 1-
PARENTAL NOTIFICATION RULES AND FORMS ~~December 20, 1999~~ May 22, 2000 — Page 1

-HEADER 2-
Page 1 — May 1, 2000 PARENTAL NOTIFICATION RULES AND FORMS (proposed revisions)

07/12/00 Senator Harris letter to Babcock

08/29/00 draft of Recusal Rule (clean copy)

08/31/00 Hamilton letter to Babcock with changes to 08/29/00 draft of Recusal Rule

08/31/00 Watson letter to Hamilton suggesting two changes to Recusal Rule draft

• Chap. 74, Govt Code (GIL Concern)

• Spouse involved in Case (GIL Concern)
(Spouses addressed in other place, But NOT as law partner)

~~August 29~~ **October 19**, 2000

SUPREME COURT ADVISORY COMMITTEE
SUBCOMMITTEE WORKING DRAFT
OF RECUSAL RULE PROPOSAL

~~Disqualification~~

Rule _____.[1] **Disqualification and Recusal of Judges**

(a) Grounds for Disqualification.[2] A Judge is disqualified in the following circumstances:

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

(Track Constitution)

(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.[3] A judge must recuse in the following circumstances:

(1) the judge's impartiality might reasonably be questioned,[4]

(2) the judge has a personal bias or prejudice concerning the subject matter or a party,[5]

(3) the judge [or the Judge's spouse] has been or is likely to be 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;[6]

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[1]This rule would replace current Rules 18a and 18b of the Texas Rules of Civil Procedure.

[2]Section (a) is a nonsubstantive recodification of current Rule 18b(1). Both provisions are based on constitutional grounds for disqualification.

[3]This section is derived from current Rule 18b(2).

[4]From Current Rule 18b(2)(a).

[5]From Current Rule 18b(2)(b).

[6]Current Rule From 18b(2)(c) & (f)(iii).

(4) the judge has personal knowledge of material evidentiary facts relating to the dispute between the parties;[7]

(5) the judge expressed an opinion concerning the matter while acting as an attorney in government service;[8]

(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;[9]

(7) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to anyone ~~with~~ a financial interest in the matter or a party, or any other interest that could be substantially affected by the outcome of the matter;[10]

(8) the judge or the judge's spouse is related by consanguinity or affinity within the third[11] degree to a lawyer in the proceeding.[12]

(9)[13] *the judge has accepted a campaign contribution, as defined in § 251.001 Election Code, which exceeds the limits in § 253.155(b) or § 253.157 Election Code, made by or on behalf of a party, by a lawyer or a law firm representing a party, or by a member of that law firm, as defined in § ~~253.175(e)~~* ***253.157(e)*** *Election Code, unless the excessive contribution is returned in accordance with § 253.155 of the Election Code. This ground for recusal arises at the time the excessive contribution is accepted and extends for the term of office for which the contribution was made.*

(10) a direct campaign expenditure as defined in § 251.001 Election Code which exceeds the limits in § 253.061 or 253.062 was made, for the benefit of the judge, when a candidate, by or on behalf of a party, by a lawyer or law firm representing a party, or by a member of that law firm as defined in § 253.157(e) Election Code. This

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[7]From current Rule 18b(2)(b).

[8]From current Rule 18b(2)(d).

[9]From current Rule 18b(2)(f)(i).

[10]From current Rule 18b(2)(f)(ii).

[11]Currently first degree.

[12]From current Rule 18b(2)(g).

[13]Paragraphs (9) and (10) are based on proposals by the Judicial Campaign Finance Study Committee. Italicized print generally indicates new or changed language from the recodification or current Rule 18.

ground for recusal arises at the time the excessive direct campaign expenditure occurs and extends for the term of office for which the direct campaign expenditure was made.

(11) a lawyer in the proceeding, or the lawyer's law firm, is representing the judge, or judge's spouse or minor child, in an ongoing legal proceeding other than a class action, except for legal work by a government attorney in his/her official capacity.

(c) Waiver.[14] Disqualification cannot be waived. *The parties to a proceeding may waive any ground for recusal after it is fully disclosed on the record.*

Needs caption

(d) If a judge does not discover that ~~he is recused~~ there must be a recusal under subparagraphs ~~(2)(c) or (2)(f)(iii)~~(b)(7) until after ~~he~~ substantial time has been devoted ~~substantial time~~ to the matter, ~~he~~ the judge is not required to recuse ~~himself~~ if ~~he or~~ the person ~~related to him~~, with the financial interest, divests ~~himself~~ ~~himself/herself of~~ the interest that would otherwise require recusal.

(e) Procedure.

(1) *Motion.* A motion to disqualify or recuse a judge, *associate judge, or statutory master,* other than a judge of the Supreme Court, Court of Criminal Appeals, Court of Appeals or Statutory Probate Court, must state in detail *the factual and legal basis* for recusal or disqualification and, if applicable, any exception under ~~subdivision~~ Sub paragraph (d)(2), and must be made on personal knowledge[15] or upon information and belief if the grounds for such belief are stated specifically.[16] A *judge's rulings may not be a basis for the motion, but may be admissible as evidence relative to the motion.*[17] A motion to recuse must be verified; **an unverified motion ~~may be ignored~~ does not invoke the proceedings under this rule except for sanctions**.[18] *A motion to recuse a judge for any ground listed in subparagraph (b)(9) or (b)(10) may not be filed by any party, lawyer or law firm whose action constituted a ground for recusal.*[19]

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[14]This section is from current Rule 18b(5).

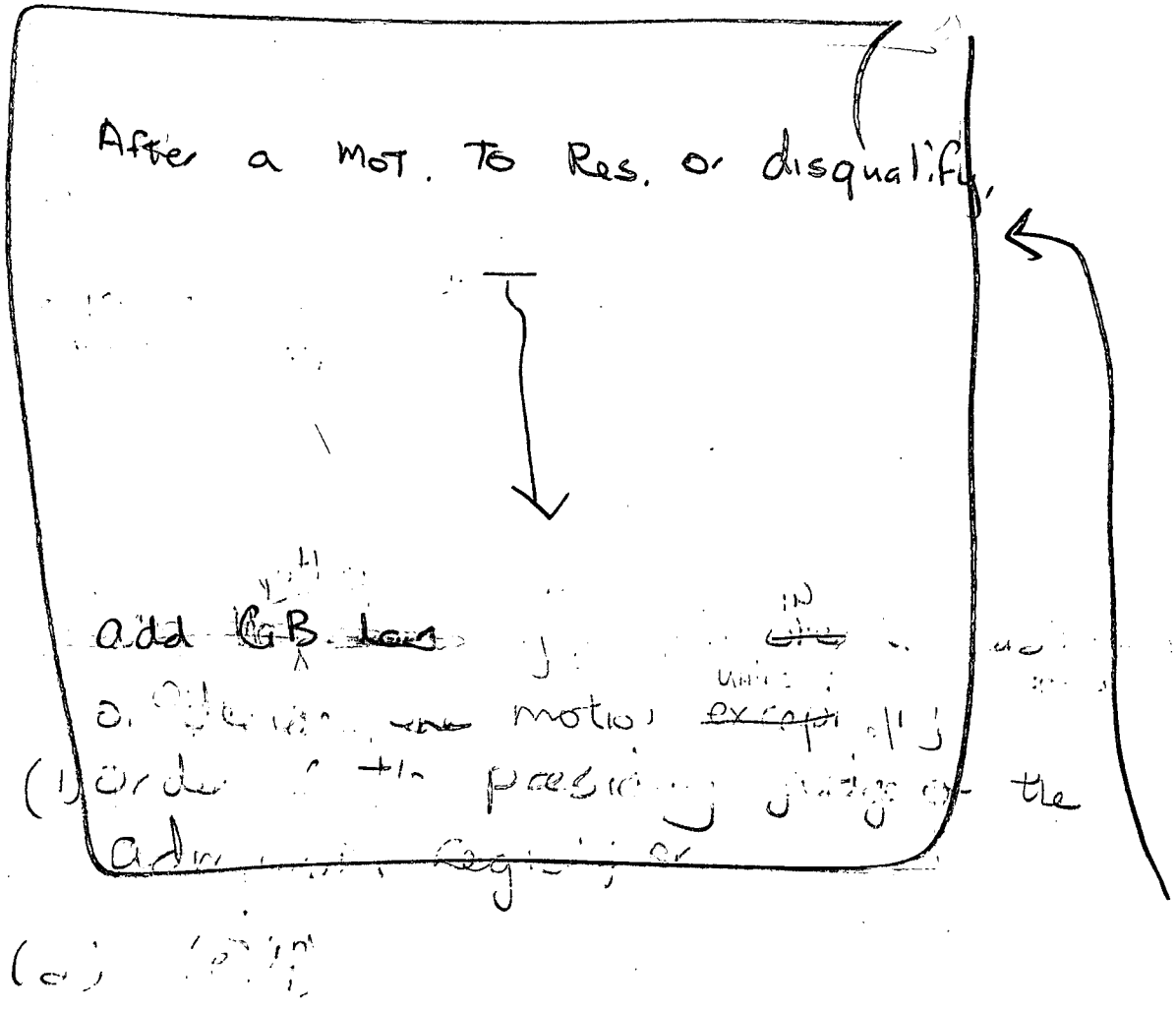
[15]This requires details of facts and the legal basis for the motion, former rule required "grounds".

[16]This sentence is from current Rule 18a(a).

[17]This sentence is new.

[18]This sentence is based on current Rule 18a(a).

[19]This sentence is new. It is part of the Judicial Campaign Finance Study Committees proposal.


After a MOT. TO Res. or disqualify,

(2) **Time to File.** *A motion to disqualify may be filed at any time. A motion to recuse is waived if filed later than the tenth day prior to the date the case is set for trial or other hearing except in the following instances:*

(a) when the basis for recusal did not exist before ten (10) days prior to the date the case is set for trial or hearing; or

(b) the judge who is sought to be recused was not assigned to the case before ten (10) days prior to the date the case is set for trial or other hearing; or

(c) the party filing the motion neither knew nor should have known of the basis for recusal before ten (10) days prior to the date the case was set for trial or other hearing; or

(d) for other good cause shown.

Any motion filed after the tenth (10th) day prior to the date the case is set for trial or other hearing is governed by subparagraph ~~(d)(4)~~ (e)(4).[20]

(3) ***Referral.***

The judge in the case in which the motion is filed must promptly sign an order ruling on the motion prior to taking any other action in the case. **If the judge voluntarily recuses or disqualifies pursuant to the motion, the case shall be referred to the presiding judge of the administrative region for reassignment unless the parties agree that the case may be reassigned in accordance with local rules.** If the judge refuses to recuse or disqualify, the judge must promptly refer the motion to the ~~presiding judge of the~~ administrative region. *If the judge in the case in which the motion is filed does not promptly grant the motion or refer it to the presiding judge of the administrative region, the movant may forward a copy of the motion to said presiding judge and request the presiding judge to hear the motion or assign a judge to hear it. If the motion complies with subparagraph ~~(d)~~(e)(1), the presiding judge of the administrative region shall hear the motion or immediately assign a judge to hear it.* ***Notwithstanding these rules or any local rule, the case cannot be assigned to another judge pending the ruling on the recusal motion. If the motion does not comply with subparagraph (d)(1), the said presiding judge may deny the motion without a hearing.*** ***motion cannot be reassigned to another judge except by the presiding judge of the administrative region.***

[20] There is no ending date by which the motion must be filed if based on any of the exceptions in (e)(2)(a), (b), (c), or (d).

(4) **Interim Proceedings.**[21] *After referring the motion to the judge of the administrative region, the judge in whose case the motion is filed must take no further action in the case until the motion is disposed of; except for good cause stated in the order in which the action is taken. ~~But~~ **However**, in the following instances, the judge may proceed with the case as though no motion had been filed, pending a ruling on the motion:*

*(a) when the motion is subsequent to a motion to recuse or disqualify filed in the case against a judge by the same party which has been sanctioned pursuant to subparagraph ~~(d)(11)(b)~~**(e)(11)(b)** regardless of the facts and legal basis alleged;*[22] *or*

(b) when the motion to recuse or disqualify is filed after the 10th day prior to the date the case is set for ~~trial or other hearing~~.

(5) **Abatement of interim proceedings.**[24] *If all parties to the interim proceedings agree that the interim proceeding should be abated pending a ruling on the motion, the judge must abate all interim proceedings. The judge ~~hearing the motion to recuse~~ or disqualify*[25] *may also order the interim proceedings abated pending a ruling on the motion to recuse or disqualify.*

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[21]This section, based on a concept from S.B. 788, seeks to deter untimely, multiple, and frivolous-recusal motions.

[22]This provision is based on S.B. 788. Like S.B. 788, it refers to multiple recusal motions filed against "a judge." Some members of the Rules Advisory Committee questioned whether this provision was intended to prohibit only multiple recusal motions filed against a single judge or also successive recusal motions filed against various judges involved in the case.

[23]*See* ~~subsection (e)(2), above~~.

[24]This section, which differs from S.B. 788, would enable trial courts to stop interim proceedings until the recusal motion is ruled on if the motion appears to be meritorious or if the parties agree that the proceedings should be stopped. It thus prevents waste of judicial resources on proceedings where the recusal motion likely would be granted and the interim rulings caused to be "undone." *See* subparagraph (e)(6), below.

[25]*See* (e)(7), last sentence.

(6) **Order entered during interim proceedings.**[26] *If the judge who signed any order in an interim proceeding pursuant to subparagraph (d)(4) is subsequently recused, the judge assigned to the case shall, upon motion of a party, review such order but may, after reviewing the basis for such order, enter the same or similar order or vacate the order. In any case where a judge has been disqualified, the judge assigned to hear the case shall declare void all orders entered by such judge and shall rehear all matters that were heard by the disqualified judge.*

(7) **Hearing.**[27] *Unless the presiding judge of the region has denied the motion without hearing pursuant to subparagraph ~~d(3)~~ e(3), a hearing must be scheduled to commence promptly. The presiding judge must promptly give 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 or electronic copies of documents filed in the case may be used in the hearing. The judge who hears the motion must rule within three days of the last day of the hearing or the motion is deemed granted.*

(8) **Disposition.** If a judge is disqualified or recused, the regional presiding judge must assign another judge to preside over the case and notwithstanding these rules or any local rule, the case shall not be reassigned to another judge without the consent of the presiding judge of the administrative region. *If an associate judge or a statutory master is recused or disqualified, the district court to whom the case is assigned must hear the case or appoint a replacement.*[28]

(9) **Appeal.** If the motion is denied, the order may be reviewed for abuse of discretion on appeal from the final judgment. If the motion is granted, the order may not be reviewed by mandamus or appeal.[29]

(10) **Assignment of Judges by Chief Justice of the Supreme Court**. The Chief Justice of the Supreme Court may also appoint and assign judges in conformity with this rule and pursuant to statute.[30]

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[26]This section is based on S.B. 788 but clarifies how trial judges can "fix" orders entered in interim proceedings that are required to be vacated after a recusal motion is granted. It also clarifies that order entered in an interim proceeding while a disqualification motion is pending must be voided if the motion is granted.

[27]The following two subparagraphs revise existing procedures to improve expeditiousness.

[28]Masters and associate judges may be recused or disqualified. The preceding sentence clarifies the procedures for assigning replacements for such officers.

[29]From current Rule 18a(f).

[30]From current Rule 18a(g).

(11) **Sanctions**. *Sanctions are authorized as follows:*

(a) If a party files a motion under this rule and it is determined, on motion of the opposite party, or on the court's own initiative, that the motion was brought for purposes of delay and without sufficient cause, the judge hearing the motion may impose any sanctions authorized by Rule 215.2(b).[31]

either refer to TRCP TRAP

(b) Upon denial of three or more motions filed in a case against a judge under this rule by the same party, the judge denying the third or subsequent motion shall enter an order awarding to the party opposing such motion reasonable and necessary attorneys fees and costs. The party making such motion and the attorney for such party are jointly and severally liable for such fees and costs which must be paid before the 31st day after the date of the order denying the motion.[32] *If the money is not timely paid, the judge hearing the case may impose any sanctions authorized by Rule 215.2(b).*

(c) A Sanctions order shall subject to Law appeal ~~be reviewed~~ on final Judg. from the

(12) ~~***Suspension of Sanctions Order.***[33] ***The order entered pursuant to subparagraph 11 (b) may be superseded by each party and such party's attorney who is obligated to pay fees and costs, by filing with the trial court clerk a written agreement; or filing with the trial court clerk a bond signed by a sufficient surety; or making a deposit with the trial court clerk in lieu of a bond.***~~

(a) Written Agreement. The written agreement to suspend the court's sanction order must be signed by the party(s) who is beneficiary of the order and each party and each party's attorney who are obligated by the order to pay fees and costs, and state the terms of the suspension, the conditions under which the award must be paid and the method of payment. The written agreement must be approved by the court.

[31]This is from current Rule 18a(h).

[32]The preceding boldfaced language is taken from Tex.Civ.Prac.&Rem Code § 30.016(c). The language that follows is the committee's attempt to reconcile the statutory language, which contemplates superseding of an order awarding attorneys fees and costs, with the fact that such an order would be interlocutory and, therefore, not appealable or ordinarily able to be superseded.

[33]The following superseding procedure is basically from Appellate Rule 24.

(b) Bond. A bond must be in the amount of the order, payable to the party(s) who is the beneficiary of such order. The bond must be signed, as principal, by each party and such party's attorney who is obligated to pay the amount ordered by the court and by sufficient surety or sureties. The bond shall provide the amount stated in the bond shall be paid to the beneficiaries of the order by the principal(s) and surety(s) unless the principal(s) is successful in having the order reversed on appeal. To be effective the bond must be approved by the trial court clerk. Upon motion of any party the trial court shall review the bond.

(c) Deposit in Lieu of Bond. Instead of filing a surety bond, each party and the party's attorney may deposit with the trial court clerk cash, a cashier's check payable to the clerk, drawn on any federally insured or federally chartered bank or savings-and-loan association or with leave of court a negotiable obligation of the federal government or of any federally insured and federally or state chartered bank or savings-and-loan association. The amount of the deposit must be in the amount of the award. The clerk must promptly deposit any cash or cashier's check in accordance with law.

(d) Payment or Refund By Clerk. Payment by the clerk is effected by:

(1) paying to the beneficiary of the order, when cash or a cashier's check was deposited with the clerk, the amount of money stated in the order or affirmed on appeal and returning to the party(s) and that party's attorney making the deposit any funds remaining;

(2) delivering to the beneficiary of the order the bond or negotiable obligation which was deposited with the clerk.

If the order is superseded and not appealed, the clerk shall make payment to the beneficiaries of the order thirty-one (31) days after the date of the order. If the order is superseded and appealed, but is not reversed on appeal, the clerk shall make payment to the beneficiaries of the order thirty-one (31) days after the judgment in the case, including the sanctions order, becomes final.

If the order for fees and costs is reversed by the trial court or as a result of an appeal, the clerk shall refund to the party(s) and the party's attorney who superseded the order, the amount of cash

deposited together with any earned interest, the negotiable obligation or the bond which was filed with the clerk.

(13) ***Justice of Peace Courts.*** *This recusal rule does not apply to Justices of the Peace.*

Comment 1: A motion to recuse or disqualify a statutory probate judge is governing by § 25.00255 Government Code.

Comment 2: Recusals where the judge is a member of a class that is represented by a lawyer or lawyer's law firm are decided on a case-by-case basis.

---------- COMPARISON OF FOOTNOTES ----------

-FOOTNOTE 1-
This rule would replace current Rules 18a and 18b of the Texas Rules of Civil Procedure.

-FOOTNOTE 2-
Section (a) is a nonsubstantive recodification of current Rule 18b(1). Both provisions are based on constitutional grounds for disqualification.

-FOOTNOTE 3-
This section is derived from current Rule 18b(2).

-FOOTNOTE 4-
From Current Rule 18b(2)(a).

-FOOTNOTE 5-
From Current Rule 18b(2)(b).

-FOOTNOTE 6-
Current Rule From 18b(2)(c) & (f)(iii).

-FOOTNOTE 7-
From current Rule 18b(2)(b).

-FOOTNOTE 8-
From current Rule 18b(2)(d).

-FOOTNOTE 9-
From current Rule 18b(2)(f)(i).

-FOOTNOTE 10-
From current Rule 18b(2)(f)(ii).

-FOOTNOTE 11-
Currently first degree.

-FOOTNOTE 12-
From current Rule 18b(2)(g).

-FOOTNOTE 13-
Paragraphs (9) and (10) are based on proposals by the Judicial Campaign Finance Study Committee. Italicized print generally indicates new or changed language from the recodification or current Rule 18.

-FOOTNOTE 14-
This section is from current Rule 18b(5).

-FOOTNOTE 15-
This requires details of facts and the legal basis for the motion, former rule required "grounds".

-FOOTNOTE 16-
This sentence is from current Rule 18a(a).

-FOOTNOTE 17-
This sentence is new.

-FOOTNOTE 18-
This sentence is based on current Rule 18a(a).

-FOOTNOTE 19-
This sentence is new. It is part of the Judicial Campaign Finance Study Committees proposal.

-FOOTNOTE 20-
There is no ending date by which the motion must be filed if based on any of the exceptions in ~~(d)(2)(a)~~**(e)(2)(a)**, (b), (c), or (d).

-FOOTNOTE 21-
This section, based on a concept from S.B. 788, seeks to deter untimely, multiple, and frivolous-recusal motions.

-FOOTNOTE 22-
This provision is based on S.B. 788. Like S.B. 788, it refers to multiple recusal motions filed against "a judge." Some members of the Rules Advisory Committee questioned whether this provision was intended to prohibit only multiple recusal motions filed against a single judge or also successive recusal motions filed against various judges involved in the case.

-FOOTNOTE 23-
See subsection ~~(d)(2)~~**(e)(2)**, above.

-FOOTNOTE 24-
This section, which differs from S.B. 788, would enable trial courts to stop interim proceedings until the recusal motion is ruled on if the motion appears to be meritorious or if the parties agree that the proceedings should be stopped. It thus prevents waste of judicial resources on proceedings where the recusal motion likely would be granted and the interim rulings caused to be "undone." See subparagraph ~~(d)(6)~~**(e)(6)**, below.

-FOOTNOTE 25-
See ~~(d)(7)~~**(e)(7)**, last sentence.

-FOOTNOTE 26-
This section is based on S.B. 788 but clarifies how trial judges can "fix" orders entered in interim proceedings that are required to be vacated after a recusal motion is granted. It also clarifies that order entered in an interim proceeding while a disqualification motion is pending must be voided if the motion is granted.

-FOOTNOTE 27-
The following two subparagraphs revise existing procedures to improve expeditiousness.

-FOOTNOTE 28-
Masters and associate judges may be recused or disqualified. The preceding sentence clarifies the procedures for assigning replacements for such officers.

-FOOTNOTE 29-
From current Rule 18a(f).

-FOOTNOTE 30-
From current Rule 18a(g).

-FOOTNOTE 31-
This is from current Rule 18a(h).

-FOOTNOTE 32-
The preceding boldfaced language is taken from Tex.Civ.Prac.&Rem Code § 30.016(c). The language that follows is the committee's attempt to reconcile the statutory language, which contemplates superseding of an order awarding attorneys fees and costs, with the fact that such an order would be interlocutory and, therefore, not appealable or ordinarily able to be superseded.

-FOOTNOTE 33-
The following superseding procedure is basically from Appellate Rule 24.

---------- COMPARISON OF FOOTERS ----------

-FOOTER 1-

~~August 29,~~ **October 19,** 2000 -- Draft

-FOOTER 2-
:

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July 12, 2000

Charles L. Babcock
Chair, Supreme Court Advisory Committee
1100 Louisiana Street. Suite 4200
Houston. TX 77002

Dear Mr. Babcock,

I have reviewed the recusal rule proposal which you telefaxed to me, and I have three items which I would point out to you.

(1) The proposed rule remains somewhat ambiguous as to whether the tertiary recusal rule is applicable against a single judge or applicable to a law suit in general, as is pointed out in note 22 on page 5 of the proposed rule. This problem can be resolved by deleting the phrase "against a judge" on that same page in part (d)(4)(a). Note that phrase has already been deleted in section (d)(11)(b) on page 7.

(2) I could not find where present Rule 18b(6) is incorporated into the proposed rule. [Please note that the present rule has an error in that the reference to paragraph (2)(f)(iii) is incorrect and should probably reference (2)(f)(ii).]

(3) This is being picky, but the phrase on page 3 in part (d)(1) which reads "an unverified motion may be ignored" does not sound to me like language in a rule or statute, as opposed to language such as "an unverified motion is void" or "an unverified motion shall not be ruled upon."

Please let me know if I may be of any other assistance.

Sincerely,

Chris Harris

August 29, 2000

SUPREME COURT ADVISORY COMMITTEE
SUBCOMMITTEE WORKING DRAFT
OF RECUSAL RULE PROPOSAL

Rule _____.[1] Disqualification and Recusal of Judges

(a) Grounds for Disqualification.[2] A Judge is disqualified in the following circumstances:

(1) the judge formerly acted as counsel in the matter, or practiced law in association with someone while that person 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.[3] A judge must recuse in the following circumstances:

(1) the judge's impartiality might reasonably be questioned,[4]

(2) the judge has a personal bias or prejudice concerning the subject matter or a party,[5]

(3) the judge has been or is likely to be 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;[6]

(4) the judge has personal knowledge of material evidentiary facts relating to the dispute between the parties;[7]

---

[1]This rule would replace current Rules 18a and 18b of the Texas Rules of Civil Procedure.

[2]Section (a) is a nonsubstantive recodification of current Rule 18b(1). Both provisions are based on constitutional grounds for disqualification.

[3]This section is derived from current Rule 18b(2).

[4]From Current Rule 18b(2)(a).

[5]From Current Rule 18b(2)(b).

[6]Current Rule From 18b(2)(c) & (f)(iii).

[7]From current Rule 18b(2)(b).

(5) the judge expressed an opinion concerning the matter while acting as an attorney in government service;[8]

(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;[9]

(7) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to anyone with a financial interest in the matter or a party, or any other interest that could be substantially affected by the outcome of the matter;[10]

(8) the judge or the judge's spouse is related by consanguinity or affinity within the third[11] degree to a lawyer in the proceeding.[12]

(9)[13] *the judge has accepted a campaign contribution, as defined in § 251.001 Election Code, which exceeds the limits in § 253.155(b) or § 253.157 Election Code, made by or on behalf of a party, by a lawyer or a law firm representing a party, or by a member of that law firm, as defined in § 253.175(e) Election Code, unless the excessive contribution is returned in accordance with § 253.155 of the Election Code. This ground for recusal arises at the time the excessive contribution is accepted and extends for the term of office for which the contribution was made.*

(10) a direct campaign expenditure as defined in § 251.001 Election Code which exceeds the limits in § 253.061 or 253.062 was made, for the benefit of the judge, when a candidate, by or on behalf of a party, by a lawyer or law firm representing a party, or by a member of that law firm as defined in § 253.157(e) Election Code. This ground for recusal arises at the time the excessive direct campaign expenditure occurs and extends for the term of office for which the direct campaign expenditure was made.

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[8]From current Rule 18b(2)(d).

[9]From current Rule 18b(2)(f)(i).

[10]From current Rule 18b(2)(f)(ii).

[11]Currently first degree.

[12]From current Rule 18b(2)(g).

[13]Paragraphs (9) and (10) are based on proposals by the Judicial Campaign Finance Study Committee. Italicized print generally indicates new or changed language from the recodification or current Rule 18.

(11) a lawyer in the proceeding, or the lawyer's law firm, is representing the judge, or judge's spouse or minor child, in an ongoing legal proceeding other than a class action, except for legal work by a government attorney in his/her official capacity.

(c) Waiver.[14] Disqualification cannot be waived. *The parties to a proceeding may waive any ground for recusal after it is fully disclosed on the record.*

(d) 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.

(e) Procedure.

(1) *Motion.* A motion to disqualify or recuse a judge, *associate judge, or statutory master,* other than a judge of the Supreme Court, Court of Criminal Appeals, Court of Appeals or Statutory Probate Court, must state in detail *the factual and legal basis* for recusal or disqualification and, if applicable, any exception under subdivision (d)(2), and must be made on personal knowledge[15] or upon information and belief if the grounds for such belief are stated specifically.[16] A *judge's rulings may not be a basis for the motion, but may be admissible as evidence relative to the motion.*[17] A motion to recuse must be verified; an unverified motion may be ignored.[18] *A motion to recuse a judge for any ground listed in subparagraph (b)(9) or (b)(10) may not be filed by any party, lawyer or law firm whose action constituted a ground for recusal.*[19]

(2) **Time to File.** *A motion to disqualify may be filed at any time. A motion to recuse is waived if filed later than the tenth day prior to the date the case is set for trial or other hearing except in the following instances:*

---

[14]This section is from current Rule 18b(5).

[15]This requires details of facts and the legal basis for the motion, former rule required "grounds".

[16]This sentence is from current Rule 18a(a).

[17]This sentence is new.

[18]This sentence is based on current Rule 18a(a).

[19]This sentence is new. It is part of the Judicial Campaign Finance Study Committees proposal.

(a)when the basis for recusal did not exist before ten (10) days prior to the date the case is set for trial or hearing; or

(b)the judge who is sought to be recused was not assigned to the case before ten (10) days prior to the date the case is set for trial or other hearing; or

(c)the party filing the motion neither knew nor should have known of the basis for recusal before ten (10) days prior to the date the case was set for trial or other hearing; or

(d)for other good cause shown.

Any motion filed after the tenth (10th) day prior to the date the case is set for trial or other hearing is governed by subparagraph (d)(4).[20]

(3) ***Referral.***

The judge in the case in which the motion is filed must promptly sign an order ruling on the motion prior to taking any other action in the case. If the judge voluntarily recuses or disqualifies pursuant to the motion, the case shall be referred to the presiding judge of the administrative region for reassignment unless the parties agree that the case may be reassigned in accordance with local rules. If the judge refuses to recuse or disqualify, the judge must promptly refer the motion to the presiding judge of the administrative region. *If the judge in the case in which the motion is filed does not promptly grant the motion or refer it to the presiding judge of the administrative region, the movant may forward a copy of the motion to said presiding judge and request the presiding judge to hear the motion or assign a judge to hear it. If the motion complies with subparagraph (d)(1), the presiding judge of the administrative region shall hear the motion or immediately assign a judge to hear it. Notwithstanding these rules or any local rule, the case cannot be assigned to another judge pending the ruling on the recusal motion. If the motion does not comply with subparagraph (d)(1), the said presiding judge may deny the motion without a hearing.*

(4) **Interim Proceedings.**[21] *After referring the motion to the judge of the administrative region, the judge in whose case the motion is filed must take no further action in the case until the motion is disposed of; except for good cause stated in the order in*

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[20] There is no ending date by which the motion must be filed if based on any of the exceptions in (d)(2)(a), (b), (c), or (d).

[21] This section, based on a concept from S.B. 788, seeks to deter untimely, multiple, and frivolous-recusal motions.

which the action is taken. But, in the following instances, the judge may proceed with the case as though no motion had been filed, pending a ruling on the motion:

(a) when the motion is subsequent to a motion to recuse or disqualify filed in the case against a judge by the same party which has been sanctioned pursuant to subparagraph (d)(11)(b) regardless of the facts and legal basis alleged;[22] *or*

(b) when the motion to recuse or disqualify is filed after the 10th day prior to the date the case is set for trial or other hearing.[23]

(5) **Abatement of interim proceedings.**[24] *If all parties to the interim proceedings agree that the interim proceeding should be abated pending a ruling on the motion, the judge must abate all interim proceedings. The judge hearing the motion to recuse or disqualify*[25] *may also order the interim proceedings abated pending a ruling on the motion to recuse or disqualify.*

(6) **Order entered during interim proceedings.**[26] *If the judge who signed any order in an interim proceeding pursuant to subparagraph (d)(4) is subsequently recused, the judge assigned to the case shall, upon motion of a party, review such order but may, after reviewing the basis for such order, enter the same or similar order or vacate the order. In any case where a judge has been disqualified, the judge assigned to hear the case shall declare void all orders entered by such judge and shall rehear all matters that were heard by the disqualified judge.*

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[22]This provision is based on S.B. 788. Like S.B. 788, it refers to multiple recusal motions filed against "a judge." Some members of the Rules Advisory Committee questioned whether this provision was intended to prohibit only multiple recusal motions filed against a single judge or also successive recusal motions filed against various judges involved in the case.

[23]*See* subsection (d)(2), above.

[24]This section, which differs from S.B. 788, would enable trial courts to stop interim proceedings until the recusal motion is ruled on if the motion appears to be meritorious or if the parties agree that the proceedings should be stopped. It thus prevents waste of judicial resources on proceedings where the recusal motion likely would be granted and the interim rulings caused to be "undone." *See* subparagraph (d)(6), below.

[25]*See* (d)(7), last sentence.

[26]This section is based on S.B. 788 but clarifies how trial judges can "fix" orders entered in interim proceedings that are required to be vacated after a recusal motion is granted. It also clarifies that order entered in an interim proceeding while a disqualification motion is pending must be voided if the motion is granted.

(7) **Hearing.**[27] *Unless the presiding judge of the region has denied the motion without hearing pursuant to subparagraph d(3), a hearing must be scheduled to commence promptly. The presiding judge must promptly give 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 or electronic copies of documents filed in the case may be used in the hearing. The judge who hears the motion must rule within three days of the last day of the hearing or the motion is deemed granted.*

(8) **Disposition.** If a judge is disqualified or recused, the regional presiding judge must assign another judge to preside over the case and notwithstanding these rules or any local rule, the case shall not be reassigned to another judge without the consent of the presiding judge of the administrative region. *If an associate judge or a statutory master is recused or disqualified, the district court to whom the case is assigned must hear the case or appoint a replacement.*[28]

(9) **Appeal.** If the motion is denied, the order may be reviewed for abuse of discretion on appeal from the final judgment. If the motion is granted, the order may not be reviewed by mandamus or appeal.[29]

(10) **Assignment of Judges by Chief Justice of the Supreme Court.** The Chief Justice of the Supreme Court may also appoint and assign judges in conformity with this rule and pursuant to statute.[30]

(11) **Sanctions.** *Sanctions are authorized as follows:*

(a) If a party files a motion under this rule and it is determined, on motion of the opposite party, or on the court's own initiative, that the motion was brought for purposes of delay and without sufficient cause, the judge hearing the motion may impose any sanctions authorized by Rule 215.2(b).[31]

(b) Upon denial of three or more motions filed in a case against a judge under this rule by the same party, the judge denying the third or

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[27]The following two subparagraphs revise existing procedures to improve expeditiousness.

[28]Masters and associate judges may be recused or disqualified. The preceding sentence clarifies the procedures for assigning replacements for such officers.

[29]From current Rule 18a(f).

[30]From current Rule 18a(g).

[31]This is from current Rule 18a(h).

subsequent motion shall enter an order awarding to the party opposing such motion reasonable and necessary attorneys fees and costs. The party making such motion and the attorney for such party are jointly and severally liable for such fees and costs which must be paid before the 31st day after the date of the order denying the motion.[32] *If the money is not timely paid, the judge hearing the case may impose any sanctions authorized by Rule 215.2(b).*

---

(12) **Justice of Peace Courts.** This recusal rule does not apply to Justices of the Peace.

Comment 1: A motion to recuse or disqualify a statutory probate judge is governing by § 25.00255 Government Code.

Comment 2: Recusals where the judge is a member of a class that is represented by a lawyer or lawyer's law firm are decided on a case-by-case basis.

---

[32]The preceding boldfaced language is taken from Tex.Civ.Prac.&Rem Code § 30.016(c). The language that follows is the committee's attempt to reconcile the statutory language, which contemplates superseding of an order awarding attorneys fees and costs, with the fact that such an order would be interlocutory and, therefore, not appealable or ordinarily able to be superseded.

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August 31, 2000

Richard Orsinger
Attorney at Law
Tower LIfe Building, Suite 1616
San Antonio, Texas 78205
Houston, Texas 77002

Re: Rule 18(a)

Dear Richard:

I have reviewed the draft which Carrie sent to you and me and find that there are a number of changes that need to be made. Attached is my corrected version of her draft. I have made the following changes:

a. On Page two the reference to Section 253.175(e) should be 253.157(e);

b. On Page three, Paragraph (d) which we added, did not contain the correct subparagraph which should be Subparagraph (b)(7). I also changed the language to try to avoid the gender problem since we have female judges. Since Paragraph (b)(7) only refers to persons related to the judge and not the judge; I changed it to read, "the person with the interest had to divest himself/herself of the interest". It should be noted that under the old Rule 18(b)(6), the references are to two subparagraphs, one of which is where the judge has an interest. Since we moved that into the disqualification Paragraph (a)(2), which is also a constitutional provision, I did not think it appropriate to permit a disqualified judge to continue in the case by divesting themself of the interest since the Constitution does not so provide. If you think it appropriate however we can add disqualification to Paragraph (d) in addition to recusal and reference paragraph (a)(2)

c. In Paragraph (e)(1), my notes reflect that we had alot of discussion about the word "ignored", but I do not recall that we finally agreed on language.

My notes reflect that the last language that we talked about was that an unverified motion does not invoke the proceedings of this rule except for sanctions, so that is what I have put in the rule. If your notes reflect otherwise let me know.

d. On Page four I have redrafted Paragraph (3) and rearranged the sentences slightly. I have also added to the part which we added at the meeting, "except by the presiding judge of the administrative region". We had provided that notwithstanding the rules, the case could not be assigned to another judge pending the recusal motion and I wondered what would happen if that judge died or for some reason could not hear it, then as previously worded no other judge could be assigned. I added, "except for the presiding judge", and changed "case" to "motion".

e. On Page five, I changed the word at the top of the page from "but" to "however".

f. I changed all the footnotes and other references in the rule from Paragraph (d) to Paragraph (e).

g. I also noticed that for some reason Carrie deleted all the sanctions provisions and I had not remembered that we had ever agreed on that so those need to be put back into the rule.

Also enclosed is a copy of a letter from Skip Watson. I agree that subsection (b)(11) should become (b)(9). I am not knowledgeable about the footnote information. If we make that change, Paragraph (e)(1) will have to be changed in the last sentence to refere to Subparagraphs (b)(10) and (b)(11).

After you have reviewed this letter and my changes, please call me so that we can discuss the changes.

Sincerely,

O. C. Hamilton, Jr.

OCH:adk

cc: Charles L. Babcock
Attorney at Law
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Ms. Carrie Gagnon
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~~May 22~~ August 29, 2000

SUPREME COURT ADVISORY COMMITTEE
SUBCOMMITTEE WORKING DRAFT
OF RECUSAL RULE PROPOSAL

Rule _____.[1] Disqualification and Recusal of Judges

(a) **Grounds for Disqualification.**[2] A Judge is disqualified in the following circumstances:

(1) the judge formerly acted as counsel in the matter, or practiced law in association with someone while that person 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.**[3] A judge must recuse in the following circumstances:

(1) the judge's impartiality might reasonably be questioned,[4]

(2) the judge has a personal bias or prejudice concerning the subject matter or a party,[5]

(3) the judge has been or is likely to be 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;[6]

(4) the judge has personal knowledge of material evidentiary facts relating to the dispute between the parties;[7]

---

[1]This rule would replace current Rules 18a and 18b of the Texas Rules of Civil Procedure.

[2]Section (a) is a nonsubstantive recodification of current Rule 18b(1). Both provisions are based on constitutional grounds for disqualification.

[3]This section is derived from current Rule 18b(2).

[4]From Current Rule 18b(2)(a).

[5]From Current Rule 18b(2)(b).

[6]Current Rule From 18b(2)(c) & (f)(iii).

[7]From current Rule 18b(2)(b).

(5) the judge expressed an opinion concerning the matter while acting as an attorney in government service;[8]

(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;[9]

(7) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to anyone with a financial interest in the matter or a party, or any other interest that could be substantially affected by the outcome of the matter;[10]

(8) the judge or the judge's spouse is related by consanguinity or affinity within the third[11] degree to a lawyer in the proceeding.[12]

253.157(e)

(9)[13] *the judge has accepted a campaign contribution, as defined in § 251.001 Election Code, which exceeds the limits in § 253.155(b) or § 253.157 Election Code, made by or on behalf of a party, by a lawyer or a law firm representing a party, or by a member of that law firm, as defined in § 253.175(e) Election Code, unless the excessive contribution is returned in accordance with § 253.155 of the Election Code. This ground for recusal arises at the time the excessive contribution is accepted and extends for the term of office for which the contribution was made.*

(10) a direct campaign expenditure as defined in § 251.001 Election Code which exceeds the limits in § 253.061 or 253.062 was made, for the benefit of the judge, when a candidate, by or on behalf of a party, by a lawyer or law firm representing a party, or by a member of that law firm as defined in § 253.157(e) Election Code. This ground for recusal arises at the time the excessive direct campaign expenditure occurs and extends for the term of office for which the direct campaign expenditure was made.

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[8]From current Rule 18b(2)(d).

[9]From current Rule 18b(2)(f)(i).

[10]From current Rule 18b(2)(f)(ii).

[11]Currently first degree.

[12]From current Rule 18b(2)(g).

[13]Paragraphs (9) and (10) are based on proposals by the Judicial Campaign Finance Study Committee. Italicized print generally indicates new or changed language from the recodification or current Rule 18.

(11) a lawyer in the proceeding, or the lawyer's law firm, is representing the judge, or judge's spouse or minor child, in an ongoing legal proceeding other than a class action, except for legal work by a government attorney in his/her official capacity.

(c) Waiver.[14] Disqualification cannot be waived. *The parties to a proceeding may waive any ground for recusal after it is fully disclosed on the record.*

(d) **If a judge does not discover that there must be a recusal under subparagraph (b)(7) until after substantial time has been devoted to the matter, the judge is not required to recuse if the person, with the financial interest, divests himself/herself of the interest that would otherwise require recusal.**

(e) **Procedure**

(1) Motion. A motion to disqualify or recuse a judge, associate judge, or statutory master, other than a judge of the Supreme Court, Court of Criminal Appeals, Court of Appeals or Statutory Probate Court, must state in detail the factual and legal basis for recusal or disqualification and, if applicable, any exception under subdivision (e)(2), and must be made on personal knowledge or upon formation and belief if the grounds for such belief are stated specifically. A judge's rulings may not be a basis for the motion, but may be admissible as evidence relative to the motion. A motion to recuse must be verified; **an unverified motion does not invoke the proceedings under this rule except for sanctions.** A motion to recuse a judge for any ground listed in subparagraph (b)(9) or(b)(10) may not be filed by any party, lawyer or law firm whose action constituted a ground for recusal.

is waived if filed later than the tenth day prior to the date the case is set for trial or other hearing except in the following instances:

an unverified motion does not invoke the recusal proceedings of this rule except for sanction.

[14]This section is from current Rule 18b(5).

[15]This requires details of facts and the legal basis for the motion, former rule required "grounds".

[16]This sentence is from current Rule 18a(a).

[17]This sentence is new.

[18]This sentence is based on current Rule 18a(a).

[19]This sentence is new. It is part of the Judicial Campaign Finance Study Committees proposal.

(a)when the basis for recusal did not exist before ten (10) days prior to the date the case is set for trial or hearing; or

(b)the judge who is sought to be recused was not assigned to the case before ten (10) days prior to the date the case is set for trial or other hearing; or

(c)the party filing the motion neither knew nor should have known of the basis for recusal before ten (10) days prior to the date the case was set for trial or other hearing; or

(d)for other good cause shown.

Any motion filed after the tenth (10th) day prior to the date the case is set for trial or other hearing is governed by subparagraph ~~(d)(4)~~.[20] (2) (4)

(3) **Referral**

The judge, in the case in which the motion is filed, must promptly sign an order ruling on the motion prior to taking any other action in the case. **If the judge voluntarily recuses or disqualifies pursuant to the motion, the case shall be referred to the presiding judge of the administrative region for reassignment unless the parties agree that the case may be reassigned in accordance with local rules.** If the judge refuses to recuse or disqualify, the judge must promptly refer the motion to the presiding judge of the administrative region. If the judge, in the case in which the motion is filed, does not promptly grant the motion or refer it to the presiding judge of the administrative region, the movant may forward a copy of the motion to said presiding judge and request the presiding judge to hear the motion or assign a judge to hear it. If the motion does not comply with subparagraph (e)(1), the said presiding judge may deny the motion without a hearing. If the motion complies with subparagraph (e)(1), the presiding judge of the administrative region shall hear the motion or immediately assign a judge to hear it. **Notwithstanding these rules or any local rule, the motion cannot be reassigned to another judge except by the presiding judge of the administrative region.**

(4) **Interim Proceedings.**[21] *After referring the motion to the judge of the administrative region, the judge in whose case the motion is filed must take no further action in the case until the motion is disposed of; except for good cause stated in the order in*

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[20] There is no ending date by which the motion must be filed if based on any of the exceptions in ~~(d)~~(2)(a), (b), (c), or (d).

[21] This section, based on a concept from S.B. 788, seeks to deter untimely, multiple, and frivolous-recusal motions.

which the action is taken. But, in the following instances, the judge may proceed with the case as though no motion had been filed, pending a ruling on the motion:

(a) when the motion is subsequent to a motion to recuse or disqualify filed in the case against a judge by the same party which has been sanctioned pursuant to subparagraph (d)(11)(b) regardless of the facts and legal basis alleged;[22] *or*

(b) when the motion to recuse or disqualify is filed after the 10th day prior to the date the case is set for trial or other hearing.[23]

(5) **Abatement of interim proceedings.**[24] *If all parties to the interim proceedings agree that the interim proceeding should be abated pending a ruling on the motion, the judge must abate all interim proceedings. The judge hearing the motion to recuse or disqualify*[25] *may also order the interim proceedings abated pending a ruling on the motion to recuse or disqualify.*

(6) **Order entered during interim proceedings.**[26] *If the judge who signed any order in an interim proceeding pursuant to subparagraph (d)(4) is subsequently recused, the judge assigned to the case shall, upon motion of a party, review such order but may, after reviewing the basis for such order, enter the same or similar order or vacate the order. In any case where a judge has been disqualified, the judge assigned to hear the case shall declare void all orders entered by such judge and shall rehear all matters that were heard by the disqualified judge.*

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[22]This provision is based on S.B. 788. Like S.B. 788, it refers to multiple recusal motions filed against "a judge." Some members of the Rules Advisory Committee questioned whether this provision was intended to prohibit only multiple recusal motions filed against a single judge or also successive recusal motions filed against various judges involved in the case.

[23]*See* subsection (d)(2), above.

[24]This section, which differs from S.B. 788, would enable trial courts to stop interim proceedings until the recusal motion is ruled on if the motion appears to be meritorious or if the parties agree that the proceedings should be stopped. It thus prevents waste of judicial resources on proceedings where the recusal motion likely would be granted and the interim rulings caused to be "undone." *See* subparagraph (d)(6), below.

[25]*See* (d)(7), last sentence.

[26]This section is based on S.B. 788 but clarifies how trial judges can "fix" orders entered in interim proceedings that are required to be vacated after a recusal motion is granted. It also clarifies that order entered in an interim proceeding while a disqualification motion is pending must be voided if the motion is granted.

(7) **Hearing.**[27] *Unless the presiding judge of the region has denied the motion without hearing pursuant to subparagraph d(3), a hearing must be scheduled to commence promptly. The presiding judge must promptly give 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 or electronic copies of documents filed in the case may be used in the hearing. The judge who hears the motion must rule within three days of the last day of the hearing or the motion is deemed granted.*

(8) **Disposition.** If a judge is disqualified or recused, the regional presiding judge must assign another judge to preside over the case. ~~However, if~~ **and notwithstanding these rules or any local rule, the case shall not be reassigned to another judge without the consent of the presiding judge of the administrative region.** *If an associate judge or a statutory master is recused or disqualified, the district court to whom the case is assigned must hear the case or appoint a replacement.*[28]

(9) **Appeal.** If the motion is denied, the order may be reviewed for abuse of discretion on appeal from the final judgment. If the motion is granted, the order may not be reviewed by mandamus or appeal.[29]

(10) **Assignment of Judges by Chief Justice of the Supreme Court.** The Chief Justice of the Supreme Court may also appoint and assign judges in conformity with this rule and pursuant to statute.[30]

(11) **Sanctions.** *Sanctions are authorized as follows:*

(a) If a party files a motion under this rule and it is determined, on motion of the opposite party, or on the court's own initiative, that the motion was brought for purposes of delay and without sufficient cause, the judge hearing the motion may impose any sanctions authorized by Rule 215.2(b).[31]

(b) Upon denial of three or more motions filed in a case against a judge under this rule by the same party, the judge denying the third or

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[27]The following two subparagraphs revise existing procedures to improve expeditiousness.

[28]Masters and associate judges may be recused or disqualified. The preceding sentence clarifies the procedures for assigning replacements for such officers.

[29]From current Rule 18a(f).

[30]From current Rule 18a(g).

[31]This is from current Rule 18a(h).

subsequent motion shall enter an order awarding to the party opposing such motion reasonable and necessary attorneys fees and costs. The party making such motion and the attorney for such party are jointly and severally liable for such fees and costs which must be paid before the 31st day after the date of the order denying the motion.[32] *If the money is not timely paid, the judge hearing the case may impose any sanctions authorized by Rule 215.2(b).*

~~(12) Suspension of Sanctions Order. The order entered pursuant to subparagraph 11 (b) may be superseded by each party and such party's attorney who is obligated to pay fees and costs, by filing with the trial court clerk a written agreement; or filing with the trial court clerk a bond signed by a sufficient surety; or making a deposit with the trial court clerk in lieu of a bond.~~

~~(a) Written Agreement. The written agreement to suspend the court's sanction order must be signed by the party(s) who is beneficiary of the order and each party and each party's attorney who are obligated by the order to pay fees and costs, and state the terms of the suspension, the conditions under which the award must be paid and the method of payment. The written agreement must be approved by the court.~~

~~(b) Bond. A bond must be in the amount of the order, payable to the party(s) who is the beneficiary of such order. The bond must be signed, as principal, by each party and such party's attorney who is obligated to pay the amount ordered by the court and by sufficient surety or sureties. The bond shall provide the amount stated in the bond shall be paid to the beneficiaries of the order by the principal(s) and surety(s) unless the principal(s) is successful in having the order reversed on appeal. To be effective the bond must be approved by the trial court clerk. Upon motion of any party the trial court shall review the bond.~~

~~(c) Deposit in Lieu of Bond. Instead of filing a surety bond, each party and the party's attorney may deposit with the trial court clerk cash, a cashier's check payable to the clerk, drawn on any federally insured or federally chartered bank or savings-and-loan association or with leave of court a negotiable obligation of the federal government or of any federally insured and federally or state chartered bank or savings-and-loan association. The amount of the deposit must be in the amount of the award. The clerk must promptly deposit any cash or cashier's check in accordance with law.~~

~~(d) Payment or Refund By Clerk. Payment by the clerk is effected by.~~

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[32]The preceding boldfaced language is taken from Tex.Civ.Prac.&Rem Code § 30.016(c). The language that follows is the committee's attempt to reconcile the statutory language, which contemplates superseding of an order awarding attorneys fees and costs, with the fact that such an order would be interlocutory and, therefore, not appealable or ordinarily able to be superseded.

~~(1) paying to the beneficiary of the order, when cash or a cashier's check was deposited with the clerk, the amount of money stated in the order or affirmed on appeal and returning to the party(s) and that party's attorney making the deposit any funds remaining;~~

~~(2) delivering to the beneficiary of the order the bond or negotiable obligation which was deposited with the clerk.~~

This stays in.

~~If the order is superseded and not appealed, the clerk shall make payment to the beneficiaries of the order thirty-one (31) days after the date of the order. If the order is superseded and appealed, but is not reversed on appeal, the clerk shall make payment to the beneficiaries of the order thirty-one (31) days after the judgment in the case, including the sanctions order, becomes final.~~

~~If the order for fees and costs is reversed by the trial court or as a result of an appeal, the clerk shall refund to the party(s) and the party's attorney who superseded the order, the amount of cash deposited together with any earned interest, the negotiable obligation or the bond which was filed with the clerk.~~

~~(13)~~ **Justice of Peace Courts**. This recusal rule does not apply to Justices of the Peace.

Comment 1: A motion to recuse or disqualify a statutory probate judge is governing by § 25.00255 Government Code.

Comment 2: Recusals where the judge is a member of a class that is represented by a lawyer or lawyer's law firm are decided on a case-by-case basis.

---------- COMPARISON OF FOOTNOTES ----------

-FOOTNOTE 1-
This rule would replace current Rules 18a and 18b of the Texas Rules of Civil Procedure.

-FOOTNOTE 2-
Section (a) is a nonsubstantive recodification of current Rule 18b(1). Both provisions are based on constitutional grounds for disqualification.

-FOOTNOTE 3-
This section is derived from current Rule 18b(2).

-FOOTNOTE 4-
From Current Rule 18b(2)(a).

-FOOTNOTE 5-
From Current Rule 18b(2)(b).

-FOOTNOTE 6-
Current Rule From 18b(2)(c) *&* (*f*)(iii).

-FOOTNOTE 7-
From current Rule 18b(2)(b).

-FOOTNOTE 8-
From current Rule 18b(2)(d).

-FOOTNOTE 9-
From current Rule 18b(2)(f)(i).

-FOOTNOTE 10-
From current Rule 18b(2)(f)(ii).

-FOOTNOTE 11-
Currently first degree.

-FOOTNOTE 12-
From current Rule 18b(2)(g).

-FOOTNOTE 13-
Paragraphs (9) and (10) are based on proposals by the Judicial Campaign Finance Study Committee. Italicized print generally indicates new or changed language from the recodification or current Rule 18.

-FOOTNOTE 14-
This section is from current Rule 18b(5).

-FOOTNOTE 15-
This requires details of facts and the legal basis for the motion, former rule required "grounds".

-FOOTNOTE 16-
This sentence is from current Rule 18a(a).

-FOOTNOTE 17-
This sentence is new.

-FOOTNOTE 18-
This sentence is based on current Rule 18a(a).

-FOOTNOTE 19-
This sentence is new. It is part of the Judicial Campaign Finance Study Committees proposal.

-FOOTNOTE 20-
There is no ending date by which the motion must be filed if based on any of the exceptions in (d)(2)(a), (b), (c), or (d).

-FOOTNOTE 21-
This section, based on a concept from S.B. 788, seeks to deter untimely, multiple, and frivolous-recusal motions.

-FOOTNOTE 22-
This provision is based on S.B. 788. Like S.B. 788, it refers to multiple recusal motions filed against "a judge." Some members of the Rules Advisory Committee questioned whether this provision was intended to prohibit only multiple recusal motions filed against a single judge or also successive recusal motions filed against various judges involved in the case.

-FOOTNOTE 23-
See subsection (d)(2), above.

-FOOTNOTE 24-
This section, which differs from S.B. 788, would enable trial courts to stop interim proceedings until the recusal motion is ruled on if the motion appears to be meritorious or if the parties agree that the proceedings should be stopped. It thus prevents waste of judicial resources on proceedings where the recusal motion likely would be granted and the interim rulings caused to be "undone." See subparagraph (d)(6), below.

-FOOTNOTE 25-
See (d)(7), last sentence.

-FOOTNOTE 26-
This section is based on S.B. 788 but clarifies how trial judges can "fix" orders entered in interim proceedings that are required to be vacated after a recusal motion is granted. It also clarifies that order entered in an interim proceeding while a disqualification motion is pending must be voided if the motion is granted.

-FOOTNOTE 27-
The following two subparagraphs revise existing procedures to improve expeditiousness.

-FOOTNOTE 28-
Masters and associate judges may be recused or disqualified. The preceding sentence clarifies the procedures for assigning replacements for such officers.

-FOOTNOTE 29-
From current Rule 18a(f).

-FOOTNOTE 30-
From current Rule 18a(g).

-FOOTNOTE 31-
This is from current Rule 18a(h).

-FOOTNOTE 32-
The preceding boldfaced language is taken from Tex.Civ.Prac.&Rem Code § 30.016(c). The language that follows is the committee's attempt to reconcile the statutory language, which contemplates superseding of an order awarding attorneys fees and costs, with the fact that such an order would be interlocutory and, therefore, not appealable or ordinarily able to be superseded.

~~-FOOTNOTE 33-~~
~~The following superseding procedure is basically from Appellate Rule 24.~~

---------- COMPARISON OF FOOTERS ----------

-FOOTER 1-

~~May 22~~ **August 29**, 2000 Draft

-FOOTER 2-

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August 31, 2000

Mr. O. C. Hamilton, Jr.
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Via Facsimile No. (956) 686-6109
and U. S. Mail

Re: SCAC Recusal Rule Working Draft

Dear Carl:

Please consider making the two housekeeping changes to the recusal rule draft we discussed at the May 19 meeting after the committee voted to include subsection b(11) (recusal when a lawyer to a case is currently representing the judge or the judge's spouse).

First, a footnote is needed to show the source of the subsection, as was done for the other new subsections. The source was Volume 5, Section 3.6-2 of the *Guide to Judiciary Policies and Procedures* published by the Administrator's Office of the United States Courts.

Second, subsection 11 should be renumbered to logically follow subsections 6, 7 and 8, involving recusal based on other relationships of a judge or the judge's spouse. I suggest subsection 11 it be moved to 9, immediately following number 8 (recusal when lawyers are related to the judge).

Thanks for your help.

Yours very truly,

Charles R. Watson, Jr.

CRW:baa
enclosure

cc: Hon. Nathan Hecht (via U. S. Mail)
Mr. Chip Babcock (via U. S. Mail)
Mr. Richard Orsinger (via U. S. Mail)

Report of the Jury Rules Subcommittee
Proposed Voir Dire Rule
May, 2000

FINAL

REPORT OF THE JURY RULES SUBCOMMITTEE
PROPOSED VOIR DIRE RULE
MAY, 2000

First by a vote of 4-2 the subcommittee does not think that there should be a voir dire rule.

Those opposing a rule felt that the problem of unreasonable abridgment of time for voir dire which various legislators sought to address during the 1999 legislative session appears, much like the problem of Rambo litigation some years ago, to have been self-limiting, and to be largely resolved at present. Much potential for mischief exists in enactment of a rule, not the least of which is the perennial problem of unintended consequences, and a majority of the subcommittee is of the view that no rule is needed and that the risk of unintended consequences far exceeds the potential benefit of any potential rule.

Those favoring a rule felt that the methods and rules used by trial judges varied widely from court to court, more than any other aspect of trial practice, and largely because there is no rule of procedure regarding voir dire at all. Most practitioners believe voir dire has a critical impact (some say determinative) on verdicts. If so, the risk of injustice due to different voir dire practices far exceeds the risks of passing a stardardized rule.

Nonetheless, the subcommittee recognizes that the Court may feel compelled to draft a rule due to events and pressures engendered by and during the last session, and that our task is to present a potential rule to the full committee for discussion.

The subcommittee could reach a consensus only on two provisions, both relating to the time allowed for voir dire. The remaining provisions we discussed failed to gain a consensus, but are being forwarded to the full committee for discussion.

Number 1

The subcommittee unanimously agrees on the following ideas which might become part of a rule:

1. Attorneys for the parties have a right to a reasonable time for voir dire.

2. Judges may set reasonable time limits on voir dire, but such time limits shall not unreasonably abridge the time for voir dire.

The argument for stopping there is: This language protects that which legislators sought to protect: meaningful time for adequate voir dire. It entirely avoids addressing the content of voir dire, thus minimizing the risk of unintentionally changing decades of established Texas case law.

The argument against stopping there is: Most of the additional principles (listed at Number 2 and Number 3 below) simply codify rather than change decades of established Texas case law. Trial judges and practitioners alike are much more likely to be familiar with a rule of procedure than with caselaw scattered over scores of years.

Number 2

Alternatively, some argue for the addition of the following concepts, which come mainly from the jury task force's work product.

The arguments against adding these concepts to the rule are: a) their inclusion will probably result in judicial limitation on voir dire, which is the opposite of what legislators sought, and b) they do not all reflect correct statements of current law.

The arguments for adding these concepts to the rule are: a) to provide guidance to courts and litigants about the proper content of voir dire and increase the uniformity of jury selection procedures around the state, and b) to protect the rights of members of the public who are subjected to voir dire and litigants who cannot afford teams of jury selection experts.

3. The court shall permit the parties to state briefly the nature of the case and the relief requested, and to question the panelists about their qualifications, backgrounds, and experiences for a reasonable period of time.

4. The court shall prevent any examination that is unduly invasive, repetitive or argumentative.

5. Questions concerning a panelist's opinion of applicable law must be prefaced by a substantially correct statement thereof.

6. A party may not inquire as to a panelist's probable vote, or attempt to commit a panelist to a particular verdict or finding.

7. Panelists may not be asked how much weight they would give to certain evidence. The court may not examine, nor allow any party to examine, a panelist for the purpose of rehabilitation once a clear statement indicating inability or unwillingness to be fair and impartial has been made by the panelist. If such bias or prejudice is not clearly established, the court may examine or shall allow any party to examine a panelist for the purpose of clarification or reconsideration of a previous answer given by that panelist.

Number 3

Finally, some argue for inclusion of the following concepts. They are opposed by others who believe that their addition would eviscerate challenges for cause.

A panelist's general philosophical opinions and predispositions about a cause of action, a defense, or the relief sought are not a basis for challenge unless the panelist will be unable to consider the facts of the particular case and make a decision based on the credible evidence admitted at trial and the law given in the court's charge.

10. Panelists may not be disqualified because of their reaction to statements about the evidence that will be presented.

11. In determining challenges for cause the court shall consider the panelist's entire examination in context after the parties have had a reasonable opportunity to examine the panelist as to the ground of challenge.

COMBINED WORKING DRAFT A

The parties have a right to conduct voir dire examination for a reasonable time which shall be set by the court. The parties may advise the jury panel of the claims, damages and defenses in the case so that the panelists may intelligently answer questions about their qualifications, backgrounds, experiences and attitudes; and the parties may question the panelists sufficiently to be able to make reasonably informed decisions concerning the exercise of peremptory challenges and challenges for cause. The examination shall not be abusive, unduly invasive, repetitive or argumentative. A party may not attempt to commit a panelist to a particular verdict or finding, but may question a panelist generally about the panelists' ability to fairly consider any element of the claims, defenses or damages presented in the case.

COMBINED WORKING DRAFT B

(1) **The parties have a right to conduct voir dire examination for a reasonable time, which shall be set by the court.**

(2) **The parties may:**

(a) advise the jury panel of the claims, damages and defenses in the case so that the panelists may intelligently answer questions about their qualifications, backgrounds, experiences, and attitudes; and

(b) question the panelists sufficiently to be able to make reasonably informed ~~decisions concerning the exercise of~~ peremptory challenges and challenges for cause.

(3) **The examination shall not be abusive, unduly invasive, repetitive or argumentative. A party may not attempt to commit a panelist to a particular verdict or finding, but may question a panelist generally about the panelists' ability to fairly consider any element of the claims, defenses, or damages ~~presented~~ in the case.**

(4)

- Peeples worries about Challenges of Cause
- Brister

08/31/00 Memorandum from Professor Dorsaneo Regarding Miscellaneous Proposals

Proposed Revisions (Revised Draft) Texas Rules of Appellate Procedure

SOUTHERN METHODIST UNIVERSITY

William V. Dorsaneo III
Chief Justice John and Lena Hickman Distinguished Faculty Fellow
and Professor of Law

MEMORANDUM

To: Texas Rules of Appellate Procedure SCAC Subcommittee:

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Frank Gilstrap
Hill Gilstrap
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From: William V. Dorsaneo, III

Date: August 31, 2000

Re: Miscellaneous Proposals

At our August 25-26 meeting Justice Hecht provided me with the following material concerning the Texas Rules of Appellate Procedure:

1. Letter from Dave's Bar Association dated June 15, 2000 concerning TRAP 9.2.

2. Memorandum (anonymous) containing questions/suggestions received from the 2d, 10th and 14th court of appeals.

3. Eighth Circuit opinion in Anastasoff v. United States of America concerning unpublished opinions and declaring 8th Circuit Rule 28A(i) unconstitutional under Article III of the Constitution.

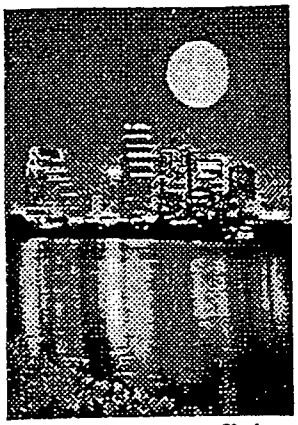
Also please consider the following communication on various subjects.

4. Letter from Paul Womack dated August 25, 2000 concerning TRAPs 9.5(a) and 13.1 (a).

5. Email messages from Justice Hecht concerning the August 24, 2000 report of the Combined Committee.

We need more work to be done on these matters, particularly on unpublished opinions. I am asking Frank Gilstrap to prepare a memorandum on this subject.

WVD/sam
Attachments



The Fabulous Austin Skyline

Dave's Bar Association

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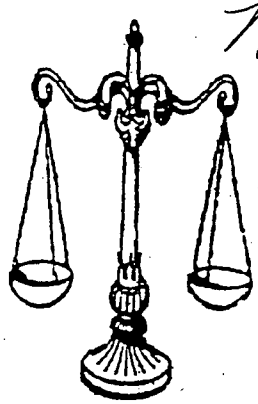


June 15, 2000

Hon. Tom Phillips, Chief Justice
Texas Supreme Court
201 West 14th Street, Room. 104
Austin, Texas 78701

Hon. Mike McCormick, Presiding Judge
Texas Court of Criminal Appeals
201 West 14th Street, Room 106
Austin, Texas 78701

Re: Defects in Rule 9.2, Texas Rules of Appellate Procedure / Proposed Rule Changes

Dear Chief Justice Phillips and Presiding Judge McCormick:

Recent discussions between members of Dave's Bar Association has brought to light two defects in Rule 9.2 of the Rules of Appellate Procedure, the so-called "Mailbox Rule." That Rule, as you are aware, dates to at least the early 19th century, see *Adams v. Lindsell*, 106 ER 250 (K.B. 1818), and provides that a document is effectively delivered upon being deposited into the mail. For purposes of modern practice and integration of the principles of ancient practice, we are respectfully suggesting that the Courts consider two modifications to the Rule.

I

The more modern problem has been created by the use of postage meters, and now, the availability of Internet postage. As it most commonly affects documents filed by mail, the Texas version of the Rule provides that "a legible postmark affixed by the United States Postal Service" may be considered proof of timely mailing. Uniformly, Texas Courts have declined to treat mail bearing metered postage as timely mailed, absent a separate post-mark applied by the U.S. Postal Service. More recently, our Courts have been faced with letters which are ostensibly mailed in a timely fashion, but which bear postage purchased from Internet postage companies such as "e-stamp," "stamps.com" and "Pitney-Works," part of the Pitney Bowes company. There may be others, but their functions are not noticeably different from these three. It appears that the appellate courts are treating Internet postage in the same fashion they have treated metered postage.

215 miles from the Clerk of the El Paso Court of Appeals and approximately 450 miles from the Clerks of your Courts. When needing to file a document with an appellate court, such practitioner is forced to use the Postal Service, but is also forced to do so at the risk that the document could be lost in the mail. This problem is not just limited to rural areas, but applies to many cases, for example, in Dallas and Houston when an appeal is transferred from the local appellate court to distant Courts of Appeals.

We suggest that the Courts modify Rule 9.2(b), governing filing by mail, by adding a subsection "3" which reads as follows:

(b) Filing by mail.

* * *

(3) Document not received within ten days: When a document filed under these rules is not received within ten days after the applicable filing date, the reviewing court shall permit the filing of a replacement document when:

(A) there is a sworn motion by counsel of record which states that:

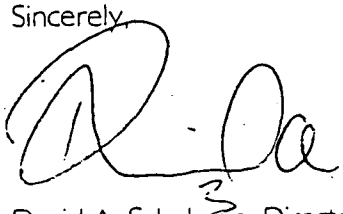
(i) the original document was time filed pursuant to section (b)(1); and

(ii) the replacement document is an exact duplicate of the lost document, and

(B) such motion is accompanied by one of the forms of proof of mailing set out in section 2, or is accompanied by a written statement by opposing counsel that states that the opposing party timely received a copy of the document.

Because the distance between many Texas cities and the appellate court with which a practitioner must deal is so great, we respectfully recommend that the Courts considered the proposed addition to Rule 9.2 of the Appellate Rules. We also recommend the adoption of similar provisions to cover U.S. Postal Service filings of documents governed by the Rules of Civil Procedure and Code of Criminal Procedure.

Sincerely,



David A. Schulman, Director
Dave's Bar Association

DAS/hc

Bob, here are some of the questions/suggestions I received. Please try to include these in your discussion. Thanks, Karen (by the way, congratulations on your new job).

FROM THE 10TH COURT OF APPEALS:

1. Some trial court clerks don't notify us when a notice of appeal has been filed in civil cases. (Sometimes months pass before we discover that an appeal has been perfected) Most follow the same procedure they use in criminal cases (as provided by TRAP 25.2(c)). Rule 25.1(e) says a copy of the civil notice of appeal must be filed with the appellate court, but it doesn't really say who bears that responsibility, although the tenor of the rule suggests the burden is on the party filing the notice. Rule 25.1(a) requires the appellate court to "immediately" send a copy of a notice of appeal to the trial court clerk if it is mistakenly filed with the appellate court. We wonder if there ought to be:

a. a concomitant responsibility for the trial court clerk to send a copy to the appellate court similar to that provided for criminal cases; or

b. a direct statement that the party filing the notice must file a copy with the appellate court.

We would prefer "a." because problems usually arise in cases where the appellant's attorney is not taking care of business as he should.

FROM THE 2ND COURT OF APPEALS:

1. TRAP 20 (this rule is our most pressing problem)

Most of the time, indigency affidavits are filed by prose parties, who don't realize that their trial court affidavit doesn't extend into the appeal. The time to file it ("with or before the notice of appeal") is too soft. It seems there should be a set time (e.g., 10 days after NOA filed), which would also prevent unsuspecting parties from defaulting their appeal simply because they were concentrating on getting the NOA filed. Extra time would not harm any party because the date for filing a contest runs from the date the affidavit is filed. Further, with an inmate, the affidavit is taken as true at any contest hearing. What if the reporter or clerk merely challenges the affidavit on the basis that it does not meet the technical requirements of TRAP 20.1? Because a defective affidavit can be amended, where does that leave the trial court?

Also, what should the parties and the courts call the review of the trial court's indigency determination under *In re Arroyo*, Nos. 98-0152 & 98-0161, 1998 WL 716921 (Tex. Oct. 15, 1998) (orig. proceeding)? (Courts have used "a matter ancillary to the underlying appeal," "a prerecord motion," and "an interlocutory matter,").

2. PARENTAL NOTIFICATION: Should a copy of the court of appeals' judgment/opinion be sent to the trial court? Family Code section 33.04(c) does not list the trial court as receiving a copy of the judgment/opinion, although rule 1.4(b)(6) indicates a ruling or opinion may be released to the trial court. Also, does the Texas Supreme Court have any internal, non-

9. TRAP 43.4: Are costs also to be assessed in criminal cases, or does this rule implicitly direct that costs are not to be assess in criminal cases?

10. TRAP 47.5: Other than dissent to the denial of a motion for rehearing en banc (if one is filed), is there anything a non-panel member can do to publically show complete disapproval with a panel's opinion?

FROM THE 14TH COURT OF APPEALS:

1. Reporter's Records.

Amend rule 34.6(b). Appellant must request the reporter to prepare the record "[a]t or before the time for perfecting the appeal." A copy of the request must be filed with the trial court clerk, but not the appellate clerk. Consequently, this court does not know if the record has been requested or who the court reporter or reporters are. Harris County uses numerous substitute court reporters. Docketing statements sometimes provide this information, but no penalty for failure to file is included in the rules. Docketing statements are almost never filed in criminal cases. Particularly in criminal cases, our clerks must call various court reporters to locate which of the many substitutes may have reported various hearings, and the clerks must also determine whether payment has been made if the appellant is not indigent. Frequently, filing of the reporter's record may be delayed for several months due to lack of information or incorrect information. Accordingly, our staff proposes that the rule be amended as follows:

a. require appellant to file a copy of the request to the court reporter with the court of appeals within a specified period of time after the notice of appeal is filed (e.g., 15 days). The request must identify all court reporters, the dates testimony was taken, and state that payment, or satisfactory arrangements, has been made. An extension of time to file the record request should be permitted. If the request is not filed with the court of appeals, after notice and an opportunity to cure, the case will be submitted on the clerk's record alone.

b. Rule 34.6(b)(3) should be repealed. Requiring the court to accept the record even when no timely request has been made results in unnecessary delays in requests and preparation of the record.

2. Extensions for Appellee's Brief.

Modify rule 38.6(d) to include a provision for an extension of time for appellee's brief. This has not been a problem at our court as our court has continued to accept and rule on these motions. There is no reason not to make this simple change, however, to avoid confusion and promote more uniformity among the courts.

3. Reconsideration on PDR.

Modify rule 50 to permit the court of appeals to withdraw its opinion without having to issue a new one within 30 days. By the time our judges have reviewed the petition and determined they would like to change the opinion, the 30-day period has nearly elapsed. It

PAUL WOMACK, JUDGE
COURT OF CRIMINAL APPEALS OF TEXAS

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Austin, Texas 78711.
(512) 463-1595. Fax: 463-7061.
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August 25, 2000

William V. Dorsaneo III, Professor
School of Law
Southern Methodist University
Dallas, Texas 75275-0116

Dear Bill,

Thank you for the memorandum on the proposed revisions to the Rules of Appellate Procedure. I am writing to bring up points about the form of two rules that are up for revisions. The points are not related to the merits of the proposed changes.

Rule 9.5(a). It is proposed to add an exception to the second sentence so that it reads, "But a party need not serve a copy of the record, except in an original proceeding." This creates a contrast with the first sentence ("At or before time of the document's filing, the filing party must serve a copy on all parties to the appeal or review") which does not speak to original proceedings. One could infer that the first sentence does not apply to original proceedings. Should the first sentence be amended to say "the filing party must serve a copy on all parties to the appeal or other proceeding"?

Rule 13.1(a). It is proposed to replace the present requirement-unless-excused with a requirement-when-requested. Both the present rule and the proposed amendment seem ambiguous.

The rule has a compound predicate with two verbs ("must attend court sessions and make a full record of the proceedings"), followed by a participial phrase that is linked by a conjunction ("unless excused by agreement of the parties" [present rule]; "when requested by the court or any party to the case" [proposed rule]). Does the participial phrase apply to both verbs or only to the second verb?

In other words, under the present rule, may the agreement of the parties excuse the court reporter from attending court sessions *and* making a full record, or only from making a full record? This ambiguity may be inconsequential, since the reporter's attendance can be independently required by the court even if the parties agree to excuse attendance.

But under the proposed rule the ambiguity may have a real effect. Would the reporter be required to attend court sessions only on request of the court or a party, or is the court reporter's obligation to attend independent of a request? Suppose I am a party and I assume the participial phrase applies only to the predicate "make a full record." I file no request because I do not want a full record; I do not want voir dire and opening statements reported. Do I have a valid complaint when the reporter doesn't show up at the beginning of testimony (because the court didn't request it or the reporter forgot the request)? Or did I waive a full report of the testimony by failing to request attendance?

Would the intended meaning of the rule be expressed by this language: "The official court reporter or court recorder must: (a) attend court sessions unless excused by agreement of the parties and the court, and make a full record of the proceedings when requested by any party"?

With best wishes, I am,

Yours truly,

Paul

Paul Womack, Judge

SMU School of Law

From: Nathan L. Hecht [nlhecht@worldnet.att.net]
Se Friday, August 25, 2000 4:47 PM
To: wdorsane@mail.smu.edu

Re your 8/24 report on proposed TRAP revisions:

38.1: OK, but how do we get better issues? Issue-writing has improved greatly since we made a point of it in the last revisions, but while the good lawyers are getting better, the worse ones are not improving much. Should we put an example in a comment? Or direct people to some other writing that would help?

38.10: Yes, but apply to Supreme Court as well -- petitions for review, original proceedings, etc.

43.2: I agree, CAs can vacate and remand for settlement, but not for other reasons.

47.7: I think we need some change, and the proposal is helpful. But we need to rethink 47.4. Perhaps that part of the rule should be rewritten to say that opinions must be published unless, rather than saying that opinions should not be published unless. Even then, the standards should favor publication. I am coming to the view that it is hard to justify not publishing a case unless its result is absolutely dictated by controlling precedent, as distinct from falling under the rationale of prior decisions. If the result is not utterly clear, the opinion should be published. Maybe that goes too far, but I doubt it.

SMU School of Law

From: Nathan Hecht [Nathan.Hecht@courts.state.tx.us]
Se Friday, August 25, 2000 1:42 PM
To: Bill Dorsaneo

A panel of the 8th Circuit held on Tuesday that its rule forbidding citation of unpublished decisions as precedent is unconstitutional. Citing Marbury v. Madison, the Federalist Papers, Blackstone, Hobbes, Coke, etc., as expressing the understanding held by the Framers that all cases were to be considered suitable precedent, the panel decided that 8th Circuit Rule 28A(i) represents the exercise of an extra-judicial power beyond those conferred by Article III of the Constitution.

The link to the opinion is below.

http://www.ca8.uscourts.gov/opndir/00/08/993917P.pdf

Revised Draft

PROPOSED REVISIONS
TEXAS RULES OF APPELLATE PROCEDURE

Rules Committee, Appellate Section, State Bar of Texas
(Pamela Stanton Baron, Chair; Diana L. Faust; Stacy R. Obenhaus)

Introduction

The appellate rules committee of the Appellate Section undertook, beginning in the fall of 1999, to solicit comments on the new Texas Rules of Appellate Procedure, which took effect in September 1997. The committee solicited comments through notices in the Appellate Advocate and on the section web-site, as well as through letters to court attorneys and local bars through the section liaisons. The committee has received eleven sets of written comments (copies of which are attached to this report), as well as a few generated by telephone calls or by the committee itself (these latter comments are reflected only in the attached summary). The comments address approximately twenty rule sections.

The comments, for the most part, are directed to small problems with the rules that have only been discovered when particular circumstances are presented. The absence of larger complaints tends to suggest that the appellate rules are working quite well.

This report summarizes the comments received, sorts the comments by rule number, and identifies the source of the comments. It does not undertake at this time to recommend whether changes should be made to the appellate rules in response to the comments. It is the committee's understanding that the committee and the Subcommittee on the Texas Rules of Appellate Procedure of the Supreme Court Advisory Committee, chaired by Professor Bill Dorsaneo, will undertake to make recommendations as a joint project of the two committees.

The chair would like to thank the two committee members, Stacy Obenhaus and Diana Faust, for their work on this project. Stacy Obenhaus deserves special recognition for serving as reporter.

Report of Combined Committee

Representatives of the Subcommittee on the Texas Rules of Appellate Procedure and of the Rules Committee, Appellate Section, (the "Combined Committee") State Bar of Texas met on August 11, 2000 and respectfully submit the following report.

William V. Dorsaneo, III
Chair, SCAC TRAP Subcommittee

Rule 9.5
Service

(a) *Service of All Documents Required.* At or before the time of a document's filing, the filing party must serve a copy on all parties to the appeal or review. But a party need not serve a copy of the record.

Proposed change

By: John Gsanger

Rule 52.7 or rule 9.5 should require that the relator in an original proceeding serve on all real parties in interest a copy of the record filed with the appellate court in that proceeding. First, the record in an original proceeding is usually brief and, by definition, it is relevant. Second, the relator is typically the only party who has ordered a reporter's record of the relevant proceedings. Third, the record may contain affidavits not on file with the lower court. Fourth, courts working to expedite the disposition of an original proceeding will frequently limit access to the record so that it cannot be checked out.

Combined Committee recommendation

Amend Rule 9.5 (a) by adding "except in an original proceeding." Alternatively, amend Rule 52.7 to require the relator to file an additional copy or copies of the record so that other parties can have access to the record without interfering with the work of the appellate court.

IN

9.5(a)

At or before the time of a document's filing, the filing party must serve a copy on all parties to the apped or origin. proceeding

~~But~~ A party need NOT serve a copy of the record IN an appeal

A party must serve a cp of the Rd. IN an original proceeding

Rule 10.1(a)(5)
Contents of Motions; Response

(a) *Motion.* Unless these rules prescribe another form, a party must apply by motion for an order or other relief. The motion must:

. . .

(5) in civil cases, contain or be accompanied by a certificate stating that the filing party conferred, or made a reasonable attempt to confer, with all other parties about the merits of the motion and whether those parties oppose the motion.

Proposed change

By: Pamela Stanton Baron, Stacy Obenhaus

Rule 10.1 (a)(5) or rule 49 should state that a certificate of conference is not required for the motion for rehearing. The motion for rehearing is really a brief on the merits, and no court appears to require the certificate anyway.

Combined Committee recommendation

Amend Rule 10.1 (a) (5) by adding the following sentence. "A certificate of conference is not required for a motion for rehearing."

(IN) add at end of (a)(5)

Rule 11
Amicus Curiae Briefs

. . . An amicus brief must:

(a) comply with the briefing rules for parties; . . .

Proposed change

By: Stacy Obenhaus

Rule 11 should state that the amicus brief should comply with the rules for papers generally (rule 9) and that in terms of content the brief need contain nothing more than a table of contents, an index of authorities, a statement of interest (as provided in subsections (b) and (c) of rule 11), and an argument. It could provide that the amicus may include any other matters required by rule 38.1 for an appellant's brief.

Combined Committee recommendation

The current general language of Rule 11 is sufficient as written.

Rule 13.1
Duties of Court Reporters

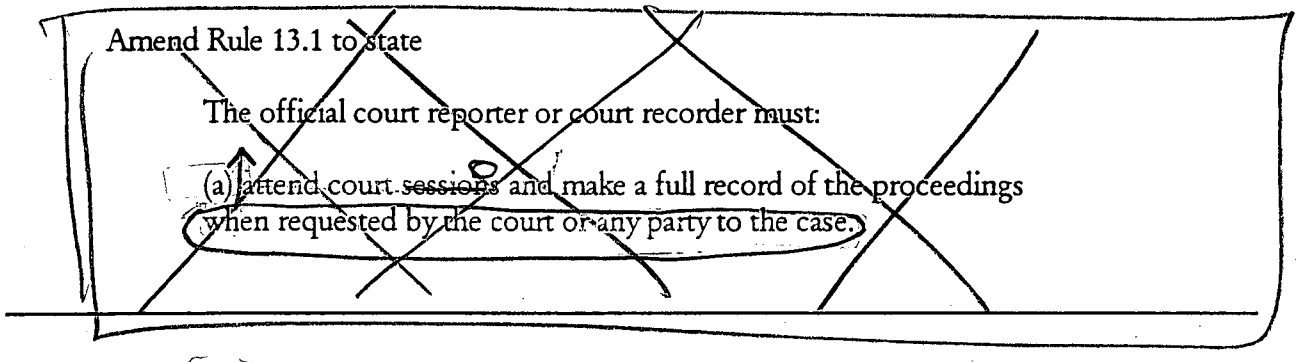
The official court reporter or court recorder must:
(a) attend court sessions and make a full record of the proceedings unless excused by agreement of the parties;
(b) take all exhibits

Proposed suggestions

by F. Scott McCown
Judge, 345th District Court
Travis County, Texas

Rule 13.1(a), as written, seems to require a record to be made of everything unless on the record people say they don't want a record. At the time the rule was adopted, trial judges were assured that the new rule was not intended to require court reporters to make a full record of all proceedings absent an agreement made on the record excusing what the rule literally requires. "The original purpose of the rule was to do away with the need for lawyers to make a 'super request' to get the court reporter to record voir dire or opening statments." "I think we need to suggest to the Court an amended version to do only what was intended." McCown letter to Babcock dated 12/23/99. *See Polasek v State*, 16 S.W.3d 82.

Combined Committee recommendation



DN

(a) When the Court or any party to the case requests, attend court and make a full record of the proceedings

Rule 18
Mandate - Issuance

The clerk of the appellate court that rendered the judgment must issue a mandate in accordance with the judgment and send it to the clerk of the court to which it is directed when one of he following periods expires: . . .

Proposed change

By: Stacy Obenhaus

Rule 18 should require that when the mandate issues the appellate court clerk must mail a copy of the mandate to all counsel of record. The date the mandate issues is an important date for the parties. In cases where a judgment has been superseded, immediate notice that the court has issued the mandate is arguably as important as immediate notice of the opinion, judgment, or order on motion for rehearing.

Combined Committee recommendation

Amend Rule 12.6 to provide that ". . . the clerk of an appellate court must promptly send a notice of any judgment, mandate or other court order to all parties to the proceeding." Also amend Rule 18.1 to state that: "The clerk . . . must issue a mandate in accordance with the judgment and send it to all parties to the proceeding and to the clerk of the court to which it is directed when one of the following periods expire:

IN

NO

Rule 25.1(d)
Contents of notice.

The notice of appeal must:
(1) identify the trial court and state the case's trial court number and style;
(2) state the date of the judgment or order appealed from;
(3) state that the party desires to appeal;
(4) state the court to which the appeal is taken unless the appeal is to either the First or Fourteenth Court of Appeals, in which case the notice must state that the appeal is to either of those courts;
(5) state the name of each party filing the notice; . . .

Proposed changes

By: Carlos Mattioli

Rule 25.1(d) might require that the notice of appeal list the names of all parties against whom the appellant intends to appeal. In most cases, the appellant will wish to appeal against all parties, and can simply state so. However, in some cases, not all parties in the trial court need be named as parties or required to participate in the court of appeals.

For instance, our firm represented a defendant in a case in which the trial court granted our client a directed verdict. After the jury rendered judgment against remaining defendants, appeal was taken by a co-defendant. Neither in the trial court, nor on appeal were any issues raised or briefed against the directed verdict granted to our client. The court of appeals did not schedule a briefing deadline as to our client like it did with all other remaining parties. After briefs were filed by the appellant, we moved to dismiss our client from the appeal. Only after this motion was filed did the appellant claim the directed verdict was improper as to our client.

Although there is an appellate remedy, a lot of the court's and client's resources could have been conserved if the appellant was required to state in its notice which parties it intends to appeal against (using a good faith standard).

By: Brenda Norton/Lily Pleitez

The rule might require that a party attach to the notice of appeal a copy of the order or judgment being appealed. If there is a timeliness issue, the clerk's office normally has to ask the trial court clerk for a copy of the judgment before determining whether the appeal is timely filed.

Combined Committee recommendation

The rule should not be amended to complicate the notice of appeal process.

Rule 25.2(b)(3)

(b) *Form and sufficiency of notice.*
(3) But if the appeal is from a judgment rendered on the defendant's plea of guilty or nolo contendere under Code of Criminal Procedure article 1.15, and the punishment assessed did not exceed the punishment recommended by the prosecutor and agreed to by the defendant, the notice must:

(A) specify that the appeal is for a jurisdictional defect;
(B) specify that the substance of the appeal was raised by written motion and ruled on before trial; or
(C) state that the trial court granted permission to appeal.

Proposed change

By: Brenda Norton/Marilyn Houghtalin

The rule should be amended to resolve the split of authority among courts of appeals with regard to whether an appellant sentenced pursuant to a plea bargain must obtain the trial court's permission to appeal voluntariness of the plea.

Combined Committee recommendation

Judge Paul Womack has advised that the question of whether an appellant sentenced pursuant to a plea bargain must obtain permission from the trial judge to appeal the voluntariness of the plea is before the Court of Criminal Appeals in *Terry Wayne Cooper v State*, No. 1100-99, which should be decided after the Court's summer recess ends. Whether the appellate rule needs amendment should be clearer after that decision. Chief Justice John Cayce of the Fort Worth Court suggests the following amendment to Rule 25.2(b)(3) :

(A) . . .
(B) . . .
(C) specify that the appeal concerns the voluntariness of a plea bargain; or
(D) state that the trial court granted permission to appeal.

Rule 26.1(a)(4)
Time to Perfect Appeal: Civil Cases.

(a) the notice of appeal must be filed within 90 days after the judgment is signed if any party timely files:

. . .

(4) a request for findings of fact and conclusions of law if findings and conclusions either are required by the Rules of Civil Procedure of, if not required, could properly be considered by the appellate court; . . .

Proposed change

By: Buddy Hanby

Rule 26.1(a)(4) should provide that a timely request for findings extends the time regardless of whether findings are appropriate in a particular case. The amendment would eliminate a trap and would make subdivision (a)(4) consistent with the principle that a timely motion for new trial or motion to modify imposes a 90-day time period no matter how poorly worded or frivolous and no matter how trivial the modification requested.

Combined Committee recommendation

IKB case

Amend Rule 26.1(a)(4) to state: IN

(4) a request for findings of fact and conclusions of law even if findings and conclusions are not proper or required by the Rules of Civil Procedure.

As an alternative, the Combined Committee recommends that Rules 26.1 and 35 be amended to state:

leave

26.1 Civil Cases.
(a) Ordinary appeals. In an ordinary appeal, a notice of appeal must be filed within 90 days after the judgment is signed.
(b) Accelerated appeals. In an accelerated appeal the notice of appeal must be filed within 20 days after the judgment or order is signed;
(c) Restricted appeals. In a restricted appeal the notice of appeal must be filed within six months after the judgment or order is signed; and
(d) Notice of Cross-appeal. If any party timely files a notice of appeal, another party may file a notice of appeal within the applicable time period stated above or 14 days after the first filed notice of appeal, which ever is later.

Rule 35 Time to File Record; Responsibility for Filing Record.
35.1 Civil Cases. The appellate record must be filed in the appellate court:
(a) if Rule 26.1(a) applies, within 120 days after the judgment is signed.
(b) if Rule 26.1(b) applies, within 10 days after the notice of appeal is filed; or
(c) if Rule 26.1(c) applies, within 30 days after the notice of appeal is filed.

The Combined Committee believes that there is no good reason to retain two appellate timetables. Originally, the trial court and appellate timetables were connected. This has not been the case for some time. If this change is approved Tex. R. Civ. P. 329b(g) will also require amendment.

Rule 29.5
Further Proceedings in Trial Court

While an appeal from an interlocutory order is pending, the trial court retains jurisdiction of the case and may make further orders, including one dissolving the order appealed from, and may proceed with a trial on the merits . . .

Proposed change

By: Buddy Hanby

Rule 29.5 should be amended to eliminate the provision allowing a trial on the merits during the pendency of an appeal of an interlocutory order. That provision conflicts with the statute on interlocutory appeals, which provides: "An interlocutory appeal under Subsection (a) shall have the effect of staying the commencement of a trial in the trial court pending resolution of the appeal." TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(b).

Committee recommendation

Amend Rule 29.5 to state:
"While an appeal from an interlocutory order is pending, the trial court retains jurisdiction of the case and may make further orders, including one dissolving the order appealed from, and if permitted by law, may proceed with a trial on the merits."

Add in the Comment to 2000 change a reference to Tex. Civ. Prac. & Rem. Code § 51.014(b) which prohibits commencement of trial on the merits only in the type of cases covered by subsection (a) of TEX. CIV. PRAC. & REM. CODE.

IN

Rule 33.1
Preservation of Appellate Complaints

(a) *In General.* As a prerequisite to presenting a complaint for appellate review, the record must show that:

(1) the complaint was made to the trial court by a timely request, objection, or motion that . . . (A) stated the grounds for the ruling . . . and (B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure . . .

Proposed change

By: El Paso Court of Appeals

Rule 33.1 should be harmonized with rule 324b of the Texas Rules of Civil Procedure, for the reasons discussed in *Wyler Industrial Works, Inc. v Garcia*, 999 S.W.2d 494, 505-06 & n.8 (Tex. App.— El Paso 1999, n.p.h.). The rule should also state whether an objection to the trial court's findings of fact is required to preserve any legal and factual sufficiency challenge to such findings. Language from the prior rule obviating the need to object to preserve these errors in a nonjury trial was deleted in the 1997 amendments.

Combined Committee recommendation

At a minimum, the Combined Committee recommends that Rule 33 be amended by adding the last sentence of former Appellate Rule 52(d) as a separate paragraph in subdivision 33.1 as follows:

(d) Sufficiency of evidence complaints in nonjury cases. A party desiring to complain on appeal in a nonjury case that the evidence is not legally or factually sufficient to support a finding of fact, that a finding of fact was established as a matter of law or was against the overwhelming weight of the evidence, or of the inadequacy or excessiveness of the damages found by the court is not required to present the complaint in the trial court to preserve it for appellate review.

Add a Comment to 2000 change stating that the last sentence of former Appellate Rule 52(d) has been reinstated to clarify the procedure for preserving evidentiary review complaints in nonjury cases.

A more comprehensive report concerning Appellate Rule 33 is being prepared by Professor Dorsaneo. This report will also deal with the relationship of Evidence Rule 103 to Appellate Rule 33.1(a).

Rule 34.6(f)
Reporter's Record

(f) *Reporter's Record Lost or Destroyed.* An appellant is entitled to a new trial under the following circumstances:
(1) if the appellant has timely requested a reporter's record;
(2) if, without the appellant's fault, a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed or — if the proceedings were electronically recorded — a significant portion of the recording has been lost or destroyed or is inaudible;
(3) if the lost, destroyed, or inaudible portion of the reporter's record, or the lost or destroyed exhibit, is necessary to the appeal's resolution; and
(4) if the parties cannot agree on a complete reporter's record.

Proposed change

By: Diana Faust

The rule for the clerk's record (rule 34.5(e)) contains express language allowing the trial court to substitute copies or reproductions of lost or destroyed parts of the clerk's record, while the rule for reporter's record does not include this express language. With regard to exhibits that are part of the reporter's record, Rule 34.6(f) should contain language similar to this express language in rule 34.5(e), thus allowing the trial court, when an exhibit is lost or destroyed, to "determine what constitutes an accurate copy of the missing [exhibit] and order it to be included in the [reporter's] record." Also, the comment to rule 34 should be revised to reflect the origin of rule 34.6(f) in former rule 50(e).

Combined Committee recommendation

Amend Rule 34.6(e) as follows:

(e) Defects or inaccuracies in the reporter's record.
(1) Correction by agreement. The parties may agree to correct any defect or inaccuracy in the reporter's record without the reporter's recertification.
(2) Correction by trial court. If the parties dispute whether the reporter's record accurately discloses what occurred in the trial court, the parties agree that the record is inaccurate but cannot agree on corrections to the reporter's record, or if an exhibit designated for inclusion in the reporter's record has been lost or destroyed and the parties cannot agree on what constitutes an accurate copy of the missing item, the trial court must - after notice and hearing – settle the dispute. After doing so, the court must order the court reporter to correct the reporter's record by conforming the text of the record to what occurred in the trial court by adding an accurate copy of the missing exhibit, and to certify and file in the appellate court a corrected reporter's record or a supplement.

Amend rule 34.6 (f) by adding "and has not been corrected or replaced" after "has been lost or destroyed."

Rule 34.6(g)
Original Exhibits

(g) *Original Exhibits.*

(1) *Reporter may use in preparing reporter's record.* At the court reporter's request, the trial court clerk must give all original exhibits to the reporter for use in preparing the reporter's record. Unless ordered to include original exhibits in the reporter's record, the court reporter must return the original exhibits to the clerk after copying them for inclusion in the reporter's record. If someone other then the trial court clerk possesses an original exhibit, either the trial court or the appellate court may order that person to deliver the exhibit to the trial court.

Proposed change

By: Buddy Hanby

It is not clear whether this rule **and Rule 34.5(f)** apply to original exhibits in a mandamus proceeding. The court reporter and court clerk should be subject the same limitations protecting original exhibits when preparing the record in mandamus proceedings as they are in preparing a record in a regular appeal. The court should also have the same power in such an instance to obtain original documents held by someone other than the trial court clerk.

Combined Committee recommendation

The Combined Committee believes that Rule 34.5 (f) does not apply to original exhibits in a mandamus proceeding. The subject is, however, covered by Civil Procedure Rule 75b, which probably should be amended to correspond with Appellate Rule 34.5(f). *See* Tex. R. Civ. P. 75b(b).

Rule 35.3
Time to File Record;
Responsibility for Filing Record

(c) *Courts to Ensure Record Timely Filed.* The trial and appellate courts are jointly responsible for ensuring that the appellate record is timely filed . . . The appellate court may enter any order necessary to ensure the timely filing of the appellate record.

Proposed changes

By: Brenda Norton, on behalf of court attorneys of Dallas Court of Appeals

The rule should provide a specific, concrete procedure for contempt actions against clerk's and court reporter's who fail to obey the appellate court's orders to prepare and file a record. The rule should give the court power to impose a monetary sanction or assess costs for the court's expenses in taking the action.

Combined Committee recommendation

The Combined Committee believes that no change is needed.

Rule 38.1
Appellant's Brief

(a) *Identity of Parties and Counsel.* The brief must give a complete list of all parties to the trial court's judgment or order appealed from, and the names and addresses of all trial and appellate counsel.

Proposed changes

By: Brenda Norton

The rule should require the brief to provide the names of all judges entering the orders that are the subject of the appeal, and all judges before whom hearings were held in the case. This is especially important with the increased use of visiting judges. The docket sheet only lists the judge who signed the final judgment or appealable order. It is common to have visiting judgment entering other orders in a case, and these orders may also be the subject of the appeal. These visiting judges may also work for the appellate court or be related to one of the justices.

Similar revisions might be in order with regard to rules 53.2(d)(2) and 55.2(d)(2).

Combined Committee recommendation

The Combined Committee believes that no action is needed.

Rule 38.1 (e)
Issues presented

(e) *Issues presented.* The brief must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included.

Proposed change

Amend the appellate briefings rules prescribing the form for issues and providing examples.

Combined Committee recommendation

No change is needed at this time.

Rule 38.1
Appellant's Brief

(h) *Argument.* The brief must contain a clear and concise argument . . .

Proposed change

By: Stacy Obenhaus

The rule should state that parties may join in a brief and that any party may adopt by reference a part of another party's brief, as under federal practice. *See* Fed. R. App. P. 28(i). This probably should apply not just to the argument, but also to the statement of issues, statement of the case, statement of facts, summary of argument, and prayer for relief. It is particularly important with respect to the argument, however, as case law exists to the effect that failure to brief a point constitutes a waiver.

Combined Committee recommendation

Amend Rule 38 by adding the following new subdivision.

38.10 Briefs in a Case Involving Multiple Appellants or Appellees. In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.

In the Comment to 2000 change, identify the source as Fed. R. App. P. 28 (h).

Rule 38.6
Time to File Briefs

(d) *Modifications of filing time.* On motion complying with Rule 10.5(b), the appellate court may extend the time for filing the appellant's brief and may postpone submission of the case. A motion to extend the time to file the brief may be filed before or after the date the brief is due. The court may also, in the interests of justice, shorten the time for filing briefs and for submission of the case.

Proposed changes

By: Brenda Norton, on behalf of court attorneys of Dallas Court of Appeals; Stacy Obenhaus; Brenda Norton/Lisa Rombok

Rule 38.6 needs to state whether and on what terms the court of appeals may grant an extension of time for the filing of the appellee's principal brief or the appellant's reply brief. Most courts of appeals entertain such motions anyway, and there are even local rules addressing this gap in the rules. *See* Fifth Ct. App. Local R. 6. The amended rule could simply authorize the court to grant an extension of time for any principal or reply brief.

The rule might also clarify how the deadlines apply in cross-appeals, or state that the same deadlines apply for anyone who is an "appellant" and anyone who is an "appellee." Some clerks have difficulty determining the deadlines for filing of briefs in cross-appeals.

Combined Committee recommendation

The part of the proposed revision concerning extensions of time has been approved by the SCAC. The proposed change substitutes the word "briefs" for the words "the appellant's brief" in Rule 38.6(d). Chief Justice John Cayce suggests that we should consider following federal practice concerning who is an appellant/appellee. See Fed. R. App. P. 4(a)(3) and 28(h). ("If a cross-appeal is filed, the party who files a notice of appeal first is the appellant . . . If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by agreement of the parties or by court order . . ."). He reports that the Fort Worth Court allows appellees who also seek some additional relief to proceed by cross-point, as under our former practice, assuming that they have filed a notice of appeal.

Rule 43.2
Types of Judgment

The court of appeals may:

(a) affirm the trial court's judgment in whole or in part;
(b) modify the trial court's judgment and affirm it as modified;
(c) reverse the trial court's judgment in whole or in party and render the judgment that the trial court should have rendered;
(d) reverse the trial court's judgment and remand the case for further proceedings;
(e) vacate the trial court's judgment and dismiss the case; or
(f) dismiss the appeal.

Proposed suggestion

By: John Gsanger

Rule 43.2 lacks an efficient means for disposing of cases that have settled on appeal. Generally, I have had to request an abatement of the appeal and a remand of the cause of action for entry of an appropriate judgment followed by a motion for dismissal of the appeal after the trial court has entered judgment. Rule 43.2 should be amended to allow for entry of an agreed judgment, but this change should not undermine the purpose of the last sentence in rule 56.3.

By: Diana Faust

A similar problem arises with respect to motions to vacate a trial court judgment by the parties' agreement prior to submission. Whereas the Dallas court of appeals will do so (under authority from 42.1(a)(1) and 43.2(e)), the Amarillo court will not. Rather, it requires that the case first have been submitted. *Compare Boeing North American Servs., Inc. v FBN Investments, Inc.*, 1999 WL 893923 (Tex. App. — Dallas 1999) (no publication), with *Nordyke v Bird*, 1999 WL 1133404 (Tex. App. — Amarillo 1999) (no publication). Then the court reverses the case (on an agreed motion) and sends it back down to the trial court, where the parties can subsequently file a motion for dismissal.

Combined Committee recommendation

After much discussion the Combined Committee believes that Rules 42 and 43 need to be amended to clarify that the courts of of appeals do have authority to vacate a trial court's judgment and remand a case for rendition of judgment pursuant to a settlement. Pamela Stanton Baron is preparing a report on this subject to determine the best way to resolve this dilemma.

Rule 46.5
Voluntary Remittitur

If a court of appeals reverses the trial court's judgment because of a legal error that affects only party of the damages awarded by the judgment, the affected party may— within 15 days after the court of appeals' judgment— voluntarily remit the amount that the court of appeals determined should not have been awarded by the judgment. If the remittitur is timely filed and the court of appeals determined that the voluntary remittitur cures the reversible error, then the remittitur must be accepted and the trial court judgment affirmed.

Proposed changes

By: Steven L. Hughes

The problem with the rule is that the deadline for filing the voluntary remittitur— 15 days from judgment— is also the deadline for filing a motion for rehearing. Consequently, the rule forces the affected party either to file a motion for rehearing to convince the appellate court it was wrong— and thereby forego any voluntary remittitur— or to file the voluntary remittitur and moot a motion for rehearing on the issue for which the court ordered remittitur.

It's possible that the rules contemplate by implication that in this situation one may file a *conditional* remittitur, one that does not moot a point in a motion for rehearing on the issue for which the court ordered remittitur. If so, the supreme court should amend the rule so as to authorize that expressly rather than by implication.

Alternative solution: amend the rule to allow a voluntary remittitur to be filed after a motion for rehearing has been filed and ruled upon by the court. A 15-day time period would allow the party sufficient time to make the decision, and would give the court of appeals ample time to make any adjustment to its judgment before the mandate is schedule to issue. *See* TEX. R. APP. P. 18.1. If the motion for rehearing is denied, the party could then file the voluntary remittitur to avoid remand. The remittitur would moot the issue. The supreme court (if it has jurisdiction) would not be bothered with the issue, and the trial court would not be forced to retry the case.

At any rate, before having to resort to remittitur, a party should at least have the chance to point out to the court of appeals any error in the court's decision.

Combined Committee recommendation

Amend Rule 46.5 to state:

Rule 46. Remittitur in Civil Cases

46.5 Voluntary Remittitur. If a court of appeals reverses a trial court's judgment because of a legal error that affects only part of the damages awarded by the judgment, the affected party may - within 15 days after the court of appeals' judgment - voluntarily remit the amount that the court of appeals determined should not have been awarded

by the judgment by including a request for acceptance of such a remittitur in a motion for rehearing and requesting an affirmance of the trial court's judgment.

47.3 yes

47.7 yes

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47.4

If the issues are settled. (Last sent. of 47.1

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Rule 47.7
Unpublished Opinions

Opinions not designated for publication by the court of appeals have no precedential value and must not be cited as authority by counsel or by a court.

Proposed change

By: Carlos Mattioli

Clarify that unpublished opinions can be cited but are not precedent. The rule does not clearly preclude such use. Although sound reasons may exist for not publishing an opinion, appellate courts are public resources and are discharging a public duty in each opinion, published or not. Some unpublished opinions contain very persuasive analysis that can be a valuable resource to other courts. While the precedential value of unpublished opinions can remain restricted, I really do not see why an unpublished opinion could not be used as persuasive, although not binding, authority (much like out of state cases, treatises, etc.).

Combined Committee recommendation

Amend Rule 47.7 to state:

"Opinions not designated for publication by the court of appeals have no precedential value but may be cited as persuasive authority by counsel or by a court."

47.7 is of interest

DUNCAN
1. What does "published" mean (West v. Publish in some form)

→ 2 tiers of justice

21-7

Eliminate

{ 47.3
all opin. of the CA must AVail to the public, including Reporting Services print & electronic

Comment
1) Can cite CA opinion

47.7
47.6
47.4

Rule 49.10
Length of Motion for Rehearing and Response
(Court of Appeals)

A motion or response must be no longer than 15 pages.

Proposed change

By: Pamela Stanton Baron

Page limits set out by this rule should exclude certain parts of the motion such as table of contents, index of authorities and certificate of service. In short, the rule on motions for rehearing should parallel the rule on briefs with respect to how one calculates the number of pages.

Combined Committee recommendation

Amend Rule 49.10 to state:

"A motion or response must be no longer than 15 pages, exclusive of pages containing the table of contents, the index of authorities, the issues presented, the signature, the proof of service, and the appendix."

Rule 52.7
Record (mandamus)

(a) *Filing by relator required.* Relator must file with the petition:
(1) a certified or sworn copy of every document that is material to the relator's claim for relief and that was filed in any underlying proceeding; and
(2) a properly authenticated transcript of any relevant testimony from any underlying proceeding, including any exhibits offered in evidence, or a statement that no testimony was adduced in connection with the matter complained.

Combined Committee recommendation

Amend Rule 9.5 (a) by adding "except in an original proceeding." Alternatively, amend Rule 52.7 to require the relator to file an additional copy or copies of the record so that other parties can have access to the record without interfering with the work of the appellate court.

Rule 55.2
Briefs on the Merits

(e) *Statement of Jurisdiction.* The petition must state, without argument, the basis of the Court's jurisdiction.

Proposed change

By: Stacy Obenhaus

Change the word "petition" to the word "brief."

Combined Committee recommendation

Rule 55.2 (e) should be changed to state:

"The brief must state, without argument, the basis of the Court's jurisdiction."

Rule 64.6
Length of Motion for Rehearing and Response
(Supreme Court)

A motion or response must be no longer than 15 pages.

Proposed suggestion

By: Pamela Stanton Baron

Page limits set out by this rule should exclude certain parts of the motion such as table of contents, index of authorities and certificate of service. In short, the rule on motions for rehearing should parallel the rule on briefs with respect to how one calculates the number of pages.

Combined Committee recommendation

Amend Rule 64.6 to state:

"A motion or response must be no longer than 15 pages, exclusive of pages containing the table of contents, the index of authorities, the issues presented, the signature, the proof of service, and the appendix."

Rule 194A. Requests for Disclosure
Under Title I and V of Texas Family Code

09/08/99 Memorandum to Richard Orsinger
Regarding Subpoenas Requesting Production
of Documents to Temporary Hearings

01/11/00 Ralph Duggins letter to Chip Babcock
with attached Local Rule 7.1

RULE 194A. REQUESTS FOR DISCLOSURE UNDER TITLE I AND V OF TEXAS FAMILY CODE

194A.1 **Request.** In suits filed under Title I, Title IV, or Title V of the Texas Family Code, a party may obtain disclosure from another party of the information or material listed in Rule 194A.2 by serving the other party–no later than 30 days before the end of any applicable discovery period–the following request: "Pursuant to Rule 194A, you are requested to disclose, within 30 days of service of this request, the information or material described in Rule [state rule, e.g., 194A.2, or 194A.2(a), (c), and (f), or 194A.2 (d)-(g)]."

194A.2 **Content.** A party may request disclosure of any or all of the following:

(a) in suits in which spousal or child support is in issue:

1. all policies, statements, and description of benefits that reflect health insurance coverage that is available for the child or the spouse and a statement of the expense of such health insurance coverage for the child;

2. from January 1 of the year prior to filing through present, a verified list of the responding party's resources, as defined by section 154.062 of the Texas Family Code–wage and salary income and other compensation for personal services (including commissions, overtime pay, tips, and bonuses); interest, dividends, and royalty income; self-employment income; rental income, severance pay, retirement benefits, pensions, trust income, annuities, capital gains, social security benefits, unemployment benefits, disability and workers' compensation benefits actually received, interest income from notes regardless of the source, gifts and prices, spousal maintenance, and alimony; and

3. accurate copies of the party's immediately previous two years' income tax returns with schedules and amendments, together with all payroll check stubs or earnings statements for the three most recent months and the party's latest Form W-2 and 1099s and K1s, for each of the past two years for which an income tax return is not provided.

(b) in suits for divorce or annulment:

1. all policies, statements, and description of benefits that reflect any and all insurance coverage that is in effect for the parties;

2. accurate copies of the party's income tax returns for the past two years with all schedules and amendments and the party's W-2s,

1099s, and K1s, for each of the past two years for which an income tax return is not provided;

3. the most recent statement of account received for any financial account (checking, savings, brokerage, CD, etc.), whether open or closed, in which the responding party claims or has claimed an interest for the period from January 1 of the year prior to filing of the Original Petition through the date that this request is received;

4. all deeds, deeds of trust, and promissory notes relating to real estate in which the responding party claims an interest;

5. the exact name of the plan and the identity and address of the plan administrator, along with all booklets, plan agreements, and the most recent statement of account received prior to filing of the Original Petition for any stock options or retirement, pension, profit-sharing, employee stock ownership, Keogh, 401K, or other employee benefit or deferred compensation plans in which the responding party claims an interest;

6. ownership documents evidencing any ownership (whether legal or equitable) of the responding party in any corporation, partnership, or joint venture;

7. accurate copies of bonds, notes, treasury bonds, or other documents evidencing indebtedness currently owed to the responding party.

8. accurate copies of all certificates of title or similar type documents evidencing any ownership by the responding party in any motor vehicle, boat, or other personal property;

9. all financial statements prepared by or on behalf of responding party and submitted to any person or entity during the period from January 1 of the year prior to filing of the Original Petition through the date this request is received;

10. a list all creditors to whom the responding party is indebted as of the date of filing of the Original Petition and with respect to each such creditor:

    a. The current amount necessary to pay the debt in full, in one lump sum payment (excluding unearned interest);
    b. The purpose for which the debt was incurred;
    c. The date the debt was incurred; and
    d. The name of the person who signed the evidence of indebtedness (i.e. promissory note, contract, etc.).

11. an accurate copy of all agreements for legal services in this case.

(c) the legal theories and, in general, the factual bases of the responding party's position regarding (the responding party need not marshal all evidence that may be offered at trial):

1. separate property
2. reimbursement
3. post-divorce spousal maintenance
4. variance from the application of the percentage guidelines for computation of child support payments set forth in § 154.105 of the Texas Family Code
5. variance from the application of the Standard Possession Order set forth in §§ 153.312-153.317 of the Texas Family Code
6. tort or contract claims
7. fraudulent transfer of community wealth
8. the amount and any method of calculating monetary recoveries;
9. the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case;

(d) for any testifying expert:

1. the expert's name, address, and telephone number;
2. the subject matter on which the expert will testify;
3. the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;
4. if the expert is retained by, employed by, or otherwise subject to the control of the responding party:

    a. all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and
    b. the expert's current resume and bibliography;

(e) any discoverable indemnity and insuring agreements;

(f) any discoverable settlement agreements;

(g) any discoverable witness statements;

(h) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that

are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills;

(i) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party.

194.6 **Certain Responses Not Admissible.** A response to requests under Rule 194.2(c) and (d), or under Rule 194A.2 (c) and (d), that has been changed by an amended or supplemental response is not admissible and may not be used for impeachment.

Comments:

Rule 194A.2(c) and (d) permit a party further inquiry into another's legal theories and factual claims than is often provided in notice pleadings. So-called "contention interrogatories" are used for the same purpose. Such requests are not properly used to require a party to marshal evidence or brief legal issues. Paragraphs (c) and (d) are intended to require disclosure of a party's basic assertions, whether in prosecution of claims or in defense. Thus, for example, a petitioner, upon request, would be required to disclose that he or she has a claim for reimbursement, that such claim was for that spouse's separate property contribution to enhancement in value of the community property residence; and to state the amount of such claim and how the amount of such claim was calculated. A respondent would similarly be required to disclose the basis for any contest of the reimbursement claim. As another example, the conservator seeking child support at variance with the Family Code guidelines would be required to explain the basis for such variation.

IN

Cmt. TO Rule 176

2. last sentence: ⇒ This Subdivision does NOT Govern the use of Subpoenas for trials and hearing.

Include in Bob's paper

MEMORANDUM

TO: Richard Orsinger
FROM: Georganna L. Simpson
DATE: September 8, 1999
RE: Subpoenas Requesting Production of Documents to Temporary Hearings

A. Problem:

There is now no difference between trial and discovery subpoenas. Rule 176.3(b) says that a subpoena may not be used for discovery to an extent, in a manner, or at a time other than as provided by the rules governing discovery. Rule 196.2 provides a minimum of 30 days for a party to respond to a request for production from another party. Accordingly, a subpoena may not be used to obtain financial documents, etc. for a hearing that is scheduled within 30 days of when the subpoena is served. The final revised version of Rule 205.3, which addresses the production of documents from non-parties without the taking of a deposition, provides as follows: "A party may compel production of documents and tangible things from a non-party by serving–a reasonable time before the response is due but no later than 30 days before the end of any applicable discovery period–the notice required in 205.2 and a subpoena compelling production or inspection of documents or tangible things." The pertinent portion of rule 205.2 provides, "[a] notice to produce documents or tangible things under Rule 205.3 must be served at least 10 days before the subpoena compelling production is served." Although unclear, it also appears that there is a 30-day waiting period to obtain documents from non-parties. Again, the judges have been inconsistent in this regard.

This 30-day waiting period poses a problem in situations wherein (1) hearings are set within the first thirty (30) days after service of an original pleading, (2) hearings are set on less than thirty (30) days in conjunction with Motion for Emergency Relief, and (3) hearings are set in conjunction with applications for Protective Orders involving family violence. In each of these situations, insufficient time is provided for discovery and the relief sought may significantly impact a person's due process rights especially in the case of protective orders, wherein the only hearing results in a final order, with the whole process taking less than 30 days.

B. Proposed Revision to Rule 176.3:

176.3 Limitations.

. . .

B. **Use for discovery.** A subpoena may not be used for discovery to an extent, in a manner, or at a time other than as provided by the rules governing discovery, except as specifically provided in subsection (c).

C. **Use at hearings on protective orders and hearings requesting emergency and/or temporary relief.** A subpoena requiring the production of documents may be issued in conjunction with, but not less than three days prior to:

1. a hearing on temporary relief that is set within the first thirty (30) days after service of an original pleading or a pleading requesting temporary relief filed pursuant to Title I, Title IV, or Title V of the Texas Family Code, where the documents are necessary:

    a. to calculate a parties' current resources (as set forth in section 154.061, 154.062, and 154.123 of the Texas Family Code) for the purpose of setting child support;

    b. to calculate a parties' current resources for the purpose of setting spousal support (as provided in section 6.502 of the Texas Family Code); or

    c. to determine what insurance is in effect for the parties and the parties' child(ren).

2. a hearing to support or rebut the allegations in an application for a Protective Order involving family violence;

3. a hearing to support or oppose a request for a temporary injunction; and

4. a hearing to support or oppose a request for emergency relief.

CANTEY & HANGER, L. P.
ATTORNEYS AT LAW

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FAX 817-877-2807

January 11, 2000

Via Fax (713) 752-4221 and
First Class Mail
Charles L. Babcock
Jackson Walker, L.L.P.
1100 Louisiana, Suite 4200
Houston, Texas 77002

Dear Mr. Babcock:

I would like to request that our Committee consider possible changes to Rule 191.2, the rule addressing conferences in connection with motions and hearings relating to discovery. At least in this area, it has been my experience that many attorneys avoid the purpose and spirit of the rule by taking up valuable judicial resources with hearings on matters that could and should be worked out by a conference. In contrast, in our federal courts here, the judges strictly enforce Local Rule 7.1, a copy of which is enclosed.

Although the procedure and practice varies from court to court, I recommend that Rule 191.2 be tightened up to insure that a good faith substantive conference occurs before a motion can be filed, or any hearing held.

I would appreciate it if you would refer this matter to the appropriate subcommittee. Thanks for your consideration.

Sincerely,

Ralph H. Duggins

Enclosure

cc: The Honorable Nathan L. Hecht
Justice, Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711-2248

LR 5.2 FILING DISCOVERY MATERIALS

(a) **Discovery Materials Not to be Filed.** Discovery materials, except deposition notices, must not be filed unless the presiding judge otherwise directs. The party requesting the discovery material shall become its custodian.

(b) **Deposition Notices Not to be Filed.** Deposition notices must be filed by the clerk only if the attorney who served the notices requests that they be filed.

(c) **Filing Discovery Materials for Use in Discovery Disputes.** A motion that relates to a discovery dispute must only contain the portions of the discovery materials in dispute.

(d) **Filing Discovery Materials for Use in Pretrial Motions.** When discovery materials are necessary for consideration of a pretrial motion, a party shall file only the portions of discovery on which that party relies to support or oppose the motion.

[Effective April 15, 1997.]

LR 5.3 PRISONER'S CIVIL RIGHTS COMPLAINTS

A prisoner's complaint alleging violations of civil rights under 28 U.S.C. § 1331 or § 1343 must be filed in accordance with the current miscellaneous order establishing procedures for such actions.

[Effective April 15, 1997.]

LR 5.4 POST-CONVICTION RELIEF

A prisoner petition or motion filed under 28 U.S.C. § 2254 or § 2255 must be filed in accordance with the current miscellaneous order establishing procedures for such petitions or motions.

[Effective April 15, 1997.]

LR 7.1 MOTION PRACTICE

Unless otherwise directed by the presiding judge, motion practice is controlled by subsection (h) of this rule. In addition, the parties must comply with the following:

(a) **Conference.** Before filing a motion, an attorney for the moving party must confer with an attorney for each party affected by the requested relief to determine whether the motion is opposed. Conferences are not required for motions to dismiss, motions for judgment on the pleadings, motions for summary judgment, motions for new trial, or when a conference is not possible.

(b) **Certificate of Conference.**

(1) Each motion for which a conference is required must include a certificate of conference indicating that the motion is unopposed or opposed.

(2) If a motion is opposed, the certificate must state that a conference was held, indicate the date of conference and the identities of the attorneys conferring, and explain why agreement could not be reached.

(3) If a conference was not held, the certificate must explain why it was not possible to confer, in which event the motion will be presumed to be opposed.

(c) **Proposed Orders.** An unopposed motion must be accompanied by an agreed proposed order, signed by the attorneys or parties. An opposed motion must be accompanied by a proposed order, unless an order is not required by subsection (h) of this rule. A proposed order must be set forth on a separate document.

(d) **Briefs.** An opposed motion must be accompanied by a brief that sets forth the moving party's contentions of fact and/or law, and argument and authorities, unless a brief is not required by subsection (h) of this rule. A response to an opposed motion must be accompanied by a brief that sets forth the responding party's contentions of fact and/or law, and argument and authorities. A responding party is not required to file a brief in opposition to a motion for which a brief is not required by subsection (h) of this rule.

(e) **Time for Response and Brief.** A response and brief to an opposed motion must be filed within 20 days from the date the motion is filed.

(f) **Time for Reply Briefs.** Unless otherwise directed by the presiding judge, a party who has filed an opposed motion may file a reply brief within 15 days from the date the response is filed.

(g) **No Oral Argument.** Unless otherwise directed by the presiding judge, oral argument on a motion will not be held.

[Effective April 15, 1997; amended effective April 15, 1998.]

LR 7.2 BRIEFS

(a) **General Form.** A brief must be printed, typewritten, or presented in some other legible form.

(b) **Amicus Briefs.** An amicus brief may not be filed without leave of the presiding judge. The brief must specifically set forth the interest of the amicus curiae in the outcome of the litigation.

(c) **Length.** A brief must not exceed 25 pages (excluding the table of contents and table of authorities). A reply brief must not exceed 10 pages. Permission to file a brief in excess of these page limitations will be granted by the presiding judge only for extraordinary and compelling reasons.

(d) **Tables of Contents and Authorities.** A brief in excess of 10 pages must contain:

(1) a table of contents with page references; and

11/02/99 Orsinger letter to Babcock enclosing Pamela Baron's amicus letter of 10/27/1999

Case: *Marco Bence Grodona, et al v. Joseph H. Hutton*, 991 S.W.2d 90 (Tex. Civ. App. – Austin 1998, pet. denied)

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November 2, 1999

Mr. Charles L. Babcock
JACKSON WALKER, L.L.P.
1100 Louisiana, Suite 4200
Houston, Texas 77002

Re: Supreme Court Advisory Committee

Dear Chip:

I am enclosing a copy of Pamela S. Baron's amicus letter of October 27, 1999 to the Clerk of the Supreme Court of Texas.

Please refer this correspondence to the appropriate Supreme Court Advisory Committee subcommittee for consideration.

Sincerely yours,

RICHARD R. ORSINGER

RRO/je
Enclosure

PAMELA STANTON BARON
ATTORNEY AT LAW

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SPECIALIZATION

October 27, 1999

By messenger
Mr. John Adams
Clerk, Supreme Court of Texas
209 W. 14th Street
Austin, Texas 78701

Re: No. 99-0007, *Grondona v. Sutton.*

To the Honorable Supreme Court of Texas:

Pamela Stanton Baron, a sole practitioner in Austin specializing in civil appellate law, submits this letter as a friend of the court. Amicus has no interest in this case, nor has she been retained by any party.

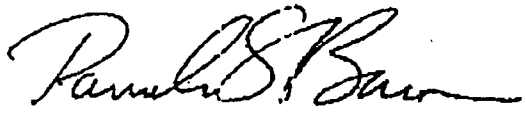
The issue of what procedures are required under Tex. R. Civ. P. 306a to prove late notice of a trial court's judgment is admittedly deadly dull. Amicus had the opportunity to brief that issue to this Court four years ago in *Stokes v. Aberdeen Ins. Co.*, No. 95-0405, which the Court decided on different grounds. 917 S.W.2d 267 (Tex. 1996) (per curiam). At that time, amicus concluded that "a litigant who seeks clarity on the procedures under Rule 306a is unlikely to find it in the case law" and that "Rule 306a is functioning as one big 'Gotcha!'" The state of the law in the intervening four years has not improved. The number of conflicting and inconsistent courts of appeals' opinions has multiplied rather than receded.

While the Rule 306a issue may not be interesting, it nonetheless has very real and important consequences. The chaotic state of the law has resulted in numerous appeals not being heard on their merits and has increased the exposure of attorneys to malpractice claims. A definitive pronouncement by this Court of the procedures and timing under Rule 306a would result in a uniform application of the rule statewide and greatly reduce the harm the current uncertainty is causing.

For these reasons, amicus urges the Court to grant on rehearing the petition for review to bring clarity and consistency to the procedures under Tex. R. Civ. P. 306a when a party is provided late notice of the trial court's judgment.

Amicus certifies service of this letter by United States first class mail on all counsel of record listed below.

Sincerely,



Pamela Stanton Baron

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strengthening Pleasant Glade's position is the fact that the First–Amendment defense based on the free-exercise clause is particularly likely to succeed where, as here, the plaintiffs were or had been members of the religious group involved. *Cf. Hester,* 723 S.W.2d at 559 (stating decision that claims not barred by First Amendment rested on fact that Hesters were not members of the religion). *See generally* Alan Stephens, Annotation, *Free Exercise of Religion Clause of First Amendment as Defense to Tort Liability,* 93 A.L.R. Fed. 754, 774–77 (1989).

Thus, the complained-of conduct is inexorably intertwined with Pleasant Glade's religious beliefs, and any inquiry into the appropriateness of the conduct would necessarily involve an inquiry into the legitimacy of the underlying religious beliefs. This violates the First Amendment, which bars such claims. *See Murphy v. I.S.K.Con. of New England, Inc.,* 409 Mass. 842, 571 N.E.2d 340, 346–48, 350 (1991) (holding First–Amendment defense applies if claim cannot stand in absence of testimony regarding church's religious beliefs), *cert. denied,* 502 U.S. 865, 112 S.Ct. 191, 116 L.Ed.2d 152 (1991). Accordingly, any discovery relating to these matters would likewise be barred as irrelevant. *See Marshall,* 925 S.W.2d at 682–83.

CONCLUSION

Because the challenged claims would necessarily require an inquiry into the exact beliefs of Pleasant Glade and how they should have been applied to Laura, the First–Amendment defense applies, and the Schuberts' "religious" claims are barred. As such, any discovery regarding these claims would be barred. Accordingly, the trial court abused its discretion in denying Pleasant Glade's motion for protective order and motion to dismiss. These facts raise important issues related to constitutional protections afforded by the First Amendment that would be inadequately protected by an appeal; thus, mandamus is appropriate. We conditionally grant a writ of mandamus and will issue it only if the trial court fails to grant Pleasant Glade's June 5, 1998 motion to dismiss and motion for protective order regarding the Schuberts' claims for negligence, gross negligence, professional negligence, negligent and intentional infliction of emotional distress, child abuse and child neglect under the Family Code, and loss of Laura's consortium.

RICHARDS, J., concurs without opinion.

Marco Bence GRONDONA, Santa Cristina Sociedad Anonima, Atahualpa del Monte Sociedad Anonima, and Ignacio Maria Steverlynck, Appellants,

v.

Joseph H. SUTTON, Appellee.

No. 03–98–00454–CV.

Court of Appeals of Texas, Austin.

Oct. 22, 1998.

Rehearing Overruled Nov. 19, 1998.

Released for Publication Nov. 19, 1998.

Following entry of default judgment, defendant filed a motion to establish late notice of judgment. The 200th Judicial District Court, Travis County, Jon N. Wisser, P.J., denied motion. Defendant appealed. The Court of Appeals held that by failing to offer prima-facie evidence of late notice of judgment during the trial court's plenary power, defendants did not invoke the court's jurisdiction to determine the date of notice.

Appeal dismissed.

1. Judgment ⇐276

Complying with the provisions of rule regarding periods to run from signing of judgment is a jurisdictional requisite. Vernon's Ann.Texas Rules Civ.Proc., Rule 306a.

2. Judgment ⇐276

Sworn motion regarding date party received notice of judgment serves the purpose of establishing a prima-facie case of lack of timely notice, thereby invoking the trial court's jurisdiction for the limited purpose of holding a hearing to determine the date of notice; if the movant fails to establish the applicability of the exception in the manner prescribed, the trial court lacks jurisdiction to determine the date of notice and any order doing so is void. Vernon's Ann.Texas Rules Civ.Proc., Rule 306a.

3. Judgment ⇐276

To make a prima-facie case of lack of timely notice, appellant has to offer evidence that neither he nor his attorney learned of the judgment within 20 days after it was signed. Vernon's Ann.Texas Rules Civ.Proc., Rule 306a, subd. 5; Rules App.Proc., Rule 4.2(c).

4. Judgment ⇐131

By failing to offer prima-facie evidence of late notice of default judgment during the trial court's plenary power, defendants did not invoke the court's jurisdiction to determine the date of notice. Vernon's Ann.Texas Rules Civ.Proc., Rule 306a.

Robert C. Alden, Bracewell & Patterson, L.L.P., Austin, for Appellants.

Edward P. Watt, Watt & Associates, P.C., Austin, for Appellee.

Before Justices POWERS, ABOUSSIE and KIDD.

PER CURIAM.

Appellants Marco Bence Grondona, Santa Cristina Sociedad Anonima, Atahualpa del Monte Sociedad Anonima, and Ignacio Maria Steverlynck move this Court to deem their appeal timely perfected. Appellee Joseph Sutton moves to dismiss the appeal for want of jurisdiction.

On April 21, 1998, the trial court signed a default judgment against appellants. Appellants timely moved for a new trial on May 21, and the court denied the motion by an order signed on July 15. On August 11, Grondona filed a motion to establish late notice of judgment, asserting that he first had notice of the judgment on May 19. He filed a notice of appeal on the same date. The remaining appellants filed notices of appeal on August 14. Grondona amended his motion to establish late notice of judgment on August 19, and on September 3, the trial court signed an order denying Grondona's motion.

An exception to the rule that procedural timetables run from the date the judgment is signed exists for a party who learns of the judgment more than twenty, but less than ninety, days after it was signed. Tex.R. Civ. P. 306a(4); Tex.R.App. P. 4.2. To benefit from the exception, the party must prove in the trial court, on sworn motion and notice, the date he or his attorney first received notice or acquired actual knowledge of the signing. Tex.R. Civ. P. 306a(5). If evidence at the hearing establishes the date of notice, appellate deadlines and the court's plenary power start from that date rather than the date the judgment was signed. *Id.* 306a(4); Tex. R.App. P. 4.2(a)(1).

[1, 2] Complying with the provisions of Rule 306a is a jurisdictional requisite. *Memorial Hosp. v. Gillis*, 741 S.W.2d 364, 365–66 (Tex.1987); *In re Simpson*, 932 S.W.2d 674, 677 (Tex.App.—Amarillo 1996, no writ). The sworn motion serves the purpose of establishing a prima-facie case of lack of timely notice, thereby invoking the trial court's jurisdiction for the limited

purpose of holding a hearing to determine the date of notice. *Carrera v. Marsh*, 847 S.W.2d 337, 342 (Tex.App.—El Paso 1993, orig. proceeding). If the movant fails to establish the applicability of the exception in the manner prescribed, the trial court lacks jurisdiction to determine the date of notice and any order doing so is void. *Gillis*, 741 S.W.2d at 365–66; *Simpson*, 932 S.W.2d at 678.

We first consider whether Grondona's motion invoked the trial court's jurisdiction to hear evidence to determine the date of notice. Grondona filed his motion eighty-four days after the date he claims to have learned of the default judgment. Neither Rule 306a nor Rule 4 states when a party must move for a determination of late notice. Several courts of appeals have held that a party must file such a motion within thirty days of acquiring notice. *See Gonzalez v. Sanchez*, 927 S.W.2d 218, 221 (Tex.App.—El Paso 1996, no writ); *Montalvo v. Rio Nat'l Bank*, 885 S.W.2d 235, 237 (Tex.App.—Corpus Christi 1994, no writ); *Womack–Humphreys Architects, Inc. v. Barrasso*, 886 S.W.2d 809, 816 (Tex. App.—Dallas 1994, writ denied).

This Court, however, has concluded that a party can file such a motion more than thirty days after receiving notice, as long as he files it within the court's plenary power counted from the date of notice. *Vineyard Bay Dev. Co. v. Vineyard on Lake Travis*, 864 S.W.2d 170, 172 & n. 1 (Tex.App.—Austin 1993, writ denied). In *Vineyard Bay*, the motion to determine notice was filed thirty-one days after the date of notice but during the court's plenary power, which had been extended by a motion for new trial. *Id.* Here, Grondona moved for a new trial on May 21, two days after the asserted date of notice, and the trial court overruled the motion on July 15. The court's plenary power would therefore have expired thirty days later on August 14. Grondona's motion, filed on August 11, was timely.

[3] To make a prima-facie case of lack of timely notice, Grondona had to offer evidence that neither he nor his attorney learned of the judgment within twenty days after it was signed. Tex.R. Civ. P. 306a(5); *Simpson*, 932 S.W.2d at 678; *see* Tex.R.App. P. 4.2(c). By affidavit attached to the motion, Grondona states that he first received notice of the judgment on May 19. Grondona offered no evidence, however, of when his attorney first learned of the judgment.

[4] On August 19, Grondona filed an amended motion to determine the date of notice. The amended motion includes the affidavit of Grondona's attorney, who avers that he did not know of the judgment until May 19. Grondona therefore could not have made a prima-facie case until the amended motion was filed on August 19, beyond the trial court's plenary power. By failing to offer prima-facie evidence of late notice of judgment during the trial court's plenary power, Grondona did not invoke the court's jurisdiction to determine the date of notice. *Barrasso*, 886 S.W.2d at 816; *Montalvo*, 885 S.W.2d at 237–38; *see Owen v. Hodge*, 874 S.W.2d 301, 303 (Tex.App.—Houston [1st Dist.] 1994, no writ).

Even if Grondona had offered prima-facie evidence during the court's plenary power, he failed to obtain a ruling on his motion within that period. *See Montalvo*, 885 S.W.2d at 237–38; *Barrasso*, 886 S.W.2d at 816; *Conaway v. Lopez*, 843 S.W.2d 732, 733 (Tex.App.—Austin 1992, no writ). The trial court heard the motion and signed the order overruling it on September 3, beyond the time it would have had power to determine the date of notice of judgment. The order is therefore of no effect.[1]

We conclude that Grondona failed to invoke the trial court's jurisdiction to de-

1. The court found in its order that the date the judgment was signed remained applicable. Having determined that the trial court lacked jurisdiction to render the order, we do not review the finding substantively.

termine the date of notice of the judgment. His notice of appeal, filed 112 days after the judgment was signed, is thus untimely. *See* Tex.R.App. P. 26.1. The remaining appellants assert that they have timely appealed because they filed their notices of appeal within fourteen days after Grondona filed his notice of appeal. *See id.* 26.1(d). Because Grondona's notice of appeal is ineffective to perfect appeal, the remaining notices are likewise ineffective.

We overrule appellants' motion to deem the appeal timely perfected. Because we lack jurisdiction over an appeal that is not timely perfected, we grant Sutton's motion to dismiss the appeal. *Davies v. Massey*, 561 S.W.2d 799, 800 (Tex.1978). We dismiss the appeal for want of jurisdiction. Tex.R.App. P. 42.3(a).

TEXAS PARKS AND WILDLIFE DEPARTMENT, Appellant,

v.

Lila WILSON, as Surviving Wife of Wilford Wilson and Janet Denise Wilson Belz, Debra Kay Wilson, Mary Ann Wilson Yancy and Tamara Lee Wilson, as Surviving Children of Wilford Wilson, Deceased; and Lydia Mae Wilson, Individually, and as Independent Executrix of the Estate of Wilton Guendell Wilson, Deceased, and Angela Gayle Wilson Kramm and Curtis Dale Wilson, Surviving Children of Wilton Guendell Wilson, Deceased, Appellees.

No. 03-97-00520-CV

Court of Appeals of Texas, Austin.

Jan. 28, 1999.

Rehearing Overruled March 25, 1999.

Wrongful death action was brought against Texas Parks and Wildlife Department, alleging that its negligence caused drowning deaths of plaintiffs' decedents on river. The 33rd Judicial District Court, Blanco County, Robert C. Wright, J., entered take nothing judgment, and appeal was taken. The Austin Court of Appeals, J. Woodfin Jones, J., affirmed, and writ of error was sought. The Supreme Court, 886 S.W.2d 259, reversed and remanded. On remand, the District Court, Travis County, 53rd Judicial District, Margaret A. Cooper, J., entered judgment for maximum amount allowed under Tort Claims Act to representatives and survivors. Department appealed. The Court of Appeals, Yeakel, J., held that: (1) facts that Department controlled and maintained state park adjoining river was legally insufficient to prove ownership of river by Department, for purposes of imposing premises liability against Department under Act, but (2) issue of whether Department controlled river presented question for jury.

Reversed and rendered in part, and remanded in part.

1. States ⇐112(2)

Under common law, the State of Texas, its agencies, and other governmental units are generally immune from suit, and this governmental immunity is waived only if liability can be established under the limited circumstances specified pursuant to the Tort Claims Act. V.T.C.A., Civil Practice & Remedies Code §§ 101.001–101.109.

2. Municipal Corporations ⇐723

As with any tort claim against a private person under Texas law, a plaintiff relying on the Tort Claims Act must prove the existence and violation of a legal duty owed him by the defendant. V.T.C.A., Civil Practice & Remedies Code §§ 101.001–101.109.

3. Municipal Corporations ⇐847

In order to predicate a duty owed by a governmental unit under the Texas Tort

REPORT OF THE SUBCOMMITTEE ON TEXAS RULES OF CIVIL PROCEDURE 300-330[1]

The Subcommittee was asked to consider issues relating to the finality of judgments, motions for new trial, and extensions of plenary power and the appellate timetable. This report discusses these issues and the Subcommittee's recommendations for amendments to the appropriate rules in the Recodification Draft.

---

[1]Chair: Sarah B. Duncan. Members: John Cayce, Ralph Duggins, Wendell Hall, Mike Hatchell, and Steven Tipps. Frank Gilstrap joined the Subcommittee after its work was concluded; thus, his views may not be reflected in the Subcommittee's recommendations.

DUNCAN - 3 choice

1. Codify Mafrige

2. Make up Magic language

3. Do NOThing

McC

The last * Judg that dispose of [last claim o- ~~Issue~~ & Parties] is [a final Jdmt]

(1) A final Jud is one the dispose of all Iss & Pa

(2) A f J should include a fJ Clause
fJ below Captio

A fin J. Clause
This is a f. J. Jdmt. All relief NOT [expressly granted] is denied

ANY OTHER Clause is Appealable ONLY if
final

GILSTRAP.
some lang. that placed in order that makes it final appealable Jdgmt

(Magic wd)

1. Final Judgments

a. Issue–Many lawyers are not familiar with the finality rules established by case law, even in the context of a conventional trial on the merits. *See, e.g., North East Independent School District v. Aldridge*, 400 S.W.2d 893 (Tex.1966). But the finality problem is particularly acute in the summary judgment context. *See, e.g., Bandera Elec. Co-op., Inc. v. Gilchrist*, 946 S.W.2d 336 (Tex. 1997); *Inglish v. Union State Bank*, 945 S.W.2d 810 (Tex. 1997); *Park Place Hosp. v. Estate of Milo*, 909 S.W.2d 508 (Tex. 1995); *Martinez v. Humble Sand & Gravel, Inc.*, 875 S.W.2d 311 (Tex. 1994); *Mafrige v. Ross*, 866 S.W.2d 590 (Tex. 1993). The issue continues to plague the courts of appeals and the supreme court. *See, e.g., Lehmann, et al. v. Har-Con Corp.*, 988 S.W.2d 415 (Tex. App.–Houston [14th Dist.] 1999, pet. granted); *Harris v. Harbour Title Co.*, No. 14-99-00034-CV, 1999 WL 211859 (Tex. App.–Houston [14th Dist.] April 8, 1999, pet. granted) (not designated for publication).

b. Subcommittee Recommendation–In light of the disarray in the case law, the Subcommittee recommends an amendment to Rule 100(b) of the Recodification Draft to prescribe when a judgment is final and appealable. Although the Subcommittee considered defining when a judgment is final, it rejected this approach because the contexts in which the issue arises are too varied and complex. Ultimately, the Subcommittee decided the best approach to the problem was a "final judgment clause" similar to that proposed by Douglas K. Norman, the chief staff attorney at the Thirteenth Court of Appeals.

Rule 100. Judgments, Decrees and Orders

(b) Final Judgment.

(1) Final Judgment Clause. An order or judgment is final for purposes of appeal if ~~and only if~~ it contains the following language:

> This is a final, appealable order or judgment. Unless expressly granted by signed order, any relief sought in this cause by any party or claimant is denied.

If this final judgment clause is to be included, it should be set apart as a separate paragraph at the end of the judgment or order immediately before the date and signature of the trial judge. ~~However, a final judgment clause placed elsewhere in a judgment or order is nonetheless valid.~~

A final judgment should be labeled final judgment

(2) Separate Orders, Conflicts. A final judgment may incorporate by reference the provisions of an earlier signed interlocutory order. If any provision of an earlier order incorporated by reference conflicts with the final judgment, the final judgment controls.

H. Carlson

McC wants order of NS to be eff. Rule Judg. labeled Final Judgment

2. Reasons for Granting a New Trial

a. Issue–Rule 320 permits a trial court to grant a new trial for good cause. TEX. R. CIV. P. 320. For all practical purposes, such an order is unreviewable. *See In re Bayerische Motoren Werke,* 8 S.W.3d 326 (Tex. 2000) (Hecht, J., joined by Owen, J., dissenting from denial of motion for rehearing of petition for mandamus). The Court Rules Committee has proposed requiring the trial court to state good cause for granting a new trial and subjecting the court's order to review by mandamus. *See* July 8, 1999 Letter From O.C. Hamilton to Chief Justice Phillips. The SCAC has also proposed, in Rule 102 of the Recodification Draft, listing situations in which a trial court may grant a new trial.

b. Recommendation–The Subcommittee recommends implementing the Court Rules Committee's recommendation to require a trial court to give reasons for granting a new trial. Whether to review such an order by mandamus would then be possible but within the courts' discretion. However, the Subcommittee also believes the reasons for granting a new trial are too numerous and varied to be codified.

Rule 102. Motions for New Trial

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

[delete (a)(1)-11)]

(g) **Order.** If a court grants a new trial, in whole or in part, it must state in the order granting the new trial or otherwise on the record the reasons for its finding that good cause exists.

3. TRCP 306a/Procedure

a. Issue–Rule 306a permits a litigant who has not been given notice or acquired actual knowledge of the signing of a judgment to restart the appellate timetable in certain circumstances. *See* TEX. R. CIV. P. 306a; TEX. R. APP. P. 4.2(d). However, as pointed out by Pam Baron in her amicus letter in *Grondona v. State*, "Rule 306a is functioning as one big 'Gotcha!'" The courts of appeals differ on when a Rule 306a motion must be filed; the effect of an unverified, untimely, or incomplete motion; the date the movant must establish; and the date by which the trial court must rule on the motion.

b. Recommendation–The Subcommittee discussed these issues at length and agreed upon the following:

(1) **Time Limit**–The rule should not require that a Rule 306a motion be filed within a set period of time after learning of the judgment or order. There may be instances in which a party will not know it needs to do so. Consider, for example, the plaintiffs in *Stokes v. Aberdeen Ins. Co.*, 917 S.W.2d 267 (Tex. 1996) (per curiam), who received notice of the June 16 judgment, but the notice erroneously stated the judgment had been signed on June 19. *Id.* at 267. The plaintiffs did not learn of the error until the Austin Court of Appeals notified them their motion for new trial was untimely. *Stokes v. Aberdeen Ins. Co.*, 918 S.W.2d 528, 529 (Tex. App.–Austin 1995), *rev'd*, *Stokes v. Aberdeen Ins. Co.*, 917 S.W.2d 267 (Tex. 1996) (per curiam).

(2) **Verification**–The seriousness of substituting a new judgment date should dictate that a Rule 306a motion be verified. However, the lack of a verification should require a prompt objection.

(3) **Amendments**–The trial court should have discretion to permit amendments at any time before the motion is determined.

(4) **Date**–The movant should be required to establish the dates required by the current rule.

(5) **Deadline for Ruling**–There should be a deadline for ruling on the motion.

(6) **Procedure in the Appellate Court**–The Subcommittee discussed adding a paragraph regarding the procedure to be followed in the appellate court if it appears an initial or additional Rule 306a proceeding is needed. But, upon reflection, there appear to be too many "ifs" to draft the paragraph. However, the Subcommittee does recommend an addition to TRAP 4.5 (modeled after TRAP 24.3) to clarify the trial court's continuing jurisdiction to entertain Rule 306a proceedings.

Rule 104. Timetables

(e) Effective Dates and Beginning of Periods

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

(4) No change.

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

(a) Requisites of Motion. To establish the application of paragraph (e)(4), the party adversely affected must file a verified motion in the trial court setting forth:

(1) The date the judgment or appealable order was signed;

(2) That neither the party nor its attorney received the notice required by paragraph (e)(3) of this rule nor acquired actual knowledge of the judgment or order within twenty days after the date the judgment or appealable order was signed; and

(3) the date upon which either the party or its attorney first

(a) received the notice required by paragraph (e)(3) of this rule; or

(b) acquired actual knowledge that the judgment or appealable order had been signed.

If an unverified motion is filed and the respondent does not object to the lack of a verification at any time before the hearing on the motion commences, the absence of a verification is waived. If an objection is timely made, the court must afford the movant a reasonable opportunity to cure the defect. In all other respects, a motion

that is filed pursuant to but not in compliance with this paragraph may be amended with permission of the court at any time before an order determining the motion is signed.

(a) **Time to File Motion, Amendments.** A motion seeking to establish the application of paragraph (e)(4) may be filed at any time.

(b) **Hearing.** Within ten days of the filing of its motion, the movant must request a hearing on its motion, and the court must hear the motion as soon as practicable. The court shall determine the motion 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.

(c) **Order.** After hearing the motion, the court must sign a written order expressly finding:

(1) whether the movant or its attorney received the notice required by paragraph (e)(3) of this rule or acquired actual knowledge of the signing of the judgment or appealable order within twenty days after the date the judgment or appealable order was signed; and

(2) the date upon which the party or its attorney first either received the notice required by paragraph (e)(3) or acquired actual knowledge that the judgment or order was signed.

TRAP 4.2(d)

(d) *Continuing Trial Court Jurisdiction.* Even after the trial court's plenary power expires, the trial court has continuing jurisdiction to hear and determine motions filed pursuant to Texas Rule of Civil Procedure 306.a.5.

5. Motions That Extend Plenary Power

a. Issue–In 1988, the supreme court held "that 'any change, whether or not material or substantial, made in a judgment while the trial court retains plenary power' restarts the appellate timetable." *Lane Bank Equip. Co. v. Smith Southern Equip., Inc.*, 10 S.W.3d 308 (Tex. 2000) (quoting *Check v. Mitchell*, 758 S.W.2d 755, 756 (Tex. 1988)). More recently, however, the court held that "only a motion seeking a substantive change will extend the appellate deadlines and the court's plenary power under Rule 329(g)." *Lane Bank*, 10 S.W.3d at 313. Accordingly, a motion for sanctions will qualify as a Rule 329b(g) motion only "if it seeks a substantive change in an existing judgment." *Id.* at 314. Concurring in the judgment, Justice Hecht would have held "that under Rule 329b(g), a post-judgment motion requesting any relief that could be included in the judgment extends the trial court's plenary power over the judgment and the deadline for perfecting appeal." *Id.* at 314, 316 (Hecht, J., concurring).

b. Recommendation–The Subcommittee shares the concern that the *Lane Bank* construction of Rule 329b(g) may create a trap for the unwary. Accordingly, the Subcommittee recommends the rule be amended to clarify the types of motions that will extend the trial court's plenary power and the appellate timetable. The Subcommittee also recommends a parallel amendment to TRAP 26.1(a)(2).

Rule 105. Plenary Power of the Trial Court

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

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

(2) if any party has timely filed a (i) motion for new trial, (ii) motion to modify the judgment or any other motion that requests relief that could be included in the judgment, (iii) motion to reinstate a judgment after dismissal for want of prosecution, or (iv) request for findings of fact and conclusions of law, within on[e] hundred and five days after the judgment is signed.

TRAP 26.1(a)(2)

a motion to modify the judgment or any other motion that requests relief that could be included in the judgment;

01/14/00 Watson letter to Babcock –
Report of Subcommittee on Justice Courts and Ancillary Proceedings

08/31/00 Hamilton letter to Babcock with changes to 08/29/00 draft of Recusal Rule
Rules 528, 647, and 742 by Subcommittee on Justice Courts and Ancillary Proceedings

11/05/98 Hamilton letter to Chief Justice Phillips regarding Proposed Rule Changes to Rules 528, 647 and 742 – Proposed Changes attached

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January 14, 2000

Mr. Charles L. Babcock
JACKSON WALKER, L.L.P.
901 Main Street, Suite 6000
Dallas, Texas 75202-3797

Via Facsimile No. (713) 752-4221

Re: Report of Subcommittee on Justice Courts and Ancillary Proceedings

Dear Chip:

The majority of the subcommittee recommends the adoption of the amendments to Rules 528 and 647 TEX. R. CIV. P. recommended by the Court's Rules Committee in O.C. Hamilton's letter of November 5, 1998 to Justice Hecht.

A majority of the subcommittee also approves of the amendment to Rule 742 proposed in Mr. Hamilton's letter, which, I understand, is to be presented by Elaine Carlson's subcommittee.

Yours very truly,

Charles R. Watson, Jr.

CRW:baa

cc: Mr. Ralph H. Duggins
Ms. Cindy Ann Lopez Garcia
Hon. Tom Lawrence

CARR, HUNT & JOY, L.L.P.

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August 31, 2000

Mr. Charles L. Babcock
JACKSON WALKER L.L.P.
1100 Louisiana, Suite 4200
Houston, Texas 77002

Via Facsimile No. (713) 752-4221
and U. S. Mail

Re: SCAC recommended changes to Rules 528, 647, and 742 by the Subcommittee on Justice Courts and Ancillary Proceedings

Dear Chip:

Enclosed for consideration at the October meeting are proposed changes to the following:

1. Rule 528 (restricting number of venue transfers in justice court);
2. Rule 647 (conforming the legal rate charged for publishing a notice of sale of real estate to TEX. GOV. CODE § 2051.045); and,
3. Rule 742 (permitting service of citation in forcible entry and detainer actions by any person authorized under Rule 103, rather than only by an officer).

The subcommittee endorses the recommendation of these changes by the State Bar Rules Committee. Attached is Carl Hamilton's letter of November 5, 1998, explaining the rules, changes, and reasons, on behalf of the Rules Committee.

Yours very truly,

Charles R. Watson, Jr.

CRW:baa
enclosure

11/12/98
4543-CCI
CC:LHS

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November 5, 1998

The Honorable Thomas R. Phillips
Chief Justice, Supreme Court
Supreme Court Bldg.
P.O. Box 12248
Capitol Station
Austin, Texas 78711

Re: Proposed Rule Changes to Rules 528, 647 and 742

Dear Justice Phillips:

Enclosed are proposed rule changes to Rules 528, 647 and 742, which have been approved for submission to the Supreme Court by the Court Rules Committee.

By copy of this letter, I am forwarding copies of these proposed rules to Luke Soules, Chairman of the Supreme Court Advisory Committee.

Sincerely,

By: O. C. Hamilton, Jr.

OCH/jf
Enclosures

cc: Mr. Luther H. Soules, III (w/encl.)
SOULES & WALLACE
Fifteenth Floor, Frost Bank Tower
100 W. Houston Street, Suite 1500
San Antonio, Texas 78205-1457

The Honorable Nathan Hecht (w/encl.)
Justice, Supreme Court of Texas
Supreme Court Building
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Ms. Vicki Wilhelm (w/encl.)
STATE BAR OF TEXAS COMMITTEES
P.O. Box 12487
Austin, Texas 78711

STATE BAR OF TEXAS

COURT RULE COMMITTEE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

I. Exact Wording of Existing Rule:

RULE 528. VENUE CHANGED ON AFFIDAVIT

If any party to a suit before any justice shall make an affidavit supported by the affidavit of two other credible persons, citizens of the county, that they have good reason to believe, and do believe, that such party cannot have a fair and impartial trial before such justice or in such justice's precinct, the justice shall transfer such suit to the court of the nearest justice within the county not subject to the same or some other disqualification.

II. Proposed Rule:

RULE 528. VENUE CHANGED ON AFFIDAVIT

If any party to a suit before any justice shall make an affidavit supported by the affidavit of two other credible persons, citizens of the county, that they have good reason to believe, and do believe, that such party cannot have a fair and impartial trial before such justice or in such justice's precinct, the justice shall transfer such suit to the court of the nearest justice within the county not subject to the same or some other disqualification. A party is entitled to only one transfer pursuant to this rule.

III. Brief Statements of Reasons for Requested Changes and Advantages to be Served by Them.

This change is to prevent abuse of the automatic venue transfer provision that exists under the current rule by providing that a party has only one right to transfer venue of a proceeding in a justice court. In 1996, this Committee previously submitted a proposed change to this rule to the Supreme Court for consideration. That proposal allowed parties two venue transfers, but also required them to file their affidavit at least one full business day prior to the trial. The current version reduces the number of transfers from 2 to 1, but eliminates the 24 hour filing rule in the prior proposal so as not to reduce the already abbreviated notice period in these cases.

STATE BAR OF TEXAS

COURT RULE COMMITTEE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

I. Exact Wording of Existing Rule:

RULE 647: NOTICE OF SALE OF REAL ESTATE

The time and place of sale of real estate under execution, order of sale, or venditioni exponas, shall be advertised by the officer by having the notice thereof published in the English language once a week for three consecutive weeks preceding such sale, in some newspaper published in said county. The first of said publications shall appear not less than twenty days immediately preceding the day of sale. Said notice shall contain a statement of the authority by virtue of which the sale is to be made, the time of levy, and the time and place of sale; it shall also contain a brief description of the property to be sold, and shall give the number of acres, original survey, locality in the county, and the name by which the land is most generally known, but it shall not be necessary for it to contain field notes. Publishers of newspapers shall be entitled to charge for such publication at a rate equal to but not in excess of the published word or line rate of that newspaper for such class of advertising. If there be no newspaper published in the county, or none which will publish the notice of sale for the compensation herein fixed, the officer shall then post such notice in writing in three public places in the county, one of which shall be at the courthouse door of such county, for at least twenty days successively next before the day of sale. The officer making the levy shall give the defendant, or his attorney, written notice of such sale, either in person or by mail, which notice shall substantially conform to the foregoing requirements.

II. Proposed Rule:

RULE 647: NOTICE OF SALE OF REAL ESTATE

The time and place of sale of real estate under execution, order of sale, or venditioni exponas, shall be advertised by the officer by having the notice thereof published in the English language once a week for three consecutive weeks preceding such sale, in some newspaper published in said county. The first of said publications shall appear not less than twenty days immediately preceding the day of sale. Said notice shall contain a statement of the authority by virtue of which the sale is to be made,

the time of levy, and the time and place of sale; it shall also contain a brief description of the property to be sold, and shall give the number of acres, original survey, locality in the county, and the name by which the land is most generally known, but it shall not be necessary for it to contain field notes. ~~Publishers of newspapers shall be entitled to charge for such publication at a rate equal to but not in excess of the published rod or line rate of that newspaper for such class of~~ The legal rate that newspapers may charge for publishing a notice under this rule is that newspaper's lowest published rate for classified advertising. If there be no newspaper published in the county, or none which will publish the notice of sale for the compensation herein fixed, the officer shall then post such notice in writing in three public places in the county, one of which shall be at the courthouse door of such county, for at least twenty days successively next before the day of sale. The officer making the levy shall give the defendant, or his attorney, written notice of such sale, either in person or by mail, which notice shall substantially conform to the foregoing requirements.

III. Brief Statements of Reasons for Requested Changes and Advantages to be Served by Them.

The proposed change conforms the rule with section 2051.045 of the Texas Government Code, which provides that the legal rate for publishing a notice in a newspaper is the newspaper's lowest published rate for classified advertising.