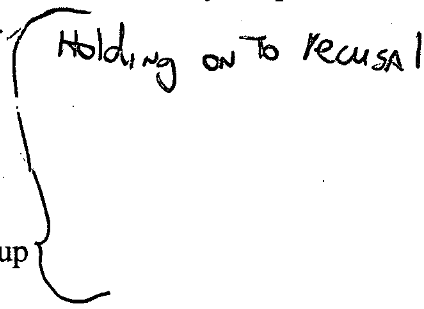
DOCUMENTS FOR SCRAC MEETING
NOV. 17-18, 2000

TAB 1. Parental Notification Order dated November 8, 2000

TAB 2. Proposed TRAP Rule 47, as transmitted by the SCRAC, includes comments by Peeples and Dorsaneo regarding suggested changes to transmitted rule.



TAB 3. Proposed TRCP 166a, as transmitted by the SCRAC

TAB 4. Proposed Voir Dire Rule, as transmitted by the SCRAC

TAB 5. Proposed Recusal Rule, sent by Chip Babcock to working group

TAB 6. TRAP Rules Report by Dorsaneo, annotated with previous SCRAC decisions and Dorsaneo and Griesel changes from last SCRAC meeting

TAB 7. TRCP Rule 300-330 Subcommittee Report by Duncan

TAB 8. McCown's suggestion on "finality" Rule

TAB 9. TRCP 194(a) Report on Family Law Requests for Disclosure by Jenkins (Not currently available)

TAB 10. Comment to TRCP Rule 176, approved at last SCRAC meeting

TAB 11. TRCP Rule 3A report by Barron

TAB 12. Jan. 2000 letter by Watson regarding amendments to TRCP Rules 528 and 647

TAB 13. Aug. 2000 letter by Watson proposing changes to TRCP Rules 528, 647, and 742

TAB 14. Nov. 1998 letter by Hamilton to Chief Justice Phillips regarding proposed changes to TRCP 528, 647, and 742

TAB 15. Disposition Chart on Texas Rules of Evidence by Lowe (not currently available)

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 00- __________

ORDER APPROVING AMENDMENTS TO
TEXAS PARENTAL NOTIFICATION RULES AND FORMS
FOR USE IN PROCEEDINGS UNDER CHAPTER 33 OF THE FAMILY CODE

ORDERED that:

1. The Texas Parental Notification Rules, adopted by Order dated December 22, 1999, in Misc. Docket No. 99-9247, are revised as follows:

   a. Rules 1.4(b), 1.6(a), 1.9, and 3.3(b) are amended;

   b. Comments 3 and 8 to Rule 1 and Comment 1 to Rule 2 are amended; and

   c. Rule 1.10 and Comment 9 to Rule 1 are added.

2. The Texas Parental Notification Forms, adopted by Order dated December 15, 1999, in Misc. Docket No. 99-9243, are revised as follows:

   a. Forms 1A, 2D, and 2F are amended; and

   b. Forms 2G and 2H are added.

3. These changes, with any modifications made after public comments are received, take effect March 1, 2001.

4. In a proceeding under Chapter 33 of the Family Code in which the final ruling in the proceeding occurred on or before February 28, 2001, an order for the State to pay fees and costs under Rule 1.9, Texas Parental Notification Rules, is valid only if the order is signed by the judge and sent to the Texas Department of Health not later than May 30, 2001.

5. The Clerk is directed forthwith to:

a. file a copy of this Order with the Secretary of State;

b. to mail a copy of this Order to each member of the Legislature;

c. to cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*; and

d. to cause a copy of this Order to be posted on the website of the Supreme Court of Texas at http://www.supreme.courts.state.tx.us.

BY THE COURT, IN CHAMBERS, this 8th_day of November, 2000.

____
Thomas R. Phillips, Chief Justice

____
Nathan L. Hecht, Justice

____
Craig T. Enoch, Justice

____
Priscilla R. Owen, Justice

____
James A. Baker, Justice

____
Greg Abbott, Justice

____
Deborah G. Hankinson, Justice

____
Harriet O'Neill, Justice

____
Alberto R. Gonzales, Justice

1.4 Confidentiality of Proceedings Required; Exceptions.

(b) ***Documents and information pertaining to the proceeding.*** As required by Chapter 33, Family Code, the application and all other court documents and information pertaining to the proceedings are confidential and privileged and are not subject to disclosure under Chapter 552, Government Code, or to discovery, subpoena, or other legal process. But documents and information may be disclosed when expressly authorized by these rules, and an order, ruling, opinion, or clerk's certificate may be released to:

(1) the minor;

(2) the minor's guardian ad litem;

(3) the minor's attorney;

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

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

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

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 promptly after the assignment of a judge to hear the case is made known to the minor or her attorney, whichever is later. An objection to an appellate judge, or a motion to recuse or disqualify an appellate judge must be filed before 10 a.m. of the first business day after 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.

1.9 Fees and Costs.

(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.***

(1) Fees and costs that may be paid. 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 trial court filing fees and costs as certified by the clerk. Court costs include the expenses of an interpreter (Form 2H) but do not include the fees or expenses of a witness. Court costs do not include fees which must be remitted to the state treasury.

(2) To whom order directed and sent. The order must be directed to the Comptroller of Public Accounts but should be sent by the clerk to the Director, Fiscal Division, of the Texas Department of Health.

(3) Form and contents of the order. The order 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 and 2G, but it is not required to do so.

(4) Time for signing and sending order. To be valid, the order must be signed by the judge and sent by the clerk to the Department of Health not later than the ninetieth day after the date of the final ruling in a proceeding, whether the application is granted, deemed granted, or denied, or the proceeding is dismissed or nonsuited.

(c) ***Motion to reconsider; time for filing.*** Within thirty days of actual receipt of the order, the Comptroller or any other person adversely affected by the order 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.

(d) ***Appeal.*** The Comptroller or any other person adversely affected by the order may

appeal from the trial court's ruling on the motion to reconsider as from any other final judgment of the court.

(e) ***Report to the Office of Court Administration.*** The Department of Health must transmit to the Office of Court Administration a copy of every order assessing costs in a proceeding under Chapter 33, Family Code. Such orders are not subject to the Amended Order of the Supreme Court of Texas, dated September 21, 1994, in Misc. Docket No. 94-9143, regarding mandatory reports of judicial appointments and fees.

(f) ***Confidentiality.*** When transmitting an order awarding costs to the Department of Health, the clerk must take reasonable steps to preserve its confidentially. 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. Amicus briefs may be submitted and received by a court – but not filed – under either of the following 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 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 in violation of Rules 1.3 and 1.4. The person must submit the original brief and the same number of copies required for other submissions to the court. If the brief is submitted to a court of appeals, the original and eleven

copies of the brief, plus a computer disk containing the brief, must also be submitted to the Supreme Court of Texas. When an appeal of a proceeding is filed, the clerk of the court of appeals or the Supreme Court must notify the parties to the appeal of the existence of any brief filed under this subsection and must make the brief available for inspection and copying. 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 it available to the public for inspection and copying.

Notes and Comments

3. Any judge involved in a proceeding, whether as the judge assigned to hear and decide the application, 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, 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.

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(f) 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.

9. Rule 1.10 adds a procedure for filing amicus curiae briefs uniquely designed for the expedited and confidential nature of parental notification cases.

RULE 2. PROCEEDINGS IN THE TRIAL COURT

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 a 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 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.

3.3 Proceedings in the Court of Appeals.

(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. The court may use Form 3C but is not required to do so.

INSTRUCTIONS FOR APPLYING TO THE COURT FOR A WAIVER OF PARENTAL NOTIFICATION

(Form 1A)

Your situation and the law

If you are younger than 18 and have not been legally "emancipated," you are "unemancipated," which means that you are legally under the custody or control of your parent(s), managing conservator, or guardian. (A "managing conservator" is a parent, other adult, or agency appointed by a court to have custody or control of you.)

If you are pregnant, unemancipated, and younger than 18, you cannot get an abortion in Texas unless:

• your doctor first informs your parent(s), managing conservator, or guardian at least 48 hours before you can have an abortion,

or unless

• a judge issues an order that "waives," or removes, the requirement that you must let your parent(s), managing conservator, or guardian know about your planned abortion.

How to get a waiver of parental notification

• Fill out the application

To get a court order waiving the requirement that you tell your parent(s), managing conservator, or guardian about your planned abortion, you or someone acting on your behalf must complete Forms 2A and 2B, ***Confidential Application for Waiver of Parental Notification***. Form 2A is the "Cover Page' for the Application; it requests basic information about why you are seeking the order. Form 2B is the "Verification Page," which requests information about you.

On the Verification Page, you will be asked to tell the court how you may be contacted quickly and confidentially. It is very important that you provide this information because the court may later need to contact you about your application. If you cannot be contacted, your application will be denied. You may list a phone, pager, beeper, or fax number, or other way that you can be contacted. You can but need not give your own number — instead, you can ask the court to contact you through someone who is helping you or acting on your behalf. You may also list a second person who may be contacted on your behalf.

You or someone acting on your behalf must deliver the forms to the clerk in the district court, county court-at-law, county court, or probate court to be filed. The court clerk can help you complete and file the application, and can help you get a hearing on your request. However, the clerk cannot give you legal advice or counsel you about abortion.

All of the information you put on the

application is confidential. You do not have to pay a fee to file this application.

• Your hearing

The court will tell you when to come to the courthouse for your "hearing." In your hearing, you will meet with a judge to discuss your request. The court will hold your hearing within two days (not counting weekends and holidays) after you file your application.

After you file your application, the court will appoint a person to meet with you before the hearing and help the judge decide your application. The person is called a "guardian ad litem." In your application you may ask the court to appoint someone you want to be your guardian ad litem (who can be a relative, clergy, counselor, psychiatrist or psychologist, or other adult), but the court is not required to appoint this person.

You must have a lawyer with you at your hearing. You may hire your own lawyer, or you may ask the court to appoint one to represent you for free. The person appointed to be your lawyer might also be appointed to be your guardian ad litem.

• Keeping it confidential

Your hearing will be confidential and private. The only persons allowed to be there are you, your guardian ad litem, your lawyer, court staff, and any person whom you request to be there.

You already know that your application stays confidential. So will everything from your hearing: all testimony, documents and other evidence presented to the court, and any order given by the judge. The court will keep everything sealed. No one else can inspect the evidence.

• The court's decision

The court must "rule" — issue a decision on your application — before 5:00 p.m. on the second day after the day you filed your application, not counting weekends and holidays.

If the court fails to rule within that time, it counts as an "OK" to you — it is an automatic waiver of the requirement that you inform your parent(s), managing conservator, or guardian about your planned abortion. If this happens, you can get a certificate from the court clerk that says that your request is "deemed granted," which means that your application was approved.

If the court *does* rule within the required time, the court issues an order that does one of the following four things:

(1) Approves your request because the court finds that you are mature enough and know enough to choose on your own to have an abortion;

(2) Approves your request because it is in your best interests to *not* notify your parent(s), managing conservator, or guardian

before getting the abortion;

(3) Approves your request because notifying your parent(s), managing conservator, or guardian before getting the abortion may lead to physical, sexual, or emotional abuse of you; or

(4) Denies your request because the court does not find (1), (2) or (3).

If you say, or if there is evidence, that you have been or may be sexually abused, the court must treat your claim as a very serious matter and may be required to refer it to the police or other authorities for investigation.

• Appealing the court's decision

If the court denies your request, you may ask another court to hear your case. This request is called an "appeal," and the new court will be the Court of Appeals.

To appeal the first court's decision, have your own lawyer or your court-appointed lawyer fill out Form 3A, ***Notice of Appeal in Parental Notification Proceeding.*** The lawyer must file it with the clerk of the court that denied your request for a waiver of parental notification.

You will *not* have to go to the Court of Appeals. Instead, the Court of Appeals will review the written record and will issue a written ruling on your appeal no later than 5:00 p.m. on the second day after the day you file the *Notice of Appeal*, not counting weekends and holidays.

The Court of Appeals will provide its ruling to you, the lawyer, your guardian ad litem, or any other person designated by you to receive the ruling.

The same guardian ad litem and lawyer who helped you with your first hearing can help with your appeal.

• Getting the forms you need

Forms 2A and 2B, the Cover Page and Verification Page to the *Confidential Application for Waiver of Parental Notification*, and Form 3A, *Notice of Appeal in Parental Notification Proceeding,* should all be attached to these instructions.

If these forms are not attached to these instructions, you can get them from the clerk of the district, county court-at-law, county, or probate court or Court of Appeals. These forms are also available on the Texas Judiciary Internet website at www.courts.state.tx.us.

JUDGMENT AND FINDINGS OF FACT AND CONCLUSIONS OF LAW ON APPLICATION IN PARENTAL NOTIFICATION PROCEEDING
(Form 2D)

CAUSE NO. ______________________

IN RE JANE DOE

IN THE ____________________

____

____________COUNTY, TEXAS

This matter was heard on this _____ day of __________________, _____. Based on the testimony and evidence presented, this court finds:

1. The applicant is pregnant.

2. The applicant is unmarried and under 18 years of age.

3. The applicant has not had her disabilities as a minor removed under Chapter 31 of the Texas Family Code.

4. The applicant wishes to have an abortion without her doctor notifying either of her parents, her managing conservator or guardian.

5. A preponderance of the evidence supports the following [State "yes" beside any issue for which the court finds in favor of the applicant by a preponderance of the evidence. If any one issue is decided in favor of the applicant, the court need not consider other issues]:

   ______ The applicant is mature and sufficiently well informed to make the decision to

have an abortion performed without notification to either of her parents, her managing conservator or guardian.

Findings of Fact/Conclusions of Law: ______________________________

____

____

____

____

____

______ Notifying either of the applicant's parents, managing conservator or guardian would not be in her best interest.

Findings of Fact/Conclusions of Law: ______________________________

____

____

____

____

____

______ Notifying either of the applicant's parents, managing conservator or guardian may lead to physical, sexual, or emotional abuse of the applicant.

Findings of Fact/Conclusions of Law: ______________________________

____

____

____

____

____

THEREFORE, IT IS ORDERED

______ The application is GRANTED and the applicant is authorized to consent to the performance of an abortion without notifying either of her parents or a managing conservator or guardian.

______ The application is DENIED. The applicant is advised of her right to appeal under Rule 3 of the Texas Parental Notification Rules and will be furnished a Notice of Appeal form, Form 3A.

All costs shall be paid by the State of Texas pursuant to Family Code Chapter 33.

____

Judge Presiding

ORDER THAT COSTS IN PARENTAL NOTIFICATION PROCEEDING BE PAID BY STATE PURSUANT TO TEXAS FAMILY CODE §33.007 (Form 2F)

Notice: To guarantee reimbursement, this Order must be served on the Director, Fiscal Division, Texas Department of Health, within the deadlines imposed by Tex. Paren. Notif. R 1.9(b).

CAUSE NO. ____________________

IN RE JANE DOE	IN THE ______________________
	______________________
	______________COUNTY, TEXAS

ORDER

In this proceeding filed under Texas Family Code § 33.003, the court heard evidence on the ________ day of ____________________, _____, concerning court costs. Based on the evidence presented, pursuant to Texas Family Code § 33.007, the State of Texas is ordered to pay:

1. Reasonable and necessary attorney ad litem fees and expenses of $____________________ to:

   Name: State Bar No.

   Address:

   Telephone: Federal Tax ID:

2. Reasonable and necessary guardian ad litem fees and expenses of $____________________ to:

   Name:

   Address:

   Telephone: Federal Tax ID:

3. Court reporter's fees certified by the court reporter to:

   Name:

   Address:

   Telephone: Federal Tax ID:

4. All court costs certified by the clerk.

____

Judge Presiding

CLERK'S CERTIFICATION OF COURT COSTS AND FEES AND TRANSMISSION OF ORDER FOR PAYMENT IN PARENTAL NOTIFICATION PROCEEDING
(Form 2G)

Director, Fiscal Division
Texas Department of Health
1100 West 49th Street
Austin TX 78756

Re: *In re Jane Doe*

Cause No. ______________________

Court: ______________________

County: ______________________

Dear Sir or Madam:

Please find enclosed a certified copy of an Order issued on ____________________, 20____, in the referenced case. Please pay the amounts to the payees as stated in the Order.

In accordance with the Order, I certify the following fees and costs for payment as follows:

Amount: $____________________

Name of the Clerk: ______________________________

Address : ______________________________________

Tax Identification No.: ____________________

Thank you.

Sincerely,

____

[seal]

Name: ______________________

Encl: Certified copy of Order

Position: ______________________

ORDER APPOINTING INTERPRETER FOR CHAPTER 33, FAMILY CODE PROCEEDINGS (Form 2H)

CAUSE NO. ______________________

IN RE JANE DOE

IN THE ____________________________

____

__________________ COUNTY, TEXAS

ORDER

ORDERED that for good cause, the following person is appointed an interpreter to assist the applicant in applying for relief under Chapter 33, Family Code:

Name: ________________________________ State Bar No. ______________

Address: ____

Telephone: ______________________ Federal Tax ID: __________________

Signed: this _____ day of __________________, 20____.

____

Judge

OATH FOR INTERPRETER

I, ____________________, do swear or affirm that I am competent and well versed in the ____________________ language and shall: (1) make a true interpretation of all the proceedings to the applicant; (2) repeat verbatim all statements, questions, and answers of all persons who are a part of the proceeding, to applicant, counsel, the court, and others in the English language and in the __________________ language, using my best skill and judgment.

I shall not: (1) participate in any manner other than as an interpreter in the decision making or adjudicative process; (2) communicate with any other person regarding the proceedings except a literal translation of questions, answers, or remarks made during the proceeding, or (3) disclose or discuss any of the proceedings with any person following entry of judgment.

____

Print Name: ________________________________

Address: __________________________________

____

Telephone: _______________________________

SWORN TO AND SUBSCRIBED before me on ______________________, 20___

[seal] ____

TRAP 47. OPINIONS AND PUBLICATION

TRAP 47.1 Written Opinions. The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.

TRAP 47.2 Signing of Opinions. A majority of the justices who participate in considering the case must determine whether the opinion will be signed by a justice or will be per curiam. The names of the participating justices must be noted on all written opinions or orders of the court or a panel of the court.

TRAP 47.3 Publication of Opinions. All opinions of the courts of appeals must be made available to the public including public reporting services, print or electronic.

TRAP 47.4 Memorandum Opinion. If the issues are settled the court should write a brief memorandum opinion no longer than necessary to advise the parties of the court's decision and the basic reason for it. An opinion should not be labeled a memorandum opinion if it does any of the following:

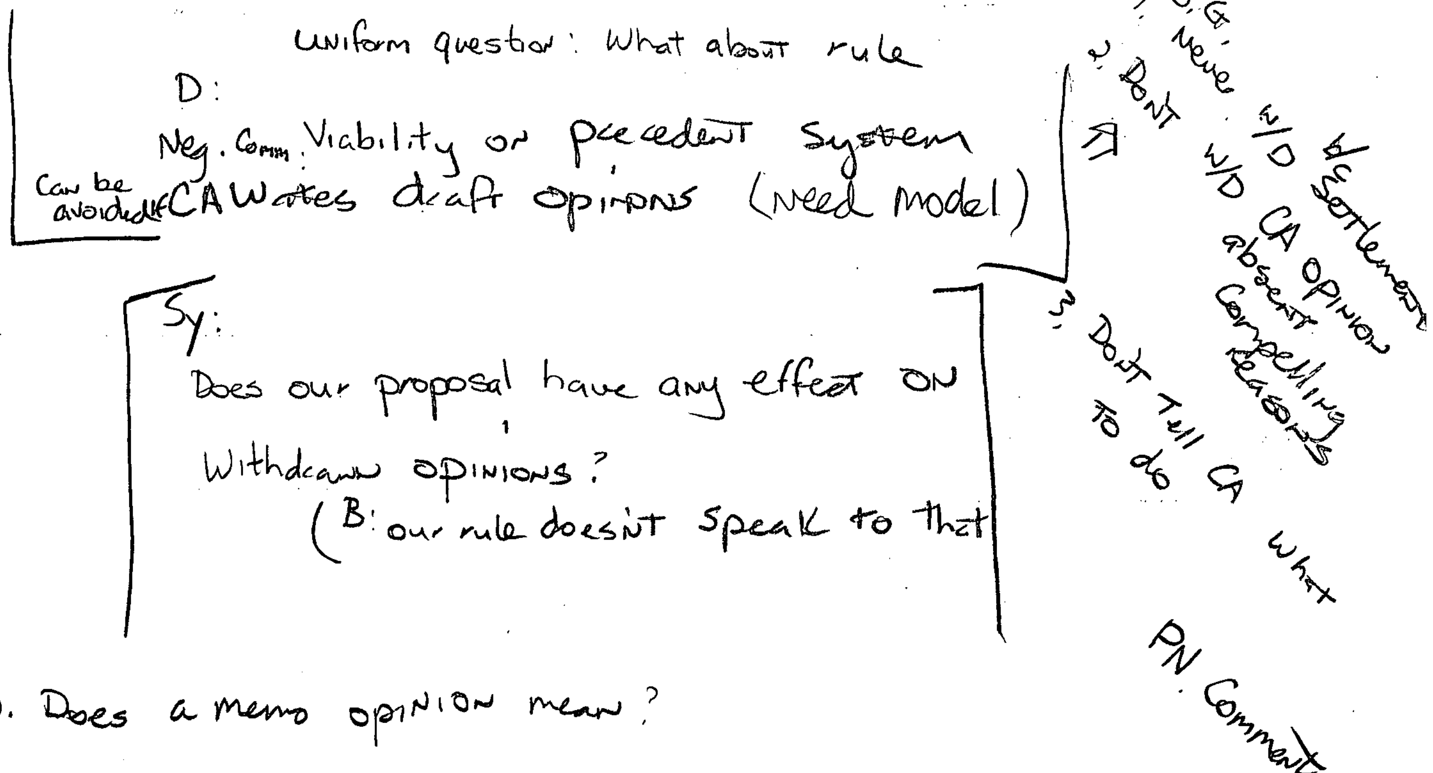
(a) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases;

(b) involves a legal issue of continuing public interest;

(c) criticizes existing law;

(d) resolves an apparent conflict of authority ; or

(e) contains a concurrence or dissent.



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(a) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases;
(b) involves a legal issue of continuing public interest;
(c) criticizes existing law;
(d) resolves an apparent conflict of authority ; or
(e) contains a concurrence or dissent.

Looks good to me. I suggest the minor wording changes shown above.

DPeeples

Faxed to Babcock, Duncan, Dorsaneo, Hecht + Griesel

SOUTHERN
METHODIST
UNIVERSITY

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

MEMORANDUM

To: Charles L. "Chip" Babcock
From: Bill Dorsaneo
Date: November 1, 2000
Re: TRAP 47. Opinions and Publication

I have reviewed the draft as edited by David Peeples and have the following additional comments. I believe that the last part of subdivision 47.4 should be worded as follows:

"An opinion should not be labeled a memorandum opinion if it does any of the following:

(a) ...
(b) ...
(c) ...
(d) ... ; or
(e) is accompanied by a concurring or dissenting opinion

I am also not sure that the Court should eliminate all of Appellate Rules 47.5 and 47.6. The first two sentences of Rule 47.5 probably should not be omitted. Only the last two sentences are about publication of concurring and dissenting opinions. Similarly Rule 47.6 is about the issuance of "signed" opinions as distinguished from "per curiam" opinions and, although this deletion is unlikely to create a problem, the Court may want to make it clear that an en banc court can decide whether an opinion will be signed by a justice rather than issued per curiam.

cc: Chris Griesel, Rules Attorney

School of Law
PO Box 750116 Dallas TX 75275-0116
214-768-2626 Fax 214-768-4330 wdorsanc@mail.smu.edu

VOIR DIRE

(1) The parties have the 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, defenses, damages, and other relief sought 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 peremptory challenges and challenges for cause.

(3) The examination shall not be abusive, repetitive, argumentative, or unduly invasive.

(4) A party may not attempt to commit a panelist to a particular verdict or finding, but may question a panelist generally about the panelist's ability to fairly consider any element of the claims, damages, defenses, and other relief sought in the case.

JACKSON
WALKER
L.L.P.

ATTORNEYS AND COUNSELORS
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CHARLES L. BABCOCK
(713) 752-4210
CBABCOCK@JW.COM

October 25, 2000

Via Facsimile Transmittal (817) 861-4685

Frank Gilstrap, Esq.
Hill Gilstrap
1400 W. Abram Street
Arlington, Texas 76013

Re: SCAC – Recusal Rule

Dear Frank:

Here is the final Recusal Rule. I am hopeful that we can arrange a meeting with Senator Harris to obtain his final blessing. You will note that the Committee does not recommend what is the apparent intent of Senator Harris' statute, which is that the denial of a third motion to recuse results in sanctions regardless of whether the first two motions were successful.

I am hopeful that Richard Orsinger or Carl Hamilton can join us for the meeting, but I think it is imperative that you and I be there, and further that we have the meeting before the next SCAC meeting which is scheduled for November 17, 2000.

May I suggest the dates of November 6, 2000, November 7, 2000 (before 3:00 p.m.) or November 10, 2000, to meet with Senator Harris?

Thanks for all your help on this and for your outstanding work on the committee.

Very truly yours,

JACKSON WALKER L.L.P.

Charles L. Babcock

CLB/clg
Enclosures
2546887.1/099996.00295

cc: With Enclosures:

The Honorable Nathan Hecht — *Via Facsimile (512)463-1365*
Justice, The Supreme Court of Texas
201 West 14th Street
P. O. Box 12248
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SUPREME COURT ADVISORY COMMITTEE SUBCOMMITTEE WORKING DRAFT OF DISQUALIFICATION AND 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 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]

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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).

[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 known or disclosed to the judge to have 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 § 253.157(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 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.*

Watson add FN

(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 subparagraphs (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 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 subparagraph (e)(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 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]

(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:*

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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.

Come out of Federal Handbook for Judiciary

(a)when the basis for recusal did not exist before ten (10) days prior to the date the case is set for trial or other 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 (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 does not comply with subparagraph (e)(1), the said presiding judge may deny the motion without a hearing. 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 any local rule or other law, after a motion to recuse or disqualify has been filed, no judge may preside, reassign, transfer, or hear any matter in the case, except pursuant to subparagraph (e)(4), before the motion has been decided by the judge assigned by the presiding judge of the administrative region.*

(4) **Interim Proceedings.**[21] *After referring the motion to the presiding judge of the administrative region, the judge in whose case the motion is filed must take no*

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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 (e)(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.

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. 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 (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 conventional trial or on the merits.*[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 presiding judge of the administrative region or 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*

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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]*North East Independent School District v. Aldridge*, 400 S.W.2d 893 (Tex. 1966).

[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.

[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.

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 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]

(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]

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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).

(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.

(c) A sanction order shall be subject to review on appeal from the final judgment.

(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.

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.

Dorsaneo Changes

(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~~ **original proceeding**. But a party need not serve a copy of the record **in an appeal**. **A party must serve a copy of the record in an original proceeding.**

See Banales

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Griesel Changes

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]~~ A party need not serve a copy of the record in an appeal. A party must serve a copy of the record in an original proceeding.

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."

Dorsaneo Changes

Changes to TRAP Rule 10.1(a)5

(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. A certificate of conference is not required for a motion for rehearing.

Griesel Changes

RULE 10. MOTIONS IN THE APPELLATE COURTS

10.1 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:

(1) contain or be accompanied by any matter specifically required by a rule governing such a motion;

(2) state with particularity the grounds on which it is based;

(3) set forth the order or relief sought;

(4) be served and filed with any brief, affidavit, or other paper filed in support of the motion; and

(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. A certificate of conference is not required for a motion for rehearing.

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

Amend Rule 13.1 to state

The official court reporter or court recorder must:

(a) attend court sessions and make a full record of the proceedings when requested by the court or any party to the case.

Dorsaneo Changes

Changes to TRAP Rule 12.6

Rule 12.6 *Notices of Court's Judgments and Orders*. In any proceeding, the clerk of an appellate court must promptly send a notice of any judgment, **mandate** or **other** ~~order of the~~ court **order** to all parties to the proceeding.

Changes to TRAP Rule 18.1

Rule 18.1 *Issuance*. The clerk of the appellate court that rendered the judgment, 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 expires:

Griesel Changes

RULE 12. DUTIES OF APPELLATE CLERK

12.6 Notices of Court's Judgments and Orders. In any proceeding, the clerk of an appellate court must promptly send a notice of any judgment, mandate, or other court order [~~of the court~~] to all parties to the proceeding.

RULE 18. MANDATE

18.1 Issuance. The clerk of the appellate court that rendered the judgment 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 expires:

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:

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.

Dorsaneo Changes

Changes to TRAP Rule 26.1(a)(4)

Rule 26.1 Civil Cases. . .

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

(1) . . .

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

Orlesel Changes

RULE 26. TIME TO PERFECT APPEAL

26.1 Civil Cases. The notice of appeal must be filed within 30 days after the judgment is signed, except as follows:

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

(1) a motion for new trial;

(2) a motion to modify the judgment;

(3) a motion to reinstate under > Texas Rule of Civil Procedure 165a; or

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

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

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

(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:

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.

Change .014

D - Restore

O - May need something other than MNT to preserve
   Estoi in CA ; no new prose slipping since

   Change appears at S.G. level

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).

G. Recorder Record

We don't want record reversed or curable issues

Other problems recorder?

Hold for (F)

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, [or] 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.

(2)

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.

TRAP Hope

Issues become more informative

D: Say Garner's Practice is Silly Booyah!

Ideally: Education

H:

Maybe comment, { both for bench / bar

Hold for return

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.

Multiparty Cases?

✓ on problems w/ FRAP 28(i)

~~H~~Hecht,

Same rule in SC

+ motion

Put in Rule 9 instead of 38

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 (i).

Refer back
Put in 9

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.

Back

fiddle some more

- What if you happy and leave
- This rule should allow lay down

Pete back

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. <u>Remittitur in Civil Cases</u>

46.5 <u>Voluntary Remittitur</u>. 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.

(as modified after committee)

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."

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."

JW

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.

No

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."

IN

To Dorsaneo w/ Changes + New Changes

PROPOSED CHANGES TO TEXAS RULES OF APPELLATE PROCEDURE

RULE 9. PAPERS GENERALLY

9.5 Service.

original proceedings

(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~~] A party need not serve a copy of the record in an appeal. A party must serve a copy of the record in an original proceeding.

RULE 10. MOTIONS IN THE APPELLATE COURTS

10.1 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:

(1) contain or be accompanied by any matter specifically required by a rule governing such a motion;

(2) state with particularity the grounds on which it is based;

(3) set forth the order or relief sought;

(4) be served and filed with any brief, affidavit, or other paper filed in support of the motion; and

(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. A certificate of conference is not required for a motion for rehearing.

RULE 13. COURT REPORTERS AND COURT RECORDERS

13.1 Duties of Court Reporters and Recorders. 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~~] when the court or any party to the case requests, attend court and make a full record of the proceedings;

(b) take all exhibits offered in evidence during a proceeding and ensure that they are

marked;

(c) file all exhibits with the trial court clerk after a proceeding ends;

(d) perform the duties prescribed by Rules 34.6 and 35; and

(e) perform other acts relating to the reporter's or recorder's official duties, as the trial court directs.

RULE 12. DUTIES OF APPELLATE CLERK

12.6 Notices of Court's Judgments and Orders. In any proceeding, the clerk of an appellate court must promptly send a notice of any judgment, mandate, or other court order [~~of the court~~] to all parties to the proceeding.

RULE 18. MANDATE

18.1 Issuance. The clerk of the appellate court that rendered the judgment 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 expires:

(a) In the Court of Appeals.

(1) Ten days after the time has expired for filing a motion to extend time to file a petition for review or a petition for discretionary review if:

(A) no timely petition for review or petition for discretionary review has been filed;

(B) no timely filed motion to extend time to file a petition for review or petition for discretionary review is pending; and

(C) in a criminal case, the Court of Criminal Appeals has not granted review on its own initiative.

(2) Ten days after the time has expired for filing a motion to extend time to file a motion for rehearing of a denial, refusal, or dismissal of a petition for review, or a refusal or dismissal of a petition for discretionary review, if no timely filed motion for rehearing or motion to extend time is pending.

(b) In the Supreme Court and the Court of Criminal Appeals. Ten days after the time has expired for filing a motion to extend time to file a motion for rehearing if no timely filed motion for rehearing or motion to extend time is pending.

(c) Agreement to Issue. The mandate may be issued earlier if the parties so agree, or for good cause on the motion of a party.

RULE 26. TIME TO PERFECT APPEAL

26.1 Civil Cases. The notice of appeal must be filed within 30 days after the judgment is signed, except as follows:

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

(1) a motion for new trial;

(2) a motion to modify the judgment;

(3) a motion to reinstate under > Texas Rule of Civil Procedure 165a; or

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

(b) in an accelerated appeal, the notice of appeal must be filed within 20 days after the judgment or order is signed;

(c) in a restricted appeal, the notice of appeal must be filed within six months after the judgment or order is signed; and

(d) if any party timely files a notice of appeal, another party may file a notice of appeal within the applicable period stated above or 14 days after the first filed notice of appeal, whichever is later.

RULE 29. ORDERS PENDING INTERLOCUTORY APPEAL IN CIVIL CASES

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, if permitted by law, may proceed with a trial on the merits. But the court must not make an order that:

(a) is inconsistent with any appellate court temporary order; or

(b) interferes with or impairs the jurisdiction of the appellate court or effectiveness of any relief sought or that may be granted on appeal.

NOTES AND COMMENTS

Comment to 2000 change: The change to Rule 29.5 clarifies that a trial court may proceed with a trial on the merits during the pendency of an appeal from an interlocutory order if it is permitted by law. Statutory provisions or other law may preclude a trial court from proceeding with a trial on the merits. *See e.g.* Section 51.004(b), Tex. Civ. Prac. & Rem. Code (stating interlocutory appeal of certain type of civil actions has "the effect staying the commencement of trial" pending resolution of the appeal) .

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.

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[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.

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.

(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.

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 <u>or any other motion that requests relief that could be included in the judgment</u>, (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 <u>or any other motion that requests relief that could be included in the judgment</u>;

At our last meeting we talked about the final judgment problem. Here is my stab at a rule.
Scott McCown

Final Judgment

When the orders of the court dispose of all claims against all parties, then the orders are final.

The last of such orders is the final judgment, and all timetables run from the date of the last order.

1. A final judgment ~~should~~ must be labeled "Final Judgment" directly below the caption and ~~should~~ must have a final judgment clause directly above the date ~~signed by~~ signature of the judge.

2. Any order with a final judgment clause in the following form is final for the purposes of appeal: "This is a final, appealable judgment. All relief requested in this case that is not expressly granted ~~in this judgment~~ is denied."

Any order without a final judgment clause in this form is final for the purposes of appeal only if final as defined in subdivision (1).

(If and only if)

or order

1. Actual lang
2. Title <should>
3. Placement
Must be placed first

IN This Judgment or by Prior written order (NON-Superceded)

*Subject TO probate

1996

(b) Final Judgment

Levy on execution

by

or by other Means

PROPOSED ADDITION TO RULE 194.2

(l) In a suit in which spousal or child support is at issue:

(1) a policy statement or a ~~all policies, statements~~ and descriptions of benefits for any medical or health insurance coverage available through responding party's employment to insure a spouse or child together with corresponding insurance card and health care provider list;

(2) responding party's income returns for the two previous years including schedules and amendments or if no return has been filed, responding party's forms, W-2, 1099s, and K-1s for such years;

(3) responding party's payroll check stubs for the preceding three months;

(m) In suits for divorce or annulment:

(1) the most recent statement (from all accounts) ~~for each financial institution~~ in which (institution where $ or property is on account) responding party claims an interest;

(2) the most recent statement of account for all of responding party's employee benefit plans;

(3) the last financial statement (submitted) ~~prepared~~ for a lending institution by responding party; and

(4) all deeds, deeds of trust, promissory notes or leases for any real estate in which responding party claims an interest.

Agenda for Jan

RELEVANT INFORMATION REGARDING PROPOSED
ADDITION TO RULE 194.2

What percentage of civil cases filed in Texas are Family Law?

Between 09/01/99 and 08/31/00:	60% of the civil cases filed in the State of Texas were Family Law. (222,764 cases out of 369,391 cases)
Out of the 60%:	22% of the family law cases filed were in Harris County
	10% in Dallas County
	7% in Tarrant County
	4% in Travis County
	9% in Bexar County

Statistics furnished by David Mudd
Judicial Information Department at the Office of Court Administration

SUMMARY OF LOCAL RULES

Disclosure requirements, major counties:

Harris – attached

Tarrant – attached

Dallas – none

Travis – none

Bexar -- none

HARRIS

4.4 Duty of Disclosure. Without waiting for a discovery request, each party to a suit for divorce, annulment, or a suit in which child or spousal support is in issue, has a duty of ⇒ disclosure of certain information to the other party. "Disclosure" includes providing for inspection and copying the information in the party's "possession, custody or control," as that phrase is defined in Rule 166b(2)(b) of the T.R.C.P.. Different types of suits require disclosure of different information.

4.4.1 Disclosure in Suit for Divorce or Annulment. Each party to a suit for divorce or annulment shall, without waiting for a discovery request, provide to the other party the following information about property in which the party claims an interest:

1) all documents pertaining to real estate;

2) all documents pertaining to any pension, retirement, profit-sharing, or other employee benefit plan, together with the most recent account statement for any plan;

3) all documents pertaining to any life, casualty, liability, and health insurance;

4) the most recent account statement pertaining to any account located with any financial institution including, but not limited to, banks, savings & loans, credit unions, and brokerage firms.

4.4.2 Disclosure in Suit in which Child or Spousal Support is in Issue. Each party to a suit in which child support or spousal support is in issue shall, without waiting for a discovery request, provide to the other party the following information:

1) all policies, statements, and description of benefits which reflect any and all medical and health insurance coverage that is or would be available for the child or the spouse;

2) Unless the information has previously been exchanged in connection with a temporary hearing (Rule 4.1), a Financial Information Statement for the party, together with that party's previous two years income tax returns and two most recent payroll check stubs, or, if no payroll check stubs are available, the party's latest Form W-2.

4.4.3 Failure to Comply. This rule providing for the duty of disclosure shall constitute a discovery request under T.R.C.P., and failure to comply with this rule (or any of its subparts) may be grounds for sanctions, as prescribed by Rule 215 of T.R.C.P..

4.4.4 Method of Disclosure.

1) Timing of Disclosure. Disclosure required under this rule shall be made as follows:

a) by a Petitioner or Movant within 30 days after the Respondent files Respondent's first pleading or makes a general appearance in the case;

b) by a Respondent within 30 days after he or she files Respondent's first pleading or makes a general appearance in the case, whichever occurs first.

2) Delivery of Disclosure. The disclosures required under this rule shall be made by furnishing the information to the opposing party's attorney of record or, if the

before the time the hearing is set. If counsel is to be late for a hearing or is in another Court, counsel or counsel's staff shall, by telephone or otherwise, notify the Court or its bailiff, giving the reason for the delay in appearance and exactly which other Courts counsel is appearing before. Failure to appear or check-in with the Associate Judge's or IV-D Master's Court within 30 minutes of the scheduled hearing time shall result in a default being granted or the hearing being passed, as appropriate. Although it is the policy of the Courts to recognize the inevitable conflicts in an urban law practice and to be reasonably flexible, it is ultimately the responsibility of counsel to keep the Court accurately informed of counsel's whereabouts so that the Court's dockets will not be unduly disrupted. Violation of this Rule may result in sanctions against counsel.

(b) Documents Required. In all cases in which support of a spouse and/or child(ren) is in issue, whether temporary or final, each party shall be required to furnish the Court and opposing party true and correct copies of the following, at or before the time of hearing, if available:

1. Summary statement of monthly income and expenses in a form substantially similar to any form that may be adopted by the Court.
2. All payroll stubs or wage statements for the past 3 months.
3. If self-employed, all Profit & Loss Statements, Balance Sheets, Income Statements or other evidence of earnings for the previous 12 months.
4. Federal Income Tax Returns, including all attachments and schedules, for the two years immediately prior to the hearing, or if a return has not been prepared and filed for a particular year, all W-2's, 1099's, K-1's or other evidence of income for such a year.
5. Financial statements filed by the parties with any financial institution within the past 3 years.
6. Any other documents as ordered by the Court, or properly subpoenaed by a party.

(c) Inventories. When ordered by the Court, each party shall file a sworn inventory and appraisement within 60 days of the Court's order, unless the Court or the parties extend or shorten such period. An Inventory and Appraisement may be ordered in any case in which the character, value or division of property or debts is in issue, and should be filed in a form substantially similar to the form provided in the Texas Family Practice Manual of the State Bar of Texas. Additionally, each party shall at the time of trial prepare for the Court and opposing counsel a written summary of that party's proposed division of property and debts.

e. Decline to set the case for trial, cancel a setting previously made, and/or

f. Dismiss the case for want of prosecution or grant a default judgment, if attorneys were ordered to appear, especially where there has been a previous failure to appear or where no amendment has been filed after exceptions were previously sustained.

g. Grant sanctions or other relief.

PART VI DISCOVERY

(Reserved for expansion).

TRCP 329b(g)

~~A motion~~ Motions (1) seeking to modify, correct, or reform an existing judgment in any respect and (2) requesting relief that could be included in the judgment (as distinguished from motions to correct the record of a judgment under Rule 316), if filed, shall be filed and determined within the time prescribed by this rule for a motion for new trial and shall extend the trial court's plenary power and the time for perfecting an appeal in the same manner as a motion for new trial. Every such motion shall be in writing and signed by the party or his attorney and shall specify the ~~respects in which the judgment should be modified, corrected, or reformed~~ relief requested and the grounds therefor. The overruling of such a motion shall not preclude the filing of a motion for new trial, nor shall the overruling of a motion for new trial preclude the filing of a motion to modify, correct, or reform.

SUPREME COURT RULES ADVISORY COMMITTEE PROPOSED CHANGE TO COMMENT 2, RULE 176 , TEXAS RULE OF CIVIL PROCEDURE

Notes and Comments

Comments to 1999 change:

...

2. Rule 176.3(b) prohibits the use of a subpoena to circumvent the discovery rules. Thus, for example, a deposition subpoena to a party is subject to the procedures of Rules 196, 199, and 200, and a deposition subpoena to a nonparty is subject to the procedures of Rule 205. <u>This subdivision does not govern the use of subpoenas for a trial or hearing.</u>

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BOARD CERTIFIED,
CIVIL APPELLATE LAW,
TEXAS BOARD OF LEGAL
SPECIALIZATION

MEMORANDUM

To: Members of Subcommittee on Rules 1-14c

From: Pamela Stanton Baron

Date: November 9, 2000

Re: Proposed Changes to Tex. R. Civ. P. 3a

Attached is a new draft of the rule to incorporate comments from subcommittee members. The changes are minor wording revisions.

Attachments

1. Current Tex. R. Civ. P. 3a
2. Recodification Draft
3. Proposed Revision to Recodification Draft Rule 2 (Highlighted Copy)
4. Proposed Revision to Recodification Draft Rule 2 (Clean Copy)

Current Rule 3a, Tex. R. Civ. P.:

Rule 3a. Local Rules.

Each administrative judicial region, district court, county court, county court at law, and probate court, may make and amend local rules governing practice before such courts, provided:

(1) that any proposed rule or amendment shall not be inconsistent with these rules or with any rule of the administrative judicial region in which the court is located;

(2) no time period provided by these rules may be altered by local rules;

(3) any proposed local rule or amendment shall not become effective until it is submitted and approved by the Supreme Court of Texas;

(4) any proposed local rule or amendment shall not become effective until at least thirty days after its publication in a manner reasonably calculated to bring it to the attention of attorneys practicing before the court or courts for which it is made;

(5) all local rules or amendments adopted and approved in accordance herewith are made available upon request to members of the bar;

(6) no local rule, order, or practice of any court other than local rules and amendments which fully comply with all requirements of this Rule 3a shall ever be applied in determining the merits of any matter.

Change by amendment effective April 1, 1984: Moves Rule 817 to Rule 3a to emphasize the superiority of the general rules over local rules of procedure and requires Supreme Court approval so as to achieve uniformity.

Change by amendment effective September 1, 1986: Amended to delete any reference to appellate procedure. The words "Court of Appeals, each" have been deleted.

Change by amendment effective September 1, 1990: To make Texas Rules of Civil Procedure timetables mandatory and to preclude use of unpublished local rules or other "standing" orders or local practices to determine issues of substantive merit.

Recodification Draft:

Rule 2. Local Rules.

Each administrative judicial region, district court, county court, county court at law, and probate court, may make and amend local rules governing practice before these courts, provided:

(a) that a proposed rule or amendment must not be inconsistent with these rules or with a rule of the administrative judicial region in which the court is located;

(b) no time period provided by these rules may be altered by local rules;

(c) a proposed local rule or amendment is not effective until it is approved by the Supreme Court of Texas;

(d) a proposed local rule or amendment is not effective until at least thirty days after its publication in a manner reasonably calculated to bring it to the attention of the attorneys practicing before the court or courts for which it is made;

(e) the local rules are available upon request to the members of the bar;

(f) no local rule, order, or practice of any court other than local rules and amendments that comply with the requirements of this rule can be applied in determining the merits of any matter.

Change by amendment effective April 1, 1984: Moves Rule 817 to Rule 3a to emphasize the superiority of the general rules over local rules of procedure and requires Supreme Court approval so as to achieve uniformity.

Change by amendment effective September 1, 1986: Amended to delete any reference to appellate procedure. The words "Court of Appeals, each" have been deleted.

Change by amendment effective September 1, 1990: To make Texas Rules of Civil Procedure timetables mandatory and to preclude use of unpublished local rules or other "standing" orders or local practices to determine issues of substantive merit.

Proposed Revisions to Recodification Draft Rule 2 (Highlighted Copy):

Rule 2. Local Rules.

2.1. Procedure for adoption. Each administrative judicial region, district court, county court, county court at law, and probate court, may make and amend local rules governing practice before these courts, provided:

~~(a) that a proposed rule or amendment must not be inconsistent with these rules or with a rule of the administrative judicial region in which the court is located;~~ moved to 2.3(a)(1)

~~(b) no time period provided by these rules may be altered by local rules;~~ moved to 2.3(a)(2)

~~(c)~~ (a) a proposed local rule or amendment is not effective until it is approved by the Supreme Court of Texas; and

~~(d)~~ (b) a proposed local rule or amendment is not effective until at least thirty days after its publication in a manner reasonably calculated to bring it to the attention of the attorneys practicing before the court or courts for which it is made~~;~~.

~~(e)~~ 2.2. Availability. T~~t~~he local rules ~~are~~ must be available upon request to the members of the bar~~;~~.

2.3. Validity and Applicability.

(a) No local rule may:

~~(1) (a)~~ ~~that a proposed rule or amendment must not~~ be inconsistent with these rules or with a rule of the administrative judicial region in which the court is located; or

~~(2) (b)~~ ~~no time period provided by these rules may be altered by local rules~~ alter any time period provided by these rules.

(b) A local rule that would otherwise be invalid under 2.3(a) is valid if the Supreme Court order approving adoption of the rule explicitly states that it is valid notwithstanding the inconsistency.

~~(f)~~ (c) No local rule, order, or practice of any court other than local rules and amendments that comply with the requirements of this rule can be applied in determining the merits of any matter.

Proposed Revisions to Recodification Draft Rule 2 (Clean Copy):

Rule 2. Local Rules.

2.~~1~~ 2 Procedure for adoption. Each administrative judicial region, district court, county court, county court at law, and probate court, may make and amend local rules governing practice before these courts, provided:

(a) a proposed local rule or amendment is not effective until it is approved by the Supreme Court of Texas; and

(b) a proposed local rule or amendment is not effective until at least thirty days after its publication in a manner reasonably calculated to bring it to the attention of the attorneys practicing before the court or courts for which it is made.

2.~~2~~ 3 Availability. The local rules must be available upon request ~~to the members of the bar~~.

2.~~3~~ 4 Validity and Applicability.

(a) No local rule may:

(1) be inconsistent with these rules or with a rule of the administrative judicial region in which the court is located; or

(2) alter any time period provided by these rules.

(b) A local rule that would otherwise be invalid under 2.3(a) is valid if the Supreme Court order approving adoption of the rule explicitly states that it is valid notwithstanding the inconsistency.

~~(a) No local rule, order, or practice of any court other than local rules and amendments that comply with the requirements of this rule can be applied in determining the merits of any matter.~~

2.1. Exclusivity

No Local Rule, Local Order, or Local Practice can be applied in determining any matter unless it complies with the requirements of this rule.

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BOARD CERTIFIED,
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TEXAS BOARD OF LEGAL
SPECIALIZATION

MEMORANDUM

To: Members of Subcommittee on Rules 1-14c

From: Pamela Stanton Baron

Date: October 31, 2000

Re: Proposed Changes to Tex. R. Civ. P. 3a

Chairman Babcock has asked our subcommittee to review Tex. R. Civ. P. 3a and to report on the rule at the November meeting. Specifically, he asked us to consider comments made at the morning session of the August 25, 2000, Supreme Court Advisory Committee meeting addressing a problem with Rule 3a in connection with our recent revisions to the recusal rule. I have attached a transcript of the relevant discussion.

You might remember the example that came up repeatedly in the recusal discussion — a situation in which local rules were invoked to transfer a case to another judge and thus to avoid a recusal hearing. *See In re Rio Grande Valley Gas Co.*, 8 S.W.3d 303 (Tex. 1999) (Hecht, J., dissenting to denial of petition for writ of mandamus) (copy attached). Apparently, it was suggested in that situation that the language in Rule 3a prohibiting rules inconsistent with the Texas Rules of Civil Procedure applies only to "proposed" rules and not to rules that have actually been adopted and approved by the Supreme Court. See 08/25/00 Transcript at 1913. The rule currently provides: "that any proposed rule or amendment shall not be inconsistent with these rules or with any rule of the administrative judicial region in which the court is located." Tex. R. Civ. P. 3a(1). The discussion focused on the word "proposed and suggested that the word should be deleted. 08/25/00 Transcript at 1913-1914. The discussion further developed two other concerns: (1) the Supreme Court approval process, to be efficient, does not always catch inconsistencies between the local rules and the Texas Rules of Civil Procedure; and (2) sometimes the Supreme Court intentionally approves local rules inconsistent with the rules of procedure to allow experimentation and innovation.

I assume that we can all agree on the following three propositions:

- Rule 3a was intended not merely to prohibit "proposed" local rules that are inconsistent with the Texas Rules of Civil Procedure but to prohibit any local rule from being inconsistent;

- approval by the Supreme Court does not ordinarily permit a local rule to override the Texas Rules of Civil Procedure; and

- the Supreme Court needs the flexibility to allow local rules to override the procedural rules in certain situations, such as pilot or other experimental projects.

Rule 3a, then, needs to be modified to recognize all three of these points.

The problem with Rule 3a is that it covers three different events with a single introductory phrase: the initial process for adopting local rules; the on-going administrative requirement that the rules be made available to the bar; and the substantive on-going issue of when local rules may or may not be applied to specific cases. By breaking the rule out into these three categories, I believe that all of the objectives can be accomplish with minimal changes to the language of the rule.

I have attached copies of existing Rule 3a, the recodification draft, and proposed changes to the recodification draft in marked and clean versions.

I suggest we proceed as follows: by e-mail or fax (or phone) let me know if you (1) think Rule 3a needs to be amended; (2) assuming amendment is necessary, whether you agree or disagree with the three propositions outlined in the bullet points above; and (3) whether you are in general agreement or disagreement with the approach for change — to reorganize the rule with minimal language changes. If we have consensus on these points, then we can turn to the proposed wording either by further e-mail or by conference call if necessary.

The meeting is November 17 and it would help to have our report done by Friday, November 10. Working backwards, then, it would help to have your response to these preliminary items no later than Monday, November 6. It would also help to know your availability for a conference call, should one be needed, on Tuesday, November 7, Wednesday, November 8, or Thursday, November 9.

Attachments

1. Transcript excerpt, Supreme Court Advisory Committee, Morning Session, August 25, 2000, pages 1911-1915.
2. *In re Rio Grande Valley Gas Co.*, 8 S.W.3d 303 (Tex. 1999) (Hecht, J., dissenting to denial of petition for writ of mandamus).
3. Current Tex. R. Civ. P. 3a
4. Recodification Draft
5. Proposed Revision to Recodification Draft Rule 2 (Highlighted Copy)
6. Proposed Revision to Recodification Draft Rule 2 (Clean Copy)

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8 MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

9 August 25, 2000

10 (MORNING SESSION)

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20 Taken before D'Lois L. Jones, Certified

21 Shorthand Reporter in Travis County for the State of Texas,

22 reported by machine shorthand method, on the 25th day of

23 August, 2000, between the hours of 9:00 o'clock a.m. and

24 12:35 o'clock p.m., at the Texas Law Center, 1414 Colorado,

25 Room 101, Austin, Texas 78701.

Anna Renken & Associates
(512)323-0626

1 -- I would say "a motion to recuse must be verified,"

2 period. "An unverified motion" -- dah-dah-dah-dah-dah,

3 but this, but that. But however you want to do it is

4 fine.

5 CHAIRMAN BABCOCK: Okay. Very good. Okay.

6 Let's go on to the -- we have still got another recusal

7 issue, I'm sad to say.

8 MR. ORSINGER: It's the following page. It's

9 a letter from Judge Hester dated August 11, 2000, and Carl

10 is going to address that. The letter was to Carl, from

11 Judge Hester to Carl.

12 MR. HAMILTON: Judge Hester is a little bit

13 upset about a situation in Hidalgo County that was like

14 this, and Judge Hecht maybe can correct me if I'm wrong on

15 this. He wrote a dissenting opinion in it, but apparently

16 what happened is Luke Soules and a bunch of lawyers had a

17 case in Hidalgo County in Judge Aparicio's court. They

18 filed a motion to recuse him, and the local administrative

19 judge, who was Judge Gonzalez, I think, at the time,

20 transferred the case on his own to his own court; and that

21 went up on a mandamus; and the mandamus was issued because

22 the local rules did not authorize Judge Gonzalez to take

23 the case unless Judge Aparicio asked him to take it.

24 So it went back down and then the judges got

25 together and amended the local rules to provide that the

1 local judge on his own could transfer the case even
2 without a request. So once they got amended, then they
3 went through the exercise again; and that went up on
4 mandamus; and the court of appeals denied it, and the
5 Supreme Court denied it; and Judge Hecht wrote a dissent
6 on it, pointing out that that sort of conduct violated not
7 only the Rules of Civil Procedure, but also the statute,
8 the Texas Government Code.
9 Judge Hester is very incensed about that.
10 He's the Fifth Administrative Judicial judge, and he has
11 suggested that we put into the rule a provision which
12 would go at the bottom of page four, which would say, "If
13 the motion complies with paragraph (d)(1), the presiding
14 judge of the administrative region shall either request
15 that the local administrative judge of the county where
16 the case is pending transfer the case to another court of
17 the county, shall hear the motion, or immediately assign
18 it to a judge to hear it."
19 We discussed this once before in the
20 committee, and I think that the consensus at that time --
21 and correct me if I'm wrong, David -- was that this was
22 maybe a local problem and the rest of the administrative
23 judges didn't have this problem. So we just sort of
24 didn't do anything about it. We didn't want to give or

25 take away the power of the local administrative judges.

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1 This sort of is a little bit of a
2 compromise, I guess, because the administrative judge can
3 either ask the local judge to do it or he can do it
4 himself, so I guess he sort of has trump power over the
5 local rules and over the local judge; but anyhow, he's
6 requesting that this be done; and along this same line
7 apparently the arguments are being made to him that under
8 Rule 3a, the Rules of Civil Procedure, they only trump
9 local proposed rules. Why the word "proposed" is in that
10 rule I don't know, but 3a says that any proposed rules
11 have to be not antagonistic to the Rules of Civil
12 Procedure.
13 So apparently the argument has been made to
14 him that because of the word "proposed" in there, when you
15 have an existing rule that rule doesn't apply. There are
16 a couple of court of appeals cases, I think, that have
17 interpreted that sort of ignoring the word "proposed," but
18 anyhow, he'd like to see that changed.
19 CHAIRMAN BABCOCK: Yeah. Let's stay away
20 from 3a for now. We'll --
21 MR. HAMILTON: Well, that's part of the same
22 thing because --
23 CHAIRMAN BABCOCK: That's part of the
24 problem, yeah.

25 MR. HAMILTON: That's the argument that's

1 used to make the local rule trump the Rule of Civil
2 Procedure.
3 Yeah. I mean, he just wants "proposed"
4 taken out, but he would like to have the administrative
5 judge have the power to deal with a recusal motion and
6 either do it himself, assign another judge to do it, or
7 request the local administrative judge to assign it.
8 CHAIRMAN BABCOCK: Okay. Bill has got a
9 point.
10 PROFESSOR DORSANEO: This has to do with
11 that "proposed" word, and Justice Hecht may be better able
12 to tell us about this, but it seems to me that the word
13 "proposed" is in there because once upon a time the idea
14 was that there wouldn't be any local rules that hadn't
15 been studied and approved by the court, Supreme Court; and
16 that's a nice idea, except it has an unreality to it.
17 What happens is either that the local rules
18 don't get approved or they kind of just get approved, and
19 sometimes they will be inconsistent. So "proposed"
20 probably ought to come out of there in my view.
21 JUSTICE HECHT: Well, we do approve -- we do
22 approve them all; and, I mean, we go through the process.
23 Not all of them are approved because sometime we regard

24 them as inconsistent with the state rules, but sometimes

25 -- and I'm trying to think of an example and none exactly

1 comes to mind, but sometimes we do approve local rules

2 that are inconsistent with the state rules on either an

3 experimental basis or because the judges in a region feel

4 particularly strongly that this tweaking would be good for

5 them and we could wait and see how it works out, or it's

6 hard to know what the bounds of inconsistency are.

7 But there are a lot of local rules around

8 the state, particularly family cases come to mind, that

9 have lots of different requirements about what has to go

10 on in a family case because the lawyers in that -- and the

11 judges in that area where -- they like that procedure, and

12 so there are some inconsistencies in the local rules that

13 we intend at the time that we approve them to coexist with

14 the state rules.

15 PROFESSOR DORSANEO: But it is then true

16 that there are some inconsistencies that you don't see?

17 JUSTICE HECHT: A lot of that.

18 PROFESSOR DORSANEO: I mean, it's just not

19 going to be possible to evaluate them --

20 JUSTICE HECHT: Right.

21 PROFESSOR DORSANEO: -- in the abstract.

22 JUSTICE HECHT: Right.

23 PROFESSOR DORSANEO: But if they are

24 inconsistent, they should not override.

25 JUSTICE HECHT: Right.

IN RE RIO GRANDE VALLEY GAS CO. AND SOUTHERN UNION GASCO., RELATORS, IN RE PG&E REATA ENERGY, L.P. ET AL., RELATORS
NO. 99-1067, No . 99-1068

SUPREME COURT OF TEXAS

1999 Tex. LEXIS 115; 8 S.W.3d 303

November 12, 1999, Opinion Delivered

CORE TERMS: regional, assigned, transferred, recuse, local rules, recusal, assign, hear, region, orig, mandamus, sit, motion to recuse, severed, Rules of Civil Procedure, judicial district, transferring, void, duty, writ of mandamus, court of appeals, prescribed, prescribe, authorize, recused, nullify, time to time, election contest, ancillary relief, interim relief

JUDGES: [*1] JUSTICE Nathan L. HECHT, joined by JUSTICE OWEN, dissenting from the denial of the petitions for writ of mandamus.

OPINION: ON PETITION FOR WRIT OF MANDAMUS

Petitions for Writ of Mandamus denied.

DISSENTBY: Nathan L. Hecht

DISSENT: [**303] JUSTICE HECHT, joined by JUSTICE OWEN, dissenting from the denial of the petitions for writ of mandamus.

These two petitions for mandamus raise an important question about the scope of local court rules -- rules adopted by a majority of the district or county judges in a county, n1 and sometimes by individual judges. n2 The question is this: can local court rules authorize the transfer of a case from one court to another in the same county when the transfer would (a) circumvent the procedure prescribed by statute and by state court rules for determining whether the presiding judge of the court from which the case was transferred must recuse, or (b) nullify the assignment of a judge to the case made by the presiding judge of the administrative judicial region pursuant to statute and state court rules? A divided court of appeals answered yes to both parts of the question. n3 The court's ruling allows local court rules to trump state court procedural and administrative[*2] rules promulgated by this Court and even statutes enacted by the Legislature. The court of appeals' ruling also seriously undermines the authority given regional presiding judges by statute and rule. For reasons much like those set out by Justice Yanez in her articulate dissenting opinion in the court below, n4 I would reach the opposite conclusion and grant these two petitions for mandamus. Because the Court denies the petitions, I respectfully dissent.

n1 "The district and statutory county court judges in each county shall, by majority vote, adopt local rules of administration." TEX. GOV'T CODE § 74.093(a) .

n2 "Each administrative judicial region, district court, county court, county court at law, and probate court may make and amend local rules governing practice before such courts [subject to certain provisions]." TEX. R. CIV. P. 3a.

n3 In re PG&E Reata Energy, L.P., 4 S.W.3d 897, 1999 Tex. App. LEXIS 7951 (Tex. App.--Corpus Christi 1999, orig. proceeding).

n4 In re PG&E Reata Energy, L.P., 4 S.W.3d 897, 1999 Tex. App. LEXIS 7951, *11 (Yanez, J., dissenting).

[*3]

The saga of the ongoing litigation from which the petitions now before us emerge is serialized in three opinions of the court of appeals, n5 where the reader can find a [**304] complete list of the numerous parties involved and other such details. A much abbreviated summary of the latest events is all that is here required to put matters in context.

n5 In re PG&E Reata Energy, L.P., 4 S.W.3d 897, 1999 Tex. App. LEXIS 7951 (Tex. App.--Corpus Christi 1999, orig. proceeding); In re Rio Grande Valley Gas Co., 987 S.W.2d 167 (Tex. App.--Corpus Christi 1999, orig. proceeding); Rio Grande Valley Gas Co. v. City of Pharr, 962 S.W.2d 631 (Tex. App.--Corpus Christi 1997).

On October 8, 1998, Judge Noe Gonzalez, the local administrative district judge n6 in Hidalgo County, ordered seven cases in the 92nd District Court transferred to the 370th District Court, over which he presides. The cases all relate to claims by Texas municipalities that defendant gas utilities have underpaid franchise fees for their use of city[*4] property for their transmission lines and other facilities. The plaintiff municipalities in the several cases are almost all represented by the same legal counsel. There are two groups of defendants, who are relators, respectively, in the two petitions for mandamus before this Court. For present purposes, the seven cases fall into three categories as follows:

. The Assigned Cases. In three cases, Judge Westergren of the 214th District Court in Nueces County presides by virtue of assignment by the presiding judge of the fifth administrative judicial region, n7 which includes Hidalgo County. Judge Westergren was assigned to two of the cases after defendants successfully moved to recuse first Judge Homer Salinas, then judge of the 92nd District Court, n8 and later Judge Edward G. Aparicio, Judge Salinas's successor and the current presiding judge of that court. n9 The regional presiding judge's assignment orders are substantively identical and are quoted in pertinent part in the margin. n10 The third case was severed from one of the other two by Judge Westergren. n11

n6 See TEX. GOV'T CODE §§ 74.091 (providing for local administrative judge), and 74.092 (stating duties).

[*5]

n7 See TEX. GOV'T CODE §§ 74.041-.047.

n8 City of Pharr v. Rio Grande Valley Gas Co., No. C-4558-95-A-2 (92nd Dist. Ct., Hidalgo County, Tex. June 24, 1996) (severed from City of Edinburg v. Rio Grande Valley Gas Co., No. C-4558-95-A (92nd District Court, Hidalgo County, Tex. Aug. 31, 1995).

n9 City of Mercedes v. Reata Indus. Gas, L.P., No. C-2262-97-A (92nd Dist. Ct., Hidalgo County, Tex. Apr. 16, 1997).

n10 "Pursuant to Section 74.056, Tex. Gov't. Code, I hereby assign the Honorable Mike Westergren Judge of the 214th District Court to the 92nd District Court of Hidalgo County, Texas.

"This assignment is for a period beginning as determined by the assigned judge and continuing thereafter so long as may be necessary for the assigned judge to complete trial of any cause begun during such period, and to pass on motions for new trial and all other matters growing out of any cause heard by the assigned judge during such period.

"CONDITION(S) OF ASSIGNMENT (IF ANY):

"This assignment shall be for purposes of presiding in [the case described by number and style] and such other matters as may come on for hearing."

n11 City of Alton v. Rio Grande Valley Gas Co., No. C-4558-95-A(3) (92nd Dist. Ct., Hidalgo County, Tex. Mar. 1998) (intervention filed July 18, 1996, in City of Edinburg v. Rio Grande Valley Gas Co., No. C-4558-95-A (92nd District Court, Hidalgo County, Tex. Aug. 31, 1995), severed and retained in 92nd Dist. Ct.).

[*6]

. The Recusal Cases. In three cases, n12 defendants' motions to recuse Judge Aparicio are pending. Judge Aparicio has neither granted the motions nor referred them to the regional presiding [**305] judge, his only choices n13 under 74.059(c)(3) of the Government Code n14 and Rule 18a(c) of the Texas Rules of Civil Procedure. n15

n12 City of Weslaco v. Reata Indus. Gas, L.P., No. C-2276-97-A (92nd Dist. Ct., Hidalgo County, Tex. Apr. 17, 1997); City of Pharr v. PG&E Gas Transmission , No. C-427-98-G (92nd District Court, Hidalgo County, Tex. filed Jan. 29, 1998) (filed in 370th Dist. Ct., Hidalgo County, Tex., transferred the same day by docket entry to the 92nd Dist. Ct., removed to U.S. Dist. Ct., and remanded Sept. 25, 1998, to the 92nd Dist. Ct.); City of Mercedes v. PG&E NGL Mktg., L.P. , No. C-786-98-B (92nd Dist. Ct., Hidalgo County, Tex. Feb. 18, 1998) (filed in the 93rd Dist. Ct., Hidalgo County, Tex., but immediately transferred to the 92nd Dist. Ct., removed to U.S. Dist. Ct., and remanded Sept. 30, 1998, to the 92nd Dist. Ct).

n13 See In re Rio Grande Valley Gas Co., 987 S.W.2d 167, 178 (Tex. App.--Corpus Christi 1999, orig. proceeding) ("A trial judge does not have the option of doing nothing; he must act in one of the two specified ways provided in rule 18a.").

[*7]

n14 "A district . . . court judge shall . . . request the presiding judge [of the administrative region] to assign

another judge to hear a motion relating to the recusal of the judge from a case pending in his court. . . ."

n15 "Prior to any further proceedings in the case [after a motion to recuse is filed], the judge shall either recuse himself or request the presiding judge of the administrative judicial district to assign a judge to hear such motion."

. The Dismissed Case. One case, involving cross-claims by one defendant against others that were severed by Judge Westergren from one of the cases to which he was assigned, was dismissed without prejudice after the plaintiff nonsuited. n16

n16 Southern Union Co. v. Valero Energy Corp., No. C-4558-95-A-4 (92nd Dist. Ct., Hidalgo County, Tex. Mar. 26, 1997) (severed from City of Edinburg v. Rio Grande Valley Gas Co., No. C-4558-95-A (92nd District Court, Hidalgo County, Tex. Aug. 31, 1995), and dismissed after nonsuit May 1, 1998).

[*8]

On defendants' petitions for mandamus, the court of appeals directed Judge Gonzalez to vacate his transfer order. n17 The court of appeals held that Judge Gonzalez's power to transfer cases was circumscribed by the local rules adopted by the district judges in Hidalgo County. n18 Those rules provided that the transfer of a case from one court to another must be initiated by the judge presiding over the case. n19 Judge Westergren, presiding over the Assigned Cases , had not initiated transfer of those cases. Judge Aparicio, the court of appeals held, was prohibited by Rule 18a from taking any action unrelated to the pending motions to recuse in the Recusal Cases. n20 The Dismissed Case, the court observed, could not be transferred because it was no longer pending. n21 Moreover, the court reasoned that a transfer of the Recusal Cases would conflict with Rule 18a:

Accordingly, the court concluded that the cases were not properly transferred to the 370th District Court. n23

n17 In re Rio Grande, 987 S.W.2d at 180.

n18 Id. at 176.

n19 Id.

[*9]

n20 In re Rio Grande, 987 S.W.2d at 178-180.

n21 Id. at 176 ("Because the record before us indicates that [the Dismissed Case] was dismissed without prejudice prior to the October 8 transfer order, the order purportedly transferring that case is also void.").

To allow transfer of a case in circumstances where a rule 18a motion is pending would nullify the mandatory provisions of the rule. Transfer could serve as a device by which any rule 18a challenge could be preempted, thereby depriving the challenging party of its right to have a recusal issue resolved. We decline to embrace such a result. n22

n22 Id. at 178.

n23 Id. at 180.

The court of appeals issued its decision on February 18, 1999. On March 19, the seven district judges in Hidalgo County amended their local rules to provide, as do local rules in other counties, n24 for the unilateral transfer of cases[*10] by the local administrative judge. The amended rules were approved by Judge Hester on March 29, and by this Court on April 8. n25 On April [**306] 29, Judge Gonzalez complied with the court of appeals' ruling and transferred the seven cases (including the Dismissed Case) back to the 92nd District Court. But on May 12, Judge Gonzalez ordered the cases transferred back to himself, apparently on the authority of the amended local rules. (The record does not contain an order transferring one of the Assigned Cases back to Judge Gonzalez, but a facsimile cover sheet from Judge Gonzalez lists that case among the seven transferred.)

n24 See, e.g., CAMERON COUNTY LOC. R. 1.1(f)(1); EL PASO COUNTY LOC. R. 3.02(B); HARRIS COUNTY LOC. R. 3.2.5.

n25 Order of the Supreme Court of Texas for Approval of Local Rules for the District Courts in Hidalgo County, Misc. Docket No. 99-9068 (Apr. 8, 1999).

Defendants immediately challenged the transfers again by petitions for mandamus. On Thursday, October 21, 1999, a divided[*11] court issued its opinion denying relief. Concluding that "there is nothing in the rule [Rule 18a] or statute [section 74.059(c)(3) of the Government Code] to indicate that the appointment of a new judge by the Presiding Judge of the administrative judicial region following recusal is entitled to any higher dignity that the random assignment of a judge and court within the county where the lawsuit is filed", n26 the court held that Judge Gonzalez could transfer the cases to himself, as permitted by the amended local rules, thereby nullifying Judge Hester's assignment of Judge Westergren to sit in the Assigned Cases, and effectively

mooting the motions to recuse Judge Aparicio in the Recusal Cases. The court of appeals did not set aside the transfer of the Dismissed Case, contrary to its holding months earlier that the transfer of that dismissed case was void. n27

n26 4 S.W.3d at 900.

n27 In re Rio Grande, 987 S.W.2d at 176.

Defendants now petition this Court for mandamus[*12] relief directing Judge Gonzalez to transfer the seven cases at issue back to the 92nd District Court. These petitions should be granted because the Hidalgo County local district court rules cannot be applied to conflict with statutes and state rules of procedure and administration that prescribe the procedure for involuntary recusal of a judge and the authority generally of regional presiding judges to assign judges. I shall begin the analysis by focusing on recusal procedure and then move to the broader assignment issue.

By statute enacted in 1977, the Legislature determined that motions to recuse district judges must be determined by a judge assigned by the presiding judge of the administrative region. n28 The House Judiciary Committee report on the legislation explained: " The Presiding Judge should be given the duty to hear all motions to disqualify a judge from a case or to assign another judge to hear such motions." n29 The statute, now codified as section 74.059(c)(3) of the Government Code, states that "[a] district . . . judge shall . . . request the presiding judge [of the administrative judicial region] to assign another judge to hear a motion relating to the recusal[*13] of the judge from a case pending in his court . . . ." Twenty years ago in McLeod v. Harris, we held that the statute imposes a mandatory duty on a judge who receives a motion to recuse to make the request to the regional presiding judge. n30

n28 Act of May 30, 1977, 65th Leg., R.S., ch. 389, § 1, 1977 Tex. Gen. Laws 1060. See also TEX. CONST. art. V., § 7 ("The Legislature shall also provide for the holding of District Court when the judge thereof is absent, or is from any cause disabled or disqualified from presiding.").

n29 See McLeod v. Harris, 582 S.W.2d 772, 774 (Tex. 1979).

n30 Id. at 775.

In 1980, this Court adopted Rule 18a of the Rules of Civil Procedure to implement the statutory responsibility of presiding judges over motions to recuse. n31 The rule, like the statute, prescribes a mandatory procedure. Rule 18a(c) states that after a [**307] motion to recuse is timely filed, "prior to any further proceedings in the case, the judge shall either recuse himself [*14]or request the presiding judge of the administrative judicial district to assign a judge to hear such motion." Rule 18a(d) adds:

If the judge declines to recuse himself, he shall forward to the presiding judge of the administrative judicial district, in either original form or certified copy, an order of referral, the motion, and all opposing and concurring statements. Except for good cause stated in the order in which further action is taken, the judge shall make no further orders and shall take no further action in the case after filing of the motion and prior to a hearing on the motion. The presiding judge of the administrative judicial district shall immediately set a hearing before himself or some other judge designated by him, shall cause notice of such hearing to be given to all parties or their counsel, and shall make such other orders including orders on interim or ancillary relief in the pending cause as justice may require.

Thus, the regional presiding judge's responsibility is not limited to adjudication of the motion to recuse but extends to making "orders on interim or ancillary relief in the pending cause as justice may require." Finally, Rule 18a(f) states that[*15] "if the motion is granted, the order shall not be reviewable, and the presiding judge shall assign another judge to sit in the case."

n31 Order of the Supreme Court of Texas, 599-600 S.W.2d (Texas Cases) xxxiii, xxxiv-xxxv (June 10, 1980).

Not only does Rule 18a prohibit a judge whom a party has moved to recuse from taking any further action in the case except in very limited circumstances, the rule also assigns responsibility for all proceedings in the case to the regional presiding judge, pending denial of the motion or assignment of a new judge to the case. The request to the regional presiding judge must be made, not just before further action by the judge who is the subject of the motion, but "prior to any further proceedings in the case" (emphasis added) -- that is, by anyone. The rule does not permit proceedings in the case to be conducted by another judge in the same county authorized by Rule 330 to sit for the judge sought to be recused. Rather, the rule gives the responsibility and duty to afford [*16]interim relief in the case to the regional presiding judge.

Judge Gonzalez has conducted proceedings in the Recusal Cases prior to a request by Judge Aparicio to the regional presiding judge for assignment of a judge to hear the motions for recusal in those cases. This is in direct conflict with Rule

authorized to set aside the assignment of Judge Westergren to the Assigned Cases .

None of the cases cited by the real parties in interest, plaintiffs in the underlying proceedings, supports Judge Gonzalez's transfer of cases. In In re Houston Lighting & Power Co, we held that an objection to an active judge assigned to a case after another judge had voluntarily recused was mooted by the transfer of the [**309] case to the assigned judge's court. n37 The transfer in that case did not conflict with recusal procedure or interfere with the regional presiding judge's assignment; [*21] on the contrary, the transfer facilitated the assignment. The five court of appeals' cases plaintiffs cite are also distinguishable. In one, the transfer was made with the approval of the assigning judge. n38 In another, the transfer was made by the assigned judge. n39 In a third case, the court held only that the actions taken after transfer were not void under the peculiar circumstances presented. n40 In a fourth, the case was transferred because a judge was sick, not recused. n41 And the fifth case did not involve a transfer at all, but a regional presiding judge's decision to sit himself for a judge disqualified in an election contest. n42

n37 976 S.W.2d 671 (Tex. 1998) (per curiam).

n38 First Heights Bank v. Gutierrez, 852 S.W.2d 596, 619 (Tex. App.--Corpus Christi 1993, writ denied).

n39 European Crossroads' Shopping Center, Ltd. v. Criswell, 910 S.W.2d 45, 52 (Tex. App.--Dallas 1995, writ denied).

n40 Starnes v. Holloway, 779 S.W.2d 86, 91-92 (Tex. App.--Dallas 1989, writ denied).

n41 R. J. Gallagher Co. v. White, 709 S.W.2d 379, 380-381 (Tex. App.--Houston [14th Dist.] 1986, orig. proceeding).

[*22]

n42 Gonzalez v. Ables, 945 S.W.2d 253, 254 (Tex. App.--San Antonio 1997, orig. proceeding).

It is certainly true, as the court of appeals in the present case observed, that a party has no proprietary right to have case decided by a particular judge or court. n43 But a party does have a right to the procedures prescribed by rules and statutes. Relators have been denied that right.

n43 987 S.W.2d at 173.

The local rules adopted by the district judges in Hidalgo County and approved by this Court do not authorize transfer of the cases. This Court cannot promulgate rules in contradiction of statutes except by the procedure prescribed in section 22.004 of the Government Code, which was not followed when the Hidalgo County local rules were approved. Nor can I imagine that this Court would ever authorize a local rule that conflicted with a statute. Moreover, local rules are not to be inconsistent with the Rules[*23] of Civil Procedure. n44 The Hidalgo County local rule allowing the local administrative judge to transfer cases -- which other counties have also adopted -- does not, on its face, conflict with either chapter 74 of the Government Code or the Rules of Civil Procedure, and it cannot be used to cause a conflict.

n44 TEX. R. CIV. P. 3a(2).

For these reasons, I would grant the petitions for mandamus and direct Judge Gonzalez to set aside his orders transferring the cases from the 92nd District Court.

Nathan L. Hecht

Justice

Opinion delivered: November 12, 1999

CARR, HUNT & JOY, L.L.P.

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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

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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

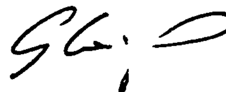
Dear Chip:

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

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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.)
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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.

IN

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,

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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.

Draft # 4 10/31/00

SECTION 3. FORCIBLE ENTRY AND DETAINER

RULE 738. MAY SUE FOR RENT

A suit for rent, contractual late charges, and attorney's fees may be joined with an action of forcible entry and detainer, wherever the ~~suit~~ amount in controversy ~~for rent~~ is within the jurisdiction of the justice court. In such case the court in rendering judgment in the action of forcible entry and detainer, may at the same time render judgment for any rent, contractual late charges, and attorney's fees, due the landlord by the renter; provided the amount thereof is within the jurisdiction of the justice court. The justice may also award costs against the unsuccessful party.

Notes and Comments

Comment: Whenever the term forcible entry and detainer is used in this section it is intended that it also include forcible detainer. Back rent, late charges authorized by lease or contract , and attorney's fees may be sought subject to the jurisdictional limit of the justice court.

[Comment for the sub-committee Late charges should be included in an eviction suit. Judicial economy dictates that a landlord not have to file for back rent in an eviction and then sue for late charges on that back rent in a separate action. I am also trying to show that late charges, attorney's fees and rent may be requested if they are within the jurisdictional limit of the court, but that costs may be awarded regardless of the amount in controversy because costs are not included within the jurisdictional limit.]

RULE 739. CITATION

When an aggrieved ~~the~~ party ~~aggrieved~~ or ~~his~~ the party's authorized agent shall file his written sworn complaint with such justice, the justice shall immediately issue citation directed to the defendant or defendants commanding ~~him to appear~~ appearance before such justice at a time and place named in such citation, such time being not more than ten days nor less than six days from the date of service of the citation.

The citation shall inform the parties that, upon timely request and payment of a jury fee no later than five days after the defendant is served with citation, the case shall be heard by a jury.

[Comment. Gender neutral changes]

RULE 740. COMPLAINANT MAY HAVE POSSESSION

The party aggrieved may, at the time of filing his complaint, or thereafter prior to final judgment in the justice court, execute and file a possession bond to be approved by the justice in such amount as the justice may fix as the probable amount of cost of suit and damages which may result to defendant in the event that the suit has been improperly instituted, and conditioned that the plaintiff will pay defendant all such costs and damages as shall be adjudged against plaintiff.

The defendant shall be notified by the justice court that plaintiff has filed a possession bond. Such notice shall be served in the same manner as service of citation and shall inform the defendant of all of the following rules and procedures:

(a) Defendant may remain in possession if defendant executes and files a counterbond prior to the expiration of six days from the date defendant is served with notice of the filing of plaintiff's bond. Said counterbond shall be approved by the justice and shall be in such amount as the justice may fix as the probable amount of costs of suit and damages which may result to plaintiff in the event possession has been improperly withheld by defendant;

(b) Defendant is entitled to demand and he shall be granted a trial to be held prior to the expiration of six days from the date defendant is served with notice of the filing of plaintiff's possession bond;

(c) If defendant does not file a counterbond and if defendant does not demand that trial be held prior to the expiration of said six-day period, the constable of the precinct or the sheriff of the county where the property is situated, shall place the plaintiff in possession of the property promptly after the expiration of six days from the date defendant is served with notice of the filing of plaintiff's possession bond; and

(d) If, in lieu of a counterbond, defendant demands trial within said six-day period, and if the justice of the peace rules after trial that plaintiff is entitled to possession of the property, the constable or sheriff shall place the plaintiff in possession of the property five days after such determination by the justice of the peace.

[Comment. No changes at this time although we will have to look at this rule in the future.]

RULE 741. REQUISITES OF COMPLAINT

The complaint shall describe the lands, tenements or premises, the possession of which is claimed, with sufficient certainty to identify the same, and it shall also state the facts which entitled the complainant to the possession and authorize the action under Chapter 24 of the ~~Sections 24.001-24.004,~~ Texas Property Code.

[Comment. This prevents having to amend the rules if the Property Code is renumbered.]

RULE 742. SERVICE OF CITATION

1. Person Authorized to Serve Citation in Forcible Entry and Detainer Actions.
Persons authorized to serve citation in Forcible Entry and Detainer actions include (1) any sheriff or constable or other person authorized by law or, (2) any person authorized by law or written order of the court who is not less than 18 years of age. No person who is a party or interested in the outcome of a suit shall serve any process.

2. Method of Service of Citation
The officer ~~receiving such citation shall execute the same~~ or other person authorized to serve citation shall execute the citation by delivering a copy of it to the defendant, or by leaving a copy thereof with some person over the age of sixteen years, at ~~his usual place of abode~~ the rental premises at issue, at least six days before the return day ~~thereof~~ for the citation. ~~and on~~ On or before the day assigned for trial the person serving the citation ~~he~~ shall return ~~such~~ the citation with his action written thereon, to the justice who issued the ~~same~~ citation.

[Comment This will conform service of citation in evictions to service for all other civil suits in Texas.]

RULE 742a. SERVICE BY DELIVERY TO PREMISES

~~If the sworn complaint lists all home an work addresses of the defendant which are known to the person filing the sworn complaint and if it states that such person knows of no other home or work adresses of the defendant in the county where the premises are located~~, If service of citation cannot be effected under Rule 742 then service of citation may be by delivery to the premises in question as follows:

If the officer or other person authorized to serve citation in forcible entry and detainer actions ~~receiving such citation~~ is unsuccessful in serving ~~such~~ citation under Rule 742, the officer or other authorized person shall no later than five days after receiving such citation execute a sworn statement based on personal knowledge, confirming that ~~the officer has made~~ diligent efforts have been made to serve such citation on at least two occasions at all addresses of the defendant in the county where the premises are located as may be shown on the sworn complaint, stating the times and places of attempted service. Such sworn statement shall be filed ~~by the officer~~ with the justice ~~who shall promptly considere the sworn statement of the officer~~. After promptly considering the sworn statement ~~of the officer~~ the justice may then authorize service by written order ~~according to the following~~ as follows:

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

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

(c) The officer or other authorized person shall note on the return of such citation the date of delivery under (a) above and the date of mailing under (b) above. The return of the citation by an authorized person shall be verified; and

(d) Such delivery and mailing to the premises shall occur at least six days before the return day of the citation; and ~~on or before~~ at least one day before the day assigned for trial. The officer or other authorized person accomplishing service ~~he~~ shall return such citation noting ~~with his~~ the action taken ~~written~~ thereon, to the justice who issued the same.

It shall not be necessary for the aggrieved party or ~~his~~ the party's authorized agent to make request for or motion for alternative service pursuant to this rule.

[Comment. This will conform service of citation under 742a with service under Rule 742. It will also relieve the landlord of the requirement of putting down all possible addresses of the defendant for the process server to attempt service at before a request for service under Rule 742a can be made. The best address in which to serve a defendant for an eviction is generally at the premises in question. It will also require the process server to get the citation back to the court at least one day prior to trial. If the trial is set for 9am and the process server doesn't get the citation back until 3pm then it doesn't do much good as the trial will have been rescheduled even though the process server will have technically complied with the law. This change will also require that the server file a verified return of citation. Another change is that the server mail the citation on the same day it is attached to or slipped through the door. This solves the problem of how you calculate the earliest trial date under sub-section (d) [i.e. do you calculate from the date of delivery or the date of mailing?] and it gets the mailed citation to the defendant quicker by 1 day.

RULE 743. DOCKETED

The cause shall be docketed and tried as other cases. If the defendant shall fail to enter an appearance upon the docket in the justice court or file answer before the case is called for trial, the allegations of the complaint may be taken as admitted and judgment by default entered accordingly. The justice shall have authority to issue subpoenas for witnesses to enforce their attendance, and to punish for contempt.

[Comment. No change]

RULE 744. DEMANDING JURY

Any party shall have the right of trial by jury, by making a request to the court on or before five days from the date the defendant is served with citation, and by paying a jury fee of five dollars. Upon such request, a jury shall be summoned as in other cases in justice court.

[Comment. See comment at the end regarding Rule 4]

RULE 745. TRIAL POSTPONED

For good cause shown, supported by affidavit of either party, the trial may be postponed for a period not exceeding ~~six~~ seven days. The trial may be postponed for a longer period upon the agreement of all parties provided such agreement is made in writing or in open court .

[Comment. Many JP courts hold evictions only one day a week and it is generally on the same day each week, therefore being able to continue a case for only 6 days is often inconvenient for the court. There are some cases where both parties would like a longer continuance in order to further prepare or for settlement discussions.

RULE 746. ONLY ISSUE

In a case of forcible entry or of forcible detainer under ~~Sections 24.001-24008~~, Chapter 24 of the Texas Property Code, the ~~only~~ issue shall be as to the right to actual possession and the merits of the title shall not be adjudicated.

[Comment. This is a housekeeping change so we will not have to amend the rules if the property code is renumbered. Also by eliminating the word only perhaps we clear up some confusion about what can be tried in an eviction action. Rule 746 now seems to be in conflict with rules 738 and 748. Striking only makes it more consistent.

RULE 747. TRIAL

If no jury is demanded by either party, the justice shall try the case. If a jury is demanded by either party, the jury shall be empaneled and sworn as in other cases; and after hearing the evidence it shall return its verdict in favor of the plaintiff or the defendant as it shall find.

[Comment. No change]

RULE 747a. REPRESENTATION BY AGENTS

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

[Comment. This will conform Rule 747a to Chapter 24.011 Texas Property Code .

RULE 748. JUDGMENT AND WRIT

If the judgment or verdict is ~~be~~ in favor of the plaintiff, the justice shall give judgment for plaintiff for possession of the premises, and costs.~~,~~ The justice may also give judgment for ~~damages~~ the plaintiff for back rent, contractual late charges and attorney's fees if sought and established by proof . ~~and he shall award his a writ of possession~~. If the judgment or verdict is ~~be~~ in favor of the defendant, the justice shall give judgment for defendant against the plaintiff for costs and for possession of the premises. The justice may also give judgment for defendant against the plaintiff for attorney's fees if authorized and established by proof . ~~and any damages~~. If the judgment be for the plaintiff for possession, the justice shall issue a writ of possession except that no ~~No~~ writ of possession shall issue until the expiration of five days from the ~~time~~ day the judgment is signed.

Notes and Comments

Comment: The main issue in a forcible entry and detainer action is possession, however a plaintiff may join a suit for rent, contractual late charges, costs, and attorney's fees to the issue of possession. The rules also allow a defendant who prevails to recover any costs and attorney's fees to which they are entitled but a defendant may not file a counterclaim. Recovery under any other grounds is not permitted under this section.

[Comment. This will clarify what a prevailing plaintiff or defendant is entitled to if they are successful. We have some defendants who try to file a counterclaim on evictions which I don't think is contemplated under the rules. This will clarify that hopefully.

NOTE: Rules 749-754 are still undergoing revision

RULE 749. MAY APPEAL

~~In appeals in forcible entry and detainer cases, no motion for new trial shall be filed.~~

~~Either party may appeal from a final judgment in such case, to the county court of the county in which the judgment is rendered by filing with the justice within five days after the judgment is signed, a bond to be approved by said justice, and payable to the adverse party, conditioned that~~