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March 28, 2001

Mr. Charles L. Babcock
Jackson Walker
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Dear Chip:

I would like to report to the Advisory Committee at its meeting this weekend on discussions among the Justices of the Courts of Appeals at their spring conference last week about proposed changes in Rule 47 of the Texas Rules of Appellate Procedure, and hear the Committee's views.

Justice McClure and I were asked to conduct an afternoon workshop for the appellate justices on the proposed changes in Rule 47 and specifically the use of memorandum opinions. My guess is that some seventy justices, active and senior, were in attendance. For about an hour I explained the proposed changes and their history and took questions. The attendees then discussed the changes and memorandum opinions in four break-out sessions for a little more than an hour. Afterward, the session leaders reported to the entire group on their discussions.

The changes I presented (Appendix A) reflected comments previously received and differed somewhat from the changes recommended by the Committee (Appendix B).

I heard no dissent expressed to the elimination of Rule 47.7, which prohibits the citation of unpublished opinions.

The predominant concern was that the elimination of the "do not publish" designation would result in all opinions being printed. Even if all opinions are available electronically, some justices expressed concern that the decision whether to print memorandum opinions should not be left entirely to a publisher, such as West. Also, some justices wondered whether a memorandum opinion could be used in every instance in which the appellate panel believed that its opinion lacked precedential value, so that the "memorandum" designation could not perfectly replace the signal afforded by the "do not publish" designation. Others believed that the "memorandum" designation should be nothing other than a signal of lack of precedential value. One suggestion was that the rule

require a citation of a memorandum opinion to indicate its designation, such as *Smith v. Jones*, [cite] (Tex. App.—Dallas 2001, no pet.) (memo). Some justices questioned whether the elimination of the "do not publish" designation was really necessary to achieve the revisions' goals.

There was no opposition to the use of memorandum opinions but much confusion over when they should be used, how they should be structured, and whether they would be accepted by the bar. Nearly everyone believed that shorter opinions are desirable as a general proposition, but they fear that any significant change will give rise to criticism that the court has not considered the case fully.

Several justices commented that Rule 47.4(e) should be changed to read "contains a concurring or dissenting opinion" so that a justice's decision to concur only in the judgment would not prevent a memorandum designation.

Several justices commented that the second sentence of Rule 47.4 appears to change the presumption against published opinions and should be changed to read, "An opinion should be labeled a memorandum opinion unless it does any of the following . . . ."

I found the justices' discussions quite constructive, and I would like the Committee's reactions.

As always, the Court appreciates the dedication you and the Committee give to the rules process.

Cordially,

Nathan L. Hecht
Justice

c: All Advisory Committee Members

# APPENDIX A

## PROPOSED CHANGES IN RULE 47, TEX. R. APP. P., AS RECOMMENDED BY THE SUPREME COURT ADVISORY COMMITTEE AND MODIFIED BASED ON COMMENTS RECEIVED

### RULE 47. OPINIONS~~,~~ AND PUBLICATION~~, AND CITATION~~

**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.~~ Where 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 reasons for it.~~[1]

**47.2. Designating and Signing ~~of~~ Court Opinions; Participating Justices.**[2] Each opinion for the court must be designated either an "Opinion," a "Memorandum Opinion," or a "Per Curiam" opinion.[3] Opinions and memorandum opinions must be signed, but per curiam opinions need not be. 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~~ — before an opinion is handed down — how it should be designated.[4] The names of the participating justices must be noted on all written opinions or orders of the court or a panel of the court.

**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.

~~a: *The Initial Decision.* A majority of the justices who participate in considering a case must determine — before the opinion is handed down — whether the opinion meets the criteria stated in 47.4 for publication. If those criteria are not met, the opinion will be distributed only to the persons specified in Rule 48, but a copy may be furnished to any person on request by that person.~~

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[1] This sentence is moved verbatim to Rule 47.4.

[2] The SCAC recommended that Rule 47.2 not be changed, and that Rule 47.3 be replaced with a single sentence. Several comments have pointed out, however, that the excisions from Rule 47.3 may be too drastic. The provisions in the current text of Rule 47.3 that should be retained seem to fit better in Rule 47.2 and have been moved there.

[3] This is similar to the designation required by Rule 47.3(b).

[4] This sentence picks up the provision in Rule 47.3(a).

~~b: *Notation on Opinions.* A notation stating "publish" or "do not publish" must be made on each opinion.~~

~~c: *Reconsideration of Decision on Whether to Publish.* Any party may move the appellate court to reconsider its decision regarding publication of an opinion but the court of appeals must not order any unpublished opinion to be published after the Supreme Court or Court of Criminal Appeals has acted on any party's petition for review, petition for discretionary review, or other request for relief.~~

~~d: *High-Court Order.* The Supreme Court or the Court of Criminal Appeals may, at any time, order a court of appeals' opinion published.~~

**47.4.** ~~**Standards for Publication.**~~ **Memorandum Opinions.** 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 reasons for it.[5] An opinion should ~~be published only~~ 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; ~~or~~

(d) resolves an apparent conflict of authority; or

(e) contains a concurrence or dissent.[6]

**47.5. Concurring and Dissenting Opinions.**[7] Only a justice who participated in the decision of a case may file or join in an opinion concurring in or dissenting from the judgment of the court of appeals. Any justice on the court may file an opinion in connection with a denial of a hearing or rehearing en banc. ~~A concurring or dissenting opinion may be published if,~~

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[5] This sentence is moved verbatim from Rule 47.1.

[6] The factors to be considered in determining whether a memorandum opinion should be used are the same as those used in determining whether an opinion should be unpublished.

[7] The SCAC's recommendation included the deletion of Rule 47.5, but comments from Justices of the courts of appeals have suggested that a portion of the rule should be retained.

~~in the judgment of its author, it meets one of the criteria established in 47.4. If a concurrence or dissent is to be published, the majority opinion must be published as well.~~

**47.6. ~~Action of~~ Change in Designation by En Banc Court.** ~~Sitting en banc, the court may modify or overrule a panel's decision regarding the signing or publication of the panel's opinion or opinions.~~ A court en banc may change a panel's designation of an opinion.[8]

~~**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.~~

[8] This simplification is not intended to change the en banc court's authority.

# APPENDIX B

## PROPOSED CHANGES IN RULE 47, TEX. R. APP. P., AS RECOMMENDED BY THE SUPREME COURT ADVISORY COMMITTEE

### RULE 47. OPINIONS, AND PUBLICATION, ~~AND CITATION~~

**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. ~~Where 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 reasons for it.~~

**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.

**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.

~~a: *The Initial Decision.* A majority of the justices who participate in considering a case must determine — before the opinion is handed down — whether the opinion meets the criteria stated in 47.4 for publication. If those criteria are not met, the opinion will be distributed only to the persons specified in Rule 48, but a copy may be furnished to any person on request by that person.~~

~~b: *Notation on Opinions.* A notation stating "publish" or "do not publish" must be made on each opinion.~~

~~c: *Reconsideration of Decision on Whether to Publish.* Any party may move the appellate court to reconsider its decision regarding publication of an opinion but the court of appeals must not order any unpublished opinion to be published after the Supreme Court or Court of Criminal Appeals has acted on any party's petition for review, petition for discretionary review, or other request for relief.~~

~~d: *High Court Order.* The Supreme Court or the Court of Criminal Appeals may, at any time, order a court of appeals' opinion published.~~

**47.4. ~~Standards for Publication.~~ Memorandum Opinions.** 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 ~~be published only~~ 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; ~~or~~

(d) resolves an apparent conflict of authority; or

(e) contains a concurrence or dissent.

~~**47.5. Concurring and Dissenting Opinions.** Only a justice who participated in the decision of a case may file or join in an opinion concurring in or dissenting from the judgment of the court of appeals. Any justice on the court may file an opinion in connection with a denial of a hearing or rehearing en banc. A concurring or dissenting opinion may be published if, in the judgment of its author, it meets one of the criteria established in 47.4. If a concurrence or dissent is to be published, the majority opinion must be published as well.~~

~~**47.6. Action of En Banc Court.** Sitting en banc, the court may modify or overrule a panel's decision regarding the signing or publication of the panel's opinion or opinions.~~

~~**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 CHANGES TO RULE 47, TEXAS RULES OF APPELLATE PROCEDURE:

# THE DISCONTINUATION OF THE "DO NOT PUBLISH" DESIGNATION,

# THE ELIMINATION OF THE PROHIBITION AGAINST THE CITATION OF UNPUBLISHED OPINIONS, AND THE USE OF MEMORANDUM OPINIONS

*by*

Hon. Nathan L. Hecht
Justice
The Supreme Court of Texas

*and*

Chris Griesel
Rules Attorney
The Supreme Court of Texas

March 2001

## I. Introduction

Rule 47 of the Texas Rules of Appellate Procedure requires that the courts of appeals write an opinion on each appeal, encourages the use of memorandum opinions, provides for unpublished opinions, and limits their precedential value and their citation. In October 2000, the Supreme Court Advisory Committee (SCAC) recommended to the Supreme Court that Rule 47 be changed to eliminate the "do not publish" designation and further encourage the use of memorandum opinions. The recommendation was made after thorough consideration of the various arguments pro and con, and was joined in by the one former and six active Justices on the Committee. Before acting on this recommendation, the Supreme Court solicited comments from all sitting appellate justices, active and retired. Those comments were largely positive. The Supreme Court has not yet adopted the proposed changes, but it is likely to do so, as modified to reflect the comments received. The proposed rule, redlined against the text of the current rule, is attached as Appendix A.

This paper recounts briefly the history of the use of unpublished opinions in Texas and federal courts, rehearses the arguments for and against the proposed changes, explains those changes, and ventures a few practical suggestions for implementing them.

## II. A Brief History of Unpublished Opinions

### A. In Texas

Several writers have explored the history of unpublished appellate court opinions and their precedential value in Texas.[1] In the early nineteenth century, opinions often went unpublished not only for want of an interested publisher but also because they were not selected by courts for publication. When West published the first volume of the *Southwestern Reporter* in 1866, enterprising printers like S.A. Posey[2] and Charles Robards[3] had already assembled volumes containing unreported cases. The presence of a well-financed, widely distributed law reporter in the state did not end the selective publication of opinions. Attorneys cited unpublished opinions when they could find them, but courts would not always follow them. For example, in one 1892 decision, *Cooper v. City of Dallas*, the Supreme Court declined to follow an unpublished 1884 opinion of the commission of appeals cited in the trial court because it was "a case to which we do not now have access."[4] It appears that appellate judges decided whether to publish their opinions, but the factors they used in making that decision were nowhere stated.[5] Caseload pressures, as much as anything, appear to have influenced the decision not to publish all opinions.[6]

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[1] *See* David M. Gunn, *"Unpublished Opinions Shall Not Be Cited As Authority": The Emerging Contours of Texas Rule of Appellate Procedure 90(i)*, 24 ST. MARY'S L. J. 115, 126-128, 128 n.65 (1992) (citing publications) [hereinafter Gunn I]; Marion Oliver, Comment, *Rule 90: The Limited Publication Controversy*, 25 TEX. TECH L. REV. 929 (1994).

[2] 1 S. A. POSEY, TEXAS UNREPORTED CASES (1886).

[3] CHARLES L. ROBARDS, SYNOPSES OF THE DECISIONS OF THE SUPREME COURT OF THE STATE OF TEXAS, RENDERED, UPON APPLICATIONS FOR WRITS OF HABEAS CORPUS, ORIGINAL AND ON APPEAL, ARISING FROM RESTRAINTS BY CONSCRIPT AND OTHER MILITARY AUTHORITIES, DURING THE TERMS IN 1862, 1863, 1864, AND THE GALVESTON TERM, 1865 (photo. reprint Austin, Dixie Book Store 1938) (1865) (containing a Civil War conscript case that never appeared in the official state reporter).

[4] 18 S.W. 565, 565 (Tex. 1892).

[5] Gunn I, *supra* note 1, at 129.

[6] *Id.* at 128.

In 1941 the Supreme Court adopted the first Rules of Civil Procedure. New Rule 452 stated:

> Opinions of the Courts of Civil Appeals shall be as brief as practicable, and shall avoid as far as possible lengthy quotations from other decisions or texts; and where the issue involved have been clearly settled by authority or elementary principles of law, the court shall write only brief memorandum opinions. Opinions shall be ordered not published when they present no question or application of any rule of law of interest or importance to the jurisprudence of the State.[7]

For the first time the practice of not publishing appellate opinions was formally recognized and a governing standard set. But the rules did not limit citation of unpublished opinions. In 1950 the Texas Civil Judicial Council recommended adding the following paragraph to Rule 452:

> When the court has ordered that an opinion shall not be published such opinion shall be considered as having no precedential value and shall not be cited or referred to by any court in any other opinion or memorandum and shall not be cited or referred to by any party in any proceeding or in any brief. Should this rule be violated in any brief, it shall be the duty of the court upon attention being called to such violation to order expunged from such brief all references to such unpublished opinion and if the court finds that such opinion was cited or referred to with full knowledge that it had been ordered not published, the court may, in its discretion, strike from the record the entire brief.[8]

But no such amendment was adopted until 1982.

The enlargement of the courts of appeals' jurisdiction in 1981 to include criminal cases dramatically increased caseload pressures on those courts. Their membership increased sixty percent, from 51 to 80, but the number of opinions they produced immediately more than tripled, from fewer than 1,900 in 1980 to 6,147 in 1983.[9] Suddenly, Rule 452 was much more important. In 1982, the Supreme Court rewrote the rule, more carefully limiting publication of opinions[10] and, for the first time, prohibiting citation of unpublished opinions as authority by court or counsel.[11] In 1986, Rule 452 was redesignated as Rule 90 of the newly adopted Rules of Appellate Procedure, with the standards for publication in paragraph (c) and the prohibition against citation of unpublished opinions in paragraph (i) remaining the same.

It is thus fair to say that the increased use of unpublished opinions has historically been viewed as a means of reducing the courts of appeals' workload. The premise is that much less time is spent drafting opinions that will not be published. The prohibition on citation has been viewed as a necessary corollary to the use of unpublished

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[7] *Id.* at 129 (citing TEX. R.. CIV. P. 452 (Vernon 1941) (repealed 1986)).

[8] Gordon Simpson & Mary Kate Wall, *Problems of Precedent Affecting Court of Civil Appeals Opinions*, 4 SW. L.J. 398, 427 (1950).

[9] Oliver, *supra* note 1, 29, at 933.

[10] "An opinion by a court of appeals shall be published only if, in the judgment of the justices participating in the decision, it is one that (1) 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; (2) involves a legal issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority." TEX. R. CIV. P. 452 (b), 629-630 SOUTHWESTERN REPORTER XLI, XLI-XLII (1982).

[11] "Unpublished opinions shall not be cited as authority by counsel or by a court." TEX. R. CIV. P. 452(f), 629-630 SOUTHWESTERN REPORTER XLI, XLI-XLII (1982).

opinions.[12] It is simply unfair to deprive the bar and the public of ready access to unpublished opinions and yet allow them to be cited as authority by those with the resources to find them.[13]

Both the use of unpublished opinions and the prohibition against citing them have been controversial. In 1990, the SCAC extensively debated relaxing the prohibition against citation, but the Supreme Court refused to make a change in the rule. Former Chief Justice Nye of the Corpus Christi Court of Appeals described the use of unpublished opinions as "the great judicial coverup."[14] In 1992, the Supreme Court denied a motion to publish a court of appeals' opinion.[15] The Court's order was not accompanied by an opinion (ironically, perhaps), but Justice Enoch's concurring opinion and Justice Doggett's dissenting opinion set out many of the arguments for and against unpublished opinions. Justice Enoch noted that legal practitioners would incur substantial costs if they were forced to purchase and maintain libraries of all appellate opinions, many of which are without jurisprudential value.[16] But Justice Doggett argued that the use of unpublished opinions encouraged "an expanding body of semi-secret law,"[17] and that the no-citation rule could force relitigation of issues already settled.[18] He also noted that Justice Raul Gonzalez had previously advocated that appellate courts publish everything, given the widely disparate percentages of published cases among the several courts.[19]

In 1997, Rule 90 was recodified as current Rule 47 without resolving these issues. Indeed, they might long have remained unresolved had technological development not have changed the entire landscape.

### B. In Federal Courts

In 1964, the Judicial Conference of the United States noted concern over the exploding dockets of the federal appeals courts, which published virtually every opinion issued.[20] The report concluded that appeals courts should authorize publication of "only those opinions which are of great precedential value."[21] The task of identifying opinions of "great precedential value" was made easier with the 1973 adoption of *Standards for Publication of Judicial Opinions* by the Advisory Council on Appellate Justice. The four standards for publication advocated by the Council — that an opinion either established a new rule, involved a legal issue of continuing public interest, criticized an existing law, or resolved an apparent conflict of authority — served as a model for state

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[12] Gunn I, *supra* note 1, at 130 (stating that the noncitation rule "follows as a logical consequence of a nonpublication rule.").

[13] Kirt Shuldberg, Comment, *Digital Influence: Technology and Unpublished Opinions in the Federal Court of Appeals*, 85 Cal. L. Rev. 543, 549 (1997) (citing William L. Reynolds & William M. Richman, *The Non-Precedential Precedent: Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1185 (1978 )).

[14] Paul W. Nye, *The Unpublished Opinion Controversy (The Great Judicial Coverup)*, 4 ADVANCED APPELLATE PRAC. COURSE W-1 (1990) (cited in *Weirich v. Weirich*, 867 S.W.2d 787, 790 (Tex. 1993) (Doggett, J., dissenting)).

[15] *Weirich v. Weirich.* 867 S.W.2d 787 (Tex. 1993).

[16] *Id.* at 787 (Enoch, J., concurring).

[17] *Id.* at 789 (Doggett, J., dissenting).

[18] *Id.* at 790.

[19] *Id.*

[20] REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES: 1964 ANNUAL REPORT OF THE DIRECTORS OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES (1965).

[21] *Id.*

and federal courts.[22] Within a few years most of the federal circuits and many state courts had adopted limited publication rules.[23]

As federal dockets grew, so did courts' use of limited publication rules. In 1981, federal circuit courts resolved 18,885 appeals, and almost half of the opinions were published. Fourteen years later, the number of cases had grown by two-thirds to 30,240, but the publication rate had dropped to approximately 27 percent. The total number of published opinions had remained essentially the same despite the increase in the caseload.

The Eighth Circuit has added a new wrinkle to the ongoing debate over the use of unpublished, uncited opinions by its recent decision in *Anastasoff v. U.S.*[24] The court held that the circuit's rule forbidding the use of unpublished opinions as precedent within in the circuit violated Article III of the United States Constitution because the judicial powers provision necessarily embraced the principle that all decisions, even unpublished ones, are precedent. While the *Anastasoff* decision would not forbid selective or limited publication, such practice, as we have seen, is not viable if citation is not restricted. Although the court's initial opinion was withdrawn on other grounds, the court in issuing a second opinion noted that the vitality of the no-citation rule within that circuit was an open question.[25]

### C. Other Courts

The same debate over unpublished opinions and limited citation is playing out across the country in state and federal courts.[26] A contemporary sign that the debate is not simply an academic discussion is the existence of a website devoted to tracking developments in selective publication and noncitation issues nationwide.[27]

## II. The Reasons for Change

Developments in technology are freeing the publication of appellate opinions from any dependency on the printing of books. For many years Texas has not had an official reporter, although the *Southwestern Reporter* may have seemed like one. Now there is a national movement away from standard case citations based on regional or proprietary reporters — such as ___ S.W.2d ___, ___ — and toward some generic citation system that could be used by any

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[22] Reynolds & Richman, *supra* note 13, at 1171 (citing Standards for Publication of Judicial Opinions: A Report of the Committee on the Use of Appellate Court Energies of the Advisory Council on Appellate Justice (Fed. Jud. Ctr. 1973)).

[23] *See* Gunn I, *supra* note 1, at 124-126; *see also* Jane Williams, *Survey of State Court Opinion Writing and Publication Practices*, 83 LAW LIBR. J. 21 (1991).

[24] 223 F.3d 898 (8th Cir.), *vacated en banc as moot*, 235 F.3d 1054 (8th Cir. 2000).

[25] *Anastasoff*, 235 F.3d at 1056.

[26] *See* California Bar Association, Conference of Delegates Resolution 10-01-96, <www.calbar.org/2ent/3con/4con/10-01.htm> (proposing an amendment to the California Rules of Court to allow parties to cite unpublished opinions); *Schmier v. Superior Court*, 78 Cal. App. 703 (Cal. App. 2000); Association of the Bar of the City of New York, Report of the Committee on Federal Courts on the Second Circuit's Rule Regarding Citation of Summary Orders, <www.abcny.org/citation.htm> (1998) (containing opposing views on the use of selective publication methods in the federal courts).

[27] URL: <www.nonpublication.com> (soliciting reports on behalf of "The Committee for the Rule of Law", among whose stated concerns are that "any rule restricting citation of, or which allows, secret, hidden, or unpublished opinions encourages expedient, not careful, consideration as the basis for judgment, and constitutes an invitation to error, incompetence, corruption and tyranny.").

reporting agency — such as TXSC010201.01.1 (the first paragraph of the first opinion issued by the Supreme Court of Texas on February 1, 2001). Although this movement has far to go to replace the West system, its existence is evidence of the demand for access to caselaw outside libraries. This demand has arisen and is being driven by the greater availability of caselaw through computer research services and on the internet. Several Texas courts have for years made their unpublished opinions available to Westlaw and Lexis, and thus to all their subscribers. More recently, courts have begun to make their opinions, whether "published" or "unpublished," freely available on the internet. Before the end of the next biennium it is anticipated that all opinions in all Texas courts will be available on the internet. In the context of these changes, it no longer makes sense to talk in terms of an opinion being unpublished.

With caselaw so readily accessible, one of the principal arguments for restricting the citation of "unpublished" opinions disappears: lawyers and parties with the means to acquire substantial libraries no longer have the same advantage they once did. Access to legal materials on the internet is easy (if not to most lawyers and judges, certainly to their school-age children!) and inexpensive. There is every expectation that that trend will continue.[28]

But powerful arguments for retaining something like the "unpublished" designation remain.[29] They concern not only courts' workloads but the burdens on the bar from increased access to caselaw. Is it an important, even necessary, expedient for courts to issue opinions with less explanation and "polish" in cases where a fair disposition of the issues requires nothing more? If so, should citation to such opinions be limited? Or does that limitation too often deprive litigants of valuable precedent and risk that courts will attempt to insulate their decisions from further review? On the other hand, would allowing citation to all opinions make research impossible? Finally, can any standards for limiting the precedential value of opinions be evenly applied?

The answer to the first question, at least in Texas, is yes. In 1996, the courts of appeals disposed of 9,950 cases. In 1999, these courts with the same membership disposed of almost 30 percent more cases (12,787). The number of published opinions in 1999, 2,092, was almost 10 percent more opinions than the 1,912 issued in 1996. It cannot be denied that any requirement that all opinions be written in the same way "published" opinions have been would be an impossible burden on the courts. But these same pressures have increased other concerns. The early critics of unpublished opinions predicted that as few as half of the courts of appeals' decisions might be published.[30] In fact, in 1992 only about 25 percent were published, and in 1999 only about 16 percent. Moreover, the several courts have taken widely divergent views regarding how much should be published, with

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[28] David Gunn predicted this development in 1992: "Technology may provide a 'solution' by making even unpublished opinions readily accessible to all." Gunn I, *supra* note 1, 29, at 144.

[29] *See, e.g.,* Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, 20 CAL. LAW. 43 (June 2000); Deborah Merritt & James Brudney, *Stalking Secret Law: What Predict Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71 (2001); Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L. J. 177 (1999); and Kirt Shuldberg, Comment, *Digital Influence: Technology and Unpublished Opinions in the Federal Court of Appeals*, 85 CAL. L. REV. 543 (1997).

[30] Oliver, *supra* note 1, at 953 (citing Charles Herring, Jr., *Tomb of the Unknown Precedent: Appellate Rule 90 and the Rash of Unpublished Opinions*, TEX. LAW., Oct. 8, 1990, at 24-25).

some courts regularly publishing half of their opinions and others less than ten percent. But while one may argue that too much caselaw is deprived of precedential value, removal of the no-citation prohibition would immediately increase the volume of materials to be researched sixfold.

While accommodation must be made for the very real burdens of the courts of appeals' workload, and the problems that can well be foreseen from too much caselaw, the criticisms of the current practice cannot be ignored.[31]

### III. The Proposed Changes

The proposed changes in Rule 47 are contained in Appendix A. As noted, the SCAC's recommendation has been modified based on comments received from Justices. (A copy of Justice Hecht's letter to the Justices of the courts of appeals is attached as Appendix B.) The Supreme Court itself has not yet considered the changes.

The proposed changes abandon the use of the "do not publish" designation because it is no longer viable in the current technological environment. Cases are being, and increasingly will be, published electronically irrespective of the designation. The elimination of the designation does not constrain West or any other publisher to print all opinions that are issued. They may well choose not to print memorandum opinions, even if they make all opinions available in computer databases.

The proposed changes continue to recognize, however, that courts must be allowed to issue memorandum opinions that fairly explain the basis of decision to the parties without the fuller explanation that would be necessary in an opinion that a court believed would speak with more authority in more cases. Because the standards for a "memorandum opinion" designation are the same as those for an unpublished opinion, courts will continue to signal by this designation their view that the opinion ought to be given little precedential value. However, citation of such opinions is no longer prohibited, and litigants are thus allowed to argue, and courts to decide, otherwise.

The SCAC did not recommend, and the Supreme Court has not considered, whether the proposed changes, including the elimination of the no-citation provision, should be retroactive.

### IV. A Few, Modest, Practical Suggestions

**One:** Models for memorandum opinions should be developed and shared by the courts of appeals so that the bar more readily becomes accustomed to the practice and comfortable with it. There is no magic formula to writing a memorandum opinion, but there are examples from other jurisdictions.

Looking first to proposed Rule 47, a memorandum opinion should:

- be brief, because if it isn't, maybe it shouldn't be a memorandum opinion;
- explain why the case fits under Rule 47.4 — i.e., why the issues are settled and the enumerated factors do not warrant a fuller opinion — although this explanation need not always be explicit and may simply be apparent from the opinion itself; and
- identify and dispose of the controlling issues with such explanation that the parties will know that they have been heard.

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[31] David W. Holman, *Is an Unpublished Opinion Still an Opinion?*, 8 APPELLATE ADVOCATE 3 (Spring 2000); David Gunn, *The Crumbling Relevance of Rule 47.7*, 8 APPELLATE ADVOCATE 9 (Summer 2000); and Jeff Nobles, *Are Unpublished Opinions Unconstitutional?* Anastasoff v. United States, 8 APPELLATE ADVOCATE 19 (Fall 2000).

A memorandum opinion need not contain:

- a recitation of the facts, other than as necessary to explain the ruling on an issue, because the parties are aware of the facts and a memorandum opinion is not addressed to anyone else; or

- an explanation of the standard of review, which can be acknowledged in a sentence or two if necessary.

Two Ninth Circuit judges, Judge Alex Kozinski and Judge Stephen Reinhardt, have helpfully explained their concept of memorandum opinions:

> Writing a [memorandum opinion] is straightforward. After carefully reviewing the briefs and records, we can succinctly explain who won, who lost, and why. We need not state the facts, as the parties already know them; nor need we announce a rule general enough to apply to future cases. This can often be accomplished in a few sentences with citations to two or three key cases.[32]

In reviewing the opinions, often prepared by the court's central staff, the judges note that "[i]f we unanimously agree that a case can be resolved without oral argument, we make sure the results is correct, but we seldom edit the [opinion] . . . Is it because the [opinion] could not be improved by further judicial attention? No, it's because the result is what matters in those cases, not the precise wording of the disposition."[33]

Under Delaware Supreme Court Rule 17, all decisions determining a case shall be made by written opinion, except that a written order can be used if the issue of appeal is controlled by settled Delaware law, is factual and there is sufficient evidence to support the verdict, is one of judicial discretion and there was no abuse of discretion. If one of these elements is met, the Supreme Court may issue a judgment order which "usually includes a brief statement of the facts, those issues raised by the appellant, and the reasons for the panel's decision.[34] Copies of a judgment order from the Delaware Court generally run between one to five double-spaced 8x11 pages, containing between one to ten paragraphs. The orders usually contain the following elements: a description of the documents reviewed by the court; a brief description of the procedural background; a brief description of pertinent facts; a short description of the issue present; a brief explanation of the reason relief is granted or denied; and a paragraph describing the judgment of the court.[35]

Alaska appellate courts can also issue a summary written order, known as a Memorandum of Judgment."[36] The document, which is not published in Alaska's official reporter and cannot be cited, is relatively uniform in form. The opinions run between three to eight 8x11 pages and contain all of the elements that the Delaware judgment contains except that the Alaska courts will write two to three paragraphs for each single paragraph the Delaware courts write.

North Dakota courts have an interesting shorthand method for indicating that certain legal or factual standards have been complied with.

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[32] Kozinski & Reinhardt, *supra* note 29, at 43.

[33] *Id.* at 44 .

[34] *See* Internal Operating Procedures of Delaware Court, attached as Appendix C. The order may also state the case is affirmed by reference to the opinion of the court below or the decision of the administrative agency and may contain one or more references to cases or other authorities.

[35] Examples of Delaware Summary Orders are attached as Appendix D.

[36] ALASKA R. P. 214. Examples of an Alaska Memorandum of Judgment are attached as Appendix E.

Under North Dakota Rule of Appellate Procedure Rule 35.1, a court may indicate the resolution of a case by citing the rule and notes by reference which of the seven legal or factual standards have been complied with. For instance, a determination that a previous controlling appellate decision is dispositive on appeal is achieved by the court noting, "We affirm under N.D.R. App. 35.1(a)-(7)," and then citing to the controlling appellate opinion.[37]

A court may consider issuing two opinions in a case, one a Memorandum Opinion dealing with issues not important to the jurisprudence, and a separate Opinion intended to have precedential value. This practice is utilized in the Ninth Circuit[38] and a similar practice has been employed by Texas courts in publishing only part of the opinion in a case.[39]

One model that should not be followed is the one-word summary affirmance or reversal used by some federal courts.[40] Rule 47 plainly contemplates some cogent explanation for the court's ruling.

**Two:** Freed from considerations of "publication", and focused on how opinions are to be drafted, courts may find it possible to reach greater consensus on the factors which govern the use of memorandum opinions.

Proposed Rule 47.4 presumes that a case can be disposed of by memorandum opinion, consistent with the current percentage of unpublished opinions. A memorandum opinion signals that the issues in the case are "settled" and that their resolution is not significant to the jurisprudence. Conversely, a fuller opinion indicates that one of the seven factors in Rule 47.4 is present, that the issues are not "settled," or that the decision of the court is such that it would be impracticable to "briefly" advise the parties of the court's decision or the basic reasons for the decision.

Similarly, the Fifth Circuit's Rule 47.5.1 prescribes that opinions that merely decide "a particular case on the basis of well-settled principles of law" should not be published because of the "needless expense on the public and burden on the legal profession."[41] However, the rule provides that an opinion that "may in any way interest persons other than the parties to a case should be published."[42]

At least one state has announced the specific types of cases that are appropriate for summary disposition. North Dakota Rule of Appellate Procedure 35.1 sets out seven types of case that the North Dakota courts have determined to be appropriate for summary disposition.[43] The seven types of case described all appear to have in common the application of a well-defined appellate standard of review to a developed factual record: the appeal is frivolous and completely without merit; the judgment of the trial court is based on findings of fact that are not clearly erroneous; the verdict of the jury is supported by substantial evidence; the trial court did not abuse its discretion; the order of an administrative agency is supported by a preponderance of the evidence; the summary judgment, directed verdict, or judgment on the pleadings is supported by the record; or a previous controlling appellate decision is dispositive of the appeal.

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[37] Example of North Dakota cases disposed of under this method are attached as Appendix F.

[38] *See* attached opinion as Appendix G.

[39] *See* attached Opinion as Appendix H.

[40] *E.g.*, 5TH CIR. R. 47.6.

[41] 5TH CIR. LOC. R. 47.5.1 (attached as Appendix I).

[42] *Id.*

[43] N.D.R. APP. P. 35.1 (attached as Appendix J).

In making a decision on the type of cases that should always be written as a memorandum opinion, courts cannot ignore criticism of the lack of apparent, announced, uniform standards.

**Three:** An effective method for screening cases for disposition by memorandum opinion may increase efficiency without sacrificing fairness. This begins with, but extends beyond, the question of whether to have oral argument in a case.

Returning to the Ninth Circuit for guidance, it reports that a significant portion of the memorandum opinions — 40 percent — was identified in the central staff's screening. Every month, three judges meet with the staff attorneys, who present the briefs, records, and proposed memorandum opinions in 100 to 150 cases. If the panel unanimously agrees that a case can be resolved without oral argument, it ensures that the result is correct but seldom edits the opinions.

A more detailed discussion of a similar court screening system is contained in the Fifth Circuit's Internal Operating Procedures.[44] Screening is assisted by the court's chief staff attorney. If, after the last brief is filed, the staff attorney concludes that the case does not warrant oral argument, a brief memorandum may be prepared and the case returned to the clerk. The clerk routes the case to a judge. If that judge agrees that the case does not warrant oral argument, the briefs, together with a proposed opinion, are forwarded to the two other judges on the screening panel. A party may request oral argument, but the request is granted only if at least one of the judges agrees that the case warrants a hearing. If no party requests oral argument, all panel judges must concur that the case does not warrant oral argument. A court's summary disposition may include a concurrence or a dissent by panel members, unless the panel has received an oral argument request.

The Fifth Circuit also employs a "conference calendar," first described in *Graves v. Hampton*.[45] Under this procedure, the chief staff attorney sends a case to a member of the court's staff for preparation of a memorandum opinion resolving the case. On rotation, three judges process the calendar, attempting to dispose of thirty cases a day. Each of the judges is responsible for presenting a third of the day's cases. This process disposes of almost all of the designated cases. A case not disposed of is returned to the docket for regular processing.[46]

Effective screening procedures are used by courts to achieve greater efficiencies in the disposition of cases that do not require plenary review.

**Four:** The courts of appeals may wish to work toward a uniform approach to making the decisions available to the public. The proposed changes in Rule 47 do not require a protocol for making opinions available to the public.

## V. Conclusion

Every court's preeminent goal is justice, but to achieve and adhere to that goal, a court must conduct its work efficiently. The proposed changes in Rule 47 are intended to facilitate the courts of appeals efforts to achieve justice.

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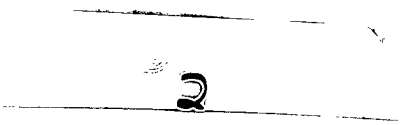
[44] Attached as Appendix K.

[45] 1 F.3d 315, 317 (5th Cir. 1993).

[46] *Id.*; *see also* Charles Clark, *The Future of Appellate Practice in the U.S. Fifth Circuit Court of Appeals*, *in* Univ. Tex. 9th Annual Conference on State and Federal Appeals 11 (1999).



Dutton H.B. No. 740

A BILL TO BE ENTITLED

AN ACT

relating to summary judgments issued by a court.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subtitle C, Title 2, Civil Practice and Remedies Code, is amended by adding Chapter 40 to read as follows:

CHAPTER 40. SUMMARY JUDGMENT

Sec. 40.001. DEFINITION. In this chapter, "claim" means:

(1) a claim, counterclaim, or cross-claim under which a person seeks recovery of damages or other relief that may be granted by a court; or

(2) an action to obtain a declaratory judgment.

Sec. 40.002. WRITTEN FINDINGS REQUIRED; SCOPE OF APPELLATE REVIEW. (a) The judge of a court who grants a motion for summary judgment with respect to all or any part of a claim shall specify the grounds, in writing, on which the motion is granted not later than the date on which the judgment is signed by the judge of the court.

(b) Notwithstanding any other law, any court hearing an appeal from a grant of a motion for summary judgment shall determine the appeal only on the grounds specified in the written findings.

Sec. 40.003. SUMMARY JUDGMENT IN CERTAIN CASES: NOTICE REQUIRED IN CITATION. In a claim for a liquidated money demand or a claim involving a sworn account that is brought in a justice court, the clerk of the court shall include a notice in the citation that, unless a sworn answer is filed on behalf of the defendant, a summary judgment against the defendant may result.

Sec. 40.004. CONFLICT WITH TEXAS RULES OF CIVIL PROCEDURE. To the extent of any conflict between this chapter and the Texas Rules of Civil Procedure, including Rule 166a, this chapter controls.

SECTION 2. This Act applies only to a grant of a motion for summary judgment on or after the effective date of this Act. A grant of a motion for a summary judgment before the effective date of this Act is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 3. This Act takes effect September 1, 2001.

3

Chris -- I have reviewed all of the comments you forwarded. To expedite matters, I thought it best to e-mail my thoughts. I will follow up with a formal letter if the court so requests.

There are three issues common to the positions taken by JDP and RFP and it is my understanding that the court has primarily invited my attention to those specific points. I will address each in turn.

**Rule 1 Comment 3**

There is a concern expressed about the release of the verification page to the judges involved [assigned judge, judge assigned to hear recusals, and appellate judges] and to the guardian ad litem. As for the judges, the issue was thoroughly debated at the subcommittee and at advisory committee. While I don't recall the precise vote of the subcommittee, it was not a contentious item. The advisory committee passed the recommendation unanimously. While I certainly understand the concern that the more judges who see the verification page, the greater the likelihood of disclosure, I don't know how any judge can properly address disqualification or recusal issues without access to it.

The comments concerning the guardians ad litem came as a bit of a surprise. It would never have occurred to me that someone appointed in that capacity would not, or should not, have access to the complete file. I recognize that some judges are appointing GALs with a particular agenda or viewpoint. While Chapter 33 is largely unclear regarding the qualifications of ad litems, the legislature has elsewhere manifested general intent that only competent and qualified persons be appointed to serve. By authorizing the appointment of "another appropriate person" in §§33.003(f), the legislature implied that the other categories of potential appointees must also be "appropriate." I don't believe that someone who cannot be objective about the best interest of the child is "appropriate" or otherwise qualified for appointment. However, it is doubtful that by rule the supreme court can change the inclination of judges to make these inappropriate appointments. And while guardians enjoy immunity under the statute, it is a qualifed immunity. Statutory exceptions [see Tex.Fam.Code Ann. §§§§33.006; 107.003] preclude immunity where the GAL's recommendation or opinion is willfully wrongful or given with conscious indifference, reckless disregard, bad faith, malice, or gross negligence. A guardian who disregards the child's best interest because of a preconceived attitude or agenda is likely not cloaked with immunity.

**Amicus Briefs**

Both JDP and RFP object to the amicus briefs. Two complaints are lodged against the general or public briefs. First, they question why there is no service of process upon the minor's attorney. The clear answer is the fact that the minor's attorney is not to be identified. Since the groups do not know who the attorney is, there can be no personal service. Second, they contend there is no ability to adequately respond. This argument is based on a misconception that the public briefs will be filed in a particular case. The public will not know about the existence of any particular case until the supreme court issues an order and/or opinion. The premise for the briefs is to allow advocacy groups the ability to address common and recurring themes, such as constitutionality, open courts/open records, and generic arguments that notification is always in a child's best interest. Because these materials will be dispersed over the internet, attorneys who handle notification cases can stay current on briefs as they are filed, without regard to any particular case. Furthermore, because the appellate timetable is controlled by defaulting to the Texas Rules of Appellate Procedure, an adverse decision does not need to be appealed within two business days of the denial. The thirty-day rule applies. Thus, the attorney has the leisure to review the public briefs before filing a notice of appeal, which then triggers the rocket docket.

As for the confidential, case-specific briefs, both groups object on two grounds. First, the "opportunity to reply" is again raised. Although this argument is more applicable to the case-specific briefs, it is still not meritorious. The attorney will have already learned of the guardian's position in the case as it will no doubt have been expressed during the hearing. As a result, the attorney must address those issues on appeal because the judge's denial of the bypass is likely based in large part on the guardian's recommendation. A guardian who has opposed the bypass is not likely to be raising constitutional issues; instead, the arguments will be fact intensive as to why the minor is not sufficiently mature or well informed, why notification is not in her best interest, or why she has not established that physical, sexual or emotional

abuse may result. The attorney will necessarily have to cover all of those bases in appealing the denial, regardless of whether the guardian submits a brief. I truly don't see the permissible amicus briefing as impacting the minor's appellate advocacy. One other thought occurs to me. There is no requirement in the current rules that the minor's attorney serve a copy of the notice of appeal on the guardian. It is simply to be filed with the clerk of the trial court and the clerk of the appellate court. I suppose the truly zealous guardian could monitor the case file to ascertain if and when the NOA is filed.

The other objection is that the rule, as written, appears to allow the judge, a court reporter, or an interpreter to file amicus briefs. I think that is unlikely and it is somewhat of an alarmist reaction, probably triggered by the briefs filed on behalf of certain legislators. If that proves to be the case, then perhaps the court will want to revisit the issue, but I think the amendments should stand for now. Both the subcommittee and the advisory committee approved the changes after extensive discussion.

**Remand**

I must confess upfront that I was a lone voice in the wilderness on this issue. I have never favored the deletion which has been implemented. The subcommittee was opposed to it as well, but the full advisory committee supported the change. The complaints urged by JDP and RFP are a little vague, but I interpret them as suggesting that remands compromise the speedy resolution of the case.

My objections to the amendment are spelled out in the transcript from the advisory committee hearing:

1) In the absence of an opinion from the intermediate court, a remand provides the trial court, or the minor for that matter, with very little guidance as to the factual sufficiency analysis. It is unlikely that a second hearing will elicit anything different in terms of testimony or outcome.

2) Because a remand is not a "denial" of the minor's application, it would not be appealable to the supreme court. Section 33.004(f) of the Family Code provides that "[a]n expedited confidential appeal shall be available to any pregnant minor to whom a court of appeals *denies an order authorizing the minor to consent to the performance of an abortion without notification . . .*" The case then gets bounced back and forth in what I call appellate orbit which can seriously impinge on the time constraints imposed by the U.S. Supreme Court.

Having said all of that, I think the issue has been adequately, and laboriously, discussed at both the subcommittee level and the advisory committee level.

**Recommendations**

It is my opinion that all three of these issues have been thoroughly considered. I see no need to reconstitute the special subcommittee. And while I don't believe it is necessary to address them again at the advisory committee level, since there is already a meeting scheduled for March 30-31, there is an opportunity to at least circulate the comments to the members.

There are, however, some excellent suggestions that should be considered in the future, particularly JDP's suggestions for appellate proceedings (at pages 5-6) and RFP's suggestion that Rule 1.9(f) provide that before transmission to OCA, the sender should take all reasonable steps to assure confidentiality (at page 3).

I hope these thoughts are of some value. Please let me know if the court needs anything further from me.

Ann

~~January 12~~ February 28, 2001[~~November 28, 2000~~]

(Babcock's 2/28/01 changes appear with strikeout and double underline

From 01/12/01 Griesel changes: Additions in Bold and Underlined
From 01/12/01 Griesel changes: [~~Deletions appear with strikeout and brackets~~])

# 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**, unless provided by Subsection (c),:**

(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]

(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) 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.[13]

(10)[14] 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.

(11) 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.

~~[(12) a lawyer in the proceeding, or the lawyer's law firm, is representing the judge, or judge's spouse or minor child, in an ongoing legal proceeding other than a class action, except for legal work by a government attorney in his/her official capacity.]~~

(c) Waiver.[15] 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[16] or upon information and belief if the grounds for such belief are stated specifically.[17] A judge's rulings may not be a basis for the motion, but may be admissible as evidence relative to the motion.[18] A motion to recuse must be verified; an unverified motion does not invoke the proceedings under this rule except for sanctions.[19] A motion to recuse a judge for any ground listed in subparagraph **(b)(10) or (b)(11)** ~~[(b)(9) or (b)(10)]~~ may not be filed by any party, lawyer or law firm whose action constituted a ground for recusal.[20]

(2) Time to File. A motion to disqualify **or recuse** 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 **conventional** trial **must state one or more of the following** ~~[or other hearing except in the following instances]~~:

**(A)** ~~[when]~~ the basis for recusal did not exist before ten (10) days prior to the date the case is set for **conventional** 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 **conventional** 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 **conventional** 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)].~~[21]

(3) Referral.

The judge in the case in which the motion is filed must **, without further proceedings,** promptly **recuse or disqualify or refer the matter to the presiding judge of the administrative region before without** ~~[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. **The** ~~[If the judge refuses to recuse or disqualify, the]~~ judge must promptly refer **every motion to recuse or disqualify** ~~[the motion]~~ to the presiding judge of the administrative region**, if the judge refuses to recuse or disqualify**. If the judge in the case in which the motion is filed does not promptly **recuse or disqualify** ~~[grant the motion]~~ or refer **the matter** ~~[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) **,and subparagraph (e)(2) if applicable**, the said presiding judge may deny the motion without a hearing. If the motion complies with subparagraph (e)(1) **and subparagraph (e)(2), if applicable**, 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**, except by agreement of parties as described above**.

(4) Interim Proceedings.[22] After referring the motion to the presiding judge of the administrative region, the judge in whose case the motion is filed must take no further action in the case until the motion is disposed of; except for good cause stated in the order in which the action is taken. However, in the following instances, the judge **against whom the motion is directed** may proceed ~~[with the case]~~ as though **the** ~~[no]~~ motion had **not** 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;[23] or~~ when the motion to recuse or disqualify is filed after the 10th day prior to the date the case is set for conventional trial on the merits~~[.]~~[24] **; or**

**(B) when the motion is the third or subsequent motion filed in the same case by the same party.**

(5) Abatement of interim proceedings.[25] 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[26] may also order the interim proceedings abated pending a ruling on the motion to recuse or disqualify.

(6) Order entered during interim proceedings.[27] If the judge who signed any order in an interim proceeding pursuant to subparagraph (e)(4) is subsequently recused, the judge assigned to the case shall, upon motion of a party, review such order but may, after reviewing the basis for such order, enter the same or similar order or vacate the order. In any case where a judge has been disqualified, the judge assigned to hear the case shall declare void all orders entered by such judge and shall rehear all matters that were heard by the disqualified judge.

(7) Hearing.[28] 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.[29]

(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.[30]

(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.[31]

(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).[32]

(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**, unless the party making such motion can demonstrate that the motion was not frivolous**. 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.

Comment 3: **The term "conventional trial on the merits" is borrowed from *North East Independent School District v. Aldridge*, 400 S.W.2d 893, 897-898 (Tex. 1966). It means a case tried on the merits of the parties' substantive claims and defenses to a jury or to the court in accordance with the rules of civil procedure and evidence. It does not include other forms of adjudication, such as summary judgment proceedings, default judgment hearings, or cases disposed of on nonsuit, dismissed on motion for dismissal because of noncompliance with statutory prerequisites to the commencement or prosecution of suit or for failure to comply with the rules of civil procedure, for want of prosecution, pleas to the jurisdiction, or pleas in abatement ~~or for want of prosecution~~.**

**Comment 4: Section (e) (3) of this rule states that a judge handling a motion to recuse or disqualify must "without further proceeding" promptly recuse or disqualify or refer the matter to the presiding judge of the administrative region. The rule contemplates that the trial judge shall make a determination on the motion based on only on the arguments made in and the evidence presented in a party's motion to recuse or disqualify and any response to the motion. While the trial court judge may hold a hearing to hear arguments on the merits of the motion to recuse or disqualify, the hearing is not evidentiary and may not be used as an "opportunity to develop a record regarding the motions to recuse".See In re Rio Grande Valley Gas Co., 987 S.W.2d 167, 179 (Tex. App. Corpus Christi 1999, orig. proceeding). Section (e)(3) expressly disapproves any type of action by a judge on a motion to recuse or disqualify other than making a decision to recuse or disqualify or to refer the motion to the presiding judge of the administrative region or holding a hearing on the motion restricted to hearing arguments based on the party's motion or response and contrary holding are overruled. See In re Rio Grande Valley Gas Co., 987 S.W.2d 167 (Tex. App. Corpus Christi 1999, orig. proceeding) and Winfield v. Daggett, 846 S.W.2d 920 (Tex.App.--Houston [1st Dist.] 1993, no writ).**

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).

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. Paragraph (9) is based on The Guide to Judiciary Policies and Procedures, Vol. 5, Section 3.6-2, published by the Administrator's Office of the United States Courts.

14. Paragraphs (10) and (11) 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.

15. This section is from current Rule 18b(5).

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

17. This sentence is from current Rule 18a(a).

18. This sentence is new.

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

20. This sentence is new. It is part of the Judicial Campaign Finance Study Committees proposal.

21. 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).

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

~~[23. 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.]~~

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

25. 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.

26. See (e)(7), last sentence.

27. 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.

28. The following two subparagraphs revise existing procedures to improve expeditiousness.

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

30. From current Rule 18a(f).

31. From current Rule 18a(g).

32. This is from current Rule 18a(h).

JACKSON
WALKER
L.L.P.

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March 2, 2001

The Honorable Bob McCoy
48th Judicial District of Texas
Justice Center, 401 W. Belknap
Fort Worth, Texas 76196-0221

The Honorable Jeff Walker
48th Judicial District of Texas
Justice Center, 401 W. Belknap
Fort Worth, Texas 76196-0221

Re: Recusal Rule

Dear Judge McCoy and Judge Walker:

Thank you for your letter of February 5, 2001. Here are my thoughts regarding your comments on the proposed recusal rule.

1. I assume that the rule will have an effective date and that the Court will articulate what that date is. I would propose that the rule apply to existing as well as after-filed cases, but that is certainly an issue the Court should consider. The three recusal rule is more problematical. I can certainly see why the three recusal rule should not come into play until the bar has been provided notice; thus, the effective date of the three recusal rule should be only after the effective date of the rule (in other words, prior denied motions to recuse would not count).

2. Regarding item number two, you will find the identical language in subsection (b)(9). (b)(12) was deleted for redundancy.

3. As to your item three, the intent of (e)(11) was to set forth the substantive grounds for an award of sanctions. section (e)(1) was intended to relieve the Court from having to deal with an unverified motion except that an unverified motion could be considered by the court in awarding sanctions. The court may be willing to give weight to the fact that the movant was unwilling to verify his allegations.

4. As to item four, I believe we have cleaned-up that language and I enclose the most recent iteration of the rule.

5. As to point five, I agree and am taking the liberty of changing the word "before" to "without". The first sentence of section (e)(3) would now read:

(3) Referral.

> The judge in the case in which the motion is filed must, without further proceedings, promptly recuse or disqualify or refer the matter to the presiding judge of the administrative region **without** taking any other action in the case.

I am asking Richard Orsinger, Carl Hamilton, and Chris Griesel to advise me as to whether this change creates any unintended consequences.

6. As to your point 6, I agree with your comments and have moved the phrase: "or for want of prosecution" in the following manner:

<u>Comment 3:</u>

* * *

> . . . It does not include other forms of adjudication, such as summary judgment proceedings, default judgment hearing, or cases disposed of on nonsuit, dismissed on motion for dismissal because of noncompliance with statutory prerequisites to the commencement or prosecution of suit or for failure to comply with the rules of civil procedure **or for want of prosecution**, pleas to the jurisdiction, or pleas in abatement.

Thank you so much for taking the time to attend our meeting and for your thoughtful comments on the rule. I hope we have an opportunity to work together again soon.

Very truly yours,

JACKSON WALKER L.L.P.

Chip

Charles L. Babcock

CLB/clg
2620186.1/099996.00295

cc: Nathan L. Hecht
Justice, The Supreme Court of Texas
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The Honorable Chris Harris
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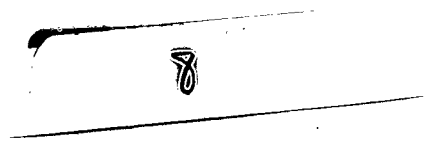

**CourtofAppeals**

**SecondDistrictofTexas**

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# MEMORANDUM

To: Charles L. "Chip" Babcock

From: Chief Justice John Cayce

Date: January 17, 2001

Re: SCAC's Proposed Recusal Rule

I write to share a concern about the authority our proposed recusal rule gives a judge to proceed in a case without good cause, when a motion to recuse alleging one of the four grounds listed in (e)(2) is filed within ten days of trial.

As currently worded, (e)(2) authorizes the filing of motions to disqualify and to recuse "at any time," and requires that at least one of four grounds be stated in a motion to recuse filed within ten days of trial to entitle the party making the motion to a hearing on the merits of the motion. It is my understanding that an intent of this latter requirement is to discourage dilatory motions to recuse that delay trial. Accordingly, under the applicable provisions of (e)(3) and (e)(4), the "penalties" for filing a dilatory motion to recuse, i.e. a motion filed less than ten days before trial that does *not* state one or more of the four

grounds listed in (e)(2), is that the motion may be denied without a hearing and the trial judge may proceed with the case as though no motion had been filed.

By contrast, however, a motion to recuse that *does* state one of the four grounds listed in (e)(2) cannot be denied without a hearing under (e)(3). Instead, the motion must be heard like other timely filed motions to recuse. Yet, the party making the motion is subjected to the same interim proceeding treatment under section (e)(4) as a party who files a dilatory (or serial or frivolous) motion to recuse--the judge is allowed to proceed with the case "as though the motion had not been filed." This inequity between the rights and protections enjoyed by parties under (e)(4) who timely file a motion stating grounds for recusal that existed and were known more than ten days before trial, and parties who timely file a motion stating grounds for recusal that did *not* exist and were *not* known more than ten days before trial seems unfair, and wholly unnecessary to achieve the rule's overriding objective of discouraging dilatory, serial and frivolous motions to recuse. If a legitimate policy interest is served by allowing a judge to act in a case without good cause after a timely motion to recuse is filed that states a ground that did not exist, or could not be discovered, more than ten days before trial, I do not know what it is.

In my view, it would be better policy to afford all parties who make a timely and proper motion to recuse the same rights and protections under section (e)(4). Because (e)(2) clearly implies that a motion that states one of the four grounds is timely, and, assuming such a motion is otherwise proper, the judge subject to the motion should be prohibited under (e)(4) from proceeding in the case until the motion is ruled on, absent good cause. Thus, I would recommend adding language to (e)(4) that would exempt cases from the provision allowing a judge to take further action in a case, without good cause, when a motion that complies with (e)(2) is filed within ten days of trial. I would also recommend that (e)(2) be revised to require that *motions to disqualify* filed within ten days of trial also state one of the four listed grounds, and that cases involving such motions be similarly exempted from the applicable provisions of (e)(4).

If it is your sense that the Committee would be receptive to these suggestions at this late stage in the rule drafting process, I will submit some language for the Committee's consideration. Please let me know what, if anything, you would like me to do.

cc: Justice Nathan L. Hecht

Carl Hamilton

Frank Gilstrap

Chris Griesel

# 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

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**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.

---

**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."

---

**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.

---

**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.

---

**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.

---

**Rule 33.1**
**Preservation of Appellate Complaints**

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

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

**Proposed change**

**By: El Paso Court of Appeals**

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

Language from the prior rule obviating the need to object to preserve these errors in a nonjury trial was deleted in the 1997 amendments.

**Combined Committee recommendation**

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

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

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

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

---

**Rule 34.6(f)**
**Reporter's Record**

(f) *Reporter's Record Lost or Destroyed.* An appellant is entitled to a new trial under the following circumstances:

> (1) if the appellant has timely requested a reporter's record;
>
> (2) if, without the appellant's fault, a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed or -- if the proceedings were electronically recorded -- a significant portion of the recording has been lost or destroyed or is inaudible;
>
> (3) if the lost, destroyed, or inaudible portion of the reporter's record, or the lost or destroyed exhibit, is necessary to the appeal's resolution; and
>
> (4) if the parties cannot agree on a complete reporter's record.

**Proposed change**

**By: Diana Faust**

The rule for the clerk's record (rule 34.5(e)) contains express language allowing the trial court to substitute copies or reproductions of lost or destroyed parts of the clerk's record, while the rule for reporter's record does not include this express language. With regard to exhibits that are part of the reporter's record, Rule 34.6(f) should contain language similar to this express language in rule 34.5 (e), thus allowing the trial court, when an exhibit is lost or destroyed, to "determine what constitutes

an accurate copy of the missing [exhibit] and order it to be included in the [reporter's] record." Also, the comment to rule 34 should be revised to reflect the origin of rule 34.6(f) in former rule 50(e).

**Combined Committee recommendation**

Amend Rule 34.6(e) as follows:

(e) Defects or inaccuracies in the reporter's record.

(1) Correction by agreement. The parties may agree to correct any defect or inaccuracy in the reporter's record without the reporter's recertification.

(2) Correction by trial court. If the parties dispute whether the reporter's record accurately discloses what occurred in the trial court, the parties agree that the record is inaccurate but cannot agree on corrections to the reporter's record, or if an exhibit designated for inclusion in the reporter's record has been lost or destroyed and the parties cannot agree on what constitutes an accurate copy of the missing item, the trial court must - after notice and hearing - settle the dispute. After doing so, the court must order the court reporter to correct the reporter's record by conforming the text of the record to what occurred in the trial court by adding an accurate copy of the missing exhibit, and to certify and file in the appellate court a corrected reporter's record or a supplement.

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

---

**Rule 34.6(g)**
**Original Exhibits**

(g) *Original Exhibits.*

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

**Proposed change**

**By: Buddy Hanby**

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

**Combined Committee recommendation**

The Combined Committee believes that Rule 34.5 (f) does not apply to original exhibits in a

mandamus proceeding. The subject is, however, covered by Civil Procedure Rule 75b, which probably should be amended to correspond with Appellate Rule 34.5(f). *See* Tex. R. Civ. P. 75b(b).

---

**Rule 35.3**
**Time to File Record;**
**Responsibility for Filing Record**

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

**Proposed changes**

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

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

**Combined Committee recommendation**

The Combined Committee believes that no change is needed.

---

**Rule 38.1**
**Appellant's Brief**

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

**Proposed changes**

**By: Brenda Norton**

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

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

**Combined Committee recommendation**

The Combined Committee believes that no action is needed.

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**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.

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**Rule 38.1**
**Appellant's Brief**

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

**Proposed change**

**By: Stacy Obenhaus**

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

**Combined Committee recommendation**

Amend Rule 38 by adding the following new subdivision.

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

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

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**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.

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## 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.

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**Rule 46.5**
**Voluntary Remittitur**

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

**Proposed changes**

**By: Steven L. Hughes**

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

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

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

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

**Combined Committee recommendation**

Amend Rule 46.5 to state:

Rule 46. Remittitur in Civil Cases

46.5 Voluntary Remittitur. If a court of appeals reverses a trial court's judgment because of a legal error that affects only part of the damages awarded by the judgment, the affected party may - within 15 days after the court of appeals' judgment - voluntarily remit the amount that the court of appeals determined should not have been awarded by the judgment by including a request for acceptance of such a remittitur in a motion for rehearing and requesting an affirmance of the trial court's judgment.

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**Rule 47.7**
**Unpublished Opinions**

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

**Proposed change**

**By: Carlos Mattioli**

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

**Combined Committee recommendation**

Amend Rule 47.7 to state:

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

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

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

**Proposed change**

**By: Pamela Stanton Baron**

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

**Combined Committee recommendation**

Amend Rule 49.10 to state:

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

## Rule 52.7
## Record (mandamus)

(a) *Filing by relator required.* Relator must file with the petition:

(1) a certified or sworn copy of every document that is material to the relator's claim for relief and that was filed in any underlying proceeding; and

(2) a properly authenticated transcript of any relevant testimony from any underlying proceeding, including any exhibits offered in evidence, or a statement that no testimony was adduced in connection with the matter complained.

### Combined Committee recommendation

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

## Rule 55.2
## Briefs on the Merits

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

### Proposed change

**By: Stacy Obenhaus**

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

### Combined Committee recommendation

Rule 55.2 (e) should be changed to state:

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

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

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

### Proposed suggestion

**By: Pamela Stanton Baron**

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

**Combined Committee recommendation**

Amend Rule 64.6 to state:

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

# MEMORANDUM

To: Chip Babcock, SCAC Chair

From: Bill Dorsaneo

Date: January 10, 2001

Re: Proposed TRAP Revisions Discussed but Not Finished at November Meeting

**Sent Via email**

The SCAC Appellate Rules Subcommittee met by telephone conference call on Monday, January 8, 2001. As a result of the conference the attached proposal for revision of TRAP 9, by adding a new subdivision 9.7 based largely on Fed. R. App. P. 28(i), was approved by a majority of the subcommittee. During the same conference, a number of revisions were made in proposed redrafts of TRAP Rules 34.6(e), 34.6(f) and 46.5 These matters are now ready for consideration by the full SCAC.

This memorandum supersedes the one provided to you earlier, dated January 5, 2001.

cc: All SCAC members

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## Proposed TRAP Changes (1/9/01)

### Changes to TRAP Rule 9

Amend TRAP Rule 9 by adding the following new subdivision:

Rule 9.7 *Adoption by Reference; Cases Involving Multiple Parties.*

In a case involving more than one appellant, appellee, relator or respondent, including consolidated cases, any number of appellants, appellees, relators or respondents may join in a brief, petition, response, motion or other document filed in an appellate court, and any party may adopt by reference a part of another's brief, petition, response, motion or other filed document.

### Changes to TRAP 34.6(e)

Amend TRAP Rule 34.6(e) as follows:

(e) *Inaccuracies in the Reporter's Record*

(1) *Correction of inaccuracies by agreement.* The parties may agree to correct an inaccuracy in the reporter's record without the court reporter's recertification.

(2) *Correction of inaccuracies by trial court.* If the parties dispute whether the reporter's record accurately discloses what occurred in the trial court, or the parties agree that it is inaccurate but cannot agree on corrections to the reporter's record, or if the accuracy of an exhibit designated for inclusion in the reporter's record is disputed and the parties cannot agree on what constitutes an accurate exhibit, the trial court must - after notice and hearing - settle the dispute. After doing so, the court must order the court reporter to ~~conform~~ 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 exhibit, and to certify and file in the appellate court a corrected reporter's record or a supplement.

**(3)** *Correction after filing in appellate court.* If the dispute arises after the reporter's record has been filed in the appellate court, that court may submit the dispute to the trial court for resolution. The trial court must then ensure that the reporter's record is made to conform to what occurred in the trial court.

## Changes to TRAP Rule 34.6(f)

Amend TRAP Rule 34.6(f) as follows:

(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~~

(4) if the parties cannot agree on replacement of the lost, destroyed or inaudible portion of the reporter's record, or cannot agree on replacement of any lost or destroyed exhibit and the missing exhibit or exhibits cannot be replaced with copies that are determined to accurately duplicate the original exhibits with reasonable certainty by the trial court or the court of appeals.

## Changes to TRAP Rule 46.5

Rule 46.5 *Voluntary Remittitur.* If a court of appeals reverses the 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 appeal's judgment - voluntarily remit the total amount ~~that the court of appeals' determined should not have been awarded by the judgment~~ of the damages affected by the error.

A motion for rehearing may include a conditional request for acceptance by the court of appeals of a voluntary remittitur and an affirmance of the trial court's judgment as reduced by the remittitur, without waiving the movant's complaint that the court of appeals erred in ruling that a reversible error was committed in the court below. If the remittitur is timely filed and the court of appeals determines that the voluntary remittitur cures the reversible error, then the remittitur must be accepted and the trial court judgment affirmed.

## NOTE TO SCAC APPELLATE RULES SUBCOMMITTEE MEMBERS

After our telephone conference, I checked to see whether Appellate Rule 46 actually revised former Appellate Rule 85 "without substantive change" as stated in the comment to Appellate Rule 46. I determined that it did not do so. Former Appellate Rule 85(e) was worded differently, as shown below, and the unintentional change, made sometime after the SCAC recommended changes in the appellate rules to the Court, make the current subdivision meaningless, i.e. not essentially different from Appellate Rule 46.2-3.

**(e) Voluntary Remittitur**. If a case appealed to the court of appeals is reversed because of an error of law that affects only part of the damages or judgment, the affected party may voluntarily remit such amount within 15 days after the court's opinion or judgment. If such remittitur is filed and the court of appeals is of the opinion that such voluntary remittitur cures the reversible error, then such remittitur shall be accepted and the cause affirmed.

*Document 1*

*CHANGES MADE AT JAN 2001 MEETING WITH COMMENTS FOR FUTURE DISCUSSIONS*

**MEMORANDUM**

To: Chip Babcock, SCAC Chair

Bill Edwards

Chris Griesel, Rules Staff Attorney

From: Bill Dorsaneo

Date: January 15, 2001

Re: Proposed TRAP Revisions Approved at January Meeting

**Sent Via email**

The SCAC approved the following revisions for TRAP Rules 9, 34.6 and 46.5. I assume that the SCAC"s approval of TRAP 42 at the same meeting will be reported to you by Pam Baron.

The SCAC Appellate Rules Subcommittee met by telephone conference call on Monday, January 8, 2001. As a result of the conference the attached proposal for revision of TRAP 9, by adding a new subdivision 9.7 based largely on Fed. R. App. P. 28(i), was approved by a majority of the subcommittee. During the same conference, a number of revisions were made in proposed redrafts of TRAP Rules 34.6(e), 34.6(f) and 46.5 These matters are now ready for consideration by the full SCAC.

cc: Pam Baron

**Proposed TRAP Changes**

**Changes to TRAP Rule 9**

Amend TRAP Rule 9 by adding the following new subdivision:

Rule 9.7 *Adoption by Reference.*

Any party may join in or adopt by reference all or any part of a brief, petition, response, motion or other document filed in an appellate court by another party in the same case.

**Changes to TRAP 34.6(e)**

Amend TRAP Rule 34.6(e) as follows:

(e) *Inaccuracies in the Reporter"s Record*

(1) *Correction of inaccuracies by agreement.* The parties may agree to correct an inaccuracy in the reporter"s record, including an exhibit, without the court reporter"s recertification.

(2) *Correction of inaccuracies by trial court.* If the parties dispute whether the reporter"s record accurately discloses what occurred in the trial court, or the parties agree that it is inaccurate but cannot agree on corrections to the reporter"s record, or if the accuracy of an exhibit designated for inclusion in the reporter"s record is disputed and the parties cannot agree on what constitutes an accurate exhibit, the trial court must - after notice and hearing - settle the dispute. After doing so, the court must order the court reporter to ~~conform~~ 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 exhibit, and to certify and file in the appellate court a corrected reporter"s record or a supplement.

**(3)** *Correction after filing in appellate court.* If the dispute arises after the reporter"s record has been filed in the appellate court, that court may submit the dispute to the trial court for resolution. The trial court must then ensure that the reporter"s record is made to conform to what occurred in the trial court.

**Changes to TRAP Rule 34.6(f)**

Amend TRAP Rule 34.6(f) as follows:

(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~~

(4) if the parties cannot agree on replacement of the lost, destroyed or inaudible portion of the reporter"s record, or cannot agree on replacement of any lost or destroyed exhibit and the missing exhibit cannot be replaced with a copy that is determined to accurately duplicate the original exhibit with reasonable certainty by the trial court.

**Changes to TRAP Rule 46.5**

Rule 46.5 *Voluntary Remittitur.* If a court of appeals reverses the 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 appeal"s judgment - voluntarily remit the amount ~~that the court of appeals" determined should not have been awarded by the judgment~~ of the damages that the affected party believes will cure the reversible error.

A motion for rehearing may include a conditional request for acceptance by the court of appeals of a

voluntary remittitur and an affirmance of the trial court"s judgment as reduced by the remittitur, without waiving the movant"s complaint that the court of appeals erred in ruling that a reversible error was committed in the court below.

If the court of appeals determines that the request for voluntary remittitur is not sufficient to cure the reversible error, but that remittitur is appropriate, the court must suggest a remittitur in accordance with subdivision 46.3. If the remittitur is timely filed and the court of appeals determines that the voluntary remittitur cures the reversible error, then the remittitur must be accepted and the trial court judgment affirmed.

**NOTE TO CHRIS and to BILL EDWARDS:** This draft does not include the suggestion made by Bill Edwards concerning applicability of the motion for rehearing timetable to voluntary remittitur requests not included in motions for rehearing. This type of language can be included in the second paragraph. Bill, if you have specific language in mind, please send it to us for consideration and inclusion. Thanks, WVDIII

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***Document 2***

**MEMORANDUM**

To: Chip Babcock, SCAC Chair

From: Bill Dorsaneo

Date: January 4, 2001

Re: TRAP Revisions Approved at November Meeting

Based on my notes and my review at the meeting transcript, here are the revised Rules of Appellate Procedure considered by the Advisory Committee on November 17, 2000. This memorandum supplements the memorandum dated November 2, 2000, which covers TRAP Rules 9.5, 10.1(a)5, 13.1, 12.6, 18.1, 26.1(a)(4), and 29.5 (Agenda item 3.2).

cc: Chris Griesel, Rules Attorney

All SCAC Members

**TRAP Changes**

**Changes to TRAP Rule 33.1**

Add the following new paragraph to subdivision 33.1:

(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 the following comment:

Comment to 2001 change. The last sentence of former Appellate Rule 52(d) has been reinstated to clarify the procedure for preserving evidentiary review complaints in nonjury cases.

**Changes to TRAP Rule 49.10**

Rule 49.10 *Length of Motion and Response.* A motion or response must be no longer than 15 pages, exclusive of pages containing the identity of parties and counsel, the table of contents, the index of authorities, the statement of the case, the issues presented, the signature, the proof of service and the appendix.

**Changes to TRAP Rule 55.2**

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

**Changes to TRAP Rule 64.6**

Rule 64.6 *Length of Motion and Response.* A motion or response must be no longer than 15 pages, exclusive of pages containing the identity of parties and counsel, the table of contents, the index of authorities, the statement of the case, the issues presented, the signature, the proof of service and the appendix.

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Document 3

CHANGES APPROVED AT NOVEMBER 2000 MEETING

**PROPOSED CHANGES TO TEXAS RULES OF APPELLATE PROCEDURE**

**RULE 9. PAPERS GENERALLY**
**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.

**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 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) .

Document 4

CHANGES APPROVED AT OCTOBER 2000 MEETING

## 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.

Bill, Chip and Chris:

Attached hereto are the proposed TRAP changes with my additions, which have been included in all capital letters, not for the purpose of emphasis, but so you can see what I have done.

Yours very truly,

Bill Edwards 1-800-475-0971

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## Proposed TRAP Changes

### Changes to TRAP Rule 9

Amend TRAP Rule 9 by adding the following new subdivision:

Rule 9.7 *Adoption by Reference.*

Any party may join in or adopt by reference all or any part of a brief, petition, response, motion or other document filed in an appellate court by another party in the same case.

### Changes to TRAP 34.6(e)

Amend TRAP Rule 34.6(e) as follows:

(e) *Inaccuracies in the Reporter's Record*

(1) *Correction of inaccuracies by agreement.* The parties may agree to correct an inaccuracy in the reporter's record, including an exhibit, without the court reporter's recertification.

(2) *Correction of inaccuracies by trial court.* If the parties dispute whether the reporter's record accurately discloses what occurred in the trial court, or the parties agree that it is inaccurate but cannot agree on corrections to the reporter's record, or if the accuracy of an exhibit designated for inclusion in the reporter's record is disputed and the parties cannot agree on what constitutes an accurate exhibit, the trial court must - after notice and hearing - settle the dispute. After doing so, the court must order the court reporter to ~~conform~~ correct the reporter's record by conforming the text of the record IN ACCORDANCE WITH SUCH SETTLEMENT to what occurred in the trial court or by adding an accurate copy of the exhibit IN ACCORDANCE WITH SUCH SETTLEMENT, and to certify and file in the appellate court a corrected reporter's record or a supplement.

**(3)** *Correction after filing in appellate court.* If the dispute arises after the reporter's record has been filed in the appellate court, that court may submit the dispute to the trial court for resolution. The trial court must then ensure that the reporter's record is made to conform to what occurred in the trial court AS PROVIDED IN 34.6(e)(2).

### Changes to TRAP Rule 34.6(f)

Amend TRAP Rule 34.6(f) as follows:

(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~~

(4) if the parties cannot agree on replacement of the lost, destroyed or inaudible portion of the reporter's record, or cannot agree on replacement of any lost or destroyed exhibit and the missing exhibit cannot be replaced with a copy that is determined to accurately duplicate the original exhibit with reasonable certainty by the trial court.

**Changes to TRAP Rule 46.5**

Rule 46.5 *Voluntary Remittitur.* If a court of appeals reverses the 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 appeal's judgment - voluntarily remit the amount ~~that the court of appeals' determined should not have been awarded by the judgment~~ of the damages that the affected party believes will cure the reversible error.

A motion for rehearing may include a conditional request for acceptance by the court of appeals of a voluntary remittitur and an affirmance of the trial court's judgment as reduced by the remittitur, without waiving the movant's complaint that the court of appeals erred in ruling that a reversible error was committed in the court below.

If the court of appeals determines that the request for voluntary remittitur is not sufficient to cure the reversible error, but that remittitur is appropriate, the court must suggest a remittitur in accordance with subdivision 46.3. If the remittitur is timely filed and the court of appeals determines that the voluntary remittitur cures the reversible error, then the remittitur must be accepted and the trial court judgment affirmed.

A VOLUNTARY REMITTITUR FILED WITH THE COURT OF APPEALS IN ACCORDANCE WITH THIS RULE WILL BE TREATED AS A TIMELY FILED MOTION FOR REHEARING FOR PURPOSES OF RULE 53.7.

As we discussed, there may be other reasons as well for which we would want to treat the filing of a voluntary remittitur as a timely filed motion for rehearing.

NOTE RE: TRAP 46.5 - The last sentence of TRAP 46.5 was omitted from the draft.

COURT OF APPEALS
SECOND DISTRICT OF TEXAS

CHIEF JUSTICE
JOHN HILL CAYCE, JR.

TARRANT COUNTY JUSTICE CENTER
401 W. BELKNAP, SUITE 9000
FORT WORTH, TEXAS 76196

DIRECT DIAL:
(817) 884-2170

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# MEMORANDUM

To: Professor Bill Dorsaneo
From: Chief Justice John Cayce
Date: December 27, 2000
Re: Elimination of Mandatory Parallel Briefing Tracks for Cross-Appeals

I am writing to ask that the appellate rules subcommittee consider recommending to the entire SCAC that the briefing rules be amended to eliminate mandatory parallel briefing tracks for ordinary cross-appeals in the courts of appeals.

Under the current appellate rules, any party who seeks to alter the trial court's judgment must file a notice of appeal and, because they are an "appellant," must file an appellant's brief. TEX. R. APP. P. 3.1(a), 25.1(c), 38.6(a), 38.8(a). As you know, one consequence of these rules is that when a cross-appeal is filed the same parties file twin briefs as *both* appellant and appellee. For example, in a simple two-party appeal in which the prevailing party in the trial court seeks a more favorable award of attorney's fees, and thus files a cross-appeal to complain of the attorney's fees award, the current rules permit a combined total of six briefs: two appellant's briefs, two appellee's briefs, and two reply briefs. By contrast, typical briefing under the former rules would have produced only three briefs (an appellant's brief, an appellee's brief containing a cross-point, and a reply brief).

Based on my unscientific poll of intermediate appellate court justices and appellate lawyers, no one favors parallel briefing in ordinary cross-appeals. Although the problems associated with parallel briefing are not unmanageable, processing twin sets of briefs filed by different parties having identical party designations is often confusing, inconvenient and wasteful. I, therefore, recommend that we return to the former practice of allowing cross-appeals in the courts of appeals to be briefed in the appellee's brief, rather than a separate appellant's brief. To accomplish this, I suggest the adoption of a rule similar to FED. R. APP. P. 28(h) which designates the first party who files a notice of appeal as the

"appellant" for briefing purposes. Under this federal rule, when a cross-appeal is filed, there is one appellant and one appellant's brief. Specifically, that rule provides in pertinent part:

> If a cross-appeal is filed, the party who files a notice of appeal first is the appellant for the purposes of this rule . . . . 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. With respect to appellee's cross-appeal and response to appellant's brief, appellee's brief must conform to the [requirements for the appellant's brief].

FED. R. APP. P. 28(h). Fifth Circuit Local Rule 28 goes on to provide that the appellee/cross-appellant should file "a single brief containing both the argument as an appellant and the response to the opening brief. The appellant/cross-appellee [may then] file a combined response and reply." 5th CIR. R. 28.4.

In cases involving multiple appellants, or where the nature and complexity of the cross-appeal justifies a separate briefing track for the cross-appellant, the courts of appeals should have the discretion to order separate briefing tracks, or make any other order "necessary for a satisfactory submission of the case." *See* TEX. R. APP. P. 38.9. We may also permit longer briefs under TEX. R. APP. P. 38.4.

Incidentally, I am not suggesting that the supreme court briefing rules be changed. Although there is parallel briefing in the supreme court when two or more parties file a petition for review, cross or conditional complaints in the supreme court are less common than in the courts of appeals and, under the petition for review procedures, probably result in fewer briefs and related documents to manage.

cc: Charles L. "Chip" Babcock
Chris Griesel, Rules Attorney

# PROPOSED ADDITION TO RULE 194.2

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

(1) 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 for each financial institution in which 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 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.

# 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 08/3 1 /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, profiteering, 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 rule shall be made by furnishing the information to the opposing party's attorney of record or, if the

TARRANT

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 in 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 espousal 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 full 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,1099s, K-ls or other evidence of income for such a year.

5 . Financial statements filed by the parties with stay 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 parry 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 tried 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.

DALLAS

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).

## PROPOSED ADDITION TO RULE 194.2

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

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

(2)responding party's federal income tax returns for the two previous years, including schedules and amendments or 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 last statement from any account in a financial institutional bank or brokerage accounts in which responding party claims an interest;

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

(3)the last financial statement prepared for submitted to 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.

MAR01-00156

## PROPOSED ADDITION TO RULE 194.2

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

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

(2) responding party's federal income tax returns for the two previous years, including schedules and amendments oramendments, 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 recentlast statement from any account in a financial institutionall bank or brokerage accounts in which responding party claims an interest;

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

(3) the last financial statement prepared forsubmitted to 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.

MAR01-00158

## PROPOSED AMENDMENT TO RULE 194.5

No Objection or Assertion of Work Product. No objection or assertion of work product is permitted to a request to this rule/except that a party to a pre or post marital agreement may object to production under (m) if such objection would be proper under these rules.

MAR01-00155

## PROPOSED AMENDMENT TO RULE 194.5

No Objection or Assertion of Work Product. No objection or assertion of work product is permitted to a request to this rule exceptrule/except that a party to a pre or post marital agreement may object to production under (m) if such objection would be proper under these rules.

MAR01-00157

**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.

- **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**

- Final Judgment.
    - **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.**

    - **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**

- **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)]**

- **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

- 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:

- The date the judgment or appealable order was signed;

- **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**
- **the date upon which either the party or its attorney first**
  - **received the notice required by paragraph (e)(3) of this rule; or**
  - 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.**

- **Time to File Motion, Amendments. A motion seeking to establish the application of paragraph (e)(4) may be filed at any time.**
- **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.**
- Order. After hearing the motion, the court must sign a written order expressly finding:
  - **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**
  - 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)**

- *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

- 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:
    - within thirty days after the judgment is signed, or
    - if any party has timely filed a (i) motion for new trial, (ii) motion to modify the judgment or any other motion that requests relief that could be included in the judgment, (iii) motion to reinstate a judgment after dismissal for want of prosecution, or (iv) request for findings of fact and conclusions of law, within on[e] hundred and five days after the judgment is signed.

TRAP 26.1(a)(2)

a motion to modify the judgment or any other motion that requests relief that could be included in the judgment;

**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.**

**MEMORANDUM**

TO: Hon. Sarah Duncan, Subcommittee Chair, Subcommittee TRCP 300-330

cc: Charles Babcock, Supreme Court Advisory Committee Chair

Hon. Nathan Hecht, Rules Member of the Texas Supreme Court

All members of the SCAC

FROM: Bill Dorsaneo

Date: January 26, 2001

Re: Final Judgment Problems

Based on our last several meetings and a careful consideration of the specific problems presented by our practice of appealing final judgments, but of treating a series of separate orders that finally dispose of all claims and parties as the one final and appealable judgment, here are my specific ideas and the reasons for them.

1. No Need to Address Appealing Interlocutory Orders

We need not complicate the final judgment problem by incorporating coverage or dealing with the separate problems involved in appealing interlocutory orders as provided by statute. These matters have caused no comparable problems and are fairly well under control. It may not always be easy to identify what constitutes an appealable temporary injunction, but these issues are simple by comparison to our final judgment problems. *See* Tex. Civ. Prac. & Rem. Code ß 51.014 (2000).

- The *Runnymede* Problem, the *Quanaim* Problem, the "Mother Hubbard" Problem, & Magic Language Issues

The final judgment problem has a number of different aspects, but our present concern involves three interrelated difficulties.

First, the *Runnymede* problem, which, as Justice Clarence Guittard explained to the SCAC some years ago, is based on the principle that a final judgment is or can be composed of a series of separate orders, makes it easy for a party *not* to recognize when an order finalizes the litigation, thereby forfeiting the right to appeal. *See Runnymede Corp. v. Metroplex Plaza, Inc.*, 543 S.W.2d 4, 5 (Tex. Civ. App.-Dallas 1976, writ ref'd).

In *Runnymede*, the Dallas Court of Appeals ruled that an order sustaining a plea in abatement finalized the case because it disposed of the last remaining claim, even though it did not expressly incorporate or even refer to a previous interlocutory order that dealt with the other defendant.

Although a so-called "final judgment" was signed months later, which expressly incorporated both of the previous orders and recited that both were interlocutory, the Dallas Court held that the latter order was a nullity because it was signed after the expiration of the trial court's plenary power as computed from the date of the abatement order.

In 1995, Chief Justice Guittard explained the *Runnymede* decision and its problems to the SCAC as follows:

Let me give a little historical background here. As I understand it, it used to be the law that you didn't have a final judgment unless you had a document to dispose of all claims and all parties; and if you didn't have that kind of a document, you have to get one before you can appeal. Now, the Supreme Court and some of the other courts began to say that, no, you don't have to have a final -- a complete judgment if you have a series of judgments which taken together dispose of all claims and all parties.

Now, that kind of holding came up in cases where there was a contention that the appeal ought to be dismissed because there was no final judgment that disposed by its terms of all claims and all parties. Now, there came before the Dallas Court of Appeals a case where they had the opposite situation in *Runnymede* against *Metroplex Plaza*. In that case they had one summary judgment disposing of one party, a second summary judgment disposing of the other party, which didn't refer to the first one, and then later another judgment which embodied both of the previous judgments. And the contention was made there that the bill ought to be dismissed because the second order was final and, therefore, the [appeal] had to be filed within 30 days after that judgment, that the last judgment was, in effect, a nullity.

Now, as I sat on the court that considered that case it appeared to me that there hadn't been any case which actually said that a case had to be dismissed in that situation because it wasn't filed in time. However, I felt bound by the other cases to hold that the case had to be dismissed because a second order was valid, was final, and I was not satisfied with that disposition of the case, so I wrote an opinion in *Runnymede* which put it right straight to the Supreme court as to whether or not this case had to be dismissed because it had not been-the [appeal] had not been filed within 30 days after the second order. *And I was hoping I would get reversed, but the Supreme Court refused without qualification* . . . . It seems to me that if you follow the rule that the last judgment has to embody all of the provisions of the previous judgment . . . then if you have the situation that prevailed in these earlier cases there is no great harm done because if the judgment is not final, you send it back and you can get a final order. Nobody is hurt very much.

Whereas, in the second situation where there is an order that disposes of the second of two separate claims and then a subsequent order which embodies both if-in that situation if the losing party doesn't take an appeal from that second order, which he might have not really understood was the final order, he's out. He's completely gone. And so it seems like to me that the preferable rule would be to require a final judgment which embodies all claims and all parties and then it's clear to everybody that that's the judgment that the appeal ought to be taken from and that that's more a user-friendly rule than the rule that the Supreme Court has developed in these other cases.

Honorable Clarence A. Guittard, Texas Supreme Court Advisory Comm. (1995) (emphasis added).

Justice Guittard's suggestion dealing with the *Runnymede* problem, which is embodied in a proposal for redrafting and amending Civil Procedure Rule 300(b), is discussed below. In my view, both of the situational difficulties mentioned - a too late appeal - and - a premature appeal of a nonfinal judgment will be ameliorated, if not eliminated, by requiring the addition of language making it very clear that the order containing the language is ripe for appeal. As shown at the end of this memorandum, I have attempted to incorporate suitable finality language in a revision of the Guittard proposal, which originally was approved and recommended to the Court for adoption by the SCAC in 1996.

Second, as reflected in cases like *Quanaim v. Fras. Res & Catering*, 17 S.W. 3d 30 (Tex. App.-Houston [14th Dist.] 2000, pet. denied), the use of multiple orders in the same case often has another somewhat less catastrophic attribute: it is hard to know how to interpret the orders. Civil Procedure Rule 301 provides that "[o]nly one final judgment shall be rendered in any cause except where it is otherwise specially provided by law." Tex. R. Civ. P. 301. Aside from the obvious difficulty of interpreting this requirement in the context of multiple court orders disposing of different claims and parties in the same case, another equally serious problem arises if the multiple orders deal with the same claim or claims differently and it is not entirely clear that a subsequent order is intended to supersede an earlier order. At one time, it was generally held that if there was nothing in the record already showing that the first order was vacated, the second judgment was a nullity, even though it was rendered while the trial court retained plenary power over its judgment. *See Mullins v. Thomas*, 150 S.W.2d 83 (Tex. 1941). In fact, some courts of appeals strengthened this rule by requiring an "express and specific" order vacating, setting aside, modifying, or amending a judgment before a new order would be given effect. *See Poston Feed Mill Co. v. Leyva*, 438 S.W.2d 366, 369 (Tex. Civ. App.-Houston [14th Dist.] 1969, writ dism'd), quoted with approval in *McCormack v. Guillot*, 597 S.W.2d 345, 346 (Tex. 1980). Subsequent Texas Supreme Court decisions reject this approach and presume or infer that a second judgment was intended to supersede its predecessor, regardless of the nature of the modification. *See Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308, 310-311 (Tex. 2000); *see also Quanaim v. Frasco Rest. & Catering*, 17 S.W.3d 30, 38-40 (Tex. App.-Houston [14th Dist.] 2000, pet. denied) ("Inasmuch as the Texas Supreme Court has found in *Lane* that a motion for sanctions proposed a 'change' to the trial judgment under Rule 329b(g), we are persuaded that the trial court's entry of a subsequent order identifying different grounds for summary judgment should also be construed as a 'change' sufficient to restart the appellate timetable under Rule 329b(h).").

Unfortunately, however, in *Quanaim*, the court of appeals decided that the last order, adding additional grounds for summary judgment, superseded the earlier orders, which were based on other grounds. The court of appeals did so because the last order did not make it clear that the earlier ones were *not* being superseded. As Justice Hecht has explained in email correspondence, it is very unlikely that this is, in fact, what the trial judge intended, but who knows? The problem is that the last order did not try to convey the actual contours of the one final judgment. As explained further below, this problem can be addressed by telling trial judges that they should explain things better in the order that finalizes the case and that makes the order ripe for an appeal, but it cannot be solved by the use of any kind of magic language.

The third major problem, which is termed the Mother Hubbard problem in this memorandum, exists because the magic language proposed by Chief Justice Robert W. Calvert in *North East Independent School District v. Aldridge*, 400 S.W.2d 893 (Tex. 1966), is insufficient to advise the parties of need for action and problematic in a number of other respects. In *Aldridge* Chief Justice Calvert, speaking for a unanimous court, states the following:

Analysis of the decisions we have discussed is sufficient to lead us to the statement of a rule for determining, in most instances, whether judgments in which parties and issues made by the pleadings

are not disposed of in express language are, nevertheless, final for appeal purposes. When a judgment, not intrinsically interlocutory in character, is rendered and entered in a case regularly set for a conventional trial on the merits, no order for a separate trial of issues having been entered pursuant to Rule 174, Texas Rules of Civil Procedure, it will be presumed for appeal purposes that the Court intended to, and did, dispose of all parties legally before it and of all issues made by the pleadings between such parties. A claim duly severed under Rule 41 is a 'case' within the meaning of the foregoing rule. The rule will be subject to the exception created by *Davis v. McCray Refrigerator Sales Corporation*; but it will apply to separate claims of the plaintiff, cross-actions and counterclaims by defendants against the plaintiff, cross-actions by defendants against other defendants and cross-actions by defendants against third-party defendants. *Of course, the problem can be eliminated entirely by a careful drafting of judgments to conform to the pleadings or by inclusion in judgments of a simple statement that all relief not expressly granted is denied.*

*Id.* at 897-98 (emphasis added).

The italicized language, however, has caused judges unintentionally to deny claims that have not actually been adjudicated and finalize cases in ways that have caused parties to lose substantive rights. This problem has been exacerbated by the Texas Supreme Court's attempt to solve it through the adoption of a bright line test. *See, e.g., Mafrige v. Ross*, 866 S.W.2d 590 (Tex. 1993); *Lehmann v. Har-Con Corp.*, 988 S.W.2d 415 (Tex. App.-Houston [14th Dist.] 1999, pet. granted).

The *Mafrige* court found that the inclusion of Mother Hubbard language, or its equivalent, in orders granting summary judgment, as suggested by Chief Justice Calvert in *Aldridge*, makes otherwise partial summary judgments final for purposes of appeal. In so finding, the *Mafrige* court held that:

If a summary judgment order appears to be final, as evidence by the inclusion of language purporting to dispose of all claims or parties, the judgment should be treated as final for purposes of appeal. If the judgment grants more relief than requested, it should be reversed and remanded, but not dismissed. We think this rule to be practical in application and effect; litigants should be able to recognize a judgment which on its face purports to be final, and courts should be able to treat such a judgment as final for purposes of appeal.

*Mafrige*, 866 S.W.2d at 592.

Similarly, in *Inglish v. Union State Bank*, 945 S.W.2d 810 (Tex. 1997) (per curiam), the Texas Supreme Court affirmed *Mafrige* holding that it is error for an appellate court to fail to apply *Mafrige* in situations where a summary judgment appears final but is not appealed. *See id.* at 811.

In *Lehmann v. Har-Con Corporation*, 988 S.W.2d 415 (Tex. App.-Houston [14th Dist.] 1999, pet granted), however, the Fourteenth District Court of Appeals recognized the "unfortunate consequences,"*Id.* at 416, and "unfairness of the rule" established in *Mafrige* and affirmed in *Inglish*, *Id.* at 417. In fact, the *Lehmann* court argued:

In short, *Mafrige* has created several problems: 1) it is catching the parties by surprise-we have had more than a few appeals dismissed on the basis of *Mafrige*; 2) it exalts form over substance; and 3) in more than a few situations, it ignores common sense. Under *Mafrige* and its progeny, the mere presence of the Mother Hubbard clause transforms an otherwise interlocutory summary judgment into a final judgment. Our emphasis should not be on the form of the judgment. Rather, our emphasis should be to seek the truth. The truth lies, not in the form, but in the substance of the summary judgment motion and response, together with evidence of the intent of the parties and the court.

If *Mafrige* remains the law, parties to a summary judgment proceeding should never use a Mother Hubbard Clause . . . . For, by using a Mother Hubbard Clause, they may inadvertently dismiss parties

and/or causes of action never addressed or intended to be addressed in the motion. If *Mafrige* remains the law, even parties who were not the subject of a motion for summary judgment must scrutinize summary judgments to ensure that they do not contain a Mother Hubbard clause. The failure to do so, even when a motion for summary judgment was not filed against them, may mean that they find their cause of action gone.

*Lehmann,* 988 S.W.2d at 418 (quoting *Mafrige*, 866 S.W.2d at 592 (citing *Terr v. Duddlesten*, 664 S.W.2d 702, 704 (Tex. 1984) ("a Mother Hubbard has 'no place' in a partial summary judgment and should not be used")).

The *Lehmann* court concluded by "respectfully urg[ing] the Texas Supreme Court to reconsider the harshness of its bright line rule imposed by *Mafrige* and its progeny." *Lehmann*, 988 S.W.2d at 418.

These are the problems that do need attention. Like the *Runnymede* problem, but unlike the *Quanaim* problem, the use of better finality language will go a long way toward eliminating the insufficiency of Calvert's Mother Hubbard language. As explained in the next section of this memorandum, however, the finality language must be selected carefully or it will certainly invigorate other problems.

3. The Final Judgment Rule, Presumed Finality and Mother Hubbard

Chief Justice Calvert's *Aldridge* opinion provides a useful and, I believe, necessary starting point for the attempted resolution of the three problems discussed above, without doing damage to the one final judgment rule. In the opinion, as reflected in the first part of the long quotation from *Aldridge* on page 4 of this memorandum, Chief Justice Calvert identifies certain orders as presumptively final for appeal purposes and excludes others. He does not talk about summary judgment or sanctions orders because he had not often encountered these modern procedural problems. Nonetheless, Chief Justice Calvert's adoption and restriction of a rule of presumed finality for conventional trials is an excellent idea. Although it is not idiot proof, it preserves the main idea of required finality for appeal and humanizes the operation of the final judgment rule by not requiring parties and judges to deal expressly with claims they have overlooked despite completion of a conventional trial on the merits, probably because the claims are not considered to be of any continuing importance. In my view, it would be a bad idea to extend this idea to summary judgment practice because summary judgment is frequently not meant to be dispositive of the whole case.

We need to retain the one final judgment rule's approach to appealability on prudential grounds. Interlocutory orders should not generally be appealable immediately. To do otherwise, would not only violate the jurisdictional statutes making final judgments appealable, *see* Tex. Civ. Prac. & Rem. Code ß 51.012 (2000), but would also promote the very bad idea of allowing piecemeal appeals in all cases. Whatever may be said about the special problems of probate litigation, receivership proceedings, and other cases that involve more than one final judgment, our appellate system would probably be so overtaxed by allowing interlocutory orders to be routinely treated as final judgments by the expedient of adding magic language designed to avoid our other problems, that it would not function. In other words, merely saying that an order is final when it is not creates a more serious problem than the one it seeks to cure. That is part of what I mean when I say that "magic language" alone and "magic orders" are inadequate solutions.

As I read your subcommittee's draft, it requires *every* order, not made immediately appealable by statute or special finality principles applicable to probate and receivership cases, to include language denying all relief that is not or has not been expressly granted. This is a very, very bad idea. Trial judges should not be encouraged or allowed to automatically include language denying all remaining claims unless that is what the trial judge really intended to do. Any "magic language" designed to make a case appealable should be used only when the case is really over, not to finalize it for the sake of finality. Trial judges should not include such language unless they believe that they have actually considered and disposed of all the parties and all the issues. The desire for a clear starting point for

post-trial motions and appeals (hence the magic language) should not be allowed to operate to sacrifice the substantive rights of the litigants by denying relief before the parties' rights are actually litigated to conclusion.

Magic finality language creates additional problems when it purports to "deny" claims. It is not all clear what such a judgment means. Some courts have held that the Mother Hubbard language does not dispose of the claims one way or the other but only makes the case appealable. Other courts have held that the claims are actually denied, treating the Mother Hubbard language as indicating an actual decision on the merits rejecting the claim. The application of preclusion doctrines may kick in, prohibiting later litigation of claims that were not, in fact, considered by the court the first time. In addition, the "all claims denied" approach creates unnecessary procedural issues. For example, would a party whose case is torpedoes by such general language after only one part of the case was litigated be required to raise the issue in the trial court in order to preserve error for appeal? Would the appellant simply be able to complain about the fact that the claim was disposed of without actual consideration, or would the accuracy of the "denial" be the issue? What if an earlier order of the court addresses those claims in a different way?

Magic language should never be a knee-jerk aspect of an order. While it has the superficial appeal of creating a clear starting point for plenary power and appeal deadlines, it creates a number of additional problems that could be avoided by a fuller approach to the problem of finality. The next section recommends what seems to me to be the best solution to the interlocking problems.

Your subcommittee has proposed other, better, clearer language than the Mother Hubbard clause suggested by Chief Justice Calvert. I believe that such language is a partial solution, and will help remedy the problems caused by the ambiguity of Chief Justice Calvert's choice of words. Trial judges may continue to misuse the Mother Hubbard language in summary judgment cases, but unless the clearer finality language is also included, the *Mafrige* problem will not go away.

- One Final Writing

The best way to deal with all of these problems is to require the one final judgment to be memorialized in one writing that also contains some of the better magic language developed by your subcommittee, Judge McCown, Buddy Low, and Carl Hamilton while retaining our traditional definition of a final judgment and Chief Justice Calvert's limited presumption of finality by implication in cases that are conventionally and completely tried on the merits.

As Chief Justice Guittard stated:

[I]t seems like to me that the preferable rule would be to require a final judgment which embodies all claims and all parties and then it's clear to everybody that that's the judgment that the appeal ought to be taken from and that that's more a user-friendly rule than the rule that the Supreme Court has developed in these other cases.

Honorable Clarence A. Guittard, Texas Supreme Court Advisory Comm. (1995).

As explained above, however, in my view the two proposals developed by the subcommittee suffer from three significant shortcomings: (a) they purport to apply to both interlocutory and final orders; (b) they avoid deciding what constitutes a final judgment; and (c) they do not embrace Chief Justice Calvert's idea of finality by implied disposition as set forth in *North East Independent School District v. Aldridge*, 400 S.W.2d 893 (Tex. 1996).

This takes me back to the provisions of proposed Civil Procedure Rule 300(b) as set forth in the

SCAC report made to the Texas Supreme Court in 1996. Proposed Rule 300(b) states:

**Rule 300. Judgments, Decrees and Orders**

**(b) Final Judgment**

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

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

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

Tex. R. Civ. P. 300(b) (Proposed 2000), *available at* Recodification Draft of the Texas Rules of Civil Procedure, Rule 100(b) http://www.smu.edu/~wdorsane/PDF_Files/recod_all_sec.pdf (March 2, 2000).

I recommend changing paragraph (3) in the following way to express its intended meaning, and adding a new paragraph (4) as shown: below.

(3) *Draft of Final Judgment; Incorporation of Separate Orders.* When

different parties or separate claims are disposed of by separate orders, no one of which by its terms disposes of all parties and claims, none of the orders is final in the trial court or appealable as a final judgment until ~~a judgment~~ an additional order is signed that expressly or by implication disposes of all parties and claims and includes the title and finality language required by paragraph (4) of this subdivision (b). A final judgment may incorporate by reference the provisions of an earlier signed interlocutory order, but if any provision of the earlier order conflicts with the final judgment, the final judgment controls, except that no relief previously granted may be nullified by a general provision in the final judgment that all relief not previously granted is denied.

(4) *Title of Order; Notice of Finality.* A final judgment must be entitled "Final Judgment" and the first paragraph of the judgment or order must contain the following statement: "This is a final and appealable judgment for purposes of the accrual of pre-and postjudgment interest, the enforcement of orders and judgments, the time for filing postjudgment motions pursuant to Texas Rule of Civil Procedure 329b, the notice required Texas Rule of Civil Procedure 306a(3), and the time for perfecting an appeal pursuant to Texas Rule of Appellate Procedure 26."

Unless the trial court's written draft of the final judgment complies with the requirements of this paragraph, it is not final in the trial court or appealable as a final judgment.

5. The Balance of the Guittard-Hunt Report

As noted above, in 1996 a complete report concerning the preparation of judgments and the procedures for postverdict motion practice was submitted to the Court by the SCAC after considerable debate and discussion. My recollection is that the full SCAC spent nearly a year on the report.

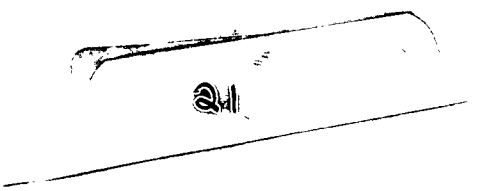
As incorporated into the Recodification Draft (Proposed Rules 100-105), the recommended rules address a number of current problems with the current civil procedure rules, including the final judgment problem that we are debating now.

I mention this work product for two reasons.

**First**, one of the major problems with the Texas Rules of Civil Procedure results from their piecemeal revision over the period of their existence. The Chief Justice and the Court is well aware of this aspect of reality. Nonetheless, we appear to be engaging in piecemeal problem solving once again.

**Second**, there is every reason to use the SCAC's prior work as a basis for additional recommendations to the Court. Proposed Rule 301 (Recodification Draft Rule 101) addresses and deals with the tricky problems of postverdict motion practice, explaining how the various motions work in connection with one another. Proposed Rule 302 (Recodification Draft Rule 102) spells out the details of new trial practice clearly for the first time. Proposed Rule 303 (Recodification Draft Rule 103) does the same thing for preservation of complaints. Finally, Proposed Rules 304 and 305 (Recodification Draft Rules 104 and 105) deal respectively with timetables and plenary power. These proposed rules are certainly not perfect, but it would be foolish to ignore them now.

**Third**, although I included the magic language proposal in paragraph (b)(4) it could also be incorporated in subdivision (c) of proposed Rule 300 (Recodification Draft Rule 100). I consider this to be a drafting issue.



# Supplemental Memorandum

Recognizing that one's person clear language is "jabberwocky"[1] to others or can be "jabberwocky" to others, after reviewing the Texas Supreme Courts decision in *Lehmann v. Har-Con Corp.*, 44 Tex. Sup. Ct. J. 364 (2001), although I do not believe that the opinion makes a major difference in the proposal submitted to you earlier, the draft "magic" language contained in the proposal could be replaced with Justice Hecht's more abbreviated formulation. Justice Hecht's opinion in *Lehmann* recommends a statement like "this judgment finally disposes of all parties and all claims and is appealable." Justice Hecht's sentence might itself be improved by the addition of the words "in this case" after the word "claims," but otherwise it works for me in lieu of the longer version.

1. A nonsense poem by Lewis Carroll is entitled "Jabberwocky".

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Mr. Chris Griesel
Supreme Court of Texas
P. O. Box 12248, Capitol Station
Austin, Texas 78711

Dear Chris:

After I returned from our last meeting, I thought more about the suggestion that Judge Hecht made concerning final judgment and making it clear when a judgment is actually a final judgment. The more I thought of it, the more I began to realize that is probably the best approach rather than having it in an instrument that actually gives specific relief or denies relief. I am enclosing herein draft of a new rule that I would propose.

I ask that you look over this and talk with Justice Hecht about it. If the two of you think it is worth following up, I will mail it to Sarah. Now I will explain the various elements.

In the first sentence I used the word "cause" instead of case because if there is a severance there would be separate causes but they could be considered the same case and quite often a case is severed into a separate cause so that it will be final.

Skipping down to (a) 4 - I want this final judgment to be brief and be a separate and stand alone judgment, not combined with any order that gives any specific relief. The reason for this is there can be a "final decree of divorce" or "judgment of annulment" or "judgment of adoption" and that will not interfere with the way those particular items are captioned. Yet, in order for this to be final, you would have to have the separate document entitled "Final Judgment." All the cases referred to above do often speak of final judgment, although they are captioned differently.

Chris, look this over and give me a call.

Sincerely,

Buddy

Buddy Low

BL:cc

## RULE 301a - FINAL JUDGMENT

When all claims of all parties in the captioned cause have been ruled on by the court, a final judgment shall be rendered. Only one final judgment shall be rendered in any cause except where is otherwise specifically provided by law [take this out of Rule 300 and insert it here].

(a) Form - The final judgment shall:

1. Be captioned "Final Judgment."

2. State that the case is finished and final, and this is a final judgment for all purposes of the Rules of Civil Procedure, including, but not limited to, (a) plenary power of the court; (b) timetables for all motions following final judgment; (c) timetables for appeal.

3. State that all relief not heretofore granted or denied by judgment or order currently in effect is hereby denied.

4. Not be combined with any order or judgment that grants or denies any specific relief other than the relief specified herein.

(b) Effect -

1. All relief not heretofore granted or denied by judgment or order currently in effect is denied.

2. The case is finished and final, and this is a final judgment for all purposes of the Rules of Civil Procedure, including, but not limited to, (a) plenary power of the court; (b) timetables for all motions following final judgment; (c) timetables for appeal.

(c) Compliance -

1. No other order or judgment shall be captioned "Final Judgment" or contain the words "Final Judgment." If an order or judgment does not comply with the requirements of this rule, it shall not be a final judgment for any purpose.

2. Other than the words "Final Judgment" as used herein, the exact language used to comply with this rule may vary slightly as long as clear notice is expressed as to the items stated in item (b) (Form) above and said order or judgment does not violate any of the requirements of this rule. However, the following language, appearing alone in a final judgment, following the cause number, the court and the style of the case, shall be sufficient to comply therewith:

Final Judgment

It having come to the attention of the court that all claims of all parties in the captioned cause have been ruled on by the court, and Final Judgment should be rendered, it is therefore ORDERED that this case is finished and final and that this is a Final Judgment for all purposes of the Rules of Civil Procedure, including, but not limited to, (a) plenary power of the court; (b) timetables for all motions following the final judgment; (c) timetables for appeal. It is further ordered that all relief not heretofore granted or denied by judgment or order currently in effect is hereby denied.

(d) Notice - Notice of the signing of final judgment shall be given as provided in Rule 306a.

Note: After 301a is passed, the following rules should be amended:

Rule 301 - Amend first sentence: The judgment of the court, except final judgment....
Rule 305 - Amend: "a proposed judgment, including final judgment" as to each place where the word "proposed judgment" is used.
Rule 306 - Amend: "the entry of judgment, except final judgment, shall contain....

# IN THE SUPREME COURT OF TEXAS

No. 99-0406

Douglas Lehmann and Virginia Lehmann, Petitioners

v.

Har-Con Corporation, Respondent

***- consolidated with -***

No. 99-0461

Melvin G. Harris and Helena M. Harris, Petitioners

v.

Harbour Title Company, Respondent

On Petitions for Review from the

Court of Appeals for the Fourteenth District of Texas

[caption]

ORDER

On this 12 day of March , 1998 came on to be considered the Motion for Summary Judgment of HAR-CON CORPORATION. After considering the motion, the response, the summary judgment evidence and the argument of counsel, the Court is of the opinion that the motion should be in all things granted. It is therefore,

ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment by HAR-CON CORPORATION be and it is hereby GRANTED.

All relief not expressly granted herein is denied.

Signed this the 12 day of March , 1998

s/

JUDGE PRESIDING

[s/ Attorneys for Har-Con Corporation]

The order did not reference Virginia's claims on behalf of her son against Har-Con, although it would appear that Har-Con's summary judgment on its indemnity claim would effectively bar recovery for Virginia's son. The order also did not reference Virginia's son's claims against the University, which would not appear to be affected by Har-Con's summary judgment. The order contained a "Mother Hubbard" clause stating that "[a]ll relief not expressly granted herein is denied."

The district clerk advised the Lehmanns by postcard that an interlocutory summary judgment order had issued. The record does not reflect whether the parties received a copy of the actual order after it was signed. The Lehmanns tell us that the practice of the district clerk in Harris County is not to send copies of orders to the parties but to give parties notice by postcard when orders are signed. The notice does not completely describe the content of the order.

The Lehmanns appear to have believed that the summary judgment order was interlocutory because they moved to sever it and Har-Con's claims into a separate action, ostensibly to make the summary judgment final. The court granted the motion to sever on the twenty-fifth day after the summary judgment order was signed. Twenty-eight days after the severance order was signed, the Lehmanns

noticed their appeal from the summary judgment order.

If the summary judgment was not final until the severance order was signed, then the Lehmanns' appeal was timely. But the court of appeals held that the summary judgment order was final when it issued because of the Mother Hubbard clause and that the order was not modified by the severance so as to restart the time for perfecting appeal.(7) Because the Lehmanns did not perfect appeal within thirty days of the signing of the order as prescribed by the rules of appellate procedure,(8) the court dismissed the appeal for want of jurisdiction. In holding that the summary judgment order was final, the court followed our decision in *Mafrige*, although the court expressed concerns that the inclusion of a Mother Hubbard clause in an otherwise plainly interlocutory order should not make the order final.

We granted the Lehmanns' petition for review and consolidated it for argument and decision with *Harris v. Harbour Title Co.*(9)

*Harris v. Harbour Title Co.*

Melvin and Helena Harris sued five defendants -- Greenfield Financial Corp. and Larry J. Greenfield ("the Greenfield defendants), Tim Rice and Rice Development, Inc. ("the Rice defendants"), and Harbour Title Co. -- in the district court in Harris County on breach-of-contract and tort claims arising from a conveyance of real property. The court granted an interlocutory default judgment against Tim Rice on liability only, leaving for later a determination of the damages to be assessed against him. The Harrises nonsuited their claims against the Greenfield defendants. The fifth defendant, Harbour Title Co., moved for summary judgment, which the court granted with the following order:

[caption]

Order Granting Harbour Title Company's

Motion for Summary Judgment

On August 28, 1998, came on to be heard the Motion for Summary Judgment of one of the defendants, Harbour Title Company, and the Court having considered the Motion, together with any response, and the supplemental briefing filed by the parties to date is of the opinion that said Motion is with merit and should be granted. It is therefore

ORDERED that defendant Harbour Title Company's Motion for Summary Judgment is in all things granted; it is further

ORDERED that the Plaintiffs, Melvin G. Harris and Helena M. Harris take nothing as to any of their claims against Harbour Title Company.

All relief requested and not herein granted is denied.

SIGNED this 15 day of October 1998.

s/

JUDGE PRESIDING

APPROVED AND ENTRY REQUESTED:

[s/ Attorneys for Harbour Title Company]

Although the order did not reference the Harrises' pending claims against the Rice defendants, it nevertheless contained a Mother Hubbard clause stating that "[a]ll relief requested and not herein granted is denied."

The Harrises assert that they received notice of the order by a postcard that described the order as an interlocutory summary judgment, but the postcard is not in our record. The record does not reflect whether the parties obtained a copy of the order after it was signed. It appears that the district clerk followed her usual procedure of notifying the parties by postcard in lieu of providing copies of the order.

The district court apparently did not consider the summary judgment order to be final; forty-six days after it was signed, the court generated a form order setting the case for trial the next year. The Harrises, too, appear to have believed the summary judgment to be interlocutory; two weeks after the order issued setting the case for trial, the Harrises obtained what was captioned a "Final Default Judgment" against the Rice defendants. Twenty-five days later the Harrises noticed their appeal from Harbour Title's summary judgment.

If Harbour Title's summary judgment did not dispose of the Harrises' claims against the Rice defendants, and the default judgment against those defendants was the final order in the case, then the Harrises' appeal was timely. But following *Mafrige*, as it had done in *Lehmann*, the court of appeals concluded that the summary judgment order was final and therefore dismissed the appeal as not having been timely perfected. We granted the Harrises' petition for review and consolidated it with *Lehmann* for argument and decision.(10)

## II

### A

Though its origins are obscure and its rationale has varied over time,(11) the general rule, with a few mostly statutory exceptions, is that an appeal may be taken only from a final judgment.(12) A judgment is final for purposes of appeal if it disposes of all pending parties and claims in the record, except as necessary to carry out the decree.(13) (An order that does not dispose of all pending parties

and claims may also be final for purposes of appeal in some instances, such as orders that resolve certain discrete issues in some probate[14] and receiverships[15] cases, but we exclude those cases from consideration here. Nor do we consider when a judgment may be final for purposes other than appeal, such as claim and issue preclusion.[16]) Because the law does not require that a final judgment be in any particular form, whether a judicial decree is a final judgment must be determined from its language and the record in the case. Since timely perfecting appeal (as well as filing certain post-judgment motions and requests) hangs on a party's making this determination correctly, certainty is crucial.

From the beginning, however, certainty in determining whether a judgment is final has proved elusive. What has vexed courts in this State and elsewhere is this: must a final judgment dispose of all parties and claims specifically, or may it do so by general language or even by inference? If a specific disposition of each party and claim is strictly required, a judgment apparently intended by the parties and the trial court to be final and appealable may not be. An appeal from such a judgment must be dismissed or at least abated, resulting in delay and a waste of the courts' and the parties' resources. More importantly, if a judgment intended to be final did not meet the strict requirements, then the case would remain open, allowing the possibility of further proceedings and appeal years later. On the other hand, if a judgment may dispose of all parties and claims by general language or inference, a party or trial court may think that a judgment is interlocutory, only to be told later by the appellate court after the time for appeal has passed that the judgment was final. A party who is uncertain whether a judgment is final must err on the side of appealing or risk losing the right to appeal.

In 1881, after struggling with these problems for many years,[17] we attempted to resolve them in the case of *Linn v. Arambould*.[18] There we stated that a final judgment after trial must dispose of the issues "intrinsically, and not inferentially."[19] That is, specificity was strictly required. The results of this rule were predictable. Appellate courts frequently declared shabbily drafted judgments interlocutory even though the trial courts and the parties had obviously intended for them to be final.[20] Confused parties were spending time and money attempting to appeal from possibly final judgments, only to have the appellate courts dismiss the appeals for want of jurisdiction.[21] As this Court later reflected on *Arambould*'s intrinsic-disposition requirement for finality:

By its application most judgments easily became black or white -- final or interlocutory; but all too often judgments which were obviously intended to be final were being held interlocutory because of careless draftsmanship. The rule had to be changed to accommodate oversight or carelessness.[22]

In 1896 we altered course. In *Rackley v. Fowlkes,*[23] the plaintiff had, in a prior suit, sued for title to real property and for rent for the four years the property was in the defendant's possession, but at trial he offered no evidence of the amount of rent due until after the evidence was closed, and because the offer was late the court refused to hear it. The court in that suit rendered judgment awarding title to the plaintiff without mentioning his claim for rent. When the plaintiff filed a second suit for the rent, the defendant asserted res judicata in defense. The trial court rendered judgment for the plaintiff, concluding that the rent claim had not been adjudicated in the prior suit, and the court of civil appeals affirmed. We reversed the judgments of the lower courts, not because the rent claim should have been adjudicated in the first suit, but because it *was* adjudicated:

The proposition seems to be sound in principle and well supported by authority that where the pleadings and judgment in evidence show that the pleadings upon which the trial was had put in issue plaintiff's right to recover upon two causes of action, and the judgment awards him a recovery upon one, but is silent as to the other, such judgment is prima facie an adjudication that he was not entitled to recover upon such other cause. This liberal construction of the judgment against the party who sought to recover therein is supported by the presumption that the court performed the duty devolved upon it upon the submission of the cause by disposing of every issue presented by the pleadings so as

to render its judgment final and conclusive of the litigation, and by the further fact that the policy of the law favors the speedy settlement of litigation and opposes the harassing of the defendant with two suits for the same cause.(24)

Three years later we used the rule stated for purposes of res judicata in *Rackley* to determine whether a judgment was final for purposes of appeal. In *Davies v. Thomson*,(25) the plaintiffs sued for money and an interest in real property as their share of a joint venture. The trial court rendered judgment on a jury verdict awarding the plaintiffs money without mentioning the claim for an interest in real property. We held that the judgment disposed of both claims was therefore final and appealable.(26)

Neither *Rackley* nor *Davies* mentioned *Arambould* or attempted to reconcile their results with the rule in that case, thereby generating confusion in the appellate courts over how to determine finality in cases involving cross-claims and counterclaims. Some courts treated judgments that merely implicitly disposed of all claims as final, while other courts required that final judgments expressly adjudicate each claim.(27) In 1913, the Court resolved the conflict in *Trammell v. Rosen*,(28) rejecting the rule stated in *Arambould*. The plaintiff in *Trammell* sued on a promissory note secured by property that the defendant and his wife claimed was their homestead. The couple counterclaimed to establish their homestead claim and for damages for wrongful sequestration. The trial court instructed a verdict for the plaintiff on his claim and against the defendants on their counterclaim. The judgment recited the verdict and awarded damages to the plaintiff but did not mention the counterclaim.(29) Citing *Rackley*, the Court concluded that the judgment was final, reasoning that by granting the plaintiff's claim the trial court implicitly but necessarily denied the defendants' counterclaim.(30) Still, the Court strongly encouraged courts to expressly address each claim and party in final judgments to avoid further confusion:

> We feel constrained to hold that the judgment of the trial court, although irregular and imperfect in form, is sufficient to support the appeal. However, we feel impelled to say, also, that we think that, as a matter of practice, and to avoid confusion, every final judgment should plainly, explicitly, and specifically dispose of each and every party to the cause, and of each and every issue therein presented by the pleadings.(31)

Two cases decided after *Trammell* suggest that the entire record should be considered in determining whether a post-trial judgment is final. In *Hargrove v. Insurance Investment Corp.*, we held that a judgment for the plaintiff was final when "considered as a whole in the light of the entire record".(32) Similarly, in *Ferguson v. Ferguson*, we held that a judgment awarding the plaintiff recovery on some of her claims while silent as to others was final, stating that "[i]n arriving at whether or not a judgment is final, the pleadings and evidence must also be taken into consideration".(33) Neither case should be read to deviate from the presumptive rule of *Trammell*. We did not hold in either case that the record could be used to show that a post-trial judgment final on its face was really not final. In two other cases during the same time period we did not mention the record in applying *Trammell*.(34)

In 1966, we reaffirmed *Rackley*, *Davies*, and *Trammell* in *Northeast Independent School District v. Aldridge*.(35) The school district sued Aldridge for breach of contract, and he asserted in his defense that he had contracted only as an agent for his principal. He also brought a third-party action against his principal, alleging that the principal was responsible for any damages to which the school district might be entitled. The trial court granted a partial summary judgment holding Aldridge personally liable to the district and directed that the case proceed to trial to determine the amount of damages to be awarded. The parties then stipulated to the amount of damages, and the trial court rendered judgment for the district against Aldridge based on the stipulation. The judgment did not mention Aldridge's third-party action against his principal. The court of civil appeals dismissed Aldridge's appeal, holding that the trial court's judgment was not final.(36) We held that the judgment against Aldridge disposed of the third-party action and was final for purposes of appeal. After reviewing the

courts' historical difficulties in making finality determinations, we stated the following rule

for determining, in most instances, whether judgments in which parties and issues made by the pleadings are not disposed of in express language are, nevertheless, final for appeal purposes. When a judgment, not intrinsically interlocutory in character, is rendered and entered in a case regularly set for conventional trial on the merits, no order for a separate trial of issues having been entered . . . , it will be presumed for appeal purposes that the Court intended to, and did, dispose of all parties legally before it and of all issues made by the pleadings between such parties.(37)

We added: "Of course, the problem [of determining whether judgments are final] can be eliminated entirely by a careful drafting of judgments to conform to the pleadings or by inclusion in judgments of a simple statement that all relief not expressly granted is denied."(38) Inclusion of a catch-all statement -- which we later denominated a "Mother Hubbard" clause(39) -- would make clear that a post-trial judgment on the merits, presumed to have disposed of all claims, did indeed do so.

**B**

The presumption that a judgment rendered after a conventional trial on the merits is final and appealable has proved fairly workable for nearly a century, but we have never thought that it could be applied in other circumstances, as we first explained nearly sixty years ago. In *Davis v. McCray Refrigerator Sales Corp.*,(40) the plaintiff sued for the unpaid balance of the purchase price of a refrigerator, and the defendant counterclaimed for cancellation of the debt and for damages for payments already made and lost merchandise due to improper refrigeration. The defendant also filed a plea in abatement on the grounds that the plaintiff was a foreign corporation not licensed to do business in Texas and therefore not entitled to sue in state court. The trial court deferred ruling on the defendant's plea until after the case was tried on the merits. After the jury returned a verdict, the trial court rendered judgment both that the plaintiff's claim be dismissed and that the plaintiff take nothing.(41) The only basis the trial court had for dismissal was the defendant's plea in abatement, while the only basis for rendering a take-nothing judgment was plaintiff's failure of proof at trial. The judgment did not mention the defendant's counterclaim. The court of civil appeals rejected the defendant's argument that the judgment was interlocutory and reversed and rendered judgment for the plaintiff.(42) This Court reversed and dismissed the appeal. Citing *Trammell*, the Court acknowledged that while a final judgment need not expressly dispose of each issue so long as other provisions of the judgment necessarily imply that the unmentioned issues have been disposed of, a dismissal of the plaintiff's suit did not necessarily imply a disposal of the defendant's cross-action.(43) The Court explained:

[I]f the court had intended to merely sustain the plea in abatement and dismiss plaintiff's suit, and had intended to retain the defendant's cross-action for further consideration, it would have entered the very judgment that was entered in this case. The mere failure of the judgment to refer to defendant's cross-action was not sufficient in itself to raise an inference that it was thereby intended to dispose of the cross-action.(44)

Although the judgment did not "merely" sustain the plea in abatement but also decreed that the plaintiff take nothing, the inclusion of the dismissal in the judgment as the first basis for decision was enough to make *Trammell*'s presumptive finality rule inapplicable.

*Davis* may have departed too far from *Trammell*. The trial court's decree following a jury trial on the merits that the plaintiff take nothing without mention of the defendant's counterclaim should perhaps have been presumed to deny all relief, despite the alternative ruling that the plaintiff's claim should be dismissed. But regardless of *Davis*'s unusual circumstances, the case makes the point, which we expressly acknowledged in *Aldridge*, that "[i]t will not be presumed that a judgment dismissing a

plaintiff's suit on nonsuit, plea to the jurisdiction, plea in abatement, for want of prosecution, etc., also disposed of the issues in an independent cross-action."(45)

We have since held that "etc." includes default judgments and summary judgments.(46) The reason for not applying a presumption in any of these circumstances is that the ordinary expectation that supports the presumption that a judgment rendered after a conventional trial on the merits will comprehend all claims simply does not exist when some form of judgment is rendered without such a trial. On the contrary, it is quite possible, perhaps even probable these days in cases involving multiple parties and claims, that any judgment rendered prior to a full-blown trial is intended to dispose of only part of the case. Accordingly, the finality of the judgment must be determined without the benefit of any presumption.

A judgment that finally disposes of all remaining parties and claims, based on the record in the case, is final, regardless of its language.(47) A judgment that actually disposes of every remaining issue in a case is not interlocutory merely because it recites that it is partial or refers to only some of the parties or claims. Thus, if a court has dismissed all of the claims in a case but one, an order determining the last claim is final.(48) This is settled law in Texas, and while there have been proposals to change it by rule, proposals that are currently pending consideration by this Court's Advisory Committee, we are not inclined to depart from it here. The language of an order or judgment cannot make it interlocutory when, in fact, on the record, it is a final disposition of the case.

But the language of an order or judgment *can* make it final, even though it should have been interlocutory, if that language expressly disposes of all claims and all parties. It is not enough, of course, that the order or judgment merely use the word "final". The intent to finally dispose of the case must be unequivocally expressed in the words of the order itself. But if that intent is clear from the order, then the order is final and appealable, even though the record does not provide an adequate basis for rendition of judgment. So, for example, if a defendant moves for summary judgment on only one of four claims asserted by the plaintiff, but the trial court renders judgment that the plaintiff take nothing on all claims asserted, the judgment is final -- erroneous, but final.(49) A judgment that grants more relief than a party is entitled to is subject to reversal, but it is not, for that reason alone, interlocutory.(50)

Texas appellate courts, this Court included, have had difficulty determining when a judgment is final on its face -- by its own express terms, in other words -- even though it should not have been because no sufficient basis for rendering a final judgment was presented. In *Schlipf v. Exxon Corp.*,(51) the plaintiffs sued for gas royalties and prejudgment interest, and moved for summary judgment only on the royalties issue. Neither the defendant nor an intervenor moved for summary judgment against the plaintiffs. The trial court granted the plaintiffs' motion, awarding the royalties claimed, but denied prejudgment interest. The judgment recited:

the relief herein granted Plaintiffs, . . . is in satisfaction of all of their claims and causes of action . . . and all claims and/or causes of action herein asserted by all parties herein and not herein granted are hereby in all things denied and concluded . . . .(52)

We held that this language conclusively disposed of all parties and issues, as it clearly did, although in reaching this conclusion, we reiterated our observation in *Aldridge* that the finality of a judgment would be made clear "by inclusion . . . of a simple statement that all relief not expressly granted is denied."(53) This observation, appropriate in *Aldridge* in reference to judgments after a conventional trial on the merits, was misleading in *Schlipf*, because the only "relief" properly under consideration when the order issued was that raised by the motion for summary judgment(54) -- the plaintiffs' entitlement to royalties. After a full trial on the merits, the statement in a judgment that all relief not requested is denied signifies finality; there is no expectation that the court tried only part of the case,

absent an order for severance or separate trials. But after a motion for partial summary judgment, the same statement in a judgment is ambiguous. It may refer only to the motion on which the trial court is ruling, not to all claims of all parties, and not even to other claims of the movant.

Two years later, in *Teer v. Duddlesten*, we emphasized that the *Aldridge* language -- all relief not expressly granted is denied -- which we termed for the first time a "Mother Hubbard" clause, has no place in partial summary judgments because, by definition, those proceedings do not address all of the facts and issues in a case.(55) A Mother Hubbard clause, we said, could not convert a partial summary judgment into a final order.(56) Following *Teer*, most courts of appeals held that a Mother Hubbard clause could not make final a judgment rendered without a full trial,(57) although other courts reached the contrary conclusion.(58)

We attempted to clarify matters in *Mafrige v. Ross*.(59) There, two plaintiffs sued some twelve defendants for malicious prosecution, slander, libel, conspiracy, and negligence.(60) No party other than the plaintiffs asserted any claims. The defendants, some individually and some in groups, filed a total of eight summary judgment motions, some directed against one of the plaintiffs and some against both.(61) Only one motion addressed both of the plaintiffs and all of the claims asserted;(62) even together, the other seven motions did not address both plaintiffs and all claims.(63) The trial court granted all eight motions with eight separate orders, one for each motion.(64) Each order stated that the plaintiff or plaintiffs, depending on whether the motion had been directed at one or both, were to take nothing against the movant or movants.(65) Thus, taken together, the eight orders provided that both of the plaintiffs were to take nothing against all of the defendants. On the plaintiffs' appeal, however, the court of appeals held that there was not a final judgment because most of the defendants had not moved for summary judgment on all claims by both plaintiffs and thus were not entitled to a final judgment, and the "take nothing" language of the orders did not make them final.(66) The court also held that if the orders had contained Mother Hubbard clauses they would have been final under this Court's precedents, although the court of appeals did not agree that that would have been the proper result.(67)

We reversed, holding that the "take nothing" language in the eight summary judgment orders disposed of all claims asserted by both plaintiffs against each of the defendants and thus constituted a final judgment. We then explained:

If a summary judgment order appears to be final, as evidenced by the inclusion of language purporting to dispose of all claims or parties, the judgment should be treated as final for purposes of appeal. If the judgment grants more relief than requested, it should be reversed and remanded, but not dismissed. We think this rule to be practical in application and effect; litigants should be able to recognize a judgment which on its face purports to be final, and courts should be able to treat such a judgment as final for purposes of appeal.(68)

As examples of "language purporting to dispose of all claims or parties," we gave not only the "take nothing" language of the orders before us, and the statement that summary judgment is granted as to all claims asserted, but also the standard Mother Hubbard clause -- that all relief not expressly granted is denied.(69) In so doing we revived the ambiguity created in *Schlipf* that *Teer* had tried to end.

The ambiguity has persisted in our decisions. In *Martinez v. Humble Sand & Gravel, Inc.*,(70) we held that the inclusion of a Mother Hubbard clause in an order did not necessarily make it final. There, some but not all of the defendants moved for summary judgment, and the trial court granted the motions, dismissing the plaintiff's cause of action against "those Defendants", but also ordering that summary judgment was proper "as to all remaining Defendants", thereby suggesting that the

court intended to render a final summary judgment.(71) However, the trial court subsequently severed the summary judgment by order inviting other defendants to move on the same grounds.(72) Although this order contained a Mother Hubbard clause, we held that judgment had not been rendered for the non-moving defendants.(73)

But in *Bandera Electric Cooperative, Inc. v. Gilchrist*,(74) we held that a Mother Hubbard clause in a summary judgment made it final. There the plaintiff moved for summary judgment on its claims without mentioning the defendant's counterclaims.(75) The defendant did not move for summary judgment. The trial court granted the plaintiff's motion by order that included a Mother Hubbard clause. We concluded that the order was final, albeit erroneous.(76) We attempted to explain that our ruling was consistent with *Martinez* because the conflict in the orders involved in that case showed that they were not final even though "a Mother Hubbard clause . . . would have created a final and appealable judgment".(77) Besides its obvious inadequacy in explaining the result in *Martinez*, this explanation suggested that a Mother Hubbard clause would by itself make any summary judgment final, contrary to our holding in *Teer*.

Determining the significance of omitting a Mother Hubbard clause in an order has been no easier. In *Park Place Hosp. v. Estate of Milo*, we suggested that the absence of a Mother Hubbard clause indicated that a summary judgment was intended to be interlocutory.(78) There, the trial court granted summary judgment for three of five remaining defendants and later severed the judgment from the case. We concluded that the judgment did not become final for purposes of appeal until it was severed, in part based on the omission of a Mother Hubbard clause. But in two other cases we held that the omission of a Mother Hubbard clause did not make a summary judgment interlocutory that otherwise appeared final. In *Continental Airlines, Inc. v. Kiefer*,(79) the defendant moved for summary judgment "on all claims brought by" the plaintiffs. After the motion was filed, but before it was heard and decided, the plaintiffs amended their pleadings to add additional claims. The defendant did not amend its motion to address these later claims. The trial court granted what it entitled a "final summary judgment", dismissing the plaintiffs' cause of action" -- "cause", singular -- although multiple causes of action had been asserted. We held that the judgment was final, explaining as follows:

Finality "must be resolved by a determination of the intention of the court as gathered from the language of the decree and the record as a whole, aided on occasion by the conduct of the parties." 5 Ray W. McDonald, Texas Civil Practice § 27:4[a], at 7 (John S. Covell, ed., 1992 ed.); *see Ferguson v. Ferguson*, 338 S.W.2d 945, 947 (Tex. 1960). In the circumstances described here, we think the district court intended to render a final, appealable judgment. . . . Neither the parties nor the court of appeals have suggested that the judgment was not final.(80)

The judgment did not include a Mother Hubbard clause, but we did not find its omission significant. We reached a similar conclusion in *Inglish v. Union State Bank*.(81)

In sum, our opinions have not been entirely consistent on whether the inclusion or omission of a Mother Hubbard clause does or does not indicate that a summary judgment is final for purposes of appeal. This ambivalence has resulted in considerable confusion in the courts of appeals.(82)

## III

### A

Much confusion can be dispelled by holding, as we now do, that the inclusion of a Mother Hubbard clause -- by which we mean the statement, "all relief not granted is denied", or essentially those

words -- does not indicate that a judgment rendered without a conventional trial is final for purposes of appeal. We overrule *Mafrige* to the extent it states otherwise. If there has been a full trial on the merits either to the bench or before a jury, the language indicates the court's intention to finally dispose of the entire matter, assuming that a separate or bifurcated trial is not ordered. But in an order on an interlocutory motion, such as a motion for partial summary judgment, the language is ambiguous. It may mean only that the relief requested *in the motion* -- not all the relief requested by anyone in the case -- and not granted by the order is denied. The clause may also have no intended meaning at all, having been inserted for no other reason than that it appears in a form book or resides on a word processor. For whatever reason, the standard Mother Hubbard clause is used in interlocutory orders so frequently that it cannot be taken as any indication of finality.

As we have already explained, an order can be a final judgment for appeal purposes even though it does not purport to be if it actually disposes of all claims still pending in the case. Thus, an order that grants a motion for partial summary judgment is final if in fact it disposes of the only remaining issue and party in the case, even if the order does not say that it is final, indeed, even if it says it is not final. (Again, we do not consider here the various kinds of cases in which there may be more than one final judgment for purposes of appeal.) Also, an order can be final and appealable when it should not be. For example, an order granting a motion for summary judgment that addressed all of the plaintiff's claims when it was filed but did not address claims timely added by amendment after the motion was filed may state unequivocally that final judgment is rendered that the plaintiff take nothing by his suit. Granting more relief than the movant is entitled to makes the order reversible, but not interlocutory.(83)

While the present problems in determining whether an order is a final judgment should be lessened significantly by denying the standard Mother Hubbard clause of any indicia of finality in any order not issued after a conventional trial, the difficulty in determining what does make an order final and appealable remains. One solution would be stricter requirements for the form of a final judgment. Rule 58 of the Federal Rules of Civil Procedure takes this approach by requiring that to be final a judgment must "be set forth on a separate document" and be entered by the clerk on the civil docket. The separate-document requirement was added to the rule in 1963 to remove uncertainty over whether a trial judge's opinion or order constituted a final judgment.(84) Rule 58, with its dual requirements, "'enhances certainty by insisting on formality.'"(85) The United States Supreme Court has insisted on strict compliance with the rule, quoting Professor Moore's observation that the rule

"'would be subject to criticism for its formalism were it not for the fact that something like this was needed to make certain when a judgment becomes effective, which has a most important bearing, inter alia, on the time for appeal and the making of post-judgment motions that go to the finality of the judgment for purposes of appeal.'"(86)

The one recognized exception is a party's failure to object.(87)

The price of certainty, however, as federal rulemakers have come to realize, is that in many cases the failure to comply with Rule 58 means that no final judgment was ever rendered, and the time for appeal remains open.(88) A proposed amendment to Rule 58 would provide that if final judgment is not rendered on a separate document, it is deemed rendered on the sixtieth day after the clerk's entry on the civil docket.(89) While this proposal helps ensure that every case will be closed, it also makes it more likely that a party will not be aware that the time for appeal is running -- the problem the 1963 amendment to Rule 58 was meant to cure -- because he does not know of the clerk's entry on the civil docket.

There may be other solutions to these dilemmas which could be implemented by changes in our own rules, and this Court's Advisory Committee is presently studying the issues. But we do not write rules by opinion.(90) We must decide what Texas law requires for finality given the present rules.

In the past we have tried to ensure that the right to appeal is not lost by an overly technical application of the law.(91) Fundamentally, this principle should guide in determining whether an order is final. Simplicity and certainty in appellate procedure are nowhere more important than in determining the time for perfecting appeal. From the cases we have reviewed here, we conclude that when there has not been a conventional trial on the merits, an order or judgment is not final for purposes of appeal unless it actually disposes of every pending claim and party or unless it clearly and unequivocally states that it finally disposes of all claims and all parties. An order that adjudicates only the plaintiff's claims against the defendant does not adjudicate a counterclaim, cross-claim, or third party claim, nor does an order adjudicating claims like the latter dispose of the plaintiff's claims. An order that disposes of claims by only one of multiple plaintiffs or against one of multiple defendants does not adjudicate claims by or against other parties. An order does not dispose of all claims and all parties merely because it is entitled "final", or because the word "final" appears elsewhere in the order, or even because it awards costs. Nor does an order completely dispose of a case merely because it states that it is appealable, since even interlocutory orders may sometimes be appealable. Rather, there must be some other clear indication that the trial court intended the order to completely dispose of the entire case. Language that the plaintiff take nothing by his claims in the case, or that the case is dismissed, shows finality if there are no other claims by other parties; but language that "plaintiff take nothing by his claims against X" when there is more than one defendant or other parties in the case does not indicate finality.

To determine whether an order disposes of all pending claims and parties, it may of course be necessary for the appellate court to look to the record in the case. Thus, in the example just given, if the record reveals that there is only one plaintiff and only one defendant, X, the order is final, but if the record reveals the existence of parties or claims not mentioned in the order, the order is not final. On the other hand, an order that expressly disposes of the entire case is not interlocutory merely because the record fails to show an adequate motion or other legal basis for the disposition. The record may help illumine whether an order is made final by its own language, so that an order that all parties appear to have treated as final may be final despite some vagueness in the order itself, while an order that some party should not reasonably have regarded as final may not be final despite language that might indicate otherwise.

One may argue after *Aldridge* and *Mafrige* that it is perilous to suggest any particular language that will make a judgment final and appealable because that language can then be inserted in orders intended to be interlocutory. But to leave in doubt the degree of clarity required for finality creates its own problems. The Mother Hubbard clause proved to give no indication of finality not just because it found its way into every kind of order, but because it was inherently ambiguous, as we have explained. A statement like, "This judgment finally disposes of all parties and all claims and is appealable", would leave no doubt about the court's intention. An order must be read in light of the importance of preserving a party's right to appeal. If the appellate court is uncertain about the intent of the order, it can abate the appeal to permit clarification by the trial court.(92) But if the language of the order is clear and unequivocal, it must be given effect despite any other indications that one or more parties did not intend for the judgment to be final. An express adjudication of all parties and claims in a case is not interlocutory merely because the record does not afford a legal basis for the adjudication. In those circumstances, the order must be appealed and reversed.

**B**

Nothing in the order in *Lehmann* indicates that it is a final judgment, and it did not dispose of all pending claims and parties. The order in *Harris* states that plaintiffs take nothing as to "one of the defendants", but that language does not suggest that all of the plaintiffs' claims were denied. As the order recites and as the record demonstrates, the defendant named in the order was not the only defendant remaining in the case. Thus, we conclude that a final and appealable judgment was not rendered in either case.

We are concerned that in neither case were the non-movants provided a copy of the court's signed order but were merely sent notice by postcard that an order had been signed. The Rules of Civil Procedure do not require clerks to send all parties copies of all orders, only final orders.(93) Nevertheless, the practice of courts in some counties is to require that a party seeking an order provide copies and addressed, postage-paid envelopes for all other parties. The Court's Advisory Committee should consider whether the rules should require that all parties be given copies of all orders signed in a case.

## IV

We must respond briefly to the concurring opinion. It would hold that no "type of conclusory finality language can ever be read to grant more relief than requested by the parties."(94) This goes too far. The legitimate problem with Mother Hubbard clauses, which we failed to appreciate in *Mafrige*, is that they are ambiguous: one cannot be sure whether the denial of all relief other than what has been expressly granted is limited to relief requested in a motion or extends to all relief requested in the litigation. But it is a long way from the now well-established fact that Mother Hubbard clauses can understandably be misread to the concurring opinion's conclusion that clear language should be given no meaning. We require certainty for finality, but we cannot say that certainty is impossible.

The concurring opinion claims as authority for its position pre-*Mafrige* law, but before *Mafrige*, this Court repeatedly held that general language in a summary judgment finally disposed of the litigation even though no party had requested final relief. In *Schlipf v. Exxon Corp.* we held that an order granting the plaintiffs' motion for summary judgment on one of its claims and generally denying all other relief was final, even though no defendant had moved for summary judgment or requested the denial of any relief.(95) Similarly, in *Chessher v. Southwestern Bell Telephone Co.* we held that a summary judgment generally disposing of all four claims asserted by the plaintiff was final, even though the defendant moved for summary judgment on only one of the claims.(96) Again in *Young v. Hodde*, we agreed that a Mother Hubbard clause in an order granting summary judgment for the plaintiff disposed of a defendant's counterclaim, even though the plaintiff's motion had addressed only his own claims and not the counterclaim.(97) It has simply never been the law in Texas that a summary judgment generally disposing of all claims and parties is nevertheless interlocutory merely because rendition of a final judgment was improper. In essence, the concurring opinion's position is that a trial court has no jurisdiction to grant more relief than is requested, and that if it does so, its action is absolutely void. We do not agree that a court's *power* to act, as distinct from the proper exercise of that power, is defined by a party's request for relief.

The concurring opinion acknowledges that its position may result in more appeals being taken from orders that look final but are really interlocutory, but it argues that appellate courts can easily deal with such problems by abating appeals to allow trial courts to clarify their orders. What the concurring opinion ignores is that trial courts and parties will assume that orders with general dispositive language mean what they say, only to learn months or years after an appeal should have been taken that no final judgment was ever rendered. Justice Baker would insist that every order granting summary judgment

specifically identify: (1) the claims each party brought; (2) the grounds upon which each party seeks summary judgment; (3) each ground upon which the trial court granted summary judgment; and (4) each ground upon which the trial court denied summary judgment.

Any order that failed to meet these requirements would be interlocutory, according to Justice Baker, "*regardless* of how clearly it states that it is a final judgment disposing of all parties and issues."(98) The very real risk of such a rule is that thousands of judgments intended to be final would remain interlocutory because they did not comply with all of these requirements. This is precisely what has

happened in the federal system, as we have already explained, even though the federal rules impose far fewer requirements on final judgments than the concurring opinion would.

* * * * *

For the reasons we have explained, the judgments of the court of appeals in these cases are reversed, and the cases are remanded to that court for further proceedings.

Nathan L. Hecht

Justice

Opinion delivered: February 1, 2001

1. *See Crowson v. Wakeham*, 897 S.W.2d 779, 783 (Tex. 1995) (involving probate proceedings); *Huston v. Federal Deposit Ins. Corp.*, 800 S.W.2d 845, 847 (Tex. 1990) (involving receivership proceedings).

2. *See Street v. Second Court of Appeals*, 756 S.W.2d 299, 301 (Tex. 1988).

3. 866 S.W.2d 590 (Tex. 1993).

4. *Teer v. Duddlesten*, 664 S.W.2d 702, 704 (Tex. 1984).

5. *Mafrige*, 866 S.W.2d at 590 n.1.

6. *Lehmann v. Har-Con-Corp.*, ___ S.W.2d ___ (Tex. App.--Houston [14th Dist.] 1998), 988 S.W.2d 415 (1999) (op. on reh'g); *Harris v. Harbour Title Co.*, ___ S.W.2d ___ (Tex. App.--Houston [14th Dist.] 1999).

7. ___ S.W.2d ___, 988 S.W.2d 415 (op. on reh'g).

8. *See* Tex. R. App. P. 26.1 (appellate time limits).

9. 43 Tex. Sup. Ct. J. 94, 96 (Nov. 12, 1999).

10. 43 Tex. Sup. Ct. J. 94, 96 (Nov. 12, 1999).

11. *See* Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice & Procedure §§ 3906-3907 (1992).

12. *See, e.g., North East Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 895 (Tex. 1966); *Gulf C. & S.F. Ry. v. Fort Worth & N.O. Ry.*, 2 S.W. 199, 200 (Tex. 1886), *op. on reh'g*, 3 S.W. 564 (1887); see Tex. Const. art. V, § 3-b (direct appeals to the Supreme Court); Tex. Civ. Prac. & Rem. Code §§ 15.003(c) (interlocutory joinder and intervention appeals), 51.012 (court of appeals jurisdiction), 51.014 (interlocutory appeals); Tex. Gov't Code §§ 22.001(c) (direct appeals), 22.225(d) (interlocutory appeal to the Supreme Court).

13. *See Jack B. Anglin Co., v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992); *Linn v. Arambould*, 55 Tex.

611, 617-18 (1881) (surveying several tests for determining when a judgment is final). *See generally* 49 C.J.S. *Judgments* § 11 (1947); 46 Am. Jur. 2d *Judgments* § 200-206 (1994).

14. *Crowson v. Wakeham*, 897 S.W.2d 779, 783 (Tex. 1995).

15. *Huston v. Federal Deposit Ins. Corp.*, 800 S.W.2d 845, 847 (Tex. 1990).

16. *See Street v. Second Court of Appeals*, 756 S.W.2d 299, 301 (Tex. 1988).

17. *See Hanks v. Thompson*, 5 Tex. 6, 8 (1849) (defining a final judgment as awarding the judicial consequences which the law attaches to the facts and determining the subject matter of the controversy between the parties); *accord West v. Bagby*, 12 Tex. 34 (1854). *See also Fitzgerald v. Fitzgerald*, 21 Tex. 415 (1858); *Hancock v. Metz,* 7 Tex. 177 (1851) (both holding that a judgment for the defendant for costs did not constitute a final judgment); *Warren v. Shuman*, 5 Tex. 441, 450 (Tex. 1849) (finding that a judgment that awards costs without disposing of the subject matter of the controversy is not a final judgment). *See generally* 31 Jeremy C. Wicker, Texas Practice, Civil Trial & Appellate Procedure § 506, at 289-311 (1985) (chronicling, in depth, the challenges of distinguishing between final and interlocutory judgments in various contexts beginning in the mid-19th century).

18. 55 Tex. 611 (1881).

19. *Id.* at 619.

20. *See Aldridge*, 400 S.W.2d at 895.

21. *See, e.g., East & West Tex. Lumber Co. v. Williams*, 9 S.W. 436 (Tex. 1888); *Hill v. Templeton*, 25 S.W. 652 (Tex. Civ. App. 1894); *Mills v. Paul*, 23 S.W. 395 (Tex. Civ. App. 1893).

22. *Aldridge*, 400 S.W.2d at 895.

23. 36 S.W. 77, 78 (Tex. 1896).

24. *Id.* at 78 (citations omitted).

25. 49 S.W. 215 (Tex. 1899).

26. *Id.* at 217.

27. *See Trammell v. Rosen*, 157 S.W. 1161, 1162 (Tex. 1913) (listing the various appellate courts subscribing to each school of construction).

28. *Id.*

29. *Id.* at 1161.

30. *Id.* at 1161-1163.

31. *Id.* at 1163. *See also Burton Lingo Co. v. First Baptist Church*, 222 S.W. 203, 204 (Tex. Comm'n App. 1920, holding approved) (citing *Trammell* for support of its presumption that the judgment disposed of a claim).

32. 176 S.W.2d 744, 746 (Tex. 1944).

33. 338 S.W.2d 945, 947 (Tex. 1960).

34. *Gamble v. Banneyer*, 151 S.W.2d 586 (Tex. 1941); *Vance v. Wilson*, 382 S.W.2d 107 (Tex. 1964) (res judicata).

35. 400 S.W.2d 893 (Tex. 1966).

36. *Aldridge v. Northeast Indep. Sch. Dist.*, 392 S.W.2d 607 (Tex. Civ. App.--San Antonio 1965), *rev'd and remanded*, 400 S.W.2d 893 (Tex. 1966).

37. 400 S.W.2d at 897-898.

38. *Id.* at 898.

39. *Teer v. Duddlesten*, 664 S.W.2d 702, 704 (Tex. 1984).

40. 150 S.W.2d 377 (Tex. 1941).

41. *McCray Refrigerator Sales Corp. v. Davis*, 140 S.W.2d 477, 478 (Tex. Civ. App.--Fort Worth 1940), *rev'd*, 150 S.W.2d 377 (Tex. 1941).

42. *Id.*

43. 150 S.W.2d at 378.

44. *Id.*

45. *Aldridge*, 400 S.W.2d at 897.

46. See, e.g., *Houston Health Clubs, Inc. v. First Court of Appeals*, 722 S.W.2d 692 (Tex. 1986), and the cases cited therein.

47. *Farmer v. Ben E. Keith Co.*, 907 S.W.2d 495, 496 (Tex. 1995) (per curiam); *H. B. Zachry Co. v. Thibodeaux*, 364 S.W.2d 192, 193 (Tex. 1963) (per curiam); *McEwen v. Harrison*, 345 S.W.2d 706, 707 (Tex. 1961).

48. *Farmer*, 907 S.W.2d at 496; *H. B. Zachry Co.*, 364 S.W.2d at 193; *McEwen*, 345 S.W.2d at 707.

49. *Young v. Hodde*, 682 S.W.2d 236 (Tex. 1984) (per curiam); *Chessher v. Southwestern Bell Tel. Co.*, 658 S.W.2d 563, 564 (Tex. 1983) (per curiam).

50. *Continental Airlines, Inc. v. Kiefer*, 909 S.W.2d 508, 510 (Tex. 1995).

51. 644 S.W.2d 453 (Tex. 1982) (per curiam).

52. *Id.* at 454.

53. *Id.*

54. *See New York Underwriters Ins. Co. v. Sanchez*, 799 S.W.2d 677, 678 (Tex. 1990) (per curiam); *Young v. Hodde*, 682 S.W.2d 236 (Tex. 1984) (per curiam); *Chessher v. Southwestern Bell Tel. Co.*,

658 S.W.2d 563, 564 (Tex. 1983) (per curiam).

55. *Teer v. Duddlesten*, 664 S.W.2d 702, 704 (Tex. 1984).

56. *Id.*

57. *E.g.*, *Bethurum v. Holland*, 771 S.W.2d 719 (Tex. App.--Amarillo 1989, no writ); *Sakser v. Fitze*, 708 S.W.2d 40, 42 (Tex. App.--Dallas 1986, no writ) (declaring that a Mother Hubbard clause in an order does not convert an intrinsically interlocutory partial summary judgment into a final judgment).

58. *E.g.*, *Georgetown Assoc., Ltd. v. Home Fed. Sav. & Loan Ass'n*, 795 S.W.2d 252, 253 (Tex. App.--Houston [14th Dist.] 1990, writ dism'd w.o.j.); *Hodde v. Young*, 672 S.W.2d 45, 47 (Tex. App.--Houston [14th Dist.]) (holding that a judgment was final and appealable because it contained a Mother Hubbard clause), *writ ref'd, n.r.e.*, 682 S.W.2d 236 (Tex. 1984) (per curiam) (noting that the erroneous rendition of a final judgment is not fundamental error).

59. 866 S.W.2d 590 (Tex. 1993).

60. *Id.* at 590.

61. *Id.*

62. *Ross v. Arkwright Mut. Ins. Co.*, 834 S.W.2d 385, 388-389 (Tex. App.--Houston [14th Dist.] 1992), *rev'd sub nom. Mafrige v. Ross*, 866 S.W.2d 590 (Tex. 1993).

63. *Id.*

64. 866 S.W.2d at 590-591.

65. *Id.*

66. *Ross*, 834 S.W.2d at 394.

67. *Id.* at 393-395.

68. *Mafrige*, 866 S.W.2d at 592; *accord Springer v. Spruiell*, 866 S.W.2d 592 (Tex. 1993) (per curiam).

69. *Id.* at 590 n.1.

70. 875 S.W.2d 311 (Tex. 1994) (per curiam).

71. *Id.* at 313.

72. *Id.*

73. *Id.*

74. 946 S.W.2d 336 (Tex. 1997) (per curiam).

75. *Id.* at 337.

76. *Id.*

77. *Id.* at 337 n.2.

78. 909 S.W.2d 508, 510 (Tex. 1995).

79. 920 S.W.2d 274, 276 (Tex. 1996).

80. *Id.* at 277.

81. 945 S.W.2d 810 (Tex. 1997) (per curiam).

82. *See, e.g.,* Elaine A. Carlson & Karlene S. Dunn, *Navigating Procedural Minefields: Nuances in Determining Finality of Judgments, Plenary Power, and Appealability*, 41 So. Tex. L. Rev. 953, 969-1001 (2000); William J. Cornelius & David F. Johnson, *Tricks, Traps, and Snares in Appealing a Summary Judgment in Texas*, 50 Baylor L. Rev. 813, 825-835 (1998).

83. *See Young v. Hodde*, 682 S.W.2d 236, 237 (Tex. 1984) (per curiam); *Chessher v. Southwestern Bell Tel. Co.*, 658 S.W.2d 563, 564 (Tex. 1983) (per curiam); *Schlipf v. Exxon Corp.*, 644 S.W.2d 453 (Tex. 1983) (per curiam).

84. *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384-385 (1978).

85. Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice & Procedure § 2781 (2d ed. 1995) (quoting Benjamin Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963*, 77 Harv. L. Rev. 801, 831 (1964)).

86. *United States v. Indrelunas*, 411 U.S. 216, 220-221 (1973).

87. *Bankers Trust*, 435 U.S. at 387-388.

88. Committee on Rules of Practice & Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 100-114 (Aug. 2000).

89. Id.

90. *State Dept. of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992); *Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 915 (Tex. 1992).

91. *Verburgt v. Dorner*, 959 S.W.2d 615, 616-617 (Tex. 1997).

92. Tex. R. App. P. 27.2.

93. *See* Tex. R. Civ. P. 306a(3).

94. *Post* at ___.

95. 644 S.W.2d 453 (Tex. 1982) (per curiam).

96. 658 S.W.2d 563 (Tex. 1983) (per curiam). Although our opinion did not quote the trial court's order, an examination of the record in the case reveals that the order recited that the court had

considered the defendant's motion for summary judgment, the plaintiff's responses, and the defendant's reply, and had notified the parties that "it had determined to grant the defendant's motion for summary judgment." The decretal portion of the order stated "that plaintiff, Paul G. Chessher, take nothing of and from defendant, Southwestern Bell Telephone Company. Costs of court are hereby taxed against plaintiff, Paul G. Chessher."

97. *Young v. Hodde*, 682 S.W.2d 236, 236-237 (Tex. 1984) (per curiam), *writ ref'd n.r.e.*, 672 S.W.2d 45 (Tex. App.--Houston [14th Dist.]).

98. *Post* at ___ (emphasis in original).

# IN THE SUPREME COURT OF TEXAS

No. 99-0406

Douglas Lehmann and Virginia Lehmann, Petitioners

v.

Har-Con Corporation, Respondent

***- consolidated with -***

No. 99-0461

Melvin G. Harris and Helena M. Harris, Petitioners

v.

Harbour Title Company Respondent

On Petitions for Review from the

Court of Appeals for the Fourteenth District of Texas

**Argued January 26, 2000**

Justice Baker filed a concurring opinion in which Justice Enoch joined, except for Part IV and the discussion of *Inglish* and *Bandera*, and in which Justice Hankinson joined, except Part IV.

The Court granted these petitions in *Lehmann* and *Harris* to solve the *Mafrige* problems. The Court fails to do so. Thus, while I concur in the result the Court reaches, I cannot agree with the reasoning it uses to reach that result.

In March 1993, we granted writ in *Mafrige v. Ross* to resolve the inherent problems in determining finality of summary judgments for purposes of appeal. 866 S.W.2d 590 (Tex. 1993). There we recognized that determining finality had "been a recurring and nagging problem throughout the judicial history of this state." *Mafrige*, 866 S.W.2d at 590. Thus, in a major departure from our prior jurisprudence, we created a new rule providing: "If a summary judgment order appears to be final, as evidenced by the inclusion of language purporting to dispose of all claims or parties, the judgment should be treated as final for purposes of appeal." *Mafrige*, 866 S.W.2d at 592.

Despite the certainty we intended this bright-line rule to provide, the last seven years have proved that the *Mafrige* rule has created more problems than it solved--confusing the lower courts, operating as a trap for unwary litigants, and consistently bringing about arguably unjust and oftentimes absurd results. So, in November 1999, we granted the petitions in these cases to resolve the *Mafrige* problems. Inexplicably, the Court begins its opinion by chronicling the evolution of the rules and presumptions governing finality of orders following a conventional trial on the merits from the middle of the last century to the present.(1) Then, with very little discussion of the problems *Mafrige* and its progeny created in determining summary judgment finality, the Court concludes that the solution is to maintain the principle of the *Mafrige* legal fiction--with only slight modification. However, rather than solve, the Court merely perpetuates the problems *Mafrige* created. The cases grappling to apply *Mafrige* illustrate that there is but one real solution. We should return to the principle we announced in *Teer v. Duddlesten*--that a Mother Hubbard clause simply "has no place in a partial summary judgment," and that a summary judgment order is not an appealable, final judgment unless it actually disposes of all parties and issues. 664 S.W.2d 702, 703-04 (Tex. 1984). The Court states: "[W]e do not write rules by opinion." ___ S.W.3d at ___. The Court is right; we should not establish rules by judicial fiat. We should not have done so in *Mafrige* and we should not have perpetuated the *Mafrige* problems with *Inglish* and *Bandera*. Any new summary judgment finality rule should be achieved by this Court's formally promulgating a new procedure rule. The Court should recognize this, overrule *Mafrige* and its progeny, and await a recommendation by our rules advisory committee. Because the Court refuses to take this path, I concur in the judgment only.

- ***MAFRIGE* AND ITS PROGENY**

Before *Mafrige*, courts determined summary judgment finality by reviewing the live pleadings, the summary judgment motion, and the summary judgment order. *Harris County v. Nash*, 22 S.W.3d 46, 49-50 (Tex. App.--Houston [14th Dist.] 2000, pet. filed); *Kaigler v. General Elec. Ins. Mortgage Corp.*, 961 S.W.2d 273, 275 (Tex. App.--Houston [1st Dist.] 1997, no pet.). A summary judgment was deemed final and appealable only if it expressly disposed of all parties and issues or if it was severed from the remainder of the suit. *Pan Am. Petroleum Corp. v. Texas Pac. Coal & Oil Co.*, 324 S.W.2d 200, 200 (Tex. 1959) ("[A] summary judgment which does not dispose of all parties and issues in the pending suit is interlocutory and not appealable unless a severance of that phase of the case is ordered by the trial court.").

With *Mafrige*, this Court attempted to simplify this process by holding that the "magic language" of a Mother Hubbard or similar finality clause conclusively transforms an interlocutory summary judgment into a final, appealable order. *Mafrige*, 866 S.W.2d at 592. We have twice revisited *Mafrige* to clarify its scope. *See Inglish v. Union State Bank*, 945 S.W.2d 810, 811 (Tex. 1997) (holding that the *Mafrige* rule applies even when neither party appeals the erroneous summary judgment); *Bandera Elec. Coop., Inc. v. Gilchrist*, 946 S.W.2d 336, 337 (Tex. 1997) (explaining that when the *Mafrige* rule renders a partial summary judgment final for purposes of appeal, the appellate court should reverse and remand only the erroneously disposed claims). Unfortunately, *Mafrige* did little towards alleviating the lower courts' confusion--and *Inglish* and *Bandera* only compounded it. The Court's opinion suffers the same problem. Namely, its slightly-modified *Mafrige* rule falls far short of remedying the myriad of problems the *Mafrige* fiction and its progeny created.

**A. Finality Language**

One source of confusion under *Mafrige* has been uncertainty about what language triggers its finality rule. In *Mafrige*, we held that a partial summary judgment is treated as final for appeal purposes when the order contains a Mother Hubbard clause stating that "all relief not expressly granted is denied" or other language "purporting to dispose of all claims or parties." 866 S.W.2d at 590 & n.1, 592. We further clarified that "other" finality language includes "a statement that the summary judgment is granted as to all claims asserted by the plaintiff, or a statement that the plaintiff takes nothing against defendant." *Mafrige*, 866 S.W.2d at 590 n.1.; *see also Inglish*, 945 S.W.2d at 811 (holding statement that "[d]efendant is entitled to summary judgment in this case," and that plaintiff should "take nothing on account of his lawsuit" rendered partial summary judgment final for purposes of appeal); *Springer v. Spruiell*, 866 S.W.2d 592, 593 (Tex. 1993) (holding that summary judgment order reciting plaintiffs "have and recover nothing" purported to dispose of all parties and issues).

Despite these examples, some lower courts have refused to hold orders containing this exact language final for purposes of appeal. *E.g., Carey v. Dimidjian*, 982 S.W.2d 556, 558 (Tex. App.--Eastland 1998, no pet.) (holding that order containing Mother Hubbard clause was not final and appealable where the motion was labeled "Partial Summary Judgment" and the parties treated the order as interlocutory); *Hinojosa v. Hinojosa*, 866 S.W.2d 67, 69-70 (Tex. App.--El Paso 1993, no writ) (holding that order containing Mother Hubbard clause did not render judgment final because it did not dispose of counterclaim). Other courts have struggled with what "other" language purports to render a judgment final--often reaching opposite conclusions about identical clauses. *Compare Positive Feed, Inc. v. Guthmann*, 4 S.W.3d 879, 881 (Tex. App.--Houston [1st Dist.] 1999, no pet.) (holding that order granting defendant's summary judgment "in all things" purported to be final), *with St. Paul Ins. Co. v. Mefford*, No. 05-96-01581-CV (Tex. App.--Dallas Nov. 30, 1998, no pet.) (not designated for publication), 1998 WL 821537, at *2 (2) (holding that order granting defendant's summary judgment "in all things" did not purport to be final).

While the Court recognizes that the "routine inclusion of [a Mother Hubbard clause] in otherwise plainly interlocutory orders and its ambiguity in many contexts have rendered it inapt for determining finality," ___ S.W.3d at ___, it ignores the obvious problems courts have faced interpreting *other* language "purporting to dispose of all claims or parties." *Mafrige*, 866 S.W.2d at 592. In fact, despite the Court's extensive analysis and discussion, its holding represents but a minor departure from *Mafrige*.

Its modified rule has two parts. The first represents no change in Texas law. It simply reiterates that a summary judgment order that *actually* disposes of all parties and issues is final for purposes of appeal. ___ S.W.3d at ___. The second part provides that a Mother Hubbard clause is no longer enough to invoke the fiction that an otherwise interlocutory order is treated as final for purposes of appeal. Instead, to invoke the *Mafrige* fiction, an interlocutory order must now "clearly and

unequivocally state[ ] that it finally disposes of all claims and all parties." ___ S.W.3d at ___. The Court further explains that the statements "plaintiff take nothing by his claims in the case" and "[t]his judgment finally disposes of all parties and all claims and is appealable" clearly and unequivocally state that an order is final. ___ S.W.3d at ___. In essence, the Court's rule does no more than replace one set of magic language with another--while ignoring the reality that courts will likely face the same challenges deciding what language "clearly and unequivocally states" that an order is final, ___ S.W.3d at ___, as they did deciding what other language clearly "purport[s] to dispose of all claims or parties" under *Mafrige*. 866 S.W.2d at 592.

**B. Omitted Parties**

Applying *Mafrige* to omitted parties, like those in both *Lehmann* and *Harris*, has also troubled the lower courts. Specifically, they have struggled with deciding when finality language operates to render a summary judgment final against omitted parties. This issue often surfaces when both the summary judgment motion *and* the resulting order omit any specific reference to one or more parties. (3) In this situation, several courts have held that *Mafrige* applies, reasoning that issues and parties are co-extensive and thus if "an order disposes of all issues in a case, then it necessarily disposes of all parties to a case, and vice versa." *Kaigler*, 961 S.W.2d at 276; *see also Lehmann v. Har-Con Corp.*, 988 S.W.2d 415, 416-17 (Tex. App.--Houston [14th Dist.] 1999, pet. granted); *Harper v. Newton*, 910 S.W.2d 9, 12 n.1 (Tex. App.--Waco), *rev'd sub nom. on other grounds*, *Dallas County v. Harper*, 913 S.W.2d 207 (Tex. 1995).

In contrast, other courts have interpreted *Mafrige* more narrowly, reasoning that an "order that explicitly grants a summary judgment in favor of less than all the defendants *does not* clearly evidence an intent to dispose of all claims against all defendants, especially those against whom summary judgment was not sought, regardless of the inclusion of a Mother Hubbard clause." *Lowe v. Teator*, 1 S.W.3d 819, 823-24 (Tex. App.--Dallas 1999, pet. filed); *see also Midkiff v. Hancock E. Tex. Sanitation, Inc.*, 996 S.W.2d 414, 416 (Tex. App.--Beaumont 1999, no pet.); *Vanderwiele v. Llano Trucks, Inc.*, 885 S.W.2d 843, 845 (Tex. App.--Austin 1994, no writ).

Here the Court summarily dismisses this omitted parties problem:

Nothing in the order in *Lehmann* indicates that it is a final judgment, and it did not dispose of all pending claims and parties. The order in *Harris* states that plaintiff take nothing as to "one of the defendants", but that language does not suggest that all of the plaintiffs' claims were denied. As the order recites and as the record demonstrates, the defendant named in the order was not the only defendant remaining in the case. Thus, we conclude that a final appealable judgment was not rendered in either case.

___ S.W.3d at ___. Despite the presence of a Mother Hubbard clause, the trial court and parties in *Lehmann* continued treating the order as interlocutory--even in the face of this Court's admonishment that a Mother Hubbard clause indicates finality.(4) 988 S.W.2d at 416. The Court now holds that the order did not purport to be final based solely on its new rule discounting the dispositive effect of Mother Hubbard clauses.

However, the Court's resolution merely sidesteps the real problem. What happens in the next case when, on facts identical to *Lehmann*, a trial court signs an interlocutory summary judgment with the Court's new magic language rather than a Mother Hubbard clause? We are right back where we started. Substituting one magic phrase for another leads nowhere.

The reality is simply that omitted parties oftentimes do not believe that a summary judgment order that they have not seen, that does not mention them, and that results from a hearing in which they did not participate will operate to dispose of them or their claims. But, under the Court's standard, if these parties do not perfect a timely appeal from the erroneous judgment, their right to appeal is forever lost. This result elevates form over substance and hinders parties' rights to have the merits of their claims considered. *See, e.g., Rodriguez v. NBC Bank*, 5 S.W.3d 756, 763 n.4 (Tex. App.--San Antonio 1999, no pet.) (recognizing this Court's "express goal of reaching the merits of a cause of action, instead of dismissing actions on procedural technicalities").

**C. Omitted Cross-Claims and Counterclaims**

The courts of appeals have also treated omitted cross-claims and counterclaims inconsistently--despite our holding in *Bandera*. In *Bandera*, the trial court signed an order with a Mother Hubbard clause that did not mention the defendant's counterclaims. 946 S.W.2d at 337. This Court explained that "[b]ecause the order contained a Mother Hubbard clause denying all other relief, it also purported to dispose of [the defendant's] counterclaims." *Bandera*, 946 S.W.2d at 337. But several courts have refused to apply *Mafrige* in this situation, maintaining that a summary judgment that does not mention counterclaims or cross-claims cannot purport to be final--regardless of whether it contains finality language. *E.g., Sommers v. Concepcion*, 20 S.W.3d 27, 33 (Tex. App.--Houston [14th Dist.] 2000, pet. denied); *Hervey v. Flores*, 975 S.W.2d 21, 25 (Tex. App.--El Paso 1998, pet. denied); *cf. Coleman Cattle Co., Inc. v. Carpentier*, 10 S.W.3d 430, 433 n.2 (Tex. App.--Beaumont 2000, no pet.). Other courts have followed *Bandera*'s mandate, holding that finality language--such as "plaintiff takes nothing"--renders a judgment final for appeal purposes, despite omission of any reference to defendant's counterclaims. *In re Monroe*, No. 05-99-01758-CV (Tex. App.--Dallas Mar. 31, 2000, orig. proceeding) (not designated for publication), 2000 WL 378519, at *1-2; *see also Kaigler*, 961 S.W.2d at 275-76.

The Court's rule does not provide a satisfactory remedy for this situation either. The Court states:

An order that adjudicates only the plaintiff's claims against the defendant does not adjudicate a counterclaim, cross-claim, or third party claim, nor does an order adjudicating claims like the latter dispose of the plaintiff's claims. An order that disposes of claims by only one of multiple plaintiffs or against one of multiple defendants does not adjudicate claims by or against other parties. An order does not dispose of all claims and all parties merely because it is entitled "final," or because the word "final" appears elsewhere in the order, or even because it awards costs. Nor does an order completely dispose of a case merely because it states that it is appealable, since even interlocutory orders may sometimes be appealable. Rather, there must be some other clear indication that the trial court intended the order to completely dispose of the entire case.

___ S.W.3d at ___.

Under its modified finality rule, the lower courts' disagreement in this area will continue because too many questions are left unanswered. For example, should a "final" summary judgment order stating that defendant is granted summary judgment "in all things" dispose of a cross-claim by another defendant as well as the claim by the plaintiff that brought the original claim? In this situation, there is no doubt that the order is unambiguous. However, it is likewise clear, but not from the order, that the third party's claim against the defendant was never considered. Should an order granting summary judgment for a plaintiff that recites it is a final and appealable order be final for counterclaims not

mentioned in the motion or order? The order unequivocally states that it is a final, appealable order. Nonetheless there is a counterclaim that has not been considered. The Court states that a summary judgment granted for a plaintiff "does not adjudicate a counterclaim" and then goes on to say that to make the order final there must be "some other clear indication that the trial court intended the order to completely dispose of the entire case." ___ S.W.3d at ___. In the example above, does the additional statement that "this is a final, appealable order" provide this "other clear indication"? These very issues are repeatedly raised in the courts of appeals, and the Court's modified rule simply does not resolve them.

**D. Trial Courts' and Parties' Intent**

Differing philosophies about the effect the trial courts' and parties' intent should have on how *Mafrige* applies has created the most confusion and inconsistency. The courts of appeals have taken three approaches. Some courts apply a bright-line test, holding that a Mother Hubbard clause or other finality language *always* renders an order final for appeal purposes, regardless of any evidence of contrary intent. *E.g.*, *Preston v. American Eagle Ins. Co.*, 948 S.W.2d 18, 20-21 & n.1 (Tex. App.--Dallas 1997, no writ) (holding that summary judgment purported to be final despite fact it was entitled "partial summary judgment"); *cf. In re Cobos*, 994 S.W.2d 313, 315 (Tex. App.--Corpus Christi 1999, orig. proceeding) ("As *Mafrige* and *Inglish* make clear, the intent of the trial court is not the controlling consideration in determining whether a judgment is final."). Other courts modify this approach, looking only within the four corners of the order and giving effect to any evidence of contrary intent found there. *E.g., Rodriguez*, 5 S.W.3d at 763-64 (Tex. App.--San Antonio 1999, no pet.) ("Looking within the four corners of the summary judgment order, the plain language of the Mother Hubbard clause did not, and could not, purport to grant or deny any more relief than the relief which [the defendant] sought."); *Midkiff*, 996 S.W.2d at 416 (looking to order "as a whole" to conclude that summary judgment order containing Mother Hubbard clause did not purport to be final).

Finally, despite our holding in *Inglish* that the trial court's intent is irrelevant in this context, other courts still refuse to apply *Mafrige* if there is evidence of contrary intent *anywhere* in the record. This usually occurs when the parties and court treat an order as interlocutory by continuing with the litigation rather than appealing the erroneous order. *E.g., Lowe*, 1 S.W.3d at 823-24 (holding that summary judgment could not be final where the record reflected that there were parties who did not participate in the summary judgment proceeding); *Carey*, 982 S.W.2d at 558 (relying, in part, on court's and parties' treatment of order containing Mother Hubbard clause as interlocutory to conclude judgment was not final).

The Court's solution to this problem is as confusing as the rule it seeks to supplant. It appears to reject the bright-line approach *Mafrige* espouses and instead adopt a rule combining the second and third approaches. First, the Court notes that an order is final for appeal purposes if it "unequivocally states that it finally disposes of all parties and all claims and is appealable." ___S.W.3d at ___. It also explains that "[i]f the language of the order is clear and unequivocal, it must be given effect despite any other indications that one or more parties did not intend for the judgment to be final." ___ S.W.3d at ___. From these statements, the Court's new rule walks and talks a lot like a bright-line *Mafrige* rule, with magic language establishing finality.

However, the Court also states that "[t]o determine whether an order disposes of all pending claims and parties, it may of course be necessary for the appellate court to look to the record in the case." ___ S.W.3d at ___. This sounds more like a pre-*Mafrige* rule, where a court must look to the record and the order to determine if an order actually disposes of all pending parties and issues.

Because of the lower courts' confusion and disagreement about the role of intent in determining finality, I am convinced that the Court has not provided a workable rule that clearly defines that role

as it applies to determining summary judgment finality.

### E. Applying *Mafrige* To Non-Summary Judgment Orders

Finally, the question of whether *Mafrige* applies outside the summary judgment context has confused the lower courts. Courts of appeals have applied *Mafrige* to a plea to the jurisdiction, *Webb v. HCM Mgmt. Corp.*, No. 07-96-0369-CV (Tex. App.--Amarillo Jan. 12, 1998, pet. denied) (not designated for publication) 1998 WL 16033, at *1; an agreed judgment, *In re Cobos*, 994 S.W.2d at 315-16; a directed verdict, *e.g., Polley v. Odem*, 957 S.W.2d 932, 943 (Tex. App.--Waco 1997, judgm't vacated); and a severance order, *Harris County Flood Control Dist. v. Adam*, 988 S.W.2d 423, 427 (Tex. App.--Houston [1st Dist.] 1999, pet. filed). In contrast, at least one court has declined to apply *Mafrige* to a dismissal for want of jurisdiction. *In re Tejas*, Nos. 01-98-00688-CV, 01-98-00689-CV, 01-98-00690-CV (Tex. App.--Houston [1st Dist.] July 13, 1998, orig. proceeding) (not designated for publication), 1998 WL 394562, at *1 n.1. And another has expressly refused to extend *Mafrige* to any order that is not a summary judgment. *Biltmore Swim & Racquet Club Recreational Ass'n v. McAbee*, No. 05-98-00252-CV (Tex. App.--Dallas Aug. 10, 1998, no pet.) (not designated for publication), 1998 WL 459819, at *1.

In *Aldridge*, this Court held that a presumption of finality exists when an order is signed following a traditional trial on the merits. *Aldridge*, 400 S.W.2d at 897-98. But we specifically noted that such a finality presumption would not be appropriate in other contexts. *Aldridge*, 400 S.W.2d at 897. Then in *Mafrige* we carved out an exception to what we had said in *Aldridge* by holding that an irrebuttable finality presumption applies to summary judgments containing a Mother Hubbard or similar finality clause. *Mafrige*, 866 S.W.2d at 592. Here again, just as we had limited *Aldridge* to conventional trials on the merits, we expressly limited *Mafrige* to summary judgments. *Mafrige*, 866 S.W.2d at 591 ("[T]he issue is whether . . . a summary judgment, which purports to be final by the inclusion of Mother Hubbard language or its equivalent, should be treated as final for purposes of appeal."). Unfortunately, several courts of appeals have erroneously applied *Mafrige* in other contexts, causing confusion over how to determine finality of various other types of orders.

*Mafrige* and its progeny *are* limited to summary judgments--*with good reason*. No good can come of interjecting additional uncertainty into (1) conventional trials on the merits, to which the majority acknowledges the *Aldridge* presumption has "proved a fairly workable" rule, ___ S.W.3d at ___, or (2) numerous other types of orders, when even the majority acknowledges that "the ordinary expectation" supporting a finality presumption "simply does not exist when some form of judgment is rendered without such a trial" because "it is quite possible, perhaps even probable these days . . . that any judgment rendered prior to a full-blown trial is intended to dispose of only part of the case." ___ S.W.3d at ___.

However, the Court's opinion here implicates finality of all judgments. This expansion into issues not before the Court today can only cause mischief in areas already plagued by confusion. If the Court persists in adhering to *Mafrige*'s principles, it should at least limit its holding, as we did in *Mafrige*, to summary judgements.

## II. POLICY CONSIDERATIONS

Not surprisingly, the post-*Mafrige* era has given rise to considerable analysis by courts and commentators of both the competing policies *Mafrige* implicates and suggestions for reform. A few have applauded the bright-line rule. *See Kaigler*, 961 S.W.2d at 275-76 (recognizing that the rule provides harsh results, but emphasizing that uniform enforcement "encourage[s] attentiveness to correct judgments"); Boyce, Mafrige v. Ross *and the Pitfalls of Presumptions*, Appellate Advocate,

Nov. 1997, at 7 (opining that *Mafrige* "resolved the confusion created by prior contradictory language and flatly inconsistent holdings").

However, praises have been few and far between. Criticism has been the rule and the comments call for this Court to reconsider our decision:

What began as a benign growth allowing review of unripe claims on appeal, in *Mafrige*, became a malignant cancer cutting off causes of action before trial, in *Inglish*. If it were up to me, I would lock Mother Hubbard in the cupboard and return to the rule before *Aldridge* that a judgment is final and appealable only if it expressly disposes of all parties and all claims in the case. That appellants can even cite authority for the absurd result they seek, illustrates how wrong a turn the law has taken in this area--and how strong the need to right it.

*Harris County Flood Control Dist.*, 988 S.W.2d at 427-28 (Taft, J., concurring in denial of rehearing en banc); *see also, e.g., Lehmann*, 988 S.W.2d at 418 ("*Mafrige* is not as clear to litigants as the supreme court believes it is . . . . In short, *Mafrige* has created several problems: 1) it is catching the parties by surprise . . . ; 2) it exalts form over substance; and 3) in more than a few situations, it ignores common sense."); Carlson & Dunn, *Navigating Procedural Minefields: Nuances in Determining Finality of Judgments, Plenary Power, and Appealability*, 41 S. Tex. L. Rev. 953, 971 (2000) ("[D]espite the appeal of the certainty provided by this bright-line rule, the reality is that still, after seven years, it continues to operate as a trap for unwary litigants, bringing about arguably unjust and oftentimes draconian results."); Swanda, *Summary Judgment, Mother Hubbard Clauses, and* Mafrige v. Ross, Appellate Advocate, May 1997, at 3 (complaining that the questions *Mafrige* raises "are just as elusive" as the questions it sought to resolve).

Strong policies support our practice of adhering to settled rules of law "unless there exists the strongest reasons for chang[e]." *Benavides v. Garcia*, 290 S.W. 739, 740-41 (Tex. Comm'n App. 1927, judgm't adopted). But we have also recognized the "doctrine of stare decisis does not stand as an insurmountable bar to overruling precedent." *Gutierrez v. Collins*, 583 S.W.2d 312, 317 (Tex. 1979). "Generally, we adhere to our precedents for reasons of efficiency, fairness, and legitimacy." *Weiner v. Wasson*, 900 S.W.2d 316, 320 (Tex. 1995). However, when adherence to a judicially-created rule of law no longer furthers these interests, and "the general interest will suffer less by such departure, than from a strict adherence," we should not hesitate to depart from a prior holding. *Benavides*, 290 S.W. at 740. The lower courts' application of *Mafrige* over the last seven years illustrates undeniably that this is just such a case.

We intended *Mafrige*, *Inglish,* and *Bandera* to provide certainty to litigants. Instead, they have bred chaos. Most disturbing is that the casebooks are now replete with examples of dismissed cases where the parties and courts clearly intended an order containing finality language to be interlocutory.(5) *E.g., Inglish*, 945 S.W.2d at 811; *In re Cobos*, 994 S.W.2d at 315-16; *Pena v. Valley Sandia, Ltd.*, 964 S.W.2d 297, 298-99 (Tex. App.--Corpus Christi 1998, no pet.); *Kaigler*, 961 S.W.2d at 275-76. Even the Court acknowledges:

[T]he ordinary expectation that supports the presumption that a judgment rendered after a conventional trial on the merits will comprehend all claims simply does not exist when some form of judgment is rendered without such a trial. On the contrary, it is quite possible, perhaps even probable these days in cases involving multiple parties and claims, that any judgment rendered prior to a full-blown trial is intended to dispose of only part of the case. Accordingly, the finality of the judgment must be determined without the benefit of any presumption.

___S.W.3d at ___. Because of this reality, it is difficult to understand why the Court persists in adhering to *Mafrige*'s principles.

There is no presumption in partial summary judgments that the judgment was intended to make an adjudication about all parties and issues. The Mother Hubbard clause that "all relief not expressly granted is denied" has no place in a partial summary judgment hearing. The concepts of a partial summary judgment on the one hand, and a judgment that is presumed to determine all issues and facts on the other, are inconsistent.

664 S.W.2d at 704. In *Mafrige* we recognized this earlier statement in *Teer*, but rejected it and held that finality language could render a partial summary judgment final for purposes of appeal. 290 S.W.2d at 592.

*Mafrige*'s second holding--that a summary judgment granting more relief than requested should be reversed and remanded, but not dismissed--does not appear to be an entirely new rule. In both *Teer* and *Chessher*, another pre-*Mafrige* case, we reversed and remanded (rather than dismissed) summary judgment orders after determining that they were interlocutory because they granted more relief than requested. *See Teer*, 664 S.W.2d at 705; *Chessher v. Southwestern Bell Tel. Co.*, 658 S.W.2d 563, 564 (Tex. 1983). *But see Ross v. Arkwright Mut. Ins. Co.*, 834 S.W.2d 385, 393 (Tex. App.--Houston [14th Dist.] 1992) (opining that these cases are "in direct contravention of Tex. R. Civ. P. 166a(c)" and discussing disagreement in the courts over whether summary judgment orders granting more relief than requested were interlocutory or appealable, but erroneous, judgments), *rev'd sub. nom. Mafrige*, 866 S.W.2d at 590. Thus, while the courts were not entirely in agreement, it appears we had already established the rule that a summary judgment order granting more relief than requested is not interlocutory--it is simply erroneous. For this reason, I agree with the Court that if an order actually does dispose of each claim and every party, it is an appealable judgment, even if it grants more relief than requested. This is consistent with the long-standing rule that if an order *actually* disposes of all parties and issues, it is final for appeal purposes. *E.g., Houston Health Clubs, Inc. v. First Court of Appeals*, 722 S.W.2d 692, 693 (Tex. 1986). However, consistent with my view that we should overrule *Mafrige* and its progeny and recognize no presumption *for or against* finality, I do not believe any type of conclusory finality language can ever be read to grant more relief than requested by the parties.(6)

We should determine summary judgment finality by comparing the live pleadings and the summary judgment order. A summary judgment order should only be final if it matches the contents of the pleadings. And, as was the law before *Bandera*, a court of appeals should summarily reverse any summary judgment granting more relief than requested, without any *sua sponte* severance of some issues while others are remanded.

Wiping the slate clean by overruling the rules created in *Mafrige*, *Inglish*, and *Bandera* while we study the best method of tackling summary judgment finality through our formal rule-promulgation process is the better solution for several reasons. First, this approach strikes a more reasonable balance between the competing policies of promoting certainty and preserving parties' rights to appellate review. And, under this approach, the trial court and the parties drafting summary judgment orders would have the burden, and *the incentive*, to ensure that the pleadings, summary judgment motions, and the summary judgment orders match. If a premature appeal is taken, the court of appeals need only compare the pleadings, motions, and order. If the order does not dispose of parties or issues raised in the pleadings, then it is interlocutory and the court must dismiss the appeal.(7) If the order explicitly disposes of issues and parties not raised in the motion, it is erroneous and the court must reverse the entire order.

Most importantly, this approach alters the consequences of poorly-drafted orders. Specifically, the consequence flowing from a poorly drafted order becomes the risk of a *premature* appeal rather than an *untimely* one. This eliminates the greatest risk *Mafrige* created--that an interlocutory order, contrary to the trial court's and (at least one party's) intent, will be fictitiously made final, starting the

appellate and plenary power timetables even while the litigation continues. No one would argue that conducting a trial after the trial court's plenary power has expired is not a waste of judicial resources. Moreover, because overruling *Bandera* eliminates the benefits of a premature appeal, taking such an appeal would not be a cost-efficient mistake for litigants to make, increasing the incentive to ensure orders are more clearly drafted. If a premature appeal is nonetheless taken, it would not create an onerous burden for the appellate court. The opposing party need only file a brief pointing out that the pleadings, motion, and order do not match, leading to automatic remand or dismissal.

No one disputes that rules governing summary judgment finality could be helpful to the bench and bar and facilitate judicial efficiency. But history, as well as our own precedent, has shown that judicial opinions are not the place to achieve this. Any attempt to adhere to the *Mafrige* principle or retain parts of it while rejecting others can only lead to more problems. Instead, this Court should overrule *Mafrige* and its progeny and start anew. As the Court even notes, our rules advisory committee is currently studying summary judgment finality. ___ S.W.3d at ___. Retaining parts of *Mafrige*, *Inglish*, *Bandera* as modified by the Court's less-than-clear opinion today--only to follow with promulgation of a concurrent finality rule--will only lead to more confusion.

I agree that the cases here should be reversed. But, because the Court refuses to fix the problems its judicial rulemaking in *Mafrige* caused and allow our rulemaking process to work, I cannot join the Court's opinion.

## IV. RECOMMENDATION

I recognize that the Supreme Court of Texas Advisory Committee on Rules of Civil Procedure has been studying the problem of summary judgment finality. It has proposed an amendment to Rule 166a of the *Texas Rules of Civil Procedure*:

(j) Statement of Grounds. An order granting summary judgment must state the ground or grounds on which the motion was granted. No judgment may be affirmed on other grounds stated in the motion unless they are asserted by appellee in the appellate court as alternative grounds for affirmance.

I do not believe this proposed amendment goes far enough.

First I would suggest to the committee that they consider requiring each summary judgment order specifically identify: (1) the claims each party brings; (2) the grounds upon which each party seeks summary judgment; (3) each ground upon which the trial court granted summary judgment; and (4) each ground upon which the trial court denied summary judgment.

This solution is intuitive. In the vast majority of cases, this formality, rather than including magic language, would provide notice to parties about what has actually happened. In practice, this procedure alleviates many problems *Mafrige*'s finality rule has caused.

Under this approach, a summary judgment is not final unless the order specifically identifies each claim for relief, the grounds upon which each party seeks summary judgment, and the court's disposition of each claim and party. The appellate court's jurisdiction is determined only by looking at whether the trial court rendered an order expressly disposing of all remaining parties and issues. If the trial court errs by omitting certain claims or parties from the order, as happened in *Lehmann* and *Harris*, it is not a final order for purposes of appeal. Under this approach a party *never* loses its right to appeal based upon the finality of a summary judgment order *that is silent* about the party or its claims or that *sua sponte* grants relief no party requested without mentioning the parties or claims--

*regardless* of how clearly it states that it is a final judgment disposing of all parties and issues.

Most significantly, *in practice* this would lead to better drafting and fewer erroneous appeals. Specifically, if required to expressly list each ground upon which summary judgment is requested, trial courts are not likely to *add* grounds to their order that the summary judgment motion did not raise.

Second, I would suggest the committee consider a rule requiring that the prevailing party, who is charged with drafting the court's order, serve copies on all other parties at least ten days *before* the trial court is to sign and enter the order. Consistent with this suggestion, I agree with the Court's suggestion that the clerk send copies of all the actual signed orders--rather than just a postcard indicating that the court has signed an order.

The majority's author criticizes my first recommendation, asserting that there is a "very real risk" that requiring judges to be explicit in their summary judgment orders would result in "thousands of judgments intended to be final . . . remain[ing] interlocutory." ___ S.W.3d at ___. He contends that "[t]his is precisely what has happened in the federal system even though the federal rules impose far fewer requirements on final judgments than the dissent would." ___ S.W.3d at ___. Federal Rule 58, to which he refers, requires that *all final judgments* "be set forth on a separate document" and be entered by the clerk on the docket. Fed. R. Civ. P. 58.

This criticism only serves to amplify the real dangers of straying outside the summary judgment context in these cases. How finality of different types of judgments is determined must be governed by the *nature* of the judgment. *Houston Health Clubs, Inc.*, 722 S.W.2d at 693 ("In determining whether a judgment is final, different presumptions apply depending on whether the judgment follows a conventional trial on the merits or results from default or a motion for summary judgment."). Cognizant of this, my recommendation, unlike Federal Rule 58, is limited to summary judgment finality.

The live pleadings define the issues in a case. The issues tried do not always mirror these pleadings. *See Vance v. Wilson*, 382 S.W.2d 107, 108 (Tex. 1964). Nonetheless, we have repeatedly recognized that a presumption should exist that all issues presented by the pleadings are disposed of in a conventional trial on the merits. *See Aldridge*, 400 S.W.2d at 897-98; *Vance*, 382 S.W.2d at 108. This presumption can be rebutted by a contrary showing in the record. *See Richey v. Bolerjack*, 589 S.W.2d 957, 959 (Tex. 1979). But absent such a rebuttal, this presumption prevents judgments from languishing after trial based solely on variations in the pleadings and judgment. This presumption has saved us from the types of problems the federal system has experienced.

However, we sensibly limited this presumption to judgments "not intrinsically interlocutory in character." *Aldridge*, 400 S.W.2d at 897. We have also explained that summary judgments are intrinsically interlocutory and thus they should not be presumed final. *Houston Health Clubs, Inc.*, 722 S.W.2d at 693. Thus, there is nothing illogical about requiring that finality language be explicit. And I respectfully disagree that my recommendation, limited to summary judgments, will cause such major havoc in the court system. Further, I believe the additional formality in this context is worth the certainty and protections such a rule provides.

## V. CONCLUSION

In Texas, the test for determining summary judgment finality has always been whether the judgment disposes of all parties and all issues raised in the pleadings. In *Mafrige* we created a legal fiction to simplify the process of determining finality. But *Mafrige* created more problems than it solved. It is beyond me why the Court insists on struggling through pages and pages of history about presumptions, magic language, and Mother Hubbard clauses instead of squarely considering the

problems *Mafrige* caused and providing a solution. Its willingness to cling to this legal fiction, while refusing to recognize that our rulemaking in *Mafrige* and its progeny was not the correct solution, will only create more problems.

I concur in the judgment in these cases. But, because the Court declines to overrule *Mafrige*, *Inglish*, and *Bandera*, and await our promulgation of a rule governing summary judgment finality, I do not concur in its reasoning.

James A. Baker, Justice

Opinion Delivered: February 1, 2001

1. These rules and presumptions are irrelevant to the issues before the Court today. As we have repeatedly admonished--in *Mafrige*, in *Aldridge*, and even in the Court's opinion today--the rules governing finality after a conventional trial are wholly inappropriate for determining finality of summary judgments. *See Mafrige*, 400 S.W.2d at 592; *North E. Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 897-98 (Tex. 1966); *Lehmann*, ___ S.W.3d ___.

2. The unpublished opinions cited in Part I are cited only as examples, not as precedent. *See* Tex. R. App. P. 47.7.

3. This issue also arises when a trial court expressly mentions and disposes of a party even though that party was not mentioned in the motion for summary judgment. Here, the lower courts have been more willing to apply *Mafrige* and hold that the order purports to dispose of all parties and issues. *See, e.g., Mikulich v. Perez*, 915 S.W.2d 88, 91-92 (Tex. App.--San Antonio 1996, no writ).

4. In fact, the district clerk sent all the parties (including those omitted from the summary judgment order) a postcard indicating that an "Order for Interlocutory Summary Judgment" had been signed. *Lehmann*, 988 S.W.2d at 416.

5. Oftentimes in these cases litigation continues to move forward. Any error in including magic finality language in a summary judgment is not discovered until it is too late; the appellate timetable has expired and the trial court has lost plenary power to act. The litigants have forever lost their right to complain of the judgment.

6. It would *not* be enough for a court to generally state "plaintiff takes nothing," "defendant is granted summary judgment in all things," or "this is a final appealable judgment." Conclusory finality clauses (i.e. "magic language") do not indicate that a trial court *actually* granted relief *not requested* for or against parties or issues are *not mentioned* in the order.

7. Of course, this procedure would not apply if the order fell within the category of cases for which there can be more than one final judgment, or the category of orders for which a court of appeals has been granted statutory authority to review interlocutory orders.

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March 23, 2001

Mr. Chris Griesel
Supreme Court of Texas
P. O. Box 12248, Capitol Station
Austin, Texas 78711

Dear Chris:

I am enclosing herein chart showing action taken by the Supreme Court the last time the committee discussed Evidence Rules. At that time Rule 702 was approved but the comment was not discussed. I have not attached hereto Rule 702. I am attaching that to the other chart that I am enclosing herein, along with the comment, which will be discussed at our next meeting.

Chris, the second enclosure is Disposition Chart Texas Rules of Evidence (Agenda March 30-31, 2001).

If you have any questions, please call me. I look forward to seeing you Friday.

Sincerely,

Gilbert I. Low

GIL:cc

Enclosures

# CHART SHOWING ACTION TAKEN
# BY SUPREME COURT ADVISORY COMMITTEE
# AT MEETING OF NOVEMBER 18, 2000

| RULE NO. | ACTION TAKEN BY SUPREME COURT ADVISORY COMMITTEE |
|---|---|
| 103 (COMMENT) | Comment approved as attached |
| 404 (COMMENT) | Comment approved as attached |
| 703 | No action taken since the problem had previously been addressed in 1998 by TRE 705(b), (c), and (d). |
| 409 | Referred back to SBOT Administration of Rules of Evidence Committee to study effect on non-personal injury and property damage cases and possibly to make the language clearer. Further study is to be made to see if any statutes are in effect that now cover this. |
| 701 | The rule and comment approved as attached. |
| 702 | Rule approved as attached. Comment will be discussed at next meeting. |
| TEXAS RULE OF CIVIL PROCEDURE (NEW) 195a | This was not discussed but will be discussed at the next meeting as to whether or not the comment is the proper approach and if so, what changes are to be made, or whether a rule is the proper approach. |

## PROPOSED COMMENT TO RULE TRE 103

For an explanation of preservation of error in obtaining a ruling from the trial court, see Rule 33.1(a)(2) of the Texas Rules of Appellate Procedure.

## PROPOSED COMMENT TO RULE TRE 404

In certain prosecutions for an offense committed against a child under 17 years of age, refer to Article 38.37 of the Code of Criminal Procedure for additional provisions on the admissibility of certain extraneous acts.

## Proposed Rule 701 and Comments

The subcommittee recommends adopting Rule 701 as proposed by the National Conference. The proposed federal rule is nearly identical; the only difference is that the National Conference refers to testimony by a lay witness, while the federal proposal refers to lay witnesses.

We have changed the comments from those given by the National Conference to give it more of a Texas flavor. The first sentence of the comments is virtually identical in the National Conference proposal and the federal committee proposal. The second paragraph is based on the last paragraph of the federal committee note. The third paragraph is based on the language of the second paragraph of the federal committee note.

It should be noted that Dean Sutton has criticized both proposed amendments because some "'notice' problems will be difficult, particularly since the overlap between 702 and 701 is a gray area because the 'perceptions' of a 'lay' witness often can be and are based on unusual knowledge that few folk possess. Havoc in the use of lay- or fact-witnesses may result from the proposed amendment."

Rule 701 Opinion Testimony by Lay Witness. If a witness's testimony is not based on scientific, technical, or other specialized knowledge within the scope of Rule 702, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences that are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Comment. The amendment to Rule 701 is intended to eliminate the risk that the reliability requirements for the admissibility of scientific, technical or specialized knowledge under Rule 702 will be evaded through the expedient of proffering an expert as a lay witness.

The phrase "scientific, technical, or other specialized knowledge" is intended to have the same meaning as the identical phrase in Rule 702. However, the language does not change the standards for admissibility of evidence traditionally offered under Rule 701. Generally lay testimony is based on common and everyday observations and inferences.

The amendment distinguishes between expert and lay *testimony* and not between expert and lay *witnesses* since it is possible for the same witness to give both lay and expert testimony in the same case.

**DISPOSITION CHART**
**TEXAS RULES OF EVIDENCE**
**(AGENDA MARCH 30-31, 2001)**

| RULE NO. | HISTORY | RECOMMENDATION OF EVIDENCE SUBCOMMITTEE | REASONS |
|---|---|---|---|
| 702 | Referred by both Justice Hecht and by SBOT Administration of Rules of Evidence Committee - clarify the reliability requirement for the testimony of an expert | Proposed revised rule and comment attached | Set clear guidelines for attorneys and judges to follow in determining whether reliability requirement of expert testimony is met. |
| Texas Rule of Civil Procedure (New 195a) | Referred by Justice Hecht to establish rule of procedure when testimony of expert or reliability factor of testimony is challenged | Take no action other than adding comment to Evidence Rule 702, which is attached. | It is extremely difficult to draw a rule that would be helpful in every situation and the proposed comment gives flexibility to the trial judge. However, if the rule is approved by the committee, a draft of such rule is attached. |

# INDEX

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Gil

**Harvey G. Brown**
**Judge, 152nd District Court**
**1019 Congress Plaza**
**Houston, Texas 77002**
**(713) 755-6282**

March 22, 2001

Gilbert I. Low
Orgain, Bell & Tucker
470 Orleans Street
P.O. Box 1751
Beaumont, Texas 77704-1751

Re: Evidence subcommittee

Dear Buddy:

Here are the changes I have made to Rule 702 based on the discussions at the November Advisory Committee meeting. The new rule tracks the new federal rule closely in section 4. I also made some changes to proposed Rule 195b based on some suggestions by Mark Sales.

Can you please put thse into a booklet form for the meeting next week?

Thank you for your help. I look forward to seeing you and the other committee members next week.

Sincerely,

Harvey G. Brown

:HB

Rule 702. Testimony by Experts

(a) General rule. A witness may testify in the form of opinion or otherwise *if the* following are satisfied [**for each opinion**]:

(1) Basis for testimony. The testimony is based on scientific, technical, or other specialized knowledge.

(2) Assistance to trier of fact. The testimony will assist the trier of fact to understand evidence or determine a fact in issue.

(3) Qualification of witness. The witness is qualified by knowledge, skill, experience, training, or education as an expert in the scientific, technical, or other specialized field.

(4) Reliability. The testimony is

**(A) sufficiently based upon a reliable foundation of facts, data, studies or reasonable assumptions;**

**(B) the product of reliable principles and methods; and**

(C) **the product of a reliable application of the foundational data, principles and methods to the facts of the case.**

Revised Rule 702. Testimony by Experts

(b) General rule. A witness may give expert testimony in the form of opinion or otherwise if the following are satisfied:

(1) Basis for testimony. The testimony is based on scientific, technical, or other specialized knowledge.

(2) Assistance to trier of fact. The testimony will assist the trier of fact to understand evidence or determine a fact in issue.

(3) Qualification of witness. The witness is qualified by knowledge, skill, experience, training, or education as an expert in the scientific, technical, or other specialized field.

(4) Reliability. The testimony is

**(A) based upon sufficient facts or data;**

**(B) the product of reliable principles and methods; and**

(C) **the product of a reliable application of the data, principles and methods to the facts of the case.**

**OR**

(4) Reliability.

(A) The testimony is based upon sufficient facts or data;

(B) The testimony is the product of reliable principles and methods; and

(C) The witness has applied the data, principles and methods reliably to the facts of the case.

Comments

An expert opinion derived from scientific, technical, or other specialized knowledge must assist the trier of fact. *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000). The opinion will not assist the trier of fact unless the opinion is relevant to a material issue and is based upon a foundation of knowledge shown to be, or known to be, reliable. *E.I. duPont de Nemours v. Robinson*, 923 S.W.2d 549 (Tex. 1995). Subdivisions (a)(1), (2) and (3) retain the substance of existing Rule 702 but are changed stylistically to show the different subparts of the rule.

Subdivision (a)(4) is based on the three different reliably tests identified by *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997). Reliability requires the trial court to scrutinize not only the principles and methods used by the expert, but also whether these principles and methods have been properly applied to the facts of the case and any data, studies, or facts that underlie, or form the foundation of, the expert's opinion.

Courts have established a number of non-exclusive facts for assessing the reliability of expert testimony. No attempt has been made to codify these specific factors and they do not all apply to all expert testimony. When required, the court shall consider relevant additional factors, which may include:

(1) Testing. The extent to which the principle or methodology **or application of the principle or methodology** has been tested [source: National Conference; *Daubert*, *Robinson*, bold is addition of subcommittee].

(2) Research methods. The adequacy of research methods employed in testing the principle or methodology [source: National Conference].

(3) Peer review. The extent to which the principle or methodology **or application of the principle or methodology** has been published and subjected to peer review [source: National Conference; *Daubert*, *Robinson*; bold is addition of subcommittee].

(4) Rate of error. The rate of error in the application of the principle or methodology [source: National Conference; *Daubert*, *Robinson*]...

(5) **[Qualifications]** of expert. The experience and qualifications of the witness as an expert [source: National Conference, although it just refers to experience, not qualifications, *Kelly* refers to qualification as do numerous federal cases; *Gammill* refers to experience, Texas Administration Comm. refers to experience and skill as separate from qualification sand lists qualifications as separate factor].

(6) Acceptance within the field. The extent to which the field of knowledge has substantial acceptance within the relevant scientific, technical, or specialized community [source: National Conference; *Daubert*, *Robinson*]...

(7) Subjective. The extent to which the expert's opinion is subjective or can be objectively verified [source: *Daubert II*; *Robinson*].

(8) Prior Use of Principles and Methodology. The extent to which the same or a similar principle or methodology in a non-litigation setting [source: *Robinson*].

(9) Literature or studies. The existence of literature supporting or rejecting the theory or technique, the application of the theory or technique or the foundation supporting the expert's opinion [source: Texas Administration Comm.; *Kelly*]..

(10) The availability of other experts to test or evaluate the theory or technique, its application to the case in question, or use as a foundation for the expert's opinion [source: Texas Administration Comm.; *Kelly*].

(11) Clarity. The clarity with which the theory or technique can be explained in the trial court [source: Texas Administration Comm.; *Kelly*].

(12) Whether the expert has adequately accounted for obvious alternative explanations. [source: federal committee note; *Robinson*]

(13) Whether the expert is using the same level of rigor as he or she would be in his regular professional work [source federal committee note; *Kumho*]; and

(14) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. [source: federal committee; *Kumho; Nenno*]

The role of the trial court is not to determine the validity or accuracy of the opinions formed by the expert, but to determine admissibility of the opinions. The trial court's decision on admissibility and selection of the criteria for examining the principles and methodology used by the expert is subject to review for abuse of discretion. [source: Texas Administration Comm.]. Courts may consider inadmissible evidence pursuant to Rule 104(a) in making this determination.

Particular opinions or portions of the testimony of an expert may be admissible under this rule even though other opinions or portions of the testimony from the same witness are inadmissible under this rule.

Alternative comment

If the court determines that a comment should not identify factors, the subcommittee suggests the following language:

> The relevant factors for determining reliability under Rule 702(a)(4) will vary from expertise to expertise. For a list of some of the factors used by courts, see *E.I. duPont de Nemours v. Robinson,* 923 S.W.2d 549 (Tex. 1995); *Nenno v. State*, 970 S.W. 2d 549, 561 (Tex. Crim. App. 1998); *Kelly v. State*, 824 S.W.2d 569, 572, 573 (Tex. Crim. App. 1992). The court should also consider whether the expert has used the same principles and methodology that the expert uses in his or her field. *Kumho Tire Co. Ltd. vs. Carmichael*, ___ U.S. ___, 119 S.Ct. 1167 (1999). The reliability inquiry is a flexible one and will vary according to the expert's field. In some cases, the extent of the expert's personal experience will be an important factor for determining reliability.
>
> The trial court's determination of admissibility should be made outside the presence of the jury.

## Proposed comment on Procedural Issues

The subcommittee was split on whether a comment could adequately address procedural difficulties created by *Daubert/Robinson* or whether a rule is needed. The majority of the committee favored a comment. Both are presented for consideration by the whole committee.

### Proposed Comment

This amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert.

The trial judge should set appropriate deadlines for filing objections or challenges to an expert's qualifications or opinions consistent with justice and judicial economy. The challenge or objection must state the specific ground for challenging the expert's opinion or otherwise provide reasonable notice of the basis for the challenge, if the specific ground is not apparent from the content. "Such objection or challenge should **ordinarily** be determined prior to trial.

**The trial court has the discretion to impose appropriate sanctions [under Tex. R.Civ.P.13] for abuses in designating or challenging expert witnesses.**

### Proposed Tex. Civ. P. 195a

TRCP 195a Challenges to Expert Testimony

(a) Motion and Proceedings. Unless otherwise ordered by the trial court, an objection or challenge to the reliability of expert testimony under Texas Rule of Evidence 702(a)(4) shall made for any expert who has been deposed or provided a written report no later than seven days after the end of the discovery period and served at least twenty-one days before the time specified for hearing. The challenge or objection shall be made in a written motion to strike with or without supporting affidavits. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response. No oral testimony shall be received at the hearing unless (1) it is requested or permitted by the court and (2) seven days notice is given to the other side of the identity of the witnesses who are expected to testify and a summary of their testimony sufficient to satisfy Rule 194.2(f).

(b) Basis for Challenge. The motion must state the specific ground for challenging the expert opinion or otherwise provide reasonable notice of the basis for the challenge, if the specific ground is not apparent from the context. The party making the challenge shall furnish the court sufficient information to enable it to determine the basis of the challenge and to enable all parties fairly to respond to the challenge.

(c) Opportunity to Be Heard. A party is entitled upon timely request to an oral hearing as to the propriety of striking an opinion of an expert witness.

(d) Appendices, References and Other Use of Discovery Not Otherwise on File. Same as TRCP 166a(d).
(e) Form of Affidavits; Further Testimony. Same as Rule 166a(f).
(f) When Affidavits are Unavailable. Same as Rule 166a(g).
(g) Experts and Sanctions. Should it appear to the satisfaction of the court at any time that the designation of an expert on a topic or the challenge to an expert was in bad faith or groundless, a court may in its discretion award the costs incurred by the successful party. Groundless for purpose of this rule means no basis in law or fact for believing the witness could provide a reliable basis for expert testimony pursuant to Rule 702(a)(4) and not warranted by good faith argument for the extension, modification or reversal of existing law or existing scientific, technical or other specialized knowledge.
(h) Opportunity to Supplement. If the court grants a motion to strike expert testimony, the party proffering that testimony may seek to supplement with other expert testimony pursuant to the provisions of Tex.R. Civ. P 193.6.

OR Effect on Trial Setting. A trial court may in its discretion continue the trial of the case and allow the new designation of expert witnesses if it strikes an expert and determines that the expert challenge was not filed as soon as was reasonably practical under the circumstances or otherwise determines that the trial setting would result in a miscarriage of justice. If the court continues the case under such circumstance, it may award the other party for any wasted expense in preparing for trial.

(i) Preservation of Error. When the court hears a motion to strike expert testimony out of the presence of the jury no more than thirty days before trial, objections to evidence made at the hearing or in the motion shall be deemed to apply to such evidence when it is offered before the jury without the necessity of repeating those objections.

Comments

A trial court may, upon the motion of either party, shorten or extend the time for filing motions to strike expert testimony. In most cases, the party filing the motion should request the hearing on the motion to strike well in advance of trial and the court should hear the matter well in advance of trial. If the proponent of the expert requests the trial court to delay hearing the matter until trial – for example, to avoid the expense of bringing the expert twice or to place the matter in the context of the entire trial - that request should ordinarily be granted.

TRCP 195a does not authorize conclusory or general challenges to an expert's opinions.

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**Appendix B**
**Rule 702**
**By**
**National Conference of Commissions on the Uniform State Laws to Revise the Uniform Rules of Evidence**

(a) **General rule.** A witness may testify in the form of opinion or otherwise if the following are satisfied.

(1) **Basis for testimony.** The testimony is based on scientific, technical, or other specialized knowledge.

(2) **Assistance to trier of fact.** The testimony will assist the trier of fact to understand evidence or determine a fact in issue.

(3) **Qualification of witness.** The witness is qualified by knowledge, skill, experience, training, or education as an expert in the scientific, technical, or other specialized field.

(4) **Reliability.** Any principle or methodology upon which the testimony is based is reasonably reliable (A) if its reliability has been established under subdivision (b), (c), or (e) and (B) can be reliably applied to the facts of the case.

(b) **Reliability deemed to exist.** A principle or methodology is deemed reasonably reliable if its reliability has been established by controlling legislation or judicial decision.

(c) **Presumption of reliability.** A principle or methodology is presumed to be reasonably reliable if it has substantial acceptance within the relevant scientific, technical, or specialized community. A party seeking to rebut this presumption must prove that it is more probable than not that the principle or methodology is not reasonably reliable as provided in subdivision (e).

(d) **Presumption of unreliability.** A principle or methodology is presumed not to be reasonably reliable if it does not have substantial acceptance within the relevant scientific, technical, or specialized community. A party seeking to rebut this presumption must prove that it is more probable than not that the principle or methodology is reasonably reliable as provided in subdivision (e).

(e) **Other reliability factors.** When required, the court shall consider relevant additional factors, which may include:

(1) **Testing.** The extent to which the principle or methodology has been tested.

(2) **Research methods**. The adequacy of research methods employed in testing the principle or methodology.

(3) **Peer review.** The extent to which the principle or methodology has been published and subjected to peer review.

(4) **Rate of error.** The rate of error in the application of the principle or methodology.

(5) **Experience of expert.** The experience of the witness as an expert in the application of the principle or methodology.

(6) **Acceptance within the field**. The extent to which the field of knowledge has substantial acceptance within the relevant scientific, technical, or specialized community.

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stance appeared to be a narcotic, so long as a foundation of familiarity with the substance is established. *See, e.g., United States v. Westbrook*, 896 F.2d 330 (8th Cir. 1990) (two lay witnesses who were heavy amphetamine users were properly permitted to testify that a substance was amphetamine; but it was error to permit another witness to make such an identification where she had no experience with amphetamines). Such testimony is not based on specialized knowledge within the scope of Rule 702, but rather is based upon a layperson's personal knowledge. If, however, that witness were to describe how a narcotic was manufactured, or to describe the intricate workings of a narcotic distribution network, then the witness would have to qualify as an expert under Rule 702. *United States v. Figueroa-Lopez, supra.*

The amendment incorporates the distinctions set forth in *State v. Brown*. 836 S.W.2d 530, 549 (1992), a case involving former Tennessee Rule of Evidence 701, a rule that precluded lay witness testimony based on "special knowledge." In *Brown*, the court declared that the distinction between lay and expert witness testimony is that lay testimony "results from a process of reasoning familiar in everyday life," while expert testimony "results from a process of reasoning which can be mastered only by specialists in the field." The court in *Brown* noted that a lay witness with experience could testify that a substance appeared to be blood, but that a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma. That is the kind of distinction made by the amendment to this Rule.

### GAP Report—Proposed Amendment to Rule 701

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 701:

1. The words "within the scope of Rule 702" were added at the end of the proposed amendment, to emphasize that the Rule does not require witnesses to qualify as experts unless their testimony is of the type traditionally considered within the purview of Rule 702. The Committee Note was amended to accord with this textual change.

2. The Committee Note was revised to provide further examples of the kind of testimony that could and could not be proffered under the limitation imposed by the proposed amendment.

## RULE 702. TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

### COMMITTEE NOTE

Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to the many cases applying *Daubert*,

including *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999). In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. *See also Kumho*, 119 S.Ct. at 1178 (citing the Committee Note to the proposed amendment to Rule 702, which had been released for public comment before the date of the *Kumho* decision). The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. Consistently with *Kumho*, the Rule as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful. Consequently, the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171 (1987).

*Daubert* set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are (1) whether the expert's technique or theory can be or has been tested—that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. The Court in Kumho held that these factors might also be applicable in assessing the reliability of non-scientific expert testimony, depending upon "the particular circumstances of the particular case at issue." 119 S.Ct. at 1175.

No attempt has been made to "codify" these specific factors. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific *Daubert* factors can apply to every type of expert testimony. In addition to *Kumho*, 119 S.Ct. at 1175, *see Tyus v. Urban Search Management*. 102 F.3d 256 (7th Cir. 1996) (noting that the factors mentioned by the Court in *Daubert* do not neatly apply to expert testimony from a sociologist). *See also Kannankeril v. Terminix Int'l. Inc.*, 128 F.3d 802, 809 (3d Cir. 1997) (holding that lack of peer review or publication was not dispositive where the expert's opinion was supported by "widely accepted scientific knowledge"). The standards set forth in the amendment are broad enough to require consideration of any or all of the specific *Daubert* factors where appropriate.

Courts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include:

(1) Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311. 1317 (9th Cir. 1995).

(2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. *See General Elec. Co. v. Joiner*, 522 U.S.

136, 146 (1997) (noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered").

(3) Whether the expert has adequately accounted for obvious alternative explanations. *See Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition). *Compare Ambrosini v. Labarraque*, 101 F.3d 129 (D.C. Cir. 1996) (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).

(4) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting." *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997). *See Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999) (*Daubert* requires the trial court to assure itself that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field").

(5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. *See Kumho Tire Co. v. Carmichael*, 119 S.Ct.1167, 1175 (1999) (*Daubert's* general acceptance factor does not "help show that an expert's testimony is reliable where the discipline itself lacks reliability, as for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy."), *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269 (5th Cir. 1998) (en banc) (clinical doctor was properly precluded from testifying to the toxicological cause of the plaintiff's respiratory problem, where the opinion was not sufficiently grounded in scientific methodology); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988) (rejecting testimony based on "clinical ecology" as unfounded and unreliable).

All of these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended. Other factors may also be relevant. *See Kumho*, 119 S.Ct. 1167, 1176 ("[W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."). Yet no single factor is necessarily dispositive of the reliability of a particular expert's testimony. *See, e.g., Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 155 (3d Cir. 1999) ("not only must each stage of the expert's testimony be reliable, but each stage must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules."); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317, n.5 (9th Cir. 1995) (noting that some expert disciplines "have the courtroom as a principal theatre of operations" and as to these disciplines "the fact that the expert has developed an expertise principally for purposes of litigation will obviously not be a substantial consideration.").

A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a "seachange over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996). As the Court in *Daubert* stated: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but

admissible evidence." 509 U.S. at 595. Likewise, this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert. *See Kumho Tire Co. v. Carmichael*, 119 S.Ct.1167, 1176 (1999) (noting that the trial judge has the discretion "both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.").

When a trial court, applying this amendment, rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. *See, e.g., Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 160 (3d Cir. 1999) (expert testimony cannot be excluded simply because the expert uses one test rather than another, when both tests are accepted in the field and both reach reliable results). As the court stated in *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 744 (3d Cir. 1994), proponents "do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable.... The evidentiary requirement of reliability is lower than the merits standard of correctness." *See also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995) (scientific experts might be permitted to testify if they could show that the methods they used were also employed by "a recognized minority of scientists in their field."); *Ruiz-Troche v. Pepsi Cola*, 161 F.3d 77, 85 (1st Cir. 1998) ("*Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance.").

The Court in *Daubert* declared that the "focus, of course, must be solely on principles and methodology, not on the conclusions they generate." 509 U.S. at 595. Yet as the Court later recognized, "conclusions and methodology are not entirely distinct from one another." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Under the amendment, as under *Daubert*, when an expert purports to apply principles and methods in accordance with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied. *See Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594, 598 (9th Cir. 1996). The amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case. As the court noted in *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994), "*any* step that renders the analysis unreliable ... renders the expert's testimony inadmissible. *This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.*"

If the expert purports to apply principles and methods to the facts of the case, it is important that this application be conducted reliably. Yet it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or bloodclotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles. For this

kind of generalized testimony, Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony "fit" the facts of the case.

As stated earlier, the amendment does not distinguish between scientific and other forms of expert testimony. The trial court's gatekeeping function applies to testimony by any expert. *See Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1171 (1999) ("We conclude that *Daubert's* general holding—setting forth the trial judge's general 'gatekeeping' obligation—applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge."). While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert's testimony should be treated more permissively simply because it is outside the realm of science. An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist. *See Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997) ("[I]t seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique."). Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication, than others. Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded. *See, e.g.*, American College of Trial Lawyers, *Standards and Procedures for Determining the Admissibility of Expert Testimony after Daubert*, 157 F.R.D. 571, 579 (1994) ("[W]hether the testimony concerns economic principles, accounting standards, property valuation or other non-scientific subjects, it should be evaluated by reference to the 'knowledge and experience' of that particular field.").

The amendment requires that the testimony must be the product of reliable principles and methods that are reliably applied to the facts of the case. While the terms "principles" and "methods" may convey a certain impression when applied to scientific knowledge, they remain relevant when applied to testimony based on technical or other specialized knowledge. For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So long as the principles and methods are reliable and applied reliably to the facts of the case, this type of testimony should be admitted.

Nothing in this amendment is intended to suggest that experience alone—or experience in conjunction with other knowledge, skill, training or education—may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not

sole, basis for a great deal of reliable expert testimony. *See, e.g., United States v. Jones*, 107 F.3d 1147 (6th Cir. 1997) (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail); *Tassin v. Sears Roebuck*, 946 F.Supp. 1241, 1248 (M.D.La. 1996) (design engineer's testimony can be admissible when the expert's opinions "are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches"). *See also Kumho Tire Co. v. Carmichael*, 119 S.Ct.1167, 1178 (1999) (stating that "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.").

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply "taking the expert's word for it." *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995) ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough."). The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable. *See O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994) (expert testimony based on a completely subjective methodology held properly excluded). *See also Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999) ("[I]t will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.").

Subpart (1) of Rule 702 calls for a quantitative rather than qualitative analysis. The amendment requires that expert testimony be based on sufficient underlying "facts or data." The term "data" is intended to encompass the reliable opinions of other experts. See the original Advisory Committee Note to Rule 703. The language "facts or data" is broad enough to allow an expert to rely on hypothetical facts that are supported by the evidence. *Id.*

When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on "sufficient facts or data" is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.

There has been some confusion over the relationship between Rules 702 and 703. The amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided under Rule 702. Rule 702 sets forth the overarching requirement of reliability, and an analysis of the sufficiency of the expert's basis cannot be divorced from the ultimate reliability of the expert's opinion. In contrast, the "reasonable reliance" requirement of Rule 703 is a relatively narrow inquiry. When an expert relies on inadmissible information, Rule 703 requires the trial court to determine whether that information is of a type reasonably relied on by other experts in the field. If so, the expert can rely on the information in reaching an opinion. However, the question whether the expert is relying on a *sufficient* basis of information—whether admissible information or not—is governed by the requirements of Rule 702.

**New material underlined. Deleted material lined through.**

The amendment makes no attempt to set forth procedural requirements for exercising the trial court's gatekeeping function over expert testimony. *See* Daniel J. Capra, *The Daubert Puzzle*, 38 Ga.L.Rev. 699, 766 (1998) ("Trial courts should be allowed substantial discretion in dealing with *Daubert* questions; any attempt to codify procedures will likely give rise to unnecessary changes in practice and create difficult questions for appellate review."). Courts have shown considerable ingenuity and flexibility in considering challenges to expert testimony under *Daubert*, and it is contemplated that this will continue under the amended Rule. *See, e.g., CortesIrizarry v. Corporacion Insular*, 111 F.3d 184 (1st Cir. 1997) (discussing the application of *Daubert* in ruling on a motion for summary judgment); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 736, 739 (3d Cir. 1994) (discussing the use of *in limine* hearings); *Claar v. Burlington N.R.R.*, 29 F.3d 499, 502–05 (9th Cir. 1994) (discussing the trial court's technique of ordering experts to submit serial affidavits explaining the reasoning and methods underlying their conclusions).

The amendment continues the practice of the original Rule in referring to a qualified witness as an "expert." This was done to provide continuity and to minimize change. The use of the term "expert" in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an "expert." Indeed, there is much to be said for a practice that prohibits the use of the term "expert" by both the parties and the court at trial. Such a practice "ensures that trial courts do not inadvertently put their stamp of authority" on a witness's opinion, and protects against the jury's being "overwhelmed by the so-called 'experts'." Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials*, 154 F.R.D. 537, 559 (1994) (setting forth limiting instructions and a standing order employed to prohibit the use of the term "expert" injury trials).

### GAP Report—Proposed Amendment to Rule 702

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 702:

1. The word "reliable" was deleted from Subpart (*l*) of the proposed amendment, in order to avoid an overlap with Evidence Rule 703, and to clarify that an expert opinion need not be excluded simply because it is based on hypothetical facts. The Committee Note was amended to accord with this textual change.

2. The Committee Note was amended throughout to include pertinent references to the Supreme Court's decision in *Kumho Tire Co. v. Carmichael*, which was rendered after the proposed amendment was released for public comment. Other citations were updated as well.

3. The Committee Note was revised to emphasize that the amendment is not intended to limit the right to jury trial, nor to permit a challenge to the testimony of every expert, nor to preclude the testimony of experience-based experts, nor to prohibit testimony based on competing methodologies within a field of expertise.

4. Language was added to the Committee Note to clarify that no single factor is necessarily dispositive of the reliability inquiry mandated by Evidence Rule 702.

## RULE 703. BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

### COMMITTEE NOTE

Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted. Courts have reached different results on how to treat inadmissible information when it is reasonably relied upon by an expert in forming an opinion or drawing an inference. *Compare United States v. Rollins*, 862 F.2d 1282 (7th Cir. 1988) (admitting, as part of the basis of an FBI agent's expert opinion on the meaning of code language, the hearsay statements of an informant), *with United States v. 0.59 Acres of Land*. 109 F.3d 1493 (9th Cir. 1997) (error to admit hearsay offered as the basis of an expert opinion, without a limiting instruction). Commentators have also taken differing views. *See e.g.*, Ronald Carlson, *Policing the Bases of Modern Expert Testimony*, 39 V and.L.Rev. 577 (1986) (advocating limits on the jury's consideration of otherwise inadmissible evidence used as the basis for an expert opinion); Paul Rice, *Inadmissible Evidence as a Basis for Expert Testimony: A Response to Professor Carlson*, 40 V and.L.Rev. 583 (1987) (advocating unrestricted use of information reasonably relied upon by an expert).

When information is reasonably relied upon by an expert and yet is admissible only for the purpose of assisting the jury in evaluating an expert's opinion, a trial court applying this Rule must consider the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information for substantive purposes on the other. The information may be disclosed to the jury, upon objection, only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect. If the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes. *See* Rule 105. In determining the appropriate course, the trial court should consider the probable effectiveness or lack of effectiveness of a limiting instruction under the particular circumstances.

The amendment governs only the disclosure to the jury of information that is reasonably relied on by an expert, when that information is not admissible for substantive purposes. It is not intended to affect the admissibility of an expert's testimony. Nor does the amendment prevent an expert from relying on information that is inadmissible for substantive purposes.

Nothing in this Rule restricts the presentation of underlying expert facts or data when offered by an adverse party. *See* Rule 705. Of course, an adversary's attack on an expert's basis will often open the door to a proponent's rebuttal with information that was reasonably relied upon by the expert, even if that information would not have been discloseable initially under the balancing test provided by this amendment. Moreover, in some circumstances the proponent might wish to disclose information that is relied upon by the expert in order to "remove the sting" from the opponent's anticipated attack, and thereby prevent the jury from drawing an unfair negative inference. The trial court should take this consideration into account in applying the balancing test provided by this amendment.

This amendment covers facts or data that cannot be admitted for any purpose other than to assist the jury to evaluate the expert's opinion. The balancing test provided in this amendment is not applicable to facts or data that are admissible for any other purpose but have not yet been offered for such a purpose at the time the expert testifies.

The amendment provides a presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert. In a multi-party case, where one party proffers an expert whose testimony is also beneficial to other parties, each such party should be deemed a "proponent" within the meaning of the amendment.

**GAP Report—Proposed Amendment to Rule 703**

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 703:

1. A minor stylistic change was made in the text, in accordance with the suggestion of the Style Subcommittee of the Standing Committee on Rules of Practice and Procedure.

2. The words "in assisting the jury to evaluate the expert's opinion" were added to the text, to specify the proper purpose for offering the otherwise inadmissible information relied on by an expert. The Committee Note was revised to accord with this change in the text.

3. Stylistic changes were made to the Committee Note.

4. The Committee Note was revised to emphasize that the balancing test set forth in the proposal should be used to determine whether an expert's basis may be disclosed to the jury either (1) in rebuttal or (2) on direct examination to "remove the sting" of an opponent's anticipated attack on an expert's basis.

## RULE 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

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

* * *

(6) *Records of Regularly Conducted Activity.*—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information