Chris Griesel

From: Osler McCarthy
Sent: Thursday, January 24, 2002 12:39 PM
Subject: RESENDING Texas Supreme Court Rules Advisory Committee for 1.25-26.02

TEXAS SUPREME COURT advisory

Contact: Chris Griesel, rules attorney

512.463.6645 or chris.griesel@courts.state.tx.us

SUPREME COURT ADVISORY COMMITTEE TO MEET FRIDAY AND SATURDAY

RESENDING PREVIOUS NOTICE WITH .PDF FILES ATTACHED with the following statement by Chris Griesel: "There's nothing like being a computer moron and having the whole world know about it. I apologize."

The Supreme Court Advisory Committee will meet Friday and Saturday, January 25 and 26, at the Texas Law Center (State Bar of Texas building), 1414 Colorado, Room 101, in Austin. The meetings will begin at 9 a.m. Friday and 8:30 a.m. Saturday, if the business of the committee is not completed Friday. The meeting is open to public.

Agenda documents are attached in .PDF format. A copy of the transcript of the last meeting of the SCAC can be requested by contacting chris.griesel@courts.state.tx.us.

To download a free Adobe Reader:

http://www.adobe.com/products/acrobat/alternate.html

The agenda for the meeting:

1. Report from Justice Hecht on developments on Rules Proposal and Court Action

2. Report on proposed changes to Parental Notification Rules

3. Comments to changes to proposed TRAP rules

4. Report on proposed changes to Texas Rule of Civil Procedure 103 and 536 relating to civil process servers

5. Report on proposed changes to Texas Rule of Civil Procedure 6

6. Report on Texas Rule of Civil Procedure 18c and Texas Rule of Appellate Procedure 14 relating to electronic media in the courtroom

7. Report on Texas Rule of Civil Procedure 330, Visiting Judge Peer Review (no documents at present time)

8. Report on Texas Rule of Civil Procedure 21 relating to the addition of discovery (no documents at present time)

9. Report on Texas Rule of Civil Procedure 306A

10. Report relating to Texas Rule of Civil Procedure 329B(h)

11. Report relating to the Texas Rules of Civil Procedure relating to forcible entry and detainer

12. New assignments, including assignment of work on rules relating to offers of judgment and ex-parte communications and the patient-physician privilege

Any person may at any time comment on rules proposals before the Supreme Court of Texas or the Supreme Court Advisory Committee or suggestions to changes to the Texas Rules of Court, including the Texas Rules of

Civil Procedure, the Texas Rules of Appellate Procedure, the Texas Rules of Evidence, the Rules of Judicial Administration, and the Parental Notification Rules. Written comments may be mailed to Rules Attorney, P.O. Box 12248, Austin, Texas 78711, or may be faxed to the attention of Rules Attorney at (512)463-1365, or e-mailed to chris.griesel@courts.state.tx.us.

Additional information about the January Rules meeting, the development of the Texas Rules of Court, or questions regarding the Texas Rules of Court should be directed to Chris Griesel, rules attorney at (512) 463-6645.


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The Supreme Court of Texas

SUBMISSION OF ELECTRONIC BRIEFING IN GRANTED CASES

Some information provided on this page is stored in Adobe Acrobat (.PDF) format.

Get Acrobat Reader

The Texas Supreme Court has begun an effort to post briefs on the merits from petitions granted for review to allow ready access by the public and lawyers across the state to arguments in the detail that justices consider.

Supreme Court Clerk John Adams has notified counsel in cases accepted for review since Jan. 1 that exact copies of briefs already on file be submitted on 3.5-inch diskette for posting on the Court's Web site. Briefs by amicus curiae also will be solicited in this voluntary project.

Links to eBriefs received will be posted on the Case Docket Sheet and Submission Calendar and individuals subscribing for vNotices on a case where an eBrief is posted will receive an email indicating the link to the posted document.

Webmaster Note:
It is anticipated that the automated posting/notification mechanism will be in place within the next few weeks.

Links to eBriefs currently available:

01-0287
PETITIONER : ARGONAUT INSURANCE COMPANY
RESPONDENT : DEBBI BAKER, INDIVIDUALLY AND AS NEXT FRIEND OF ANTHONY BAKER, AN INCAPACITATED PERSON, AND AS NEXT FRIEND OF M. B., A MINOR, AND LEIGHLA BAKER, AND ROCKEY BAKER

01-0336
PETITIONER : HILCO ELECTRIC COOPERATIVE, INC. AND HILCO UNITED SERVICES, INC.
RESPONDENT : MIDLOTHIAN BUTANE GAS COMPANY, INC. D/B/A MIDTEX LP GAS, ET AL.

The following is the text of the information sheet being transmitted by the clerks office:

INFORMATION ON SUBMISSION OF ELECTRONIC BRIEFING IN GRANTED CASES

Beginning January 1, 2002, the Court has begun a voluntary project to make all petitioner's briefs on the merits, respondent's briefs, petitioner's brief in reply, and amicus briefs in all cases that are granted review by the court, available to the public via its web site. To this end, the Court requests that all of the parties provide the Clerk of the Court, within ten days of this letter, an electronic copy of all petitioner's briefs on the merits, respondent's briefs, petitioner's brief in reply, and amicus briefs that you previously filed with the Court in this case.

The Court asks the parties to submit each electronic brief in the following form and format :

1. Each brief should be submitted on a separate 3 ½ inch computer disk.

2. Each disk must include a label that includes the case name, the docket number, identify the type of brief (i.e. petitioner's brief, brief in reply, amicus brief), and specify the word processing software and version used to prepare the brief.

3. If available, the Court greatly prefers the use of **searchable** Portable Document Format files (Adobe PDF), because files in this format generally may not be altered under normal circumstances. If this format is not available to you, the Court greatly prefers the use of either Microsoft Word (up to Word 2002 (Word XP)) or WordPerfect version 5.1 through 10.0. Documents submitted in these versions will be converted to searchable PDF by the Clerk's office. Webmaster's Comment

4. The disk must contain only an electronic copy of the submitted brief. The disk must not contain any appendices, any portion of the appellate record (other than a portion contained in the text of the brief), hypertext links to other material, or any document that is not included in the brief.

5. The disk must be free of viruses or any other files that would be disruptive to the Court's computer system.

6. The disk should be submitted, with a completed certificate of compliance, within ten days of the receipt of notice from the Court.

Adobe PDF Version of Information Sheet including Certificate of Compliance
Word Perfect Version of Information Sheet including Certificate of Compliance
Microsoft Word Version of Information Sheet including Certificate of Compliance

INFORMATION ON SUBMISSION OF ELECTRONIC BRIEFING IN GRANTED CASES

Beginning January 1, 2002, the Court has begun a voluntary project to make all petitioner's briefs on the merits, respondent's briefs, petitioner's brief in reply, and amicus briefs in all cases that are granted review by the court, available to the public via its web site. To this end, the Court requests that all of the parties provide the Clerk of the Court, within ten days of this letter, an electronic copy of all petitioner's briefs on the merits, respondent's briefs, petitioner's brief in reply, and amicus briefs that you previously filed with the Court in this case.

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3. If available, the Court greatly prefers the use of **searchable** Portable Document Format files (Adobe PDF), because files in this format generally may not be altered under normal circumstances. If this format is not available to you, the Court greatly prefers the use of either Microsoft Word (up to Word 2002 (Word XP)) or WordPerfect version 5.1 through 10.0. Documents submitted in these versions will be converted to searchable PDF by the Clerk's office.

4. The disk must contain only an electronic copy of the submitted brief. The disk must not contain any appendices, any portion of the appellate record (other than a portion contained in the text of the brief), hypertext links to other material, or any document that is not included in the brief.

5. The disk must be free of viruses or any other files that would be disruptive to the Court's computer system.

6. The disk should be submitted, with a completed certificate of compliance (see reverse side), within ten days of the receipt of notice from the Court.

CERTIFICATE OF COMPLIANCE

At the request of the Court, I certify that this submitted computer disk complies with the following requests of the Court:

1. This brief is submitted on a 3 ½ inch disk;

2. This disk is labeled with the following information:
   A. Case Name:_____
   B. The Docket Number: _____
   C. The Type of Brief :_____
   D. The Word Processing Software and Version Used to Prepare the Brief:_____

3. This disk contain only an electronic copy of the submitted brief and does not contain any appendices, any portion of the appellate record (other than a portion contained in the text of the brief, hypertext links to other material, or any document that is not included in the brief.

4. The disk is free of viruses or any other files that would be disruptive to the Court's computer system. The following software, if any, was used to ensure the brief is virus-free:_____ .

5. I understand that a copy of this brief will be posted on the Court's website and that the submitted disk becomes part of the Court's record.

6. Copies have been sent to all parties associated with this case.

_____
(Signature of filing party and date)

_____
(Printed name)

_____
(Firm)

REPORT OF THE PARENTAL NOTIFICATION RULES SUBCOMMITTEE

FORMS

We recommend a new form Notice to Clerk and Court Reporter to Prepare Records. There is a copy attached. Please note that we have added a space for the time of day the notice is filed. We have also added the phrase "Immediately upon completion of the record, the clerk must contact the undersigned attorney at the following phone numbers _____ to inform the attorney that the record is available."

RULES

We recommend amendments to Rule 2.4(d) so that it will now read:

2.4 Hearing.

(d) Record. ~~If the minor appeals, or i~~**If there is evidence of past or potential abuse of the minor, the hearing must be transcribed instanter. If the minor files a notice to clerk and court reporter to prepare records, the hearing must be transcribed instanter and the clerk's record compiled. The court reporter shall immediately upon completion provide the original and one copy of the reporter's record to the clerk. A copy of the clerk's record and a copy of the reporter's record shall be delivered by the clerk to the minor's attorney immediately upon completion. To facilitate delivery of the record, the clerk must immediately contact the attorney at the phone numbers provided in Form ___ Notice to Clerk and Court Reporter to Prepare Records. Upon the filing of a notice of appeal, the full record shall be forwarded to the Court of Appeals in accordance with Rule 3.2(b).**

We also recommend that Rule 1.10(b) be amended so as to read:

1.10 Amicus Briefs. Amicus briefs may be submitted and received by a court but not filed under either of the following procedures.

(b) Public or General Briefs. Any person may submit a brief addressing any matter relating to proceedings under Chapter 33, Family Code. Such a brief must not contain any information in violation of Rules 1.3 and 1.4 The person must submit the original brief and the same number of copies required for other submissions to the court. If the brief is submitted to a court of appeals, the original and eleven copies of the brief, plus a computer disk containing the brief, must also be submitted to the Supreme Court of Texas. When an appeal of a proceeding is filed, the clerk of the court of appeals or the Supreme Court must notify the ~~parties~~ **minor** to the appeal of the existence of any brief filed under this subsection and must **instanter** make the brief available for inspection and copying. Upon submission, the Clerk for the Supreme

Court must, **instanter**~~as soon as practicable~~, have the brief posted on the Texas judiciary Internet site and make it available to the public for inspection and copying.

REMAND

At the October SCRAC meeting, the subcommittee was asked to revisit the remand issue and we have done so. The March 2001 amendments to Rule 3.3(b) deleted the sentence: "If the court of appeals reverses the trial court order, it must also state in its judgment that the application is granted." By a vote of 3-1, we ask the Committee to recommend that the Supreme Court reinsert the sentence, which will foreclose the option of a remand by an intermediate court of appeals to the trial court.

RECORDS RETENTION

After a lengthy review, the Subcommittee by a vote of 3-1 rescinds its recommendation that the rules, which are currently silent, provide for a ten year retention period and substitutes its recommendation that the rules provide for a one year retention period.

NOTICE TO CLERK AND COURT REPORTER TO PREPARE RECORDS

CAUSE NO._____

IN RE JANE DOE:

This matter was heard on the _____ day of _____, _____. The Court has issued a final judgment. Jane Doe may desire to appeal. Jane Doe requests the court reporter and appropriate clerk to prepare instanter a record of the trial proceedings and deliver same to: _____ (name and address of counsel). Immediately upon completion of the record, the clerk must contact the undersigned attorney at the following telephone numbers _____ (telephone number of counsel) to inform the attorney that the record is available.

A copy of this notice has been given to both the appropriate clerk and court reporter and no additional request for the record of the trial proceeding is required. The filing of this document with the clerk constitutes proof that written request for preparation of the trial record was made.

Signed the _____ day of _____, _____
at _____ o'clock ___.m.

_____
ATTORNEY

The Supreme Court of Texas

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
NATHAN L. HECHT
CRAIG T. ENOCH
PRISCILLA R. OWEN
JAMES A. BAKER
DEBORAH G. HANKINSON
HARRIET O'NEILL
WALLACE B. JEFFERSON
XAVIER RODRIGUEZ

201 West 14th Street Post Office Box 12248 Austin TX 78711
Telephone: 512/463-1312 Facsimile: 512/463-1365

CLERK
JOHN T. ADAMS

EXECUTIVE ASSISTANT
WILLIAM L. WILLIS

ADMINISTRATIVE ASSISTANT
NADINE SCHNEIDER

January 16, 2002

Charles L. Babcock
Jackson Walker
1100 Louisiana #4200
Houston TX 77002

Dear Chip:

The Supreme Court is very grateful to the Advisory Committee for its study of the Rules of Appellate Procedure and its recommendation for changes in those rules. The Court has reviewed the Committee's recommendations and has reached tentative conclusions on them. As usual, our review process has suggested to us other changes that should perhaps be included in this revision cycle. These changes have not previously been before the Committee. The Court requests the Committee's further advice on all these matters.

The attached table compares the Committee's recommendations, shown in the left column, with the Court's tentative conclusions, shown in the right column. When the right column contains no rules or comment text, the Court's view that the recommendation should either be accepted as presented or rejected entirely is indicated in brackets. Sometimes a brief explanation is offered. Rules and comment text in the right column is what the Court is considering adopting in lieu of or in addition to the Committee's recommendations. In a few instances the right column reflects that the Court is divided and has not yet reached even a tentative view. For Rule 38, the Court is undecided not only as to whether to make a change in procedure, but if so, how. Recognizing that many of the issues involved in the proposed changes have already been debated by the Committee at length (like Rule 47.7, for example), the Court nevertheless requests the Committee's assistance in reaching a final conclusion.

I would like the Committee to review all of the issues raised in the attached table, and any others regarding changes in the Rules of Appellate Procedure, at its next meeting on January 25 and 26. At the meeting I will attempt to explain the Court's tentative views further. After that meeting I will ask the Court for a final decision.

I am also asking the Court of Criminal Appeals to review all proposed changes as they affect criminal cases. That Court may have additional concerns, just as we have had. As in the past, we expect to join our sister Court in all changes affecting criminal cases, and we will ask that Court to join in all changes affecting civil cases. The

rules on particular subjects may be different for civil and criminal cases, but the text will be agreed to by both Courts. This has proven to be a great benefit to the bench and bar.

Once a complete text of changes is finalized, we will publish them in the *Texas Bar Journal* for public comment. Changes may still be made in response to such comments, but unless they are extensive, the rules will not be republished for comment. As in the past, I anticipate that the changes will take effect on the first day of the fourth calendar month following the month the changes are published in the *Texas Bar Journal*. If we hold to the schedule we are now on, it appears that these changes will likely take effect this summer.

As always, the Supreme Court is deeply grateful to you and all of the members of the Advisory Committee for the enormous amount of time and expertise devoted to the rules of procedure. The justice system in Texas is much the better for your efforts.

Sincerely,

Nathan L. Hecht
Justice

201 West 14th Street Post Office Box 12248 Austin TX 78711
Telephone: 512/463-1312 Facsimile: 512/463-1365

January 16, 2002

Hon. Paul Womack
The Court of Criminal Appeals of Texas
P.O. Box 12308
Austin TX 78711

Dear Paul:

The Rules Advisory Committee has recommended a number of changes in the Rules of Appellate Procedure. This Court has reviewed these recommendations and tentatively decided to adopt some as made, adopt others as modified, and reject a few. As usual, in the process of reviewing these recommendations we have come across a few additional changes that perhaps should be included in these revisions on which the Committee has not had a chance to advise.

The enclosed table shows the Committee's recommendations on the left and this Court's tentative conclusions on the right. When the right column contains no rules or comment text, the Court's view that the recommendation should either be accepted as presented or rejected entirely is indicated in brackets. Sometimes a brief explanation is offered. Rules and comment text in the right column is what the Court is considering adopting in lieu of or in addition to the Committee's recommendations. In a few instances the right column reflects that the Court is divided and has not yet reached even a tentative view. For Rule 38, the Court is undecided not only as to whether to make a change in procedure, but if so, how.

We have requested the Committee's views on the entire package at its next meeting on January 25 and 26. I expect that this Court will make final determinations shortly after that.

I respectfully request that the Court of Criminal Appeals consider the Committee's recommendations and this Court's modifications and additions. I include with this letter a lengthy memo that I prepared for this Court on the Committee's recommendations for whatever use you may make of it. My staff attorney for rules, Chris Griesel, and I are at your disposal to provide any assistance we can. Either or both of us will be happy to meet with you, your committee, or your Court if you think it would be helpful.

If our two Courts ultimately disagree on a change, I hope it will be possible for both to adopt one rule for civil cases and another for criminal cases as we have done in the past, so that all of the appellate rules will remain in one set.

The Court of Criminal Appeals may wish to make changes beyond those recommended by the Committee, as this Court has indicated it may do. Our Court is, of course, amenable to considering such additional changes.

The 1997 revisions to the Rules of Appellate Procedure have worked very well in civil cases, and I hope that has been your experience in criminal cases. Many of the proposed changes correct minor problems; only a few are significant. This reflects well, I think, on the care that has gone into crafting simple, efficient appellate procedures and plain, well-written rules. I very much appreciate the cooperation of you and your colleagues in this process.

Cordially,

Nathan L. Hecht
Justice

c: Hon. Thomas R. Phillips
Chief Justice
The Supreme Court of Texas

Hon. Sharon Keller
Presiding Judge
The Court of Criminal Appeals of Texas

Mr. Charles L. Babcock
Chairman
Supreme Court Rules Advisory Committee

Parsons, Carol

From: Richard R. Orsinger [richard@orsinger.com]
Sent: Friday, January 18, 2002 1:54 PM
To: Chris Griesel
Cc: Lee, Debra; Babcock, Chip; William V. Dorsaneo (E-mail)
Subject: Supreme Court Rule Advisory Committee, TRAP 33.1

Chris:

I have comments on the Supreme Court's reaction to the SCAC request to amend TRAP 33.1, relating to preservation of error on legal and factual sufficiency of the evidence in a non-jury trial.

I support the SCAC's recommendation that we make it clear that no procedural step should be required in order to preserve a sufficiency of the evidence complaint on appeal from a non-jury trial. I support this proposition both for the practical reason that it has been the prevailing practice for years, and also for reasons relating to procedure.

In a jury trial, there is no jury charge to object to, and there is no verdict to JNOV or disregard. To preserve a legal sufficiency challenge, non-jury litigants would have to rely on a motion for instructed verdict (even though there is no verdict), or they would have to file something not presently recognized in Texas practice such as a post-rendition objection to the rendition, or motion modify the judgment to arrive at the opposite result.

Relying on a motion for instructed "verdict" to preserve a legal sufficiency challenge in a non-jury case is complicated by Quantel Business Sys., Inc. v. Custom Controls Co., 761 S.W.2d 302 (Tex.1988), which allows the court, when the plaintiff rests in a non-jury trial, to deny plaintiff relief on either legal sufficiency grounds or just based upon a preponderance of the evidence. If such a motion is granted without specifying the basis (as will ordinarily be the case upon oral motions), was it for legal sufficiency or failure to establish something by a preponderance of the evidence? Further, the motion for instructed verdict when the plaintiff rests is waived as far as the defendant is concerned if the defendant puts on evidence in rebuttal, requiring a new motion for instructed verdict at the close of evidence. For a plaintiff to preserve a "legal sufficiency" challenge, the plaintiff would have to move for judgment (or would he move for a finding) as a matter of law at some point, in order to complain on appeal that a fact issue was established as a matter of law.

Also, a verdict is determined before judgment is rendered, so parties can focus their legal sufficiency challenges for the trial court before the trial court renders judgment. In a non-jury trial, the findings of fact will almost always be issued after the judgment is signed. Therefore, if we require parties to bring legal sufficiency challenges to specific findings of fact, then unlike in jury trials these legal sufficiency challenges will occur after the trial court has signed a judgment.

As to factual sufficiency challenges, the logic of requiring a motion for new trial does not fit well into non-jury trials. In a jury trial, a trial judge is bound to render judgment on the verdict if there is legally sufficient evidence to support it. If the evidence is legally sufficient but not factually sufficient to support the verdict, the trial court can only grant a new trial--it cannot render a judgment contrary to the jury verdict. In a non-jury trial, a judge is not bound to render a judgment in favor of a party who has established a proposition by legally sufficient evidence--unless that evidence is so strong that it establishes the proposition as a matter of law. The distinction between legally sufficient evidence and factually sufficient evidence in a non-jury trial therefore

does not limit the trial court's options (render judgment vs. grant new trial), but only the appellate court's options (i.e., rendition vs. remand). So distinguishing between a legal and factual sufficiency complaint needs to be made to the appellate court but not necessarily to the trial court.

Apart from these details, it is my belief that the purpose of a motion for new trial is to call the court's attention to and secure the court's ruling on an issue which the trial court has not already ruled on. In a jury trial, unless some motion is made there will be no ruling by the trial court on the sufficiency of the evidence. In a non-jury trial, the trial court's rendition of judgment itself is the ruling on the sufficiency of the evidence. Why have the judge rule when rendering judgment, and require the parties to request the judge to rule on the same thing a second time after (s)he has ruled on it the first time?

Apart from the advisability of this proposed change, I am also troubled by the language of the proposed change to TRAP 33.1(d). Often a party who has the burden of proof in the trial court but fails to convince the trial judge will not end up with a negative finding on that point, but instead the trial court will just refuse to grant a favorable finding that the party requests. So we will not always have a negative finding that would be against the overwhelming weight of the evidence. Sometimes on appeal the proponent will be attacking the trial court's refusal to grant a desired finding. Instead of saying that a finding was proved as a matter of law or is against the great weight and preponderance of the evidence, we should say that "a requested finding was established as a matter of law or by the great weight and preponderance of the evidence." The problem with my proposed language is that it requires preservation as to specific findings or requested findings, and therefore cannot be done during trial, and likely cannot be done before rendition and signing of the judgment.

Thanks.

Richard

Richard

Published opinions help Texas courts

The Texas Supreme Court Advisory Committee has made a recommendation that all Texans should support — eliminating the growing practice by District Courts of Appeals to not publish their opinions.

When an opinion is designated DNP, for Do Not Publish, Texans are deprived of some of the basic openness that all governmental entities should honor. In legal terms, unpublished opinions cannot be used as precedent for other cases. This can cause a lack of uniformity among the state's 14 District Courts of Appeals if they aren't fully aware of how the others think. Unpublished opinions are also unfair to the litigants because they are far less likely to be reviewed by the Supreme Court.

As of Aug. 31 of last year, only 15 percent of the 12,798 opinions released by the state's 14 District Courts of Appeals were published. For the Ninth District in Beaumont, 210 opinions were published and 216 weren't, according to the Texas Judicial System Annual Report 2000. One court published only 3.6 percent of its opinions.

Traditionally, unpublished opinions have been used for minor cases to help courts focus on more serious issues. But the trend toward not publishing appears to have grown too much. The practice should be eliminated in most cases.

THE BEAUMONT ENTERPRISE

THE ADVOCATE FOR SOUTHEAST TEXAS
SINCE 1880

Aubrey L. Webb
Publisher

Timothy M. Kelly
Editor

Thomas Taschinger
Opinions editor

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◆

The Beaumont Enterprise welcomes comments from readers. Letters must include the writer's address and daytime telephone number so letters can be verified. Letters should not exceed 250 words, about three-fourths of a double-spaced typewritten page.

All letters are subject to editing for length, libel, grammar, clarity and newspaper style, without changing the meaning and intent of the letter. Readers are limited to one letter every 30 days to ensure a diversity and variety of viewpoints.

The Enterprise will not publish anonymous letters; "open" or "third-party" letters written to someone else; letters that constitute an advertisement; letters endorsing political candidates; or letters about a personal matter or conflict between individuals that would not be of interest to readers.

Address letters to:

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Beaumont, Texas 77704

E-mail The Enterprise at

OP-ED ARTICLE – CORPUS

The Texas Supreme Court and the Texas Court of Criminal Appeals are currently considering a proposal to eliminate a rule which allows the Court of Appeals to designate their judicial opinions (decisions) in cases as DNP, Do Not Publish. Under this rule a DNP designation means the case may not be used or cited as precedent by lawyers in other cases or indeed by the courts themselves.

Recent statistics show that 85% of all Courts of Appeals decisions in Texas received the DNP designation. One court did not publish 97% of its decisions. This phenomenon, which has been criticized by legal scholars and some judges, can lead to curious results.

In a recent case, the Dallas Area Rapid Transit (DART) Board received a favorable ruling from an appellate court on a particular point of law. The judicial opinion was designated DNP. Two years later DART was back in court facing the same legal issue. Its lawyers, however, could not cite the prior opinion because of the DNP rule.

This time different judges from the same court decided the case the other way and ordered the opinion published. So the same defendant lost the exact same legal issue in the same court despite having won two years earlier.

This is but one example of the mischief the DNP rule can generate. Critics of the rule also point out:

In recognition of these problems the Texas Supreme Court asked its Advisory Committee, which I chair, to study ways to fix the problem. After extensive review and public

discussion, the Committee recommended that the DNP designation be abolished and that decisions formerly designated as DNP be eligible for citation as persuasive although not binding authority.

The proposed rule has the support of the Advisory Committee and, Justice Nathan Hecht reports, is acceptable to the appellate judges. It also has the overwhelming support of the civil and criminal lawyers who practice before these courts and who, under the old rule, are precluded from citing persuasive authority to the court merely because it carries the label DNP.

Indeed a lawyer in California who cited an opinion which had been designated DNP under a federal rule similar to the Texas procedure was hauled up on ethics charges for violating a court rule. The lawyer escaped punishment but with an admonition and warning not to do it again.

Texas has the opportunity to avoid such situations and can be a model for courts across the country who are struggling with the DNP designation. The Supreme Court and Texas Court of Appeals are expected to act soon.

NewsBank InfoWeb
San Antonio Express-News

San Antonio Express-News
December 16, 2001

Court opinions should become public

Author: Bruce Davidson

Edition: Metro
Section: Editorial
Page: 2G
Index Terms:
Editorial
Estimated printed pages: 2

Article Text:

It would probably surprise the average Texan to learn that most state appellate court opinions cannot be used as precedent in future cases, and in fact, aren't even published.

But that's the way it's done under current state rules.

The DNP, or Do Not Publish opinion, has become increasingly popular among Texas appellate judges.

Chip Babcock, chairman of the Texas Supreme Court Advisory Committee, recently noted in an article published by Houston Lawyer that only 15 percent of the 12,798 courts of appeals opinions written in fiscal year 2000 were published.

The panel headed by Babcock has recommended that all appellate opinions be published in the future, and that those which are not groundbreaking in some fashion be disposed of in brief memorandums of opinion.

The proposed change is important to all Texans.

Judges who are interpreting the law that we live by should put their work on the record. Opinions should be published and accessible to all who are interested.

The state's high court is expected make a decision on the recommendation early next year.

Supporters of the rule that allows unpublished opinions say the appellate courts already are awash in paper, and forcing them publish all opinions will fill law books with so much unnecessary verbiage that they will become useless.

Unpublished opinions also relieve busy appellate judges from the burden of polishing each opinion when a rougher version will dispose of a routine case.

Babcock said, "The official rationale is that with heavy caseloads the only way to get through the docket is to dash out opinions on the easy ones and not have to worry about it being cited as precedent."

Some of the state's 14 appellate courts put unpublished opinions on their web sites, but others don't, making the opinions difficult to obtain.

Even unpublished opinions that are accessible are frustrating for lawyers because they can't be cited as precedent even when breaking new ground. The situation retards the evolution of the law as it is interpreted by appellate courts.

The same legal dispute can be fought again and again without being resolved because a standard has not been established.

Some appellate judges like unpublished opinions, because they reduce the chance of being reversed.

Appeals of unpublished opinions are less likely to be accepted by the Supreme Court.

Fourth Court of Appeals Chief Justice Phil Hardberger, a member of the Supreme Court Advisory Committee, favors publishing all opinions, saying that unpublished opinions reduce accountability.

"One way of evaluating judges is for the public to know what they are saying and why they are saying it," Hardberger said. "I don't want to be below the radar scope."

Supreme Court Chief Justice Tom Phillips said he is undecided on the proposed rule change and will not make up his mind until the court debates the issue next year.

"There's advantages both ways," Phillips said.

He added, "It's not a clear-cut issue to me. There's not a clearly right opinion."

If the court approves the committee's recommendation, the Texas legal community is likely to be pleased about winning permission to cite all appellate opinions.

But lawyers may become frustrated later when cases they have worked hard to present are disposed of with one-paragraph memorandum opinions.

Most importantly, it is unfair to Texans who must pick their judges in the voting booth to not have a full record of judicial performance.

Justice should not be meted out in secret even when rulings are considered mundane by practitioners of the legal profession.

To contact Bruce Davidson, e-mail bdavidson@express-news.net.

Date December 17, 2001
Source Star-Telegram
Section Metro;Fort Worth & Region
Edition FINAL

One would think that, any time a Texas appeals **court** issues a ruling, anyone could find it in the law books and rely on it to make an argument in one's own case.

One would be wrong.

A peculiar and oft-criticized rule lets Texas appellate judges designate some of their opinions "Do Not Publish" - or DNP. That means they can't be relied on in future cases, even those raising the exact same issues.

Lawyers cannot cite DNP rulings as precedent, meaning that other **courts** are not bound to follow them and can't look to them for guidance. And, because a DNP designation basically shouts "I'm Not Important," those rulings are far less likely to get reviewed by the Texas **Supreme Court** or **Court** of Criminal Appeals.

Originally, marking an opinion DNP meant it wouldn't make it into printed law volumes, the theory being that it made little sense to spend time and book space on routine rulings with little relevance to other cases. However, DNP rulings now show up in online legal research services, so they're in circulation even if the rule says they don't carry much value. And, in practice, one case's trivia could prove to be a future case's treasure.

The most troubling by-product of the rule has been that some **courts** - either by accident or by design - end up shielding large numbers of their rulings from getting a second look from the state's highest **courts.**

One study showed that the 5th District **Court** of Appeals in Dallas published 3.6 percent of its rulings in 2000, while the 9th District **Court** of Appeals in Beaumont published 49.3 percent. The 2nd **Court** of Appeals in Fort Worth published 12.7 percent.

Are Beaumont's rulings really so abundantly compelling and Dallas' really so overwhelmingly picayune?

The Texas **Supreme Court's Advisory Committee** has recommended abolishing this troublesome distinction and allowing all appellate rulings to stand as precedents except for a fraction that meet specific guidelines as being really of narrow importance.

Both the **Supreme Court** and the **Court** of Criminal Appeals should adopt this revision to add consistency to Texas law and improve the **courts'** public accountability.

Houston Chronicle
Dec. 9, 2001 p. 2C-3C

PUBLISH OR PERISH

Unpublished appellate court opinions corrode Texas law

Opinions rendered by Texas appellate courts that are designated "do not publish" are among the sort of legal peculiarities of which the nonlawyering public generally is unaware. And yet, the large number of these so-called DNP opinions has a corrosive effect on the practice of law in this state, which results in Texans having little, or even conflicting, guidance on those very important legal issues that the courts of appeals are charged with sorting out. What's more, citizens are less able to know what their elected justices are up to when so many of the decisions they make are not made public.

To remedy this, the Texas Supreme Court Advisory Committee is recommending that the rules governing how the appellate courts handle their business be changed to eliminate the overly broad use of the DNP designation on rendered opinions.

Among the reasons to take this sensible step is the fact that DNP opinions apply only to the lawsuit and parties involved in any given case. Such opinions cannot be cited as precedent in subsequent, similarly situated cases. Without a published opinion to bind them, appeals court rulings — even out of the same court — can come down all over the map, even in deciding cases with identical fact situations.

Nor can the public count on getting well-researched, well-written opinions if its elected justices know they are writing what will be an unpublished opinion. Furthermore, the Supreme Court is less likely to review unpublished opinions, which is unfair to litigants in court cases and Texans in general.

But one of the most worrisome aspects of DNP opinions is that the decisions that come out under a given judge's name are about the only means the public has of evaluating a judge's performance on the bench. Unpublished opinions are released to electronic services that record legal decisions only at the discretion of the individual appellate courts. Of 12,798 opinions released by Texas' 14 courts of appeals in a 12-month period ending in August this year, only 1,935 were published.

Generally speaking, under the proposed rule change, justices would have to publish any opinion that: establishes or alters a point of law or that applies to a novel fact situation that is likely to recur; involves a constitutional issue; criticizes existing law; or resolves an apparent conflict of authority.

Those proposed changes make sense and will make a better, more coherent, brand of criminal and civil justice in Texas.

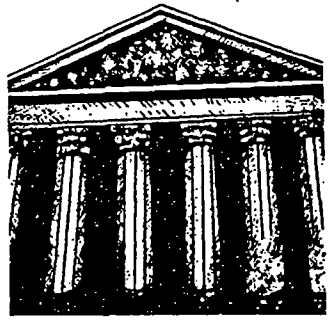
Court opinions need more review

The Chronicle's Dec. 9 editorial, "Publish or Perish; Unpublished appellate court opinions corrode Texas law," was a typical piece of propaganda telling the public about the wonderful Supreme Court Advisory Committee that is looking after our interests and praising the proposed rule changes that would require the publishing of appellate court opinions involving constitutional issues.

I have studied appellate court decisions for 15 years and I believe these proposed "new" rules have always been in place, even thought they haven't been followed. And they won't be followed in the future because there is no system of oversight or enforcement.

The unpublished appellate court decisions are no problem; it is the published opinions that are the problem. Appellate courts annually publish 13,000 opinions and only five out of 100 are reviewed by the state Supreme Court.

This allows the appellate courts to issue opinions that do not follow the Legislature's intent or previous Supreme Court decisions. When these faulty opinions



are not reviewed, they become precedent-setting for other appellate courts to use in rendering another faulty decision, and so on.

Laws enacted by the Texas Legislature are similarly being disregarded, mutated and, worst of all, repealed by judicial decree.

Judicial activism is rampant at the trial-court and appeal-court levels. The legal community knows what's going on and will not discipline itself.

The editorial's statement that a better, more coherent brand of justice is in the offing for Texas has no basis whatsoever.

Ray E. Dittmar, Houston

Opinion - Editorial - Dallas Morning News

Court blackout

Too many opinions are kept under wraps

12/31/2001

You have been wronged by a company and have filed a lawsuit in a Texas court. In preparing for trial, your attorney found a case identical to yours in which an appeals court ruled in the plaintiff's favor, citing the same legal points you want to make.

But your luck runs out when your attorney learns the appellate decision bears the initials D.N.P. This means "do not publish" and it eliminates the chance of using the court opinion as a precedent to win the lawsuit.

This scenario is all too common in Texas' appeals courts. From the year ending Aug. 31, 2000, only 1,935 of the 12,798 opinions issued by the 14 district courts of appeal in Texas were published - just 15 percent.

The Texas Supreme Court Advisory Committee has recommended the state's appellate procedure rules be amended to eliminate the increasing frequency of unpublished opinions. The Supreme Court should follow that advice and end the tendency of appeals courts to hide behind the "do not publish" decree.

Not only is the policy detrimental to lawyers looking for court decisions that support their arguments, it permits judges to become sloppy in their rulings. Without fear that the decision will set precedents, appeals judges sometimes can hastily reach conclusions.

The reasons for not publishing court opinions vary. Some judges say they do not have time to write complete opinions that could be used later as legal precedents. But the practice of not publishing appeals court rulings has become problematic for the legal system. Too often, lawyers find court rulings that might be persuasive in their cases, but they are compelled to remain silent about them.

In May, the 9th U.S. Circuit Court of Appeals considered imposing sanctions against a lawyer because she cited an unpublished opinion in a brief, in defiance of court rules. Eventually, the court decided not to sanction the lawyer, but warned this was an unusual case, that it might not be as lenient next time.

The Supreme Court Advisory Committee has found a fair and equitable way to do away with unpublished opinions. The committee proposed that appeals court judges be permitted to designate some rulings "memorandum opinions," meaning they have little precedential value. That should counter complaints from the judges that there would be too much work if all rulings had to be fully written out. The Texas Supreme Court should adopt these recommendations as soon as possible.

From: Carrie Gagnon
To: cbabcock
Date: Fri, Apr 27, 2001 2:59 PM
Subject: TRAP 41.2(a)

Chip:

Re: TRAP Rule 41.2(a)'s definition of "en banc court". I searched the transcripts on Summation (which included not only the ones since you've been the Chair, but ones from the 80's and 90's that Holly gave me . . . but I couldn't swear they were complete) and I could not find any discussion or reference to "en banc court" or rule 41.2/41.2(a). "en banc court" came up briefly when we discussed TRAP 47.6 on November 17, 2000, morning session, but the discussion was not along the lines of the e-mails from Justices Tim Taft and Hecht. Thus, I don't believe that the definition of en banc court has been discussed in Committee.

From: Nathan Hecht
To: Charles Babcock, Bill Dorsaneo
Date: 4/26/01 10:34AM
Subject: FW: TRAP rule 41.2(a)'s definition of "en banc court"

Bill: The Committee may have discussed this before, I've forgotten. But if we didn't, we need to. I'm not sure I'm for Tim's change, but I'm willing to listen. Nathan

-----Original Message-----
From: Justice Tim Taft [mailto:Tim.Taft@courts.state.tx.us]
Sent: Wednesday, April 25, 2001 3:17 PM
To: Nathan.Hecht@courts.state.tx.us
Subject: TRAP rule 41.2(a)'s definition of "en banc court"

Justice Hecht,

The latest change in the rule (41.2(a)) defining "en banc court" includes a visiting judge sitting on the original panel. The result of this rule is that a minority of the elected Justices plus a visiting judge from the original panel can defeat a request for en banc review that a majority of the elected Justices want to grant. That is what happened in Willover v. State, 38 S.W.3d 672 (Tex. App.--Houston [1st Dist.] 2000). See my dissenting opinion at pages 687-89. Please consider returning to the former definition of "en banc court" as being the members of the court, i.e., the elected Justices. As stated in my opinion, this would eliminate a conflict with an existing statute, and also advance a sound policy of accountability. Thanks for your consideration.

Respectfully,
Tim Taft

MEMORANDUM

Date: September 27, 2001

To: Bill Dorsaneo

From: Frank Gilstrap

Re: Composition of en banc court

Justice Jim Taft, of the First Court of Appeals, has asked the committee to examine Rule 41.2(a) & (b), TEX.R.APP.P., which involves the composition of the en banc court. This matter was referred to the appellate rules subcommittee, and you requested this memo from me.

The en banc rule

Prior to 1997, the en banc rule read as follows:

> Where a case is submitted to an en banc court, whether on motion for rehearing or otherwise, a majority of the membership of the court shall constitute a quorum and the concurrence of a majority of the court sitting en banc shall be necessary to a decision

Former Rule 79(d), TEX.R.APP.P. (superseded effective September 1, 1997)(emphasis added). In 1997 the rule was amended to read as follows:

> An en banc court consists of all members of the court who are not disqualified or recused and—if the case was originally argued before or

decided by a panel—any members of the panel who are not members of the court but remain eligible for assignment to the court.

Rule 41.2(a), TEX.R.APP.P. (emphasis added). Under this provision, a visiting justice who serves on a panel will also serve on the en banc court which reviews the panel decision. Justice Taft has criticized this provision in two recent opinions. His concerns are of two kinds. First, as a matter of policy, he argues that a visiting justice should not be able to join with a minority of the elected justices to prevail over a majority of the elected justices. Second, he questions the validity of the rule on statutory and constitutional grounds.

The policy issue: the majority of elected justices can be outvoted.

In *Polasek v. State*, 16 S.W.3d 82 (Tex.App.—Houston [1st Dist.] 2000, pet ref'd)(en banc), the defendant was convicted of criminal trespass. 16 S.W.3d at 83. On appeal he argued that he had been denied a reporter's record. *Id.* A panel of the First Court, including a visiting justice, affirmed the conviction. *Id.* The defendant requested rehearing en banc. *Id.* Under Rule 41.2(a), quoted above, the visiting justice became a member of the en banc court. *Polasek*, 16 S.W.3d at 83. As a result, the en banc court consisted of ten justices (the nine elected members of the First Court and the one visiting justice). *Id.* The en banc court divided five-to-five on the request for rehearing. *Id.* at 87. A second visiting justice was then appointed, pursuant to the tie-breaker provision of Rule 41.2(b). This raised the total number of justices to eleven (nine elected and two visiting). *Polasek*, 16 S.W.3d at 86-87. A majority of the eleven member court voted to

rehear the case en banc. *Id.* The en banc court affirmed the trial court decision by a vote of seven-to-four. *Id.* at 89 One visiting justice voted with the majority, and one voted with the minority. *Id.* at 86, 89.

In his majority opinion, Justice Taft criticized the policy behind Rule 41.2(a), which makes the visiting justice a part of the en banc court. This procedure

> created the possibility that the two visiting justices could have voted with a minority of four elected justices on this Court to defeat the will of the majority of the elected judges. Such a frustration of the will of the majority of elected justices did not happen in this case, but we point out this potential result of the change of the definition of en banc court for the consideration of the rule making committee.

Polasek, 16 S.W.3d at 87.

In *Ex parte Wilson*, 25 S.W.3d 932 (Tex.App.—Houston [1st Dist.] 2000, pet. ref'd)(per curiam), the First Court modified its en banc practice to eliminate the need for a tie-breaker. In that case, the panel again included a visiting justice. *Id.* at 932. En banc rehearing was requested, and again the visiting justice became a member of the en banc court. *Id.* Once more, "[t]he vote of the en banc court on the motion [for rehearing] resulted in a five to five tie." *Id.* But this time the court decided that no tie-breaker was needed. *Id.* at 932-933. It based its decision on the following rule:

> While the court of appeals has plenary jurisdiction, a majority of the en banc court may, with or without a motion, order en banc reconsideration of a panel's decision.

Rule 49.7, TEX.R.APP.P. (emphasis added).[1] Because six justices would be required to constitute "a majority" of an eleven member court, the motion failed because it did not receive the required six votes. *Wilson*, 25 S.W.2d at 933. Therefore, no tie-breaker was needed. *Id.* at 932.

In *Willover v. State*, 38 S.W.3d 672 (Tex.App.—Houston [1st Dist.] 2000, pet.granted), the defendant was convicted of sexually assaulting a child and sentenced to life in prison. 38 S.W.3d at 673. A panel of the First Court, including one visiting justice, reversed because the trial court had improperly excluded a videotaped interview with the complainant. *Id.* at 673-678 (panel opinion). The State moved for rehearing en banc. *Id.* at 679. Again, the visiting justice became a member of the en banc court, and again the vote on the motion for rehearing was five-to-five. *Id.* at 687 (Taft, J. dissenting from denial of en banc rehearing). Five elected justices voted for rehearing, and four elected justices and the one visiting justice voted against. *Id.* Under *Ex parte Wilson*, the motion failed because a majority of the ten member court (six members) did not vote for rehearing. *Willover*, 38 S.W.3d at 688. Thus, the motion was denied, even though the elected justices favored en banc rehearing by a five-to-four margin. *Id.*

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[1] *Cf.* former Rule 79(d)(". . . a majority of the membership of the court . . .").

Justice Taft's dissented in *Willover* repeated the concerns that he raised in *Polasek*. Before the 1997 rule change, a visiting justice who sat on a panel could not sit with the en banc court. But under the amended rule, the visiting justice was a part of the en banc court. As a result,

> [A] minority of the elected Justices, plus one visiting judge who was a member of the original panel deciding this case, are able to frustrate the will of the majority of the will of the elected Justices. This is a because a five-to-five tie does not obtain the necessary majority of the en banc court to require en banc review.

Willover, 38 S.W.3d. at 687 (Taft, J., dissenting from denial of en banc rehearing).

The validity of the en banc rule.

In his *Willover* dissent, Justice Taft also made three arguments as to why Rule 41.2(a) is invalid. *See Willover,* 38 S.W.3d at 687-688.

In his principal argument, Justice Taft says that the rule conflicts with Section 22.223(b) of the Government Code. In making this argument, he refers to his majority opinion in *Polasek*. There he noted that, prior to 1997, "the practice of [the First] Court had been to include only elected judges of [that] Court in en banc decisions." *Polasek*, 16 S.W.3d at 87 (emphasis added, footnote deleted). This practice was based on both a rule and a statute. The rule reads as follows:

> Where a case is submitted to an en banc court, whether on motion for rehearing or otherwise, a majority of the membership of the court shall constitute a quorum and the concurrence of a majority of the court sitting en banc shall be necessary to make a decision

Former Rule 79(d), TEX.R.APP.P. (superseded effective September 1, 1997)(emphasis added). And the statute says that

> When convened en banc, a majority of the membership of the court constitutes a quorum and the occurrence of the majority of the court sitting en banc is necessary for a decision.

TEX.GOV'T CODE § 22.223(b)(emphasis added). *See Polasek*, 16 S.W.3d at 87. In 1997, the Court of Criminal Appeals repealed former Rule 79 and replaced it with the current Rule 41.2(a). This new rule expressly allows a visiting justice to serve on the en banc court, as we have seen. But the Legislature did not repeal section 22.223(b) of the Government Code. The new rule and the old statute thus appear to conflict.

"[W]hen a rule of procedure conflicts with a statute, the statute prevails unless the rule has been passed subsequent to the statute and repeals the statute as provided by Texas Government Code section 22.004" (for the Supreme Court) or section 22.108 (for the Court of Criminal Appeals.). *Johnstone v. State*, 22 S.W.3d 408, 409 (Tex.2000)(per curiam). The latter provision reads as follows:

> The court of criminal appeals is granted rulemaking power to promulgate rules of posttrial, appellate, and review procedure in criminal cases, except that its rules may not abridge, enlarge or modify the substantive rights of a litigant.

TEX.GOV'T CODE, § 22.108(a)(emphasis added).[2] The validity of current Rule 41.2(a), depends, therefore, on whether the above provision gave the Court of Criminal Appeals the power to repeal section 22.223(b) of the Government Code, which is quoted on page 6 above. *Willover*, 38 S.W.3d at 687-688.

In Justice Taft's view, the Court of Criminal Appeals did not have that power. He concludes that a repeal of section 22.223(b) of the Government Code would "abridge, enlarge or modify the substantive rights of a litigant." *Willover*, 38 S.W.3d at 687 (quoting TEX.GOV'T CODE § 22.108(a)). This is because, as he stated in his *Willover* dissent, "the change [of the en banc] rule will determine which litigant wins." 38 S.W.3d at 687.

In making this argument, Justice Taft refers to his majority opinion in *Polasek*. In that case the criminal defendant had claimed that he was deprived "of a meaningful record on appeal." *Polasek*, 16 S.W.3d at 88. The court had rejected his contention and affirmed his conviction. *Id.* at 87. In the process, the court invalidated the 1997 amendment to Rule 13.1(a), TEX.R.CIV.P., which requires court reporters to

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[2] *See generally State v. Hardy*, 963 S.W.2d 516, 519-523 (Tex.Crim.App. 1997). *Cf.* TEX.GOV'T CODE, § 22.004(a) ("The supreme court has the full rulemaking power and the

make a full record of the proceedings "unless excused by agreement of the parties." *Polasek*, 16 S.W.3d at 88. In so doing, the court ruled that "the new rule is at odds with an existing statute," *Polasek*, 16 S.W.3d at 88, and that it amounted to "an enlargement of a defendant's substantive rights." *Id.* at 89. Accordingly, the court held "that Rule 13.1(a) is void." *Id.* Indeed, it was on this particular point that the en banc court divided.[3]

In his next argument, Justice Taft's says that "the Texas Constitution provides that the justices on the courts of appeals shall be elected by the qualified voters of their respective districts." *Willover*, 38 S.W.2d at 688 (citing TEX.CONST., art. V § 6). But in *Polasek*, the First Court expressly ruled that a visiting justice could sit on a on panel. *Polasek*, 16 S.W.3d at 85-86.[4] If the Texas Constitution allows a visiting justice to serve on a panel, then why doesn't it also allow a visiting justice to sit on an en banc court?

In his third argument, Justice Taft notes that the procedure under the current rule is different from the procedure under Rule 35(a), FED.R.APP.P., which

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practice and procedure in civil actions, except that its rules may not abridge, enlarge or modify the substantive rights of a litigant.").

[3] *Cf. Polasek*, 16 S.W.3d at 89-90 (Robertson, J., concurring); *Id.* at 90-91 (Price, J., dissenting). *Note also Tanguma v. State*, No. 13-99-490-CR, 2001 WL 378388 at **1-2 (Tex.App.—Corpus Christi May 17, 2001, pet.filed)(expressly disagreeing with *Polasek*).

[4] *Cf. Polasek*, 16 S.W.3d at 91 (O'Conner, J., dissenting)("I also agree with the appellant that the appointment of visiting judges violates the Texas Constitution article 5, section 6, which requires the election of judges.").

"provides that the en banc court is composed of the circuit judges who are on regular, active service." *Willover*, 38 S.W.3d at 688. He further notes that "in *O'Conner v. First Court of Appeals*, 837 S.W.2d 94 (Tex.1992), the supreme court supported its decision by pointing out that it was consistent with the federal rule guiding the circuit court of appeals upon which this state's panel system was modeled." *Willover*, 38 S.W.2d at 688.[5]

Recommendation

The Court of Criminal Appeals has granted the petition for discretionary review in *Willover*. Accordingly, the committee should await that court's opinion before considering further action in this area.

[5] (citing *O'Conner*, 837 S.W.2d at 96).

REPORT ON RULE 103/536

January 20, 2002

As was noted at the last meeting, there is no state-wide licensing system for private process servers. Tex. R. Civ. P. 103, provides that "citation or other notices may be served anywhere by (1) any sheriff or constable or other person authorized by law or, (2) by any person authorized by law or by written order of the court who is not less than eighteen years of age." Rule 536 sets out similar standards for service of process in Justice Courts. Under both rules, parties and other persons "interested" in the outcome of the lawsuit cannot serve process in that case. Under both rules, the clerk of the court can serve citation by registered or certified mail. The concluding sentence to TRCP 103 and 536 (a) provides:

> The order authorizing a person to serve process may be made without written motion and no fee shall be imposed for issuance of such order.

The present practice is for the judge of each court to control by court order who can serve process in a case pending in that court. Many larger counties with a number of courts sharing a county or district clerk have adopted an uniform order for all courts in that county, setting out requirements that must be met in order to serve process out of those courts. Dallas, Harris and Bexar Counties have done that. A second method of regulating process servers is a practice in several smaller counties which issue a blanket order for a process serving organization that covers all employees. Some larger counties have issued blanket orders on a person-by-person basis.

Process servers that work in the county where they live may be able to conveniently comply with the local standards for serving process issued out of the local courts. However, that arrangement will not work where process is issued, say out of a Dallas Court, for service in Travis County. The process will actually be served on the defendant in Travis County by a process server who lives in Travis County, but since the process is issued out of a Dallas court, that person in Travis County will have to meet the Dallas County requirements for process servers.

A coherent state-wide system of private process serving is very difficult to set up because of the varying requirements from locale to locale. Dallas County requires that you obtain a DPS criminal history check and submit the original to the Dallas County District Clerk, plus you must take a course. Galveston County wants to run its own local criminal history check, and charges $10.00 for it. Harris County requires the person serving process out of those courts to attend a seminar put on by the Houston Young Lawyers' Association. You must pay $115.00 fee to Harris County for the course, but the courses are scheduled irregularly and many months apart. In McAllen, the process service has to "open up a case" in the court system, by paying a filing fee of $175.00, just like a lawsuit was being

initiated. For Nueces County, you can serve their process just by filling out an application, but you must pay $2.00 to file the return of service. Bexar County requires process servers of its process to carry $300,000 worth of insurance, while Tarrant County requires the process server to carry $100,000 worth of insurance. To complicate matters worse for a business owner, each process server's authorization order issued out of a county expires on a unique date, and sometimes it is difficult to find out when an order expires.

Also, Rule 103 provides that no motion is necessary in order to obtain an order to serve process. The official Comment to Rule 103 says that this proviso was "added to avoid the necessity of motions and fees." But Harris County judges still require the motion.

RECENT EFFORTS TO REGULATE PROCESS SERVERS AND CURRENT PRACTICES BY PRIVATE AGENCY

There have been several unsuccesful efforts to establish a uniform system and licensing in the legislature.

The State Attorney General uses private process servers for its cases. Rick Keeney's company did $1.2 million of business with the AG last year. The AG's office got a bill passed to permit private process serving on their cases without a court order, and no classes and no liability insurance is required.

The Committee and the Court has been approached the process server group which would like to have a uniform statewide licensing requirement, so that once you comply then you are licensed to serve process anywhere in Texas. They suggest the following requirements: over age 18, criminal background check and exclude felons and perhaps persons convicted of a crime of moral turpitude, be a citizen of the USA, and have 7 hours of training. If the conviction is for a misdemeanor, or is more than 7 years old, then the judge of the court can waive those disabilities. A copy of the proposed language of the process servers is attached as Appendix A.

In October, 2001, the Civil Process Servers, represented by Rick Keeney, met with Richard Orsinger, Chris Griesel, and Colin Coe. A description of that meeting was provided to the Committee at the November 2001 meeting. At that meeting, the Committee asked that a copy of a proposed language to Rule 103 and 536 be prepared. The committee suggested a provision that would allow the issuance of an order if the person either 1) complied with the requirements of that court or 2) complied with the "best (and toughest) practices" of the courts which have previously adopted licensing requirements. A copy of the proposed rule is attached as Appendix B. The Committee has also prepared language suggested by the process servers that was not included in the Committee's initial

instructions but that was suggested as important by the process servers.

APPENDIX A-

PROCESS SERVERS' PROPOSED

AMENDMENT TO TRCP 103

November 2, 2001

RULE 103. WHO MAY SERVE

Citation and other notices may be served anywhere by (1) any sheriff or constable or other person authorized by law, (2) by any person authorized by law or by written order of the court who is not less than eighteen years of age. The order authorizing a person to serve process may be made without written motion and no fee shall be imposed for issuance of such order , (3) by any person who is not less than eighteen years of age, is a U.S. Citizen, has not been convicted in any jurisdiction of a felony or misdemeanor involving moral turpitude, provides a Texas Department of Public Safety verified finger print criminal history record check, proof of attendance at a seven-hour education course on civil process approved by the Presiding District Judge or his/her designee, proof of Errors & Omissions & General Liability Insurance coverage for such person a face amount not less than $300,000 to the Presiding District Judge or his/her designee. Upon compliance with the foregoing requirements, the person shall be issued no later than 30 days after application, a photo identification card with a unique county registration number on it and shall therefore be authorized under this order to serve citation and other notices as herein provided . The authorized person shall list that unique number on each return of service made by such authorized person that is filed with the clerk of the appropriate court. The identification card shall remain the property of the Presiding District Judge or his/her designee and must be surrendered upon written demand by the Presiding District Judge or his/her designee. The person appointed under this rule shall be considered an officer of the court when in performance of his/her duties. The person will have the authority to serve process issued out of any court in the State of Texas in the same manner as constables and sheriffs, and may serve process anywhere the defendant may be found. A person authorized under this rule shall not serve any writs that require the person to take control of, possession of, or the seizure of any person, property, or thing. The order authorizing a person to serve process may be made without written motion and a fee may be imposed for issuance of such order. No person who is a party to or interested in the outcome of a suit shall serve any process. Service by registered or certified mail and citation by publication shall, if requested, be made by the clerk of the court in which the case is pending.

APPENDIX B-COMMITTEE'S PROPOSED CHANGES

PROPOSED CHANGE TO RULE 103

Rule 103. PERSONS WHO MAY SERVE CITATIONS AND NOTICES[Who May Serve]

(1) Citation and other notices may be served anywhere by:

(a) [(1)] any sheriff or constable or other person authorized by law; or[,]

(b)[(2)] by any person authorized by law or by written order of the court who is not less than eighteen years of age.

(2) A person [No person] who is a party to or interested in the outcome of a suit may not [shall] serve any process.

(3) Service by registered or certified mail and citation by publication shall, if requested, be made by the clerk of the court in which the case is pending.

(4) An [The] order authorizing a person to serve process under Subsection (1)(b) may be made without written motion. A [and no] fee may not [shall] be imposed for the issuance of the [such] order.

(5) A court shall issue a written order of the court allowing a person to serve citation or other notices only if:

(a) the person complies with any requirements of the court for issuance of a written order of the court under this rule; or

(b) the person:

(i) is 18 years old or older;

(ii) is a United States citizen;

(iii) has not been convicted in any jurisdiction of a felony or misdemeanor involving moral turpitude;

(iv) has had a Department of Public Safety verified finger print criminal history record check performed in the previous 12 months; and

(v) has attended a seven or more hours of continuing education on the service of civil process approved by a presiding district or county judge or the judge's designee;

(vi) submits proof of a current errors & omissions insurance policy and a current general liability insurance policy for the person in an amount of at least $300,000 and that is directed to the presiding district or county judge of the county in which the order is being sought or the judge's designee.

(6) A court or the court's designee may issue a identification card to a person indicating that the requirements of Subsection (5)(b) have been met.

Additional Suggestions of the Civil Process Servers

(7) A person authorized by written order of the court under subsection (1)(b):

(a) is an officer of the court when the person is serving citation or other notices;

(b) may serve citation or other notices issued by any state court in the state in the same manner as a constable or sheriff; and

(c) may serve a citation or other notices at any location where the person who is the subject of the citation or other notice may be found.

(8) A person authorized by written order of the court under subsection (1)(b) may not serve any writ or other notice that require the person to take control of, possession of, or seize any person or property.

PROPOSED CHANGES TO RULE 536

RULE 536. WHO MAY SERVE [AND METHOD OF SERVICE]

(1) Citation and other notices may be served anywhere by:

(a) any sheriff or constable or other person authorized by law; or

(b) by any person authorized by law or by written order of the court who is not less than eighteen years of age.

(2) A person who is a party to or interested in the outcome of a suit may not serve any process.

(3) Service by registered or certified mail and citation by publication shall, if requested, be made by the clerk of the court in which the case is pending.

(4) An order authorizing a person to serve process under Subsection (1)(b) may be made without written motion. A fee may not be imposed for the issuance of the order.

(5) A court shall issue a written order of the court allowing a person to serve citation or other notices only if:

(a) the person complies with any requirements of the court for issuance of a written order of the court under this rule; or

(b) the person:

(i) is 18 years old or older;

(ii) is a United States citizen;

(iii) has not been convicted in any jurisdiction of a felony or misdemeanor involving moral turpitude;

(iv) has had a Department of Public Safety verified finger print criminal history record check performed in the previous 12 months; and

(v) has attended a seven or more hours of continuing education on the service of civil process approved by a judge or the judge's designee;

(vi) submits proof of a current errors & omissions insurance policy and a current general liability insurance policy for the person in an amount of at least $300,000 and that is directed to the judge in which the order is being sought or the judge's designee.

(6) A court or the court's designee may issue a identification card to a person indicating that the requirements of Subsection (5)(b) have been met.

Additional Suggestions of the Civil Process Servers

(7) A person authorized by written order of the court under subsection (1)(b):

(a) is an officer of the court when the person is serving citation or other notices;

(b) may serve citation or other notices issued by any state court in the state in the same manner as a constable or sheriff; and

(c) may serve a citation or other notices at any location where the person who is the subject of the citation or other notice may be found.

(8) A person authorized by written order of the court under subsection (1)(b) may not serve any writ or other notice that require the person to take control of, possession of, or seize any person or property.

[(a) Citation and other notices may be served anywhere by (1) any sheriff or constable or other person authorized by law or, (2) any person authorized by law or by written order of the court who is not less than eighteen years of age. No person who is a party to or interested in the outcome of a suit shall serve any process. Service by registered or certified mail and citation by publication shall, if requested, be made by the clerk of the court in which the case is pending. The order authorizing a person to serve process may be made without written motion and no fee shall be imposed for issuance of such order.]

RULE 536.1 METHOD OF SERVICE

(a)[(b)] Unless the citation or an order of the court otherwise directs, the citation shall be served by any person authorized by this rule by:

(1) delivering to the defendant, in person, a true copy of the citation with the date of delivery endorsed thereon with a copy of the petition attached thereto, or

(2) mailing to the defendant by registered or certified mail, return receipt requested, a true copy of the citation with a copy of the petition attached thereto if any is filed.

(b)[(c)] Upon motion supported by affidavit stating the location of the defendant's usual place of business or usual place of abode or other place where the defendant can probably be found and stating specifically the facts showing that service has been attempted under either (a)(1) or (a)(2) at the location named in such affidavit but has not been successful, the court may authorize service:

(1) by leaving a true copy of the citation, with a copy of the petition attached, with anyone over sixteen years of age at the location specified in such affidavit, or

(2) in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit.

APPENDIX C-CURRENT RULE 103/536

Rule 103. Who May Serve

Citation and other notices may be served anywhere by (1) any sheriff or constable or other person authorized by law or, (2) by any person authorized by law or by written order of the court who is not less than eighteen years of age. No person who is a party to or interested in the outcome of a suit shall serve any process. Service by registered or certified mail and citation by publication shall, if requested, be made by the clerk of the court in which the case is pending. The order authorizing a person to serve process may be made without written motion and no fee shall be imposed for issuance of such order.

Rule 536. Who May Serve and Method of Service

(a) Citation and other notices may be served anywhere by (1) any sheriff or constable or other person authorized by law or, (2) any person authorized by law or by written order of the court who is not less than eighteen years of age. No person who is a party to or interested in the outcome of a suit shall serve any process. Service by registered or certified mail and citation by publication shall, if requested, be made by the clerk of the court in which the case is pending. The order authorizing a person to serve process may be made without written motion and no fee shall be imposed for issuance of such order.

(b) Unless the citation or an order of the court otherwise directs, the citation shall be served by any person authorized by this rule by:

(1) delivering to the defendant, in person, a true copy of the citation with the date of delivery endorsed thereon with a copy of the petition attached thereto, or

(2) mailing to the defendant by registered or certified mail, return receipt requested, a true copy of the citation with a copy of the petition attached thereto if any is filed.

(c) Upon motion supported by affidavit stating the location of the defendant's usual place of business or usual place of abode or other place where the defendant can probably be found and stating specifically the facts showing that service has been attempted under either (a)(1) or (a)(2) at the location named in such affidavit but has not been successful, the court may authorize service:

(1) by leaving a true copy of the citation, with a copy of the petition attached, with anyone over

sixteen years of age at the location specified in such affidavit, or

(2) in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit.

Pam Barron

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Logged

June 11, 2001

Chris Griesel
Rules Attorney
Supreme Court of Texas

Mr Griesel:

I am writing to request the Court consider amending Rule 6, Texas Rules of Civil Procedure to explicitly provide that writs of execution may be served on Sunday. The rule currently provides:

> Rule 6. Suits Commenced on Sunday
>
> No civil suit shall be commenced nor process issued or served on Sunday, except in cases of injunction, attachment, garnishment, sequestration, or distress proceedings; provided that citation by publication published on Sunday shall be valid.

This Court clarified years ago that the predecessor statutes to this rule did not apply to writs of execution. *See Houston Oil Co. of Tex. v. Randolph*, 251 S.W. 794, 800 (Tex. Comm'n App. 1923, holding approved) ("[T]he issuance of the writ [of execution] on Sunday would not make it void."); *Crabtree v. Whiteselle*, 65 Tex. 111, 113-14 (1885) (explaining that rule did not apply to executions because its application is limited to "such process as pertains to the commencement of suits").

However, because the rule enumerates specific exceptions that do not include executions, most sheriffs' departments and constables' offices refuse to serve writs of execution on Sunday without a court order explicitly permitting service on Sunday. This process results in unnecessary expense and wastes the courts' time.

We would appreciate your considering this change. Please contact me if I can provide any additional information.

Thank you,

Daniel Sanders
713-528-6946

Attachments

REPORT ON CAMERAS IN THE COURTROOM AND MEDIA GUIDELINES

The Texas Rules of Civil Procedure and Appellate Procedure set out broad standards for recording and broadcasting of court proceeding. Texas Rule of Civil Procedure 18c sets out:

> Rule 18c. Recording and Broadcasting of Court Proceedings.
> A trial court may permit broadcasting, televising, recording, or photographing of proceedings in the courtroom only in the following circumstances:
>
> (a) in accordance with guidelines promulgated by the Supreme Court for civil cases, or
> (b) when broadcasting, televising, recording, or photographing will not unduly distract participants or impair the dignity of the proceedings and the parties have consented, and consent to being depicted or recorded is obtained from each witness whose testimony will be broadcast, televised, or photographed, or
> (c) the broadcasting, televising, recording, or photographing of investiture, or ceremonial proceedings.

Texas Rule of Appellate Procedure 14 states:

> RULE 14. RECORDING AND BROADCASTING COURT PROCEEDINGS
>
> 14.1. Recording and Broadcasting Permitted
> An appellate court may permit courtroom proceedings to be broadcast, televised, recorded, or photographed in accordance with this rule.
>
> 14.2. Procedure
> (a) Request to Cover Court Proceeding
>
> (1) A person wishing to broadcast, televise, record, or photograph a court proceeding must file with the court clerk a request to cover the proceeding. The request must state:
>
> (A) the case style and number;
> (B) the date and time when the proceeding is to begin;
> (C) the name of the requesting person or organization;
> (D) the type of coverage requested (for example, televising or photographing); and
> (E) the type and extent of equipment to be used.
>
> (2) A request to cover argument of a case must be filed no later than five days before the date the case is set for argument and must be served on all parties to the case. A request to cover any other proceeding must be filed no later than two days before the date when the proceeding is to begin.
>
> (b) Response. Any party may file a response to the request. If the request is to cover argument, the response must be filed no later than two days before the date set for argument. If a party objects to coverage of the argument, the response should state the injury that will

allegedly result from coverage.

(c) Court May Shorten Time. The court may, in the interest of justice, shorten the time for filing a document under this rule if no party or interested person would be unduly prejudiced.

(d) Decision of Court. In deciding whether to allow coverage, the court may consider information known ex parte to the court. The court may allow, deny, limit, or terminate coverage for any reason the court considers necessary or appropriate, such as protecting the parties' rights or the dignity of the court and ensuring the orderly conduct of the proceedings.

14.3. Equipment and Personnel.
The court may, among other things:
(a) require that a person seeking to cover a proceeding demonstrate or display the equipment that will be used;
(b) prohibit equipment that produces distracting sound or light;
(c) prohibit signal lights or devices showing when equipment is operating, or require their concealment;
(d) prohibit moving lights, flash attachments, or sudden lighting changes;
(e) require the use of the courtroom's existing video, audio, and lighting systems, if any;
(f) specify the placement of personnel and equipment;
(g) determine the number of cameras to be allowed in the courtroom; and
(h) require pooling of equipment if more than one person wishes to cover a proceeding.

14.4. Enforcement
The court may sanction a violation of this rule by measures that include barring a person or organization from access to future coverage of proceedings in that court for a defined period.

While the Supreme Court has not adopted guidelines on this issue, most urban counties or counties in which one notable trial has occurred have adopted, either in their local rules or by court orders unique to a case, a media policy.

The Texas Legislature, in 1999, asked in S.C.R. 23, the Office of Court Administration (OCA) to study the "study and develop uniform guidelines for media pooling agreements for courtroom coverage". The OCA was asked to "[a]spects of courtroom media coverage that warrant study include the use of media pooling agreements by broadcast news organizations for the mutual sharing of audio and visual recordings; notice to the court for the use, operation, and placement of media equipment; the conduct of media personnel; and criteria for the restriction of media coverage in cases involving juveniles and other cases considered sensitive". The Legislature put a restriction on the guidelines that "[i]n the interest of justice, media coverage guidelines regarding the photographing, broadcasting, or recording of courtroom proceedings should not affect the court's power to control and administer access by the media to the courtroom". A copy of the concurrent resolution is attached as Appendix A.

The Texas Judicial Council appointed a Committee on Media and the Courts. The committee

was composed of Judge Robin Smith (Midland), Judge Chiuminatto (Kingsville), Ms. Sharon Wilk (Bastrop), Presiding Judge Keller (CCA), Justice O'Neill (5th COA), and Mr. Paul Watler (Dallas). The committee was staffed by Osler McCarthy, Staff Attorney of Public Information. The Committee met over a year- long period and examined existing rules adopted by courts in this state and other states. The committee prepared a series of proposed advisory guidelines that were presented to and approved by the Texas Judicial Council. A copy of the proposal was forwarded to the legislature. The proposed guideline set out uniform methods for asking courts for permission to broadcast, describe coverage limitations, sets out standards for operating cameras in a courtroom, and suggests pooling procedures. The guidelines are attached as Appendix B.

The proposed guidelines has recently been used successfully by a justice court in Galveston in a high-profile criminal hearing.

Chief Justice Phillips has asked the Supreme Court Rules Advisory Committee to offer input on the proposed guideline before presenting the guideline to the court. The staff member who prepared the guidelines will be present to answer any questions regarding the formation of the guidelines.

APPENDIX A

S.C.R. No. 23

SENATE CONCURRENT RESOLUTION

WHEREAS, The Office of Court Administration operates under the direction of the Texas Supreme Court to provide administrative, technical, and research assistance to all Texas courts and to develop and implement court guidelines and rules of procedure that foster an effective and efficient judicial system; and

WHEREAS, Texas court rules currently allow courts to have their proceedings recorded and broadcast under certain circumstances; with the exception of the Eighth Court of Appeals, however, no court in the Texas judicial system has made explicit provision for media coverage of court proceedings; and

WHEREAS, The Eighth Court of Appeals' local rules provide specific guidelines for media agencies making pool arrangements to avoid disruption of proceedings by an excessive number of cameras in the courtroom; similar guidelines could help other Texas courts operate more effectively and efficiently, and development of a uniform set of guidelines would ensure consistency in court interactions with the public media throughout the state; and

WHEREAS, In accordance with its powers and duties, the Office of Court Administration, whose responsibilities include research functions to further the establishment of innovative court programs and technology systems that promote efficient judicial administration, should undertake a study of media pooling arrangements for courtroom coverage and develop the appropriate guidelines for such arrangements; and

WHEREAS, Aspects of courtroom media coverage that warrant study include the use of media pooling agreements by broadcast news organizations for the mutual sharing of audio and visual recordings; notice to the court for the use, operation, and placement of media equipment; the conduct of media personnel; and criteria for the restriction of media coverage in cases involving juveniles and other cases considered sensitive; and

WHEREAS, In the interest of justice, media coverage guidelines regarding the photographing, broadcasting, or recording of courtroom proceedings should not affect the court's power to control and administer access by the media to the courtroom; now, therefore, be it

RESOLVED, That the 76th Legislature of the State of Texas hereby direct the Office of Court Administration to study and develop uniform guidelines for media pooling agreements for courtroom coverage; and, be it further

RESOLVED, That the Office of Court Administration solicit and consider the opinions and advice of the judiciary in developing the uniform guidelines; and, be it further

RESOLVED, That the secretary of state forward an official copy of this resolution to the executive assistant of the Office of Court Administration.

APPENDIX B

PROPOSED UNIFORM COURT RULES FOR COVERAGE OF JUDICIAL PROCEEDING IN TEXAS TRIAL AND APPELLATE COURTS

POLICY

These guidelines are intended to standardize the use of electronic media coverage in the courts of Texas to preserve the independence of the judiciary, maintain the dignity, decorum and impartiality of court proceedings and to protect the rights of litigants.

DEFINITIONS

"Audio-visual coverage" or "electronic media coverage" or "coverage" shall mean (1) electronic broadcasting or other transmission to the public of radio or television signals from the courtroom, (2) electronic recording of sound or visual images in the courtroom for later transmission or reproduction, and (3) still photography in the courtroom. In the use of each of these terms, such coverage may refer to that by news or educational media.

"Media" or "media agency" mean any news reporting or news-gathering entity and any associated agents or employees thereof, including television, radio, and television networks, news services, newspapers, magazines, trade papers, in-house publications, professional journals, or any educational

media the function of which is to inform the public. Educational media coverage includes but is not limited to reproduction of court proceedings for public or private school classroom use or for legal training.

"Judicial proceeding" means the proceeding of a court or a judge wherever conducted.

"Court" means a presiding judge, associate judge, master or other justice designated to preside over the proceedings in question. If more than one justice presides, any decision required shall be made by a majority of the judges.

"Pool" means an arrangement among several media agencies for joint production of video, audio and still photographic coverage of a judicial proceeding.

PROCEDURE FOR APPLICATION AND APPROVAL

Application; Notification of Parties. Coverage of judicial proceedings may be granted only to members of the news or educational media and only by the court's approval of a written application for coverage by a news or educational media representative with the applicable clerk of the court without cost. The application shall be signed by an authorized media representative and acknowledge receipt of a copy of these rules and that these rules are binding upon it. The application shall be served on the parties to the proceeding no later than the day before the scheduled proceeding, unless the proceeding is set on less than a day's notice, in which case the notice should be served as soon as practicable.

The request should state as much identifying information as practical to inform the court, such as the case style and number and the date and time the proceeding is scheduled to begin. The request must state the name of the requesting person or organization; the type of coverage requested (for example, televising or photographing); and the type and extent of equipment to be used. Upon the filing of such notice and before the commencement of the proceeding, any party may request a hearing on objections to such coverage. Objections to media coverage should state the specific and demonstrable injury alleged from media coverage. The hearing shall be at a time that will not substantially delay the proceedings.

Time for filing a request. A request to cover a court proceeding must be filed no later than three days before the proceeding to be covered. The court may, in the interest of justice, shorten the time for filing a document under this rule if no party or interested person would be unduly prejudiced.

Decision of Court. The granting of a coverage request shall be made at the court's discretion. The court shall, by written order, either allow, deny or limit coverage. The court has the discretion to allow, deny, limit or terminate electronic media coverage of a proceeding when the interests of justice demand protecting the rights of the parties, witnesses, or the dignity of the court, or assuring the orderly conduct of the proceedings, or for any other reason considered necessary or appropriate by the court. In granting a request, the court shall consider all relevant factors, including but not limited to:

(a) the type of case involved;

(b) whether the coverage would harm any participants;

(c) whether the coverage would interfere with the fair administration of justice, provision of a fair trial, or the rights of the parties;

(d) whether the coverage would interfere with any law enforcement activity;

(e) the objections of any of the parties, prospective witnesses, victims, or other participants in the proceeding of which coverage is sought;

(f) the physical structure of the courtroom and the likelihood that any equipment required to conduct coverage of proceedings can be installed and operated without disturbance to those proceedings or any other proceedings in the courthouse;

(g) the extent to which the coverage would be barred by law in the judicial proceeding; and

(h) the fact that any party, prospective witness, victim, or other participant in the proceeding is a child, to which fact the court shall give great weight.

The court may grant a request, subject to limitations suggested by these rules, unless coverage would clearly deprive a participant in the proceedings of a right protected by the constitutions or other laws of the United States or of Texas. Whenever coverage would impair the rights of a participant, coverage may be allowed subject to narrowly designed limitations that safeguard the protected interest. Technological techniques that safeguard the protected interest are to be preferred over prohibiting all coverage of the proceeding or any part thereof. For example, in instances where the identity of a witness should not be made public, requiring the media to electronically obscure the face and/or disguise the voice of the witness is preferable to prohibiting coverage of the witness' testimony. Likewise, precluding or restricting coverage of part of a witness' testimony is preferable to barring coverage of the witness' entire testimony.

COVERAGE LIMITATIONS

Equipment and Personnel. Coverage in general should be by a pool system established by the news organizations and administered by those organizations, subject to the following limitations:

(a) No more than one video camera and one camera operator shall be permitted in any proceeding at any time. Only video cameras, audio equipment and still camera equipment that does not produce disruptive sound or light may be employed to cover judicial proceedings. In the event the electronic media intends to cover any entire or lengthy proceeding, and informs the court, or in other appropriate circumstances, the court may allow an unmanned second camera into the courtroom.

(b) No more than one photographer to operate two still cameras shall be permitted in any proceeding at any time.

(c) No more than one audio system for broadcast purposes shall be permitted in any proceeding at any time. Audio pickup for all news media purposes shall be through existing audio systems in the court, if possible. If no technically suitable audio system is available, microphones and related wiring essential for media purposes shall be unobtrusive and placed in the courtroom at the court's direction, preferably only at the bench, witness stand and counsel tables.

(d) No moving lights, flash attachments or sudden lighting changes shall be permitted during the coverage of judicial proceedings. No light or signal visible to trial participants shall be used on any equipment during coverage to indicate whether it is operating. The court may, in its discretion, approve modifications and additions in light sources existing in the courtroom, provided such modifications or

additions are installed and maintained at media expense and are not distracting or otherwise offensive.

(e) Video cameras, still cameras and camera personnel shall be positioned in such locations as shall be designated by the presiding judge. The areas designated shall provide the news media with reasonable access to cover the proceedings with the least possible interference with court proceedings. During the proceedings, operating personnel shall not move about, nor shall equipment be placed, moved or removed. All such activities shall take place each day before the proceeding. All equipment shall be in place in advance of the commencement of the proceeding.

(f) Identifying marks, call letters, words, logos and symbols shall be concealed on all equipment. Persons operating such equipment shall not display any identifying insignia on their clothing.

Specific restrictions on coverage. No coverage of the jury or of any juror or alternate juror in the jury deliberation room or during recess shall be permitted. Coverage of the jury, including alternate jurors, while in the jury box or elsewhere in the courtroom, may be disallowed, but in any event shall not focus on, involve close-ups of, or otherwise emphasize any individual juror or alternate juror. Electronic media coverage of proceedings held in chambers, proceedings closed to the public, and jury selection is prohibited. Audio coverage of conferences between an attorney and client, witness or aide, between attorneys, or between counsel and the court at the bench is prohibited.

Because of the routine occurrence of sensitive matters occurring in the courts, juvenile and family courts may establish and publish additional policies regarding electronic media coverage of certain types of proceedings in their courts.

Supervision of audio-visual coverage. Coverage of judicial proceedings shall be subject to the

continuing supervision of the court. Violations of these rules, or of the specific order governing coverage entered by the court, shall be punishable by the court's contempt powers. Notwithstanding the approval of a request for permission to provide coverage of judicial proceedings, the court shall have discretion throughout such proceedings to revoke such approval or to limit the coverage authorized.

Ceremonial coverage. If electronic media coverage is of investiture or ceremonial proceedings as allowed by Rule 18c(c) of the Texas Rules of Civil Procedure, permission for, and the manner of such coverage, are determined solely by the court, with or without guidance from these rules.

Official Record. Films, videotapes, photographs or audio reproductions made in court proceedings shall not be considered part of the official court record.

POOLING

If more than one media agency of one type applies for coverage of a judicial proceeding, they shall make pool arrangements. If they are unable to agree, the court may deny all electronic media coverage by that type of media agency, or may designate one agency or one representative as pool coordinator, specifying such other conditions of pool coverage as may be necessary. A pool will be declared when any TV news organization has camera and sound access to courtroom proceedings being covered by any other TV news organization. It will be the responsibility of the station inside the courtroom to provide either instant electronic distribution of all the audio and video of the court proceedings through use of a distribution amplifier ("DA,") or a "dub copy" of all the court proceedings recorded by the

station allowed camera and microphone access to the courtroom.

Eligibility. The only stations eligible for access to the pool will be those stations that have a representative covering the proceeding during the time the pool camera and microphone are inside the courtroom. Each station present should notify the pool provider of its interest in receiving the audio and video feed or dub in a timely fashion, preferably at the time of the proceeding. In the case of instant electronic distribution the audio and video signals will be made available to all TV news organizations present. No dubs will be made. In the case of no signal distribution, only TV news organizations present during the pooled proceedings will be eligible for a dub of those proceedings.

Pool Responsibilities. The TV news organization that makes an initial agreement with the court where the proceedings are to take place becomes the pool camera, by virtue of the fact that until others express an interest, the coverage is "exclusive." If, however, more than one station expresses an interest in coverage of the proceeding 24 hours before the start of TV coverage of that proceeding, the stations will determine which of them will provide the pool coverage through an agreement, drawing or flip of a coin.

Notification. TV news organizations that gain access to court proceedings on their own have no obligation to notify other stations of their intent to record those proceedings. If, however, other stations express an interest in similar coverage during the time the initial station is covering the inside courtroom proceedings, then a pool is declared but no requirement for other stations to be notified of the pool arrangement exists.

REPORT ON PROPOSED RULE 13, PEER REVIEW OF VISITING JUDGES

In 1997, the Texas Judicial Council created the Committee on Visiting and Retired Judges and instructed that committee to study the visiting judge program and make recommendations on the ways the program could be improved. The committee, composed of Chief Justice Cayce, Presiding Judge McCormick, Representative Gallego, Representative Thompson, Judge Peeples, and Mr. Joseph Callier, conducted six public hearings and obtained input from visiting judges, the presiding judges of the nine judicial administrative regions, and from the general public. The committee submitted a series of legislative recommendations (which later became H.B. 639, sponsored by Rep. Thompson) and a series of proposed changes to the Rules of Judicial Administration. Both the rules and legislative recommendations were approved by the Judicial Council at its November 1998 and January 1999 meeting. A copy of the legislative proposal is attached as Appendix A and the original draft of the rule is attached as Appendix B

The Judicial Section of the State Bar has also approved an internal legislative recommendation that would establish a peer review panel to be selected by the presiding judges of the nine judicial administrative regions.

Following the end of the 1999 legislative session, the Judicial Council again took up the issue. Between 2000-2001, the Judicial Council again reviewed the rules provisions. The Court asked that the council to review the proposed rules changes, which had been modified by comments received from interested parties. The revised draft was then circulated to the Regional Presiding Judges and then the Council. The Council approved with change a proposed draft of the rule. (Attached as Appendix C)

The draft, a red-lined version which compare a final draft with original suggested

language, was prepared for the Council by the Rules attorney Bob Pemberton and contains in the footnotes various issues raised by the Council staffers that were not resolved by the final vote of the Judicial Council and his recommendations for resolving certain issues. Chief Justice Phillips asked that this draft be presented to the SCAC for comment.

The proposed rule requires that the performance of each visiting judge must be reviewed by a peer review committee in each administrative judicial region in which the visiting judge is assigned. A peer review committee must evaluate a visiting judge's performance as either "favorable" or "unfavorable" to the presiding judge.

The peer review committee must consider the visiting judge's temperament and demeanor, mental and perceptual capacity, knowledge of law and procedure, competence in area of specialization, and any other factor that may be relevant in evaluating judicial performance. Any person who participated in a case before the visiting judge, from attorney to court staff, and any citizen who resides in the region may make written comments which must be considered by the peer review committee.

A peer review committee must make its recommendation concerning each visiting judge not later than the 30th day after the date the peer review committee completes it review. The recommendation must be in writing and be served on the presiding judge. A visiting judge is given a reasonable opportunity to respond to a proposed unfavorable recommendation and may request reconsideration of an unfavorable recommendation. Recommendation are also forwarded to the Office of Court Administration. The presiding judge may, on request, obtain additional information concerning a recommendation from the visiting judge and the peer review committee.

The Peer Review Committee is composed of at least five members, 2/5 active judges, 2/5

citizen members who are members of the State Bar, and 1/5 citizen members who are not licensed to practice law. Each member serves a 2 year term.

Communications to the peer review committee and the committee's record are confidential and exempt from disclosure under Rule 12.

APPENDIX A-H.B.639, 76TH LEGISLATIVE SESSION

By Thompson

H.B. No. 639

A BILL TO BE ENTITLED
AN ACT

relating to the assignment of certain retired or former judges as visiting judges.

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

SECTION 1. Section 74.003, Government Code, is amended by amending Subsection (b) and adding Subsection (f) to read as follows:

(b) The chief justice of the supreme court may assign a qualified retired justice or judge of the supreme court, of the court of criminal appeals, or of a court of appeals to a court of appeals for active service regardless of whether a vacancy exists in the court to which the justice is assigned. To be eligible for assignment under this subsection, a retired justice or judge must:

(1) have served as an active justice or judge for at least 96 months in a district, statutory probate, statutory county, or appellate court, including at least 48 months in an appellate court;

(2) not have been removed from office;

(3) certify under oath to the chief justice of the supreme court, on a form prescribed by the chief justice, that the judge did not resign from office after having received notice that formal proceedings by the State Commission on Judicial Conduct had been instituted as provided in Section 33.022 and before the final disposition of the proceedings;

(4) annually demonstrate that the judge has completed in the past calendar year the educational requirements for active appellate court justices or judges; and

(5) certify to the chief justice of the supreme court a willingness not to appear and plead as an attorney in any court in this state for a period of two years.

(f) For the purposes of Subsection (b)(1), a month of service is calculated as a calendar month or a portion of a calendar month in which a judge was authorized by election or appointment to preside.

SECTION 2. Section 74.053, Government Code, is amended to read as follows:

Sec. 74.053. OBJECTION TO [~~ASSIGNED~~] JUDGE ASSIGNED TO A TRIAL COURT. (a) When a judge is assigned to a trial court under this chapter the presiding judge shall, if it is reasonable and practicable and if time permits, give notice of the assignment to each attorney representing a party to the case that is to be heard in whole or part by the assigned judge.

(b) If a party to a [~~civil~~] case files a timely objection to the assignment, the judge shall not hear the case. Except as provided by Subsection (d), each party to the case is only entitled to one objection under this section for that case.

(c) An objection under this section must be filed not later than the seventh day after the date that the party receives actual notice of the assignment or before the date that the first hearing or trial, including pretrial hearings, commences, whichever date occurs earlier. The presiding judge may extend the time to file an objection under this section on written motion by a party who demonstrates good cause [~~over which the assigned judge is to preside~~].

(d) An assigned [~~A former~~] judge or justice who was defeated in the last primary or general election for which the judge or justice was a candidate for the judicial office held by the judge or justice [~~not a retired judge~~] may not sit in a case if either party objects to the judge or justice.

(e) In this section, "party" includes multiple parties aligned in a case as determined by the presiding judge.

SECTION 3. Sections 74.055(c) and (e), Government Code, are amended to read as follows:

(c) To be eligible to be named on the list, a retired or former judge must:

(1) have served as an active [~~a~~] judge for at least 96 [~~48~~] months in a district, statutory probate, statutory county, or appellate court;

(2) have developed substantial experience in the judge's area of specialty;

(3) not have been removed from office;

(4) certify under oath to the presiding judge, on a form prescribed by the state board of regional judges, that the judge did not resign from office after having received notice that formal proceedings by the State Commission on Judicial Conduct had been instituted as provided in Section 33.022 and before the final disposition of the proceedings;

(5) annually demonstrate that the judge has completed in the past calendar year the educational requirements for active district, statutory probate, and statutory county court judges; and

(6) certify to the presiding judge a willingness not to appear and plead as an attorney in any court in this state for a period of two years.

(e) For purposes of Subsection (c)(1), a month of service is calculated as a calendar month or a portion of a calendar month in which a judge was authorized by election or appointment [~~by the governor~~] to preside.

SECTION 4. Section 75.551, Government Code, is amended to read as follows:

Sec. 75.551. OBJECTION TO JUDGE OR JUSTICE ASSIGNED TO AN APPELLATE COURT. (a) When a judge or justice is assigned to an appellate court under this chapter or Chapter 74, the person who assigns the judge or justice shall, if it is reasonable and practicable and if time permits, give notice of the assignment to each attorney representing a party to the case that is to be heard in whole or part by the assigned judge or justice.

(b) A judge or justice assigned to an appellate court may not hear a [~~civil~~] case if a party to the case files a timely objection to the assignment of the judge or justice. Except as provided by Subsection (d):

(1) each party to the case is entitled to only one objection under this section for that case in the appellate court; and

(2) a party to an appeal may not in the same case object in an appellate court to the assignment of a judge or justice under Section 74.053(b) and under this subsection.

(c) An objection under this section must be filed not later than the seventh day after the date that the party receives actual notice of the assignment or before the date that the case is submitted to the court, whichever date occurs earlier. The court may extend the time to file an objection under this section on a showing of good cause [~~first hearing in which the assigned judge or justice is assigned to sit~~].

(d) A [~~former~~] judge or justice who was defeated in the last primary or general election for which the judge or justice was a candidate for the judicial office held by the judge or justice [~~not a retired judge or justice~~] may not sit in an appellate case if either party objects to the judge or justice.

(e) In this section, "party" includes multiple parties aligned in a case as determined by the appellate court.

SECTION 5. Section 74.055(d), Government Code, is repealed.

SECTION 6. (a) The change in law made by Sections 2 and 4 of this Act applies only to a case that is pending or commences on or after the effective date of this Act.

(b) Except as provided by Subsection (c) of this section, the change in law made by Sections 1, 3, and 5 of this Act applies only to the assignment of a judge or justice under Chapter 74 or 75, Government Code, made on or after the effective date of this Act. An assignment made before the effective date of this Act is governed by the law in effect at the time the assignment is made, and that law is continued in effect for that purpose.

(c) The change in law made by Sections 1, 3, and 5 of this Act does not apply to a person who immediately before the effective date of this Act is eligible to be assigned as a visiting judge by the chief justice of the supreme court under Section 74.003(b) or Chapter 75, Government Code, or to be named on a list of retired and former judges under Section 74.055(c), Government Code, and the former law is continued in effect for determining that person's eligibility for those purposes.

SECTION 7. This Act takes effect September 1, 1999.

SECTION 8. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

BILL ANALYSIS

Office of House Bill Analysis

H.B. 639
By: Thompson
Judicial Affairs
3/9/1999
Introduced

BACKGROUND AND PURPOSE

Currently, the chief justice of the supreme court is authorized to assign a former judge of certain courts to active service as a visiting judge. The Government Code does not set forth the eligibility requirements for a visiting judge. H.B. 639 sets forth those eligibility requirements and clarifies the process of objecting to a judge's assignment.

RULEMAKING AUTHORITY

It is the opinion of the Office of House Bill Analysis that this bill does not expressly delegate any additional rulemaking authority to a state officer, department, agency, or institution.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 74.003, Government Code, by amending Subsection (b) and adding Subsection (f), as follows:

(b) Provides that in order for a retired justice or judge to be eligible for assignment to a court of appeals for active service, the retired judge or justice must have served as an active justice or judge for at least 96 months in a district, statutory probate, statutory county, or appellate court, including at least 48 months in an appellate court. Provides that the retired judge or justice must not have been removed from office and must certify under oath to the chief justice of the supreme court, on a form prescribed by the chief justice, that the judge did not resign from office after having received notice that formal proceedings by the State Commission on Judicial Conduct had been instituted as provided in Section 33.022 (Complainant's and Judge's Rights) and before the final disposition of the proceedings. Provides that the retired judge or justice must also annually demonstrate that the judge has completed in the past calendar year the educational requirements for active appellate court justices or judges and must certify to the chief justice of the supreme court a willingness not to appear and plead as an attorney in any court in this state for a period of two years.

(f) Establishes that for the purposes of computing months of active service in Subsection (b), a month of service is calculated as a calendar month or a portion of a calendar month in which a judge was authorized by election or appointment to preside.

SECTION 2. Amends Section 74.053, Government Code, as follows:

Sec. 74.053. New title: OBJECTION TO JUDGE ASSIGNED TO A TRIAL COURT. Requires a presiding judge, when assigned to a trial court, to give notice of the assignment to each attorney representing a party to the case that is to be heard if it is reasonable and practicable and if time permits. Prohibits a judge from hearing a case if a party to the case files a timely objection to the assignment. Provides that an objection must be filed not later than the seventh day after the date that the party receives actual notice of the assignment or before the date that the first hearing or trial, including pretrial hearings, commences, whichever date occurs earlier. Authorizes the presiding judge to extend the time to file an objection on written motion by a party who demonstrates good cause. Prohibits an assigned judge or justice from sitting in a case if the judge or justice was defeated in the last primary or general election for which the judge or justice was a candidate for the judicial office held by the judge or justice and if either party objects to the judge or justice. Defines "party."

SECTION 3. Amends Sections 74.055(c) and (e), Government Code, to make conforming changes.

SECTION 4. Amends Section 75.551, Government Code, to make conforming changes.

SECTION 5. Repealer: Section 74.055(d), Government Code (regarding a list of retired and former judges subject to assignment). Section 74.055(d) currently provides that a former district judge need not fulfill a 48-month service requirement in order to appear on the list of retired and former judges.

SECTION 6. (a) Makes application of Sections 2 and 4 of this Act prospective.

(b) Makes application of Sections 1, 3, and 5 of this Act prospective, except as provided by Subsection (c).

(c) Provides that the change in law made by Sections 1, 3, and 5 of this Act does not apply to a person who immediately before the effective date of this Act is eligible to be assigned as a visiting judge by the chief justice of the supreme court under Section 74.003(b) or Chapter 75, Government Code (Other Court Administration), or to be named on a list of retired and former judges under Section 74.055(c), Government Code, and the former law is continued in effect for determining that person's eligibility for those purposes.

SECTION 7. Effective date: September 1, 1999.

SECTION 8. Emergency clause.

APPENDIX B-ORIGINAL DRAFT OF PROPOSED RULE

RULES OF JUDICIAL ADMINISTRATION

RULE ___. VISITING JUDGE PEER REVIEW.

____ **Definitions.** In this rule:

(a) *Peer Review Committee* means a committee established under Section _____ of this rule.

(b) *Presiding Judge* means the presiding judge of an administrative judicial region.

(c) *Visiting Judge* means a retired or former judge who is eligible for assignment under Section 74.055, Government Code.

____ **Peer Review Committee.**

(a) *Membership.* The presiding judge must appoint at least five persons to serve as members of a peer review committee. The peer review committee's membership must adhere to a ratio of 2/5 active judges, 2/5 citizen members who are members of the State Bar of Texas, and 1/5 citizen members who are not licensed to practice law.

(b) *Terms.* A member of the peer review committee serves a term of two years. The presiding judge may re-appoint a person to the committee whose term has expired.

(c) *Expenses.* A member of the peer review committee may not receive compensation for service on the committee. The presiding judge may use regional funds to reimburse a member for actual and necessary expenses incurred in the performance of committee duties under this rule.

(d) *Rules and Procedures.* The presiding judge may promulgate rules and procedures that are reasonably necessary to comply with this rule including procedures for obtaining comments about the performance of a visiting judge. The presiding judge may delegate to the peer review committee the authority to adopt procedures that are reasonably necessary for the performance of the committee's duties under this rule.

____ Duties of Peer Review Committee.

(a) *Biennial Review.* The peer review committee must conduct a biennial review of the performance of each visiting judge who is eligible for assignment in the region. For purposes of this rule, a visiting judge is subject to review as follows:

(1) for a judge whose last year of active service ended in an even-numbered year, the next even-numbered year and every two years afterward; or

(2) for a judge whose last year of active service ended in an odd-numbered year, the next odd-numbered year and every two years afterward.

(b) *Considerations.* The peer review committee must consider the following factors in evaluating the visiting judge's performance:

(1) the visiting judge's temperament and demeanor;

(2) the visiting judge's mental and perceptual capacity;

(3) the visiting judge's knowledge of law and procedure; and

(4) any other factor that may be relevant in evaluating judicial performance.

(c) *Written comments or other information.* In considering the factors in Subsection (b), the peer review committee must consider information submitted by:

(1) the presiding judge;

(2) any sitting judge in whose court the visiting judge's services were performed;

(3) any member of the bar who has participated in a case before the visiting judge;

(4) court staff and personnel who have worked with the visiting judge during the visiting judge's assignment; and

(5) any public citizen who resides in the region where the visiting judge is assigned or has formerly presided.

(d) *Response by Visiting Judge.* Before the peer review committee makes an unfavorable recommendation to the presiding judge, the committee must notify the visiting judge in writing and give the visiting judge an opportunity to respond to its proposed recommendation. The committee shall simultaneously forward a copy of the written notice to the presiding judge. The peer review committee may not reveal the name of

any person who submits comments or other evaluative information under this rule.

(e) *Committee Recommendation.* Not later than the 30th day after the peer review committee completes its review, the committee must make a written recommendation to the presiding judge stating only whether the visiting judge should or should not continue to be assigned by the presiding judge. The committee must provide additional information to the presiding judge upon request of the presiding judge. Upon receipt of the recommendation, the presiding judge must forward copies of the recommendation to the administrative director of the Office of Court Administration and to the visiting judge. The administrative director shall retain a copy of a recommendation that is issued to the presiding judge for public inspection.

____ Reconsideration by Committee.

(a) *Request for Reconsideration.* A visiting judge who receives a recommendation that the visiting judge not continue to be assigned may submit a written request for reconsideration by the peer review committee not earlier than the 180th day after the date that the committee issued its recommendation.

(b) *Amendment of Recommendation.* If at any time the peer review committee determines that a recommendation submitted under this rule should be amended, the committee shall send the amended recommendation to the presiding judge. The presiding judge shall promptly forward a copy of the committee's amended recommendation to the visiting judge and to the administrative director of the Office of Court Administration. The administrative director shall retain a copy of the amended recommendation for public inspection.

____ Confidentiality.

(a) Except as otherwise provided by this rule or by statute, all written and oral communications made to a peer review committee and the records and proceedings of the peer review committee are confidential.

(b) For purposes of Rule 12, Rules of Judicial Administration, information that is collected in connection with a peer review committee's evaluation of a visiting judge's performance is not a judicial record.

APPENDIX C-REVISED DRAFT APPROVED BY JUDICIAL COUNCIL

RULES OF JUDICIAL ADMINISTRATION

RULE 13. VISITING JUDGE PEER REVIEW.

13.1 Definitions. In this rule:

(a) *Peer Review Committee* means a committee established under ~~Section _____ of this rule~~Rule 13.4.

(b) *Presiding Judge* means the presiding judge of an administrative judicial region.

(c) *Visiting Judge* means a retired or former judge who is eligible for assignment in an administrative judicial region[1] under Section 74.055, Government Code.

13.2 Biennial Peer Review Required.[2] The performance of each visiting judge must be reviewed biennially by a peer review committee in each administrative judicial region in which the visiting judge is subject to assignment. A visiting judge must be reviewed as follows[3]:

(a) a judge whose last year of active service ended in an even-numbered year must be reviewed during each even-numbered calendar[4] year afterward in which the judge is subject to assignment in the administrative judicial region; and

(b) a judge whose last year of active service ended in an odd-numbered year must be reviewed during each odd-numbered calendar year afterward in which the judge is

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[1]Each administrative judicial region maintains its own list of visiting judges eligible to sit. *See* Tex. Govt. Code § 74.055.

[2]I reorganized the rule to emphasize the requirement of peer review rather than the composition and duties of the peer review committees.

[3]The substance of this sentence and the following has been moved from subpart (a) of the "Duties of Peer Review Committee" section in the original draft.

[4]My intent here is to clarify that the period in which the judge is to be reviewed runs between January and December of the even- or odd- numbered year, not from the date that the judge ceased active service. *See also* note 5, *infra.*

subject to assignment in the administrative judicial region.[5]

13.3 Procedures for Biennial Peer Review.

(a) ***In general.*** The peer review committee must evaluate the visiting judge's performance and make a recommendation — either "favorable" or "unfavorable" as concerning each of the judge's areas of specialization under Section 74.055(b) of the Government Code[6] — to the presiding judge.

(b) ***Considerations.***[7] The peer review committee must consider the following factors in evaluating the visiting judge's performance:

(1) the visiting judge's temperament and demeanor;

(2) the visiting judge's mental and perceptual capacity;

(3) the visiting judge's knowledge of law and procedure; ~~and~~

(4) the visiting judge's competence[8] in each of the judge's areas of specialization under Section 74.055(b) of the Government Code[9]; and

(5) any other factor that may be relevant in evaluating judicial performance.

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[5]Should these time periods be expressly linked to the period for which a visiting judge is certified under Section 74.055 of the Government Code? To be subject to assignment, a visiting judge must file an initial certification of willingness not to appear and plead effective for a two-year period beginning January 1 of the year in which the certificate is filed or the year in which the judge leaves full-time judicial service. Tex. Govt. Code § 74.0551. The certification is renewed automatically for every successive two-year period, beginning on January 1, unless the judge files a written revocation at least 30 days before the revocation is to take effect. *Id.*, § 74.0551(c).

[6]The Legislature requires that presiding judges divide the list of visiting judges in their regions according to areas of specialization, criminal, civil, or domestic relations, and assign judges only to cases within their areas of specialization. *See* Tex. Govt. Code § 74.055(b). Consistent with this legislative mandate, visiting judges should be reviewed according to each of their areas of specialization.

[7]Subparts (b)-(f) are taken from the "Duties of Peer Review" section in the original draft.

[8]Or "performance"?

[9]*See* note 6.

(c) ***Written comments or other information.*** In considering the factors in Subsection (b), the peer review committee must consider information submitted by:

(1) the presiding judge;

(2) any sitting judge in whose court the visiting judge's services were performed;

(3) any member of the bar who has participated in a case before the visiting judge;

(4) court staff and personnel who have worked with the visiting judge during the visiting judge's assignment; and

(5) any public citizen who resides in the region where the visiting judge is assigned or has formerly presided.[10]

(d) ***Response by Visiting Judge.***

(1) *Right to response.* A visiting judge need not submit materials to a peer review committee in support of a favorable recommendation.[11] However, a ~~Before the~~ peer review committee may not makes an unfavorable recommendation concerning a visiting judge unless it first gives ~~to the presiding judge, the committee must notify the visiting judge in writing and give~~ the visiting judge a~~n~~ reasonable opportunity to respond to it's a proposed unfavorable recommendation. ~~The committee shall simultaneously forward a copy of the written notice to the presiding judge. The peer review committee may not reveal the name of any person who submits comments or other evaluative information under this rule.~~

(2) *Procedure for requesting response.*

(A) Content of request. To request a response from a visiting judge as required by subparagraph (1), a peer review committee must serve written notice on the

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[10]Should these sources be limited solely to the region for which the judge is being peer reviewed? The original draft seemed to contemplate that visiting judges will be reviewed by different regions' peer review committees based on the same information. This suggests that a visiting judge could be "blackballed" statewide by a complaint within a single region. But perhaps this should be the case if the complaint concerns sufficiently egregious misconduct or incompetence.

[11]My draft makes such filings optional. Should the rule go farther to prohibit such filings?

visiting judge stating:

(1) the peer review committee is proposing to make an unfavorable recommendation or recommendations concerning the visiting judge;

(2) the area or areas of specialization that each proposed unfavorable recommendation concerns;

(3) the visiting judge has a right to respond to each proposed unfavorable recommendation; and

(4) the deadline and location for filing the response.

(B) Service on presiding judge. The peer review committee must also serve the presiding judge with a copy of the notice required by (A).

(e) ~~*Committee*~~ ***Recommendation.***

(1) *Time.* The peer review committee must make a recommendation concerning each of the visiting judge's areas of specialization under Section 74.055(b) of the Government Code n~~N~~ot later than the 30th day after the peer review committee completes its review.~~,~~[12]

(2) *Form.* T~~t~~he committee's recommendation must be in writing and must ~~make a written recommendation to the presiding judge stating~~ state only whether the recommendation concerning each area of specialization is "favorable" or "unfavorable." A "favorable" recommendation means that a ~~the~~ visiting judge should ~~or should not~~ continue to be assigned by the presiding judge to sit in cases within that area of specialization. An "unfavorable" recommendation means that a visiting judge should not continue to be assigned by the presiding judge to sit in cases within that area of specialization.

[12]When does a peer review committee "complete its review"? What does this term mean?

(3) *Service.* The committee must serve the recommendation on the presiding judge.[13] ~~The committee must provide additional information to the presiding judge upon request of the presiding judge. Upon receipt of the recommendation, the presiding judge must forward copies of the recommendation to the administrative director of the Office of Court Administration and to the visiting judge. The administrative director shall retain a copy of a recommendation that is issued to the presiding judge for public inspection.~~

(f) ***Reconsideration and Amendment of Recommendation*** ~~**by Committee.**~~

(1) *Request for Reconsideration.* A visiting judge who receives an unfavorable recommendation ~~that the visiting judge not continue to be assigned~~ may submit a written request for reconsideration ~~by~~ to the peer review committee not earlier[14] than the 180th day after the date that the committee issued its recommendation.

(2) *Amendment of Recommendation.* ~~If at any time the~~ The peer review committee may, either in response to a request for reconsideration or on its own initiative at any time, serve the serve the presiding judge with an amended recommendation.[15] ~~determines that a recommendation submitted under this rule should be amended, the committee shall send the amended recommendation to the presiding judge. The presiding judge shall promptly forward a copy of the committee's amended recommendation to the visiting judge and to the administrative director of the Office of Court Administration. The administrative director shall retain a copy of the amended recommendation for public inspection.~~

(g) ***Powers and Duties of Presiding Judge.***[16]

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[13]The following text has been moved to the sections concerning the powers and duties of the presiding judge and the administrative director of OCA.

[14]Should this be not *later* than the 180th day?

[15]The following text has been moved to the sections concerning duties of the presiding judge and administrative director of OCA.

[16]The draft rule said nothing concerning whether a presiding judge is obligated to follow or even consider an unfavorable recommendation. Shouldn't the presiding judge be required at least to consider the recommendation, if not to defer to it altogether? Why would we require the peer review committee to review a visiting judge at great time and expense if the presiding judge is free to disregard the recommendation?

(1) *Obtaining additional information.* The presiding judge may, upon request, obtain additional information concerning a recommendation or a visiting judge from the peer review committee. ~~The committee must provide additional information to the presiding judge upon request of the presiding judge~~.

(2) *Dissemination of recommendation.* Upon ~~receipt of~~ receiving ~~the~~ a recommendation or recommendations or any amendments thereto, the presiding judge must forward copies ~~of the recommendation~~ to the administrative director of the Office of Court Administration and to the visiting judge.

(h) ***Duties of administrative director.*** The administrative director of the Office of Court Administration must ~~shall~~ retain a copy of ~~a~~ each recommendation or amendment ~~that is issued to the presiding judge~~ for public inspection.[17]

(i) ***Additional rules and procedures.*** The presiding judge may promulgate additional rules and procedures that are reasonably necessary to conduct biennial peer review of visiting judges under this rule, including procedures for obtaining comments concerning the performance of a visiting judge. The presiding judge may delegate this rulemaking power to the peer review committee.[18]

13.4 Peer Review Committee; Administration.

(a) *Composition~~Membership~~.* The presiding judge must appoint at least five persons to serve as members of a peer review committee. The peer review committee's membership must adhere to a ratio of 2/5 active judges, 2/5 citizen members who are members of the State Bar of Texas, and 1/5 citizen members who are not licensed to practice law.

I would recommend prohibiting a presiding judge from assigning a visiting judge to a case in an area of specialization in which the judge has received an unfavorable recommendation unless and until the judge sets forth good cause for the assignment in an order or other writing. I would also extend this prohibition or requirement to presiding judges' assignment of visiting judges to cases outside the visiting judges' areas of specialization. *See* Tex. Govt. Code § 74.055(b).

Alternatively, or in addition, parties might be permitted to strike without limit any visiting judge — whether a former judge or retired judge — who is appointed over an unfavorable recommendation.

[17]For how long?

[18]Should these rules be subject to this Court's approval?

(c) *Written comments or other information.* In considering the factors in Subsection (b), the peer review committee must consider information submitted by:

(1) the presiding judge;

(2) any sitting judge in whose court the visiting judge's services were performed;

(3) any member of the bar who has participated in a case before the visiting judge;

(4) court staff and personnel who have worked with the visiting judge during the visiting judge's assignment; and

(5) any public citizen who resides in the region where the visiting judge is assigned or has formerly presided.

(d) *Response by Visiting Judge.* Before the peer review committee makes an unfavorable recommendation to the presiding judge, the committee must notify the visiting judge in writing and give the visiting judge an opportunity to respond to its proposed recommendation. The committee shall simultaneously forward a copy of the written notice to the presiding judge. The peer review committee may not reveal the name of any person who submits comments or other evaluative information under this rule.

(e) *Committee Recommendation.* Not later than the 30th day after the peer review committee completes its review, the committee must make a written recommendation to the presiding judge stating only whether the visiting judge should or should not continue to be assigned by the presiding judge. The committee must provide additional information to the presiding judge upon request of the presiding judge. Upon receipt of the recommendation, the presiding judge must forward copies of the recommendation to the administrative director of the Office of Court Administration and to the visiting judge. The administrative director shall retain a copy of a recommendation that is issued to the presiding judge for public inspection.

Reconsideration by Committee.

(a) *Request for Reconsideration.* A visiting judge who receives a recommendation that the visiting judge not continue to be assigned may submit a written request for reconsideration by the peer review committee not earlier than the 180th day after the date that the committee issued its recommendation.

(b) *Amendment of Recommendation.* If at any time the peer review committee determines that a recommendation submitted under this rule should be amended, the committee shall send the amended recommendation to the presiding judge. The presiding judge shall promptly forward a copy of the committee's amended recommendation to the visiting judge and to the administrative director of the Office of Court Administration.

~~The administrative director shall retain a copy of the amended recommendation for public inspection.~~

13.5 Confidentiality.

(a) ***In general.*** Except as otherwise provided by this rule or by statute, all written and oral communications made to a peer review committee and the records and proceedings of the peer review committee are confidential and privileged against disclosure. The peer review committee must not reveal the name of any person who submits written comments or other information under Rule 13.3.

(b) ***Rule of Judicial Administration 12.*** For purposes of Rule 12, Rules of Judicial Administration, information that is collected in connection with a peer review committee's evaluation of a visiting judge's performance is not a judicial record.

TRCP 306a. PERIODS TO RUN FROM SIGNING OF JUDGMENT

1. **Beginning of Periods.** No change

2. **Date to Be Shown.** No change.

3. **Notice of Judgment.** No change.

4. **No Notice of Judgment.** No change.

5. **Motion, Notice and Hearing.** In order to establish the application of paragraph (4) of this rule~~, the party adversely affected is required to prove in the trial court, on sworn motion and notice, the date on which the party or his attorney first either received a notice of the judgment or acquired actual knowledge of the signing and that this date was more than twenty days after the judgment was signed.~~:

a. **Requisites of Motion, Amendment**. The party adversely affected must file a verified motion in the trial court setting forth:

(1) The date judgment or appealable order was signed;

(2) That neither the party nor its attorney received the notice required by paragraph (3) of this rule or acquired actual knowledge of the judgment or order within twenty days after the date the judgment or appealable order was signed; and

(3) The earliest date upon which either the party or its attorney first

(a) received the notice required by paragraph (3) of this rule; or

(b) acquired actual knowledge that the judgment or appealable order had been signed.

If an unverified motion is filed and the respondent does not object to the lack of a verification at any time before the hearing on the motion commences, the absence of a verification is waived. If an objection is timely made, the court must afford the movant a reasonable opportunity to cure the defect. In all other respects, a motion that is filed pursuant to but not in compliance with this paragraph may be amended with permission of the court at any time before an order determining the motion is signed.

b. **Time to File Motion.** A motion seeking to establish the application of paragraph (4) may be filed at any time.

c. **Hearing.** [See attachment]

d. **Order.** After hearing the motion, the court must promptly sign a written order expressly finding:

(1) whether the movant or its attorney received the notice required by paragraph (3) of this rule or acquired actual knowledge of the signing of the judgment or appealable order within twenty days after the date the judgment or appealable order was signed; and

(2) the earliest date upon which the party or its attorney first either received the notice required by paragraph (3) or acquired actual knowledge that the judgment or appealable order was signed.

Option 1 - Mandatory 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 motion; the response, if any; 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.

Option 2 - Hearing at the Option of the Trial Court

If the trial court determines that an oral hearing would be useful, it must schedule a hearing as soon as practicable. The court shall determine the motion on the basis of the motion; the response, if any; 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 the oral testimony, if any. 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.

TRAP 4.2

(d) **Continuing Trial Court Jurisdiction.** Even after the trial court's plenary power expires, the trial court has jurisdiction to hear and determine motions filed pursuant to Texas Rule of Civil Procedure 306.a.5.

TO: **SCAC R. 300-330 Sub-committee**

FROM: Skip

RE: Justice Hecht's 5-26-01 e-mail to Chip Babcock concerning whether the holding of *Porter v. Vick*, 888 S.W.2d 789 (Tex. 1994), should be changed by rule in light of its application in *Ferguson v. Globe Texas, Co.*, 35 S.W.3d 688 (Tex.App. – Amarillo, 2000 pet. denied.).

PROBLEM

Some courts have limited a trial court's power to reinstate a judgment previously set aside by granting a motion for new trial, to 75 days after the judgment was originally signed. As a result, a court must re-try a case if it waits too long to re-enter judgment.

POSSIBLE SOLUTION

Amend Rule 329 b (h) to read:

"If a motion for new trial is granted, the judgment that has been set aside may be re-entered, modified, corrected or reformed, or a new judgment may be signed at any time prior to [the commencement of/close of evidence] in the new trial. The time for appeal shall run from the time the order granting judgment is re-entered, modified, corrected or reformed, or the new judgment is signed."

BACKGROUND

Ferguson v. Globe Texas, Co., 35 S.W.3d 688, 691-92 (Tex.App. – Amarillo, 2000, pet. denied) held that a "trial court may only vacate an order granting a new trial during the period when it continues to have plenary power" and that "the trial court's plenary power only continues for 75 days after the date judgment is signed."

In *Ferguson* the Amarillo court held that the trial court lacked plenary power to grant a motion to reinstate a judgment originally signed 100 days earlier, which had been set aside by a motion for new trial signed on day 71. It held that the plain meaning of Rule 329(e) limits trial courts' plenary power to the "grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after such timely filed motions are overruled." Thus, it reasoned, because no motion for new trial was overruled, the court's plenary power to reinstate judgment ended when the motion for new trial would have been overruled by operation of law. *Id.* at 690.

The court stated that Rule 329(e) was clear and unambiguous in specifying the types of powers it vested in trial courts and those powers did not expressly include the power to ungrant a new trial. It held the rule should not be construed to mean something other than its plain words "unless application of the literal language would produce an absurd result." *Id.* at 691.

The court did not consider whether it was an absurd result to require a district court to retry a case that could have been, and should have been, disposed of by entry of judgment mistakenly set aside by an order granting a new trial. The court did not consider whether the apparent basis for Rule 329(e)'s time limits (the need for a judgment to become final within a finite time after signing) did not apply when the judgment, and the finite plenary period its signing invoked, had been set aside by the granting of a new trial. The problem appears to be supreme court precedent.

The court of appeals relied on the supreme court's opinion in *Porter v. Vick*, 888 S.W.2d 789 (Tex. 1994), for its holding that a trial court may only vacate an order granting a new trial during the period when it continues to have plenary power. *Porter v. Vick* was a per curiam mandamus issued by the supreme court to set aside an order vacating an order of new trial. The trial had been non-jury. A new trial had been mistakenly granted by default by a visiting judge when opposing counsel's message to the trial judge that he had been delayed in another court was not relayed to the visiting judge at the new trial hearing. The default order granting new trial was set aside by the original judge who had presided over the trial and entered the judgment. Because the order vacating the new trial order was signed "long past the time for plenary power over the judgment, as measured from the date the judgment was signed," the supreme court held it was void. *Id.*, citing *Fulton v. Finch*, 346 S.W.2d 823, 826 (Tex. 1961).

However, as noted by Justice Hecht's e-mail, the holding in *Fulton v. Finch* was based on a prior version of Rule 329(b) that required that all motions for new trial "must be determined within not exceeding forty-five (45) days after the. . . .motion is filed. . . ." The language was dropped when the rule was rewritten in 1981. In *Porter v. Vick*, the per curiam court apparently relied on the holding of *Fulton v. Finch* without considering the reason for that holding.

The problem was fully briefed for the supreme court on Petition for Review in *Ferguson v. Globe Texas Co.* The Petition was denied after the court requested briefing. It may prefer to address the problem created by *Porter v. Vick* by clarifying the rule.

January 22, 2002

M E M O

To: SCAC Members

From: O. C. Hamilton, Jr.

Gentlemen:

In addition to what Skip Watson has included in his memo, I want to comment and mention a couple of cases.

I strongly believe that once the trial Court has granted a Motion for New Trial, the Court retains jurisdiction of the case for all purposes and should not be precluded from ungranting the Motion for New Trial at any time if the Court later decides that is the appropriate action to take.

The 14th Court of Appeals in Houston has essentially said the same thing in two cases, *Gates vs Dow Chemical Company*, 777 S.W.2d 120 (Tex.App–Houston [14th Dist.] 1989), judgment vacated by agreement, 783 S.W.2d 589 (Tex. 1989), and *Biaza vs. Simon*, 879 S.W.2d 349 (Tex. App. – Houston [14th Dist.] 1994 Pet Denied). In *Gates,* the 75 day period of Rule 329b expired on Saturday, September 26th and on Monday, September 28th, the Judge granted a new trial (which was held to be proper). However, on October 22nd, the Judge vacated the Order Granting a New Trial. That Court approved the "ungranting" of a new trial within the 105 day period following the Judgment, but stated,

> ... Once a new trial is granted, the trial court has exclusive jurisdiction in the case. (at page 123)
>
> ...
>
> ...There is no provision in the rule giving the trial court the power to vacate the granting of a new trial. The reason lies in common sense. Once a new trial is granted, the trial court is the only court having authority to rule on the case. The trial court has the sole discretion in ruling on the case. This discretion includes the power to enter orders which correct earlier errors. This is in contrast to where a motion for new trial is overruled. The trial court and the appellant court then have a quasi-concurrent jurisdiction in the case. The only step necessary for a litigant to invoke appellate court jurisdiction is to file an appeal bond. Nowhere does Rule 329b restrict the trial court from overturning an order for a new trial. Holding that the trial court lacked power to vacate its previous order would impair its authority to enter orders necessary for the efficient administration of its docket. (at page 124)

In *Biaza vs. Simon*, the Motion for New Trial was filed on January 14th. On March 22nd the trial court granted a Motion for New Trial, and on August 15th (eight months after the

judgment) set aside the order granting the Motion for New Trial and reinstated the order that had been signed December 14th of the preceding year. In that case, the 14th Court affirmed the trial court, saying,

> Appellants' argument presents the question of when a trial court may rescind its order granting a new trial and reinstate a previously vacated judgement. In *Fulton v. Finch*, 162 Tex. 351, 346 S.W.2d 823, 827 (1961), the court reasoned that it could be done at any time when the trial court had the power to deny the motion for a new trial in the first place. See also *Homart Dev. Co. v. Blanton*, 755 S.W.2d 158, 159 (Tex.App.– Houston [1st Dist.] 1988, orig. proceeding) (holding that any reconsideration of the order granting a new trial must be accomplished with 75-day period); TEX.R.CIV.P. 329b(c). Under the current Rules of Civil Procedure, that would mean that the trial court would have seventy-five days after judgment to "ungrant" a motion for new trial. See TEX.R.CIV.P. 329b(c).
>
> Two recent cases have added to the seventy-five day period the thirty days of plenary power that the court would have retained had the motion been denied on the seventy-fifth day, effectively giving a trial court 105 days to "ungrant" a motion for new trial. Gates v. Dow Chemical Co., 777 S.W.2d 120, 123 (Tex.Appl–Houston [14th Dist.] 1989), *judgement vacated by agr.*, 783 S.W.2d 589 (Tex. 1989); *Wood v. Component Constr. Corp.*, 722 S.W.2d 439, 442 (Tex.App.–Fort Worth 1986, no writ); *see* TEX.R.Civ.P. 329b(e). Thus, some courts hold that the trial court has seventy-five days to grant an order setting aside a previous order granting a motion for new trial; others hold that the court has 105 days.
>
> In the most recent Texas Supreme Court opinion on this issue, the court reaffirmed the trial court's power to "ungrant' a motion for new trial within the seventy-five days and held that the court of appeals erred in holding that a trial court does not have the authority to vacate an order for new trial during the seventy-five day period. *Fruehauf Corp. v. Carrillo*, 848, S.W.2d 83, 84 (Tex.1993) (citing Fulton, 346 S.W.2d at 827). However, in its reasoning, the court stated that a trial court has plenary power over its judgment until it becomes final and retains continuing control over interlocutory orders and has the power to set aside those orders any time before a final judgment is entered. *Carrillo*, 848 S.W2d at 84. Because an order granting a new trial is an unappealable, interlocutory order, *id.*, the court thus retains continuing control over orders granting new trials until a final judgment is entered. *See id.* Based on this reasoning, it appears that a new trial may be "ungranted" at any time before a new final judgment. *See id.* This appears to be the most logical result based on the well-established principle that orders granting new trials are interlocutory and it harmonizes these orders with the rules pertaining to other interlocutory orders. But see *Hunter v. O'Neill*, 854 S.W.2d 704, 705-06 (Tex.App.–Dallas 1993, orig. proceeding) (post-*Carrillo* case adhering to the 75-day rule).
>
> Several cases cited by appellant hold that a once a trial court grants a motion for new trial, the court is without authority to set aside that order and reinstate the

> vacated judgment without another trial. Most of these cases pre-date all of the cases cited above, and based on the holdings in *Fulton* and *Carrillo* have been implicitly overruled. We hold, based on the court's reasoning in *Carrillo,* that a trial court has authority to rescind its order granting a motion for new trial and reinstate the vacated judgment at any time before a new final judgement is signed. (at pages 356-357)

It is my opinion that the Houston court has correctly stated what the law ought to be and to the extent that it may be different as a result of *Porter vs. Vick*, I would urge the Advisory Committee to ask the court to overrule *Porter vs. Vick* by a change in Rule 329b. The change I would suggest would be an addition to Rule 329b of sub-paragraph (i), which would read:

> "Once a new trial is granted, the trial court has exclusive jurisdiction in the case until a final judgment is entered and the court's plenary power, as set forth in this rule, has expired."

Eviction Rules 4, 143a, 216, 190, 245 Ver. Ver. 7.5 (1/22/02)

RULE 4. COMPUTATION OF TIME

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday. Saturdays, Sundays and legal holidays shall not be counted for any purpose in any time period of five days or less in these rules, except that Saturdays, Sundays and legal holidays shall be counted for purposes of the three-day periods in rules 21 and 21a, extending other periods by three days when service is made by registered mail or by telephonic document transfer, and for purposes of the five-day periods provided for under Rules 740, 744, 748, 749, 749a, ~~749b~~, ~~and~~ ~~749c~~ 750 and 754.

(Note to committee: This needs to be changed because under the current rules 5 days may be longer than 6 days.
Example: A defendant is served with citation for an eviction on a Wednesday so under Rule 739 the trial can be held as early as the following Tuesday. However, under rule 744 the defendant can request a jury trial within 5 days of service, and under rule 4 you cannot count holidays, Saturdays or Sundays in that 5 day calculation. If the tenant was served on Wednesday you would count Thursday and Friday as day 1 and 2, exclude Saturday and Sunday and then count Monday as day 3, Tuesday as day 4 and Wednesday as day 5. Therefore a defendant could come in on Wednesday to timely request a jury trial under rule 744 one day after the trial could have been set under rule 739. If service occurred the Wednesday before thanksgiving then day five would be Friday of the following week or 3 days after the trial. Adding rule 744 to rule 4 would seem to solve this problem. Other changes to the rules necessitate deleting rules 749b and 749c, and adding rules 750 and 754.)

Rule 143a. COST ON APPEAL TO COUNTY COURT

If the appellant fails to pay the cost on appeal from a judgment of a justice of the peace or small claims court, within twenty (20) days after being notified to do so by the county clerk, the appeal shall be deemed not perfected and the county clerk shall return all papers in said cause to the justice of the peace having original jurisdiction and the justice of the peace shall proceed as though no appeal had been attempted. Payment of costs on appeal from a forcible entry and detainer action are governed by Rules 749, 749b, and 749c.

(Added July 22, 1975, eff. Jan. 1, 1976.)

RULE 190 DISCOVERY LIMITATIONS

190.1 Discovery Control Plan Required. Except in forcible entry and detainer cases, every case must be governed by a discovery control plan as provided in this Rule. A plaintiff must allege in the first numbered paragraph of the original petition whether discovery is intended to be conducted under Level 1, 2, or 3 of this Rule.

RULE 216 REQUEST & FEE FOR JURY TRIAL

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

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

c. This Rule does not apply in forcible entry and detainer cases.

Notes and Comments

Comment to 2001 change: Rule 744 governs request & fee for jury trials in forcible entry and detainer cases in justice court, and Rule 754 governs request & fee for jury trials in forcible entry and detainer appeals in county court.

Rule 245. ASSIGNMENT OF CASES FOR TRIAL

The court may set contested cases on written request of any party, or on the court's own motion, with reasonable notice of not less than forty-five days to the parties of a first setting for trial, or by agreement of the parties; provided, however, that when a case previously has been set for trial, the Court may reset said contested case to a later date on any reasonable notice to the parties or by agreement of the parties Noncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time. The forty-five day notice required in the preceding sentence will not apply to cases set for trial in justice court, including forcible entry and detainer cases, nor will it apply to the de novo trial of appeals of forcible entry and detainer cases in county court.

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

(Amended July 22, 1975, eff. Jan. 1, 1975; Dec. 5, 1983, eff. April 1, 1984; April 24, 1990, eff. Sept. 1, 1990.)

Eviction Rules 738-755 Ver. 7.5 (1/22/02)

SECTION 3. FORCIBLE ENTRY AND DETAINER

RULE 738. JOINDER OF ADDITIONAL CLAIMS

~~A suit for rent, may be joined with an action of forcible entry and detainer, wherever the suit for rent is within the jurisdiction of the justice court. In such case the court in rendering judgment in the action of forcible entry and detainer, may at the same time render judgment for any rent, due the landlord by the renter; provided the amount thereof is within the jurisdiction of the justice court.~~

A suit for rent, contractual late charges, and attorney's fees may be joined with an action of forcible entry and detainer. The court in rendering judgment for possession, may at the same time render judgment for any rent, contractual late charges, and attorney's fees, due the landlord by the renter. The justice may also award court costs against the unsuccessful party.

Notes and Comments

Source: Art. 3976, unchanged.

Notes and Comments

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

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

RULE 739. CITATION

When an aggrieved ~~the~~ party ~~aggrieved~~ or ~~his~~ the party's authorized agent shall file ~~his~~ a written sworn complaint, the justice shall immediately issue citation ~~directed to~~ directing the defendant or defendants ~~commanding him~~ to appear for trial before such justice at a

time and place named in such citation, such time being not more than ten days nor less than six days from the date of service of the citation.

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

(Amended July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art. 3977.

[Comment for the committee. Gender neutral changes]

Rule 740 Version #1 (Jury trial permitted, trials to be held within 6 days or as soon as possible)

RULE 740. COMPLAINANT MAY HAVE POSSESSION

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

The justice court shall notify the defendant that plaintiff has filed a possession bond. Such notice ~~shall~~ must be served on a defendant, in the same manner as service of citation in a forcible entry and detainer suit and shall inform the defendant of all of the following rules and procedures, except that the officer or other authorized person serving the notice of possession bond shall return such notice to the justice who issued same within one day after service:

(a) Defendant may remain in possession if;

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

(2) ~~Defendant~~ defendant, ~~is entitled to~~ within two days of being served with notice of the possession bond, demands ~~and he shall be granted~~ a trial ~~to~~ which will be held, insofar as practicable, prior to the expiration of six days from the date defendant is served with notice of the filing of the plaintiff's possession bond. In order to obtain a jury trial, the defendant must demand the same within this two day period and pay the jury fee. If, in lieu of a counterbond, defendant demands trial within said six-day period, and if the justice of the peace rules after trial that plaintiff is entitled to

possession of the property, the ~~constable of sheriff shall place the plaintiff in possession of the property promptly~~ justice court may issue a writ of possession after the expiration of five days after such determination by the justice of the peace. If the defendant requests a trial under this rule it will be the only trial held in this cause and will supercede the trial which would have been held under the original citation for forcible entry and detainer.

(b) If defendant does not file a counterbond ~~and if defendant does not~~ or demand a trial be held, the ~~constable of the precinct or the sheriff of the county where the property is situated, shall place the plaintiff in possession of the property promptly~~ plaintiff may request a writ of possession from the justice court after the expiration of six days from the date defendant is served with notice of the filing of plaintiff's possession bond;

(c) Whenever a justice court issues a writ of possession under this rule a defendant may appeal in the same manner as after a traditional forcible entry and detainer trial.

Rule 740 Version #2 (No jury trials, bench trials to be held within 6 days)

RULE 740. COMPLAINANT MAY HAVE POSSESSION

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

The justice court shall notify the defendant that plaintiff has filed a possession bond. Such notice ~~shall~~ must be served on a defendant, in the same manner as service of citation in a forcible entry and detainer suit and shall inform the defendant of all of the following rules and procedures, except that the officer or other authorized person serving the notice of possession bond shall return such notice to the justice who issued same within one day after service:

(a) Defendant may remain in possession if;

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

(2) ~~Defendant~~ defendant ~~is entitled to~~ within two days of being served with notice of the possession bond, demands ~~and he shall be granted~~ a trial ~~to~~ which must be held prior to the expiration of six days from the date defendant is served with notice of the filing of plaintiff's possession bond. If, in lieu of a counterbond, defendant demands trial within said six-day period, and if the justice of the peace rules after trial that plaintiff is entitled to possession of the property, the ~~constable or sheriff shall place the plaintiff in possession of the property~~ justice court may issue a writ of possession after the expiration of five days after such determination by the justice of the peace. If the defendant requests a trial under this rule it will be the only trial held in this cause and will supercede the trial which would have been held under the original citation for forcible entry and detainer; Any trial held under this rule must be a trial by judge.

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

(c) Whenever a justice court issues a writ of possession under this rule a defendant may appeal in the same manner as after a traditional forcible entry and detainer trial.

Notes and Comments

A defendant must be served with a possession bond in the same manner as citation in a forcible entry and detainer suit. The trial held under this rule must be a trial by judge because of the severe time limits imposed. If a trial is requested by the defendant under this rule then it will take the place of the trial referenced in the original citation.-

RULE 741. REQUISITES OF COMPLAINT

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

(Amended Dec. 5, 1983, eff. April 1, 1984; July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art. 3979, unchanged.

Change by amendment effective April 1, 1984; Corrective.

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

RULE 742. SERVICE OF CITATION

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

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

(Amended Aug. 18, 1947, eff. Dec 31, 1947.)

Notes and Comments

Source: Art 3980, with minor textual change.

[Comment for the committee. This will conform service of citation in evictions to service for all other civil suits in Texas. The requirement that the citation be returned at least one day prior to trial will prevent the citation being returned after the time set for trial although on the same day.]

RULE 742a. SERVICE BY DELIVERY TO PREMISES

If the sworn complaint lists ~~all home an work addresses~~ the address of the premises at issue as well as any other alternate addresses of the defendant or defendants as contained in a written lease agreement, ~~of the defendant which are known to the person filing the sworn complaint and if it states that such person knows of no other home or work~~

~~addresses of the defendant in the county where the premises are located~~, and if service of citation cannot be effected under Rule 742 then service of citation may be by delivery to the premises ~~in question~~ at issue as follows:

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

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

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

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

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

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

(Added April 15, 1982, eff. Aug. 15, 1982.)

Notes and Comments

This is a new rule.

[Comment for the committee. This will conform service of citation under 742a with service under Rule 742. It will also relieve the landlord of the requirement of putting

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

RULE 743. DOCKETED

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

Generally, discovery is not appropriate in forcible entry and detainer actions, however, the justice has the discretion to allow reasonable discovery.

(Amended Aug. 18, 1947, eff. Dec. 31, 1947.)

Notes and Comments

Source: Art. 3981, unchanged.

[Comment for the committee: Some provision must be made for discovery although applying the entire discovery rules for forcible entry and detainer cases is not reasonable. This language is similar to the language in Chapter 28 of the Government Code providing for reasonable discovery in small claims court, therefore the justice courts will be familiar with this terminology.]

RULE 744. DEMANDING JURY

Any party shall have the right of trial by jury, by making a request to the court on or before five days from the date the defendant is served with citation, and by paying ~~a~~ the jury fee ~~of five dollars~~ required by law for requesting a jury trial in justice court. Upon such request, a jury shall be summoned at the earliest opportunity, as in other ~~cases in~~ justice court proceedings. This rule will not apply to trials conducted under Rule 740.

(Amended July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art 3982, unchanged.

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

RULE 745. TRIAL POSTPONED

For good cause shown, supported by affidavit of either party, the trial may be postponed for a period not exceeding ~~six~~ seven days. Upon a showing of exceptional circumstances, supported by affidavit of either party, or on the court's own motion, the trial may be postponed for an additional seven day period. The trial may be postponed for a longer period upon the agreement of all parties provided such agreement is made in writing and filed with the court, or if the agreement is made in open court.

Notes and Comments

Source: Art 3983, unchanged.

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

RULE 746. ONLY ISSUE

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

Except as provided in rule 738, the only issue in a forcible entry and detainer action under Chapter 24 of the Texas Property Code is the right to actual possession and the merits of the title shall not be adjudicated.

(Amended Dec. 5, 1983, eff. April 1, 1984; July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art. 3984, with minor textual change.

Change by amendment effective April 1, 1984: Corrective.

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

RULE 747. TRIAL

If no jury is demanded by either party, the justice shall try the case. If a jury is demanded by either party, the jury shall be impaneled and sworn as in other cases; and after hearing the evidence it shall return its verdict in favor of the plaintiff or the defendant as it shall find.
(Amended June 16, 1943, eff. Dec. 31, 1943; June 10, 1980, eff. Jan 1, 1981.)

Notes and Comments

Source: Art. 3985.

Change by amendment effective January 1, 1981: The last sentence of the former rule is deleted because it is the same provision as the second sentence of Rule 743.

RULE 747a. REPRESENTATION BY AGENTS

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

(Added April 15, 1982, eff. Aug. 15, 1982.)

Notes and Comments

This is a new rule.

[Comment for the committee. This will conform Rule 747a to Section 24.011 Texas Property Code.

RULE 748. JUDGMENT AND WRIT

If the judgment or verdict is ~~be~~ in favor of the plaintiff, the justice shall give judgment for plaintiff for possession of the premises, and costs. The justice may also give judgment for ~~damages~~ the plaintiff for back rent, contractual late charges and attorney's fees, if

sought and established by proof, and provided that such claims are within the jurisdiction of the court . ~~and he shall award his a writ of possession~~. If the judgment or verdict is ~~be~~ in favor of the defendant, the justice shall give judgment for defendant against the plaintiff for costs and for possession of the premises. The justice may also award a defendant who prevails against the plaintiff in the issue of possession, a judgment for attorney's fees if authorized and established by proof, and provided that such claim is within the jurisdiction of the court. ~~and any damages~~. If the judgment is for the plaintiff for possession, the justice shall issue a writ of possession except that no ~~No~~ writ of possession shall issue until the expiration of five days from the ~~time~~ day the judgment is signed.

(a) A forcible entry and detainer judgment shall be in writing in a separate document and contain the full names of the parties, as stated in the pleadings, and state for and against whom the judgment is rendered. The judgment shall recite who is awarded:
(1) possession of the premises:
(2) back rent, if any, and contractual late charges, if any, and in what amount.
(3) attorney's fees, if any, and in what amount;
(4) court costs and in what amount.

(b) A forcible entry and detainer judgment shall contain findings of fact which must include the following:
(1) whether there is an obligation to pay rent on the part of the defendant;
(2) a determination of the rent paying period;
(3) a determination of the day rent is due;
(4) a determination of the amount of rent due each rent paying period, and if the rental agreement provides that all or part of the tenant's rental obligation is subsidized by the government then a determination as to how much rent is to be paid by the tenant and how much rent is to be paid by the federal government;
(5) a determination of the date through which the judgment for back rent, and contractual late charges is calculated.

(c) If there is no obligation on the part of the tenant to pay rent then the judge shall make a finding as to the fair market rental value of the premises per month as if there was an obligation to pay rent.

(d) If the judgment of the justice court is not appealed then it remains in force and a prevailing party may enforce their rights under the judgment in the justice court. If the appeal from the justice court is perfected in accordance with Rule 749b, and the county courts jurisdiction is invoked then the justice court may not enforce the judgment. The judgment of the justice court will be vacated upon final judgment in the case by the county court.

(e) The county court may rely on the justice court judgment in determining when and in what amount rent is due to be paid by the appellant into the registry of the county court during the pendency of the appeal. The county court may also rely on the

judgment of the justice court in determining whether of not to issue a writ of possession in the event rents are not timely paid into the registry of the county court. Nothing in this rule prohibits the county court from making an independent determination, either on its own motion or on sworn motion of either party, as to the amounts and due dates of rents to be paid into the registry of the county court during the pendency of the appeal.

Notes and Comments

Comment: The main issue in a forcible entry and detainer action is possession, however a plaintiff may join a claim for rent, contractual late charges, costs, and attorney's fees to the issue of possession. The rules also allow a defendant who prevails to recover any costs and attorney's fees to which they are entitled and although a defendant may not file a counterclaim, any available defenses may be raised at trial. Recovery under any other grounds is not permitted under this section. This amendment to the rule also sets out a requirement that judgments in a forcible entry and detainer case be in writing in a separate document and that the judgment contains specific information, including findings of fact about the rent. This is necessary in order to determine the amount of the appeal bond and the supersedeas bond, and for the county court to determine when and how much rent the tenant/appellant should pay into the registry of the court when the appeal is pending in county court.. Part (c) requires a finding by the court of the fair market rental value of the premises if there is no contractual obligation for the defendant to pay rent. This is necessary, for example, where a tenant at sufferance who holds over after the termination of an executory contract or after a foreclosure, or someone who has entered the real property of another without legal authority, (see Chapter 24 of the Texas Property Code).

Once an appeal is perfected to the county court in accordance with Rule 749b, the county court's jurisdiction is invoked. Should the county court dismiss the appeal for want of jurisdiction, that ruling is reviewable by the court of appeals. If no timely appeal is taken of a county court dismissal for want of jurisdiction, then the justice court judgment will be the prevailing judgment.

(Amended July 26, 1960, eff. Jan. 1, 1961; July 22, 1975, eff. Jan. 1, 1976; June 10, 1980, eff. Jan 1, 1981; July 15, 1987, eff. Jan 1, 1988.)

Notes and Comments

Source: Art. 3986.

Change: Elimination of verdict of "guilty" or "not guilty."

Change by amendment effective January 1, 1961: The time within which writ of restitution to issue changed from two days to five days.
Changes by amendment effective January 1, 1976; The amendments authorize judgments for costs and damages which Rule 740 protects.

Change by amendment effective January 1, 1981; Changed so that time runs from the date judgment is signed.

[Comment for the committee. This will clarify what a prevailing plaintiff or defendant is entitled to if they are successful. We have some defendants who try to file a counterclaim on evictions which I don't think is contemplated under the rules. Since a forcible entry and detainer does not bar a tenant from filing a suit for trespass, damages, waste, mesne profits or any other cause of action, the inability to file a counterclaim in a forcible will not harm the tenant. This will also require for the first time a separate written judgment which contains information which will be needed in setting an appeal or supersedeas bond and in calculating how much rent will need to be paid into the registry of the court during the pendency of the appeal)

RULE 749. MAY APPEAL

~~In appeals in forcible entry and detainer cases, no motion for new trial shall be filed. Either party may appeal from a final judgment in such case, to the county court of the county in which the judgment is rendered by filing with the justice within five days after the judgment is signed, a bond to be approved by said justice, and payable to the adverse party, conditioned that he prosecute his appeal with effect, or pay all costs and damages which may be adjudged against him. Within five days following the filing of such bond, the party appealing shall give notice as provided in Rule 21a of the filing of such bond to the adverse party. No judgment shall be taken by default against the adverse party in the court to which the cause has been appealed without first showing substantial compliance with this rule.~~

~~The justice shall set the amount of the bond to include the items enumerated in Rule 752.~~

(a) All motions to set aside a forcible entry and detainer judgment or for a new trial shall be made within 1 day after the judgment is signed. The filing of a motion to set aside a judgment or for a new trial does not extend the deadline to perfect an appeal under these rules.

(b) A party may appeal from a final judgment in a forcible entry and detainer to the county court of the county in which the judgment is signed.

(c) A defendant may appeal by filing with the justice, not more than five days after the judgment is signed, an appeal bond, deposit, or security to be approved by said justice in an amount equal to the court costs incurred in justice court.

(d) A plaintiff may appeal by filing a written notice of appeal with the justice not more than five days after the day the judgment is signed. The notice of appeal must identify the trial court, plaintiff, defendant and the cause number, and state that the plaintiff desires to appeal. The notice of appeal must be signed by the plaintiff or the plaintiff's authorized agent.

(e) The party appealing the judgment must also pay to the justice court, the filing fee required by that county to appeal a case to county court. The justice court will

forward the filing fee to the county clerk along with all other papers in the case. The filing fee must be made payable to the county clerk of the county in which the case was heard.

(f) If an appeal bond is posted it must meet the following criteria:
(1) It must be in an amount required by this rule,
(2) It must be made payable to the county clerk of the county in which the case was heard,
(3) It must be signed by the judgment debtor or the debtor's authorized agent,
(4) It must be signed by a sufficient surety or sureties as approved by the court. If an appeal bond is signed by a surety or sureties, then the court may, in its discretion, require evidence of the sufficiency of the surety or sureties prior to approving the appeal bond.

(g) Deposit in lieu of appeal bond. Instead of filing a surety appeal bond, a party may deposit with the trial court:
(1) cash;
(2) a cashier's check payable to the county clerk of the county where the case was heard,
drawn on any federally insured and federally or state chartered bank or savings and loan association; or
(3) with leave of court, a negotiable obligation of the federal government or of any federally insured and federally or state chartered bank or savings and loan association.

(h) Any motions challenging the sufficiency of the appeal bond or deposit in lieu of appeal bond may be filed with the county court.

(i) Within five days following the filing of an appeal bond by a defendant, or the filing of a notice of appeal by a plaintiff, the party appealing shall give notice in accordance with Rule 21a of the filing of an appeal bond or the filing of a notice of appeal to the adverse party. No judgment shall be taken by default against the adverse party in the county court to which the cause has been appealed without first showing substantial compliance with this subsection.

(Amended Aug. 18, 1947, eff. Dec. 31, 1947; July 22, 1975, eff. Jan. 1, 1976; June 10, 1980, eff. Jan 1, 1981; July 15, 197, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art. 3987, unchanged.

Changes by amendment effective January 1, 1976: The first sentence has been moved to that place from within the rule as previously written. The amount of the appeal bond is fixed by the justice as prescribed by Rule 752.

Change by amendment effective January 1, 1981: Changed so that time runs from the date judgment is signed.

Comment on 1988 Change: The purpose of this amendment is to give notice to the appellee that an appeal of the case from the justice court has been perfected in the county court.

(Note to committee: This rule is rewritten to allow a two-part method of appeal. Rule 749 sets forth what a plaintiff and defendant must do to appeal the judgment, including the notice, amount of the appeal bond or contents of the notice of appeal. Rule 749a talks about the affidavit of indigence which replaces the old pauper's affidavit. The affidavit of indigence may be used to avoid posting the appeal bond and may be used to suspend the enforcement of the judgment, including the writ of possession. Rule 749b discusses what must occur for an appeal to be perfected and rule 749c contains the form of the appeal bond, which was formerly found in rule 750.)

~~RULE 749a. PAUPER'S AFFIDAVIT~~

~~If appellant is unable to pay the costs of appeal, or file a bond as required by Rule 749, he shall nevertheless be entitled to appeal by making strict proof of such inability within five days after the judgment is signed, which shall consist of his affidavit filed with the justice of the peace stating his inability to pay such costs, or any part thereof, or to give security, which may be contested within five days after the filing of such affidavit and notice thereof to the opposite party or his attorney of record by any officer of the court or party to the suit, whereupon it shall be the duty of the justice of the peace in whose court the suit is pending to hear evidence and determine the right of the party to appeal, and he shall enter his finding on the docket as part of the record. Upon the filing of a pauper's affidavit the justice of the peace or clerk of the court shall notice the opposing party of the filing of the affidavit of inability within one working day of its filing by written notification accomplished through first class mail. It will be presumed prima facie that the affidavit speaks the truth, and, unless contested within five days after the filing and notice thereof, the presumption shall be deemed conclusive; but if a contest is filed, the burden shall then be on the appellant to prove his alleged inability by competent evidence either than by affidavit above referred to. When a pauper's affidavit is timely contested by the appellee, the justice shall hold and rule on the matter within five days.~~

~~If the justice of the peace disapproves the pauper's affidavit, appellant may, within five days thereafter bring the matter before the county judge for a final decision, and, on request, the justice shall certify to the county judge appellant's affidavit, the contest thereof, and all documents, and papers thereto. The county judge shall set a day for hearing, not later than five days, and shall hear the contest de novo. If the pauper's affidavit is approved by the county judge, he shall direct the justice to transmit to the clerk of the county court, the transcript, records and papers of the case.~~
~~A pauper's affidavit will be considered approved upon one of the following occurrences: (1) the pauper's affidavit is not contested by the other party; (2) the pauper's affidavit is contested by the other party and upon hearing the justice determines that the pauper's~~

~~affidavit is approved; or (3) upon a hearing by the justice disapproving of the pauper's affidavit the appellant appeals to the county judge who then, after a hearing, approves the pauper's affidavit.~~

~~No writ of possession may issue pending the hearing by the county judge of the appellant's right to appeal on a pauper's affidavit. If the county judge disapproves the pauper's affidavit, appellant may perfect his appeal by filing an appeal bond in the amount as required by Rule 749 within five days thereafter. If no appeal bond is filed within five days, a writ of possession may issue.~~

~~(Added May 9, 1977, eff. Sept. 1, 1977; amended June 10, 1980, eff. Jan. 1, 1981; April 245, 1990 amendment withdrawn Sept. 4, 1990, and rule amended eff. retroactively to Sept. 1, 1980.)~~

~~This is a new rule. It substantially tracks Rule 572.~~

~~**Notes and Comments**~~

~~Change by amendment effective January 1, 1981: Changed so that time runs from the date judgment is signed.~~

~~Comment to 1990 change: Proceedings on pauper affidavits are revised. The term writ of restitution is corrected to writ of possession.~~

Rule 749a Affidavit of Indigence

(a) Establishing indigence

A party who cannot pay the costs to appeal to the county court may proceed without advance payment of costs if:

(1) the party files an affidavit of indigence in compliance with this rule within five days after the justice court judgment is signed; and

(2) the claim of indigence is not contested or, if contested, the contest is not sustained by a timely written order.

(b) Contents of affidavit.

The affidavit of indigence must identify the party filing the affidavit and must state what amount of costs, if any, the party can pay. The affidavit must also contain complete information about:

(1) the nature and amount of the party's current employment income, government- entitlement income, and other income;

(2) the income of the party's spouse and whether that income is available to the party;

(3) real and personal property the party owns;

(4) cash the party holds and amounts on deposit that the party may withdraw;

(5) the party's other assets;

(6) the number and relationship to the party of any dependents;

(7) the nature and amount of the party's debts;
(8) the nature and amount of the party's monthly expenses;
(9) the party's ability to obtain a loan for court costs;
(10) whether an attorney is providing free legal services to the party;
(11) whether an attorney has agreed to pay or advance court costs.

(c) When and Where Affidavit Filed

An appellant must file the affidavit of indigence in the justice court within five days after the justice court judgment is signed

(d) Duty of Clerk or Justice of the Peace

Upon the filing of an affidavit of indigence the justice of the peace or clerk of the court shall notice the opposing party of the filing of the affidavit of indigence within one working day of its filing by written notification accomplished by first class mail.

(e) No contest filed

Unless a contest is timely filed, no hearing will be conducted, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs.

(f) Contest to affidavit

The appellee or county clerk, may contest the claim of indigence by filing a contest to the affidavit. The contest must be filed in the justice court within five days after the date when the notice of the filing of the affidavit was mailed by the clerk or justice of the peace to the opposing party. The contest need not be sworn.

(g) Burden of Proof

If a contest is filed, the party who filed the affidavit of indigence must prove the affidavit's allegations. If the indigent party is incarcerated at the time the hearing on a contest is held, the affidavit must be considered as evidence and is sufficient to meet the indigent party's burden to present evidence without the indigent party's attending the hearing.

(h) Hearing and decision in the trial court

(1) Notice required

If the affidavit of indigence is filed in the justice court and a contest is filed, the justice court must set a hearing and notify the parties of the setting.

(2) Time for hearing.

The justice court must either hold a hearing and rule on the matter or sign an order extending the time to conduct a hearing within five days from the date a contest is filed.

(3) Extension of time for hearing.

The time for conducting a hearing must not be extended for more than five days from the date the order is signed.

(4) Time for written decision; effect.

Unless—within the period set for the hearing---the justice court signs an order sustaining the contest, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs.

(i) Appeal from the justice court order disapproving the affidavit of indigence

(1) No writ of possession may issue pending the hearing by the county court of the appellant's right to appeal on an affidavit of indigence.

(2) If a justice of the peace disapproves the affidavit of indigence, appellant may, within five days thereafter, bring the matter before the county court for a final decision, and , on request, the justice shall certify to the county court appellant's affidavit, the contest thereof, and all documents, and papers thereto. The county court shall hold a hearing de novo and rule on the matter within five days from the date the matter is brought to the county court, or within that five day period, sign an order extending the time to conduct a hearing. The time for conducting a hearing must not be extended for more than five days from the date the order is signed. If the affidavit of indigence is approved by the county court, it shall direct the justice to transmit to the clerk of the county court, the transcript, records, and papers of the case. If the county court disapproves the affidavit of indigence, appellant may perfect an appeal by filing an appeal bond, deposit, or security with the justice court in the amount required by this rule within five days thereafter. If no appeal bond is filed within five days thereafter, the justice court may issue a writ of possession.

(j) Costs defined

As used in this rule, costs means:

(1) a filing fee paid in justice court to initiate the forcible entry and detainer action:

(2) any other costs sustained in the justice court; and

(3) a filing fee paid to appeal the case to the county court.

(Note to committee: The new affidavit of indigence replaces the pauper's affidavit and generally follows the TRAP rules except for a few modifications necessary to make the rule fit these cases. It is important to note that the approval of an affidavit of indigence ~~only~~ allows the case to be appealed ~~but does not~~ and ~~suspend~~ suspends the enforcement of the judgment. ~~, except for the writ of possession~~. The procedures for filing, contesting and appealing the denial of the affidavit of indigence are essentially the same as under old rule 749a.)

~~RULE 749b. PAUPER'S AFFIDAVIT IN NONPAYMENT OF RENT APPEALS~~

~~In a nonpayment of rent forcible detainer case a tenant/appellant who has appealed by filing a pauper's affidavit under these rules shall be entitled to stay in possession of the premises during the pendency of the appeal, by complying with the following procedure:~~

~~(1) Within five days of the date that the tenant/appellant files his pauper's affidavit, he must pay into the justice court registry on rental period's rent under the terms of the rental agreement.~~

~~(2) During the appeal process as rent becomes due under the rental agreement, the tenant/appellant shall pay the rent into the county court registry within five days of the due date under the terms of the rental agreement.~~

~~(3) If the tenant/appellant fails to pay the rent into the court registry within the time limits prescribed by these rules, the appellee may file a notice of default in county court. Upon sworn motion by the appellee and a showing of default to the judge, the court shall issue a writ of restitution.~~

~~(4) Landlord/appellee may withdraw any or all rent in the county court registry upon a) sworn motion and hearing, prior to final determination of the case, showing just cause, b) dismissal of the appeal, or c) order of the court upon final hearing.~~

~~(5) All hearings and motions under this rule shall be entitled to precedence in the county court.~~

~~(Added May 9, 1977, eff. Sept. 1, 1977.)~~

~~**Notes and Comments**~~

~~This is a new rule.~~

Rule 749b Appeal Perfected

When the defendant timely files an appeal bond, deposit, or security in conformity with Rule 749, and the filing fee required for the appeal of cases to the county court is paid, or an affidavit of indigence approved in conformity with Rule 749a, the appeal by the defendant shall be perfected. When the plaintiff timely files a notice of appeal in conformity with Rule 749 and the filing fee required for the appeal of cases to county court is paid, or an affidavit of indigence approved in conformity with Rule 749a, the appeal by the plaintiff shall be perfected. When an appeal has been perfected, the justice court shall make out a transcript of all the entries made on it's docket of the proceedings had in the case and immediately file the same, together with the original papers, any money in the court registry pertaining to that case, and the appeal bond, deposit, or security filed in conformity with Rule 749, or the affidavit of indigence approved in conformity with Rule 749a with the county clerk of the county in which the case was heard.

The county clerk shall docket the case and the trial shall be de novo. The county clerk shall immediately notify both appellant and appellee of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when there is no written answer on file in the justice court.

The perfection of an appeal in a forcible entry and detainer case does not suspend enforcement of the judgment. Enforcement of the judgment, may proceed in the county court unless the enforcement of the judgment is suspended in accordance with rule 750. If the appeal is based on a judgment for possession and court costs only, then the tenant's failure to post a supersedeas bond, when required, will allow the appellee to seek a writ of possession, and the issue of possession may not be further litigated in the forcible entry and detainer action in the county court.

No factual determination in a forcible entry and detainer action, including determination of the right to possession, will be given preclusive effect in other actions that may be brought between the parties.

Notes and Comments

An appeal by a tenant for rent, contractual late charges, attorney's fees, and court costs may be appealed without appealing the issue of possession. However, if the appeal is based on a judgment for possession and court costs only, then the tenant's failure to post a supersedeas bond will allow the appellee to seek a writ of possession. No factual determination in a forcible entry and detainer action, including a determination of the right to possession, will be given any preclusive effect in other actions that may be brought between the parties. Thus, a tenant dispossessed under a writ of possession is not precluded under res judicata or collateral estoppel principles from bringing a wrongful eviction action.

If a defendant perfects the appeal to the county court by the approval of an affidavit of indigence, it is not necessary for the defendant to post a supersedeas bond, deposit , or security to remain in possession, and to suspend the enforcement of the judgment.

(Added May 9, 1977, eff. Sept. 1, 1977; amended April 15, 1982, eff. Aug. 15, 1982; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Change by amendment effective August 15, 1982: This rule is amended so that one month's rent need not be paid when an appeal bond is made.

Comment to 1990 change: To dispense with the appellate requirement of payment of any rent into the court registry.

(Amended May 9, 1977, eff. Sept. 1, 1977; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.)

(From old RULE 751)

Notes and Comments

Source: Art. 3989.

Amended to require immediate filing of papers and money with clerk of county court. Provides for precedence of trial, hearings, and motions.

Comment on 1988 Change: This amendment provides due process to pro se defendants by advising them of the necessity of filing a written answer in the county court if they did not file one in the justice court.

Comment to 1990 change: To provide for transfer of subject funds.

(Note to committee; This rule sets forth what must occur to perfect an appeal. It now includes a requirement that the filing fee for county court be paid to the justice court. As in old rule 749c it also dictates what the justice court must do when an appeal is perfected.)

~~**RULE 749c. APPEAL PERFECTED**~~

~~When an appeal bond has been timely filed in conformity with Rule 749 or a pauper's affidavit approved in conformity with Rule 749a, the appeal shall be perfected.~~

~~(Added May 9, 1977, eff. Sept. 1, 1977; amended April 15, 1982, eff. Aug. 15, 1982; April 24, 1990, eff. Sept. 1, 1990.)~~

~~**Notes and Comments**~~

~~Change by amendment effective August 15, 1982: This rule is amended so that one month's rent need not be paid when an appeal bond is made.~~

~~Comment to 1990 change: To dispense with the appellate requirement of payment of any rent into the court registry.~~

~~**RULE 750.**~~ **RULE 749c FORM OF APPEAL BOND**

The appeal bond authorized in the preceding article may be substantially as follows:

_____ , Plaintiff

vs.

_____ , Defendant

"The State of Texas,

"County of _____

Cause Number _____

"~~Whereas~~ WHEREAS, in the above entitled and numbered ~~upon a writ of~~ forcible entry and detainer in the Justice Court of precinct _____ of _____ County, Texas, judgment was signed on the _____day of _____, _____ in favor of ~~A.B~~ _____ appellee., and against ~~C.D.~~ _____ appellant. ~~tried before _____, a justice of the peace of _____ county, a judgment was rendered in~~

~~favor of the said A.B. on the _____day of _____, A.D. ___, and against the said C.D~~ From ~~from~~ which judgment the said ~~C.D~~ appellant, ~~has appealed~~ wishes to appeal to the county court; now, therefore, the said ~~C.D~~ appellant, and ~~his/her~~ sureties, covenant that appellant will prosecute ~~his/her~~ said appeal with effect and pay all cost and damages which may be adjudged against the appellant, provided the sureties shall not be liable in an amount greater than $_____, said amount being the amount of the bond herein.

NOW, THEREFORE, WE _____, appellant, as principal, and _____, as surety at _____ (address of surety), and_____ as surety at _____ (address of surety), acknowledge ourselves as bound to pay to _____ appellee, the sum of $ _____, conditioned that appellant shall prosecute the appeal with effect and will perform an adverse judgment final on appeal.

" Given under our hands this _____day of _____, A.D. ____."

_____

Signature of Appellant

_____

Signature of Surety

_____

Signature of Surety

(Amended July 22, 1975, eff. Jan. 1, 1976.)

Notes and Comments

Source: Art. 3988, unchanged.

Change by amendment effective January 1, 1976: The form is amended to state the limits of liability of the sureties.

(Note to committee: This form of the appeal bond has been modified. It was formerly found in rule 750 but was moved so that all rules pertaining to the appeal are found in one place.)

Rule 750 SUSPENDING ENFORCEMENT OF FORCIBLE ENTRY AND DETAINER JUDGMENT PENDING APPEAL TO COUNTY COURT

(a) In a forcible entry and detainer case an appellant who has perfected an appeal under

these rules shall be entitled to suspend the enforcement of the judgment and, where applicable, stay in possession of the premises during the pendency of the appeal, by complying with the following procedure:

(1) filing with the justice court a written agreement with the appellee for suspending enforcement of the judgment ; or

(2) filing with the justice court a good and sufficient supersedeas bond; or

(3) making a deposit with the justice court in lieu of a supersedeas bond; or

(4) providing alternate security as ordered by the justice court.

(b) Supersedeas Bonds

(1) must be in an amount required by this rule;

(2) must be made payable to the county clerk of the county in which the case was heard;

(3) must be signed by the appellant or the appellant's agent;

(4) must be signed by a sufficient surety or sureties as approved by the justice court.

(5) the justice court may, in its discretion require evidence of the sufficiency of the surety or sureties prior to approving the supersedeas bond.

(c) Deposit in lieu of supersedeas bond.

Instead of filing a surety supersedeas bond, a party may deposit with the justice court;

(1) cash;

(2) a cashier's check payable to the county clerk , drawn on any federally insured and federally or state chartered bank or savings and loan association; or

(3) with leave of court, a negotiable obligation of the federal government or of any federally insured and federally or state chartered bank or savings and loan association.

(d) in lieu of a supersedeas bond, or any alternate security ordered by the court is subject to liability for all damages and costs that may be awarded against the debtor—up to the amount of the supersedeas bond, deposit, or security—if;

(1) the debtor does not perfect an appeal or the debtor's appeal is dismissed, and the debtor does not perform the justice court's judgment; or

(2) the debtor does not perform an adverse judgment final on appeal.

(e) Effect of supersedeas. Enforcement of a judgment must be suspended if the judgment is superseded. Enforcement begun before the judgment is superseded must cease when the judgment is superseded. If execution or a writ of possession has been issued, the county court will promptly issue a writ of supersedeas.

(f) Amount of supersedeas bond, deposit or security. The amount of the supersedeas bond, deposit or security must be at least in an amount to cover;

(1) the amount of the judgment, and interest on the judgment for the estimated duration of the appeal;

(2) the amount of attorney's fees awarded for the appellee;

(3) the amount of rent owed by the appellant for the current rent paying period less any portion of that rent reflected in the judgment, except that if the appellant was the plaintiff in justice court then the supersedeas bond need not include any rent; or
(4) if there is no obligation on the part of the appellant to pay rent then an amount equal to the fair market value of the rent for the current month.
(5) Lesser amount The justice court may order a lesser amount than required by subsections 1-4 above if the justice court finds that;
(A) posting a supersedeas bond, deposit, or security in the amount required by subsections 1-4 above will irreparably harm the appellant; and
(B) that posting a supersedeas bond, deposit or security in a lesser amount will not substantially impair the appellee's ability to recover under the judgment after all appellate remedies are exhausted.

(g) Effect of appellant's not paying rent or the amount of fair market value into the registry of the county court.
(1) During the pendency of the appeal the appellant must pay rent, or the amount determined to be a fair market rental value of the premises as set forth in Rule 748, into the registry of the county court as it becomes due. Upon sworn motion filed in county court, either party may contest the findings set forth in the justice court judgment as to rent or fair market rental value. The court may hold a hearing on the motion. If the appellant fails to make timely payments into the registry of the county court as it becomes due, the appellee may file a notice of default in the county court where the cause is pending. Upon sworn motion by the appellee, and a showing of default by the appellant in making payments into the registry of the county court as they become due, the court may issue a writ of possession.
(2) During the appeal, if a governmental agency is responsible for payment of a portion of the rent and does not pay that portion to the landlord or into the registry of the county court, the landlord may file a motion with the county court requesting that the tenant be required to pay the full amount of the rent into the county court registry as a condition for remaining in possession. After notice and hearing, the court may grant the motion only if the landlord:
(A) did not cause the agency to cease making the payments: and
(B) is not able to take an action that will cause the agency to resume making payments or to otherwise pay all or part of the rent.
(3) The county court may allow the appellee to withdraw any or all rent or the amount determined to be a fair market rental value from the county court registry upon;
(A) sworn motion and hearing, prior to final determination of the case, showing the right to receive payment;
(B) dismissal of the appeal, or
(C) order of the court upon final hearing.
(4) All hearings and motions under this rule shall be entitled to precedence in the county court.

(h) When the enforcement of the judgment has been suspended the justice court shall

stay all further proceedings on the judgment and shall immediately make out a transcript of all the entries on the court's docket of the proceedings related to the suspension of the judgment; and shall immediately file same, together with the supersedeas bond, deposit, or security with the clerk of the county court. The justice court will immediately issue whatever writs of supersedeas are needed, or take other actions to suspend the enforcement of the judgment.

(i) Once the appeal has been perfected and five days have expired since the day the judgment was signed, any actions to enforce or suspend the enforcement of the judgment under this rule, or to modify an existing justice court order suspending the enforcement of the judgment, must be filed in the county court where the appeal is pending.

(j) If the appeal is perfected and the tenant does not pay rent into the registry of the county court as it becomes due, the county court, where the appeal is pending, may issue a writ of possession at any time. The duty of the defendant to pay rent into the registry of the county court as it becomes due exists even if the appeal is perfected by the approval of an affidavit of indigence.

(k) If the appeal is perfected by the approval of an affidavit of indigence, the defendant need not post a supersedeas bond, deposit, or security with the justice court in order to remain in possession, or to suspend the enforcement of the judgment.

Notes and Comments

If the defendant who perfects an appeal from an adverse judgment does not pay rent into the registry of the county court as it becomes due, the appellee may request a writ of possession from the county court where the case is pending at any time. A defendant who perfects an appeal by the approval of an affidavit of indigence may remain in possession and suspend the enforcement of the judgment without posting a supersedeas bond, deposit or security. A defendant who perfects an appeal by approval of an affidavit of indigence must still pay rent into the registry of the county court as it becomes due in order to be allowed to remain in possession.

(Note to committee: This sets up the second part of an appeal, which is suspending the enforcement of the judgment by posting a supersedeas bond. There is no provision to avoid the posting of a supersedeas bond by filing an affidavit of indigence. This provision is very similar to the TRAP rules modified somewhat for these cases.)

~~**RULE 751. TRANSCRIPT**~~

~~When an appeal has been perfected, the justice shall stay all further proceedings on the judgment, and immediately make out a transcript of all the entries made on his docket of~~

~~the proceedings had in the case; and he shall immediately file the same, together with the original papers, and any money in the court registry, including sums tendered pursuant to Rule 749b(1), with the clerk of the county court of the county in which the trial was had, or other court having jurisdiction of such appeal. The clerk shall docket the cause, and the trial shall be de novo.~~

~~The clerk shall immediately notify both appellant and the adverse party of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court.~~

~~The trial, as well as all hearing and motions, shall be entitled to precedence in the county court.~~

~~(Amended May 9, 1977, eff. Sept. 1, 1977; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.)~~

~~**Notes and Comments**~~

~~Source: Art. 3989.~~

~~Amended to require immediate filing of papers and money with clerk of county court. Provides for precedence of trial, hearings, and motions.~~

~~Comment on 1988 Change: This amendment provides due process to pro se defendants by advising them of the necessity of filing a written answer in the county court if they did not file one in the justice court.~~

~~Comment to 1990 change: To provide for transfer of subject funds.~~

Rule 751 Form of Supersedeas Bond

The supersedeas bond authorized in the preceding article may be substantially as follows:

SUPERSEDEAS BOND

"The State of Texas"
"County of _____"
"Cause No. _____"

WHEREAS, in the above entitled and numbered forcible entry and detainer in the Justice Court of Precinct _____ of _____ County, Texas, judgment was signed on the _____ day of _____, _____ in favor of _____ (plaintiff/defendant), hereinafter referred to as appellee against _____ (plaintiff/defendant), hereinafter referred to as appellant for;

____ Possession,

____ Court costs of $_____,
____ Back rent and contractual late charges of $_____,
____ Attorney's fees of $_____,
together with interest thereon from the date of the judgment, at the rate of ____ percent per annum, from which judgment appellant has appealed to the county court of _____ County, Texas.

WHEREAS, appellant desires to suspend enforcement of the judgment pending determination of said appeal:

NOW, THEREFORE, WE _____ (appellant), as principal, and _____ as surety at _____ (address of surety), and _____ as surety at _____ (address of surety), acknowledge ourselves as bound to pay to _____ (appellee), the sum of $_____, said sum being at least the amount of the judgment, interest, and costs, plus estimated interest from the date of the judgment until final disposition of the appeal, and any rent, or the fair market value of the property, currently owed during this rent paying period and not reflected in the judgment, conditioned that appellant shall prosecute the appeal with effect; and in case the judgment of the county court be against appellant, appellant shall perform its judgment, sentence or decree, and pay all such damages as the court may award against appellant up to the amount of the bond.

"Given under our hands this ____ day of _____, ____."

_____
Signature of Appellant

_____
Signature of Surety

_____
Signature of Surety

Notes and Comments

This is a new rule which provides a suggested form for the supersedeas bond provided by rule 750.

(Note to committee: This is a new supersedeas bond form. Most of the content of old rule 751 is now in rule 749c.)

RULE 752. DAMAGES

On the trial de novo of the cause in the county court the appellant or appellee shall be permitted to plead, prove and recover his damages, if any, suffered for withholding or defending possession of the premises during the pendency of the appeal.

Damages may include but are not limited to loss of rentals during the pendency of the appeal and reasonable attorney fees in the justice and county courts provided, as to attorney fees, that the requirements of Chapter 24 ~~Section 24.006~~ of the Texas Property Code have been met. Only the party prevailing in the county court shall be entitled to recover damages against the adverse party. ~~That prevailing party shall be entitled to recover against the sureties on the appeal bond in cases where the adverse party has executed such bond.~~

Notes and Comments

Source: Art. 3990, unchanged; except that by amendment effective December 31, 1943, the rule is made to extend, in a proper case, to appellant as well as to appellee; and other relevant changes have been made.

Changes by amendment effective January 1, 1976: Costs and damages are stated by this rule rather than by various enumeration's in other rules.

~~RULE 753. JUDGMENT BY DEFAULT~~

RULE 753. DUTY OF CLERK TO NOTIFY PARTIES

The county clerk shall immediately notify all parties to the justice court judgment of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court.

RULE 753a. JUDGMENT BY DEFAULT

~~Said cause shall be subject to trial at any time after the expiration of eight full days after the date the transcript is filed in the county court.~~ If the defendant has filed a written answer in the justice court, the same shall be taken to constitute ~~his~~ the defendant's appearance and answer in the county court, and such answer may be amended as in other cases. If the defendant made no answer in writing in the justice court, and ~~if he~~ fails to file a written answer within ten ~~eight~~ full days after the transcript is filed in the county court, the allegations of the complaint may be taken as admitted and judgment by default may be entered accordingly.

(Amended June 16, 1943, eff. Dec. 31, 1943; Aug. 18, 1947, eff. Dec. 31, 1947; July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art 3991, with minor textual change.

RULE 754. ~~[BLANK]~~ TRIAL OF THE CASE IN COUNTY COURT

(a) The trial of a forcible entry and detainer appeal as well as all hearings and motions shall be entitled to precedence in the county court.

(b) No jury trial shall be had in any appeal of a forcible entry and detainer, unless a written request for a jury trial is filed with the clerk of the court a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than five days in advance. The fee required by law for requesting a jury trial in county court must be deposited with the county clerk within the time for making a written request for jury trial. The clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet.

(c) Generally, discovery is not appropriate in forcible entry and detainer appeals, however, the county court has the discretion to allow reasonable discovery.

(d) The forcible entry and detainer appeal shall be subject to trial de novo at any time after the expiration of ten full days after the date the transcript is filed in the county court. The county court may set appeals of forcible entry and detainer cases for trial on written motion of any party or on the court's own motion, with reasonable notice to the parties of a first setting for trial, or by agreement of the parties. The case shall be docketed in the county court in the name of the plaintiff in the justice court as plaintiff, and in the name of the defendant in the justice court as defendant. Regardless of which party appealed from the judgment in the justice court, only the plaintiff in the county court may take a non-suit. If the county court's jurisdiction is invoked, then it must dispose of all parties and issues before the court, including the issue of possession.

(e) On written motion by the appellee contesting the sufficiency of the appeal bond or the supersedeas bond, the county court may hold a hearing on the appellee's motion. If upon review of the appeal bond or the supersedeas bond, the county court should find the bond to be deficient, the court may disapprove the bond and allow the appellant five days from the date the bond is disapproved to correct the deficiencies with the bond. If the deficiencies are corrected then the bond may be approved. If the deficiencies on the appeal bond are not corrected then the appeal may be dismissed. If the deficiencies on a supersedeas are not corrected then the appellee may proceed with the enforcement of judgment including a writ of possession

(f) When the appellant fails to prosecute the appeal with effect or the county court renders judgment against the appellant, then the county court must render judgment against the sureties on the appellant's appeal bond or supersedeas bond, for the performance of the judgment up to the amount of the bond.

Notes and Comments

This rule provides guidance to the county court in procedures to use in the trial of the case. When the county court invokes jurisdiction of a case it must dispose of all issues and parties before the court. If the case is dismissed, once the county court has invoked jurisdiction, then the dismissal should address the issue of possession

(Note to committee: This rule will provide guidance to the county court's on how to try appeals of forcible entry and detrainer cases. See 754(e) for a comment on a still unresolved issue.)

RULE 755. WRIT OF POSSESSION

The writ of possession, or execution, or both, shall be issued by the clerk of the county court according to the judgment rendered, and the same shall be executed by the sheriff or constable, as in other cases; and such writ of possession shall not be suspended or superseded in any case by appeal from such final judgment in the county court, unless the premises in question are being used ~~as the principal residence of a party~~ for residential purposes only. A judgment of a county court may not under any circumstances be stayed pending appeal unless, within ten days of the signing of the judgment, the appellant files a supersedeas bond in an amount set by the county court.

(Note to committee: There is a conflict between the language in the current rule 755 which says that you cannot supersede a judgment unless the premises was used as a primary residence and the language in Texas Property Code Section 24.007 which says that a judgment cannot be stayed unless the premises was used as a residence. This amendment would conform the rule to the property code. The last sentence in this rule mirrors the mandate of Section 24.007.)

(Amended July 15, 1987, Jan. 1, 1988.)

Notes and Comments

Source: Art 3993, unchanged.

Revised 1/15/02

PROPOSED RULE 166b

1. Definitions.

(a.) "Claim" means a claim to recover monetary damages or for other relief, and includes a counterclaim, cross-claim, or third-party claim.

(b.) "Claimant" means a person making a claim.

(c.) "Defendant" means a person from whom a claimant seeks recovery of damages or other relief on a claim, including a counterdefendant, cross-defendant, or third-party defendant.

(d.) "Litigation costs" means costs actually incurred that are directly related to preparing an action for trial and actual trial expenses which are incurred after the date of the rejected offer to settle which is used to measure an award under Section 9 of this rule, including:

(1) attorneys' fees, including fees earned pursuant to a valid contingency fee contract;

(2) costs of court;

(3) reasonable deposition costs; and

(4) reasonable fees for necessary testifying expert witnesses.

(e.) "Offer to settle" means an offer to settle or compromise a claim made in compliance with Section 5.

2. Applicability and Effect.

(a.) This rule does not apply to:

(1) a class action;

(2) an action brought under the Deceptive Trade Practices-Consumer Protection Act (Sections 17.41 et seq., Business & Commerce Code);

(3) an action brought under the Family Code; or

(4) an action to collect workers' compensation benefits under Subtitle A, Title 5, Labor Code.

(b.) This rule does not limit or affect the ability of any person to make an offer to settle or compromise a claim that does not comply with this rule. A party's offer to settle or compromise that does not comply with subsection 5 of this rule does not entitle the party to recover litigation costs under this rule.

3. Election By Governmental Units; Waiver.

(a.) This rule does not apply to an action by or against the state, any unit of state government, or any political subdivision of the state unless the governmental unit expressly elects both to seek recovery of litigation costs under this rule and to waive immunity from liability for litigation costs awarded under this rule.

(b.) To be effective as an election and waiver, the governmental unit must make the election and waiver specifically and affirmatively by a writing filed with the court within 45 days of the filing of the governmental unit's original petition or original answer.

(c.) An election and waiver is effective only in the action in which it is filed, even if the action is subsequently joined or consolidated with another action.

4. **Service.** When this rule requires a writing to be served on another party, service is adequate if it is performed in a manner described in Rules 4, 5 and 21a, Texas Rules of Civil Procedure.

5. **Offer To Settle.**

(a.) A party may serve on an opposing party an offer to settle all the claims in the action between that party and the opposing party.

(b.) The offer to settle:

(1) must be in writing;

(2) must state that it is an offer to settle all claims pursuant to this section;

(3) must specify the terms by which the claims may be settled;

(4) must specify a deadline by which the offer must be accepted;

(5) may not include a demand for litigation costs except for costs of court;

(6) must offer to allow a judgment to be entered consistent with the terms of the offer; and

(7) must be served on the party to whom the offer is made.

(c.) A party may not make an offer to settle under this section after the tenth day before the date set for trial, except that a party may make an offer to settle that is a counteroffer on or before the seventh day before the date set for trial.

(d.) The parties are not required to file with the court an offer to settle.

(e.) A party may only make an offer to settle under this rule during the course of the litigation but may make successive offers to settle.

6. **Acceptance of Offer.**

(a.) A party may accept an offer to settle on or before 5:00 p.m. on the 14th day after the date the party received the offer to settle or before the deadline specified in the offer, whichever is later.

(b.) Acceptance of an offer must be:

(1) in writing; and

(2) served on the party who made the offer.

(c.) Upon acceptance of an offer to settle, either party may file the offer and notice of acceptance together with proof of service thereof, and thereupon the court shall enter judgment in accordance with the offer and acceptance except that the Court may not seal any judgment without first complying with Rule 76a, T.R.C.P..

7. **Withdrawing an Offer**

(a.) A party may withdraw an offer to settle by a writing served on the party to whom the offer was made before the party accepts the offer. A party may not accept an offer to settle after it is withdrawn. A party may not withdraw an offer to settle after it has been accepted.

(b.) If a party withdraws an offer to settle, that offer does not entitle the party to recover litigation costs.

8. **Rejection of Offer.** For purposes of this rule, an offer to settle a claim is rejected if:

(a.) the party to whom the offer was made rejects the offer by a writing served on the party making the offer; or

(b.) the offer is not withdrawn and is not accepted before the deadline for accepting the offer.

9. Award of Litigation Costs.

(a.) A party who made an offer to settle the claims between that party and the party to whom the offer was made may recover litigation costs provided:

(1) the offer to settle was rejected;

(2) the court entered a judgment on the claims and;

(3) if a party sought monetary damages.

(A) the amount of monetary damages awarded on the claims in the judgment is more favorable to the party who made the offer than the offer to settle the claims; and

(B) the difference between the amount of monetary damages awarded on the claims in the judgment and the amount of the offer to settle the claims is equal to or greater than twenty-five percent of the amount of the offer to settle the claims; or

(4) if a party sought nonmonetary relief, the judgment is more favorable to the party who made the offer to settle the claims.

(b.) Each element of litigation costs awarded under this rule must be both reasonable and necessary to the prosecution or defense of the action.

(c.) The court will determine the amount of "Litigation Costs" under this rule and may reduce, but not enlarge, the amount as justice requires.

(d.) The amount of litigation costs awarded against the claimant may not exceed the amount of the damages recovered by the claimant in the action.

10. Attorney's Fees.

(a.) A party may not recover attorneys' fees as litigation costs under this rule unless the party was represented by an attorney.

(b.) If Litigation Costs are contested, the court may award additional Litigations Costs for the reasonable and necessary amount expended to pursue or dispute the claimed Litigation Costs.

11. Evidence Not Admissible.

(a.) Evidence relating to offers to settle is not admissible except in an action to enforce the settlement or in a proceeding to obtain litigation costs under this rule.

(b.) Except in an action or proceeding described in Subsection 11(a), the provisions of this rule may not be made known to the jury through any means, including voir dire, introduction into evidence, instruction, or argument.

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January 11, 2002

Justice Nathan L. Hecht
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Re: Supreme Court Advisory Committee - Ex Parte Communications and Physician-Patient Confidentiality

Dear Justice Hecht:

The recent case of Durst v. Hill County Memorial Hospital, San Antonio Court of Appeals No. 04-00-00540-CV, decided December 19, 2001, succinctly states what appears to be a serious problem with respect to confidential communications protected by the physician-patient relationship.

There is apparently no explicit procedure provided for parties to litigation to learn discoverable information from a party's treating physician. Accordingly, the San Antonio Court of Appeals has concluded that there is no bar to ex parte communications with a party's physician by attorneys for the opposing side.

Not all information in the hands of a treating physician is necessarily discoverable under exceptions to a physician-patient confidentiality. It would appear that the patient should be the first to determine if information in the hands of the patient's physician is discoverable, and, if the opposing party should disagree with the decision of the patient, then it should be the Court, not opposing party or opposing counsel, who makes the decision as to whether or not the information is discoverable.

At any rate, it would appear that discovery of medical evidence from a treating physician should be no different than discovery of any information from an expert witness, that is, with the permission of the opposing party or with notice to the opposing party and an opportunity for the opposing party to protect whatever privileges may exist.

It is requested that this matter be placed on the agenda of the Committee at the earliest possible time.

Thank you for your consideration of this matter.

Yours very truly,

William R. Edwards

WRE/bam