Chris Griesel

From: Osler McCarthy
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Texas Supreme Court advisory 6.18.03

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LEGISLATIVE CHANGES ON RULE-MAKING WILL BE FOCUS OF SUPREME COURT ADVISORY COMMITTEE MEETING FRIDAY, SATURDAY
Meeting agenda

The Supreme Court Advisory Committee will meet Friday and Saturday in Room 101 of the Texas Law Center (State Bar of Texas building), 1414 Colorado in Austin. The Friday meeting will begin at 9 a.m. and will continue at 8:30 a.m. Saturday.

Supreme Court Advisory Committee meetings are open to the public.

The committee meeting, the first since the end of the 78th Legislative session, will focus on the effect of recent legislation on rules of procedure and evidence governing Texas civil cases. A letter from Justice Nathan L. Hecht, the Court's liaison to the committee, sets out the scope and timetable for the committee's work.
This meeting will be the second since 15 new members were appointed in February. See the February order appointin committee (Adobe PDF document). To download a free Adobe Reader: http://www.adobe.com/products/acrobat/alternate.html.

AGENDA FOR THE JUNE 2003 MEETING

1. WELCOME

2. REPORT FROM JUSTICE HECHT

2.1 Status Report
Justice Hecht will report on Supreme Court actions and those of other courts related to the Supreme Court Advisory Committee since the April 2003 meeting. Justice Hecht will also review new legislation that may require rules changes and may refer new issues for the committee's study. Click here for letter from Justice Hecht.

3. HOUSE BILL 4 AND OTHER LEGISLATIVE CHANGES

3.1 Overview of rules changes required by or necessitated by statutes
Click here for complete text of HB 4.
Click here for proposed TRAP changes regarding appeal bonds.
Click here for statutory changes to appeal bond requirements.

3.2 Offer of Settlement
Compare previous SCAC draft from April meeting with language regarding offers of settlement in HB 4.
HB 4 provisions relating to offer of settlement are contained in Article 2 of the bill, on pages 6-11 of the .PDF version. Click here for link to Adobe (PDF) version of HB 4.
Click here for latest Advisory Committee draft prepared with transcript following meeting. (Carlson)
Click here for SCAC draft without transcript following April meeting. (Jacks)
Click here for emailed comments relating to Jacks draft.

3.3 Class Actions

Compare previous rules subcommittee drafts by the Task Force on Civil Litigation Improvements -- the "Jama committee" -- and April 2003 meeting discussion with language regarding class actions in HB 4.
Provisions of HB 4 relating to class actions are in Article 1, on pages 1-6 of the .PDF version. Click here to fi link to Adobe (.PDF) version of HB 4 (duplicate link from agenda item 3.2, above).
Click here for copy of current Texas Rule of Civil Procedure 42
Click here for copy of Task Force's class-action proposal.

3.4 Complex Litigation/Multi-District Litigation (MDL)

Compare previous Jamail committee drafts and April 2003 meeting discussion with language regarding complex litigation in HB 4.
HB 4 provisions relating to complex litigation/MDL are in Article 3, on pages 11-18 of the .PDF version. Clic here to find link to Adobe (.PDF) version of HB 4 (duplicate link from agenda items 3.2 and 3.3, above).
Click here for Task Force's complex-litigation proposal.
Rule 11, Rules of Judicial Administration currently provides a method for consolidating certain case for pretri purposes. These Rule 11 provisions can be found on pages 7-10 of this .PDF version of the rules. Click here.
Provisions of HB 3386, passed this session, relate to Rule 11 and also may have an effect on complex litigation/MDL issues. Click here for a copy of HB 3386.

3.5 Appearance By Counsel: TRCP 7 and 8

Continuation of discussion and comment on appearance of counsel rules proposed by Jamail committee.
Click here for Task Force on Civil Litigation Improvements' appearance-by-counsel proposal.

3.6 Ad Litem Appointments, Responsibility and Compensation: TRCP 173

Continuation of discussion and comment on Task Force's ad litem rules proposal, including any changes that need to be considered in light of HB 1815.
HB 1815 relates to appointments and duties of ad litems. Click here for a copy of HB 1815.
Click here for Task Force's ad litem proposal.

Any person at any time may comment on rules proposals before the Supreme Court of Texas or the Supreme Court Advisory Committee or offer suggested 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 Administratior and the Parental Notification Rules.

Written comments may be mailed to the Chris Griesel, rules attorney, P.O. Box 12248, Austin, Texas 78711, or may b faxed to the attention of the Rules Attorney at (512) 463-1365, or e-mailed to chris.griesel@courts.state.tx.us.

The Supreme Court of Texas

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June 16, 2003

Mr. Charles L. Babcock, Chairman
Supreme Court Advisory Committee
Jackson Walker
901 Main Street, Suite 6000
Dallas TX 75202-3797

Dear Chip:

As you know, the Seventy-Eighth Legislature has delegated to the Supreme Court the responsibility for drafting rules to implement House Bill 4. Three major assignments are:

- MDL rules: to adopt rules of practice and procedure for the judicial panel on multidistrict litigation created by chapter 74, subchapter H of the Government Code (HB 4, § 3.02);

- Offer-of-settlement rules: to promulgate rules implementing chapter 42 of the Civil Practice and Remedies Code providing for offers of settlement (HB 4, § 2.01); and

- Class action rules: to adopt rules to provide for the fair and efficient resolution of class actions, including rules that comply with the mandatory guidelines of chapter 26 of the Civil Practice and Remedies Code (HB 4, § 1.01).

HB 4 also directs that Rule 407(a) of the Texas Rules of Evidence be amended to conform to Rule 407 of the Federal Rules of Evidence (HB 4, § 5.03). In addition, other rules changes may be necessary or appropriate because of the enactment of HB 4 and other statutes this session. Chris Griesel, the Court's Rules Attorney, has compiled the attached list of possible changes, which you will see is quite lengthy. This is only a preliminary list.

The Supreme Court is of the view that the Legislature's delegation of rule-making responsibility to the Supreme Court to effectuate the Legislature's policy choices is in the best interests of the administration of justice and of the people of Texas. The Legislature's actions this year reconfirm the statement of the Forty-Sixth Legislature that "it is essential to place the rule-making power in civil actions in the Supreme Court, whose knowledge, experience, and intimate contact with

the problems of judicial administration render that Court particularly qualified to mitigate and cure these evils [of unnecessary delay and expense to litigants]." Act of May 12, 1939, 46th Leg., R.S., ch. 25, 1939 Tex. Gen. Laws 201, 202 (enacting what is now Tex. Gov't Code § 22.004). The Supreme Court gladly accepts this responsibility and intends to comply fully with the Legislature's directives.

The Court relies heavily on the counsel of its Advisory Committee, as it has for sixty-four years. The members of the Committee should consider the Legislature's faith in the rule-making process a credit to their wisdom and experience and to the value of their work. I and my colleagues look forward to working with you on these new assignments.

The amendment to Rule 407(a) of the Texas Rules of Evidence is to be made "[a]s soon as practicable" after HB 4's effective date, September 1, 2003 (HB 4, § 5.03). The MDL rules also apply beginning that date. The class action rules are to be "adopted on or before December 31, 2003", and the offer-of-settlement rules "must be in effect on January 1, 2004." The Supreme Court is tentatively of the view that the deadlines specified in HB 4 take precedence over the requirements for publication and comment contained in sections 22.004 and 74.024 of the Government Code but that those requirements should be followed where possible. Therefore, the Court has adopted the following schedule:

- The Court will next meet to consider the Committee's recommendations and any other matters pertaining to rules changes the week of August 25, 2003.

- Effective September 1, 2003, the Court will amend Rule 407(a) of the Texas Rules of Evidence and adopt MDL rules, both to be disseminated to the bench and bar as widely as possible and published in the October issue of the *Texas Bar Journal* for formal comment. The changes may be revised following comments.

- The Court will also publish in the October issue of the *Texas Bar Journal* for comment an offer-of-settlement rule and a revised class action rule to comply with HB 4's mandatory guidelines, both rules to take effect January 1, 2004.

- In the October issue of the *Texas Bar Journal*, or as soon thereafter as possible, the Court will publish for comment any further changes in the class action rule, any rules changes adopted in accordance with pending recommendations by the Advisory Committee, and any rules changes to be made regarding ad litem fees and referral fees, as recommended by the Jamail Committee.

The Court believes that this schedule will comply with the mandates of HB 4, permit as much comment as possible, allow for reaction to that comment, complete related pending work before the Committee, and complete action on Committee recommendations already made. Other proposals before the Committee, and other changes that may be necessary or appropriate due to recent legislation, should be deferred until the proposed schedule has been completed.

I fully realize that this is an enormous amount of work for the Committee, but I believe the Committee is entirely

capable of assisting the Court in discharging its responsibility.

The following issues are of interest to the Court:

- Rule 407(a), Texas Rules of Evidence: What impediments are there to simply conforming the language to Rule 407 of the Federal Rules of Evidence?

- MDL rules: How should the judicial panel function? Where should it meet? When must issues be decided by a hearing before the panel and when by submission? May the panel confer and decide issues by telephone, by letter, or by email? Where will records be kept? Should policies for decision be stated in the rules or left entirely for the panel to set? Assuming that policies should be thoroughly stated in the rules, what should those policies be?

- Offer-of-settlement rule: Can the work already done by the Committee on this rule be modified to comply with the requirements of HB 4? What additional parameters should be included consistent with those requirements?

- Class action rule: In addition to changes required by HB 4's mandatory guidelines, should the rule require opt-in classes for certain claims? Assuming that it should, what should those claims be?

As always, Chip, the Supreme Court extends to you and all of the members of the Committee its deepest gratitude.

Sincerely,

Nathan L. Hecht
Justice

c: The Chief Justice and Justices of the Supreme Court of Texas
The Members of the Supreme Court Advisory Committee
The Members of the Jamail Committee
The Hon. Bill Ratliff
The Hon. Joe Nixon

SUMMARY OF RULES CHANGES TO EXAMINE

BILL (section or article affected)	NATURE OF LEGISLATIVE CHANGE	RULES TO EXAMINE
HB 4		
Sec 1.01	By 12/31/03, the "Supreme Court shall adopt rules to provide for fair and efficient resolution of class actions". Bill lays out some guidelines for class fee recovery	TRCP 42. Consider the Committee's previous work on the subject, including review of previous Jamail committee drafts, and make suggestions
Sec. 1.02	Amends cases that are appealable by interlocutory appeal to the Supreme Court and defines "conflicts jurisdiction"	Review TRAP rules, including Rule 53.2
Sec. 1.03	Amends list of cases that may be brought by interlocutory appeal; Allows certain classes of cases to be stayed pending appellate resolution; defines "conflicts jurisdiction"	Review TRAP rules, including comment to TRAP 29 and Rule 53.2
Sec. 1.05	The effective date of this bill is 9/01/03 and appeals to all appeals filed after that date	Does the Court need to take any "emergency" rules action before 9/01/03 ?
Sec. 2.01	By 12/31/03, the "Supreme Court shall promulgate rules implementing" the offer of settlement provisions of HB 4. The bill lays out more extensive guidelines for provisions of the rules but leaves the court with a number of issues to resolve.	Compare the committee's existing work to the guidelines of HB 4 and make any additional suggestions

Sec. 3.01	The Supreme Court may adopt " rules relating to the transfer of related cases for consolidated or coordinated pretrial proceeding" (A similar, slightly narrower, grant of authority was also given the Court by HB 3386) The Legislature created a "judicial panel on multidistrict litigation". The Chief Justice will appoint 5 active court of appeals or administrative judges to the panel. The rules must allow the panel to transfer related civil actions for consolidated or coordinated pretrial proceedings; allow for transfers and remands of actions; and provide for appellate relief of the panel's orders.	Determine changes needed to TRCP or Rules of Judicial Administration. Consider the operation of existing RJA 11 and federal MDL rules
Sec. 3.03	Plaintiffs added by joinder are required to independently meet venue provisions or face mandatory transfer to county of proper venue or face dismissal	Determine if joinder rules ,TRCP 39 et.seq, require amendment. Determine if interlocutory appeal provision, including stay provision, requires TRAP change or comment.
Sec. 4.01 et seq.	Changes made to proportionate responsibility submission and designation of responsible parties. Changes in some cases the method of reducing damages from dollar amount to percentage amount	Determine if these changes require amendment to TRCP, including rules affecting submission of charge
Sec. 4.12	Requires amendment of TRCP Rule 194.2, as soon as practicable, to include disclosure of responsible third parties	TRCP Rule 194.2
Sec. 5.01 et seq.	Makes changes to liability of defendants in certain products cases	Determine if these changes require amendment to TRCP
Sec. 5.03	Requires Supreme Court to amend TRE Rule 407(a) to conform with FRE Rule 407	TRE Rule 407(a)
Sec. 7.01 et seq.	Creates statutory changes to amount of appeals bonds. Applies to any judgment filed after 9/01/03	Determine changes needed to TRAP, including TRAP 24. Does the Court need to take any "emergency" rules action before 9/01/03 ?

Sec. 8.01	HB 4 repeals evidentiary bar on seat belt non-use.	Determine if this bar is mentioned in TRCP or TRE and suggest appropriate changes
Sec. 10.01 et seq.	Revision of methods for notice, evidence, and procedure of medical liability and medical malpractice actions	HB 4 creates an new system of notice and pleadings, submission of expert reports, and discovery for health care liability claims. Determine what actions to take to modify existing TRCP, TRE, and TRAP rules relating to pleading and discovery rules to, at the minimum, place bench and bar on notice of the conflicting health care liability provisions. Consider the adoption of Section 74.002, Civil Practice and Remedies Code in Section 10.01 relating to conflicts between court rules and the statute. Also consider a method to advise bench and bar that "local rules" may not conflict with the statutory changes Change all 4590i references to Chapter 74, Civil Practice and Remedies Code.
Sec 13.03	Statutory change requiring exemplary damage jury verdict be unanimous and a jury charge must contain a instruction alerting the jury to that fact	Determine changes needed to TRCP, including TRCP 292. Does the Court need to take any "emergency" rules action before 9/01/03 ?

Sec. 23.02	Various portions of HB 4 become effective on various dates and apply to differing classes of cases	Does the Court need to take any immediate action or make "emergency" rules action on any of the changes to the court rules?
ALL		Alert the court to any other rules changes required by HB 4
Family Code Issues		
HB 821 Sec.1 HB 518 Sec. 1 HB 1815 (all) HB 883 (all)	This bill allows notice of an associate judge's report , including proposed order, to be given by fax and creates a rebuttable presumption of receipt. Creates new method of service by publication and new method for calculating the date notice is given Alters scope and duties of guardian ad litems and attorney ad litems in suits affecting parent child relationship The date an agreed order or a default order is signed by an associate family law judge is the controlling date for the purpose of an appeal to, or a request for other relief relating to the order from, a court of appeals or the supreme court.	Determine if these changes require amendment to TRCP
Other Changes		

HB 3306 HB 3386	Objections to a visiting judge must be filed not later than the seventh day after the date the party receives actual notice of the assignment or before the date the case is submitted to the court, whichever date occurs earlier. Notice of an assignment may be given and an objection to an assignment may be filed by electronic mail. Allows the Supreme Court to adopt Rules of Judicial Administration to allow for the conducting of proceedings under Rule 11, Rules of Judicial Administration, by a district court outside the county in which the case is pending.	Determine if these changes require amendment to TRCP or RJA
SB 352	A judge commits an offense if the judge solicits or accepts a gift or a referral fee in exchange for referring any kind of legal business to an attorney or law firm. This does not prohibit a judge from soliciting funds for appropriate campaign or officeholder expenses as permitted by Canon 4D, Code of Judicial Conduct or from accepting a gift in accordance with the provisions of Canon 4D, Code of Judicial Conduct.	Determine if this prohibition needs to be included within recusal rule before court or is already covered
SB 1601	Before entering an order approving settlement or judgment, the court shall require all defendants to report to the court by a certain date the total amount of all funds paid to the class members. After the report is received, the court may amend the settlement or judgment to direct each defendant to pay the sum of any unpaid funds to the clerk of the court. The unpaid funds will be placed in a trust fund and may be spent only to programs approved by the supreme court that provide civil legal services to the indigent.	Determine if a change to TRCP, including Rule 42 is appropriate.

Changes to Tex. R. App. P. 24 and 29 Necessitated By HB 4, Article 7. These changes apply to "any case in which a final judgment is signed on or after the effective date of this Act". (9/1/03)

Tex. R. App. P. 24. Suspension of Enforcement of Judgment Pending Appeal in Civil Cases

24.1 Suspension of Enforcement

(a) Methods. Unless the law or these rules provide otherwise, a judgment debtor may supersede the judgment by:

(1) filing with the trial court clerk a written agreement with the judgment creditor for suspending enforcement of the judgment;

(2) filing with the trial court clerk a good and sufficient bond;

(3) making a deposit with the trial court clerk in lieu of a bond; or

(4) providing alternate security ordered by the court.

(b) Bonds.

(1) A bond must be:

(A) in the amount required by 24.2;

(B) payable to the judgment creditor;

(C) signed by the judgment debtor or the debtor's agent;

(D) signed by a sufficient surety or sureties as obligors; and

(E) conditioned as required by (d).

(2) To be effective a bond must be approved by the trial court clerk. On motion of any party, the trial court will review the bond.

(c) Deposit in Lieu of Bond.

(1) Types of Deposits. Instead of filing a surety bond, a party may deposit with the trial court clerk:

(A) cash;

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

(C) 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.

(2) Amount of Deposit. The deposit must be in the amount required by 24.2.

(3) Clerk's Duties. The clerk must promptly deposit any cash or a cashier's check in accordance with law. The clerk must hold the deposit until the conditions of liability in (d) are extinguished. The clerk must then release any remaining funds in the deposit to the judgment debtor.

(d) Conditions of Liability. The surety or sureties on a bond, any deposit in lieu of a 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 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 trial court's judgment;

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

(3) the judgment is for the recovery of an interest in real or personal property, and the debtor does not pay the creditor the value of the property interest's rent or revenue during the pendency of the appeal.

(e) Orders of Trial Court. The trial court may make any order necessary to adequately protect the judgment creditor against loss or damage that the appeal might cause.

(f) 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 has been issued, the clerk will promptly issue a writ of supersedeas.

24.2 Amount of Bond, Deposit or Security

(a) Type of Judgment.

(1) For Recovery of Money. When the judgment is for money, the amount of the bond, deposit, or security must be at least the amount of compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment, provided however, the amount of security must not exceed the lesser of:

a. 50 percent of the judgment debtor's current net worth based upon fair market value*, as established by an order of the trial court after notice and evidentiary hearing;** or

b. $25 million dollars.***

Discussion:

** Query: How should the procedures be handled for the defendant establishing net worth?

- as claimed by the judgment debtor unless challenged by the judgment creditor within x days of filing appellate security (so trial clerk would have a ministerial duty to accept tendered security on a claim of value of net worth by judgment debtor) OR
- as established by affidavit proof filed by the judgment debtor together with the appellate security unless challenged by the judgment creditor within x days of filing appellate security OR
- as determined by the trial court, after notice and evidentiary hearing

Query: Is Net Worth Discoverable? If so, when?

Query: May a judgment debtor conceptually be excused from filing any supersedeas, when it has a negative net worth? See Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35 (Tex. 1998) (Defendant's negative net worth in relation to award of punitive damages.).

**Query: What is "net worth"? Textbook definition: Assets less liabilities. I am told that generally accepted accounting principles, require that net worth be reported based upn historical costs (book value) as opposed to current fair market value (with the exception of marketable securities). Assume judgment debtor assets consist of 3 acres of land purchased 20 years ago at $1,000 acre. The land is paid for.

Current "net worth" using historical costs of assets=$3,000. Assume the current fair market value of that land is $100,000 an acre, using the fair market value approach the net worth of the judgment debtor is $300,000. The book value "net worth" formula does reflect depreciation, but generally does not reflect appreciation, save for marketable investment securities. HB 4 is silent as to whether net worth should be assessed based upon book value or fair market value. The proposal above incorporates the fair market value standard. (Profit is an opinion, but cash is a fact.)

Another gray area that affects the calculation of net worth is reserves. Assume that the judgment debtor manufactures widgets and provides a 1 year repair or replacement warranty. It will carry reserves to cover the repair or replacement but will necessarily have to estimate that number based on historical data (1 of out every 100 items has historically been replaced.)

Does net worth include insurance coverage for the claimed wrong in determining net worth? (Insurance is generally not considered an asset for accounting purposes unless it has a cash surrender value.)

Do we include exempt assets (such as a homestead, qualified retirement accounts) in calculating net worth? (It would seem so). Is the amount of the judgment itself included in determining net worth? (It would not seem proper to include the judgment as that is what the bond is securing.)

*** The cap is the cap is the cap. It appears that if a party posts security at the "cap" (lesser of $25 mil or 50% of judgment debtor's net worth) interest and costs do not have to be further secured.

(2) For Recovery of Property. When the judgment is for the recovery of an interest in real or personal property, the trial court will determine the type of security that the judgment debtor must post. The amount of that security must be at least:

(A) the value of the property interest's rent or revenue, if the property interest is real; or

(B) the value of the property interest on the date when the court rendered judgment, if the property interest is personal.

(3) Other Judgment. When the judgment is for something other than money or an interest in property, the trial court must set the amount and type of security that the judgment debtor must post. The security must adequately protect the judgment creditor against loss or damage that the appeal might cause. But the trial court may decline to permit the judgment to be superseded if the judgment creditor posts security ordered by the trial court in an amount and type that will secure the judgment debtor against any loss or damage caused by the relief granted the judgment creditor if an appellate court determines, on final disposition, that that relief was improper.

(4) Conservatorship or Custody. When the judgment involves the conservatorship or custody of a minor or other person under legal disability, enforcement of the judgment will not be suspended, with or without security, unless ordered by the trial court. But upon a proper showing, the appellate court may suspend enforcement of the judgment with or without security.

(5) For a Governmental Entity. When a judgment in favor of a governmental entity in its governmental capacity is one in which the entity has no pecuniary interest, the trial court must determine whether to suspend enforcement, with or without security, taking into account the harm that is likely to result to the judgment debtor if enforcement is not suspended, and the harm that is likely to result to others if enforcement is suspended. The appellate court may review the trial court's determination and suspend enforcement of the judgment, with or without security, or refuse to suspend the judgment. If security is required, recovery is limited to the governmental entity's actual damages resulting from suspension of the judgment.

(b) Lesser Amount.

1. The trial court **shall** lower the amount of the security ~~may order a lesser amount than~~ required by (a)(1) to an amount that will not cause the judgment debtor substantial economic harm, if, after notice to all parties and a hearing, the court finds that posting a bond, deposit, or security in the amount required by (a)(1) is likely to cause the judgment debtor substantial economic harm. ~~will irreparably harm the judgment debtor; and~~

~~(2) that posting a bond, deposit, or security in a lesser amount will not substantially impair the judgment creditor's ability to recover under the judgment after all appellate remedies are exhausted.~~

The trial court may enjoin the judgment debtor from dissipating or transferring assets to avoid satisfaction of the judgment, but the trial court may not make any order that interferes with the judgment debtor's use, transfer, conveyance, or dissipation of assets in the normal course of business.

[NOTE: HB4 only addresses money judgments, thus the standard for lesser security that has been a part of our rules is retained as to non-monetary judgments. Is there any sentiment for using the "new" standard for lesser security as to all judgments?]

2. The trial court may order a lesser amount than required by (a)(2)-(5)) if, after notice to all parties and a hearing, the court finds:

(1) that posting a bond, deposit, or security in the amount required by (a)(2)-(5) will irreparably harm the judgment debtor; and

(2) that posting a bond, deposit, or security in a lesser amount will not substantially impair the judgment creditor's ability to recover under the judgment after all appellate remedies are exhausted.

24.3 Continuing Trial Court Jurisdiction; Duties of Judgment Debtor

(a) Continuing Jurisdiction. Even after the trial court's plenary power expires, the trial court has continuing jurisdiction to do the following:

(1) order the amount and type of security and decide the sufficiency of sureties; and

(2) if circumstances change, modify the amount or type of security required to continue the suspension of a judgment's execution.

(b) Duties of Judgment Debtor. If, after jurisdiction attaches in an appellate court, the trial court orders or modifies the security or decides the sufficiency of sureties, the judgment debtor must notify the appellate court of the trial court's action.

24.4 Appellate Review

(a) Motions; Review. On a party's motion to the appellate court, that court may review:

(1) the sufficiency or excessiveness of the amount of security, provided that when the judgment is for money, the appellate court may not modify the amount of security to exceed the amount allowed under 24.2(a)(1);

(2) the sureties on any bond;

(3) the type of security;

(4) the determination whether to permit suspension of enforcement; and

(5) the trial court's exercise of discretion under 24.3(a).

(b) Grounds of Review. Review may be based both on conditions as they existed at the time the trial court signed an order, and on changes in those conditions afterward.

(c) Temporary Orders. The appellate court may issue any temporary orders necessary to preserve the parties' rights.

(d) Action by Appellate Court. The motion must be heard at the earliest practicable time. The appellate court may require that the amount of a bond, deposit, or other security be increased or decreased, and that another bond, deposit, or security be provided and approved by the trial court clerk. The appellate court may require other changes in the trial court order. The appellate court may remand to the trial court for entry of findings of fact or for the taking of evidence.

(e) Effect of Ruling. If the appellate court orders additional or other security to supersede the judgment, enforcement will be suspended for 20 days after the appellate court's order. If the judgment debtor does not comply with the order within that period, the judgment may be enforced. When any additional bond, deposit, or security has been filed, the trial court clerk must notify the appellate court. The posting of additional security will not release the previously posted security or affect any alternative security arrangements that the judgment debtor previously made unless specifically ordered by the appellate court.

Tex. R. App. P. 29 Orders Pending. Interlocutory Appeals in Civil Cases.
(I did not see that any changes were required).

29.1 Effect of Appeal

Perfecting an appeal from an order granting interlocutory relief does not suspend the order appealed from unless:

(a) the order is superseded in accordance with 29.2; or

(b) the appellant is entitled to supersede the order without security by filing a notice of appeal.

29.2 Security

The trial court may permit an order granting interlocutory relief to be superseded pending an appeal from the order, in which event the appellant may supersede the order in accordance with Rule 24. ~~[FN1]~~ If the trial court refuses to permit the appellant to supersede the order, the appellant may move the appellate court to review that decision for abuse of discretion.

29.3 Temporary Orders of Appellate Court

When an appeal from an interlocutory order is perfected, the appellate court may make any temporary orders necessary to preserve the parties' rights until disposition of the appeal and may require appropriate security. But the appellate court must not suspend the trial court's order if the appellant's rights would be adequately protected by supersedeas or another order made under Rule 24.

29.4 Enforcement of Temporary Orders

While an appeal from an interlocutory order is pending, only the appellate court in which the appeal is pending may enforce the order. But the appellate court may refer any enforcement proceeding to the trial

court with instructions to:

(a) hear evidence and grant appropriate relief; or

(b) make findings and recommendations and report them to the appellate court.

29.5 Further Proceedings in Trial Court

While an appeal from an interlocutory order is pending, the trial court retains jurisdiction of the case and may make further orders, including one dissolving the order appealed from, and if permitted by law, may proceed with a trial on the merits. But the court must not make an order that:

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

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

29.6 Review of Further Orders

(a) Motion to Review Further Orders. While an appeal from an interlocutory order is pending, on a party's motion or on the appellate court's own initiative, the appellate court may review the following:

(1) a further appealable interlocutory order concerning the same subject matter; and

(2) any interlocutory order that interferes with or impairs the effectiveness of the relief sought or that may be granted on appeal.

(b) Record. The party filing the motion may rely on the original record or may file a supplemental record with the motion.

House Bill 4, Article 7

Section 35.006, Civil Practice and Remedies Code, is amended to read as follows:

Sec. 35.006. STAY. (a) If the judgment debtor shows the court that an appeal from the foreign judgment is pending or will be taken, **that the time for taking an appeal has not expired, or that a stay of execution has been granted, has been requested, or will be requested,** and proves that the judgment debtor has furnished **or will furnish** the security for the satisfaction of the judgment required by the state in which it was rendered, the court shall stay enforcement of the foreign judgment until the appeal is concluded, the time for appeal expires, or the stay of execution expires or is vacated.

(b) If the judgment debtor shows the court a ground on which enforcement of a judgment of the court of this state would be stayed, the court shall stay enforcement of the foreign judgment for an appropriate period and require the same security for **suspending enforcement** ~~satisfaction~~ of the judgment that is required in this state **in accordance with Section 52.006.**

Chapter 52 of the Civil Practices and Remedies Code, to be amended as follows:

52.001 Definition (No change proposed)

In this chapter, "security" means a bond or deposit posted, as provided by the Texas Rules of Appellate Procedure, by a judgment debtor to suspend execution of the judgment during appeal of the judgment.

52.002 Bond or Deposit for Money Judgment **(Repealed)**

A trial court rendering a judgment that awards recovery of a sum of money, other than a judgment rendered in a bond forfeiture proceeding, a personal injury or wrongful death action, a claim covered by liability insurance, or a workers' compensation claim, may set the security in an amount less than the amount of the judgment, interest, and costs if the trial court, after notice to all parties and a hearing, finds that:

(1) setting the security at an amount equal to the amount of the judgment, interest, and costs would cause irreparable harm to the judgment debtor; and

(2) setting the security at the lesser amount would not substantially decrease the degree to which a judgment creditor's recovery under the judgment would be secured after the exhaustion of all appellate remedies.

52.003 Review for Sufficiency **(Repealed)**

In a manner similar to appellate review under Rule 49, Texas Rules of Appellate Procedure, of the sufficiency of the amount of security set by a trial court, an appellate court may review the sufficiency of the amount of security set by the trial court under Section 52.002.

52.004 Review for Excessiveness **(Repealed)**

(a) In a manner similar to appellate review under Rule 49, Texas Rules of Appellate Procedure, of the sufficiency of the amount of security set by a trial court, an appellate court may review for excessiveness the amount of security set by a trial court under:
(1) Section 52.002; or
(2) the Texas Rules of Appellate Procedure if security is not set under Section 52.002.

(b) If the appellate court finds that the amount of security is excessive, the appellate court may reduce the amount.

52.005 Conflict with Texas Rules of Appellate Procedure (No change proposed)

(a) To the extent that this chapter conflicts with the Texas Rules of Appellate Procedure, this chapter controls.

(b) Notwithstanding Section 22.004, Government Code, the supreme court may not adopt rules in conflict with this chapter.

(c) The Texas Rules of Appellate Procedure apply to any proceeding, cause of action, or claim to which Section 52.002 does not apply.

Sec. 52.006. AMOUNT OF SECURITY FOR MONEY JUDGMENT.

(a) Subject to Subsection (b), when a judgment is for money, the amount of security must equal the sum of:

(1) the amount of compensatory damages awarded in the judgment;

(2) interest for the estimated duration of the appeal; and

(3) costs awarded in the judgment.

(b) Notwithstanding any other law or rule of court, when a judgment is for money, the amount of security must not exceed the lesser of:

(1) 50 percent of the judgment debtor's net worth; or

(2) $25 million.

(c) On a showing by the judgment debtor that the judgment debtor is likely to suffer substantial economic harm if required to post security in an amount required under Subsection (a) or (b), the trial court shall lower the amount of the security to an amount that will not cause the judgment debtor substantial economic harm.

(d) An appellate court may review the amount of security as allowed under Rule 24, Texas Rules of Appellate Procedure, except that when a judgment is for money, the appellate court may not modify the amount of security to exceed the amount allowed under this section.

e) Nothing in this section prevents a trial court from enjoining the judgment debtor from dissipating or transferring assets to avoid satisfaction of the judgment, but the trial court may not make any order that interferes with the judgment debtor's use, transfer, conveyance or dissipation of assets in the normal course of business.

FYI

Post-judgment interest rate 10% to 5% (actually tied to prime rate as published by the federal Reserve Bank of New York on the date of computation but not less than 5%).

Effective Date: "The changes in law made by this article apply in any case in which a final judgment is signed or is subject to appeal on or after the effective date of this Act." (Sept. 1, 2003).

167.[1] OFFER OF SETTLEMENT; AWARD OF ~~VOIDABLE~~ LITIGATION EXPENSES; ~~POST-REJECTION COSTS, INCLUDING CERTAIN FEES AND EXPENSES[2] FOR UNREASONABLE[3] REJECTION~~

167.1 DEFINITIONS. ~~In this chapter:~~

(1) "Claim" means a request, including a counterclaim, cross-claim, or third-party claim, to recover monetary damages.

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

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

(4) "Governmental unit" means the state, a unit of state government, or a political subdivision of this state.

(5) "Litigation costs" means money actually spent and obligations actually incurred that are directly related to the case in which a settlement offer is made. The term includes:

(A) taxable court costs[4];

(B) reasonable fees for not more than two testifying expert witnesses who are not regular employees of the offeror and when expert testimony is necessary[5]; and

(C) reasonable attorney's fees.

(6) "Settlement offer" means an offer to settle or compromise a claim made in compliance with this rule~~chapter~~.

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[1]More of the purpose and intended operation of this rule can be explained in comments as was done, for example, in the discovery rules changes.

[2]The use of sanctions in the procedural rules to shift costs, expenses, and attorney fees for improper conduct has solid precedent. See TEX.R.CIV.P. 13 (frivolous pleadings); TEX.R.CIV.P. 215 (discovery abuse); TEX.R.APP.P. 45 and 62 (frivolous appeals). The improper conduct addressed by this rule is unreasonable refusal to settle. The sanction must, of course, fall on the culprit, so whoever controls settlement -- an insurer, for example - bears the responsibility for sanctions. See 167.6(c).

[3]This is the essential point. The rules should not force settlement of claims that should fairly be litigated, but neither should they condone unnecessary or harassing litigation. The rule describes what is unreasonable.

[4] It may be useful to limit court costs recoverable to those that are "taxable", to provide some certainty to the amount of costs that may be shifted.

[5] This limitation comports with the vote taken at the April 2003 SCAC meeting.

167.2 ~~Sec. 42.002.~~ APPLICABILITY AND EFFECT. (a) The settlement procedures provided in this rule ~~chapter~~ apply only to claims for monetary relief.

(b) This rule ~~chapter~~ does not apply to:

(1) a class action;

(2) a shareholder's derivative action;

(3) an action by or against a governmental unit;

(4) an action brought under the Family Code;

(5) an action to collect workers' compensation benefits under Subtitle A, Title 5, Labor Code; or

(6) an action filed in a justice of the peace or small claims[6] court.

(7) the Deceptive Trade Practices—Consumer Protection Act, sections 17.41-.63 of the Business and Commerce Code;[7] [8]

Others?????????????[9]

(c) This rule ~~chapter~~ does not apply until a defendant files a declaration that the settlement procedure allowed by this rule ~~chapter~~ is available in the action. If there is more than one defendant, the settlement procedure allowed by this rule ~~chapter~~ is available only in relation to the defendant that filed the declaration and to the parties that make or receive offers of settlement in relation to that defendant. Such a declaration must be filed no later than the defendant's appearance date.?????? [10]

(d) This rule ~~chapter~~ does not limit or affect the ability of any person to:

(1) make an offer to settle or compromise a claim that

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[6] It would be odd if a JP action were exempt from the rule, but not a Small Claims action.

[7] The DTPA has its own remedies for refusal to settle. TEX.BUS.&COM.CODE §§17.505-.5052.

[8] Committee discussion. Transcript, p. 8211. Query. If the lawsuit asserts claims, some excluded (DTPA) some not excluded, is the rule inoperative to the entire proceeding?

[9] Under HB4, the Supreme Court has the authority to designate other actions that will be exempt from the operation of the offer of settlement rules.

[10] The time for the defendant to make the declaration should be early in the lawsuit. This will allow parties to expedite discovery if necessary to assist in evaluation of the value of the case.

does not comply with this rule ~~chapter~~; or

(2) offer to settle or compromise a claim to which this rule ~~chapter~~ does not apply.

(e) An offer to settle or compromise that is not made under this rule ~~chapter~~ or an offer to settle or compromise made in an action to which this rule ~~chapter~~ does not apply does not entitle the offering party to recover litigation costs under this rule ~~chapter~~.

167.3. MAKING SETTLEMENT OFFER. A settlement offer must:

(1) be in writing;

(2) state that it is made under this rule ~~chapter~~;

(3) state the terms by which the claims may be settled; and must offer to settle all monetary claims raised by the pleadings between the offeror and offeree??? [Query, may the offer encompass other conditions the offeror may choose to include, perhaps knowing the offer will be rejected because of those conditions, as a means of achieving fee shifting? Ex. Return all discovery, confidentiality, etc.] [11]

(4) state a deadline by which the settlement offer must be accepted which must be date at least 14 days after the offer is served[12]; and

(5) be served on all parties to whom the settlement offer is made.

~~**Generally.** A party[13] who rejects an offer of settlement made in accordance with this rule may be responsible for avoidable litigation expenses except in an action brought in a small claims or justice court or under:~~[14]

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[11] Nevada's rule provides extensive provisions regarding multi-parties.

a) Multi-parties may make a joint offer of judgment.
b) A party may make two or more parties an apportioned offer of judgment that is conditioned upon acceptance by all the parties.
c) The sanctions for refusing an offer apply to each party who rejected the apportioned offer, but not to a party who accepted the offer.

[12] This reflects the April 2003 vote at our last SCAC meeting.

[13] This includes governmental entities and cases like eminent domain, delinquent taxes, etc. Some proposals would exclude actions by and against the government.

[14] Committee discussion. Transcript, p. 8211. Query. If the lawsuit asserts claims, some excluded (DTPA) some not excluded, is the rule operative to the entire proceeding?

~~(a) article 5.14 of the Texas Business Corporation Act;[15]~~

~~(b) Rule 42 of the Texas Rules of Civil Procedure in which a class has been certified;[16]~~

~~(c) the Deceptive Trade Practices - Consumer Protection Act, sections 17.41-.63 of the Business and Commerce Code;[17]~~

~~(d) the Family Code;[18]~~

~~(e) chapter 410, subchapters F and G of the Labor Code.[19]~~[20]

167.42 Time Limitations on Making Offer~~Making an Offer~~.

(a) *Requirements*. The offer must:

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[15]A settlement of a shareholder derivative suit must have court approval. TEX.BUS.CORP.ACT art. 514(I).

[16]A settlement of a certified class action must have court approval. TEX.R.CIV.P. 42(e).

[17]The DTPA has its own remedies for refusal to settle. TEX.BUS.&COM.CODE §§17.505-.5052.

[18]It is not yet clear how procedures like these could apply in family cases.

[19]A settlement of a workers' compensation case must be approved by the court. TEX.LABOR CODE § 410.256.

[20]The rule does not apply to cases in which group settlement must be approved by the court (i.e., (a), (b), and (e)), cases in which the consequences for refusing to settle are provided by statute (i.e., (c)), and family law cases. Some proposals would also exclude:

! actions for which recovery of attorney fees and costs is provided by statute. But this is so large a category of cases (see TEX.CIV.PRAC.&REM.CODE § 38.001) that the effect of the rule would be severely limited. Moreover, it is not clear why such cases should be excluded. The principal argument appears to be that application of the rule in such cases may be more difficult.

! actions for nonmonetary relief. Again, it is not clear why, other than that the rule is more difficult to apply. The proposed change in FED.R.CIV.P. 68 would have included such actions. Thus, such cases are not excluded entirely under this rule, although a claim for nonmonetary relief may not provide a basis for the imposition of costs pursuant to this Rule.

~~! actions in which damages are capped. The concern is that settlement offers will be distorted by the cap. For example, if the plaintiffs recovery were capped at $100,000, the defendant could trigger the rule by a $70,000 offer, even if the plaintiff believed damages might well exceed the cap. Plaintiffs could use similar strategies against defendants. But many cases asserting actions with a damage cap would not be subject to this strategic abuse. The better solution is to deal with strategic abuse rather than except entire categories of cases.~~

~~! actions in the justice and small claim courts. It would be difficult for the rule to apply in eviction cases, for example, but there might be instances when it would apply. Many unsophisticated litigants would not be able to use the rule effectively, and perhaps that is a reason to exclude such cases.~~

(1) be made

(A) for cases governed by

(i) Rule 190.2, more than thirty days after the appearance in the case of the offeror or offeree, whichever is later;[21]

(ii) Rule 190.3 or Rule 190.4, more than ninety days after the appearance in the case of the offeror or offeree, whichever is later; and,

~~(iii) Rule 190.4, on or after a date to be stated in the scheduling order; and~~ (B) no less than thirty days before the date ~~a~~ the case is set for a conventional trial on the merits ~~is set for trial for~~[22], or if in response to a prior offer, within three days of the prior offer, whichever is later.[23]

~~(2) be in writing;~~

~~(3) identify the party or parties making the offer and the party or parties to whom the offer is being made;~~

~~(4) state that it is being made in accordance with this rule;~~

~~(5) offer to settle all the claims for monetary relief[24] in the action between the offeror and offeree;[25]~~

~~(6) specify the terms of settlement, including the amount of attorneys' fees being claimed~~

~~; if the offeror has a claim against the offeree for the recovery of~~

[21] Various proposals differ greatly over this start time. The point of the rule is to encourage early evaluations of cases, but often some discovery is needed. The party with less information to start with may be unduly pressured by a quick offer.

[22] Trial commences when the first witness is called to testify.

[23] While the purpose of the rule is to encourage early evaluation of cases, it can be anticipated that often settlement discussions will be more serious very close to trial. Even if the only savings were trial expenses, the purpose of the rule would be served.

[24] This includes only monetary ~~and non-monetary~~ claims. A nominal offer could not be the basis for ~~sanctions~~ the imposition of costs if not made in good faith. See 167.6(~~c~~d)(3)(A). Should "not" be removed?

[25] Difficulties in applying the rule may arise in multi-party cases when only some of the parties are attempting to settle. An offer to one party that is conditioned on acceptance of another offer to another party may also give rise to difficulties, but these factors should be considered by the court under 167.6(d)(3). This point can be made in a comment.

~~attorneys' fess;~~[26]

~~(7) specify a date by which the offer must be accepted "the acceptance date" which must be either a date at least fourteen days after the offer is served; and~~

~~(8) be served~~[27] ~~on the offeree.~~

167.5 ~~(b)~~ Successive Offers. ~~*Successive offers.*~~ A party may make an offer after having made or rejected a prior offer. A rejection of an[28] offer that exceeds an offeror's prior offers, if any, is subject to imposition of ~~avoidable~~ litigation expenses under this rule.

167.6 ~~(c)~~ Modification of Ttime Limits. The court may modify any of the time limits proscribed by this Rule by written order entered before trial for good cause shown upon the motion of any party or on its own initiative.

167.73 Withdrawal of Offer. An offer can be withdrawn before it is accepted. Withdrawal is effective when written notice of the withdrawal is served on the offeree.[29] Once an unaccepted offer has been withdrawn, it cannot be accepted or be the basis for imposing ~~avoidable~~ litigation expenses under this rule.

167.84 Acceptance of Offer. An offer that has not been withdrawn can be accepted only by written notice served on the offeror by the acceptance date. When an offer is accepted, the offeror or offeree may file the offer and acceptance along with a motion for judgment. (Is it desirable to include a provision that the acceptance must be unconditional?)

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[26]Some proposals require that the offeror agree to rendition of judgment consistent with the terms of settlement, but agreement to a judgment should simply be on term an offer may make.

[27]This rule can specify that service is under Rule 21 a (as for other post-petition papers) and include Rules 4 and 5 (which prescribe time periods), or that point, which ought to be apparent, can be made in a comment.

[28]Imposing costs for the rejection of the last offer that exceeds all prior offers is intended to encourage parties to arrive at a realistic offer sooner than later. While it might be argued that imposing costs only for the rejection of a party's last offer would not seem to encourage plaintiffs to make lower offers earlier, the fact that plaintiffs can only recover costs if the judgment is at least 130% of their highest offer provides a strong incentive for plaintiffs not to make their highest offer unrealistically high. Additionally, the dynamics of settlement negotiations usually serve to discourage ever – increasing offers from plaintiffs. Awarding costs only from the time of the highest offer should encourage defendants to make higher offers earlier, when expenses can be avoided. ~~Sanctioning the rejection of any offer, not just the last offer, appears to be the most common proposal. Sanctioning only the rejection of a party's last offer would not seem to encourage plaintiffs to make lower offers earlier and defendants to make higher offers earlier, which expenses can be avoided. Thus, for example, a plaintiff who offered $10,000 sixty days before trial, $20,000 thirty days before trial, and $30,000 ten days before trial, and who recovered $20,000, would be entitled to sanctions under the rules as written, but not if only the last offer mattered. By the same token, a defendant who offered $30,000 sixty days before trial, $20,000 thirty days before trial, and $10,000 ten days before trial, and who suffered a $20,000 judgment, would be entitled to sanctions under the rule as written, but not if only the last offer mattered.~~ But the issue is not a simple one.

[29]It should be noted, here and elsewhere, that services is ordinarily effective upon the sender's completion of the prescribed process and does not await receipt.

167.95 Rejection of Offer. An offer may be rejected by written notice served on the offeror by the acceptance date, or by failure to respond on or before the acceptance date; which is deemed to be a rejection.

167.10 OFFEREE MAY DECLARE OFER VOID UNDER CERTAIN CIRCUMSTANCES.

HB 4 mandates inclusion of the following:

In actions involving multiple parties, if the offering party joins another party or designates a responsible third party after making the settlement offer, the party to whom the settlement offer was made may declare the offer void.

Query: Can the offeree declare the offer void after acceptance? Should there be a time limit? What is the outside time limit for a defendant to designate a responsible third party? HB4 amends Ch. 33, CPRC 33.004(a): "The motion must be filed on or before the 60th day before the trial date unless the court finds good cause to allow the motion to be filed at a later date."

167.116 AWARDING LITIGATION COSTS.

(a) If a settlement offer is made and rejected and the final[30] judgment to be rendered will be significantly less favorable to the rejecting party than was the settlement offer, the offering party shall recover litigation costs from the rejecting party.

(b) A judgment will be significantly less favorable to the rejecting party than is the settlement offer if:

(1) the rejecting party is a claimant and the award will be less than 80 percent of the rejected offer; or

(2) the rejecting party is a defendant and the award will be more than 120 percent of the rejected offer.

(c) The litigation costs that may be recovered by the offering party under this section are limited to those litigation costs incurred [31]by the offering party, in relation to the offeree,[32] after the date the rejecting

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[30] In determining whether a judgment is significantly less favorable to the rejecting party, the court must consider any remittiturs, and any modifications to the judgment, including the granting of a judgment n.o.v..

It may be necessary to modify Tex. R. Civ. P. 315. It currently provides: Rule 315 (Tex. R. Civ. P.): "Any party in whose favor a judgment has been rendered may remit any part thereof in open court, or by executing and filing with the clerk a written remittitur signed by the party....Execution shall issue for the balance only of such judgment." Tex. R. App. P. 46, allows the court of appeals to suggest a remittitur, and if accepted it is to "reform and affirm the trial court's judgment in accordance with the remittitur." Two problems: Is a modified judgment necessary upon remittitur? Can a plaintiff voluntarily remit to bring the case outside the 20% margin?

party rejected the settlement offer. until the date the final judgment is signed????[33]

(d) The litigation costs that may be awarded under this rule [34]~~chapter~~ may not be greater than an amount computed by:

(1) determining the sum of:

(A) 50 percent of the economic damages to be awarded to the claimant in the judgment;

(B) 100 percent of the noneconomic damages to be awarded to the claimant in the judgment; and

(C) 100 percent of the exemplary or additional damages to be awarded to the claimant in the judgment; and

(2) subtracting from the amount determined under Subdivision (1) the amount of any statutory or contractual liens in connection with the occurrences or incidents giving rise to the claim. [35]

(e) If a claimant or defendant is entitled to recover fees and costs under another law, that claimant or defendant may not recover litigation costs in addition to the fees and costs recoverable under the other law.[36]

(f) If a claimant or defendant is entitled to recover fees and costs under another law, the court must not include fees and costs incurred by that claimant or defendant after the date of rejection of the settlement offer when calculating the amount of the judgment to be rendered under Subsection (a).[37]

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[31] Should "incurred" be defined? Are attorney's fees incurred at the billable rate or some lesser rate that the firm has contracted to accept from an insurer, for example?

[32] So, for example, when multiple parties are incurred, the attorney's fees that might be shifted must be segregated as to the offeree against whom the fees are sought.

[33] Making clear appellate attorney's fees, for example, may not be shifted.

[34] Apparently this cap applies to both Plaintiffs and Defendants, so that Defendant's liability for fees shifted are capped by the Plaintiff's recovery. Further, if a take-nothing judgment is entered, apparently no fee shifting will occur.

[35] What would this include? Hospital liens-Chapter 55 Texas Property Code- See Karen L. Neal, Ten Basic Facts to Know-The Texas Hospital Lien Statute, 61 Tex. B. J. 428 (1998). Would the attorney's have a lien?

[36] Is a party "entitled" to attorney's fees under "another law" when the granting of fees is discretionary? Can a party elect between a statute and this rule?

[37] This seems to suggest that otherwise the amount of attorney's fees and costs are included in calculating the amount of the judgment to be rendered under Subsection (a).

(g) If litigation costs are to be awarded against a claimant, those litigation costs shall be awarded to the defendant in the judgment as an offset against the claimant's recovery from that defendant.

~~**Imposition of Avoidable litigation expenses.**~~

~~(a) *Availability*. If the judgment to be rendered[38] is significantly less favorable to a party than an offer the party rejected, the offeror may move for imposition of avoidable litigation expenses. A motion to impose avoidable litigation expenses made after judgment is signed is a motion to modify, correct, or reform the judgment and is governed by the timetables in Rule 329b. A judgment is significantly less favorable than an offer~~

~~(1) to a party making a claim if a monetary award – including, if awarded, only those costs, attorney fees, and interest incurred as of the date of the offer was rejected – is less than 70%[39] of the amount offered;[40] and~~

~~(2) to a party against whom a claim is made if that portion of a monetary award – including costs, attorney fees, and interest found by the court to have been – attributable to the period of time before the offer was rejected is more than 130% of the amount offered.~~

~~(b) *Amount*. The court, after a hearing at which the parties may present evidence, must[41] award the offeror as avoidable litigation expenses those amounts reasonably and necessarily[42] required to compensate the offeror for post-rejection~~

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[38]The rule is not limited to judgments on verdicts but includes, for example, summary judgments, judgments after directed verdicts, and judgments notwithstanding verdicts.

[39]Some proposals have a 10% differential. The margin of error should reflect the usual difficulties involved in evaluating cases for settlement.

[40]Of course, all of the terms of the offer must be considered in determining "the amount offered", so that a pay-out over time may be worth less than immediate payment, and a secured offer may be worth more than an unsecured one. This point can be made in a comment. ~~A comment should also warn against use of the margin of error to determine the amount of the offer in cases in which damages are capped.~~

[41]This initial proposition is nondiscretionary. Discretion can be employed in the situations later described in 167.6(d)(3).

[42]Nothing is said specifically about contingent fee arrangements, but under existing law, which can be referenced in a comment, such agreements may be taken into account in determining a reasonable fee.

167.[1] OFFER OF SETTLEMENT; POST-REJECTION COSTS, INCLUDING CERTAIN FEES AND EXPENSES FOR UNREASONABLE[2] REJECTION

167.1 Generally. A party[3] who rejects an offer of settlement made in accordance with this rule may be sanctioned except in an action brought in a small claims or justice court or under:

(a) Article 5.14 of the Texas Business Corporation Act;[4]

(b) Rule 42 of the Texas Rules of Civil Procedure in which a class has been certified;[5]

(c) the Deceptive Trade Practices-Consumer Protection Act, section 17.41-.63 of the Business and Commerce Code;[6]

(d) The Family Code;[7]

(e) chapter 410, subchapters F and G of the Labor Code.[8][9]

167.2 Making of Offer

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[1] More of the purpose and intended operation of this rule can be explained in comments as was done, for example, in the discovery rules changes.

[2] This is the essential point. The Rules should not force settlement of claims that should fairly be litigated, but neither should they condone unnecessary or harassing litigation. The rule describes what is unreasonable.

[3] This includes governmental entities and cases like eminent domain, delinquent taxes, etc. Some proposals would exclude actions by and against the government.

[4] A settlement of a shareholder derivative suit must have court approval. TEX. BUS. CORP. ACT art. 5.14(I).

[5] A settlement if a certified class action must have court approval. TEX. R. CIV. P. 42(e).

[6] The DTPA has its own remedies for refusal to settle. Tex. Bus. & Com. Code §§ 17.505-.5052.

[7] It is not yet clear how procedures like these could apply in family cases.

[8] A settlement of a workers' compensation case must be approved by the court. TEX. LABOR CODE § 410.256.

[9] The rule does not apply to cases in which group settlements must be approved by the court (i.e., (a), and (b), and (e)), cases in which the consequences for refusing to settle are provided by statute (i.e., (c)), and family law cases. Some proposals would also exclude:

- actions for which recovery of attorney fees and costs is provided by statute. But this is so large a category of cases (*see* TEX. CIV. PRACT.& REM. CODE § 38.001) that the effect of the rule would be severely limited. Moreover, it is not clear why such cases should be excluded. The principal argument appears to be that application of the rule in such cases may be more difficult.
- actions for nonmonetary relief. Again, it is not clear why, other than that the rule is most difficult to apply. The proposed change in FED. R. CIV. P. 68 would have included such actions. Thus such cases are not excluded entirely under this rule, although a claim for non-monetary relief may not provide a basis for the imposition of costs pursuant to this Rule.

(a) *Requirements.* The offer must

(1) be made

(A) For cases governed by (i) Rule 190.2, more than thirty days after the appearance in the case of the offeror or offeree, whichever is later;[10] (ii) Rule 190.3, more than ninety days after the appearance in the case of the offeror or offeree, whichever is later; (iii) Rule 190.4, on or after a date to be stated in the scheduling order; provided, however, that if discovery is stayed in any of the foregoing cases, the applicable time period shall run from the date discovery may commence; and

(B) no less than thirty days before the date of trial, or if in response to a prior offer, within three days of the prior offer, whichever is later.[11]

(2) be in writing;

(3) identify the party or parties making the offer and the party or parties to whom the offer is being made;

(4) state that it is being made in accordance with this rule;

(5) offer to settle all of the claims for monetary relief[12] in the action between the offeror and offeree;[13]

(6) specify the terms of settlement[14], including the amount of attorneys' fees being claimed if the offeror has a claim against the offeree for the recovery of attorneys' fees.

(7) specify a date by which the offer must be accepted – "the acceptance date" – which must be either a date at least fourteen days after the offer

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[10] Various proposals differ greatly over this start time. The point of the rule is to encourage early evaluations of cases, but often some discovery is needed. The party with less information to start with may be unduly pressured by a quick offer.

[11] While the purpose of the rule is to encourage early evaluation of cases, it can be anticipated that often settlement discussions will be more serious very close to trial. Even if the only savings were trial expenses, the purpose of the rule would be served.

[12] This includes only monetary claims. A nominal offer could not be the basis for the imposition of costs if not made in good faith. See 167.6(d)(3)(A).

[13] Difficulties in applying the rule may arise in multi-party cases when only some of the parties are attempting to settle. An offer to one party that is conditioned on acceptance of another offer to another party may also give rise to difficulties, but these factors should be considered by the court under 167.6(d)(3). This point can be made in a comment.

[14] Some proposals require that the offeror agree to rendition of judgment consistent with the terms of settlement, but agreement to a judgment should simply be one term offer may make.

is served; and

(8) be served[15] on the offeree.

(b) *Successive offers.* A party may make an offer after having made or rejected a prior offer. A rejection of an[16] offer that exceeds an offeror's prior offers, if any, is subject to imposition of costs under this rule.

(c) *Modification of time limits.* The court may modify any of the time limits in this Rule by written order entered before trial for good cause shown upon the motion of any party or on its own initiative.

167.3 Withdrawal of offer. An offer can be withdrawn before it is accepted. Withdrawal is effective when written notice of the withdrawal is served on the offeree.[17] Once an unaccepted offer has been withdrawn, it cannot be accepted or be the basis for imposing costs under this rule.

167.4 Acceptance of Offer. An offer that has not been withdrawn can be accepted only by written notice served on the offeror by the acceptance date. When an offer is accepted, the offeror or offeree may file the offer and acceptance along with a motion for judgment.

167.5 Rejection of Offer. An offer may be rejected by written notice served on the offeror by the acceptance date, or by failure to respond on or before the acceptance date; which, is deemed to be a rejection

167.6 Imposition of Costs.

(a) *Availability.* If the judgment to be rendered[18] is significantly less favorable to a party than an offer the party rejected, the offeror may move for imposition of costs. A judgment is significantly less favorable than an offer –

(1) to a party making a claim if a monetary award – including awarded,

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[15] This rule can specify that service is under Rule 21a (as for other post-petition papers) and include Rules 4 and 5 (which prescribe time periods), or that point, which ought to be apparent, can made be in a comment.

[16] Imposing costs for the rejection of the last offer that exceeds all prior offers is intended to encourage parties to arrive at a realistic offer sooner than later. While it might be argued that imposing costs only for the rejection of a party's last offer would not seem to encourage plaintiffs to make lower offers earlier, the fact that plaintiffs can only recover costs if the judgment is at least 130% of their highest offer provides a strong incentive for plaintiffs not to make their highest offer unrealistically high. Additionally, the dynamics of settlement negotiations usually serve to discourage ever – increasing offers from plaintiffs. Awarding costs only from the time of the highest offer should encourage defendants to make higher offers earlier, when expenses can be avoided. But the issue is not a simple one.

[17] It should be noted, here and elsewhere, that service is ordinarily effective upon the sender's completion of the prescribed process and does not await receipt.

[18] The rule is not limited to judgments on verdicts but includes, for example, summary judgments, judgments after directed verdicts, and judgments notwithstanding verdicts.

only those costs, attorney fees, and interest incurred as of the date the offer was rejected – is less than 70%[19] of the amount offered;[20] and

(2) to a party against whom a claim is made if that portion of a monetary award – including costs, attorney fees, and interest found by the court to have been – attributable to the period of time before the offer was rejected is more than 130% of the amount offered.

(b) *Amount.* The court, after a hearing at which the parties may present evidence, must[21] award the offeror as costs those amounts reasonably and necessarily[22] required to compensate the offeror for post-rejection and prejudgment:

(1) court costs;[23]

(2) fees and expenses for no more than two testifying expert witnesses[24] who are not regular employees of the offeror[25] (but not for consulting expert witnesses); and

(3) attorney fees and expenses, if the offeror was represented by an attorney.

(c) *Limitations and Exceptions.* The imposition of costs is subject to the following limitations and exceptions:

(1) costs may not exceed $50,000;[26]

(2) Costs imposed on a party with respect to its claims for monetary relief may not exceed the amount awarded the party by the judgment; and[27]

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[19] Some proposals have a 10% Differential. The margin of error should reflect the usual difficulties involved in evaluating cases for settlement.

[20] Of course, all of the terms of the offer must be considered in determining "the amount offered", so that a pay-out over time may be worth less than immediate payment, and a secured offer may be worth more than an unsecured one. This point can be made in a comment.

[21] This initial proposition is nondiscretionary. Discretion can be employed in the situations later described in 167.6(d)(3).

[22] Nothing is said specifically about contingent fee agreements, but under existing law, which can be referenced in a comment, such agreements may be taken into account in determining a reasonable fee.

[23] Court costs are defined by rule, case law, or contract. See Allen & Ellis, W*hat are Taxable Court Costs in Texas?*. Houston Lawyer (Sept.-Oct. 1998).

[24] The rule does not specify which two.

[25] A party would not ordinarily pay its own employee a fee for expert testimony.

[26] This absolute dollar limit ought to be at the 70- or 90- percentile level of cases affected, so that cases with exceptionally large trial expenses are not subjected to a "lottery" kind of rule.

[27] These subsections apply independently. Thus, for example, costs imposed on a claimant cannot be as much as the amount awarded by judgment if that amount exceeds $50,000. A defendant who has a legitimate counterclaim for monetary relief is also protected from suffering an imposition of costs in excess

(3) the court may reduce the amount of costs awarded or refuse to award any amount of costs at all if the court determines in detailed, written findings[28] that an imposition of costs:

(A) would unjustly punish a party or unjustly reward unfair, strategic conduct rather than a good faith attempt to reach a settlement, or

(B) would not further the purpose of this rule in promoting reasonable settlements and avoiding the expense to the public and to the parties of unnecessary litigation.

In determining the reasonableness of the amount of costs imposed, the court shall also consider, along with all other relevant material, the following factors:

(i) the then-apparent merit or lack of merit in the claim;[29]

(ii) the number and nature of the offers made by the parties;

(iii) the closeness of questions of law and fact in issue;

(iv) whether the party making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer;

(v) whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties; and

(vi) the amount of this additional delay, cost and expense that the party making the offer reasonably would be expected to incur if the litigation were to be prolonged.

167.7 Evidence Not Admissible. Evidence relating to an offer is not admissible except for purposes of enforcing a settlement agreement or obtaining costs under this rule. The provisions of this rule may not be made known to the jury by any means.

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of its monetary recovery on its claim. A defendant may not benefit from this provision by asserting a frivolous claim for monetary relief.

[28] The trial court must have enough discretion to prevent an unjust or perverse application of the rule, but not so much that it can simply refuse to follow the rule. The requirement that findings be made is intended to provide an appellate court with an adequate, understandable explanation of the reasons for not applying the rule in a particular situation.

[29] i.e., apparent at the time of rejection of the offer.

167.8 Other Dispute Resolution Mechanisms Not Affected. This rule does not apply to any offer made in a mediation proceeding and should not affect other alternate dispute resolution mechanisms. The rule does not apply to or preclude offers of settlement that do not comply with the rule.

167.9 Appellate Review. A judgment awarding costs or reducing or refusing to award costs under 167.6(c) may be reviewed for an abuse of discretion on the appeal of the judgment.

EMAILS REGARDING OFFER OF SETTLEMENT RECEIVED ON DRAFT GENERATED AFTER LAST MEETING BEFORE TRANSCRIPT WAS AVAILABLE

From Pete Schenkkan (4/21)

The new draft puts the "Florida factors" in the proposed rule. Does this reflect our intent? My notes indicate that we voted 16-7 not to put them in the rule, then voted 14- 11 to put them in the footnote/comments. Tr. 8244 and 8245 are consistent with my notes.

From Carl Hamilton (4/22)

To: Chip Babcock

Re: Offer of Settlement Rule

The following are my comments about the Offer of Settlement Rule:

Line 38: The word "either" does not seem to be appropriate since there is noother alternative but 14 days after the offer is served.

Footnote 12: The reference to 167.6(d)(3)(A) is apparently incorrect and should be 167.6(c)(3)(A).

Also, I am not certain that the footnote is worded correctly when it says a nominal offer could not be the basis for the imposition of costs if not made in good faith. Should that read, "a nominal offer could be the basis for the imposition of costs if not made in good faith"?

Line 62: I think the word "if" needs to be inserted between the words "including" and "awarded."

Line 84: Although we probably did not discuss this, it seems that the word "detailed" in unnecessary and may have unintended consequences. I am not sure that it is intended to add anything more than the ordinary requirement of written findings to support the trial court action.

That is all I have. Carl

From Justice Tom Gray (4/23)

To: Chip Babcock

From: Tom Gray

CC: SCAC

Re: Offer of Settlement...

I am new to this so I will follow Carl's format. Also because I am new to this, as I understand it, this is not a conventional mechanism and is unique to this rule and situation, so I have endeavored to limit my comments, and make them without any suggestion that I would support everything else in the rule as drafted. But still I must apologize for the length of these comments.

Line 25: I thought in reference to the closing date of the window to make an offer, "trial" was going to be referred to as "a conventional trial on the merits."

While I have not thought about all the mechanics of how this would work, here is the scenario that I seek to avoid: Offeree makes the offer 10 days before a summary judgment hearing. The hearing is held as scheduled. The motion is taken under advisement. Discovery continues. Discovery continues. Motion practice continues. You get the idea. Trial setting. Trial courts grants the summary judgment that would trigger the application of the rule...except that it was made within 30 days of the "trial."

Line 38: I agree with Carl. There is no alternative so "either" should be removed.

Line 58 and throughout where the term "cost" is used: I remain troubled about the use of this term. As many on the committee acknowledged, we all have our own concepts of what "cost" means and even though we try to be more descriptive in the rule, I believe that the use of a term that has so much history and preconceptions, when used in reference to a new situation, will increase the confusion and resistance to achieving the goal of the new rule. In light of these concerns, please consider the use of a term such as "Avoidable Litigation Expenses" or "Unnecessary Litigation Expenses" or something that alludes to the fundament nature of what it is that the rule is trying to address. I acknowledge this will be more cumbersome in drafting the rule but I also believe it will add significantly to the clarity of the rule.

Line 69-71: My problem with the way this is drafted is the injection of a flexible quantitative (read that as a question of fact) and possibly a qualitative (read that as trial court discretion) standard--reasonably and necessarily required to compensate the offeror--at this stage of the rule. Please remember that I am approaching this from the perspective of having to review on appeal an award or denial of some amount under this rule. I would capture in the "amount" all expenses and place the qualifier for unreasonable and unnecessary expense as a "Limitation and Exception" requiring the trial court to make "detailed findings" to support the reduction. Thus, "(b) Amount" would read: "The court, after a hearing at which the parties may present evidence, must award the offeror as Avoidable Litigation Expense the post-rejection and prejudgment amount of...[then listing the three categories of expense as now set out in the draft]." A sub-section 167.5(c)(3)(C) would be added as follows: "would otherwise include an amount the trial court determines is unreasonable or unnecessary." With this change in structure of the rule, any deduction from the expenses that were determined by the trial court to be unreasonable and unnecessary would be subject to the written findings requirements on lines 84-85 of the draft.

Line 84: Insert the word "only" after "all" so that it reads: "the court may reduce the amount of costs awarded, or refuse to award any amount of costs at all, only if the court determines in detailed, written findings that an imposition of costs:..." But I do agree with Carl that "detailed" is not necessary and may have unintended consequences. If trial court findings get any more "detailed" for this proceeding than they do for bench trials, as compared to jury findings, the trial court will have to detail the evidence found to be credible rather than making findings necessary to support the award.

Line 86: Does not need the words "a party" in the first phrase.

Line 92: This new language inserts another qualitative (read that trial court discretion) standard into the determination of the amount. The only "reasonableness" requirement up to this point in the rule is the one discussed above as to the reasonable and necessary expenses. Whether the above suggested change is made or not, the trial court must make the determination that the award is for reasonable and necessary cost. As this qualifier is worded, it appears to refer to the amount to be awarded in the overall sense. This may simply be a problem caused by the referenced to reasonableness, the structure, and the placement of the introduction of the Florida Factors to be considered. Try this, whether this is in the text of the rule or the footnote: "In determining the amount of reduction, if any, under 167.5(c)(3)(A)&(B), the court should consider, along with any other relevant factor, the following:..."

Line 105: Why should the factor be limited to the far-reaching importance affecting nonparties. Why not simply "...questions of far-reaching importance;" Maybe it is a small case but will have bet-the-company implications if it is settled without a trial on the merits.

Line 109: Should "made under this rule" be inserted after the word "offer?" It would read "Evidence relating to an offer made under this rule is not admissible..."

Line 119: Yes, I know that there is not a Line 119. Again, please remember that I am thinking about how I am going to have to review one of these orders. Please consider the "detailed, written findings" required by the rule on line 84-85 could be done in any of several ways--dictated into the reporters record (this satisfies the written requirement in some aspects of criminal cases), in the judgment/order, or in a writing separate from the judgment. Do we want to be more specific? What about the time within which they must be prepared? Also, do we want to specify a standard of review for the required findings. Are they subject to the usual legal and factual sufficiency reviews, substantial-evidence-in-the-record review, or some-evidence-in-the-record-to-support review? I care less about the chosen standard than I do that it is specified. But I would suggest that if there is substantial evidence in the record to support the court's finding, an appropriate balance between the rigors of an evidentiary hearing and the goal of the rule is achieved. Thus Line 119 would be: "The trial court's written findings required by this rule are to be prepared on the time-table of TRCP 297, may be dictated into the record, appear in the judgment, or in a separate writing, and may be reviewed on appeal, if properly challenged, to determine if there is substantial evidence in the record to support the finding." You may want to consider breaking this down into multiple sub-parts.

If you are curious as to my concerns regarding the specification for the standard of review, I invite you to consider the excerpt below from Bocquet v. Herring, 972 S.W.2d 19 (Tex. 1998) discussing attorney fees awarded under the Declaratory Judgments Act. It is this type of dispute that I am trying to avoid.

If you got to here, thanks for taking the time to read this.

Chip, if this is not appropriate under the circumstances, please tell me.

Thanks,

Tom Gray

Excerpt from Bocquet v. Herring follows:

> [6]> [7] In sum, then, the Declaratory Judgments Act entrusts attorney fee awards to the trial court's sound discretion, subject to the requirements that any fees awarded be reasonable and necessary, which are matters of fact, and to the additional requirements that fees be equitable and just, which are matters of law. It is an abuse of discretion for a trial court to rule arbitrarily, unreasonably, or without regard to guiding

legal principles, e.g., > Goode v. Shoukfeh, 943 S.W.2d 441, 446 (Tex.1997), or to rule without supporting evidence, > Beaumont Bank v. Buller, 806 S.W.2d 223, 226 (Tex.1991). Therefore, in reviewing an attorney fee award under the Act, the court of appeals must determine whether the trial court abused its discretion by awarding fees when there was insufficient evidence that the fees were reasonable and necessary, or when the award was inequitable or unjust. Unreasonable fees cannot be awarded, even if the court believed them just, but the court may conclude that it is not equitable or just to award even reasonable and necessary fees. This multi-faceted review involving both evidentiary and discretionary matters is required by the language of the Act.

> [8] In the present case, we find nothing to indicate that the district court's attorney fee award was unjust or inequitable, and there was some evidence to support it. The court of appeals did not reach a contrary conclusion. Although the court of appeals' opinion is not completely clear on the matter, we read it to sustain the Herrings' complaint that the evidence of reasonableness and necessity of attorney fees was factually insufficient, given the court's conclusions that the fees awarded were excessive and that a remittitur was appropriate. It would be an abuse of discretion for the district court to award fees without factually sufficient supporting evidence. But before the court of appeals could reach that conclusion, it was required to detail all relevant evidence and explain why the evidence was factually insufficient. > Rose v. Doctors Hospital, 801 S.W.2d 841, 848 (Tex.1990). This it did not do.

Accordingly, the Court grants the Bocquet parties' application for writ of error and, without hearing oral argument, reverses the judgment of the court of appeals and remands the case to that court to redetermine the factual sufficiency of the evidence of the reasonableness and necessity of the attorney fees awarded by the district court. TEX.R.APP. P. 59.1. The determination should be made in light of the standards prescribed in Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct. If the court finds the evidence sufficient, the district court's judgment must be affirmed; if the court finds the evidence insufficient, it may affirm conditioned on a remittitur or remand for further proceedings.

972 S.W.2d 19, Bocquet v. Herring, (Tex. 1998)
---------- Excerpt from pages 972 S.W.2d 21-972 S.W.2d 22

From Pete Schenkkan (4/23)

I want to second Justice Gray's points about trial court discretion, and add another reason to take this concern seriously, in addition to the problems it poses for appellate review: Broad trial court discretion undermines the goal of encouraging early settlement on reasonable terms.

An offer of settlement rule works only if plaintiffs and their attorneys believe that, if the judgment is (more than 30%) less favorable to the plaintiff than the defendant's offer that they reject, defendant's post -offer costs are going to be shifted to the plaintiff (up to the lesser of the plaintiff's award or $50,000) .

Broad trial court discretion to decide whether or not to enforce shifting of post-offer costs undercuts this belief in two ways.

First, costs will not in fact be shifted in a much higher percentage of cases.

Second, plaintiffs whose counsel have been able to choose their trial forum will be especially likely to hope or expect it will not be applied in their case.

Federal Rule 68 is automatic and non-discretionary. So are many of the counterpart state rules and statutes. If offer of settlement winds up being handled by the Court rather than the Legislature, I hope

we will have a chance to discuss the discretion issue further.

AN ACT

relating to reform of certain procedures and remedies in civil actions.

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

ARTICLE 1. CLASS ACTIONS

SECTION 1.01. Subtitle B, Title 2, Civil Practice and Remedies Code, is amended by adding Chapter 26 to read as follows:

CHAPTER 26. CLASS ACTIONS

SUBCHAPTER A. SUPREME COURT RULES

Sec. 26.001. ADOPTION OF RULES BY SUPREME COURT. (a) The supreme court shall adopt rules to provide for the fair and efficient resolution of class actions.

(b) The supreme court shall adopt rules under this chapter on or before December 31, 2003.

Sec. 26.002. MANDATORY GUIDELINES. Rules adopted under Section 26.001 must comply with the mandatory guidelines established by this chapter.

Sec. 26.003. ATTORNEY'S FEES. (a) If an award of attorney's fees is available under applicable substantive law, the rules adopted under this chapter must provide that the trial court shall use the Lodestar method to calculate the amount of attorney's fees to be awarded class counsel. The rules may give the trial court discretion to increase or decrease the fee award calculated by using the Lodestar method by no more than four times based on

specified factors.

(b) Rules adopted under this chapter must provide that in a class action, if any portion of the benefits recovered for the class are in the form of coupons or other noncash common benefits, the attorney's fees awarded in the action must be in cash and noncash amounts in the same proportion as the recovery for the class.

[Sections 26.004-26.050 reserved for expansion]

SUBCHAPTER B. CLASS ACTIONS INVOLVING JURISDICTION OF STATE AGENCY

Sec. 26.051. STATE AGENCY WITH EXCLUSIVE OR PRIMARY JURISDICTION. (a) Before hearing or deciding a motion to certify a class action, a trial court must hear and rule on all pending pleas to the jurisdiction asserting that an agency of this state has exclusive or primary jurisdiction of the action or a part of the action, or asserting that a party has failed to exhaust administrative remedies. The court's ruling must be reflected in a written order.

(b) If a plea to the jurisdiction described by Subsection (a) is denied and a class is subsequently certified, a person may, as part of an appeal of the order certifying the class action, obtain appellate review of the order denying the plea to the jurisdiction.

(c) This section does not alter or abrogate a person's right to appeal or pursue an original proceeding in an appellate court in regard to a trial court's order granting or denying a plea to the jurisdiction if the right exists under statutory or common law in effect at the time review is sought.

SECTION 1.02. Section 22.225, Government Code, is amended

by amending Subsections (b) and (d) and adding Subsection (e) to read as follows:

(b) Except as provided by Subsection (c) or (d), a judgment of a court of appeals is conclusive on the law and facts, and a petition for review [~~writ of error~~] is not allowed to [~~from~~] the supreme court, in the following civil cases:

(1) a case appealed from a county court or from a district court when, under the constitution, a county court would have had original or appellate jurisdiction of the case, with the exception of a probate matter or a case involving state revenue laws or the validity or construction of a statute;

(2) a case of a contested election other than a contested election for a state officer, with the exception of a case where the validity of a statute is questioned by the decision;

(3) an appeal from an interlocutory order appointing a receiver or trustee or from other interlocutory appeals that are allowed by law;

(4) an appeal from an order or judgment in a suit in which a temporary injunction has been granted or refused or when a motion to dissolve has been granted or overruled; and

(5) all other cases except the cases where appellate jurisdiction is given to the supreme court and is not made final in the courts of appeals.

(d) A petition for review [~~writ of error~~] is allowed to [~~from~~] the supreme court for an appeal from an interlocutory order described by Section 51.014(a)(3) or (6) [~~51.014(6)~~], Civil Practice and Remedies Code.

(e) For purposes of Subsection (c), one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants.

SECTION 1.03. Sections 51.014(a), (b), and (c), Civil Practice and Remedies Code, are amended to read as follows:

(a) A person may appeal from an interlocutory order of a district court, county court at law, or county court that:

(1) appoints a receiver or trustee;

(2) overrules a motion to vacate an order that appoints a receiver or trustee;

(3) certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure;

(4) grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65;

(5) denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state;

(6) denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article I [~~1~~], Section 8, of the Texas Constitution, or Chapter 73;

(7) grants or denies the special appearance of a

defendant under Rule 120a, Texas Rules of Civil Procedure, except in a suit brought under the Family Code; [~~or~~]

(8) grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001;

(9) denies all or part of the relief sought by a motion under Section 74.351(b), except that an appeal may not be taken from an order granting an extension under Section 74.351; or

(10) grants relief sought by a motion under Section 74.351(l).

(b) An interlocutory appeal under Subsection (a), other than an appeal under Subsection (a)(4), stays [~~shall have the effect of staying~~] the commencement of a trial in the trial court pending resolution of the appeal. An interlocutory appeal under Subsection (a)(3), (5), or (8) also stays all other proceedings in the trial court pending resolution of that appeal.

(c) A denial of a motion for summary judgment, special appearance, or plea to the jurisdiction described by Subsection (a)(5), (7), or (8) is not subject to the automatic stay [~~of the commencement of trial~~] under Subsection (b) unless the motion, special appearance, or plea to the jurisdiction is filed and requested for submission or hearing before the trial court not later than the later of:

(1) a date set by the trial court in a scheduling order entered under the Texas Rules of Civil Procedure; or

(2) the 180th day after the date the defendant files:

(A) the original answer;

(B) the first other responsive pleading to the

plaintiff's petition; or

(C) if the plaintiff files an amended pleading that alleges a new cause of action against the defendant and the defendant is able to raise a defense to the new cause of action under Subsection (a)(5), (7), or (8), the responsive pleading that raises that defense.

SECTION 1.04. Section 22.001, Government Code, is amended by adding Subsection (e) to read as follows:

(e) For purposes of Subsection (a)(2), one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants.

SECTION 1.05. (a) The changes in law made by Section 1.02 of this Act to Section 22.225(d), Government Code, apply to any case in which a petition for review to the Supreme Court of Texas is filed on or after the effective date of this Act.

(b) The changes in law made by Section 1.03 of this Act to Sections 51.014(b) and (c), Civil Practice and Remedies Code, apply to any case in which an appeal allowed by Section 51.014(a), Civil Practice and Remedies Code, as amended by this Act, is taken and the notice of appeal is filed on or after the effective date of this Act.

ARTICLE 2. SETTLEMENT

SECTION 2.01. Subtitle C, Title 2, Civil Practice and Remedies Code, is amended by adding Chapter 42 to read as follows:

CHAPTER 42. SETTLEMENT

Sec. 42.001. DEFINITIONS. In this chapter:

plaintiff's petition; or

(C) if the plaintiff files an amended pleading that alleges a new cause of action against the defendant and the defendant is able to raise a defense to the new cause of action under Subsection (a)(5), (7), or (8), the responsive pleading that raises that defense.

SECTION 1.04. Section 22.001, Government Code, is amended by adding Subsection (e) to read as follows:

(e) For purposes of Subsection (a)(2), one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants.

SECTION 1.05. (a) The changes in law made by Section 1.02 of this Act to Section 22.225(d), Government Code, apply to any case in which a petition for review to the Supreme Court of Texas is filed on or after the effective date of this Act.

(b) The changes in law made by Section 1.03 of this Act to Sections 51.014(b) and (c), Civil Practice and Remedies Code, apply to any case in which an appeal allowed by Section 51.014(a), Civil Practice and Remedies Code, as amended by this Act, is taken and the notice of appeal is filed on or after the effective date of this Act.

ARTICLE 2. SETTLEMENT

SECTION 2.01. Subtitle C, Title 2, Civil Practice and Remedies Code, is amended by adding Chapter 42 to read as follows:

CHAPTER 42. SETTLEMENT

Sec. 42.001. DEFINITIONS. In this chapter:

(1) "Claim" means a request, including a counterclaim, cross-claim, or third-party claim, to recover monetary damages.

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

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

(4) "Governmental unit" means the state, a unit of state government, or a political subdivision of this state.

(5) "Litigation costs" means money actually spent and obligations actually incurred that are directly related to the case in which a settlement offer is made. The term includes:

(A) court costs;

(B) reasonable fees for not more than two testifying expert witnesses; and

(C) reasonable attorney's fees.

(6) "Settlement offer" means an offer to settle or compromise a claim made in compliance with this chapter.

Sec. 42.002. APPLICABILITY AND EFFECT. (a) The settlement procedures provided in this chapter apply only to claims for monetary relief.

(b) This chapter does not apply to:

(1) a class action;

(2) a shareholder's derivative action;

(3) an action by or against a governmental unit;

(4) an action brought under the Family Code;

(5) an action to collect workers' compensation benefits under Subtitle A, Title 5, Labor Code; or

(6) an action filed in a justice of the peace court.

(c) This chapter does not apply until a defendant files a declaration that the settlement procedure allowed by this chapter is available in the action. If there is more than one defendant, the settlement procedure allowed by this chapter is available only in relation to the defendant that filed the declaration and to the parties that make or receive offers of settlement in relation to that defendant.

(d) This chapter does not limit or affect the ability of any person to:

(1) make an offer to settle or compromise a claim that does not comply with this chapter; or

(2) offer to settle or compromise a claim to which this chapter does not apply.

(e) An offer to settle or compromise that is not made under this chapter or an offer to settle or compromise made in an action to which this chapter does not apply does not entitle the offering party to recover litigation costs under this chapter.

Sec. 42.003. MAKING SETTLEMENT OFFER. A settlement offer must:

(1) be in writing;

(2) state that it is made under this chapter;

(3) state the terms by which the claims may be settled;

(4) state a deadline by which the settlement offer must be accepted; and

(5) be served on all parties to whom the settlement offer is made.

Sec. 42.004. AWARDING LITIGATION COSTS. (a) If a settlement offer is made and rejected and the judgment to be rendered will be significantly less favorable to the rejecting party than was the settlement offer, the offering party shall recover litigation costs from the rejecting party.

(b) A judgment will be significantly less favorable to the rejecting party than is the settlement offer if:

(1) the rejecting party is a claimant and the award will be less than 80 percent of the rejected offer; or

(2) the rejecting party is a defendant and the award will be more than 120 percent of the rejected offer.

(c) The litigation costs that may be recovered by the offering party under this section are limited to those litigation costs incurred by the offering party after the date the rejecting party rejected the settlement offer.

(d) The litigation costs that may be awarded under this chapter may not be greater than an amount computed by:

(1) determining the sum of:

(A) 50 percent of the economic damages to be awarded to the claimant in the judgment;

(B) 100 percent of the noneconomic damages to be awarded to the claimant in the judgment; and

(C) 100 percent of the exemplary or additional damages to be awarded to the claimant in the judgment; and

(2) subtracting from the amount determined under Subdivision (1) the amount of any statutory or contractual liens in connection with the occurrences or incidents giving rise to the

claim.

(e) If a claimant or defendant is entitled to recover fees and costs under another law, that claimant or defendant may not recover litigation costs in addition to the fees and costs recoverable under the other law.

(f) If a claimant or defendant is entitled to recover fees and costs under another law, the court must not include fees and costs incurred by that claimant or defendant after the date of rejection of the settlement offer when calculating the amount of the judgment to be rendered under Subsection (a).

(g) If litigation costs are to be awarded against a claimant, those litigation costs shall be awarded to the defendant in the judgment as an offset against the claimant's recovery from that defendant.

Sec. 42.005. SUPREME COURT TO MAKE RULES. (a) The supreme court shall promulgate rules implementing this chapter. The rules must be limited to settlement offers made under this chapter. The rules must be in effect on January 1, 2004.

(b) The rules promulgated by the supreme court must provide:

(1) the date by which a defendant or defendants must file the declaration required by Section 42.002(c);

(2) the date before which a party may not make a settlement offer;

(3) the date after which a party may not make a settlement offer; and

(4) procedures for:

(A) making an initial settlement offer;

(B) making successive settlement offers;

(C) withdrawing a settlement offer;

(D) accepting a settlement offer;

(E) rejecting a settlement offer; and

(F) modifying the deadline for making, withdrawing, accepting, or rejecting a settlement offer.

(c) The rules promulgated by the supreme court must address actions in which there are multiple parties and must provide that if the offering party joins another party or designates a responsible third party after making the settlement offer, the party to whom the settlement offer was made may declare the offer void.

(d) The rules promulgated by the supreme court may:

(1) designate other actions to which the settlement procedure of this chapter does not apply; and

(2) address other matters considered necessary by the supreme court to the implementation of this chapter.

SECTION 2.02. The changes in law provided by this article apply only to an action filed on or after January 1, 2004.

ARTICLE 3. VENUE; FORUM NON CONVENIENS

SECTION 3.01. Section 74.024(c), Government Code, is amended to read as follows:

(c) The supreme court may consider the adoption of rules relating to:

(1) nonbinding time standards for pleading, discovery, motions, and dispositions;

(2) nonbinding dismissal of inactive cases from dockets, if the dismissal is warranted;

RULE 42. CLASS ACTIONS

Certain Inchoate Claims. A class action personal injuries, death, products liability or property damage involving mass tort or disaster litigation, claimants whose injuries or claims are wholly inchoate may not be certified as a class or subclass or included within another certified class or subclass. Injuries or claims are considered "wholly inchoate" where there has been no discernable or detectable manifestation of injury or damage using admissible expert evidence. In certifying classes, the court is shall, after a hearing and upon proper evidence presented, determine whether any claimants assert wholly inchoate claims. Inchoate claims excluded from class certification shall, by court order, be protected against the running of any applicable statute of limitations by a specific finding that the claims have not manifested, ripen accrued or been discoverable as of the date of the written order. Entry of an order containing such findings shall not trigger any applicable statute of limitations.

(2) After the court has determined that a class action may be maintained it shall order the party claiming the class action to direct to the members of the class the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort. In all class actions maintained under subdivisions (b)(1), (b)(2), and (b)(3), this notice shall advise the members of the class (A) the nature of the suit, (B) the binding effect of the judgment, whether favorable or not, and (C) the right of any member to appear before the court and challenge the court's determinations as to the class and its representatives. In all class actions maintained under subdivision (b)(4) this notice shall advise each member of the class (A) the nature of the suit; (B) that the court will include him in the class only if he so requests by a specified date; (C) that the judgment, whether favorable or not, will include and bind all members who do request inclusion by the specified date; and (D) that any member who does not request inclusion may if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivisions (b)(1), (b)(2), and (b)(3), whether or not favorable to the class, shall include, describe, and be binding upon all those whom the court finds to be members of the class and who received notice as provided in subdivision (c)(2). The judgment in an action maintained as a class action under subdivision (b)(4), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have

requested inclusion and whom the court finds to be members of the class.

(g) Class Counsel.

(1) *Appointing Class Counsel.*

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(2) *Appointment Procedure.*

(A) The court may allow a reasonable period after the commencement of the action for attorneys seeking appointment as class counsel to apply.

(B) In appointing an attorney class counsel, the court must consider (i) counsel's experience in handling class actions and other complex litigation, (ii) the work counsel has done in identifying or investigating potential claims in this case, and (iii) the resources counsel will commit to representing the class, and may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class. The court may direct potential class counsel to provide information on any such subject and to propose terms for attorney fees and nontaxable costs. The court may also make further orders in connection with selection of class counsel.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs.

(3) *Rule 8 Applicable.* The provisions of Rule 8 also apply to this rule.

(h) **Attorney Fees Award.** In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) *Motion for Award of Attorney Fees.* A claim for an award of attorney fees and nontaxable costs must be made by motion, subject to the provisions of this subdivision, at a time directed by the court. Notice of the motion must be served on all parties and, for motions by class counsel, given to all class members in a reasonable manner.

(2) *Objections to Motion.* A class member or a party from whom payment is sought may object to the motion.

(3) *Hearing and Findings.* The court may hold a hearing and must find the facts and state its conclusions of law on the motion.

[Existing Rules 7 and 8 of the Texas Rules of Civil Procedure state:

Rule 7. May Appear by Attorney

Any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court.

Rule 8. Attorney in Charge

On the occasion of a party's first appearance through counsel, the attorney whose signature first appears on the initial pleadings for any party shall be the attorney in charge, unless another attorney is specifically designated therein. Thereafter, until such designation is changed by written notice to the court and all other parties in accordance with Rule 21a, said attorney in charge shall be responsible for the suit as to such party.

They would be replaced by the following rule.]

RULE 7. APPEARANCE BY ATTORNEY

7.1 Right; Necessity. Except as provided by statute, an individual may, and any other person or entity must, be represented in court by an attorney.

7.2 Designating or Identifying Counsel. Every designation or identification of an attorney as counsel must state the attorney's name, mailing address, telephone number, any fax number, and either the State Bar of Texas identification number if the attorney is licensed to practice in Texas, or the jurisdiction in which the attorney is licensed.

7.3 Appearance of Attorney as Counsel. An attorney may appear for a party by filing a notice identifying the attorney as counsel for the party. Any attorney whose name is shown as counsel for a party on a paper filed for the party is deemed to have appeared for the party. The clerk must note on the case docket the names of all attorneys who have appeared for the party.

7.4 Lead Counsel.

(a) *Responsibility.* Lead counsel is responsible for the suit with respect to the party represented.

(b) *Communications.* The court and all parties must direct all communications with respect to the suit to lead counsel.

(c) *How Designated.* A party may file a notice designating the attorney who will be the party's lead counsel. A notice which designates new lead counsel must be signed by that attorney and by either the party or the former lead counsel. If no lead counsel is designated by notice, the attorney whose signature first appears on the first paper filed for the party is deemed to have been designated lead counsel.

7.5 Litigation Payments.

(a) *Defined.* A litigation payment includes a payment:

(1) to any person with respect to:

(A) the referral of an attorney, a client, or a case;

(B) the solicitation of a client or a case by any means that does not include the name of lead counsel or lead counsel's law firm; or

(C) the forwarding or transferring of a case to an attorney; or

(2) to an attorney who:

(A) is not lead counsel or associated with lead counsel in the same law firm, and

(B) has not appeared in the case or provided substantial professional services with respect to the case.

(b) *Disclosure.* Lead counsel must file with the court a notice disclosing every litigation payment made or agreed to be made with respect to the case. The notice must:

(1) state the amount and date of each payment made or to be made;

(2) state the name, address, and telephone number of the person, or identify the attorney, to whom each payment has been made or is to be made;

(3) include a copy of each agreement for a litigation payment;

(4) include a copy of the client's approval of each such payment or agreement; and

(5) contain a copy of all print advertisements and a transcript of all other advertisements – not containing the name of lead counsel or lead counsel's law firm – to which the client responded.

(c) *Time for Disclosure*. At the first appearance of an attorney as lead counsel, the attorney must disclose all litigation payments made or agreed to be made. Thereafter, lead counsel must disclose any litigation payment within 15 days after is made or agreed to be made.

(d) *Disqualification*. The court must disqualify an attorney from acting as lead counsel for a party in a case if the court finds that:

(1) the attorney intentionally failed to make the disclosure required by this rule;

(2) the attorney divided or agreed to divide a fee in violation of Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct;

(3) a litigation payment in excess of $50,000 or 15% of the attorney fees for the party in the case, whichever is less, has been made or agreed to be made; or

(4) the attorney's representation of the party in the case occurred as a result of an advertisement or solicitation of any kind that did not state the name of the attorney or the attorney's law firm.

(e) *Hearing*. The court must, on a party's motion, and may, on its own initiative, conduct a hearing to determine whether there has been a violation of this rule.

(f) *Sanctions*. An attorney or law firm found to be in violation of this rule shall be subject to such sanctions as are just, including an order declaring the underlying fee agreement or contract for retention of legal services to be voidable at the insistence of the client.

[Existing Rule 173 of the Texas Rules of Civil Procedure, entitled "Guardian Ad Litem", states:

> When a minor, lunatic, idiot or a non-compos mentis may be a defendant to a suit and has no guardian within this State, or where such person is a party to a suit either as plaintiff, defendant or intervenor and is represented by a next friend or a guardian who appears to the court to have an interest adverse to such minor, lunatic, idiot or non-compos mentis, the court shall appoint a guardian ad litem for such person and shall allow him a reasonable fee for his services to be taxed as part of the costs.

It would be replaced with the following rule.]

RULE 173. AD LITEM REPRESENTATION

173.1 Court's Power Limited. A court may not appoint, authorize, or compensate an ad litem representative except as permitted by this rule or by statute.

173.2 Appointment.

(a) *When Appointment Required.* The court must appoint a guardian ad litem for a party who is a minor or is under other legal incapacity if but only if:

(1) the party has no next friend or guardian within this State, or

(2) the party has a next friend or guardian who appears to the court to have an interest adverse to the party.

(b) *Attorney as Guardian ad Litem.* The court may appoint an attorney as guardian ad litem and must do so if the guardian is to provide legal representation to the party.

(c) *Attorney ad Litem.* The court may appoint an attorney ad litem in addition to a guardian ad litem in exceptional circumstances when it appears to the court that an attorney appointed as guardian ad litem cannot fully represent the party's interests.

(d) *Representation for More Than One Party.* The same ad litem representative may be appointed for more than one party if it appears to the court that the parties' interests are not adverse.

(e) *Attorney to Represent Guardian or Attorney ad Litem.* The court may appoint an attorney to represent a guardian ad litem or an attorney ad litem only as necessary to protect the interests of the party.

(f) *Written Order Required.* An appointment under this rule must be by written order.

173.3 Eligibility of Attorney for Appointment.

(a) *Approval by Regional Presiding Judge.* An attorney may not be appointed under this rule without the approval of the presiding judge of the administrative judicial region in which the case is pending. The regional presiding judge must maintain a list of attorneys approved as qualified for appointment.

(b) *Disqualification.* An attorney who violates this rule is disqualified from appointment under this rule for ten years.

173.4 Authority and Responsibility of Representative.

(a) *Guardian ad Litem.* A guardian ad litem must represent the party's best interests in the case.

(b) *Attorney ad Litem.* An attorney ad litem must represent the party's preferences in the case.

(c) *Limited Participation in Proceedings.* A guardian ad litem or attorney ad litem should not participate in discovery, trial, or other court proceedings except with approval of the court and as necessary to protect the party's interests which are not otherwise adequately represented.

(d) *Structured Settlements.* If a settlement of the case is proposed that would structure recovery to be paid over a period of time through the use of a financial intermediary - such as a depository, insurer, trustee, assignee, broker, or other such person or entity - a guardian

ad litem or attorney ad litem:

(1) must report to the court on whether the settlement is fair;

(2) may not recommend or require the use of a specific intermediary;

(3) must determine the fiscal soundness of any intermediary to be used; and

(4) is not liable for the party represented or anyone else for any injury resulting from the intermediary's insolvency more than ninety days after the settlement if the guardian ad litem or attorney ad litem reasonably relied on generally accepted published ratings showing the intermediary to be financially sound.

173.5 Compensation.

(a) *Entitlement.* A person appointed under this rule is entitled to be reimbursed the reasonable and necessary expenses incurred in the representation, and if the person is an attorney, to be paid a reasonable hourly fee, customary in the community in which the case is pending, for necessary services performed.

(b) *Determination of Hourly Fee by Court Before Appointment.* The court must state in the order of appointment the hourly fee to be paid and that the hourly fee is customary in the community.

(c) *Hearing on Completion of Representation.* At the conclusion of the appointed representation, before payment of compensation to the representative, the court must conduct a hearing to determine the total amount of fees and expenses that are reasonable and necessary. In making this determination, the court must not consider the amount of the settlement or judgement or use any percentage or contingent fee.

(d) *Costs.* Compensation under this rule is to be taxed as costs.

(e) *Other Compensation Prohibited.*

(1) A person appointed under this rule may not receive, directly or indirectly, anything of value in consideration of the appointed representation other than as provided by this rule, including without limitation, any payment, referral fee, or consultation fee in any other matter, or any payment from any insurance or financial broker involved in structuring a settlement.

(2) A person who makes a payment in violation of this rule may be sanctioned for contempt of court.

173.6 **Certain Structured Settlements Prohibited.** In any case in which an ad litem is appointed under this rule, the court must not approve a settlement that would structure recovery to be paid over a period of time through the use of a financial intermediary - such as a depository, insurer, trustee, assignee, broker, or other such person or entity - if the financial intermediary or any broker, agent, or representative involved:

(a) is specified by a defendant, a defendant's attorney in the case, or an insurer of a defendant as part of the settlement;

(b) is one in which any party or attorney in the case has a financial interest; or

(c) is one from which any party or attorney in the case would receive anything of benefit not disclosed to the court in the settlement agreement.

[Rule 5 of the Rules of Judicial Administration would be amended as follows.]

Rule 5. DUTIES OF THE PRESIDING JUDGE

In addition to the duties place on Presiding Judges by law and these rules, each Presiding Judge should oversee the general docket management, the prompt disposition of all cases filed in each district and statutory county court within the region, and the proper administration of the affairs of the courts within the administrative region. The Presiding Judge shall:

a. ensure the adoption of uniform local rules;

b. hold periodic meetings with the judges in counties with more than one court;

c. consult with each trial judge of the administrative region to implement more efficient methods of docket management;

d. study in detail the condition of the dockets in each county;

e. discover and encourage the implementation of systems to reduce delay in local dockets;

f. provide for orientation and training of new judges in the administrative regions;

g. ensure adherence to the time standards provided by Rule 6 in the courts of the administrative region;

h. direct the district and county clerks within the regions to submit such statistical reports as may be requested by either the local administrative judge or the presiding judge;

i. examine the qualifications of attorneys to serve as guardians ad litem and attorneys ad litem by appointment under Rule 173 of the Rules of Civil Procedure, and to compile a list of such attorneys approved for appointment; and

j. perform such other duties as may be assigned by the Chief Justice.

H.B. No. 1815

AN ACT

relating to court-ordered representation in suits affecting the parent-child relationship.

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

SECTION 1. Subchapters A, B, and C, Chapter 107, Family Code, are amended to read as follows:

SUBCHAPTER A. COURT-ORDERED [~~GUARDIAN AD LITEM~~] REPRESENTATION IN SUITS AFFECTING THE PARENT-CHILD RELATIONSHIP

Sec. 107.001. DEFINITIONS. In this chapter:

(1) "Amicus attorney" means an attorney appointed by the court in a suit, other than a suit filed by a governmental entity, whose role is to provide legal services necessary to assist the court in protecting a child's best interests rather than to provide legal services to the child.

(2) "Attorney ad litem" means an attorney who provides legal services to a person, including a child, and who owes to the person the duties of undivided loyalty, confidentiality, and competent representation.

(3) "Developmentally appropriate" means structured to account for a child's age, level of education, cultural background, and degree of language acquisition.

(4) "Dual role" means the role of an attorney who is appointed under Section 107.0125 to act as both guardian ad litem and attorney ad litem for a child in a suit filed by a governmental entity.

(5) "Guardian ad litem" means a person appointed to represent the best interests of a child. The term includes:

(A) a volunteer advocate appointed under Subchapter C;

(B) a professional, other than an attorney, who holds a relevant professional license and whose training relates to the determination of a child's best interests;

(C) an adult having the competence, training, and expertise determined by the court to be sufficient to represent the best interests of the child; or

(D) an attorney ad litem appointed to serve in the dual role. [~~APPOINTMENT OF GUARDIAN AD LITEM. (a) In a suit in which termination of the parent-child relationship is requested, the court or an associate judge shall appoint a guardian ad litem to represent the interests of the child immediately after the filing of the petition but before the full adversary hearing to ensure adequate representation of the child, unless:~~

[~~(1) the child is a petitioner;~~

[~~(2) an attorney ad litem has been appointed for the child; or~~

[~~(3) the court or an associate judge finds that the interests of the child will be represented adequately by a party to the suit and are not adverse to that party.~~

[~~(b) In a suit filed by a governmental entity in which the entity requests the termination of the parent-child relationship or~~

appointed in the dual role;

(5) review and sign, or decline to sign, an [~~any~~] agreed order affecting the child; and

(6) explain the basis [~~testify in court, except as provided by Subsection (d), regarding the recommendations concerning the actions that the guardian ad litem considers to be in the best interest of the child, including giving reasons~~] for the guardian ad litem's opposition to the agreed order if the guardian ad litem does not agree to the terms of a proposed order.

(d) The court may compel the guardian ad litem to attend a trial or hearing and to testify as necessary for the proper disposition of the suit. [~~An attorney who is appointed as attorney ad litem and guardian ad litem for a child may not testify under Subsection (c)(6).~~]

(e) Unless the guardian ad litem is an attorney who has been appointed in the dual role and subject to the Texas Rules of Evidence, the court shall ensure in a hearing or in a trial on the merits that a guardian ad litem has an opportunity to testify or submit a report regarding the guardian ad litem's recommendations regarding:

(1) the best interests of the child; and

(2) the bases for the guardian ad litem's recommendations. [~~An attorney who is appointed as attorney ad litem and guardian ad litem for a child shall:~~

[~~(1) become familiar with the American Bar Association's standards of practice for lawyers who represent children in abuse and neglect cases; and~~

[~~(2) comply with the requirements of the Texas Disciplinary Rules of Professional Conduct.~~]

(f) In a nonjury trial, a party may call the guardian ad litem as a witness for the purpose of cross-examination regarding the guardian's report without the guardian ad litem being listed as a witness by a party. If the guardian ad litem is not called as a witness, the court shall permit the guardian ad litem to testify in the narrative [~~An attorney who is appointed as attorney ad litem and guardian ad litem for a child and who determines that a conflict exists by performing both roles shall:~~

[~~(1) withdraw as the child's guardian ad litem;~~

[~~(2) continue to serve as the child's attorney ad litem; and~~

[~~(3) request appointment of a new guardian ad litem for the child without revealing the reason a new appointment is required~~].

(g) In a contested case, the guardian ad litem shall provide copies of the guardian ad litem's report, if any, to the attorneys for the parties as directed by the court, but not later than the earlier of:

(1) the date required by the scheduling order; or

(2) the 10th day before the date of the commencement of the trial.

(h) Disclosure to the jury of the contents of a guardian ad litem's report to the court is subject to the Texas Rules of Evidence.

Sec. 107.003. POWERS AND DUTIES OF ATTORNEY AD LITEM FOR CHILD AND AMICUS ATTORNEY. An attorney ad litem appointed to represent a child or an amicus attorney appointed to assist the court:

(1) shall:

(A) subject to Rule 4.04, Texas Disciplinary Rules of Professional Conduct, and within a reasonable time after the appointment, interview:

(i) the child in a developmentally appropriate manner, if the child is four years of age or older;

of the child, an amicus attorney is not bound by the child's expressed objectives of representation.

(b) An amicus attorney shall:

(1) seek to elicit in a developmentally appropriate manner the child's expressed objectives of representation;

(2) with the consent of the child, ensure that the child's expressed objectives of representation are made known to the court;

(3) consider the impact on the child in formulating the amicus attorney's presentation of the child's expressed objectives of representation to the court;

(4) review and sign, or decline to sign, an agreed order affecting the child;

(5) explain the basis for the amicus attorney's opposition to the agreed order if the amicus attorney does not agree to the terms of a proposed order;

(6) explain the role of the amicus attorney to the child; and

(7) inform the child that the amicus attorney may use information that the child provides in providing assistance to the court.

(c) An amicus attorney may not disclose confidential communications between the amicus attorney and the child unless the amicus attorney determines that disclosure is necessary to assist the court regarding the best interests of the child.

Sec. 107.006. ACCESS TO CHILD AND INFORMATION RELATING TO CHILD. (a) Except as provided by Subsection (c), in conjunction with an appointment under this chapter, other than an appointment of an attorney ad litem for an adult or a parent, the court shall issue an order authorizing the attorney ad litem, guardian ad litem for the child, or amicus attorney to have immediate access to:

(1) the child; and

(2) any otherwise privileged or confidential information relating to the child.

(b) Without requiring a further order or release, the custodian of any relevant records relating to the child, including records regarding social services, drug and alcohol treatment, or medical or mental health evaluation or treatment of the child, law enforcement records, school records, records of a probate or court proceeding, and records of a trust or account for which the child is a beneficiary, shall provide access to a person authorized to access the records under Subsection (a).

(c) A mental health record of a child at least 12 years of age that is privileged or confidential under other law may be released to a person appointed under Subsection (a) only in accordance with the other law [~~GUARDIAN AD LITEM AND ATTORNEY AD LITEM POOL; QUALIFICATIONS. (a) The local administrative district judge in each county in a Department of Protective and Regulatory Services region for child protective services that contains a county having a population of 2.8 million or more shall establish a pool from which guardians ad litem and attorneys ad litem are appointed for proceedings in the district courts of the county. A local administrative district judge in any other county may establish a pool from which guardians ad litem and attorneys ad litem are appointed for proceedings in the district courts of that county. To be eligible for a pool established under this subsection, a person must:~~

[~~(1) complete training approved by the State Bar of Texas in family law and the responsibilities of ad litems;~~

[~~(2) complete as part of the person's annual continuing legal education requirement not fewer than three hours in family law issues; and~~

[~~(3) meet other requirements established by the local~~

(c) An attorney ad litem or attorney appointed in the dual role who determines that the child cannot meaningfully formulate the child's expressed objectives of representation under subsection (a) shall, if a guardian ad litem has been appointed for the child:

(1) consult with the guardian ad litem; and

(2) present the child's objectives of representation to the court based on the guardian ad litem's opinion regarding the best interests of the child.

Sec. 107.009. IMMUNITY. (a) A guardian ad litem, an attorney ad litem, or an amicus attorney appointed under this chapter is not liable for civil damages arising from a recommendation made or an opinion given in the capacity of guardian ad litem, attorney ad litem, or amicus attorney.

(b) Subsection (a) does not apply to an action taken or a recommendation or opinion given:

(1) with conscious indifference or reckless disregard to the safety of another;

(2) in bad faith or with malice; or

(3) that is grossly negligent or wilfully wrongful.

Sec. 107.010. DISCRETIONARY APPOINTMENT OF ATTORNEY AD LITEM FOR INCAPACITATED PERSON. The court may appoint an attorney to serve as an attorney ad litem for a person entitled to service of citation in a suit if the court finds that the person is incapacitated. The attorney ad litem shall follow the person's expressed objectives of representation and, if appropriate, refer the proceeding to the proper court for guardianship proceedings.

SUBCHAPTER B. APPOINTMENTS IN CERTAIN SUITS [~~ATTORNEY AD LITEM~~]

PART 1. APPOINTMENTS IN SUITS BY GOVERNMENTAL ENTITY

Sec. 107.011. MANDATORY [~~DISCRETIONARY~~] APPOINTMENT OF GUARDIAN [~~ATTORNEY~~] AD LITEM. (a) Except as otherwise provided by this subchapter, in a suit filed by a governmental entity seeking termination of the parent-child relationship or the appointment of a conservator for a child, the court shall appoint a guardian ad litem to represent the best interests of the child immediately after the filing of the petition but before the full adversary hearing. [~~An associate judge shall recommend the appointment of an attorney ad litem for any party in a case in which the associate judge deems representation necessary to protect the interests of the child who is the subject matter of the suit.~~]

(b) The guardian ad litem appointed for a child under this section may be:

(1) a charitable organization composed of volunteer advocates or an individual volunteer advocate appointed under subchapter C;

(2) an adult having the competence, training, and expertise determined by the court to be sufficient to represent the best interests of the child; or

(3) an attorney appointed in the dual role [~~court shall appoint an attorney ad litem for any party in a case in which the court deems representation necessary to protect the interests of the child who is the subject matter of the suit~~].

(c) The court may not appoint a guardian ad litem in a suit filed by a governmental entity if an attorney is appointed in the dual role unless the court appoints another person to serve as guardian ad litem for the child and restricts the role of the attorney to acting as an attorney ad litem for the child.

(d) The court may appoint an attorney to serve as guardian ad litem for a child without appointing the attorney to serve in the

dual role only if the attorney is specifically appointed to serve only in the role of guardian ad litem. An attorney appointed solely as a guardian ad litem:

(1) may take only those actions that may be taken by a attorney guardian ad litem; and

(2) may not:

(A) perform legal services in the case; or

(B) take any action that is restricted to a licensed attorney, including engaging in discovery other than as a witness, making opening and closing statements, or examining witnesses.

Sec. 107.012. MANDATORY APPOINTMENT OF ATTORNEY AD LITEM FOR CHILD. In a suit filed by a governmental entity requesting termination of the parent-child relationship or to be named conservator of a child, the court shall appoint an attorney ad litem to represent the interests of the child immediately after the filing, but before the full adversary hearing, to ensure adequate representation of the child.

Sec. 107.0125. APPOINTMENT OF ATTORNEY IN DUAL ROLE. (a) In order to comply with the mandatory appointment of a guardian ad litem under Section 107.011 and the mandatory appointment of an attorney ad litem under Section 107.012, the court may appoint an attorney to serve in the dual role.

(b) If the court appoints an attorney to serve in the dual role under this section, the court may at any time during the pendency of the suit appoint another person to serve as guardian ad litem for the child and restrict the attorney to acting as an attorney ad litem for the child.

(c) An attorney appointed to serve in the dual role may request the court to appoint another person to serve as guardian ad litem for the child. If the court grants the attorney's request, attorney shall serve only as the attorney ad litem for the child.

(d) Unless the court appoints another person as guardian ad litem in a suit filed by a governmental entity, an appointment of an attorney to serve as an attorney ad litem in a suit filed by a governmental entity is an appointment to serve in the dual role regardless of the terminology used in the appointing order.

Sec. 107.013. MANDATORY APPOINTMENT OF ATTORNEY AD LITEM FOR PARENT. (a) In a suit filed by a governmental entity in which termination of the parent-child relationship is requested, the court shall appoint an attorney ad litem to represent the interests of:

(1) an indigent parent of the child who responds in opposition to the termination;

(2) a parent served by citation by publication;

(3) an alleged father who failed to register with the registry under Chapter 160 and whose identity or location is unknown; and

(4) an alleged father who registered with the paternity registry under Chapter 160, but the petitioner's attempt to personally serve citation at the address provided to the registry and at any other address for the alleged father known by the petitioner has been unsuccessful.

(b) If both parents of the child are entitled to the appointment of an attorney ad litem under this section and the court finds that the interests of the parents are not in conflict, the court may appoint an [~~a single~~] attorney ad litem to represent the interests of both parents.

[~~Sec. 107.0135. APPOINTMENT OF ATTORNEY AD LITEM NOT REQUIRED; CERTAIN CASES. A court is not required to appoint an attorney ad litem in a proceeding in which:~~

[~~(1) a suit for the dissolution of a marriage is~~

~~ncontested; or~~

[~~(2) the issues of possession of and access to a child re agreed to by both parents.~~

[~~Sec. 107.014. POWERS AND DUTIES OF ATTORNEY AD LITEM FOR HILD. (a) An attorney ad litem appointed under this subchapter to epresent a child:~~

[~~(1) shall investigate to the extent the attorney ad item considers appropriate to determine the facts of the case;~~

[~~(2) shall obtain and review copies of all of the hild's relevant medical, psychological, and school records;~~

[~~(3) may call, examine, or cross-examine witnesses; nd~~

[~~(4) shall become familiar with the American Bar ssociation's standards of practice for lawyers who represent hildren in abuse and neglect cases.~~

[~~(b) An attorney ad litem appointed to represent a child hall within a reasonable time after the appointment:~~

[~~(1) interview the child if the child is four years of ge or older;~~

[~~(2) interview individuals with significant knowledge f the child's history and condition, including the child's foster arents; and~~

[~~(3) interview all parties to the suit.~~]

Sec. 107.015. ATTORNEY [~~AD LITEM~~] FEES. (a) An attorney ppointed under this chapter to serve as an attorney ad litem for a hild, an attorney in the dual role, [~~to represent a child~~] or an ttorney ad litem for a parent [~~as authorized by this subchapter~~] is ntitled to reasonable fees and expenses in the amount set by the ourt to be paid by the parents of the child unless the parents are ndigent.

(b) If the court [~~or associate judge~~] determines that one or ore of the parties are able to defray the [~~costs of an attorney ad item's~~] fees and expenses of an attorney ad litem or guardian ad item for the child as determined by the reasonable and customary ees for similar services in the county of jurisdiction, the fees nd expenses may be ordered paid by one or more of those parties, or he court [~~or associate judge~~] may order one or more of those arties, prior to final hearing, to pay the sums into the registry f the court or into an account authorized by the court for the use nd benefit of the payee [~~attorney ad litem~~] on order of the court. he sums may be taxed as costs to be assessed against one or more of he parties.

(c) If indigency of the parents is shown, an attorney ad item appointed to represent a child or parent in a suit filed by a overnmental entity in which termination of [~~to terminate~~] the arent-child relationship is requested shall be paid from the eneral funds of the county according to the fee schedule that pplies to an attorney appointed to represent a child in a suit nder Title 3 as provided by Chapter 51. The court may not award ttorney ad litem fees under this chapter against the state, a state gency, or a political subdivision of the state except as provided y this subsection.

(d) A person appointed as a guardian ad litem or attorney ad item shall complete and submit to the court a voucher or claim for ayment that lists the fees charged and hours worked by the guardian d litem or attorney ad litem. Information submitted under this ection is subject to disclosure under Chapter 552, Government ode.

Sec. 107.016. CONTINUED REPRESENTATION. In a suit filed ~~brought~~] by a governmental entity in which [~~seeking~~] termination f the parent-child relationship or appointment of the entity as onservator of the child is requested, an order appointing the epartment of Protective and Regulatory Services as the child's

managing conservator may provide for the continuation of the appointment of the guardian ad litem or attorney ad litem [~~appointment~~] for the child for any period set by the court.

Sec. 107.017. APPOINTMENT OF AMICUS ATTORNEY PROHIBITED. court may not appoint a person to serve as an amicus attorney in a suit filed by a governmental entity under this chapter.

PART 2. APPOINTMENTS IN SUITS OTHER THAN SUITS BY GOVERNMENTAL ENTITY

Sec. 107.021. DISCRETIONARY APPOINTMENTS. (a) In a suit in which the best interests of a child are at issue, other than a suit filed by a governmental entity, the court may appoint:

(1) an amicus attorney;

(2) an attorney ad litem; or

(3) a guardian ad litem.

(b) In determining whether to make an appointment under this section, the court:

(1) shall:

(A) give due consideration to the ability of the parties to pay reasonable fees to the appointee; and

(B) balance the child's interests against the cost to the parties that would result from an appointment by taking into consideration the cost of available alternatives for resolving issues without making an appointment;

(2) may make an appointment only if the court finds that the appointment is necessary to ensure the determination of the best interests of the child; and

(3) may not require a person appointed under this tion to serve without reasonable compensation for the services dered by the person.

Sec. 107.022. CERTAIN PROHIBITED APPOINTMENTS. In a suit other than a suit filed by a governmental entity, the court may not appoint:

(1) an attorney to serve in the dual role; or

(2) a volunteer advocate to serve as guardian ad litem for a child unless the training of the volunteer advocate is designed for participation in suits other than suits filed by a governmental entity.

Sec. 107.023. FEES IN SUITS OTHER THAN SUITS BY GOVERNMENTAL ENTITY. (a) In a suit other than a suit filed by a governmental entity, in addition to the attorney's fees that may be awarded under Chapter 106, the following persons are entitled to reasonable fees and expenses in an amount set by the court and ordered to be paid by one or more parties to the suit:

(1) an attorney appointed as an amicus attorney or as an attorney ad litem for the child; and

(2) a professional who holds a relevant professional license and who is appointed as guardian ad litem for the child, other than a volunteer advocate.

(b) The court shall:

(1) determine the fees and expenses of an amicus attorney, an attorney ad litem, or a guardian ad litem by reference to the reasonable and customary fees for similar services in the county of jurisdiction;

(2) order a reasonable cost deposit to be made at the e the court makes the appointment; and

(3) before the final hearing, order an additional amount to be paid to the credit of a trust account for the use and benefit of the amicus attorney, attorney ad litem, or guardian ad litem.

(c) A court may not award costs, fees, or expenses to an amicus attorney, attorney ad litem, or guardian ad litem against the state, a state agency, or a political subdivision of the state under this part.

SUBCHAPTER C. APPOINTMENT OF VOLUNTEER ADVOCATES [~~OTHER COURT APPOINTMENTS~~]

Sec. 107.031. VOLUNTEER ADVOCATES. (a) In a suit filed by a governmental entity, the court may appoint a charitable organization composed of volunteer advocates whose charter mandates the provision of services to allegedly abused and neglected children or an individual [~~person~~] who has received the court's approved training regarding abused and neglected children and who has been certified by the court to appear at court hearings as a guardian ad litem for the child or as a volunteer advocate for [~~on behalf of~~] the child.

(b) In a suit other than a suit filed by a governmental entity, the court may appoint a charitable organization composed of volunteer advocates whose training provides for the provision of services in private custody disputes or a person who has received the court's approved training regarding the subject matter of the suit and who has been certified by the court to appear at court hearings as a guardian ad litem for the child or as a volunteer advocate for the child. A person appointed under this subsection is not entitled to fees under Section 107.023 [~~addition, the court may appoint a group of court-certified volunteers to serve as an administrative review board to advise the court as to the conservatorship appointment and the placement of the child by the Department of Protective and Regulatory Services or authorized agency in substitute care~~].

[~~(c) A court-appointed volunteer, a board member or employee of a volunteer advocate charitable organization, or a member of an administrative review board is not liable for civil damages for a recommendation made or opinion rendered while serving or having served as a court-appointed volunteer, board member or employee of a volunteer advocate charitable organization, or member of an administrative review board under this section unless the act or failure to act is wilfully wrongful, committed with conscious indifference or reckless disregard for the safety of another, committed in bad faith or with malice, or is grossly negligent.~~

[~~(d) This section does not prohibit the court from appointing as a guardian ad litem for a child under Section 107.001 a court-certified volunteer advocate appointed for the child under this section.~~

[~~(e) A court-certified volunteer advocate appointed under this section for a child with a disability may be assigned to act as a surrogate parent for the child, as provided by 20 U.S.C. Section 1415(b) and its subsequent amendments, if:~~

[~~(1) the child is in the conservatorship of the Department of Protective and Regulatory Services;~~

[~~(2) the volunteer advocate is serving as guardian ad litem for the child; and~~

[~~(3) a foster parent of the child is not acting as the child's parent under Section 29.015, Education Code.~~]

SECTION 2. The changes in law made by this Act apply only to a suit affecting the parent-child relationship filed on or after the effective date of this Act. A suit filed before the effective date of this Act is governed by the law in effect on the date the suit was filed, and the former law is continued in effect for that purpose.

SECTION 3. This Act takes effect September 1, 2003.