SCAC Meeting
October 20-21, 2006
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The Supreme Court of Texas

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Chambers of
Justice Nathan L. Hecht

September 22, 2006

Charles L. "Chip" Babcock
Chair, Supreme Court Rules Advisory Committee
Jackson Walker, L.L.P.
1401 McKinney, Suite 1900
Houston, TX 77010

Re: Referral of Various Proposed Changes to Rules of Civil and Appellate Procedure
Via e-mail

Dear Chip:

The Court requests the Advisory Committee's recommendations on a number of proposed changes to the Rules of Civil Procedure and Rules of Appellate Procedure. These proposals are summarized in two attached appendices. Appendix A contains three proposals submitted to the Court by the State Bar Rules Committee. Appendix B contains proposals submitted to the Court over the past six months or so from various sources: members of the bar, members of the Advisory Committee, and members of the Court or the Court's staff. Although a number of rules proposals received by the Court are not being referred at this time, the Court believes that the proposals discussed in the attached appendices warrant the Committee's evaluation.

The Court greatly appreciates the Committee's thoughtful consideration of these issues, for its dedication to the rules process, and for your continued leadership on the Committee. I look forward to seeing you all in October.

Sincerely,

Nathan L. Hecht
Justice

Rule: 199 (**Depositions Upon Oral Examination**)

Text:

199.2 Procedure for Noticing Oral Deposition
(a) *Time to Notice Deposition.* A notice of intent to take an oral deposition must be served on the witness and all parties a reasonable time before the deposition is taken. An oral deposition may be taken prior to the appearance of all parties only by agreement of the parties or with leave of court. An oral deposition may be taken outside the discovery period only by agreement of the parties or with leave of court.

Summary of Issue:
The State Bar Rules Committee recommends the above change in response to the observation that there have been times where a party has sought an early deposition prior to appearance of all parties to a lawsuit for strategic purposes only. The SBRC notes that the proposed change would restrict the first deposition to occurring after all parties had appeared unless otherwise agreed or with leave of court.

Rule: TRCP 245 **(Assignment of Cases for Trial)**

Text of Existing Rule:

The court may set contested cases on written request of any party, or on the court's own motion, with reasonable notice of not less than forty-five days to the parties of a first setting for trial, or by agreement of the parties; provided, however, that when a case previously has been set for trial, the Court may reset said contested case to a later date on any reasonable notice to the parties or by agreement of the parties. Non-contested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time.

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

Proposed New Text (proposed additions underlined):

1. The court may set contested cases on written request of any party or on the court's own motion. Unless all parties agree otherwise, the court shall give reasonable notice of the first setting for trial of not less than seventy-five [75] days to the parties who have appeared when notice is given.
2. When a case previously has been set for trial, the court may reset the case to a later date on any reasonable notice to the parties who have appeared or by agreement of those parties. Non-contested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time.

3. If a party is joined or appears after a case has been set for trial, the court shall give reasonable notice of the trial setting to that party of not less than seventy-five [75] days after that party has appeared, unless that party agrees otherwise. For good cause, the court has discretion to shorten the notice to the newly joined or appearing party of an existing trial setting; provided, that the court shall grant that party a reasonable period to resolve its pretrial motions and conduct discovery.

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

Summary of Issue:

The State Bar Rules Committee felt that two matters had rendered the 45-day period under the existing rule insufficient time to prepare for trial. First, the SBRC notes that changes in statutory law and rules of procedure made it difficult to resolve a number of pre-trial motions (including motions for summary judgment, change of venue, and forum non conveniens, and designation of responsible third parties and of experts) before trial if a case is set shortly after it is filed. Second, the rule does not provide a minimum notice period for parties first joined after the case is set for trial.

Rule: TRCP 296 **(Requests for Findings of Fact and Conclusions of Law)**

Text:

In any case tried in the district or county court without a jury, or in any matter where findings are required or permitted, any party may request the court to state in writing its findings of fact and conclusions of law. Such request shall be entitled "Request for Findings of Fact and Conclusions of Law" and shall be filed within twenty days after judgment is signed with the clerk of the court, who shall immediately call such request to the attention of the judge who tried the case. The party making the request shall serve it on all other parties in accordance with Rule 21a. The findings of fact shall only include the elements of each ground of recovery or defense.

Comment: The trial court is not required to support its findings of fact with recitals of the evidence.

Summary of Issue:

The State Bar Rules Committee observes that many courts and practitioners feel compelled to make or propose voluminous and detailed findings of fact, out of fear that omitting a single key fact may undermine the validity of a subsequent judgment or broaden the basis for appeal. This is said to be time-consuming and a waste of both judicial economy and the litigants' resources.

The SBRC proposes that a solution to this problem may lie in a combination of the proposed additional language to Rule 296 and the comment that follows. The proposed comment and rule text would clarify that while the elements of each ground of recovery or defense must be contained in findings of fact, a trial court would not be required to support its findings with recitals of the evidence on which its findings are based, or to make findings on every controverted fact.

Rule: TRCP 306a (**Periods to Run From Signing of Judgment**)

Current text:

1. **Beginning of Periods.** The date of judgment or order is signed as shown of record shall determine the beginning of the periods prescribed by these rules for the court's plenary power to grant a new trial or to vacate, modify, correct or reform a judgment or order and for filing in the trial court the various documents that these rules authorize a party to file within such periods including, but not limited to, motions for new trial, motions to modify judgment, motions to reinstate a case dismissed for want of prosecution, motions to vacate judgment and requests for findings of fact and conclusions of law; but this rule shall not determine what constitutes rendition of a judgment or order for any other purpose.

***

4. **No Notice of Judgment.** If within twenty days after the judgment or other appealable order is signed, a party adversely affected by it or his attorney has neither received the notice required by paragraph (3) of this rule nor acquired actual knowledge of the order, then with respect to that party all the periods mentioned in paragraph (1) [the trial court's plenary power to grant a new trial or to vacate, modify, correct, or reform a judgment or order] shall begin on the date that such party or his attorney received such notice or acquired actual knowledge of the signing, whichever occurred first, but in no event shall such periods begin more than ninety days after the original judgment or other appealable order was signed.

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

Summary of Issue:

TRAP 4.2 generally mirrors TRCP 306a by granting additional time to file post-judgment pleadings when a party did not receive notice of judgment within 20 days after it was signed. The main difference is that TRCP 306a addresses pleadings governed by the rules of civil procedure (such as a motion for new trial), whereas TRAP 4.2 addresses pleadings governed by the rules of appellate procedure (such as a notice of appeal). However, unlike TRCP 306a, TRAP 4.2(c) also specifically requires the trial court to "sign a written order that finds the date when the party or the party's attorney first either received notice or acquired actual knowledge that the judgment or order was signed." The issue for

the Committee's study is whether this or similar language should be added to TRCP 306a(5) to require the trial court to specify the date a party received late notice of judgment. See *In re The Lynd Co.*, No. 05-0432 (holding that TRAP 4.2(c)'s required finding stating the date of late notice cannot be implicitly read into TRCP 306a, and disapproving court of appeals decisions holding otherwise).

Rule: TRAP 13 (**Court Reporters and Court Recorders**)

Current text:

13.2 Additional Duties of Court Recorder

The official court recorder must also:**(a)** ensure that the recording system functions properly throughout the proceeding and that a complete, clear, and transcribable recording is made;**(b)** make a detailed, legible log of all proceedings being recorded, showing:

(1) the number and style of the case before the court;**(2)** the name of each person speaking;**(3)** the event being recorded such as the voir dire, the opening statement, direct and

cross-examinations, and bench conferences;**(4)** each exhibit offered, admitted, or excluded;**(5)** the time of day of each event; and**(6)** the index number on the recording device showing where each event is recorded;

(c) after a proceeding ends, file with the clerk the original log;

(d) have the original recording stored to ensure that it is preserved and is accessible; and

(e) ensure that no one gains access to the original recording without the court's written order.

Summary of Issue:

This proposal was submitted to the Court by Justice David Gaultney. He notes that TRAP 13 currently places no duty on the court recorder to transcribe the electronic recording of the trial. He further observes that parties to appeals often must request extensions of time because the electronic recordings of the trial have not been transcribed at the time the parties file them with the court of appeals, which is the event that triggers the countdown for filing briefs (assuming the clerk's record has already been filed), and that needless delay results while the parties obtain a transcription. He proposes to amend TRAP 13.2 to address the duty of transcribing electronic recordings by expressly assigning that duty to the recorder, or, in the alternative, by allowing parties to prepare transcriptions from a certified copy of the recording provided by the recorder.

Rule: TRAP 20.1 (**When Party Is Indigent**)

Current text:

20.1 Civil Cases

(a) *Establishing Indigence.* A party who cannot pay the costs in an appellate court may proceed without advance payment of costs if:

(1) the party files an affidavit of indigence in compliance with this rule.

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(c) *When and Where Affidavit Filed.*

(1) Appeals. An appellant must file the affidavit of indigence in the trial court with or before the notice of appeal. An appellee who is required to pay part of the cost of preparation of the record under Rule 34.5(b)(3) or 34.6(c)(3) must file an affidavit of indigence in the trial court within 15 days after the date when the appellee becomes responsible for paying that cost.

Summary of Issue:

The rule requires an indigent appellant to file an affidavit "in the trial court with or before the notice of appeal." TRAP 20.1(c)(1). Although indigence affidavits previously submitted for trial purposes are literally filed "before the notice of appeal," several courts of appeals have held that such trial affidavits do not satisfy the affidavit requirement of TRAP 20.1(c)(1). *See In re J.B.*, 2003 WL 1922835 at *1 n.1 (Tex. App.—Tyler 2003, no pet.); *Holt v. F.F. Enters.*, 990 S.W.2d 756, 758 (Tex. App.—Amarillo 1998, pet. denied). The Committee is asked to consider whether TRAP 20.1 should be amended to clarify that an affidavit of indigence filed at trial does not satisfy TRAP 20.1.

Proponents would argue that the rule should be clarified to remove any ambiguity suggesting that prior trial affidavits can satisfy the appellate requirement. Pro se litigants are generally held to the standard of an attorney responsible for following the rules of procedure; however, pro se and other litigants may find it difficult to perceive from the rule itself the necessity of a new affidavit at the time appeal is perfected. Proponents would argue that, while it is reasonable to require indigents to file a new affidavit at the time appeal is perfected, even if they had previously filed one for trial purposes, the rule should be amended to clarify that the trial affidavit does not satisfy the requirement of TRAP 20.1.

The Court recently issued a *per curiam* opinion in *Higgins v. Randall County Sheriff's Office*, No. 05-0095, holding that because the indigence-affidavit requirement on appeal is not jurisdictional, courts of appeals must allow a reasonable time to cure the defect. 2006 WL 1450042, at *1. To the extent that non-compliance results from the failure of pro se litigants and others to look beyond the text of TRAP 20.1, the *Higgins* decision may not

resolve the ambiguity concern described above. However, the decision arguably makes the perceived need for clarification less urgent, as it clarifies that the initial failure to file an appeal affidavit will not result in immediate dismissal.

Rule: TRAP 24 (**Suspension of Enforcement of Judgment Pending Appeal in Civil Cases**)

Current text:

24.2. Amount of Bond, Deposit or Security

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(c) *Determination of Net Worth.*

(1) Judgment Debtor's Affidavit Required; Contents; Prima Facie Evidence. A judgment debtor who provides a bond, deposit, or security under (a)(2) in an amount based on the debtor's net worth must simultaneously file an affidavit that states the debtor's net worth and states complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained. The affidavit is prima facie evidence of the debtor's net worth.

(2) Contest; Discovery. A judgment creditor may file a contest to the debtor's affidavit of net worth. The contest need not be sworn. The creditor may conduct reasonable discovery concerning the judgment debtor's net worth.

(3) Hearing; Burden of Proof; Findings. The trial court must hear a judgment creditor's contest promptly after any discovery has been completed. The judgment debtor has the burden of proving net worth. The trial court must issue an order that states the debtor's net worth and states with particularity the factual basis for that determination.

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, but when the judgment is for money, the appellate court must not modify the amount of security to exceed the limits imposed by rule 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).

Summary of Issues:

(1) TRAP 24.2(c) does not presently address the situation in which the judgment debtor files a net worth affidavit that is either facially defective (*i.e.*, it fails to state "complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained"), or is facially sufficient in that respect but is found not to be credible. An example of the latter situation was presented in *In re Smith*, No. 06-0107, and *In re Main Place Homes*, No. 06-0108, which were decided in a per curiam opinion of the Supreme Court issued May 5, 2006. In those cases, which involved separate mandamus petitions arising from the same trial, the judgment debtor submitted a net worth affidavit supported by an accounting statement, but the trial court's finding of an alter ego led the court to attribute to the debtor a significantly higher net worth than the debtor claimed.

The present rule notes that "[t]he judgment debtor has the burden of proving net worth," and it requires the trial court to make a net worth finding that "states with particularity the factual basis for that determination." TRAP 24.2(c)(3). However, it is arguably unclear whether a net worth affidavit that is deficient or is found to lack credibility serves to supersede the judgment pending appeal—particularly where the judgment creditor did not provide competing financial data sufficient to let the trial court make a net worth finding supported by detailed evidence, as required by the rule. Accordingly, the Committee is requested to consider:

- whether Rule 24 should be amended to state that a judgment is not superseded when the judgment debtor fails to obtain a net worth finding in line with his net worth affidavit; and

- whether Rule 24 should be amended to explicitly allow a judgment creditor to file a motion to strike a net worth affidavit for facial deficiencies, providing for a hearing on the motion within a relatively short time, and providing that the judgment is no longer superseded if the trial court grants the motion to strike.

(2) TRAP 24.4(a) provides that, "[o]n a party's motion to the appellate court, that court may review" various aspects of a trial court's supersedeas rulings. The 1990 amendment to former TRAP 49, which changed "court of appeals" to "appellate court," introduced uncertainty in at least two respects. First, it is unclear whether the current rule gives either a court of appeals or the Supreme Court jurisdiction over a supersedeas ruling when there is no appeal of the underlying case yet pending before the court. Second, if the rule authorizes an appellate court to review supersedeas rulings when the underlying case is not before it, the rule does not specify by what procedural vehicle supersedeas issues should be presented to the Supreme Court, *i.e.*, whether by motion or by mandamus. (The Supreme Court is

an "appellate court" as defined by TRAP 3.1(b)). The Court addressed this issue in *Smith/Main Place Homes* by treating the "Tex. R. App. P. 24.4 Motion" as a mandamus petition. *In re Smith*, 2006 WL 1195327, at *3 (Tex. May 5, 2006). The Committee is further asked to address whether Rule 24 should be amended to address either of the above issues.

Rule: TRAP 41 (**Panel and En Banc Decision**)

Current text (with potential revisions shown):

41.1 Decision by Panel

(a) *Constitution of panel.* Unless a court of appeals with more than three justices votes to decide a case en banc, a case must be assigned for decision to a panel of the court consisting of three justices, although not every member of the panel must be present for argument. If the case is decided without argument, three justices must participate in the decision. A majority of the panel, which constitutes a quorum, must agree on the judgment. Except as otherwise provided in these rules, a panel's opinion constitutes the court's opinion, and the court must render a judgment in accordance with the panel opinion.

(b) *When panel cannot agree on judgment.* After argument, if for any reason a member of the panel cannot participate in deciding a case, the case may be decided by the two remaining justices. If they cannot agree on a judgment, the chief justice of the court of appeals must designate another justice of the court to sit on the panel to consider the case, request the assignment of a qualified ~~retired or former~~ justice or judge to sit on the panel to consider the case, or convene the court en banc to consider the case. The reconstituted panel or the en banc court may order the case reargued.

(c) *When court cannot agree on judgment.* After argument, if for any reason a member of a court consisting of only three justices cannot participate in deciding a case, the case may be decided by the two remaining justices. If they cannot agree on a judgment, that fact must be certified to the Chief Justice of the Supreme Court. The Chief Justice may then temporarily assign a justice of another court of appeals or a qualified ~~retired or former~~ justice or judge to sit with the court of appeals to consider the case. The reconstituted court may order the case reargued.

Summary of Issue:

In 2003, Section 74.003 of the Government Code, which delineates the qualifications of a justice or judge serving on assignment in the appellate courts, was amended to add subsection (h):

> Notwithstanding any other provision of law, an active district court judge may be assigned to hear a matter pending in an appellate court.

This new provision permitted the Chief Justice of the Supreme Court, for the first time, to use active district court judges for assignments in the intermediate appellate courts. Many appellate courts prefer using active district judges to avoid using visiting judge funds. The Committee is asked to consider whether the limitation on the qualifications of assigned

judges contained in the TRAP 41.1 should be revised in light of the statutory amendment, perhaps by replacing the term "retired or former justice or judge" with "qualified justice or judge," as suggested above.

Rule: TRAP 49 (**Motion and Further Motion for Rehearing**)

Current text:

49.7 En Banc Reconsideration.
While the court of appeals has plenary jurisdiction, a majority of the en banc court may, with or without a motion, order en banc reconsideration of a panel's decision. If a majority orders reconsideration, the panel's judgment or order does not become final, and the case will be resubmitted to the court for en banc review and disposition.

Summary of Issue:

TRAP 49.7 provides that a majority of an en banc court of appeals may, "with or without a motion," order en banc reconsideration at any time "[w]hile the court of appeals has plenary jurisdiction." Although Rule 49 contemplates the filing of en banc motions, it does not specify a deadline for filing them—only that the court of appeals can consider them within its plenary jurisdiction. The court of appeals's plenary power expires "30 days after the court overrules all timely filed motions for rehearing, including motions for en banc reconsideration of a panel's decision under Rule 49.7...." TRAP 19.1. Thus, under the current rules, an en banc motion would presumably have to be filed within 30 days after the overruling of a motion for rehearing; if so, the appellate court's plenary power extends until 30 days after it overrules the en banc motion. The Court's recent decision in *City of San Antonio v. Hartman*, No. 05-0147, holds that an en banc motion counts as a motion for rehearing for purposes of the 45-day rule in TRAP 53.7. In light of that decision, the Committee is asked to consider whether TRAP 49 should be amended to provide specific procedural guidelines governing motions for en banc reconsideration, such as:

- whether to clarify or shorten the existing deadline for when such motions must be filed;
- whether they should be subject to the 15-day extension rule in TRAP 49.8;
- the page limit applicable to such motions;
- whether the rule should specify procedures for responses, as in TRAP 49.2;
- whether an en banc motion can be filed in the same motion with a motion for panel rehearing, or whether separate motions can simultaneously be filed, or whether a party can or must wait to file an en banc motion until after its motion for panel rehearing is denied;
- whether, as in Fifth Circuit practice, the en banc motion is initially to be treated as a motion for rehearing by the panel if no motion for rehearing was previously filed (See "Handling of Petition by the Judges" following Fifth Circuit local rule 35.6);
- when it is appropriate to seek en banc reconsideration, *compare* FRAP 35(b)(1) (requiring statement that panel decision either (1) conflicts with precedent from the U.S. Supreme Court or the court to which the en banc motion is addressed, or (2)

involves questions of exceptional importance), *with* TRAP 41.2(c) (noting that "en banc consideration is not favored and should not be ordered unless necessary to secure or maintain uniformity of the court's decisions or unless extraordinary circumstances require en banc reconsideration").

- whether the TRAP rule should specify the availability of sanctions, to discourage frivolous en banc motions. *See* Fed. Local R. App. P. 35.1 (noting that court is "fully justified in imposing sanctions on its own initiative . . . for manifest abuse of the procedure").

Rule: TRAP 52 (**Original Proceedings**)

Current text:

Rule 52.3 Original Proceedings; Form and Content of Petition
All factual statements in the petition must be verified by affidavit made on personal knowledge by an affiant competent to testify to the matters stated. [Remainder of paragraph omitted]

Summary of Issues:

Some appellate practitioners have asked the Court to modify TRAP 52 to account for situations in which the Relator's attorney cannot verify, based on personal knowledge, that all facts stated in the mandamus petition are true and correct. These proponents argue that the purpose of Rule 52's verification requirement would be satisfied by including in the mandamus record a copy of the witness's sworn affidavit, and they suggest amending TRAP 52 to allow sworn testimony or affidavits in the record to satisfy the verification requirement.

In practice, an attorney will often lack the personal knowledge of the facts demanded by the verification requirement, unless the facts relevant to the mandamus concern events witnessed by the attorney at trial. Thus, to comply with the requirement, it may be necessary to obtain sworn statements from witnesses or others with personal knowledge of the facts. However, mandamus petitions often must be prepared and filed on little notice due to circumstances beyond the attorney's control. Thus, the Committee is asked to consider whether a central purpose of the verification requirement—to avoid factual disputes in mandamus proceedings—might be achieved in a manner that is less burdensome to practitioners. *See Cantrell v. Carlson*, 313 S.W.2d 624, 626 (Tex. Civ. App.—Dallas 1958, no writ) (noting that verification must constitute a positive statement of factual knowledge as to support a charge of perjury if the facts were found to be untrue); *see also Hooks v. Fourth Court of Appeals*, 808 S.W.2d 56, 60 (Tex. 1991) (appellate courts may not deal with disputed factual matters in mandamus proceedings).

Several other issues are raised when the facts pertinent to the mandamus are neither within the attorney's personal knowledge nor the personal knowledge of any single witness. Must the petition be verified by multiple affiants? If so, how should their verifications reflect those facts to which each respective affiant is competent to swear? The Committee is further asked to consider whether TRAP 52.3 should be amended to address these issues.

Rule: none

Current text: none

Summary of Issue:

Government Code §22.010 states: "The supreme court shall adopt rules establishing guidelines for the courts of this state to use in determining whether in the interest of justice the records in a civil case, including settlements, should be sealed." Pursuant to that statutory requirement, the Court in 1990 promulgated TRCP 76a, which governs sealing records in trial courts. However, there is no comparable TRAP rule that governs requests to seal records in the appellate courts. Accordingly, the Committee is asked to consider whether the Appellate Rules should contain a provision that governs requests to seal records in the appellate courts.

Issue: Although TRAP 4.2(c) requires the trial court to sign "a written order that finds the date when the party or the party's attorney first either received notice or acquired actual knowledge that the judgment or order was signed," TRCP 306a does not. Recently, the supreme court held that "when the trial court fails to specifically find the date of notice, the finding may be implied from the trial court's judgment, unless there is no evidence supporting the implied finding or the party challenging the judgment establishes as a matter of law an alternate notice date," disapproving court of appeals' opinions to the contrary. *In re Lynd Co.*, 195 S.W.3d 682, 686 (Tex. 2006). Justice Hecht's September 22, 2006 letter asks whether TRCP 306a(5) should be amended to "require the trial court to specify the date a party received late notice of judgment." The subcommittee unanimously recommends amendment.

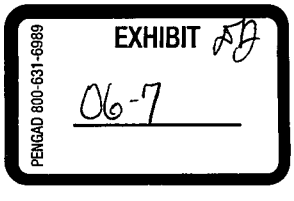
Rule 306a

....

3. **Notice of Judgment.** When the final judgment or other appealable order is signed, the clerk of the court shall immediately give notice to the parties or their attorneys of record by first class mail advising that the judgment or order was signed. Failure to comply with the provisions of this rule shall not affect the periods mentioned in paragraph (1) of this rule, except as provided in paragraph (4).

4. **No Notice of Judgment.** If within twenty days after the judgment or other appealable order is signed, a party adversely affected by it or his attorney has neither received the notice required by paragraph (3) of this rule nor acquired actual knowledge of the order, then with respect to that party all the periods mentioned in paragraph (1) shall begin on the date that such party or his attorney received such notice or acquired actual knowledge of the signing, whichever occurred first, but in no event shall such periods begin more than ninety days after the original judgment or other appealable order was signed.

5. **Motion, Notice, ~~and~~ Hearing, and Order.** In order to establish the application of paragraph (4) of this rule, the party adversely affected is required to prove in the trial court, on sworn motion and notice, the date on which the party or his attorney first either received the notice required by Texas Rule of Civil Procedure 306a.3 or acquired actual knowledge of the signing of the judgment and that this date was more than twenty days after the judgment was signed. After hearing the motion, the trial court must sign a written order expressly finding the date the party or the party's attorney first either received the notice required by Texas Rule of Civil Procedure 306a.3 or acquired actual knowledge that the judgment or order was signed.



MEMORANDUM

To: SCAC Members

From: Bill Dorsaneo

Date: October 19, 2006

Re: Nathan Hecht Letter 9/22/06

Several members of the Appellate Rules Subcommittee conducted a teleconference on October 11 and considered the changes suggested for Appellate Rules 13 (Court Reporters and Court Recorders), 20.1 (When Party is Indigent), 24.2 (Amount of Bond, Deposit or Security), 41 (Panel and En Banc Decision), 49 (Motion and Further Motion for Rehearing), 52 (Original Proceedings) and a possible appellate rule to govern the sealing of records in the appellate courts. Here are the subcommittee's recommendations.

13.2 Additional Duties of Court Recorder. The official court recorder must also:

(a)

(b)

(c)

(d)

(e)

(f) if requested by any party to the appeal, prepare and file a stenographic transcription of the proceedings along with the reporter's record as provided in Rule 34.6(a)(2).

34.6 Reporter's Record.

(1)

(a) *Contents*

(1) Stenographic recording.

. . .

(2) Electronic recording.

. . .

(b) *Request for preparation.*

(1) Request to court reporter or court recorder. At or before the time for perfecting the appeal, the appellant must request in writing that the official reporter or recorder prepare the reporter's record. The request must designate the exhibits to be included. A request ~~to the court reporter but not the court recorder~~ must also designate the portions of the proceedings to be included.

35.3 Responsibility for Filing Record

(b) *Reporter's record.* The official or deputy court reporter or court recorder is responsible for preparing, certifying and timely filing the reporter's record if:

(1) a notice of appeal has been filed;

(2) the appellant has requested the reporter's record be prepared; and

(3) the party responsible for paying for the preparation of the reporter's record has paid the reporter's or the recorder's fee, or has made satisfactory arrangements with the reporter or recorder to pay the fee, or is entitled to appeal without paying the fee.

38.5 *Appendix for cases recorded electronically.* In cases where the proceedings were electronically recorded, the following rules apply:

(a) *Appendix.*

(1) In general. At or before the time a party's brief is due, the party must file one copy of an appendix containing a transcription of all portions of the recording that the party considers relevant to the appellate issues or points. A transcription prepared and filed by the court recorder at the request of a party pursuant to Rules 13.2(f) and 34.6(b)(1) satisfies this requirement. Unless another party objects, the transcription will be presumed accurate.

20.1 Civil Cases

(a) *Establishing indigence.* A party who cannot pay the costs in an appellate court may proceed without advance payment of costs if:

(1) the party files an affidavit of indigence in a compliance with this rule.

(b) *Contents of affidavit.*

(c) *IOLTA Certificate.* If the party is represented by an attorney who is providing free legal services, without contingency, because of the party's indigency and the attorney is providing services either directly or by referral from a program funded by the Interest on Lawyers Trust Accounts (IOLTA) program, the attorney may file an IOLTA certificate confirming that the IOLTA-funded program screened the party for income eligibility under the IOLTA income guidelines. A party's affidavit of inability accompanied by an attorney's IOLTA certificate may not be contested.

(d) *When and Where Affidavit Filed.*

(1) Appeals. An appellant must file the affidavit of indigence in the trial court with or before the notice of appeal. The prior filing of an affidavit of indigence in the trial court pursuant to Civil Procedure Rule 145 does not meet the requirements of this rule, which requires a separate affidavit and proof of current indigence. An appellee who is required to pay part of the cost. . . must file an affidavit of indigence in the trial court within 15 days after the date when the appellee becomes responsible for paying that cost.

(2) Extension of time. The appellate court may extend the time to file an affidavit if, within 15 days after the deadline for filing the affidavit, the party files in the appellate court a motion complying with Rule 10.5(b).

See Higgins v. Randall County Sheriff's Office 49 Tex. Sup. Ct. J. 645 (Tex. 2006).

24.2 Amount of Bond, Deposit or Security

Awaiting Prof. Carlson's draft.

41.1 Decision by Panel

(a) *Constitution of panel.* Unless a court of appeals with more than three justices votes to decide a case en banc, a case must be assigned for decision to a panel of the court consisting of three justices, although not every member of the panel must be present for argument. If the case is decided without argument, three justices must participate in the decision. A majority of the panel, which constitutes a quorum, must agree on the judgment. Except as otherwise provided in these rules, a panel's opinion constitutes the court's opinion, and the court must render a judgment in accordance with the panel opinion.

(b) *When panel cannot agree on judgement.* After argument, if for any reason a member of the panel cannot participate in deciding a case, the case may be decided by the two remaining justices. If they cannot agree on a judgement, the chief justice of the court of appeals must designate another justice of the court to sit on the panel to consider the case, request the assignment of an active district court judge or a qualified retired or former justice or judge to sit on the panel to consider the case, or convene the court en banc to consider the case. The reconstituted panel or the en banc court may order the case reargued.

(c) *When court cannot agree on judgment.* After argument, if for any reason a member of a court consisting of only three justices cannot participate in deciding a case, the case may be decided by the two remaining justices. If they cannot agree on a judgment, that fact must be certified to the Chief Justice of the Supreme Court. The Chief Justice may then temporarily assign a justice of another court of appeals an active district court judge or a qualified retired or former justice or judge to sit with the court of appeals to consider the case. The reconstituted court may order the case reargued.

49.7 En Banc Reconsideration. A party may file a motion for en banc reconsideration, as a separate motion, with or without filing a motion for rehearing, within 15 days after the court of appeals judgment or order is rendered. Alternatively a motion for en banc reconsideration may be filed by a party no later than 15 days after the overruling of the same party's timely filed motion for rehearing or further motion for rehearing. While the court has plenary power, as provided in Rule 19, a majority of the en banc court may, with or without a motion, order en banc reconsideration of a panel's decision . . .

49.8 Extension of Time

A court of appeals may extend the time for filing a motion for rehearing or a further motion for rehearing or a motion for en banc reconsideration if a party filesa motion complying with Rule 10.5(b) no later than 15 days after the last date for filing the motion.

49.9 Not Required for Review. A motion for rehearing is not a prerequisite to filing a motion for en banc reconsideration as provided by Rule 49.7 or a petition for review in the Supreme Court or a petition for discretionary review in the court of Criminal Appeals nor is it required to preserve error.

52.3 Original Proceedings; Form and Content of Petition. All factual statements in the petition, not otherwise supported by sworn testimony, affidavit or other competent evidence, must be verified by an affidavit or affidavits made on personal knowledge by affiants competent to testify to the matters stated. . .

53.7 Time and Place of Filing.

(a) *Petition.* The petition must be filed with the Supreme Court within 45 days after the following:

(1) the date the court of appeals rendered judgment, if no motion for rehearing or motion for en banc reconsideration is timely filed; or

(2) the date of the court of appeals' last ruling on all timely filed motions for rehearing and all timely filed motions for en banc reconsideration.

N.B. Also consider amending 19.1 to differentiate motions for rehearing from motions for en banc reconsideration as follows.

19.1 Plenary Power of Courts of Appeals. A court of appeals' plenary power over its judgment expires:

(a) 60 days after judgment if no timely filed motion to extend time or motion for rehearing is then pending.

(b) 30 days afer the court overrules all timely filed motions for rehearing and all timely filed motions for en banc reconsideration of a panel's decision under Rule 49.7, and timely motions to extend time to file a motion for rehearing or a motion for en banc reconsideration under Rule 49.8.

Bexar
Title IV assoc. judges
Juan Chavira Henrietta Cervantes 210.335.2706: left msg 10/18 10:45 am

J. James Rausch, Denise Paz 210.335.2256 ct coordinator 898 sw2d 347
has mikes at bench and witness stand; tapes provided by state. Makes logs + sheet w/party names, attorney names; doesn't make notes w/tape counter; but she will make copies of tapes for parties that they can take to CSR for transcription. Keeps tapes in order by tapes. If COA asks for transcript, she'll take it to the CSR for the district court to which special judge is assigned. Not a certified court reporter; so proposed change would be a problem; she would probably take it to CSR for district court to which case is assigned. Would be interested.
How does a person become certified recorder?

Brazos County
district and county-courts-at-law do not have court recorders, but CCL #1 used to.

Dallas County: neither district nor county courts use recorders since 1998.

Hardin County
J. Billy Carraway: 4-camera system, produces CD, charges parties $150 per copy. No appeals taken since implemented; but they just provide CD, no court reporter. Would oppose party-request proposal b/c doesn't have court reporter. 409.656.7049 cell phone.

Jasper County: County J. Joe Folk; J. Carraway says he doesn't have a lot of trials, plus is retiring at end of year. Wasn't able to contact.

Liberty County district courts do not have court recorders. CCL still does it; J. Don Taylor's Ct coordinator is recorder: Lisa Warren 936.336.4662

Montgomery County district courts and three of the county-courts-at-law do not have court recorders. County Court at Law No. 3 does use a recorder; she is Joanne Bergh at 936.539.7973. Was unavailable until Friday 10/18, but Janice Kiely (court coordinator) said that Joanne handles transcriptions (used to be court reporter); is sure she would be happy to have rule require recorder to make transcript upon request.
J. Olen Underwood- retired from district court bench, but used recorders for many years. Had to get parties to agree to record b/c wasn't "certified."

39th District Court (Throckmorton, Stonewall, and Kent counties):
The court recorder is the same person as the court reporter:
Rob McKnight
Court Reporter/Court Recorder
P O Box 541
Haskell, TX 79521 -0541
phone: (940)864-3728

would be OK with him
started 1990 with recording; has done 1746 some tapes; about 7-8 tapes to a 4-day trial (3-hr tapes).

ORGAIN, BELL & TUCKER, L.L.P.
ATTORNEYS AT LAW
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September 29, 2006

Mr. Charles L. Babcock
Jackson & Walker L.L.P.
1401 McKinney, Suite 1900
Houston, Texas 77010

Dear Chip:

Enclosed herein are Rules 904, 606 and 609, which are ready for presentation to the full Supreme Court Advisory Committee.

Thank you very much.

Sincerely,

Buddy

Buddy Low

BL:cc

Enclosures

cc: Mr. Jody Hughes
Rules Attorney
Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

DISPOSITION CHART
TEXAS RULES OF EVIDENCE AGENDA
OCTOBER 20-21, 2006

RULE NO.	HISTORY	RECOMMENDATION OF EVIDENCE SUBCOMMITTEE	REASONS
904 (new)	Referred by SBOT Administration of Rules of Evidence Committee	Adopt rule that is attached. *Also attached is Government Code § 22.004 and Civil Practice & Remedies Code § 18.001 and § 18.002.	Reduce costs and effectuate the purpose of original CPRC § 18.001-.002. *See attached letter of February 21, 2006.
606	Referred by SBOT Administration of Rules of Evidence Committee	Leave rule as it presently is.	Texas law is clear, unlike federal law wherein the circuits have differed. Clerical error has clear definition under Texas case law.
609	Referred by SBOT Administration of Rules of Evidence Committee	Leave rule as it presently is.	"Credibility" is preferable to "character for truthfulness". We presently instruct the jury they are sole judges of credibility of witnesses.

RULE 904. AFFIDAVIT OF COST AND NECESSITY OF SERVICES

(a) This rule applies to civil actions only, but not to an action on a sworn account.

(b) An affidavit that the amount a service provider charged for a service was reasonable at the time and place that the service was provided and that the service was necessary under the circumstances for which the service was performed is admissible in evidence and is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable and that the service was necessary.

(1) An affidavit must:

(A) be taken before an officer with authority to administer oaths;
(B) be made by the person who provided the service or the custodian of records showing the service provided and charge made;
(C) include an itemized statement that clearly identifies the date and description of the service and charge; and
(D) contain the address and telephone number of the affiant who is the provider who rendered the service.

(2) Filing and service of affidavit: The affidavit must be filed with the clerk of the court and a copy of the affidavit must be served on each party at least 60 days before the day on which evidence is first presented at the trial of the case.

(3) A person signing an Affidavit of Cost and Necessity, other than a custodian of records, must be timely disclosed in response to a proper discovery request.

(c) A counter-affidavit stating that the amount a person charged for a service was not reasonable at the time and place that the service was provided or that the service was not necessary under the circumstances for which the service was performed is admissible in evidence to support a finding of fact by judge or jury that the amount charged was not reasonable or that the service was not necessary. A counter-affidavit may not assert that an affiant, who is a custodian of records, testifying under section (b) is not qualified by knowledge, skill, experience, training, education, or other expertise to attest to the matters set forth in an affidavit.

(1) A counter-affidavit must:

(A) be taken before an officer with authority to administer oaths;
(B) specifically set forth the factual basis for controverting any of the contested matters contained in the affidavit;
(C) be made by a person who is qualified by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the affidavit; and
(D) include or attach the curriculum vitae or facts to support section (c)(1)(C) of the counter-affiant, which must include the address and telephone number of the counter-affiant.

(2) Filing and service of counter-affidavit: A counter-affidavit must be filed with the clerk of the court and a copy of the counter-affidavit must be served on each party within 30 days after the date the affidavit is served, or with leave of court, at any time before the day on which evidence is first presented at the trial of the case.

(d) This rule does not affect the admissibility of other evidence concerning reasonableness and necessity, except that an opponent of an affidavit may not contest reasonableness and necessity of the services unless the opponent:

(1) files a counter-affidavit, or

(2) has specifically disclosed a testifying expert as to the specific issue in question.

(e) In the event an affidavit and/or counter-affidavit is filed under this rule after the discovery period has ended but within the time period permitted in this rule, or at a time that would not otherwise reasonably permit discovery of an affiant or counter-affiant, then only in that event, the party adversely affected may nevertheless take and use the deposition of, and/or subpoena for trial, the affiant or counter-affiant.

(f) **PROPOSED FORMS OF AFFIDAVIT**

(1) An affidavit concerning cost and necessity of services of the person who provided the service is sufficient if it substantially follows the following form:

No. _____

John Doe	§	IN THE _____
(Name of Plaintiff)	§	COURT IN AND FOR
v.	§	_____ COUNTY,
John Roe	§	TEXAS
(Name of Defendant)		

AFFIDAVIT OF SERVICE PROVIDER

Before me, the undersigned authority, personally appeared _____ (NAME OF AFFIANT) _____, who, being by me duly sworn, deposed as follows:

My name is _____ (NAME OF AFFIANT) _____. I am of sound mind and capable of making this affidavit which is based upon my personal knowledge and is true and correct. A true and correct copy of my curriculum vitae is attached as Exhibit A which contains my address and telephone number.

On _____(DATE) _____, I provided a service to _____ (NAME OF PERSON WHO RECEIVED SERVICE) _____. An itemized statement of the service and the charge for the service is attached to this Affidavit as Exhibit B and contains _____ pages.

The service I provided was necessary and the amount that I charged for the service was reasonable at the time and place that the service was provided.

_____
Affiant

SWORN TO AND SUBSCRIBED before me on the _____ day of _____, 20___.

My commission expires:

_____

_____
Notary Public – State of Texas
Printed name of Notary: _____

(2) An affidavit concerning cost and necessity of services by the custodian of records showing the service provided and the charge made is sufficient if it substantially follows the following form:

No. _____

John Doe	§	IN THE _____
(Name of Plaintiff)	§	COURT IN AND FOR
v.	§	_____ COUNTY,
John Roe	§	TEXAS
(Name of Defendant)	§	

AFFIDAVIT BY CUSTODIAN OF RECORDS

Before me, the undersigned authority, personally appeared _____ (NAME OF AFFIANT) _____, who, being by me duly sworn, deposed as follows:

I am of sound mind and legally capable of making this affidavit which is based upon my personal knowledge and is true and correct.

I am the custodian of the billing records of the person who provided the service _____ (later referred to as the "Service Provider"). Attached hereto are _____ pages of records from the Service Provider. These said _____ pages of records are kept by the Service Provider in the regular course of business of the Service Provider, and it was the

regular course of business of the Service Provider for an employee or representative of the Service Provider, with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original. The service provided was necessary and the amount charged for the service was reasonable at the time and place that the service was provided.

_____
Affiant

SWORN TO AND SUBSCRIBED before me on the _____ day of _____, 20__.

My commission expires:
_____

_____
Notary Public – State of Texas
Printed name of Notary: _____

(3) A counter-affidavit to rebut cost and necessity of service by a competent person (provided by this Rule) who rebuts the reasonableness or necessity of the service is sufficient if it substantially follows the following form:

No. _____

John Doe	§	IN THE _____
(Name of Plaintiff)	§	COURT IN AND FOR
v.	§	_____ COUNTY,
John Roe	§	TEXAS
(Name of Defendant)	§	

COUNTER-AFFIDAVIT

Before me, the undersigned authority, personally appeared _____ (NAME OF COUNTER-AFFIANT) _____, who, being by me duly sworn, deposed as follows:

My name is _____(NAME OF COUNTER-AFFIANT) _____. I am of sound mind and capable of making this affidavit which is based upon my personal knowledge and is true and correct.

On _____(DATE) _____, I reviewed the records of _____

(NAME OF AFFIANT IN AFFIDAVIT BEING CONTROVERTED) _____ pertaining to _____ (NAME OF PERSON RECEIVING SERVICE) _____ which were attached to the Service Provider's affidavit. My curriculum vitae which is true and correct is attached as Exhibit A. I am qualified by knowledge, skill, experience, training, education, and other expertise to testify in opposition to the matters contained in the affidavit because _____. I specifically take exception to the services rendered and/or charges made because (NOTE: Be specific as to which particular services are inappropriate and why and/or which charges are not reasonable and necessary.

Based upon the foregoing, I do not believe the services rendered were reasonable and/or necessary at the time and place that the service was provided.

_____
Counter-Affiant

SWORN TO AND SUBSCRIBED before me on the _____ day of _____, 20__.

My commission expires:

_____

_____
Notary Public – State of Texas
Printed name of Notary: _____

Comment: This rule is a change in the law. See CPRC §§ 18.001-002 and Government Code § 22.004. Under this rule each affidavit, whether controverted or not, is sufficient to raise an issue of fact on the reasonableness of costs and the necessity of the services which are the subject of the affidavit. If an affidavit is controverted by a counter-affidavit, the parties may present additional evidence on the controverted subject, as may be permitted by the Court and in compliance with the scheduling order, if any.

The rule only addresses reasonableness of costs and necessity of services; it does not address other issues. If brought to the Court's attention, it should strike any portion of an affidavit or counter-affidavit that is beynod the scope of this rule.

Rule 904(e) includes two new concepts: (1) the discovery period has ended or (2) at a time that would not otherwise reasonably permit discovery. The first part is self-explanatory, the second part would be used if the affidavit/counter-affidavit were filed, as an example, on the last day of

the discovery period. Thus it doesn't meet part (1), but part (2) could be utilized to still obtain discovery of the affiant or counter-affiant.

In the counter-affidavit, that affiant should briefly state in the blank after the word "because" why the affiant is qualified; e.g., "I am a medical doctor who performs similar services to which I have taken exception."

rehearing denied 106 Tex. 160, 160 S.W. 471; Tyler v. Sowders (Civ.App.1915) 172 S.W. 205; Lingo Lumber Co. v. Garvin (Civ.App.1915) 181 S.W. 561.

Supreme Court is without authority to promulgate a court rule which violates statutory law. Durham v. Scrivener, 1925, 270 S.W. 161.

If there is any conflict between the statutes and the rules for district and county courts, the statutes will control. Shelton Motor Co. v. Higdon (Civ.App. 1940) 140 S.W.2d 905, reversed 138 Tex. 121, 157 S.W.2d 627. Courts ⇐ 80(1)

5. Habeas corpus

Supreme Court, not Court of Appeals, had jurisdiction of habeas corpus proceeding filed by husband adjudged guilty of contempt for violating district court order issued in partition suit for division of husband's military retirement benefits; Court of Appeals had statutory authority only for habeas matters arising from restraint due to violations of orders entered in divorce, custody or support cases. Ex parte Maroney (App. 6 Dist. 1987) 741 S.W.2d 566. Courts ⇐ 472.2

§ 22.004. Rules of Civil Procedure

(a) The supreme court has the full rulemaking power in the practice and procedure in civil actions, except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant.

(b) The supreme court from time to time may promulgate a specific rule or rules of civil procedure, or an amendment or amendments to a specific rule or rules, to be effective at the time the supreme court deems expedient in the interest of a proper administration of justice. The rules and amendments to rules remain in effect unless and until disapproved by the legislature. The clerk of the supreme court shall file with the secretary of state the rules or amendments to rules promulgated by the supreme court under this subsection and shall mail a copy of those rules or amendments to rules to each registered member of the State Bar of Texas not later than the 60th day before the date on which they become effective. The secretary of state shall report the rules or amendments to rules to the next regular session of the legislature by mailing a copy of the rules or amendments to rules to each elected member of the legislature on or before December 1 immediately preceding the session.

(c) So that the supreme court has full rulemaking power in civil actions, a rule adopted by the supreme court repeals all conflicting laws and parts of laws governing practice and procedure in civil actions, but substantive law is not repealed. At the time the supreme court files a rule, the court shall file with the secretary of state a list of each article or section of general law or each part of an article or section of general law that is repealed or modified in any way. The list has the same weight and effect as a decision of the court.

(d) The rules of practice and procedure in civil actions shall be published in the official reports of the supreme court. The supreme court may adopt the method it deems expedient for the printing and distribution of the rules.

(e) This section does not affect the repeal of statutes repealed by Chapter 25, page 201, General Laws, Acts of the 46th Legislature, Regular Session, 1939, on September 1, 1941.

Acts 1985, 69th Leg., ch. 480, § 1, eff. Sept. 1, 1985. Amended by Acts 1989, 71st Leg., ch. 297, § 1, eff. Aug. 28, 1989; Acts 2001, 77th Leg., ch. 644, § 1, eff. June 13, 2001.

was a resident at the time the cause of action accrued but has subsequently moved.

(c) Service of process under this section shall be made in the manner provided by this chapter for substituted service on nonresident motor vehicle operators, except that a copy of the process must be mailed by certified mail.

(d) Service under this section is in addition to procedures provided by Rule 117a of the Texas Rules of Civil Procedure and has the same effect as personal service.

(e) Service of process on the secretary of state under this section must be accompanied by the fee provided by Section 405.031(a), Government Code, for the maintenance by the secretary of state of a record of the service of process.

History of CPRC §17.091: Acts 1985, 69th Leg., ch. 959, §1, eff. Sept. 1, 1985. Amended by Acts 1989, 71st Leg., ch. 384, §14, eff. Sept. 1, 1989; Acts 1991, 72nd Leg., 2nd C.S., ch. 6, §60, eff. Sept. 1, 1991; Acts 1995, 74th Leg., ch. 579, §1, eff. Jan. 1, 1996; Acts 1997, 75th Leg., ch. 948, §5, eff. Sept. 1, 1997; Acts 2001, 77th Leg., ch. 1430, §34, eff. Sept. 1, 2001.

See also *O'Connor's Texas Rules*, "Serving the Defendant with Suit," ch. 2-H.

CPRC §17.092. SERVICE ON NONRESIDENT UTILITY SUPPLIER

A nonresident individual or partnership that supplies gas, water, electricity, or other public utility service to a city, town, or village in this state may be served citation by serving the local agent, representative, superintendent, or person in charge of the nonresident's business.

History of CPRC §17.092: Acts 1985, 69th Leg., ch. 959, §1, eff. Sept. 1, 1985.

CPRC §17.093. SERVICE ON FOREIGN RAILWAY

In addition to other methods of service provided by law, process may be served on a foreign railway by serving:

(1) a train conductor who:

(A) handles trains for two or more railway corporations, at least one of which is the foreign corporation and at least one of which is a domestic corporation; and

(B) handles trains for the railway corporations over tracks that cross the state's boundary and on tracks of a domestic corporation within this state; or

(2) an agent who:

(A) has an office in this state; and

(B) sells tickets or makes contracts for the transportation of passengers or property over all or part of the line of the foreign railway.

History of CPRC §17.093: Acts 1985, 69th Leg., ch. 959, §1, eff. Sept. 1, 1985.

CHAPTER 18. EVIDENCE

SUBCHAPTER A. DOCUMENTARY EVIDENCE

CPRC §18.001. AFFIDAVIT CONCERNING COST & NECESSITY OF SERVICES

(a) This section applies to civil actions only, but not to an action on a sworn account.

(b) Unless a controverting affidavit is filed as provided by this section, an affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary.

(c) The affidavit must:

(1) be taken before an officer with authority to administer oaths;

(2) be made by:

(A) the person who provided the service; or

(B) the person in charge of records showing the service provided and charge made; and

(3) include an itemized statement of the service and charge.

(d) The party offering the affidavit in evidence or the party's attorney must file the affidavit with the clerk of the court and serve a copy of the affidavit on each other party to the case at least 30 days before the day on which evidence is first presented at the trial of the case.

(e) A party intending to controvert a claim reflected by the affidavit must file a counteraffidavit with the clerk of the court and serve a copy of the counteraffidavit on each other party or the party's attorney of record:

(1) not later than:

(A) 30 days after the day he receives a copy of the affidavit; and

(B) at least 14 days before the day on which evidence is first presented at the trial of the case; or

(2) with leave of the court, at any time before the commencement of evidence at trial.

(f) The counteraffidavit must give reasonable notice of the basis on which the party filing it intends at trial to controvert the claim reflected by the initial affidavit and must be taken before a person authorized to administer oaths. The counteraffidavit must be made by a person who is qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit.

History of CPRC §18.001: Acts 1985, 69th Leg., ch. 959, §1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 167, §3.04(a), eff. Sept. 1, 1987.

See also TRE 902(10), Business Records Accompanied by Affidavit.

Jackson v. Gutierrez, 77 S.W.3d 898, 902 (Tex. App.—Houston [14th Dist.] 2002, n.p.h.). "A plaintiff may prove medical expenses are reasonable and necessary either by presenting expert testimony, or by submitting affidavits in compliance with §18.001...." *See also* ***Rodriguez-Narrera v. Ridinger***, 19 S.W.3d 531, 532 (Tex.App.—Fort Worth 2000, no pet.).

Turner v. Peril, 50 S.W.3d 742, 747 (Tex.App.—Dallas 2001, pet. denied). "Significantly, while §18.001(c)(2)(B) permits charges to be proved by a non-expert custodian, §18.001(f) requires a counter affidavit to give reasonable notice of the basis on which the party filing it intends to controvert the claim reflected by the initial affidavit *and* be made by a person qualified to testify in contravention about matters contained in the initial affidavit. [S]ection 18.001 places a greater burden of proof on counteraffidavits to discourage their misuse in a manner that frustrates the intended savings. [¶] An affidavit ... is insufficient unless its allegations are direct and unequivocal and perjury can be assigned to it."

City of El Paso v. PUC, 916 S.W.2d 515, 524 (Tex. App.—Austin 1995, writ dism'd). "Section 18.001 does not address the *admissibility* of an affidavit concerning cost and necessity of services but only the *sufficiency* of the affidavit to support a finding of fact that a charge was reasonable or a service was necessary. [¶] Section 18.001 makes no reference to requirements for admissibility of affidavits."

Beauchamp v. Hambrick, 901 S.W.2d 747, 749 (Tex.App.—Eastland 1995, no writ). CPRC "§18.001 is an evidentiary statute which accomplishes 3 things: (1) it allows for the admissibility, by affidavit, of evidence of the reasonableness and necessity of charges which would otherwise be inadmissible hearsay; (2) it permits the use of otherwise inadmissible hearsay to support findings of fact by the trier of fact; and (3) it provides for exclusion of evidence to the contrary, upon proper objection, in the absence of a properly-filed counteraffidavit. ... The statute does not provide that the evidence is conclusive, nor does it address the issue of causation." *See also* ***Sloan v. Molandes***, 32 S.W.3d 745, 752 (Tex.App.—Beaumont 2000, no pet.).

CPRC §18.002. FORM OF AFFIDAVIT

(a) An affidavit concerning cost and necessity of services by the person who provided the service is sufficient if it follows the following form:

No. _____

John Doe	§	In the _____
(Name of Plaintiff)	§	Court in & for
v.	§	_____ County,
John Roe	§	Texas
(Name of Defendant)	§	

AFFIDAVIT

Before me, the undersigned authority, personally appeared _____ (NAME OF AFFIANT), who, being by me duly sworn, deposed as follows:

My name is _____ (NAME OF AFFIANT). I am of sound mind and capable of making this affidavit.

On _____ (DATE), I provided a service to _____ (NAME OF PERSON WHO RECEIVED SERVICE). An itemized statement of the service and the charge for the service is attached to this affidavit and is a part of this affidavit.

The service I provided was necessary and the amount that I charged for the service was reasonable at the time and place that the service was provided.

_____
Affiant

SWORN TO AND SUBSCRIBED before me on the ____ day of _____, 19___.

My commission expires:

_____

_____
Notary Public, State of Texas
Notary's printed name:

_____

(b) An affidavit concerning cost and necessity of services by the person who is in charge of records showing the service provided and the charge made is sufficient if it follows the following form:

No. _____

John Doe	§	In the _____
(Name of Plaintiff)	§	Court in & for
v.	§	_____ County,
John Roe	§	Texas
(Name of Defendant)	§	

AFFIDAVIT

Before me, the undersigned authority, personally appeared _____ (NAME OF AFFIANT), who, being by me duly sworn, deposed as follows:

My name is _____ (NAME OF AFFIANT). I am of sound mind and capable of making this affidavit.

I am the person in charge of records of _____ _____ (PERSON WHO PROVIDED THE SERVICE). Attached to this affidavit are records that provide an itemized statement of the service and the charge for the service that _____ (PERSON WHO PROVIDED THE SERVICE) provided to _____ (PERSON WHO RECEIVED THE SERVICE) on _____ (DATE). The attached records are a part of this affidavit.

The attached records are kept by me in the regular course of business. The information contained in the records was transmitted to me in the regular course of business by _____ (PERSON WHO PROVIDED THE SERVICE) or an employee or representative of _____ (PERSON WHO PROVIDED THE SERVICE) who had personal knowledge of the information. The records were made at or near the time or reasonably soon after the time that the service was provided. The records are the original or an exact duplicate of the original.

The service provided was necessary and the amount charged for the service was reasonable at the time and place that the service was provided.

_____
Affiant

SWORN TO AND SUBSCRIBED before me on the ____ day of _____, 19___.

My commission expires:

_____

_____
Notary Public, State of Texas
Notary's printed name:

_____

(c) The form of an affidavit provided by this section is not exclusive and an affidavit that substantially complies with Section 18.001 is sufficient.

History of CPRC §18.002: Acts 1993, 73rd Leg., ch. 248, §1, eff. Aug. 30, 1993.

See also TRE 902(10), Business Records Accompanied by Affidavit.

Sections 18.003-18.030 reserved for expansion

SUBCHAPTER B. PRESUMPTIONS

CPRC §18.031. FOREIGN INTEREST RATE

Unless the interest rate of another state or country is alleged and proved, the rate is presumed to be the same as that established by law in this state and interest at that rate may be recovered without allegation or proof.

History of CPRC §18.031: Acts 1985, 69th Leg., ch. 959, §1, eff. Sept. 1, 1985.

CPRC §18.032. TRAFFIC CONTROL DEVICE PRESUMED TO BE LAWFUL

(a) In a civil case, proof of the existence of a traffic control device on or alongside a public thoroughfare by a party is prima facie proof of all facts necessary to prove the proper and lawful installation of the device at that place, including proof of competent authority and an ordinance by a municipality or order by the commissioners court of a county.

(b) Proof of the existence of a one-way street sign is prima facie proof that the public thoroughfare on or alongside which the sign is placed was designated by proper and competent authority to be a one-way thoroughfare allowing traffic to go only in the direction indicated by the sign.

(c) In this section, "traffic control device" includes a control light, stop sign, and one-way street sign.

(d) Any party may rebut the prima facie proof established under this section.

History of CPRC §18.032: Acts 1995, 74th Leg., ch. 165, §2, eff. Sept. 1, 1995.

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February 21, 2006

Mr. Buddy Low
Supreme Court Advisory Committee
Orgain, Bell & Tucker, LLP
P. O. Box 1751
Beaumont, Texas 77704-1751

re: Re-submission of TRE 904 with proposed revisions

Dear Buddy:

Enclosed please find proposed TRE 904 which addresses reasonableness of costs and necessity of services currently governed under CPRC 18.001-.002. On behalf of the Administration of Rules of Evidence Committee, we earnestly recommend to the Supreme Court Advisory Committee that it endorse our proposed TRE 904 and recommend it to the Supreme Court for adoption. In the above referenced matter I have attached proposed Rule 904 (revised from previous submitted versions in 2003 and 2005) which currently includes proposed forms of affidavit and counter-affidavit with comments. This latest edit of Rule 904 is the culmination of years of work by the Administration of Rules of Evidence Committee and *such revisions were passed **unanimously** by the Committee at large.*

The fact that the changes were passed unanimously in my opinion is nothing less than miraculous. AREC's initial work on this Rule was difficult, with leanings coinciding with committee member's practices on the plaintiff or on the defense side of the bar. In my opinion, AREC's unanimous recommendation of TRE 904 as revised is due to two things: 1) the stellar makeup of the sub-committee and its commitment to devising an equitable rule and 2) the blatant gamesmanship that members of the committee have observed in practice by both sides of the bar in utilizing the current CPRC 18.001 - .002 as a sword or a shield. Further, these changes are needed in light of recent opinions by Courts of Appeal that there are no forms given for counter affidavits thus adding to uncertainty and gamesmanship. ***Turner v. Peril***, 50 SW3d 742, 747 (Tex. App. - Dallas, 2001, pet. den.) Accordingly, even though the intent of CRPC 18.001 - .002 is to reduce the costs to litigants, that purpose is frustrated in multiple ways under the current Rule.

Courts of Appeal have also recognized that CPRC, Sec. "18.001 is an evidentiary statute, [*see* ***Beauchamp v. Hambric***, 901 SW2d 747, 749 (Tex. App. - Eastland, 1995, no writ)] and yet there is no Texas rule of evidence. The Texas Supreme Court, has rule making authority under Tex. Gov. Code § 22.004 that repeals all conflicting laws and parts of laws governing civil actions.

Gamesmanship under the current CPRC 18.001 - 18.002 includes, but is not limited to:

1. Parties filing multiple affidavits and slipping into the affidavit, causation language, not contemplated by the statute [***Beauchamp v. Hambric***, 901 SW2d 747, 279 (Tex. App. - Eastland, 1995, no writ); *see* also ***Sloan v. Molandes***, 32 SW3d 745, 752 (Tex. App. - Beaumont, 2000, no pet)] such as "the service I provided was necessary *due to the accident of 12/01/04* and the amount that I charged for the service was reasonable at the time and place the service was provided." In filing this language among other affidavits it may be hoped that the defendant does not catch the added causation statement or file a counter affidavit and that at trial such may be surreptitiously used to imply to the jury a health care providers' opinion on included causation.

2. The current practices of many insurance providers is to obtain a counter-affidavit on every conceivable basis, thus knocking out the affidavit and therefore evidence of costs and putting the plaintiff to the expense of bringing a witness at trial.

3. Parties may include in the bills, particularly in cases with multiple health care billers, costs of incidental health care that had nothing to do with an accident, such as visits or charges for flu, cold, pap smear and costs of other doctor's visits that are not relevant to the incident. It then becomes incumbent upon the defendant to catch these non-related charges and then hire an expert to fill out an affidavit to controvert same. Failure to controvert may have a consequence submission of non-related medical charges to the jury without ability to contest same at trial.

4. Accordingly, the cost to defendants is largely having to hire an expert to controvert and then to appear at trial based on relatively inconsequential, but wrongfully included charges. The cost to plaintiff comes in having their affidavits nullified routinely, followed by the specter of incurring the costs of having to bring someone to trial to testify as to reasonableness and necessity. Under the current Rule and practices occurring thereunder there is no certainty on either side of the docket as to admissibility of evidence and costs are magnified.

The attached proposed version of Rule 904 is an effort to bring such expensive and time consuming gamesmanship to an end and to instill some measure of certainty as to admissibility at trial. Under these proposed revisions and the comments, the plaintiff may file his reasonableness and necessity affidavit as is the current practice. Likewise, the defendant may file a counter-affidavit by a qualified person as is the current practice. However, a counter-affidavit does not nullify the plaintiff's original

reasonableness and necessity affidavit. Rather, both conforming affidavits are given to the jury and weighed as to their credibility. Further, if the language of the affidavits wanders into areas such as *causation* apart from reasonableness of costs and necessity of services, then the comment directs the Court to merely strike that portion of the affidavit that is beyond the scope of the rule, rather than to strike the entire affidavit. If a counter-affidavit is filed, the parties may also address reasonableness and necessity by bringing live witnesses as is also allowed under the current rule. *See* ***Jackson v. Gutierrez***, 77 SW3d 898, 902 (Tex. App. - Houston [14th Dist.] 2002, no pet.); *see* also ***Rodriguez-Narrera v. Ridinger***, 19 SW3d 531, 532 (Tex. App. - Ft. Worth, 2000, no pet.).

As was stated above the AREC unanimously recommends proposed Rule 904 as revised. If you have any questions with regard to this matter please feel free to call me.

Very truly yours,

W. Bruce Williams

WBW:ljj
enclosure

606

Rule 606. Competency of Juror as a Witness

(a) At the Trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes. However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; ~~or~~ (2) to rebut a claim that the juror was not qualified to serve, or (3) whether there was a mistake in entering the verdict onto the verdict form.

charges may arise out of the same matter, for there will be no other way to avoid the terrible risk of saying something perfectly innocent that might be misunderstood or incorrectly recollected by the other participant, who sometimes might not even be a lawyer." Professor Duane argued that statements made in settlement negotiations are not critical evidence of guilt, because if they are declared admissible in criminal cases, they will never be made, except by those without experienced counsel.

Rule 606. Competency of Juror as Witness

* * * * *

(b) Inquiry into validity of verdict or indictment. — Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith; ~~except that~~ But a juror may testify ~~on the question~~ about (1) whether extraneous prejudicial information was improperly brought to the jury's attention,

(2) or whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. ~~Nor may a~~ A juror's affidavit or evidence of any statement by the juror ~~concerning~~ may not be received on a matter about which the juror would be precluded from testifying ~~be received for these purposes.~~

Committee Note

Rule 606(b) has been amended to provide that juror testimony may be used to prove that the verdict reported was the result of a mistake in entering the verdict on the verdict form. The amendment responds to a divergence between the text of the Rule and the case law that has established an exception for proof of clerical errors. *See, e.g., Plummer v. Springfield Term. Ry.*, 5 F.3d 1, 3 (1st Cir. 1993) ("A number of circuits hold, and we agree, that juror testimony regarding an alleged clerical error, such as announcing a verdict different than that agreed upon, does not challenge the validity of the verdict or the deliberation of mental processes, and therefore is not subject to Rule 606(b)."); *Teevee Toons, Inc., v. MP3.Com, Inc.*, 148 F.Supp.2d 276, 278 (S.D.N.Y. 2001) (noting that Rule 606(b) has been silent regarding inquiries designed to confirm the accuracy of a verdict).

In adopting the exception for proof of mistakes in entering the verdict on the verdict form, the amendment specifically rejects the broader exception, adopted by some courts, permitting the use of

U.S. v. Hawkins, 76 F.3d 545, 551 (4th Cir.1996). "[T]estimony taken from a witness who has not given an oath or affirmation to testify truthfully is inadmissible."

U.S. v. Ward, 989 F.2d 1015, 1019 (9th Cir.1992). FRE 603 "'is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required.'" *See also Doe v. Phillips*, 81 F.3d 1204, 1211 (2d Cir.1996); *U.S. v. Saget*, 991 F.2d 702, 710 (11th Cir.1993).

FRE 604. INTERPRETERS

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

Source of FRE 604: P.L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1934; Mar. 2, 1987, eff. Oct. 1, 1987.

FRE 605. COMPETENCY OF JUDGE AS WITNESS

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Source of FRE 605: P.L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1934.

U.S. v. Paiva, 892 F.2d 148, 158 (1st Cir.1989). "The prohibition of [FRE] 605 anticipates situations where the presiding judge is called to testify as a witness in the trial.... *At 159:* A federal district court judge retains the common law power to explain, summarize and comment on the facts and evidence. ... In commenting on the testimony or questioning witnesses, however, the judge may not assume the role of a witness. A judge may 'analyze and dissect the evidence, but he may not either distort it or add to it.'"

FRE 606. COMPETENCY OF JUROR AS WITNESS

Editor's Note: The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has proposed amendments to FRE 606, to be effective December 1, 2006. For the text of the proposed amendments, see www.uscourts.gov.

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Source of FRE 606: P.L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1934; P.L. 94-149, §1(10), Dec. 12, 1975, 89 Stat. 805; Mar. 2, 1987, eff. Oct. 1, 1987.

Marquez v. City of Albuquerque, 399 F.3d 1216, 1223 (10th Cir.2005). "[A] juror may not testify in impeachment of the verdict ... except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. [T]he decision whether to grant or deny a hearing on a claim that a juror was improperly exposed to extraneous information is vested in the broad discretion of the district courts, and we will review the denial of a request for such a hearing only for an abuse of discretion. [¶] A juror's personal experience ... does not constitute 'extraneous prejudicial information. [T]he inquiry is not whether the jurors became witnesses in the sense that they discussed any matters not of record, but whether they discussed specific extra-record *facts* relating to the defendant, and if they did, whether there was a significant possibility that the defendant was prejudiced thereby." (Internal quotes omitted.)

Pyles v. Johnson, 136 F.3d 986, 991 (5th Cir.1998). FRE 606(b) "bars juror testimony regarding the following four topics: (1) the method or arguments of the jury's deliberations, (2) the effect of any particular thing upon an outcome in the deliberations, (3) the mindset or emotions of any juror during deliberation, and (4) the testifying juror's own mental process during the deliberations. However, the rule provides that 'a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.' We have interpreted this portion of Rule 606(b) as follows: 'Post-verdict inquiries into the existence of

impermissible extraneous influences on a jury's deliberations are allowed under appropriate circumstances so that a jury-man may testify to any facts bearing upon the question of the *existence* of any extraneous influence, although not as to how far that influence operated upon his mind.'" *See also* ***Outboard Mar. Corp. v. Babcock Indus., Inc.***, 106 F.3d 182, 186 (7th Cir.1997).

FRE 607. WHO MAY IMPEACH

The credibility of a witness may be attacked by any party, including the party calling the witness.

Cross-references to FRE 607: ***Commentaries***, "Impeaching the Witness," ch. 8-C, §5, p. 508.

Source of FRE 607: P.L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1934; Mar. 2, 1987, eff. Oct. 1, 1987.

U.S. v. Abel, 469 U.S. 45, 49, 105 S.Ct. 465, 467 (1984). The FREs "do not by their terms deal with impeachment for 'bias'.... *At 51, 468-69:* We think ... that it is permissible to impeach a witness by showing his bias under the [FREs]. *At 52, 469:* Bias is a term used in the 'common law of evidence' to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest. Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony. [¶] A witness' and a party's common membership in an organization, even without proof that the witness or party has personally adopted its tenets, is certainly probative of bias."

U.S. v. Ienco, 92 F.3d 564, 568 (7th Cir.1996). FRE 607 "allows the credibility of a witness to be impeached by any party, including the party calling the witness, and the asking of leading questions is a standard technique of impeachment. ... Rule 607 abolishes the voucher rule and its corollaries, such as having to declare your witness adverse before cross-examining him or to show that his testimony surprised you."

U.S. v. Gilbert, 57 F.3d 709, 711 (9th Cir.1995). "Impeachment is improper when employed as a guise to present substantive evidence to the jury that would be otherwise inadmissible."

U.S. v. Ince, 21 F.3d 576, 579 (4th Cir.1994). "One method of attacking the credibility of (i.e., impeaching) a witness is to show that he has previously made a statement that is inconsistent with his present testimony. Even if that prior inconsistent statement would otherwise be inadmissible as hearsay, it may be admissible for the limited purpose of impeaching the witness."

FRE 608. EVIDENCE OF CHARACTER & CONDUCT OF WITNESS

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

Cross-references to FRE 608: ***Commentaries***, "Impeaching the Witness," ch. 8-C, §5, p. 508.

Source of FRE 608: P.L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1935; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Mar. 27, 2003, eff. Dec. 1, 2003.

U.S. v. Abel, 469 U.S. 45, 55, 105 S.Ct. 465, 470 (1984). FRE 608(b) "allows a cross-examiner to impeach a witness by asking him about specific instances of past conduct, other than crimes covered by [FRE] 609, which are probative of his veracity or 'character for truthfulness or untruthfulness.' The Rule limits the inquiry to cross-examination of the witness, however, and prohibits the cross-examiner from introducing extrinsic evidence of the witness' past conduct." *See also* ***Palmer v. City of Monticello***, 31 F.3d 1499, 1507 (10th Cir.1994) (prior act must have some bearing on witness' credibility).

U.S. v. Montelongo, 420 F.3d 1169, 1175 (10th Cir. 2005). FRE 608(b) "only applies to specific instances of conduct used to attack or support the witness' character

TRE 604. INTERPRETERS

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

See TRCP 183, regarding appointment and compensation of interpreters; Cochran, *Texas Rules of Evidence Handbook*, p. 556 (6th ed. 2005-06).

History of TRE 604 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] liv). Amended eff. Sept. 1, 1990, by order of Apr. 24, 1990 (785-86 S.W.2d [Tex.Cases] cvi): Added comment with reference to TRCP 183, regarding appointment and compensation of interpreters. Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] li). Source: FRE 604.

International Commercial Bank v. Hall-Fuston Corp., 767 S.W.2d 259, 261 (Tex.App.—Beaumont 1989, writ denied). Where a foreign company attempts to introduce into evidence business records that are not written in English, it may have one of its corporate representatives orally interpret the documents under oath after being qualified as an expert.

TRE 605. COMPETENCY OF JUDGE AS A WITNESS

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

See Cochran, *Texas Rules of Evidence Handbook*, p. 558 (6th ed. 2005-06).

History of TRE 605 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] liv). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lii). Source: FRE 605.

In re M.S., 115 S.W.3d 534, 538 (Tex.2003). "A judge's findings of fact are not technically the same as testimony.... In this case, the orders submitted into evidence, containing findings based on pretrial evidence by the very judge presiding over the termination proceeding, could be, like a judicial comment on the weight of the evidence, a form of judicial influence no less proscribed than judicial testimony. [T]he jury was permitted to see findings of fact made by the very judge presiding over the trial, and those facts were the very ones that the jury itself was being asked to find. The fact-finding present in the orders admitted as evidence comes far too close to 'indicat[ing] the opinion of the trial judge as to the verity or accuracy of the facts in inquiry'...."

O'Quinn v. Hall, 77 S.W.3d 438, 448 (Tex.App.—Corpus Christi 2002, no pet.). TRE 605 "applies not only to members of the judiciary, 'but also to those performing judicial functions that conflict with a witness's role.' [¶] 'The judge is a neutral arbiter in the courtroom, and the rule seeks to preserve his posture of impartiality before the parties....'"

In re M.E.C., 66 S.W.3d 449, 457 (Tex.App.—Waco 2001, no pet.). TRE 605 "prohibit[s] not only direct testimony by the judge but also that which 'is the functional equivalent of witness testimony.'"

TRE 606. COMPETENCY OF JUROR AS A WITNESS

(a) At the Trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes. However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve.

See TRCP 327(b); ***Commentaries***, "MNT Based on Jury or Bailiff Misconduct," ch. 10-B, §13; Cochran, *Texas Rules of Evidence Handbook*, p. 562 (6th ed. 2005-06).

History of TRE 606 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] liv). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lii). Source: FRE 606.

Golden Eagle Archery, Inc. v. Jackson, 24 S.W.3d 362, 371 (Tex.2000). An "alleged conversation between [jurors] during a trial break ... should not be considered 'deliberations' and therefore barred by [TRE] 606(b) and [TRCP] 327(b). [TRCPs] use the term 'deliberations' as meaning formal jury deliberations—when the jury weighs the evidence to arrive at a verdict."

Rosell v. Central W. Motor Stages, Inc., 89 S.W.3d 643, 661 (Tex.App.—Dallas 2002, pet. denied). "The essence of the 'outside influence' rule is to prevent outside information that affects the merits of the case from reaching the jury. The only evidence here is that the jury was told that they probably would be required to

deliberate another day. ... Thus, the bailiff informing the jury of the court's schedule was not misconduct. Further, the juror testimony that jurors traded answers on issues is testimony about deliberations and is not evidence of outside influences."

Chavarria v. Valley Transit Co., 75 S.W.3d 107, 110 (Tex.App.—San Antonio 2002, no pet.). TRE 606(b) does "not bar juror testimony about conversations during a trial break. *At III:* [However, we] believe that jurors discussing the case on breaks during deliberations is the same as deliberations themselves."

Perry v. Safeco Ins. Co., 821 S.W.2d 279, 281 (Tex. App.—Houston [1st Dist.] 1991, writ denied). "Information gathered by a juror and introduced to other jurors by that juror—even if it were introduced to prejudice the vote—does not constitute outside influence. [¶] Further, the coercive influence of one juror upon the rest of the panel is not 'outside influence.' Proof of coercive statements and their effect on the jury is barred by the rules."

TRE 607. WHO MAY IMPEACH

The credibility of a witness may be attacked by any party, including the party calling the witness.

See *Commentaries*, "Introducing Evidence," ch. 8-C; Cochran, *Texas Rules of Evidence Handbook*, p. 577 (6th ed. 2005-06).

History of TRE 607 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lv). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lii). Source: FRE 607.

Allied Chem. Co. v. DeHaven, 824 S.W.2d 257, 265 (Tex.App.—Houston [14th Dist.] 1992, no writ). TRE 607 "allows the credibility of a witness to be attacked by the party calling him." *See also Loyd Elec. Co. v. Millett*, 767 S.W.2d 476, 479 (Tex.App.—San Antonio 1989, no writ).

TRE 608. EVIDENCE OF CHARACTER & CONDUCT OF A WITNESS

(a) Opinion and Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

(1) the evidence may refer only to character for truthfulness or untruthfulness; and

(2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence.

See *Commentaries*, "Motion in Limine," ch. 5-E; "Introducing Evidence," ch. 8-C; Cochran, *Texas Rules of Evidence Handbook*, p. 583 (6th ed. 2005-06).

History of TRE 608 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lv). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lii). Source: FRE 608(a).

Closs v. Goose Creek Consol. ISD, 874 S.W.2d 859, 870 n.7 (Tex.App.—Texarkana 1994, no writ). "The credibility of a witness may be attacked by evidence in the form of an opinion or reputation. Specific instances of the conduct of a witness, other than conviction for a crime, may not be inquired into nor proved by extrinsic evidence for purposes of attacking the credibility of the witness."

Rose v. Intercontinental Bank, 705 S.W.2d 752, 757 (Tex.App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.). Under TRE 608(a), "the witness' reputation for truthfulness must first be attacked before [the party] can offer rehabilitating evidence."

TRE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record but only if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if:

(1) based on the finding of the rehabilitation of the person convicted, the conviction has been the subject of

609

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General Rule. For the purpose of attacking the ~~credibility~~ character for truthfulness of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record but only if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party.

The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers (04-EV-017) opposes the amendment to Rule 606(b) as it was released for public comment. The College agrees that the Rule should be amended to resolve a conflict in the case law over the scope of an exception for mistaken jury verdicts. But it argues that "the new rule's exception for 'clerical mistakes' is unclear, and even if that term's meaning can be divined by reference to the case law cited by the Advisory Committee, that meaning is not adequately clarified or justified." The College suggests that the term "inadvertence, oversight or mistake" should be substituted for "clerical mistake" in the proposed amendment as it was issued for public comment.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) **General rule.**—For the purpose of attacking the ~~credibility~~ character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that

the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted ~~if it involved dishonesty or false statement~~, regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

(b) Time limit.—Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not

admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation.—Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime ~~which~~ that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications.—Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a

juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) **Pendency of appeal.**—The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Committee Note

The amendment provides that Rule 609(a)(2) mandates the admission of evidence of a conviction only when the conviction required the proof of (or in the case of a guilty plea, the admission of) an act of dishonesty or false statement. Evidence of all other convictions is inadmissible under this subsection, irrespective of whether the witness exhibited dishonesty or made a false statement in the process of the commission of the crime of conviction. Thus, evidence that a witness was convicted for a crime of violence, such as murder, is not admissible under Rule 609(a)(2), even if the witness acted deceitfully in the course of committing the crime.

The amendment is meant to give effect to the legislative intent to limit the convictions that are to be automatically admitted under

for truthfulness. [H]owever, [Ds] did not seek to cross-examine [witness] on the prior incident in order to 'attack' his 'character for truthfulness,' but rather to negate the [Ds'] guilt of the crime charged against them.... As such, Rule 608(b) does not bar the [Ds'] cross-examination of [witness]."

U.S. v. Drury, 396 F.3d 1303, 1316 (11th Cir.2005). FRE 608 "permits rehabilitative evidence only when a witness's reputation for truthfulness has actually been attacked. [T]he prosecution's questioning the veracity of the accused's testimony and calling attention to inconsistencies therein does not constitute an attack on the accused's reputation for truthfulness permitting rehabilitative testimony."

U.S. v. Geston, 299 F.3d 1130, 1137 n.2 (9th Cir.2002). FRE 403 "modifies [FRE 608(b)] by providing that otherwise admissible and relevant evidence may be excluded if the court determines that its probative value is substantially outweighed by the danger of unfair prejudice." *See also U.S. v. Marino*, 277 F.3d 11, 24 (1st Cir.2002).

U.S. v. Shay, 57 F.3d 126, 131 (1st Cir.1995). FRE 608(a), "governing the admissibility of opinion testimony concerning a witness's character, contemplates that truthful or untruthful character may be proved by expert testimony."

U.S. v. Andujar, 49 F.3d 16, 26 (1st Cir.1995). "It is well settled that a party may not present extrinsic evidence of specific instances of conduct to impeach a witness on a collateral matter. 'A matter is considered collateral if the matter itself is not relevant in the litigation to establish a fact of consequence....'" (Internal quotes omitted.)

Ad-Vantage Tel. Directory Consultants v. GTE Directories Corp., 37 F.3d 1460, 1464 (11th Cir.1994). FRE 608(b) "permits inquiry ... into specific instances of a witness's conduct that are 'probative of truthfulness or untruthfulness.' [¶] Acts probative of untruthfulness under Rule 608(b) include such acts as forgery, perjury, and fraud."

FRE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

Editor's Note: The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has proposed amendments to FRE 609, to be effective December 1, 2006. For the text of the proposed amendments, see www.uscourts.gov.

(a) General rule. For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction

inadmissible. Evidence of the pendency of an appeal is admissible.

Cross-references to FRE 609: *Commentaries*, "Impeaching by conviction," ch. 8-C, §5.4, p. 509.

Source of FRE 609: P.L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1935; Mar. 2, 1987, eff. Oct. 1, 1987; Jan. 26, 1990, eff. Dec. 1, 1990.

U.S. v. Valentine, 401 F.3d 609, 615 (5th Cir.2005). "[A] deferred adjudication does not subject a witness to impeachment with the use of a prior 'conviction."

U.S. v. Delgado, 401 F.3d 290, 301 (5th Cir.2005). In ***Ohler v. U. S.***, 529 U.S. 753 (2000) "the Supreme Court held 'that a defendant who preemptively introduces evidence of a prior conviction on direct examination may not on appeal claim that the admission of such evidence was error.' [¶] Here, as in ***Ohler***, the [D] offered testimony of his prior conviction before being asked about it on cross-examination. By introducing the evidence in the first instance, even if done to 'remove the sting' of the conviction, [D] has waived his appeal as to this matter."

U.S. v. Hernandez, 106 F.3d 737, 739-40 (7th Cir. 1997). "[I]n determining whether the probative value of the conviction outweighs its prejudicial effect [the district court should consider]: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness' subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue."

Gill v. Thomas, 83 F.3d 537, 540 (1st Cir.1996). D "maintains that but for the magistrate judge having indicated that he would permit [P] to raise them on cross-examination, [D] never would have revealed his misdemeanor convictions on direct examination. *At 541:* At trial, rather than waiting for [P] to introduce the misdemeanors, objecting, and allowing the magistrate judge to reconsider his *in limine* ruling, [D] opted to introduce the misdemeanors preemptively to 'remove the sting' from Thomas's anticipated impeachment. [A]s a consequence, [D] 'opened the door' to [P's] cross-examination on the misdemeanors and thereby eliminated any potential evidentiary error. [¶] To preserve his *in limine* objection ... [D] should have refrained from offering the evidence himself, waited to see if [P] introduced [it] on cross-examination, and if so, objected then." *See also Ohler v. U.S.*, 529 U.S. 753, 756-57, 120 S.Ct. 1851, 1853 (2000).

U.S. v. Hamilton, 48 F.3d 149, 154 (5th Cir.1995). "Because the convictions were more than 10 years old, their admissibility is governed instead by [FRE] 609(b). We have read Rule 609(b) to say that the probative value of a conviction more than 10 years old is by definition outweighed by its prejudicial effect."

FRE 610. RELIGIOUS BELIEFS OR OPINIONS

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

Source of FRE 610: P.L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1936; Mar. 2, 1987, eff. Oct. 1, 1987.

Malek v. Federal Ins. Co., 994 F.2d 49, 54-55 (2d Cir. 1993). "Because it is apparent from these questions that defense counsel attempted to show that [witness's] character for truthfulness was affected by his religious beliefs and that such questioning may have prejudiced the Maleks, the district court erred in permitting the defendants to pursue this line of questioning. We are particularly troubled about this line of questioning, especially where the impeached witness' religious affiliation is the same as that of the plaintiffs."

Virgin Islands v. Petersen, 553 F.2d 324, 328 (3d Cir. 1977). "The colloquy at side bar clearly reveals that counsel sought to put before the jury the religious affiliation and beliefs of both [alibi witness and D]. [FRE] 610, clearly prohibits such testimony when it is used to enhance the witness' credibility—and no other purpose for its admission has been suggested."

FRE 611. MODE & ORDER OF INTERROGATION & PRESENTATION

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except

deliberate another day. ... Thus, the bailiff informing the jury of the court's schedule was not misconduct. Further, the juror testimony that jurors traded answers on issues is testimony about deliberations and is not evidence of outside influences."

Chavarria v. Valley Transit Co., 75 S.W.3d 107, 110 (Tex.App.—San Antonio 2002, no pet.). TRE 606(b) does "not bar juror testimony about conversations during a trial break. *At 111:* [However, we] believe that jurors discussing the case on breaks during deliberations is the same as deliberations themselves."

Perry v. Safeco Ins. Co., 821 S.W.2d 279, 281 (Tex. App.—Houston [1st Dist.] 1991, writ denied). "Information gathered by a juror and introduced to other jurors by that juror—even if it were introduced to prejudice the vote—does not constitute outside influence. [¶] Further, the coercive influence of one juror upon the rest of the panel is not 'outside influence.' Proof of coercive statements and their effect on the jury is barred by the rules."

TRE 607. WHO MAY IMPEACH

The credibility of a witness may be attacked by any party, including the party calling the witness.

See *Commentaries*, "Introducing Evidence," ch. 8-C; Cochran, *Texas Rules of Evidence Handbook*, p. 377 (6th ed. 2005-06).

History of TRE 607 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lv). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lii). Source: FRE 607.

Allied Chem. Co. v. DeHaven, 824 S.W.2d 257, 265 (Tex.App.—Houston [14th Dist.] 1992, no writ). TRE 607 "allows the credibility of a witness to be attacked by the party calling him." *See also Loyd Elec. Co. v. Millett*, 767 S.W.2d 476, 479 (Tex.App.—San Antonio 1989, no writ).

TRE 608. EVIDENCE OF CHARACTER & CONDUCT OF A WITNESS

(a) Opinion and Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

(1) the evidence may refer only to character for truthfulness or untruthfulness; and

(2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence.

See *Commentaries*, "Motion in Limine," ch. 5 E; "Introducing Evidence," ch. 8-C; Cochran, *Texas Rules of Evidence Handbook*, p. 383 (6th ed. 2005-06).

History of TRE 608 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lv). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lii). Source: TRE 608(a).

Closs v. Goose Creek Consol. ISD, 874 S.W.2d 859, 870 n.7 (Tex.App.—Texarkana 1994, no writ). "The credibility of a witness may be attacked by evidence in the form of an opinion or reputation. Specific instances of the conduct of a witness, other than conviction for a crime, may not be inquired into nor proved by extrinsic evidence for purposes of attacking the credibility of the witness."

Rose v. Intercontinental Bank, 705 S.W.2d 752, 757 (Tex.App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.). Under TRE 608(a), "the witness' reputation for truthfulness must first be attacked before [the party] can offer rehabilitating evidence."

TRE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record but only if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if:

(1) based on the finding of the rehabilitation of the person convicted, the conviction has been the subject of

a pardon, annulment, certificate of rehabilitation, or other equivalent procedure, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment;

(2) probation has been satisfactorily completed for the crime for which the person was convicted, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment; or

(3) based on a finding of innocence, the conviction has been the subject of a pardon, annulment, or other equivalent procedure.

(d) Juvenile Adjudications. Evidence of juvenile adjudications is not admissible, except for proceedings conducted pursuant to Title III, Family Code, in which the witness is a party, under this rule unless required to be admitted by the Constitution of the United States or Texas.

(e) Pendency of Appeal. Pendency of an appeal renders evidence of a conviction inadmissible.

(f) Notice. Evidence of a conviction is not admissible if after timely written request by the adverse party specifying the witness or witnesses, the proponent fails to give to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

See ***Commentaries***, "Motion in Limine," ch. 5-E; "Introducing Evidence," ch. 8-C; Cochran, ***Texas Rules of Evidence Handbook***, p. 594 (6th ed. 2005-06).

History of TRE 609 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lv). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lii). Source: FRE 609.

Taylor v. Texas Dept. of Protective & Regulatory Servs., 160 S.W.3d 641, 653 (Tex.App.—Austin 2005, pet. denied). "[R]ule 609 is not a categorical limitation on the introduction of convictions for any purpose. Rather, it applies only to convictions offered for purposes of impeachment. Here, [P] offered [D's] convictions not solely to impeach her credibility but as relevant evidence going to the controlling issue in her case—the best interests of [the child]."

U.S.A. Precision Mach. Co. v. Marshall, 95 S.W.3d 407, 410 (Tex.App.—Houston [1st Dist.] 2002, pet. denied). A conviction is not final for purposes of impeachment under TRE 609 if it was reversed, it is pending on appeal, or the case was dismissed after a new trial was granted.

In re M.R., 975 S.W.2d 51, 55 (Tex.App.—San Antonio 1998, pet. denied). TRE 609 "exists to establish when and within what parameters a prior conviction may be introduced. It does not *require* a conviction in order to admit some testimony. [¶] [T]he Family Code itself does not require a conviction in order to introduce evidence of family violence. Instead, it requires that the evidence be 'credible.'"

Porter v. Nemir, 900 S.W.2d 376, 382 (Tex.App.—Austin 1995, no writ). "[T]he danger of unfair prejudice was particularly great because the extraneous conduct involved sexual abuse of a child. [¶] [D's] conviction for sexual abuse of a child was not admissible under [TRE] 609 [, and] the court did not abuse its discretion in concluding that the probative value *was substantially outweighed* by the danger of unfair prejudice...."

TRE 610. RELIGIOUS BELIEFS OR OPINIONS

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

Comment to 1998 change: This is prior Rule of Criminal Evidence 615.

See ***Commentaries***, "Motion in Limine," ch. 5-E; "Objecting to Evidence," ch. 8-D; Cochran, ***Texas Rules of Evidence Handbook***, p. 612 (6th ed. 2005-06).

History of TRE 610 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lvi). Adopted eff. Jan. 1, 1988, by order of Nov. 10, 1986 (733-34 S.W.2d [Tex.Cases] lxxxviii): While the rule forecloses inquiry into the religious beliefs or opinions of a witness for the purpose of showing that his character for truthfulness is affected by their nature, an inquiry for the purpose of showing interest or bias because of them is not within the prohibition; thus disclosure of affiliation with a church which is a party to the litigation is allowed under the rule. Former TRCE 610 renumbered TRCE 611. Source: New rule. See FRE 610.

TRE 611. MODE & ORDER OF INTERROGATION & PRESENTATION

(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-Examination. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.

(c) Leading Questions. Leading questions should not be used on the direct examination of a witness

David J. Beck
President Elect
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June 15, 2006

RE: Proposed Amendment to Rule 226a

Charles L. Babcock, Esq.
Jackson Walker, LLP
901 Main Street
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Dallas, Texas 75202

Dear Chip:

As we discussed, I have been concerned for some time about the so-called "Vanishing Trial," as well as the poor image of lawyers in general and trial lawyers in particular. Next year, as President of The American College of Trial Lawyers, I will begin the effort to do something about it. I mentioned one such step to you, an amendment to Tex. R. Civ. P. 226a (Admonitory Instructions to Jury Panel and Jury). More specifically, I am proposing that the Rule be amended to add the attached language as part of the instructions given by our trial judges to jury panels. If adopted, we should be able to reach thousands of Texas citizens who appear for jury duty. For example, from September 1, 2004 through August 31, 2005, there were 1,691 jury panels convened in civil cases in Texas. Although I realize this effort will not reverse what has been occurring, at least it is one step in the right direction.

For your information, I have spoken with Marc Stanley, President of the TTLA, and Hayes Fuller, President of the TADC, about this initiative and it is my understanding that they enthusiastically support it.

Please let me know if you need any additional information.

Very truly yours,

David J. Beck

DJB/bb
cc: The Honorable Nathan Hecht
Marc Stanley, Esq.
Hayes Fuller, Esq.

999.00203/321265.1

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Proposed Amendment to Texas. R. Civ. P. 226a

Those of you who will be chosen as jurors for this case will be performing a very important service, guaranteed by both the United States and Texas Constitutions. Our founding fathers believed it was essential that the right to trial by jury – and the right to serve on a jury – be conferred upon all of our citizens, including you. Your presence here today is a tribute to their beliefs and the importance of the jury system to our democratic form of government.

Before the attorneys begin their questioning, you need to be aware that our judicial system is an adversary system, which means that during the trial the parties will seek to present their respective cases in the best light possible. Attorneys in general, and trial attorneys in particular, are frequently criticized. That criticism often results from a basic misunderstanding of our adversary system, in which the attorneys act as advocates for the competing parties. As an advocate, an attorney is ethically obligated to zealously assert his or her client's position under the rules of our adversary system. By presenting the best case possible on behalf of their clients, the attorneys enable the jurors to weigh the applicable facts, to determine truth, and to arrive at a just verdict based on the evidence. Our system has served us well for over 200 years and trial attorneys have been, and continue to be, a critical part of that process.

The attorneys will now proceed with their examination.

Professor Elaine A. Carlson
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October 16, 2006

SUBCOMMITTEE REPORT: TRCP 216-299a

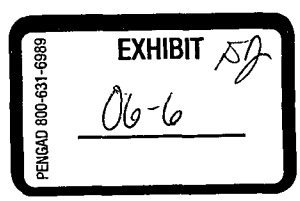
In response to Justice Hecht's letter of September 22 and David Beck's correspondence dated June 15, 2006, the Subcommittee met and considered proposed changes to TRCP 245, 296 and 226a. The subcommittee's recommendations are as follows:

TRCP 245

Proposal: The State Bar Rules Committee proposed modifications to TRCP 245 that would enlarge the notice of a first trial setting from 45 days to 75 days. In addition, Rule 245 would be amended under that proposal to clarify that a party joined or who appears after a case has been set for trial, is entitled to that same notice, with the trial court having the discretion to shorten that period for good cause.

Recommendation: The subcommittee does not recommend the adoption of this proposal for several reasons. First, the subcommittee is unaware of any compelling problems with the current operation of the rule. Second, in many cases a docket control order will set a deadline for adding parties as well as a trial setting and thus there is not an opportunity for unfair surprise. Finally, the subcommittee questioned whether the proposed enlargement of time for notice of a trial setting is desirable, especially when attempting to obtain a hearing in a case seeking injunctive relief or a declaratory judgment.

The subcommittee also discussed whether current Rule 245 is sufficiently clear as to the right of a party added after a case is set for trial to the same notice of an initial trial setting as to originally named parties. Some members of the subcommittee were concefrned the current rule is silent as to this specific matter, and the subcommittee would recommend a clarifying amendment. Changing "with reasonable notice of not less than forty-five days to the parties of a first setting for trial" to "with reasonable notice of not less than forty-five days to all ~~[the]~~ parties of a first trial setting...." may be sufficient to address this concern.



TRCP 296

Proposal: The State Bar Rules Committee proposed the following addition to TRCP 296, which addresses findings of fact in bench trials: "The findings of fact shall only include the elements of each ground of recovery or defense." Under this proposal, the following comment would be added as well: "The trial court is not required to support its findings of fact with recitals of the evidence."

Recommendation: The subcommittee does not recommend the adoption of this proposal. Appellate court decisions support that the trial court may make broad form findings of fact, so it is not accurate to state that the trial court is required to make findings as to each element of grounds raised by the pleadings and the proof, although the trial court may do so. The Committee also expressed concern that in some instances, statutory provisions require findings of fact that may include evidentiary support.

TRCP 226a

David Beck, in his capacity as President of the American College of Trial Lawyers, has recommended a change to Rule 226a. Specifically, he suggests an addition to the instructions given by the trial court to venirepersons before voir dire, to clarify the role of trial counsel in an effort to combat the negative images of trial lawyers held by the public at large. The subcommittee shares this concern and endorses the addition of the following language to the admonitory instructions mandated by TRCP 226a:

> Those of you who will be chosen as jurors for this case will be performing a very important service, guaranteed by both the United Sates and Texas Constitutions. Our founding fathers believed it was essential that the right to trial by jury-and the right to serve on a jury-be conferred upon all of our citizens, including you. Your presence here today is a tribute to their beliefs and the importance of the jury system to our democratic form of government.
>
> Before the attorneys begin their questioning, you need to be aware that our judicial system is an adversary system. ~~, which means that during the trial the parties will seek to present their respective cases in the best light possible. Attorneys in general, and trial attorneys in particular, are frequently criticized. That criticism often results from a basic understanding of our adversary system, in which the attorneys act as advocates for the competing parties.~~ As an advocate, an attorney is ethically obligated to zealously assert his or her client's position under the rules of our adversary system. By presenting the best case possible on behalf of their clients, the attorneys enable the jurors to weigh the applicable facts, to determine truth, and to arrive at a just verdict based on

the evidence. Our system has served us well for over 200 years and trial attorneys have been, and continue to be, a critical part of that process.

The attorneys will now proceed with their examination.

Pending SCAC Recommendations January 2001 - September 2006

TRCP

TRCP 3a	proposal to add JP courts w/ statutory rulemaking authority; 6/15/01
various	proposals to modify TRCP for e-filing 5/6/05
various	forcible entry & detainer, other justice court rules 9/20/02
TRCP 10	withdrawal of attorney; unanimous vote to add telephone number for court to contact pro se litigants; was slated on 5/7/05 to be placed on 8/26/05 agenda for further discussion following vote, but wasn't subsequently discussed.
TRCP 18	grounds for judicial recusal; also studied by J. Peeples/ Regional Presiding Judges
TRCP 21	substitute "ten days" for "three days" in existing paragraph 2; slight majority of SCAC favors some [unspecified] accommodation for family law practice; 6/2/06
TRCP 223	unanimous recommendation to explicitly allow use of computers to randomize shuffle; slight majority favors retaining shuffle 5/6/05
TRCP 306a	final judgments 6/15/01; Justice Duncan/ Judge Peeples?
TRCP 306a	recommendation specifying procedures for mtn & hearing on late notice; 3/9/02
TRCP 329b	proposal to specify deadline for TC to "ungrant" previously granted MNT 6/14/02

TRE

TRE 103(a)	unanimous vote to conform to FRE 103(a) 8/24/03
TRE 407(b)	defines "purchaser" of defective product per Business & Commerce Code 8/13/04
~~TRE 409~~	offers to pay expenses; unanimous vote to revise 11/8/02; per Buddy Low, was referred back to SBOT AREC to study effect on cases other than P.I. and property damage, and to see if existing statutes cover this issue.
TRE 514	HIPAA rule 8/27/05; see John Martin letter of 9/1/05 to Lisa Hobbs
TRE 701	Amendments recommended by Nat'l Conf and similar to FRE 701; **unclear whether approved by full SCAC**
TRE 702	Amendment to reorganize rule and add requirements from FRE 702 and *Merrell Dow v. Havner*, etc.; approved by full SCAC 3/30/01

TRE 705	proposal to conform TRE 705 to 2000 changes to FRE 703 8/13/04
~~TRE 904~~	proposed new TRE on counter-affidavits per CPRC 18.001; 10/25/03 [not yet presented to full SCAC]

TRAP

TRAP 8.1	eliminate requirement of filing authenticated copy of bankruptcy petition 8/26/05
TRAP 10.1, TRAP 49.11	eliminate requirement of conference certificate on MFR 8/26/05
TRAP 28	accelerated appeals; add permissive appeals rule per CPRC 51.014(d) 8/26/05
TRAP 29	amend 29.5 consistent with 2003 changes to CPRC 51.014(b) 8/26/05
TRAP 52-53	amend TRAP 52.3(d)(5)(D) & 53.2(d)(8) in light of 2002 changes to TRAP 47, to eliminate requirement that petitioner/relator inform Court whether COA's opinion is unpublished; instead, must provide Court with COA citation. 8/26/05
Retention of exhibits	Recommended change to Court order directing form of record 1/7/05 12449 rule proposals discussed 5/7/05 13877-933; no specific recommendation, back to Orsinger/Jackson

RJA

RJA 14/15	Electronic access to court records 4/1/05
No rule #	consolidation of cross appeals/overlap counties; vote for further study 8/26/05
No rule #	precedent in transferred cases; small majority recommends that the law of the transferor court apply under principles of stare decisis. 8/26/05

other rules

PN rules	**parental notification:** add comment referring to parental consent law 4/14/06 2002: recommended amendments to PN rules 1.01, 1.03, 1.04, 1.10, 2.2, 2.3, 2.4, 3.3, and new forms (Notice to Clerk and Court Reporter to Prepare Records Instanter (when minor may appeal) and Notice to Clerk and Court Reporter to Prepare Records (when no appeal will be taken)
PSRB	Process Service Review Board; SCAC recommended elimination of Harris County exception re TPSA process server course; 4/14/06

Index of Rules Discussed by SCAC 2001-2006

Caveat lector: this index consists of my informal notes charting the discussions and significant votes of the Supreme Court Rules Advisory Committee at SCAC meetings from 2001-2006. It reflects my reading of transcripts of meetings that largely predate my service with the Court, and it may be inaccurate and/or incomplete. Accordingly, it may not accurately reflect the Committee's recommendations; and of course, even to the extent it does, the Committee's views do not necessarily reflect those of the Texas Supreme Court or individual Justices. This index is intended to serve only as a reference source and a research aid, not as an official record of the meetings. Persons interested in rules discussed by the Advisory Committee should consult SCAC transcripts and agendas, which are available at http://www.supreme.courts.state.tx.us/rules/scac/current.htm

This index is a "work in progress," so please feel free to contact me regarding any discrepancies between the transcripts and this index.

Jody Hughes
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2006

December 9

December 8

October 21

October 20

June 2

- **TRCP 21** 14721-821; 14818-14820 solid majority vote to substitute "ten days" for "three days" in existing paragraph 2; slight majority favors some [unspecified] accommodation for family law practice

April 14

- **parental consent/notification** 14463-99 votes: 31-2 recommend no change to PN rules in wake of consent law; 27-6 vote to add reference to consent law in cmt to PN rules; 14498-99
- **PSRB matters** 14499-628 most matters tabled indefinitely; 27-1 vote to recommend eliminating Harris County exception re TPSA process server course at 14627
- TRCP 21 3-day notice requirement 14629-715, on next agenda for further consideration

August 27

- ~~**RJA 13**~~ 14306-394
- TRCP 223 14395-417
- ~~**TRCP 145/148**~~ 14417-30
- **TRE 514** HIPAA 14430-40

August 26

- **TRAP 28** 13995-14069; note- will need amendment to TRAP 12, see 14117
- cross-appeals in overlapping jdns 14071-115; 27-1 back to subcom for more study
- **TRAP 8.1** eliminate subsection (e) entirely; no opposition 14118-20
- **TRAP 52-53** eliminate reference to unpublished ops in PFR 14121-26 unopposed
- **TRAP 29** address amendments to CPRC 51.014(b) 14126-31 unopposed
- **TRAP 10.1 & 49.11** MFR conference certificate; 14131-32
- **precedent in transfers of appeals** 14133-192 15-11 for law of transferor 14192
- ~~RJA 13~~ 14193-14301

May 7

- retention/disposal of exhibits 13877-933; no rec, back to Orsinger/Jackson
- TRAP 28 permissive appeals 13933-84
- TRCP 10 withdrawal 13984-86; unanimous to add phone # for pro se @ 13985

May 6

- TRAP 9.5/TRCP 21a cert of service 13547-80 votes to reject amending 13577, 80
- TRCP 21a (rejected-13580)
- **TRAP 10.1 & 49.11** (MFR conference certificate) 13548-49
- precedent of transferred cases 13582-665 votes at 13644, 657 for law of transferor
- **TRCP 11, 21** (various e-filing) 13666-732; 795-872
- **TRCP 223** 13755- unanimous vote to allow computerized shuffle; 13791- slim majority vote to keep shuffle in rule

April 1-2 **RJA 14/15** (E-Access)

March 5 ~~protective order task force~~

March 4

- RJA 14/15 (E-Access) 12596-12863
- TRAP 28 accelerated appeals 12863-65
- transferred appeals 12865-912; consensus that law of transferor ct should apply

(continued next page)

2005 (cont'd)

January 8

- TRAP 10.1 MFR conf certificate 12457-69; 12468- vote to amend, back to subcom
- TRAP 12.1/25/28 permissive appeals 12470-540 on agenda for next time
- TRAP 9.5 harmonizing TRCP and TRAP certificates of service 12540-55
- precedent in transferred appeals 12555-86

January 7

- RJA 14/15 (E-Access) 12199-238
- E-filing issues 12238-372
- retention/disposal of exhibits 12372-450; 12449 vote 21-2 to amend S. Ct. orders

November 12

- report on recusal rule (TRCP 18a-b) 11992-94
- permissive appeals 12020-22 to be presented at next SCAC meeting
- retention/disposal of exhibits 12033, 12132-36
- RJA 14 12035-12132
- ~~TRCP 103~~ 12136-60
- TRCP 223 jury shuffle 12160-80 (vote on 12177, 27-0 to allow electronic shuffle)
- e-filing 12180-89 (summary 12181-2)

August 13

- ~~TRCP 103/PSRB~~ (11847-96)
- ~~TRCP 226a~~ jury instruction on exemplary damages 11738-92
- ~~TRCP 292~~ (11734-38)
- TRAP 28 (permissive appeals) 11899-959 (vote 11943)
- TRAP 28 defining accelerated appeals 11960-80
- TRE 514 HIPAA (11793-835) back to subcommittee/SBOT AREC
- **TRE 407(b) (11835-36)** recommend defining "purchaser" of defective product
- **TRE 705(d)** (11836-37) recommendation to conform to FRE 703 amendments
- JP jury charge issues re: exemplary damages 11841-2 on agenda for next time

May 14

- TRCP 202/206.2 11506-652 (no recommendation)
- ~~TRCP 226, 292~~ PJC 11653-99
- TRE 514 HIPAA 11711-24

March 5

- update on Code of Judicial Conduct committee 11199-200
- structure of fed rules committee 11202-03
- E-filing report: Vogel, Griffith, Unger 11203-57
- ~~TRCP 226a~~ PJC/unanimity on exemplary damages 11257-60
- ~~TRCP 42~~ class action: inchoate claims, opt-in 11260-63 no recommendation
- TRCP 76a 11264-83 no recommendation
- TRCP 202 11284- 341 (vote 11332, no recommendation),

January 16

- ~~TRCP 42~~ class actions 10902-73
- TRCP 202 11169-92 (no recommendation)
- ~~TRCP 194.2~~ designation of PR3Ps 11054-56
- ~~TRCP 145 ad litem~~ 10974-11050; 11056-153
- TRE 514 HIPAA 11154-68
- TRE 407(b) 11168 (no recommendation)

2003

October 25

- **TRE 904** counter-affidavits per CPRC 18.001 10774-848; vote 10848 13-9 favor
- TRE 514 HIPAA 10852-82
- TRCP 76a 10882-91 (no proposal; no change since 1990)

October 24

- ~~TRCP 42~~ effective date, opt-in, inchoate claims 10482-572
- ~~TRCP 173~~ ad litem 10572-716
- **TRE 103** 10716-39 (vote 10730 25-0 for amendment)
- **TRE 904** counter-affidavits per CPRC 18.001 10739-67

August 23

- ~~TRCP 8a~~ 10341-436; suspended by MD# 03-9207; DR 1.04 adopted MD# 05-9013
- ~~TRCP 173~~ ad litem 10436-67

August 22

- ~~TRCP 42~~ (Vol. 1 +10187-208)
- ~~TRCP 8a~~ referral fees 10208-337 (suspended by Misc. Docket 03-9207)

August 21

- ~~TRCP 167~~ Offer of Settlement 9747-9938
- ~~TRAP 24~~ 9938-57
- ~~TRCP 42~~ 9957-10033

July 19 ~~RJA 13~~
July 18 ~~RJA 13~~
July 17 ~~RJA 13~~

June 21

- ~~TRCP 167~~ Offer of Settlement 8846-74; 8909-87
- ~~RJA 13~~ MDL 8874-8909

June 20 ~~TRCP 167~~ Offer of Settlement Vols. 1-2

April 12

- TRCP 7-8 attorneys, referral fees 8403-86
- ~~TRCP 42~~ class actions 8487-8537

April 11 ~~TRCP 167~~ Offer of Settlement 8072-8190; 8201-8399

November 8

- TRCP 18c media 7710-7801
- TRCP 202 subcom still considering whether any change needed 7805-08
- proposed RJA 13 Visiting judge review 7808-68 vote 7827, 58; back to subcom
- **TRE 409** offers to pay expenses 7874-78; vote 22-0 to revise 7878
- TRE 103 7879-92 tabled b/c controversial and not on agenda
- TRE 904 7893-97 tabled b/c controversial and not on agenda
- TRE 509 (leading up to proposal on new TRE 514) 7899-7960
- E-filing pilot project 7960-8051

September 21

- TRCP 102? MNT 7576-7600 vote 7600 14-2 retain status quo
- cy pres & class action 7608-39 vote 7638 cmt instead of rule
- TRCP 21 and discovery 7640-45; removed from agenda, no interest
- TRE 514 HIPAA 7646-53 referred to evidence subcom
- proposed RJA 13 Visiting judge peer review 7653-97; back to subcom
- TRCP 202 7697-7703 no action

September 20

- update on revision to Judicial Conduct Code 7278
- TRCP 167 offer of settlement 7280-7335 will revisit later
- TRCP 18c 7335-90; 7394-7536; returned to subcommittee
- **FED rules** TRCP 739, 740, 741, 743, 748, 749, 754, 755 7536-72; votes 7547, 60

June 15 FED rules 7095-7270

June 14

- ~~TRAP 11~~ amicus 6714-5; 6727-32
- **TRCP 329b** MNT 6732-74 vote @ 6773 13-2 for 105 days; back to Dorsaneo
- TRCP 167 offer of settlement (later became) 6774-6851
- FED rules 6854-7087

May 18 FED rules

May 17

- offer of settlement (later became) 6230-6368
- FED rules 6374-6558
- TRCP 329b 6559-71 time limit on TC's power to "ungrant" MNT

March 9

- **306a** 6082-6142 vote 12-0 at 6142 recommendation specifying procedures for motion and hearing on late notice; text to be sent to Court by Babcock
- TRCP 18c media 6144-6218

(continued next page)

2001 (cont'd)

January 13

- ~~TRAP 9.7~~ 3615-30 vote 27-0 adopt recommendation at 3630
- ~~TRAP 34.6~~ inaccuracies in reporter's record 3630-58; vote 3656-7 unanimous
- ~~TRAP 46.5~~ voluntary remittitur 3658-91 to be voted on next meeting
- ~~TRAP 42~~ dismissal settlement 3691-3721 vote @ 3720 26-1 in favor
- TRCP 3a proposal to post local rules on website 3721-40
- final judgments 3742-70

January 12

- NLH status report on 166a(i), TRAP 47, voir dire proposal 3293-7
- recusal rule 3299-3409; 3413-3595
- TRCP 3a proposal to require clerk to make local rules available 3409-13
- ~~TRAP 9.7~~ adoption of briefs 3601-08 vote 19-0 in favor of proposal at 3608

Second Court of Appeals

Stephanie Lavake, Clerk of Court

1. Records that were sealed in the trial court under Rule 76a usually come to us with the word "SEALED" stamped directly on the outside cover of the records. If the records aren't already stamped "SEALED," we mark on the outside cover of the file jacket that sealed records are contained therein, and we note on case management that the records are sealed. We also place the records in an envelope, tape it shut, mark it "SEALED" and put a copy of the order sealing the record on the outside of the envelope.

2. If the parties are permitted to check out sealed documents that are part of the record, they must sign a confidentiality agreement.

3. If we grant a motion to seal a record, we mark the record sealed and follow the same procedure outlined above.

4. When mandate issues and we return sealed records to the trial court, we give notification in our cover letter that the record is sealed.

5. Whether documents that were submitted to the trial court for an in camera inspection come to us in connection with a mandamus or an appeal, the documents always come to us sealed. The documents remain under seal while in this court's possession.

6. On your frequency question:
   - We rarely get appeals under Rule 76a.
   - Motions to seal are also rare.
   - With regard to records/discovery submitted to the trial court for an in camera inspection: We rarely see this in appeals but we occasionally see it in discovery-related original proceedings.

Third Court of Appeals

Diane O'Neil, Clerk of Court

1. They are delivered to us marked and sealed. We place them in a safe in a locked room. When the case is mandated we hand deliver them to the trial court with a letter to the fact that we are returning sealed exhibits and have them sign for them.

2. If we grant the motion we seal them here and them follow the same steps when the case is mandated as described in number 1.

3. We would keep them in the safe and treat them as sealed until a review is made.

We do not have any written rules; this has been the long time practice of the court.

Fourth Court of Appeals

Keith Hottle, Clerk of Court

As referenced in your correspondence, the Fourth Court briefly addresses TRCP 76a under its Internal Operating Procedures by requiring the Clerk of the Court ensure the record remains sealed to all unauthorized persons; and issue a warning letter to the litigants and their attorneys that the record is sealed in the court. Procedures would dictate that we clearly mark the record (i.e., appellate record, shuck and related files) as sealed pursuant to Rule 76a. The sealed cases relating to minors seeking to circumvent the parental notification provision are maintained in a locked safe.

Motions that are granted to seal records not sealed under 76a in the trial court would be handled in a similar manner. A letter would be issued to the litigants, the trial court and the attorneys that the record has been sealed in the court. We would mark the record as sealed as referenced above and ensure the record remains sealed to all unauthorized persons. An entry would also made into Case Management that the record is "sealed."

In response to your question concerning how we would treat records/discovery that was submitted for an in camera inspection on a claim of privilege, where the trial court's denial of that ruling is being appealed is we would keep the records sealed and only make them available for review upon order of the court.

As to the frequency, these issues rarely come up in our Court.

Fifth Court of Appeals

Lisa Matz, Clerk of Court

We frequently receive records from the trial court that have been sealed. I don't think our Court has ever ordered anything to be sealed. Like I said, they usually come to us under a sealing order from the trial court. We keep the sealed records out of the jacket that the public can view. We only allow the attorneys on the case to check the records out.

Sixth Court of Appeals

Debbie Autrey, Clerk of Court

(*Response by chief staff attorney, Stacy Stanley:*)

In connection with your email on dealing with sealed records in the possession of our court:

1. We do not have a written policy.

2. Our general practice is this: Documents sealed by trial court and now in our record – sealed – Physically – If we need to look at them, the writing attorney/justice does. They are not circulated further unless another justice asks to separately review them. Internally, we have

no further security measures. We then reseal them. If a request by some outside party (or even the other side who did not get to see those sealed records) is made to review, clerk's office refers to court. Very seldom happens. When it does, we have denied request [although we have noted that it does make it pretty difficult for the other side to intelligently argue that it should get documents when it hasn't ever had a chance to see them ... or even have any clear idea of what they contain.].

3. We have never had a motion asking to seal any type of record up here that was not first addressed to trial court.

4. See 2 – we treat discovery/in camera review sealed docs the same way.

Seventh Court of Appeals

Peggy Culp, Clerk of Court

The Seventh Court will file a sealed record and it will remain sealed and placed with the file. We do not lock them up. It is not opened by anyone but the Judge or attorney working on the case.

If we receive a motion requesting that the record be sealed, the court will consider the motion. If the motion is granted, the court will instruct the clerk's office to seal the record and it is then placed back in the file.

Appeals regarding an in camera inspection are treated like any other sealed record. We very rarely have sealed records filed.

Eighth Court of Appeals

Denise Pacheco, Clerk of Court

In response to your question we do not have formal written procedures but our informal procedures are as follows:

1. Documents delivered to us marked and sealed are placed with the case file and a note is made in case management and on the shuck stating that sealed documents have been filed. This alerts us so that we don't release these to anybody coming by to view the file. If the trial court's order sealing the records requires us to return the records at the conclusion of the appeal or if a motion to return the records is filed and granted, we will do so. Otherwise, we generally do not return them to the trial court once the mandate is issued unless such instructions were brought to our attention.

2. Case by case. It's our recollection that we've had one such motion filed with this court. The Court granted the motion and the documents were marked as sealed.

3. If not sealed, will only seal if motion filed.

4. Seldom.

Ninth Court of Appeals

Carol Anne Flores, Clerk of Court

1. We keep sealed court records (TRCP 76a) separated from the rest of the record. It is not viewable by the public. Only our staff is allowed to review sealed records if the judges deem necessary to the case.

2. We have only sealed one motion with attachment which was filed directly with our court.

3. In camera documents are also kept separate from the remainder of the record. And are only reviewed by our staff if the judges deem necessary to the case.

Both original sealed records and original in camera records are resealed by our court prior to returning them to the trial court. If they are copies they are destroyed by shredding or incineration.

These situations are arising more frequently since more documents are being sealed by the trial courts. In camera documents are also arising more frequently than in past years.

Tenth Court of Appeals

Sharri Roessler, Clerk of Court

1. They are delivered to us marked and sealed. We note in case management that a portion of the record is sealed. They are placed in the shuck with the remainder of the record. We do not allow the sealed portion to be checked out.

2. If the motion is granted, we follow the same steps as described in #1.

3. We would treat them as sealed until further review by the court.

4. It is rare that we receive records with sealed documents.

The court does not have a written policy.

Eleventh Court of Appeals

Sherry Williamson, Clerk of Court

The 11th Court's procedures are the same as the Third Court's.

It is very rare that we receive cases with sealed documents, however.

Thirteenth Court of Appeals

Cathy Wilborn, Clerk of Court

The 13th COA's procedures for sealed documents are the same as the 3rd COA.

Fourteenth Court of Appeals

Ed Wells, Clerk of Court

1. Records sealed under TRCP 76a are forwarded to us from the trial court under seal. We docket them in case management, place the case information into a spreadsheet that lists all exhibits contained in our safe and then lock the exhibit in a safe which is contained in a room which is locked outside of our normal hours of operation. When we finally dispose of the case by issuing our mandate, we then prepare an exhibit return form that outlines exactly what the court will be returning to the trial court. The sealed record along with this form are then either mailed via certified mail return receipt requested to the county or district court of origin or in the case of Harris County, released to the county courier following him/her signing this exhibit return form. All signed exhibit return forms are then maintained by the Court in a folder for safekeeping.

2. This Court does not issue orders or rulings sealing appellate records. Instead we refer the matter to the trial court for a hearing and order under rule 76a. If a sealed record is then forwarded to us following this hearing, the same procedures outlined in the first question would be followed.

3. We would treat them as sealed and follow the same procedures outlined previously.

This Court historically has had very few issues resulting from the filing of sealed records. We receive only a small number of cases each year that contain documents sealed by the trial court under TRCP 76a.

This Court currently does not have any written IOP's regarding this issue. The procedures that are currently being followed are a result of the long term practices of the Court.

Jody Hughes

From: Karinne McCullough [Karinne.McCullough@1stcoa.courts.state.tx.us]
Sent: Friday, October 20, 2006 9:38 AM
To: Jody Hughes
Subject: RE: Question about sealing appellate records

Apologies. I was out most of Wednesday and yesterday.

Our chief staff attorney said we are basically in line with the Third Court on the first and third items.

There isn't an equivalent TRAP to 76a so this Court has not sealed records.

Karinne

Clerk of the Court
1307 San Jacinto, 10th Floor
Houston, Texas 77002
713-655-2700
713-752-2304 (fax)

From: Jody Hughes [mailto:Jody.Hughes@courts.state.tx.us]
Sent: Wednesday, October 18, 2006 5:59 PM
To: Karinne McCullough; Peggy Culp; Denise Pacheco; Sharri Roessler; Cathy Lusk; Ed Wells
Subject: FW: Question about sealing appellate records

Dear Karinne, Peggy, Denise, Sharri, Cathy, and Ed:
To my knowledge, I haven't heard back from any of you about my questions below regarding sealed records in the appellate courts. As noted in my original email, I am seeking this information to help the appellate rules subcommittee of the Court's Rules Advisory Committee understand what the current practices are in the courts of appeals. Information about how your respective courts handle these issues would be extremely helpful to the Advisory Committee, and ultimately to the Court as well. We would welcome any information you could provide or any thoughts you might offer about this process that would be helpful to the Committee's consideration of a potential appellate rule addressing sealed records.

The Advisory Committee is meeting this Friday and Saturday 10/20-21, so I am hoping to hear from as many of you as possible by Thursday.

Thanks in advance for your help.
Jody

From: Jody Hughes
Sent: Thursday, October 12, 2006 10:52 AM
To: Karinne McCullough; Stephanie Lavake; Diane O'Neal; Keith Hottle; 'The Clerk'; Debbie Autrey; Peggy Culp; 'Denise Pacheco'; Carol Anne Flores; Sharri Roessler; Sherry Williamson; Cathy Lusk; Cathy Wilborn; Ed Wells

Subject: Question about sealing appellate records

Greetings, Clerks of the Courts of Appeals-
Some of you I know and have met in person, and some of you I know from phone or email correspondence. I

hope to have an opportunity to meet all of you in person during my time as rules attorney. In the meantime, I have a question about your respective courts' record policies I'm hoping you can help me answer.

As you know, the appellate rules contain no equivalent to TRCP 76a regarding sealing court records on appeal. My questions are: does your Court have a policy or practice, formal or informal, regarding:

(1) how you treat records that were sealed in the trial court under 76a and are now part of the appellate record;
(2) motions to seal records in the appellate court (on appeal or in original proceedings) that were NOT sealed under 76a in the trial court;

(3) how you treat records/discovery that was submitted for an in camera inspection on a claim of privilege, where the trial court's denial of that ruling is being appealed.

And finally- in general, how frequently do issues relating to the above arise in your court?
The reason for my inquiry is that the Supreme Court Rules Advisory Committee has been asked to consider whether the appellate rules should contain a provision equivalent or similar to TRCP 76a. As the first part of the analysis, the appellate subcommittee wanted to get a sense of how the courts of appeals currently deal with the issue of requests to seal appellate records. I did not see anything in the published local rules on this issue for those appellate courts that have local rules; so I wondered if any of you all have IOPs or internal policies on this, or perhaps if motions/requests to seal appellate are dealt with on an ad hoc basis. (I did see that San Antonio's IOPs contain a provision relating to records sealed under 76a, but that's the only one I could find).

Thanks in advance for your help with this. I know you are all extremely busy, but I don't know who else to ask. I would greatly appreciate any information you could provide regarding your court's practices. The Advisory Committee is scheduled to meet next Friday 10/20, so if you have any info to share, I would greatly appreciate it if you could contact me by next Thursday or sometime before then.

jody

Jody Hughes
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Jody Hughes

From: Cathy Lusk
Sent: Friday, October 20, 2006 11:44 AM
To: Jody Hughes
Cc: Blake Hawthorne; Carol Anne Flores; Cathy Lusk; Cathy Wilborn; Debbie Autrey; Denise Pacheco ; Diane O'Neal; Ed Wells; Karinne McCullough; Keith Hottle; 'Lisa Matz'; 'Lisa Matz'; Louise Pearson; Peggy Culp; Sharri Roessler; Sherry Williamson; Stephanie Lavake
Subject: RE: Question about sealing appellate records

Hi, Jody. (I have been out of the office and just returned today - sorry for the delay.)

In response to your questions:

1. Sealed records or documents are immediately, clearly marked as "sealed" on the case file jacket. We note in case management that the record/document is sealed. Sealed documents or records are not allowed to be checked out or to be viewed by anyone other than this court's judges. The only court members allowed to "break" the seal on sealed documents are Judges. The Judge personally writes his initials and the date on the envelope/container of the sealed document/record at the time he opens it.

2. Such motions in our court are very rare but are handled the same as all motions -- on a case-by-case basis.

3. Essentially, we treat such records as "sealed" until the court makes a final determination in the issue.

4. Sealed Records are a rare occurrence in our court.

We do not have written policies regarding "sealed" records.

Cathy Lusk
Clerk of the Court
Twelfth Court of Appeals
1517 West Front Street, Suite 354
Tyler, Texas 75702
Phone: 903-593-8471
Fax: 903-593-2193

From: Jody Hughes
Sent: Wednesday, October 18, 2006 5:59 PM
To: Karinne McCullough; Peggy Culp; 'Denise Pacheco'; Sharri Roessler; Cathy Lusk; Ed Wells
Subject: FW: Question about sealing appellate records

Dear Karinne, Peggy, Denise, Sharri, Cathy, and Ed:
To my knowledge, I haven't heard back from any of you about my questions below regarding sealed records in the appellate courts. As noted in my original email, I am seeking this information to help the appellate rules subcommittee of the Court's Rules Advisory Committee understand what the current practices are in the courts of appeals. Information about how your respective courts handle these issues would be extremely helpful to the Advisory Committee, and ultimately to the Court as well. We would welcome any information you could provide or any thoughts you might offer about this process that would be helpful to the Committee's consideration of a potential appellate rule addressing sealed records.
The Advisory Committee is meeting this Friday and Saturday 10/20-21, so I am hoping to hear from as many of you as possible by Thursday.
Thanks in advance for your help.
Jody

From: Jody Hughes
Sent: Thursday, October 12, 2006 10:52 AM
To: Karinne McCullough; Stephanie Lavake; Diane O'Neal; Keith Hottle; 'The Clerk'; Debbie Autrey; Peggy Culp; 'Denise Pacheco'; Carol Anne Flores; Sharri Roessler; Sherry Williamson; Cathy Lusk; Cathy Wilborn; Ed Wells

Subject: Question about sealing appellate records

Greetings, Clerks of the Courts of Appeals-
Some of you I know and have met in person, and some of you I know from phone or email correspondence. I hope to have an opportunity to meet all of you in person during my time as rules attorney. In the meantime, I have a question about your respective courts' record policies I'm hoping you can help me answer.
As you know, the appellate rules contain no equivalent to TRCP 76a regarding sealing court records on appeal. My questions are: does your Court have a policy or practice, formal or informal, regarding:
(1) how you treat records that were sealed in the trial court under 76a and are now part of the appellate record;
(2) motions to seal records in the appellate court (on appeal or in original proceedings) that were NOT sealed under 76a in the trial court;
(3) how you treat records/discovery that was submitted for an in camera inspection on a claim of privilege, where the trial court's denial of that ruling is being appealed.
And finally- in general, how frequently do issues relating to the above arise in your court?
The reason for my inquiry is that the Supreme Court Rules Advisory Committee has been asked to consider whether the appellate rules should contain a provision equivalent or similar to TRCP 76a. As the first part of the analysis, the appellate subcommittee wanted to get a sense of how the courts of appeals currently deal with the issue of requests to seal appellate records. I did not see anything in the published local rules on this issue for those appellate courts that have local rules; so I wondered if any of you all have IOPs or internal policies on this, or perhaps if motions/requests to seal appellate are dealt with on an ad hoc basis. (I did see that San Antonio's IOPs contain a provision relating to records sealed under 76a, but that's the only one I could find).
Thanks in advance for your help with this. I know you are all extremely busy, but I don't know who else to ask. I would greatly appreciate any information you could provide regarding your court's practices. The Advisory Committee is scheduled to meet next Friday 10/20, so if you have any info to share, I would greatly appreciate it if you could contact me by next Thursday or sometime before then.
jody

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IN THE SUPREME COURT OF TEXAS

No. 05-0095

LAWRENCE HIGGINS, PETITIONER,

v.

RANDALL COUNTY SHERIFF'S OFFICE, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SEVENTH DISTRICT OF TEXAS

PER CURIAM

JUSTICE JOHNSON did not participate in the decision.

Lawrence Higgins, a *pro se* inmate, filed an appeal without paying a filing fee or filing an affidavit of indigence. When the court of appeals ordered him to pay the fee within ten days, Higgins filed an affidavit of indigence before the deadline. Because the court of appeals dismissed the appeal anyway, we reverse.

Higgins sued the Randall County Sheriff's Office after a fellow inmate assaulted him. The trial court dismissed his claim for want of prosecution. *See* TEX. R. CIV. P. 165a. Higgins filed a timely notice of appeal, but included neither a filing fee nor an affidavit of indigence. *See* TEX. R. APP. P. 5, 20.1(c)(1). Four months later, the court of appeals notified him that unless he paid the filing fee of $125 within ten days, his appeal would be dismissed. Nine days later, Higgins responded by filing an affidavit of indigence.

The court of appeals dismissed the appeal because the affidavit was untimely and unaccompanied by a motion to extend time. *See* TEX. R. APP. P. 20.1(c). But the affidavit is no longer a jurisdictional requirement. *See* TEX. R. APP. P. 25.1(b); *In re J.W.*, 52 S.W.3d 730, 733 (Tex. 2001). As with any other formal defect or irregularity in appellate procedure, the court of appeals could dismiss the appeal for noncompliance only after allowing Higgins a reasonable time to correct this defect. *See* TEX. R. APP. P. 44.3; *In re J.W.*, 52 S.W.3d at 733. Because an affidavit of indigence discharged the filing-fee requirement unless a contest to it was sustained, *see* TEX. R. APP. P. 20.1, Higgins corrected the defect within the allotted time.

The court of appeals held alternatively that even if the affidavit were timely, the appeal should be dismissed because it was conclusory and failed to contain all the information required. But again, dismissal cannot be sustained on this ground without giving the affiant an opportunity to amend. *See In re J.W.*, 52 S.W.3d at 733. Nothing in the affidavit shows affirmatively that Higgins could pay appellate costs, and "[c]ommon sense tells us that one in [his] circumstances had no means of obtaining an arm's length bona fide loan." *Allred v. Lowry*, 597 S.W.2d 353, 355 (Tex. 1980).

Accordingly, without hearing oral argument, *see* TEX. R. APP. P. 59.1, we reverse the court of appeals' judgment and remand for further proceedings in accordance with this opinion.

OPINION DELIVERED: May 26, 2006

IN THE SUPREME COURT OF TEXAS

NO. 05-0147

CITY OF SAN ANTONIO, PETITIONER,

v.

MARK HARTMAN, INDEPENDENT EXECUTOR OF THE ESTATE OF DONNA O'BAR, DECEASED AND ON BEHALF OF HER STATUTORY BENEFICIARIES,
MARK HARTMAN, PERSONAL REPRESENTATIVE OF THE ESTATE OF RICHARD HARTMAN, DECEASED, AND ON BEHALF OF HIS STATUTORY BENEFICIARIES; BRENDA PIVONKA, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JENNIFER ALLENSWORTH, DECEASED, AND JUSTIN HARTMAN, INDIVIDUALLY AND AS SOLE HEIR OF THE ESTATE OF MALLORI HARTMAN, DECEASED, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

Argued March 23, 2006

JUSTICE BRISTER delivered the opinion of the Court.

JUSTICE GREEN did not participate in the decision.

This interlocutory appeal presents two jurisdictional questions. First, we have jurisdiction of the appeal only if a motion for rehearing en banc qualifies as a "motion for rehearing" that extends the deadline for a petition for review. Second, the trial court has no jurisdiction of the case if a 100-year flood is an "emergency situation" to which government immunity applies. Answering both questions in the affirmative, we reverse the court of appeals' judgment and render judgment dismissing the case.

I.

On October 17, 1998, the City of San Antonio was visited by a rainstorm of historic proportions. The City was declared a disaster area, and requested state assistance. Responding to widespread

flooding, local and state officials placed barricades and flares on roads and highways throughout the city.

One of the flooded roads was Rigsby Avenue near its crossing with Salado Creek. While almost a dozen witnesses disagreed about the number and location of barricades, it appears that at least one barricade faced motorists approaching from the west, and that two cars from that direction had stopped and turned around shortly before the incident at issue here.

This incident occurred about midnight, as four members of the Hartmans' extended family were returning from an out-of-town wedding reception.[1] According to eyewitnesses, the car drove straight into the flooded portion of Rigsby without slowing, and was swept away in the current. All four occupants drowned.

The Hartmans filed suit against the City under the Texas Tort Claims Act. The City responded with a plea to the jurisdiction asserting immunity. The trial court denied the plea, and the court of appeals affirmed.[2]

II.

As an initial matter, the Hartmans assert we have no jurisdiction of this appeal because the City filed its petition for review too late.

The deadline for filing a petition depends on whether there was a motion for rehearing in the court of appeals. If so, the petition is due 45 days after the court overrules all timely filed motions for rehearing; if not, it is due 45 days after the court's judgment.[3]

Here, the City filed its petition more than 45 days after the court's judgment, but less than 45 days after the court of appeals denied its "Motion for Rehearing En Banc." The Hartmans argue the latter is not the kind of motion for rehearing contemplated by the rules, and thus did not extend the deadline. As they point out, unlike the plenary-power deadline in Rule 19.1 that runs from denial of "all timely filed motions for rehearing, *including motions for en banc reconsideration*,"[4] the petition deadline in Rule 53.7 does not include the italicized phrase.

But the explicit language of Rule 19.1 recognizes that the term "motions for rehearing" *includes* motions for en banc reconsideration as a subset of the broader category. While Rule 49.7 entitled "En Banc Reconsideration" does not contain the word "rehearing,"[5] it is a subpart of Rule 49 entitled

"Motion and Further Motion for Rehearing." At least two other rules of appellate procedure refer to en banc reconsideration as a "rehearing."[6]

It is not surprising that the appellate rules use "rehearing" and "reconsideration" interchangeably. As a "rehearing" requires no additional briefing or argument,[7] it thus implies nothing more than a "reconsideration." And whether such motions are addressed to a panel or the en banc court, the same reasons exist for postponing the petition deadline — avoiding the burden of appealing in two courts at once, and the inefficiency of briefing and reviewing a judgment that may change.

The Hartmans assert that our sister court has drawn a sharp distinction between motions for rehearing and for en banc reconsideration, but that is not necessarily true. Four members of the Court of Criminal Appeals concurred in one case and dissented in another on the ground that a motion including "en banc" in its title or citing the en banc rule does not extend the deadline for petitions for discretionary review.[8] But the Court itself issued no written opinion in either case, so we do not know whether the majority disposed of them on that ground or some other. Further, the minority was construing a different rule (Rule 68.2) than the one at issue here (Rule 53.7); although the two rules share similar language, they have different deadlines that the two courts must interpret as each sees fit.[9] As we interpret Rule 53.7, a "motion for rehearing" includes motions for en banc reconsideration.[10]

In either case, Rule 53.7 extends the petition deadline only if a motion is timely filed.[11] Although motions for rehearing must be filed within 15 days of judgment,[12] the City's motion here was filed 26 days after judgment. Nevertheless, it was timely filed.

Unlike other motions for rehearing, en banc reconsideration may be requested at any time while a court of appeals retains plenary power:

> *While the court of appeals has plenary jurisdiction*, a majority of the en banc court may, *with or without a motion*, order en banc reconsideration of a panel's decision.[13]

While rehearing before a panel requires a motion, en banc reconsideration does not — any justice may request a vote on en banc reconsideration at any time, even without a motion.[14] Because justices may request and grant en banc reconsideration even *after* an untimely motion (or no motion at all), there would be little point in setting a deadline for them. Because the City's motion was filed within the court

of appeals' plenary power, it was timely filed, and operated to extend the deadline for its petition for review.

To sum up, the City's post-judgment motion was styled a "Motion for Rehearing En Banc," cited the rules governing motions for rehearing generally, and asked the court to withdraw the panel opinion and issue a new one in its favor. Because this motion walked, talked, and quacked like a motion for rehearing, we decline to call it something else.[15] We hold the City's petition for review was timely filed.

III.

On the merits, the City asserts the trial court had no jurisdiction of this case because a statutory exception for emergencies overrides any waiver of governmental immunity. We have jurisdiction to address this matter due to a conflict among the courts of appeals.[16]

The Texas Tort Claims Act waives immunity from liability and suit in a number of circumstances.[17] But the Act includes a subchapter entitled "Exceptions and Exclusions" listing circumstances in which its waiver provisions do not apply.[18] Among those is section 101.055(2) governing emergency situations:

> This chapter does not apply to a claim arising . . . from the action of an employee while responding to an emergency call or reacting to an emergency situation if the action is in compliance with the laws and ordinances applicable to emergency action, or in the absence of such law or ordinance, if the action is not taken with conscious indifference or reckless disregard for the safety of others . . .

The Hartmans do not assert that any law or ordinance governed the placement of barricades on Rigsby Avenue. Nor do they assert that the City's acts or omissions show that it did not care what happened to motorists.[19] Accordingly, this exception to the Tort Claims Act applies unless the Hartmans presented some evidence that City employees were not reacting to an emergency situation.

That, of course, they did not and could not possibly do. The evidence is conclusive that an emergency situation existed. The City's declaration of a disaster began:

> WHEREAS, the City of San Antonio on the 18 day [sic] of October, 1998, has suffered widespread or severe damage, injury, or loss of life or property (or there is imminent threat of same) resulting from severe flooding (as much as 20 inches in some areas) beginning 6 A.M. October 17, 1998 with continuation of rain forecast over the

next several days . . .

The Mayor sought assistance from then Governor Bush because of the tremendous rainfall. The City's Flood Assessment Report two months later stated that rainfall totals exceeded those expected in a 100-year flood. Several firefighters and City personnel testified that flood-related calls came in from 90 percent of the City, and that the disaster was beyond the community's resources.

The court of appeals found a fact issue here, holding that "emergency" does not include "what might be colloquially referred to as an 'emergency,'" and pointing to cases applying section 101.055(2) to police and emergency vehicle accidents.[20] While the statute certainly has been applied to traffic accidents,[21] it has also been applied in other circumstances,[22] and at least twice to floods.[23]

We must construe this statute according to what it says, not according to what we think it should have said.[24] And because the Act creates governmental liability where it would not otherwise exist, we cannot construe section 101.055(2) to exclude emergencies the Legislature might have intended to include.[25]

The Hartmans argue that the City had at least six hours to place a barricade on the west side of the Rigsby flood, a period they deem too long to constitute an emergency. But we cannot restrict our review to Rigsby Avenue, any more than the City could. The statute exempts governments reacting to an emergency *situation*, which necessarily includes prioritizing some risks over others. Under the statute, evidence that the City had time to do more at Rigsby Avenue is not evidence that the City was no longer reacting to an emergency situation.

There are some fact questions here — whether one or more barricades stood on the western edge of the Rigsby Avenue flood, and who bore responsibility to put them there. But even after resolving all those issues in the Hartmans' favor, there is no fact question whether the City was reacting to an emergency situation. As no evidence raises a material fact question on this jurisdictional issue, we hold an emergency situation existed as a matter of law.[26]

We recognize that if section 101.055(2) extends beyond traffic accidents, there will be some cases in which the existence of an "emergency" is unclear.[27] But we cannot re-write this section to make its boundaries more distinct, any more than we can re-write the Tort Claims Act itself because "use of a motor-driven vehicle" or "use of tangible personal property" are not always clear.[28]

The Legislature has determined that the public good will be better served by encouraging public employees to take immediate action in emergency situations, rather than by suing them later if their actions were imprudent. Whether the City should have prioritized the west side of Rigsby Avenue rather than other flooded roads in the City is precisely the kind of conduct this statute removes from judicial review.

Accordingly, we reverse the court of appeals' judgment and render judgment for the City.

Scott A. Brister
Justice

OPINION DELIVERED: August 31, 2006

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[1] The Plaintiffs ("Hartmans") are Mark Hartman, personal representative of the estates of Donna O'Bar and Richard Hartman, and on behalf of their statutory beneficiaries; Justin Hartman, individually and as sole heir of the estate of Mallori Hartman; and Brenda Pivonka, individually and as administratrix of the estate of Jennifer Allensworth.

[2] 155 S.W.3d 460, 465-70 (Tex. App.–San Antonio 2004).

[3] *See* TEX. R. APP. P. 53.7(a)(1)(2).

[4] *See id.* 19.1 (emphasis added).

[5] *See id.* 49.7.

[6] *See id.* 41.2 (requiring vote on whether "a case will be heard or *reheard* en banc" upon request of a justice) (emphasis added); *id.* 47.5 (providing for opinions on "a denial of a hearing or *rehearing* en banc.") (emphases added).

[7] *See id.* 49.3 (providing for disposal of a case on rehearing without briefing or oral argument).

[8] *See Franks v. State*, 97 S.W.3d 584, 585 (Tex. Crim. App. 2003) (Cochran, J., dissenting); *see also Ex Parte Sierra*, 122 S.W.3d 202, 204 (Tex. Crim. App. 2003) (Johnson, J., concurring).

[9] *Compare* TEX. R. APP. P. 53.7(a) ("*Petition.*--The petition must be filed with the Supreme Court clerk within 45 days after the following: (1) the date the court of appeals rendered judgment, if no motion for rehearing is timely filed; or (2) the date of the court of appeals' last ruling on all timely filed motions for rehearing.") *with id.* 68.2(a) ("*First Petition.*--The petition must be filed within 30 days after either the day the court of appeals' judgment was rendered or the day the last timely motion for rehearing was overruled by the court of appeals.").

[10] Our conclusion is not changed by the court of appeals' local rule requiring a motion for rehearing en banc to be filed separately from a motion for rehearing, *see* FOURTH CT. APP. LOC. R. 6.2, as that court has unequivocally held that "an en banc motion does not lose its essential nature as a motion for rehearing merely because it is directed to the full court rather than to the panel." *Yzaguirre v. Gonzalez*, 989 S.W.2d 111, 113 (Tex. App.–San Antonio 1999, pet. denied) (en banc).

[11] *See* TEX. R. APP. P. 53.7(a)(2).

[12] *See id.* 49.1.

[13] *Id.* 49.7 (emphasis added); *Yzaguirre*, 989 S.W.2d at 113 ("[A] motion for en banc review may be filed at any time within the period of plenary power.").

[14] *See* TEX. R. APP. P. 41.2(c), 49.7.

[15] *See Thomas v. Long*, ___ S.W.3d ___, ___ (Tex. 2006) (holding substance of summary judgment asserting governmental immunity made it a plea to the jurisdiction); *see also City of New York v. Clinton*, 985 F.Supp. 168, 179 (D.D.C. 1998), *aff'd*, 524 U.S. 417 (1998) (attributing to Richard Cardinal Cushing the saying, "[w]hen I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck.").

[16] *Compare City of San Antonio v. Hartman*, 155 S.W.3d 460, 469 (Tex. App.–San Antonio 2004) (limiting § 101.055(2) to traffic accidents) *with Durham v. Bowie County*, 135 S.W.3d 294, 299 (Tex. App.–Texarkana 2004, pet. denied) *and City of Arlington v. Whitaker*, 977 S.W.2d 742, 744 (Tex. App.–Fort Worth 1998, pet. denied) (holding § 101.055(2) applied to flooding).

[17] *See* TEX. CIV. PRAC. & REM. CODE §§ 101.021-025.

[18] *See id.* §§ 101.051-066.

[19] Because "conscious indifference" and "reckless disregard" are not defined in the statute, we give each its ordinary meaning. TEX. GOV'T CODE § 312.002. We have often interpreted these terms to require proof that a party knew the relevant facts but did not care about the result. *See, e.g.*, *Fidelity and Guar. Ins. Co. v. Drewery Const. Co.*, 186 S.W.3d 571, 576 (Tex. 2006); *Dillard Department Stores, Inc. v. Silva*, 148 S.W.3d 370, 373-74 (Tex. 2004); *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 785 (Tex. 2001); *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 922 (Tex. 1981).

[20] 155 S.W.3d at 469.

[21] *See City of Amarillo v. Martin*, 971 S.W.2d 426, 430 (Tex. 1998); *City of San Angelo Fire Dept. v. Hudson*, 179 S.W.3d 695, 702 (Tex. App.–Austin 2005, no pet.); *Smith v. Janda*, 126 S.W.3d 543, 546 (Tex. App.–San Antonio 2003, no pet.); *Fernandez v. City of El Paso*, 876 S.W.2d 370,376 (Tex. App.–El Paso 1993, writ denied).

[22] *See Riggs v. City of Pearland*, 177 F.R.D. 395, 406 (S.D. Tex. 1997) (applying § 101.055(2) to the use of mace and restraints during arrest); *City of El Paso v. Segura*, 2003 WL 1090661 (Tex. App.–El Paso 2003, pet. denied) (applying § 101.055(2) to object left in roadway).

[23] *See Durham v. Bowie County*, 135 S.W.3d 294, 299 (Tex. App.–Texarkana 2004, pet. denied), *City of Arlington v. Whitaker*, 977 S.W.2d 742, 746 (Tex. App.–Fort Worth 1998, pet. denied).

[24] *See* TEX. GOV'T CODE § 312.002.

[25] *See City of Houston v. Jackson*, 192 S.W.3d 764, 770 (Tex. 2006); *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 701 (Tex. 2003).

[26] *See Texas Dept. of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 226-28 (Tex. 2004).

[27] *See id.*

[28] TEX. CIV. PRAC. & REM. Code § 101.021; *see, e.g.*, *Texas A & M Univ. v. Bishop*, 156 S.W.3d 580, 583 (Tex.

2005) (holding state did not use knife in theatrical production); *San Antonio State Hosp. v. Cowan*, 128 S.W.3d 244, 246 (Tex. 2004) (holding state did not use suspenders patient employed to commit suicide); *Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex. 1998) (holding unlocked door was not use of property causing patient's subsequent suicide); *Texas Dep't of Corrections v. Herring*, 513 S.W.2d 6, 9 (Tex. 1974) (holding allegedly inadequate medical care was not use of tangible property).

3RD ANNUAL ADVANCED INSURANCE LAW: POST-VERDICT SOLUTIONS

Unchartered Waters: Navigating the Pitfalls of Texas Civil Practice and Remedies Code section 52.006 and Texas Rule of Appellate Procedure 24.2

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I. INTRODUCTION

The enactment of House Bill 4 resulted in the addition of section 52.006 to the Texas Civil Practice and Remedies Code and the corresponding amendments to the Texas Rules of Appellate Procedure which allow for the posting of alternative security to supersede the judgment and delay collection efforts pending appeal when the judgment is for money. *See* TEX. CIV. PRAC. & REM. CODE § 52.006; TEX. R. APP. P. 24.2. Before the amendments, judgment debtors were required to post bond for the entire judgment. Thus, appellate attorneys are venturing into unchartered waters by aiding judgment debtors to supersede the judgment with alternate security in an amount not exceeding fifty percent of the judgment debtor's net worth or $25 million where judgment debtors have the opportunity to post less collateral and pursue appeal but where they may be opening up their personal finances to examination by the judgment creditor and courts. Insurers are also treading into unchartered waters with the new supersedeas requirements and facing difficult questions such as whether they have a right to intervene and whether there is coverage for the supersedeas bond.

II. THE RULE

A. Texas Civil Practice & Remedies Code Section 52.006

Texas Civil Practice and Remedies Code section 52.006 provides as follows:

> **(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
>
> (2) $25 million.
>
> **(c)** On a showing by the judgment debtor that the judgment debtor is likely to suffer substantial economic harm is required to post security in an amount required under Section (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 Rule 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.

TEX. CIV. PRAC. & REM. CODE ANN. § 52.006 (Vernon 2005).

B. Texas Rule of Appellate Procedure 24

Texas Rule of Appellate Procedure 24.2 provides:

> **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 equal the sum of compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment. But the amount must not exceed the lesser of:
>
> (A) 50 percent of the judgment debtor's current net worth; or
>
> (B) 25 million dollars.
>
> **(b) Lesser amount.** The trial court must lower the amount of security required by (a) 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) is likely to cause the judgment debtor substantial harm.

(c) Determination of net worth

(1) Judgment debtor's affidavit required; contents; prima facie evidence. A judgment debtor who provides a bond, deposit, or security under (a)(1)(A) in an amount based on the debtor's net worth must simultaneously file an affidavit that states the debtor's net worth and states complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained. The affidavit is prima facie evidence of the debtor's net worth.

(2) Contest; discovery. A judgment creditor may file a contest to the debtor's affidavit of net worth. The contest need not be sworn. The creditor may conduct reasonable discovery concerning the judgment debtor's net worth.

(3) Hearing; burden of proof; findings. The trial court must hear a judgment creditor's contest promptly after any discovery has been completed. The judgment debtor has the burden of proving net worth. The trial court must issue an order that states the debtor's net worth and states with particularity the factual basis for that determination.

(d) Injunction. 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.

TEX. R. APP. P. 24.2.

III. LEGISLATIVE HISTORY

A. Texas Legislature's Interpretation

1. Determining Legislative Intent

Statutory interpretation presents a question of law subject to *de novo* review. *Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436, 437 (Tex.1997). The Texas Legislature has provided the Code Construction Act ("the Act") to guide interpretation of Texas statutes. *See* TEX. GOV'T CODE ANN. § 311.001 et seq. (Vernon 1998). Statutes must be construed as written, and legislative intent must be ascertained from the statute's language when possible. *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001). Courts apply a statute's plain language because they presume that the legislature said what it meant, and its words are the surest guide to its intent. *Fitzgerald v. Advanced Spine Fixation SYS., Inc.*, 996 S.W.2d 864, 865-66 (Tex. 1999). Therefore, the plain language applies unless it would lead to an absurd result. *See Tune v. Tex. Dept. of Pub. Safety*, 23 S.W.3d 358, 363 (Tex. 2000).

However, even when a statute is not ambiguous on its face, other factors can be used to determine the legislature's intent, including (1) the object sought to be obtained; (2) circumstances of the statute's enactment; (3) legislative history; (4) common law or former statutory provisions, including laws on the same or similar subjects; (5) consequences of a particular construction; and (6) administrative construction of the statute; and title, preamble, and emergency provision. *Id.* (*citing* TEX. GOV'T CODE ANN. § 311.023). In determining legislative intent, courts must analyze the purpose of the legislation, the end to be attained, and the evil to be remedied. *Flowers v. Dempsey-Te-geler & Co., Inc.*, 472 S.W.2d 112 (Tex.1971); *Calvert v. Kadane*, 427 S.W.2d 605 (Tex.1968). The statute must be considered as a whole rather than in isolated provisions, and one provision should not be given a meaning inconsistent with other provisions. *Id.*

2. Legislative Hearings

The intent behind enacting the House Bill 4 amendments was to facilitate a judgment debtor's superseding a judgment to enable appeal of the judgment.

a. Object Sought to Be Obtained: Facilitation of Judgment Debtor's Appeal

APPEAL BONDS. Many defendants find it difficult to pursue appeals because they cannot afford the high costs of an appeal bond. In many cases, the cost of the bond makes the end of the suit at the time of judgment and not after a rightfully brought appeal. CSHB 4 would limit the bonding requirement to compensatory damages awarded and would cap the total amount of the bond. The proposed amount, the greater of 50 percent of the defendant's net worth or $25 million, has been found sufficient

> in other states and has not been considered so high as to encourage defendants to default on their bonds or to deny plaintiffs the relief to which they are entitled.

HOUSE RESEARCH ORGANIZATION, H.B. 4 Bill Analysis 368 (March 25, 2003).

b. Circumstances of the Enactment of section 52.006 subparts (a) and (b) of the Texas Civil Practice & Remedies Code

Representative Nixon, Chair of the Civil Practices Committee, explained that House Bill 4 was a comprehensive civil justice reform bill intended to address and correct serious problems with the court system. Debate on Tex. H.B. 4 on the Floor of the House, 78th Leg., R.S. 199 (February 26, 2003). The bill was designed to promote fairness and efficiency in civil lawsuits, protect Texas citizens and courts from abusive litigation tactics, remove incentives causing unwarranted delay and expense, and restore the balance in the court system to operate more efficiently and fairly and less costly. *Id.* Nixon recognized that the 1995 amendments made great strides in correcting some of the worst problems in the court system. *Id.* at 200. However, the amendments were unable to reach all abuses in the system, one of which was the posting of alternative security to enable a judgment debtor to appeal a judgment rendered against it. *Id.* at 200. Representative Nixon provided as follows:

> Since 1995, Texas has consistently been among the states with the largest jury verdicts. In some years, Texas is responsible by itself for more than one-fifth of the largest verdicts in the United States. Since 1995, Texas–the verdicts in Texas courts above $10 million–now we are only talking about those, Members, that are above the $10 million–have totaled $10.5 billion. This figure represents just the tip of the iceberg because we all know that small cases are settled and never go to trial. We are only talking about $10 billion in verdicts over $10 million in the last ten years. Total payoffs by defendants in our court system through either judgment or settlement is in the billions of dollars and this does not include the cost that litigation environment poses on our economy by driving away business, stifling innovation, and increasing the costs of goods and services. These costs to litigants, the court system, and society as a whole, in my opinion, are too great. The civil justice system is out of balance. And I think that recent polling indicates the 73% of Texas believe it is time to take many of the corrective actions that we have addressed in this bill.

Id. One section of the bill addressed appeal bonds and limited the types of damages for which bonding was required to supersede judgment. *See id.* at 201. Nixon commented that due to the size of some judgments out of Texas courts that it was "near impossible" to get a bond and thus impossible to appeal the judgment without liquidating a company. *Id.*

c. Legislative History: Easier Access to Appellate Relief for Judgment Debtors

During the Senate Committee hearings, there was testimony supporting easier access for a judgment debtor to appeal a judgment against it. Senate Committee Hearing on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 1448-51 (April 15, 2003).

Kent Rowald, a Houston attorney, testified that oftentimes the damages awarded in a judgment were substantially more than the value of the companies involved. *Id.* at 1448. Rowald commented that there were frequently critical legal issues involved in these kinds of cases that needed to be considered on appeal. *Id.* However, with such a large judgment it was sometimes impossible to procure a bond and otherwise collection efforts could be pursued during the appeal. *Id.* He provided that as a practical matter, collection efforts during appeal could end a company's life, resulting in bankruptcy, before the appeal had even been considered. *Id.* Allowing a judgment debtor to instead post a percentage of its net worth to stay enforcement of the judgment would allow more judgment debtors to continue their business operations while they pursued appeal. *Id.* at 1448-49. In addition, such a provision would not prevent collection efforts but would merely delay such efforts until the appeal was considered. *Id.* at 1450.

Lee Parsley, an Austin appellate attorney and former Rules Attorney for the Texas Supreme Court, explained that under the previous statutory scheme, a judgment debtor had to post security for the entire judgment including damages, interest, and costs. *Id.* He noted that the bonding process was expensive because bond companies normally required one-hundred percent security; thus, the judgment debtor had to either face

collection efforts by the judgment creditor or tie up a substantial amount of its assets to procure a bond. *Id.* Because the bonding company then had a lien on a substantial amount of the judgment debtor's assets, the judgment debtor was forced to constantly negotiate with the bond company to move, sell, or purchase assets. *Id.* In addition, due to the size of verdicts, the judgment debtor could possibly be foreclosed from seeking a bond. *Id.*

Parsley explained that allowing a judgment debtor to instead post security in an amount of fifty percent of its net worth or $25 million helped not only large corporations but also mom and pop businesses. *Id.* He commented that smaller business many times had to pursue bankruptcy protection when they were unable to post security for the entire judgment. *Id.* Parsley cautioned that companies filing for bankruptcy had greater ramifications due to its effect on other creditors –putting them at risk for seeking bankruptcy relief, in turn putting that company's employees at risk for losing their jobs. *Id.* at 1451.

d. Legislative History: Defining "Net Worth"

The Legislature declined to define "net worth" in Chapter 52 of the Texas Civil Practice and Remedies Code.

(1) Hearings in the House

The House did not reach a determination regarding the definition of "net worth." In fact, the House instead recognized the difficulty it faced in defining "net worth" and decided to instead empower the trial court to decide "net worth" on a case-by-case basis providing as follows:

> There is no easy way to define 'net worth,' and it is important to give judges discretion to determine this on a case-by-case basis. If a plaintiff feels that a defendant is manipulating its assets to reduce the bond amount, the plaintiff can ask the judge to address this.

HOUSE RESEARCH ORGANIZATION, H.B. 4 Bill Analysis 368 (March 25, 2003).

(2) Senate Hearings

The Senate also failed to reach a consensus on the definition of net worth. During the Senate Committee hearings, Dan Byrne, representing Texans for Civil Justice, requested that the Senate define "net worth." Senate Committee Hearing on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 1957-58 (May 7, 2003). In his request, Byrne also addressed the issue of insurance coverage and recommended that such coverage be considered an asset when determining a judgment debtor's net worth. *Id.* at 1458.

e. Legislative History: Facilitation of Judgment Debtor's Appeal by Enacting a Substantial Economic Harm Standard to Lower the Amount of Supersedeas

Section 52.006 provides courts flexibility to lower the amount of supersedeas based on a showing of substantial economic harm. HOUSE RESEARCH ORGANIZATION, H.B. 4 Bill Analysis 338 (March 25, 2003). If the debtor shows that it is likely to suffer substantial economic harm if required to post security in the required amount, the trial court has to lower the amount of security to an amount that will not cause the judgment debtor substantial economic harm. *Id.* at 365.

(1) Testimony in the House

Peter Kelly, an attorney from Houston, testified regarding the irreparable harm standard under the previous enactment for posting supersedeas bonds. Debate on Tex. H.B. 4 on the Floor of the House, 78th Leg., R.S. 322 (February 26, 2003). Kelly explained that the problem under the previous enactment was not the irreparable harm standard but how to go about proving irreparable harm. *Id.* Kelly did not believe that substitution of a substantial economic harm standard would solve the problem but would instead create new problems–requiring a separate trial on the issue of net worth and an extremely detailed economic finding to determine fifty percent of net worth. *Id.* at 323. Kelly instead recommended that the legislature retain the irreparable harm standard and set out the burden of proof for the judgment debtor to show irreparable harm. *Id.*

(2) Testimony in the Senate

In the Senate, Kelly complained that the term "substantial economic harm" was meaningless due to its broad definition. Senate Committee Hearing on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 1459 (April 15, 2003). Kelly contended that the appellate courts would be unable to overturn a trial court's decision on substantial economic harm because it was undefined while the current irreparable harm standard was well defined and developed through case authority. *Id.*

Lee Parsley discussed the irreparable harm standard and provided that in his experience as an appellate attorney, it was difficult to get the trial court to lower the supersedeas under the irreparable harm standard. Senate Committee Hearing on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 1450 (April 15, 2003). Therefore, Parsley requested that the legislature employ a more flexible standard where the trial court could examine the individual circumstances on a case-by-case basis. *Id.* at 1451.

Dan Byrne also expressed concern with retaining the irreparable harm standard–worrying that smaller companies with assets of $200,000-$300,000, who were judgment debtors, would feel they did not have access to appellate courts and would thus not pursue appellate relief under the irreparable harm standard if retained. *Id.* at 1469.

f. Legislative History: Dissipation of Assets by Judgment Debtor Pending Appeal

Section 52.006 now provides the trial court with authority to prevent dissipation and transfer of assets to avoid satisfaction of the judgment. TEX. CIV. PRAC. & REM. CODE § 52.006(e).

Alan Waldrop, representing Texas for Lawsuit Reform, discussed the trial court's unfettered discretion to prevent dissipation of assets. Senate Committee Hearing on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 2013 (May 7, 2003). He provided as follows:

> The whole idea of the supersedeas bond is to forestall collection efforts so that an appeal can be taken without collection efforts interfering with the business of the defendant. And so you want, you don't want to have an exception to this statute to swallow the very purpose for it.

Id. Waldrop suggested that language be added to prevent the dissipation of assets with an intent to defraud the judgment creditor and that the court not have injunctive power to interfere with the dissipation of assets in the ordinary course of business. *Id.*

Dan Byrne provided he did not have a problem with not requiring judgment debtors not superseding punitive damages awards but recommended that a new provision be added making it clear that it was inappropriate to engage in asset transfers outside the ordinary course of business. Senate Committee Hearing on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 1469 (Apr. 15, 2003). He contended that adding such a provision would make it clear that the reduced supersedeas requirements were not an invitation to engage in asset protection. *Id.*

B. Supreme Court Rules Committee Interpretation

As a result of House Bill 4, the Texas Supreme Court adopted conforming amendments to Texas Rule of Appellate Procedure 24.2 pertaining to money judgments. TEX. R. APP. P. 24.2. There were two issues that arose during committee meeting due to the statutory change: (1) the definition of net worth, and (2) the procedure to be used by a judgment debtor to supersede the judgment based on net worth. TEX. SUP. CT. ADVISORY COM. MTG. 9940-42 (Aug. 21, 2003) (afternoon session).

1. Defining Net Worth

The committee was cautioned that defining net worth would be a difficult feat including being faced with questions concerning what net worth includes, whether the judgment or insurance coverage should be considered in calculating net worth, and whether net worth is determined based on fair market value or according to generally accepted accounting standards. *Id.* at 9940. One member in addressing the difficulty of defining net worth mentioned the amount of time needed to write accounting definitions that would work for both U.S. and non-U.S. corporations and recommended that instead of providing a definition that the rule state that the judgment debtor must provide the basis for its conclusions as to its net worth. *Id.* at 9950.

Thus, the committee decided against defining net worth due to the number of disputes that could arise over what assets and liabilities were to be included in net worth and recognized that those battles would occasionally need to be fought out in the trial court. *Id.* at 9952.

2. Procedure for Superseding Money Judgment

The committee recognized that the judgment debtor needed to be provided a specific procedure to supersede the judgment in accordance with section 52.006. *Id.* at 9945. In regard to procedure, the committee considered three options for allowing a judgment debtor to supersede the judgment. *Id.* at 9941-42. The first option involved allowing the judgment debtor to file a supersedeas with the clerk's office based on fifty percent

of its net worth, and the clerk would have a ministerial duty to accept the bond in that particular amount. *Id.* at 9941. Second, the judgment debtor could file some type of sworn statement or affidavit that would be taken as true unless contested. *Id.* at 9941-42. Third, the judgment debtor could make a motion with the court and establish its net worth before the court. *Id.* at 9942.

The committee also recognized the need for a method for the judgment creditor to challenge the affidavit filed by the judgment debtor, possibly through an evidentiary hearing. *Id.* at 9945, 9947. Justice Tom Gray, a committee member, noted there was a similar scheme under Texas Rule of Appellate Procedure 20.1 for challenging an affidavit of indigency. *Id.* at 9946. Under Rule 20.1, when an affidavit of indigency is filed, the opposing party can challenge that affidavit, and a hearing is held. *Id.* at 9948. Further, Rule 20.1 put the burden of proof on the party claiming indigency, so that under Rule 24, the burden could be placed on the judgment debtor filing the net worth affidavit. *Id.* at 9948-49. Rule 20.1 provides eleven factors for claiming indigency, which could be modified under Rule 24. *Id.* at 9949.

The committee decided to go with a variation of the second option whereby the judgment debtor would post an affidavit providing its net worth and the amount of the supersedeas. *Id.* at 9943, 9946-47. Ultimately, the trial court would decide what the appropriate supersedeas would be through an evidentiary hearing if challenged by the judgment creditor. *Id.* at 9948.

3. Finding of Substantial Economic Harm

The Committee further recognized that section 52.006 only required the judgment debtor to show "substantial economic harm," not "irreparable harm," and decided to include a verbatim adoption of the statute in the rule. *Id.* at 9953-54. The discussion of this provision concentrated on whether there should be a different standard for money and non-money judgments. *Id.* at 9954-55. The consensus was it would be easier to maintain the same standard for all supersedeas rather than formulating different standards based on what type of judgment the judgment debtor was superseding. *Id.* at 9955-56.

IV. COMPARISON OF DIFFERENCES IN RULES AND RESOLUTION OF CONFLICTS

A. Textual Differences Between Texas Civil Practice & Remedies Code and Texas Rule of Civil Procedure 24.2

In section 52.006, the net worth provision states that the amount of security posted by the judgment debtor must not exceed the lesser of (1) fifty percent of the judgment debtor's **net worth**, or (2) $25 million. TEX. CIV. PRAC. & REM. CODE § 52.006(b). However Rule 24.2 provides that the amount of security is based on the judgment debtor's **current net worth**. TEX. R. APP. P. 24.2 (a)(1)(A).

B. Resolution of Conflicts

To the extent that section 52.006 conflicts with Texas Rule of Appellate Procedure 24.2, the Texas Civil Practice & Remedies Code controls. *See* TEX. CIV. PRAC. & REM. CODE § 52.005.

C. What Is Current Worth?

"Current" net worth means the judgment debtor's net worth when it posts security and files its net worth affidavit. *See* TEX. R. APP. P. 24.2(a)(1)(A). However, a judgment debtor's method of accounting and preparation of financial statements must be taken into consideration. For instance, a judgment debtor may prepare journal entries and create financial reports on a monthly or quarterly basis. If the judgment debtor posts its security and files its net worth affidavit mid-month or mid-quarterly cycle, the judgment debtor may only have the previous month's or previous quarter's financial information available from which to compute its net worth. Therefore, the judgment debtor should be allowed to file an affidavit of net worth based on that previous month's or previous quarter's financial records.

V. APPLICATION–CASES TO WHICH THE RULE APPLIES

The new enactment allowing the judgment debtor to post supersedeas in an amount not exceeding fifty percent of its net worth or $25 million applies to money judgments. *See* TEX. CIV. PRAC. & REM. CODE § 52.006(a); TEX. R. APP. P. 24.2(a)(1).

A. Money Judgments

The new supersedeas requirements apply to cases involving money judgments where the judgment debtor is attempting to supersede the judgment to forestall collection efforts pending appeal. TEX. CIV. PRAC. & REM. CODE § 52.006(a); TEX. R. APP. P. 24.2(a)(1).

VI. WHAT PORTION OF THE JUDGMENT MUST BE SUPERSEDED

Under section 52.006 and Rule 24.2, the judgment debtor must supersede (1) compensatory damages, (2) interest for the duration of the appeal, and (3) costs awarded in the judgment. TEX. CIV. PRAC. & REM. CODE § 52.006(a); TEX. R. APP. P. 24.2(a)(1). However, punitive damages need not be superseded. TEX. CIV. PRAC. & REM. CODE § 52.006(a); TEX. R. APP. P. 24.2(a)(1).

A. Defining Damages

Compensatory damages are economic and noneconomic damages, but not exemplary damages. TEX. CIV. PRAC. & REM. CODE § 41.001(8). Economic damages encompass damages intended to compensate a claimant for actual economic or pecuniary loss and do not include noneconomic or exemplary damages. *Id.* § 41.001(4). Noneconomic damages include damages awarded to compensate a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses of any kind other than exemplary damages. *Id.* § 41.001(12). Exemplary damages are damages awarded as a penalty or by way of punishment, but not as compensatory damages. *Id.* § 41.001(5). Exemplary damages are neither economic or noneconomic damages but include punitive damages. *Id.*

B. Bonding of Future Damages

Under Chapter 74 of the Civil Practice and Remedies Code, when requested by a defendant physician or healthcare provider or claimant in a medical malpractice case, the court can order that future damages awarded be paid in whole or in part in periodic payments rather than by a lump sum payment. TEX. CIV. PRAC. & REM. CODE § 74.503(b). The court must make a specific finding providing the dollar amount of the periodic payments. *Id.* § 74.503(c). Further, periodic payments, other than future loss of earnings, terminate on the death of the recipient. *Id.* § 74.506(b).

Future damages are damages incurred after the date of judgment and do not include exemplary damages. *Id.* § 41.001(9). Future damages include medical, health care, or custodial care services, physical pain and mental anguish, disfigurement, physical impairment, loss of consortium, companionship, or society, or loss of earnings. *Id.* § 74.501(1).

The jury awards future damages based on the nature of the plaintiff's injuries, the medical care rendered before trial, and the plaintiff's condition at the time of trial. *Hughett v. Dwyre*, 624 S.W.2d 401, 405 (Tex.App.-Amarillo 1981, writ ref'd n.r.e.). Texas follows the "reasonable probability" rule for future damages, including future medical expenses. *City of San Antonio v. Vela*, 762 S.W.2d 314, 321 (Tex.App.-San Antonio 1988, writ denied); *Hughett*, 624 S.W.2d at 405.

The definition of future damages shows that such damages necessarily include compensatory damages because future damages are awarded to compensate a plaintiff for future economic and noneconomic damages. TEX. CIV. PRAC. & REM. CODE § 41.001(9). By statute, the judgment debtor is responsible for superseding compensatory damages. *See* TEX. CIV. PRAC. & REM. CODE § 52.006(a); TEX. R. APP. P. 24.2(a)(1). Thus, the judgment debtor must post supersedeas in an amount for the present value of the future damages awarded in the judgment.

VII. LIMIT ON SUPERSEDEAS

The amount of the judgment that must be superseded is limited by both section 52.006 of the Texas Civil Practice and Remedies Code and Rule 24.2 of the Texas Rules of Appellate Procedure. *See* TEX. CIV. PRAC. & REM. CODE § 52.006(b); TEX. R. APP. P. 24.2(a)(1). The judgment debtor must supersede the judgment by posting security in an amount of the lesser of fifty percent of its net worth or $25 million. TEX. CIV. PRAC. & REM. CODE § 52.006(b); TEX. R. APP. P. 24.2(a)(1). The cap on security for money judgments depends on the judgment debtor's net worth so that if there are multiple defendants to the judgment, then the amount of security required to supersede the judgment may be different for each judgment debtor. *See Ramco Oil & Gas, Ltd. v. Anglo Dutch (Tenge) L.L.C.*, 171 S.W.3d 905, 911 (Tex. App.–Houston [14th Dist.] 2005, no pet.) (concluding that the trial court abused its discretion by failing to provide an amount for each judgment debtor to supersede its portion of the judgment pending appeal).

VIII. FIFTY PERCENT OF JUDGMENT DEBTOR'S CURRENT NET WORTH

The enactment of section 52.006(a) and the corresponding amendments to Texas Rule of Appellate Procedure 24.2 have, in turn, spawned a new type of litigation—a separate proceeding, ancillary to the appeal—to determine the judgment debtor's net worth. With this new type of litigation, several new issues have evolved including (1) the treatment of assets and liabilities of any alter egos of the judgment debtor, (2) what assets and liabilities should be included in net worth, and (3) under what accounting method those assets and liabilities should be valued.

A. Assets and Liabilities of Judgment Debtor's Alter Egos

When determining a judgment debtor's net worth, an issue can arise regarding the treatment of the assets and liabilities of any alleged alter egos and whether those assets and liabilities must be included for purposes of the judgment debtor's net worth. The first question that must be considered is whether the alter ego entities were parties to the underlying action and judgment. If the alter egos were pleaded and served as parties in the underlying action and named as parties in the judgment, then the assets of the alter egos can clearly be included in the net worth determination for the judgment debtor or in a separate determination of the net worth of the alter egos because those parties are also liable for the judgment. The same result may not apply when alter egos were not pleaded or served in the underlying action and were not parties to the underlying judgment, but the judgment creditor raises the issue of alter ego during post-judgment net worth proceedings in an attempt to collect on its judgment.

1. The Trial Court Does Not Have Continuing Jurisdiction to Determine Alter Ego During Post-Judgment Net Worth Proceedings

The trial court has no continuing jurisdiction to determine alter ego in post-judgment net worth proceedings. If no motion for new trial is filed, a trial court loses jurisdiction to act in a case thirty days after the judgment becomes final. *See* TEX. R. CIV. P. 329b(d). However, Texas Rule of Appellate Procedure 24.3 provides that even after the trial court plenary power has expired, the trial court has continuing jurisdiction (1) to order the amount and the type of security and decide the sufficiency of sureties, and (2) to modify the amount or type of security required to continue suspension of the judgment's execution if circumstances change. TEX. R. APP. P. 24.3 (a).

Rule 24.3 does not provide the trial court with continuing jurisdiction to entertain new theories of imputing liability following rendition of judgment and expiration of plenary power. *See id.* Consequently, the trial court would inappropriately assume continuing jurisdiction where it entertained new theories of imputing liability, including alter ego, in post-judgment net worth proceedings. *See Harris County Children's Protective Services v. Olvera*, 971 S.W.2d 172, 175 (Tex. App.–Houston [14th Dist.] 1998, pet. denied) (holding the trial court erred in awarding attorney's fees after expiration of its plenary power).

2. New Theories of Imputing Liability Cannot be Alleged Against Entities or Individuals Not Parties to the Underlying Action or Judgment

A trial court cannot entertain new theories of liability against entities not parties in the underlying action or to the underlying judgment.

a. Alter Ego Cannot Be Lodged For the First Time During Post-Judgment Net Worth Proceedings

A trial court lacks subject matter jurisdiction to consider liability theories related to other entities brought after a judgment becomes final. *See Times Herald Printing Co. v. Jones*, 730 S.W.2d 648, 649 (Tex. 1987) (per curiam) (determining that the trial court and court of appeals lacked jurisdiction to consider a motion to unseal court records by a non-party to the underlying action). Judicial action taken after a trial court's plenary power has expired is void. *State ex. rel Latty v. Owens*, 907 S.W.2d 484, 486 (Tex. 1990) (declaring an order signed after the expiration of the district court's plenary jurisdiction void). Subject matter jurisdiction is essential to the authority of the court to decide the case. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). Thus, the trial court lacks subject matter jurisdiction to disregard the corporate form of entities not parties to the underlying judgment during post-judgment net worth proceedings. *See Times Herald Printing Co.*, 730 S.W.2d at 649; *Latty*, 907 S.W.2d at 486; *Texas Ass'n of Bus.*, 852 S.W.2d at 443.

b. Alter Ego Involves a Question of Fact that Must be Submitted to the Finder of Fact

Alter ego is question of fact to be decided by the finder of fact. The Texas Supreme Court has long held that the different bases for disregarding the corporate fiction involve questions of fact. *See Castleberry v. Branscum*, 721 S.W.2d 270, 277 (Tex. 1986). Except in very special circumstances, fact questions must be determined by the finder of fact. *Id.* (*citing* TEX. CONST. art. I, § 15; *State v. Credit Bureau of Laredo, Inc.*, 530 S.W.2d 288, 293 (Tex. 1975)). The Texas Supreme Court has firmly held that the controlling issues, based on pleadings and some evidence, of alternate bases for disregarding an alleged corporate fiction should be submitted to the finder of fact. *See id.* (*citing* TEX. R. CIV. P. 279). Accordingly, the judgment creditor waives its ability to seek collection based on alleged alter ego entities' net worth for the underlying judgment where it fails to submit pleadings on these separate entities in the underlying action. *See Castleberry*, 721 S.W.2d at 277.

3. Alter Ego Barred by Collateral Estoppel and the "One Satisfaction" Rule

A post-judgment claim of alter ego is barred by collateral estoppel and the "one satisfaction" rule. Allegations of alter ego, sham to perpetrate a fraud, and piercing of the corporate veil all involve theories of derivative liability. *El Paso Nat. Gas Co. v. Berryman*, 858 S.W.2d 362, 363-64 (Tex. 1993) (per curiam). Thus, these claims are subject to collateral estoppel and the "one satisfaction" rule if they are not litigated in the initial suit for liability. *See id.* at 364; *see also Beathard Joint Venture v. West Houston Airport Corp.*, 72 S.W.3d 426, 435-36 (Tex. App.–Texarkana 2002, no pet.) (determining alter ego claims were barred by res judicata, collateral estoppel, and time).

The doctrine of res judicata, which prevents relitigation of a claim or cause of action adjudicated and resolved by a final judgment, as well as matters that with the use of diligence should have been litigated in the earlier suit, bars the theory of alter ego post-judgment. *See State & Cty. Mut. Fire Ins. Co. v. Miller*, 52 S.W.3d 693, 696, 698 (Tex. 2001) (finding party not barred from asserting claims on which it did not have a full and fair litigation but that collateral estoppel barred the party from suing new parties regarding the subject matter of the previous suit). Accordingly, where a judgment creditor raises the theory of alter ego for the first time in post-judgment net worth proceedings against entities never made part of the underlying litigation, the theory comes too late because alter ego is a form of derivative liability that should be litigated through the creditor's diligence in the earlier suit. *See Berryman*, 858 S.W.2d at 363-64; *Beathard Joint Venture*, 72 S.W.3d at 426; *Miller*, 52 S.W.3d at 696.

4. Alter Ego Cannot Be Raised in Post-Judgment Proceedings Against Parties Never Sued

Alter ego cannot be raised for the first time during post-judgment net worth proceedings against parties never sued. Judgment shall not be rendered against one who was neither named nor served as a party defendant. *Werner v. Colwell*, 909 S.W.2d 866, 869 (Tex. 1995) (*citing* TEX. R. CIV. P. 124). A plaintiff may not claim that another entity is not really separate from a defendant if the plaintiff fails to sue and serve the other person or entity. *Id.* at 870 (finding that where a trustee was not named a party to the suit, served process, and did not make a general appearance before the court in her capacity as trustee of the benefit plan, the judgment rendered against her as trustee was improper). Hence, unless waived by a general appearance, a court cannot confer a capacity on a unpleaded party. *Id.*

Accordingly, raising alter ego for the first time in post-judgment proceedings is prohibited where the judgment creditor (1) fails to plead the liability of the alleged alter egos in the underlying action; (2) fails to serve the alleged alter egos with its claims at any time during the underlying litigation; (3) the alleged alter egos never appeared in the underlying suit or post-judgment proceedings; and (4) the creditor never sought, and as a result, did not receive a judgment against the alleged alter egos. *Id.* To allow a judgment creditor to raise such a theory during post-judgment proceedings is tantamount to including the alter egos in the judgment and subjecting their assets to judgment enforcement.

5. Recovery Based on Alter Ego Theory Waived Where No Request Made for Finding of Liability

A plaintiff waives recovery based on alter ego when he fails to request submission of the theory. TEX. R. CIV. P. 279; *see also Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 495 (Tex. 1991) (finding a breach of contract claim waived where party did not request jury questions on cause of action). Thus, a judgment creditor waives any ability to pursue collection of the underlying judgment based on the net worth of alleged alter egos against whom it never sought a finding of liability. TEX. R. CIV. P. 279; *Southwestern Bell Tel. Co.*, 809 S.W.2d at 495.

6. Doctrine of Estoppel Bars Theory of Alter Ego Where Party Acts with Full Knowledge of Existence of Alter Egos

The doctrine of estoppel bars a judgment creditor from seeking a finding of alter ego during post-judgment net worth proceedings. Several Texas cases have recognized that a party seeking to pierce the corporate veil may be estopped if it acts with full knowledge of the relationship between a corporation and the shareholder. *See Gensco, Inc. v. Canco Equip., Inc.*, 737 S.W.2d 345, 348 (Tex. App.–Amarillo 1987, no writ) (concluding the defendant must secure a finding that the plaintiff had knowledge of the essential facts of the relationship between the defendant and related entities and did business with the defendant despite that knowledge).

For example, in *Paine v. Carter*, 469 S.W.2d 822, 827 (Tex. App.–Houston [14th Dist.] 1971, writ ref'd n.r.e.), the court stated:

> [W]here a party knows of the relationship between a corporation and its shareholder and chooses freely and voluntarily to deal with them in their respective capacities, he is estopped to claim that the corporation is the alter ego of the individual (or the reverse thereof).

See also Minchen v. Van Trease, 425 S.W.2d 435, 438 (Tex. App.–Houston [14th Dist.] 1968, writ ref'd n.r.e.) (holding that the plaintiff could not contend that the corporation was the alter ego of the individual where he had extensive dealings with the corporation and its president, fully knew and understood he was dealing with a corporation, negotiated with the corporation through its president, received conveyances from the corporation signed by the president in his capacity as president, and was paid by the corporation); *Atomic Fuel Extraction Corporation v. Slick's Estate*, 386 S.W.2d 180, 190-91 (Tex. App.–San Antonio 1964), *writ ref'd n.r.e. per curiam*, 403 S.W.2d 784 (Tex. 1965) (holding that the plaintiff was estopped from raising the issue of alter ego because it was aware of the risks where it was never confused about the parties with whom it contracted, made its contracts with the entities knowing about the individual and his position with respect to the entities and that he was not a party to any contract, and never requested that the individual bind himself personally and continued to deal with the corporations).

Accordingly, where the judgment creditor proceeds to trial and obtains a judgment with full knowledge of the existence of any alleged alter egos, it is estopped from pursuing collection of the judgment against these other entities. *See Gensco, Inc.*, 737 S.W.2d at 348.

B. What is Net Worth?

Another problem that arises in determining a judgment debtor's net worth and deciding what assets and liabilities should be included in the calculation and under what method these assets and liabilities must be valued. As discussed, neither section 52.006 of the Texas Civil Practice and Remedies Code nor Rule 24.2 of the Texas Rules of Appellate Procedure define net worth. TEX. CIV. PRAC. & REM. CODE § 52.006; TEX. R. APP. P. 24.2. In fact, as discussed above, the legislative history and Supreme Court Rules Committee transcripts show that "net worth" was not defined in either the statute or the rule due to the necessary fact-specific determination that must be made as to each judgment debtor.

1. Defining Net Worth

Net worth must be determined on a case-by-case basis because a judgment debtor may use a different method of accounting and valuation of its assets and liabilities depending on whether it is an individual or business and if a business, depending on the industry in which it operates. *See* HOUSE RESEARCH ORGANIZATION, H.B. 4 Bill Analysis 368 (March 25, 2003) (recognizing that net worth would need to be determined on a case-by-case basis); TEX. SUP. CT. ADVISORY COM. MTG. 9952 (Aug. 21, 2003) (afternoon session) (same). While the legislature chose not to define net worth in the context of superseding money judgments, the term has been defined under both Texas and federal law in other contexts.

a. Texas Case Authority

In *Ramco*, the Fourteenth District Court of Appeals, recognizing there was no definition for "net worth" in section 52.006, examined the definition of the term "net worth" as follows:

> "Net worth" is a term used by laymen as well as professionals. Although it is a term of art in business and accounting, its meaning is the same in ordinary usage. Dictionaries define "net worth" as the amount by which resources exceed liabilities to creditors. *See, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1519

> (defining "net assets" as "the excess of value of resources over liabilities to creditors") & 1520 (defining "net worth" as a synonym of "net assets") (1993 ed.); *see also* ENCARTA WORLD ENGLISH DICTIONARY (defining "net worth" as "assets minus liabilities: the difference between assets and liabilities of a person or company."); INVESTOPEDIA (2000 ed.) (defining "net worth" as "the amount by which a company or individual's assets exceed their liabilities"). Law dictionaries assign the term the same meaning. *See* BLACK'S LAW DICTIONARY 1639 (8th ed. 2004) (stating that "net worth" is usually calculated as excess of total assets over total liabilities); BLACK'S LAW DICTIONARY 939 (5th ed. 1979) (defining "net worth" as the "[r]emainder after deduction of liabilities from assets"); MERRIAM-WEBSTER'S DICTIONARY OF LAW (1996 ed.) (defining "net worth" as "the excess of the value of assets over liabilities").

Ramco, 171 S.W.3d at 912-13.

The *Ramco* court also noted Justice Gonzalez's concurring opinion in which he lamented the Texas Supreme Court's failure to follow his suggestion in *Lunsford v. Morris*[1] that the court define what "net worth" means in the context of the admission into evidence of a defendant's net worth for the purpose of determining what, if any, punitive damages should be assessed against that defendant. *Id.* at 915 (*citing Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 329-32 (Tex. 1993) (Gonzalez, J., concurring)).

b. Texas Staff Leasing Services Act

The Texas Staff Leasing Services Act provides as follows:

> Net worth of an applicant means the applicant's assets minus the applicant's liabilities, as shown on the applicant's financial statement or most recent federal tax return, plus the sum of any guarantees, letters of credit, or securities that may be submitted to the department.

TEX. LABOR CODE ANN. § 91.001(12) (Vernon Supp. 1996 & Supp. 2005). Thus, providing a financial statement or a copy of the most recent tax return is sufficient for an applicant under the Texas Staff Leasing Services Act to show net worth. *Id.* § 91.104(b). Further, the applicant should include adequate reserves for all taxes and insurance, including reserves for claims incurred but not paid and for claims incurred but not reported under plans of self-insurance for health benefits. *Id.* § 91.014(c). The applicant should compute net worth in accordance with section 448 of the Internal Revenue Code, which provides limitations of the use of cash method of accounting. *Id.*; 26 U.S.C. § 448.[2]

c. Texas Health Maintenance Organization Act

The Act governing health maintenance organizations provides as follows:

> Net worth means the amount by which total liabilities, excluding liability for subordinated debt issued in compliance with Article 1.39, is exceeded by total admitted assets.

TEX. HEALTH & SAFETY CODE ANN. § 843.002(20) (Vernon 1997). Thus, net worth is total admitted assets minus total liabilities. *Id.*, *see also* 28 TEX. ADMIN. CODE ANN. § 11.2302(1) (Vernon 1998) (regulating provider-sponsored health maintenance organizations and defining net worth as "the excess of total assets over total liabilities, excluding fully subordinated debt or subordinated liabilities").

d. Other Texas Statutes

Other Texas statutes define net worth as "assets minus liabilities." For example, statutes governing Texas coal mining define net worth as total assets minus liabilities and equivalent to owner's equity. 16 TEX.

[1] *See Lunsford v. Morris*, 746 S.W.2d 471, 472-73 (Tex. 1988) (changing Texas common law and holding for the first time in Texas that evidence regarding a party's "net worth" is discoverable and admissible in evidence if punitive damages are sought against that party and in which Justice Gonzalez's dissent warned that practitioners would be confused because "net worth" was not defined).

[2] Section 448 disallows the use of cash basis accounting for C-corporations, partnership in which a C-corporation is a partner, and tax shelters. 26 U.S.C. § 448(a). However, cash basis accounting is allowed for (1) farming businesses, (2) personal service corporations, (3) entities with gross receipts of less than $5,000,000. *Id.* § 448(b).

ADMIN. CODE ANN. § 12.309(j)(1)(F) (Vernon 1998); *see also* 30 TEX. ADMIN. CODE ANN. §§ 37.11(6); 336.802(11) (Vernon 2003) (same).

The Texas Department of Licensing and Regulation for vehicles defines net worth as the excess of total assets over total liabilities as reflected in audited financial statements. 16 TEX. ADMIN. CODE ANN. § 71.10(3) (Vernon 2004). The Texas Department of Insurance statutes regulating the Texas Medical Liability Insurance Underwriting Association define net worth as the difference between assets and liabilities:

> As used in this subclause, 'net worth' shall be calculated by determining the excess, if any, of the plan's total assets over the plan's total liabilities.

28 TEX. ADMIN. CODE ANN. § 5.2004(a)(5)(E)(vii)(I) (Vernon 2005); *see also* TEX. INS. CODE ANN. 843.002(20) (defining net worth as the amount by which total liabilities is exceeded by total admitted assets).

e. Federal Regulations and Cases

The Federal Deposit Insurance Corporation's rules of practice and procedure recognize net worth as "the excess of total assets over total liabilities." 12 C.F.R. § 308.177(b)(2).

Further, federal cases have defined net worth consistent with the principles underlying the statutes in which the term is used. For example, the Seventh Circuit Court of Appeals reasoned that "net worth," as used in the Fair Debt Collection Practices Act ("FDCPA"), should be calculated as assets minus liabilities under Generally Accepted Accounting Principles ("GAAP"), but that such calculation should be in accordance with the "primary purpose" of the FDCPA – to ensure that defendants are protected from having to liquidate all of their assets to satisfy a punitive damages award. *See Sanders v. Jackson*, 209 F.3d 998, 1002 (7th Cir. 2000); *see also Broaddus v. United States Army Corps of Engineers*, 380 F.3d 162, 167 (4th Cir. 2004) (providing that net worth under the Equal Access to Justice Act is computed by subtracting liabilities from assets).

Further, the Seventh Circuit Court of Appeals concluded that the plain meaning of "net worth" in the Equal Access Justice Act was the difference between total assets and total liabilities determined in accordance with GAAP. *Continental Web Press, Inc. V. NLRB*, 767 F.2d 321, 323 (7th Cir. 1985), *disapproved of on other grounds by, Comm'r, INS v. Jean*, 496 U.S. 154, 160-66, 110 S.Ct. 2316, 2319-23, 110 L.Ed.2d 134 (1990). The Court concluded as follows:

> Congress did not define the statutory term "net worth." It seems a fair guess that if it had thought about the question, it would have wanted the courts to refer to generally accepted accounting principles. What other guideline could there be? Congress would not have wanted us to create a whole new set of accounting principles just for use in cases under the Equal Access to Justice Act. The proceeding to recover attorney's fees under the Act is intended to be summary; it is not intended to duplicate in complexity a public utility commission's rate of return proceeding.

Id.

2. Methods of Accounting

The method of accounting utilized by a judgment debtor will fluctuate depending on whether the debtor is an individual or a business and if a business, the industry in which the judgment debtor operates.

a. Generally Accepted Accounting Principles (GAAP)

Generally Accepted Accounting Pprinciples ("GAAP") is a widely accepted set of rules, conventions, standards, and procedures for reporting financial information, established by the Financial Accounting Standards Board ("FASB").

Several federal cases and at least one case from Texas have concluded that net worth means assets minus liabilities in accordance with GAAP. *See, e.g., Broaddus v. United States Army Corps of Eng'rs*, 380 F.3d 162, 166-67 (4th Cir. 2004) (holding that the unambiguous meaning of "net worth" under the Equal Access to Justice Act was total assets less total liabilities in accordance with GAAP); *Sanders v. Jackson*, 209 F.3d 998, 999-1002 (7th Cir. 2000) (holding that the plain meaning of "net worth" under the Fair Debt Collection Practices Act was total assets less total liabilities according to GAAP, which is balance-sheet or book net worth); *Kuhns v. Board of Governors of Federal Reserve System*, 930 F.2d 39, 41-42 (D.C. Cir. 1991) (holding that "net worth" under the Equal Access to Justice Act must be calculated in accordance with GAAP); *see also Castelli v. Tolibia*, 83 N.Y.S.2d 554, 564 (Sup. Ct. 1948) (stating that "net worth" has a

well-defined meaning, which is the remainder after the deduction of liabilities from assets).

The Fourteenth District Court of Appeals has also determined that the plain meaning of "net worth," as used in section 52.006 of the Texas Civil Practice and Remedies Code and Rule 24, is the difference between total assets and total liabilities determined in accordance with GAAP. *Ramco*, 171 S.W.3d at 914.

(1) What Types of Judgment Debtors Use GAAP

The Texas Administrative Code provides that companies issuing publicly-traded stock and reporting to the Texas Securities Board must calculate their net worth according to GAAP. 7 TEX. ADMIN. CODE ANN. § 141.1(b)(20) (Vernon 1992) (regulating the registration of programs formed to own equipment and defining net worth as the excess of total assets over total liabilities as determined by generally accepted accounting principles including depreciation, if applicable); § 129.1(b)(16) (Vernon 1997) (governing registration of asset-backed securities and defining net worth as the excess of total assets over total liabilities as determined by generally accepted accounting principles.); § 117.1(b)(23) (Vernon 1994) (regulating the registration of real estate programs and defining net worth as the excess of total assets over total liabilities as determined by generally accepted accounting principles including depreciation, if applicable).

(a) Valuing Assets under GAAP

Several federal cases have found that when using GAAP, assets are calculated at their cost of acquisition–not based on appraisal or fair market value. *See, e.g., Broaddus*, 380 F.3d at 167; *City of Brunswick v. United States*, 849 F.2d 501, 503 (11th Cir. 1988); *American Pacific Concrete Pipe Co. v. NLRB*, 788 F.2d 586, 590 (9th Cir. 1986); *Continental Web Press, Inc. v. NLRB*, 767 F.2d 321, 323 (7th Cir. 1985).

In *Broaddus*, the Fourth Circuit Court of Appeals reasoned that computation of net worth should be achieved by subtracting liabilities from assets, where the assets are valued at their acquisition cost, not their fair market value, joining its sister circuits by applying this prevailing and uncontradicted view of asset determination. *Broaddus*, 380 F.3d at 170.

The Ninth, Eleventh, and Seventh Circuit Courts of Appeals have also concluded that where GAAP is used, an asset's value should not be based on an appraisal or fair market value, but on the cost of acquisition. *See United States v. 88.88 Acres of Land*, 907 F.2d 106, 107 (9th Cir. 1990) (using acquisition costs to determine the value of assets); *City of Brunswick*, 849 F.2d at 503 (same); *American Pacific Concrete Pipe Co.*, 788 F.2d at 590 (same); *Continental Web Press, Inc.*, 767 F.2d at 323 (same). Net worth must be derived from a company's books rather than an appraisal. *Continental Web Press, Inc.*, 767 F.2d at 323. Thus, when GAAP applies, the valuation of a company's assets should be based on the cost of acquisition. *See id.*

(2) Other Comprehensive Bases of Accounting ("OCBOA")

However, other bases of accounting, called Other Comprehensive Bases of Accounting ("OCBOA") are also widely used as an alternative to GAAP. Statement of Auditing Standards No. 62 allows OCBOA to be utilized under a GAAP-like framework. SAS No. 62. It should be emphasized that no case cited adopting the GAAP principles for determining net worth even mention whether OCBOA were considered. Accordingly, OCBOA values should be utilized in determining net worth in the appropriate context.

(a) Description of OCBOA

OCBOA are described as follows:

> (1) the basis of accounting the reporting entity used to comply with the requirements or financial reporting provisions of a governmental regulatory agency to whose jurisdiction the entity is subject;
>
> (2) the basis of accounting the reporting entity uses or expects to use to file its income tax return for the period covered by the financial statements;
>
> (3) the cash receipts and disbursements basis of accounting, and modifications of the cash basis having substantial support such as recording depreciation on fixed assets or accruing income taxes; and
>
> (4) a definite set of criteria having substantial support that is applied to all material items appearing in financial statements, such as the price-level basis of accounting.

SAS No. 62.

(b) What Characteristics Must an Entity Exhibit to Be a Candidate for Using OCBOA?

Entities that are good candidates for utilizing OCBOA usually have the following characteristics: (1) there are no third-party users of the financial statements; (2) the entity's debt is secured; (3) the entity's creditors do not require GAAP financial statements; (4) the cost of complying with GAAP would exceed the benefits; (5) the owners and managers are closely involved in the day-to-day operations of the business and have a fairly accurate picture of the entity's financial position; (6) the owners are primarily interested in cash flow; (7) the owners are primarily interested in tax implications of transactions; (8) capital expenditures and long-term financing are not significant; and (9) IRS regulations do not require the entity to prepare its tax return on the accrual basis of accounting. AICPA *Compilation and Review Alert*–1996/1997.

(c) Types of OCBOA

The most common OCBOA are cash and modified cash bases and tax basis. Use of the pure cash basis is rare and is generally limited to nonbusiness entities with simple operations, including school activity funds, fairs and other civil ventures, trusts and estates, political action committees, and political campaigns. PPC's Guide to Cash, Tax, and Other Bases of Accounting § 101.6. When using a pure cash basis, only transactions that increase or decrease cash or cash equivalents are reflected in the company's financial statements (not liabilities) and transactions are reflected not as they occur but as cash is received or disbursed. PPC's Guide to Cash, Tax, and Other Bases of Accounting § 400.2; 402.1. Thus, a cash basis entity considers only cash and cash equivalents, investments, property and equipment, borrowings, withholdings, and taxes when calculating its cash balance. PPC's Guide to Cash, Tax, and Other Bases of Accounting § 402.2-402.8.

Use of the modified cash basis is more common, but should be limited to entities oriented toward cash receipts and disbursements, not significantly influenced by financing of sales or purchases, and relatively simple. PPC's Guide to Cash, Tax, and Other Bases of Accounting § 101.7. Modified cash basis is characterized as "the pure cash basis incorporating 'modifications of the cash basis having substantial support'." PPC's Guide to Cash, Tax, and Other Bases of Accounting § 400.4 (*citing* SAS No. 62). These modifications generally involve recognizing some transactions on an accrual basis as with GAAP such as payroll taxes, pension plan contributions, and depreciation. *Id.*

Tax basis accounting is the basis of accounting that an entity uses or expects to use to file its income tax return and is typically used by entities that are either profit-oriented enterprises, partnerships whose agreements require use of such method, and non-profits. PPC's Guide to Cash, Tax, and Other Bases of Accounting § 101.8; 500.1. Because the income tax laws determine taxable income, this basis focuses on the measurement of revenues and expenses and possibly on the determination of assets and liabilities. *Id.* § 500.1. The Internal Revenue Code describes two accounting methods: (1) cash basis, and (2) accrual basis. *Id.* § 500.8. Entities carrying inventory are normally required to use the accrual basis. *Id.* § 500.9.

Other less common bases include (1) regulatory basis, (2) price-level basis, (3) current-value basis, (4) liquidation basis, and (5) agreed-upon basis. *Id.* § 101.9, 602. Regulated companies, such as insurance companies, credit unions, construction companies, and non-profits, must report financial information to federal, state, or local governmental agencies. *Id.* §§ 601.1-601.2. This reporting basis sometimes differs from GAAP due to the unique reporting requirements required by the agencies so that these types of companies are allowed to report on a regulatory basis. *Id.* § 601.1.

3. Problems with Valuing Assets and Liabilities for Net Worth Purposes

Further, problems arise when determining the assets and liabilities a judgment debtor must include in computing its net worth. See TEX. SUP. CT. ADVISORY COM. MTG. 9940 (Aug. 21, 2003) (afternoon session). The ultimate question that the judgment debtor must ask when determining whether an item must be included in its net worth calculation is whether that item may be considered in determining its ability to pay the judgment. *See TransAmerican Natural Gas Corp. v. Finkelstein*, 905 S.W.2d 412, 414 (Tex.App.–San Antonio 1995, pet. dism'd).

a. Insurance Policies

Is an insurance policy an asset? During the Supreme Court Rules Committee meeting, Professor Dorsaneo believed that liability insurance would be an asset once a judgment was rendered against a judgment debtor. TEX. SUP. CT. ADVISORY COM. MTG. 9951 (Aug. 21, 2003) (afternoon session). Professor Elaine Carlson

countered that "[f]rom the accountant's perspective, insurance is only an asset if it has some value." *Id.* Carlson then explained that while she believed the policy had great value that accountants may differ in opinion. *Id.* Mr. Schenkkan then noted that the question wasn't whether the policy had value but whether it counts for purposes of net worth. *Id.* He explained that the policy did not enable the judgment debtor to obtain more cash to supersede the judgment. *Id.* at 9952.

During the legislative hearings, Dan Byrne, from Texans for Civil Justice, explained that insurance was an important factor in determining supersedeas relief. Senate Committee Hearing on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 1469 (May 7, 2003). He mentioned that a lot of insolvent judgment debtors might have insurance coverage. *Id.* In lieu of having an insurance coverage factor in addition to consideration of net worth, Byrne requested that the legislature define net worth to include available coverage. *Id.* When questioned regarding the need to consider insurance, Waldrop provided that if the judgment debtor had insurance, then a bond was not needed. Senate Committee Hearing on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 2015 (May 7, 2003). Waldrop explained that the insurance policy could not be dissipated so there was no need to either lower or raise the requirement of supersedeas when insurance coverage was involved. *Id.* However, this did not take into consideration "wasting policies."[3]

Further, the Texas Supreme Court has held that punitive damage liability coverage is not an asset that can be considered in assessing a defendant's financial standing for purposes of punitive damages awards and that the jury cannot hear evidence of a defendant's insurance coverage. *See* Elaine A. Carlson, *Reshuffling the Deck: Enforcing and Superseding Civil Judgments On Appeal After House Bill 4*, 46 S. Tex. L. Rev. 1035, 1081 n. 282 (2005) (*citing Owens-Corning Fiberglass Corp. v. Malone*, 972 S.W.2d 35, 41 (Tex. 1998); *Rojas v. Vuocolo*, 177 S.W.2d 962, 964 (Tex. 1944)).

In sum, both the legislature and Supreme Court Rules Committee were faced with the question of whether to consider the judgment debtor's insurance coverage in determining net worth and neither elected to specifically provide that such coverage constitute an asset to the judgment debtor. *See* TEX. CIV. PRAC. & REM. CODE § 52.006; TEX. R. APP. P. 24.2. Including insurance coverage as an asset would require a judgment debtor to bond the judgment based on an illiquid asset that could not be used as collateral. The supersedeas amendments were designed to promote fairness and efficiency in civil lawsuits, protect Texas citizens and courts from abusive litigation tactics, remove incentives causing unwarranted delay and expense, and restore the balance in the court system to operate more efficiently and fairly and less costly. Debate on Tex. H.B. 4 on the Floor of the House, 78th Leg., R.S. 199 (February 26, 2003).

b. Judgment

Is the judgment a liability when calculating a judgment debtor's net worth?

A judgment most certainly affects a judgment debtor's ability to supersede the judgment. *See TransAmerican Natural Gas Corp.*, 905 S.W.2d at 414. In fact, a judgment debtor may be unable to secure a bond due to the size of the judgment rendered against it. *See* HOUSE RESEARCH ORGANIZATION, H.B. 4 Bill Analysis 368 (March 25, 2003) (noting that "[m]any defendants find it difficult to pursue appeals because they cannot afford the high costs of an appeal bond. In many cases, the cost of the bond makes the end of the suit at the time of judgment and not after a rightfully brought appeal"); Debate on Tex. H.B. 4 on the Floor of the House, 78th Leg., R.S. 199 (February 26, 2003) (providing that due to the size of some judgments out of Texas courts it was near impossible to get a bond and appeal without liquidating a company).

Accordingly, in tandem with the intent of the amendment, the court should consider whether the accounting method utilized by the judgment debtor mandates that the judgment be included for purpose of calculating the debtor's net worth and whether omitting it from the calculation could result in the judgment debtor being unable to secure adequate resources to appeal the judgment.

c. Potential *Stowers* Action

What about a potential *Stowers* action against the

[3] A "wasting policy," also called a "self liquidating," "eroding limits," or "defense within limits" policy, is a policy which limits the total amount paid for the sum of defense costs and indemnity for liability. John A. Edginton, *Admiralty Law Institute Symposium: Towage, Salvage, Pilotage, and Pollution, Ethics at Sea: Ethics Issues for Maritime Lawyers and Insurers*, 70 TUL. L. REV. 215, 442 (December 1995) (*citing* Shaun McParland Baldwin, *Legal and Ethical Considerations for "Defense Within Limits" Policies*, 61 DEF. COUNS. J. 89 (1994).

insurer? A *Stowers* action is an action against an insurance company for the negligent failure to settle an insurance claim within policy limits. *See G.A. Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544, 547 (Tex. Com. App. 1929, holding approved). The *Stowers* duty to settle is not activated unless three prerequisites are met: (1) the claim against the insured is within the scope of coverage, (2) the claimant has made a settlement demand that is within the policy limits, and (3) the terms of the demand are such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment. *Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 849 (Tex.1994). However, an insurer has no duty to settle claims not covered by the policy. *Id.* at 848.

A *Stowers* action accrues when the judgment against the insured becomes final rather than when the insured actually makes an excess payment to the original plaintiff. *In re Smith Barney, Inc.*, 975 S.W.2d 593, 598 (Tex. 1998) (*citing Hernandez v. Great American Ins. Co.*, 464 S.W.2d 91 (Tex.1971)). "A judgment is final for the purposes of bringing a *Stowers* action if it disposes of all issues and parties in the case, the trial court's power to alter the judgment has ended, and execution on the judgment, if appealed, has not been superseded." *Id.*

Because a *Stowers* recovery is speculative at the time the judgment debtor calculates its net worth and posts its net worth affidavit, the judgment debtor should not be forced to include any potential recovery as an asset in its net worth determination.

IX. NET WORTH AFFIDAVIT

A judgment debtor, who supersedes a money judgment based on net worth, must post security and simultaneously file an affidavit that states its net worth with complete, detailed information concerning its assets and liabilities from which its net worth can be ascertained. TEX. R. APP. P. 24.2(c)(1). The affidavit is considered prima facie evidence of the debtor's net worth. *Id.*

Otherwise, neither the statute nor the rule provide additional requirements for the judgment debtor's net worth affidavit. *See* TEX. CIV. PRAC. & REM. CODE § 52.006(b); TEX. R. APP. P. 24.2(c)(1). However, in exercising caution, the judgment debtor should provide a sworn affidavit setting out the amount of its individual assets and liabilities and its corresponding net worth as of a specific date in time. Further, if the values are obtained from financial statements and reports, the judgment debtor should attach a copy of those statements and reports to its affidavit and detail (1) the accountant or accounting firm that made the determination, and (2) what accounting method was used. It would also be helpful to attach a letter from the judgment debtor's accountant or accounting firm providing whether the financial statements and reports used in determining net worth were audited or unaudited.

X. CONTEST TO NET WORTH

A. Challenge to Net Worth Affidavit

After the judgment debtor supersedes the judgment and files a net worth affidavit, the judgment creditor can challenge **the judgment debtor's net worth affidavit**. TEX. R. APP. P. 24.2(c)(2).

1. Need Not Be Sworn

While the judgment debtor's net worth affidavit must be sworn, the judgment creditor's net worth contest does not need to be sworn. TEX. R. APP. P. 24.2(c)(1), (2).

2. No Specific Form

Further, there are no guidelines within section 52.006 or Rule 24.2 that explain what information the judgment creditor must include in its net worth contest. Thus, presumably the contest can encompass one line of text wherein the judgment creditor states it contests the debtor's net worth affidavit or can be several pages long wherein the judgment creditor sets out the basis of its challenge, noting the specific asset and liability amounts submitted by the judgment debtor that it contests. *See id.*

B. Discovery in Conjunction with Contest

Further, in conjunction with its contest, the judgment creditor can conduct reasonable discovery concerning the judgment debtor's net worth. TEX. R. APP. P. 24.2 (c)(2).

1. What Type of Discovery Does the Judgment Debtor Have to Answer?

The only issue of importance during the net worth contest is the value of the judgment debtor's assets and liabilities and consequently its net worth. TEX. R. APP. P. 24.2 (a)(1), (c)(1), (2), (3). Rule 24.2 provides that the

judgment debtor is required to post supersedeas in an amount not exceeding fifty percent of its current net worth. *Id.* at 24.2(a)(1)(A).

Information necessary to test the accuracy of the judgment debtor's net worth affidavit would include only information concerning the **current assets** and **current liabilities** of the judgment debtor. *See id.* Thus, presumably the rule gives the judgment creditor authority to request only information relevant to the judgment debtor's **current** net worth, including the assets and liabilities shown on the net worth statement and attached financial statements and reports or assets or liabilities the judgment creditor believes that the judgment debtor failed to include in the affidavit. See *id.* 24.2(a)(1)(A); (c)(1). Thus, any onerous requests for valuations of assets and liabilities for time periods preceding the time at which the judgment creditor's claim arose and unhelpful to determining the debtor's current net worth would fall outside the scope of the rule. *See id.* 24.2(c)(2).

2. Is the Judgment Creditor Required to Conduct Discovery?

Rule 24.2 provides the judgment creditor **may** conduct discovery. TEX. R. APP. P. 24.2(c)(2). So, is the judgment creditor required to seek such discovery before seeking a hearing on its net worth contest? Probably not.

Texas courts apply the same rules of construction to rules of procedure as to statutes. *In re VanDeWater*, 966 S.W.2d 730, 732 (Tex. App.–San Antonio 1998, no pet.); *Burrhus v. M & S Supply, Inc.*, 933 S.W.2d 635, 640 (Tex.App.–San Antonio 1996, writ denied). When a rule of procedure is clear, unambiguous, and specific, the court construes its language according to its literal meaning. *Murphy v. Friendswood Dev. Co.*, 965 S.W.2d 708, 709 (Tex. App.–Houston [1st Dist.] 1998, no pet.). The court avoids constructions giving rise to constitutional infirmities. TEX. GOV'T CODE ANN. § 311.021(1) (Vernon 2005). Rule interpretation is "a pure question of law over which the judge has no discretion." *Mitchell*, 943 S.W.2d at 437.

It is presumed that the legislature used words in a statute in the sense in which they are ordinarily understood. *Connors v. Connors*, 796 S.W.2d 233, 237 (Tex.App.–Fort Worth 1990, writ denied); *Calvert v. Austin Laundry & Dry Cleaning Co.*, 365 S.W.2d 232, 235 (Tex.Civ.App.–Austin 1963, writ ref'd n.r.e.). When "may" is used in a statute, it creates discretionary authority or grants permission or a power unless the context in which the phrase appears necessarily requires a different construction or unless a different construction is expressly provided by statute. TEX. GOV'T CODE ANN. § 311.016(1) (Vernon 2005).

Further, "must" creates or recognizes a condition precedent. *Id.* at § 311.016(3). A condition precedent is an act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises. BLACK'S LAW DICTIONARY 312 (8th ed. 2004). If the condition does not occur and is not excused, the promised performance need not be rendered. *Id.* Webster's defines "must" as an obligation or a requirement. WEBSTER'S 3RD NEW INTERNATIONAL DICTIONARY 1492 (3rd ed. 1993).

Thus, presuming that the rules committee used words in the sense in which they are commonly understood and applying the construction rules, the rule gives the judgment creditor discretionary authority or permission to conduct reasonable discovery if it contests the judgment debtor's net worth affidavit. *See* TEX. R. APP. P. 24.2(c)(2); TEX. GOV'T CODE ANN. § 311.016; *Connors*, 796 S.W.2d at 237. Because the judgment creditor's authority is discretionary, the judgment creditor is not required to conduct net worth discovery before seeking a hearing on its net worth contest. *See* TEX. GOV'T CODE ANN. § 311.016; TEX. R. APP. P. 24.2(c)(2). However, the judgment creditor proceeds to the net worth contest without having conducted net worth discovery at its own risk.

XI. HEARING ON JUDGMENT CREDITOR'S NET WORTH CONTEST

After the judgment creditor files its contest of the judgment debtor's net worth affidavit, the trial court must hold an evidentiary hearing. TEX. R. APP. P. 24.2(c)(3).

A. Net Worth Discovery Foreclosed Once Hearing Begins

The trial court must promptly hear a judgment creditor's contest only **after any discovery** has been completed. *Id.* Consequently, the plain language of the rule shows that the judgment creditor is foreclosed from seeking net worth discovery if it proceeds to an immediate hearing on its net worth contest without seeking net worth discovery. *See id.*

Rule 24.2(c)(3) requires the trial court to hold a hearing only after any net worth discovery has been

completed. TEX. R. APP. P. 24.2(c)(3). Thus, the plain language of Rule 24 suggests that the judgment creditor is foreclosed from seeking such discovery following the hearing. *See* TEX. R. APP. P. 24.2(c)(3); TEX. GOV'T CODE § 311.011. Thus, just as with a trial, the judgment creditor should be foreclosed from seeking any net worth discovery once it proceeds to the net worth contest hearing. *See* TEX. GOV'T CODE § 311.011.

B. Trial Court's Evidentiary Hearing

The trial court must hold a evidentiary hearing during which the judgment debtor and judgment creditor offer evidence on the judgment debtor's net worth. TEX. R. APP. P. 24.2(c)(3).

1. Judgment Debtor Has Burden of Proof

The judgment debtor has the burden of proving its net worth at the evidentiary hearing. TEX. CIV. PRAC. & REM. CODE § 52.006(c); TEX. R. APP. P. 24.2(c)(3); *see also Ramco*, 171 S.W.3d at 910. So, what exactly is the judgment debtor's burden?

a. Defining Burden of Proof

Black's Law Dictionary defines "burden of proof" as "[a] party's duty to prove a disputed assertion or charge." BLACK'S LAW DICTIONARY 209 (8th ed. 2004). Burden of proof includes both the burden of persuasion and the burden of production. *Id.* The burden of persuasion is "[a] party's duty to convince the fact-finder to view the facts in a way that favors that party." *Id.* The burden of production is "[a] party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling such as a summary judgment or a directed verdict." *Id.* One commentator has explained "burden of proof" as follows:

> In the past the term "burden of proof" has been used in two different senses. (1) The burden of going forward with the evidence. The party having this burden must introduce some evidence if he wishes to get a certain issue into the case. If he introduces enough evidence to require consideration of this issue, this burden has been met. (2) Burden of proof in the sense of carrying the risk of nonpersuasion. The one who has this burden stands to lose if his evidence fails to convince the jury—or the judge in a nonjury trial. The present trend is to use the term "burden of proof" only with this second meaning . . . .

Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 78 (3d ed. 1982). Another commentator stated as follows:

> The expression "burden of proof" is tricky because it has been used by courts and writers to mean various things. Strictly speaking, burden of proof denotes the duty of establishing by a fair preponderance of the evidence the truth of the operative facts upon which the issue at hand is made to turn by substantive law. Burden of proof is sometimes used in a secondary sense to mean the burden of going forward with the evidence. In this sense it is sometimes said that a party has the burden of countering with evidence a prima facie case made against that party.

William D. Hawkland, *Uniform Commercial Code Series* § 2A-516:08 (1984).

b. Preponderance of the Evidence

Texas Rule of Appellate Procedure provides only that the judgment debtor has the burden of proof, without explaining exactly what that burden entails. *See* TEX. R. APP. P. 24.2(c)(3). However, the judgment debtor should only have to prove his net worth by a preponderance of the evidence.

"No doctrine is more firmly established than that issues of fact are resolved from a preponderance of the evidence." *Sanders v. Harder*, 227 S.W.2d 206, 209 (Tex. 1950). In fact, over a century ago, the Texas Supreme Court rejected the view that "facts [must] be established by evidence with that absolute certainty . . . that excludes all reasonable doubt of their existence, as if it were a case of murder or treason . . . ." *Sparks v. Dawson*, 47 Tex. 138, 145 (1877). Seeking to avoid a blurring of the distinction between civil and criminal cases, the Court has regularly found reversible error when a trial court instructed a jury that a greater burden must be met. *See Bluntzer v. Deewes*, 15 S.W. 29, 30 (Tex. 1891) (finding reversible error in a charge requiring "a preponderance of the evidence . . . with such certainty as will satisfy your minds"); *Wylie v. Posey*, 9 S.W. 87, 88-90 (Tex. 1888) (holding there was reversible error in a charge requiring "a sufficient preponderance of the evidence, to the extent of a reasonable certainty"). In fact, only in extraordinary circumstances has the Court imposed a more onerous burden, abandoning the well-established preponderance of the evidence standard.

See Ellis County State Bank v. Keever, 888 S.W.2d 790, 792 n.5 (Tex. 1994).

Further, during the formulation Rule 24.2, committee members discussed the similarity between the challenge of an indigency affidavit under Rule 20.1 and a challenge of a judgment debtor's net worth affidavit under Rule 24.2. *See* TEX. SUP. CT. ADVISORY COMM. MTG. 9945-48 (Aug. 21, 2003) (afternoon session). Notably, the committee discussed the burden of proof under 20.1 and decided to import to the same burden to a judgment debtor filing a net worth affidavit under 24.2. *See id.* at 9948-49. Under Rule 20.1, "the test for indigence is whether a preponderance of the evidence shows that the party would be unable to pay costs 'if he really wanted to and made a good faith effort to do so.'" *Thomas v. Olympus/Nelson Prop. Mgmt.*, 97 S.W.3d 350, 352 (Tex.App.–Houston [14th Dist.] 2003, no pet.). Because the committee showed its intent to design a net worth affidavit scheme similar to the one provided in 20.1, use of the preponderance of the evidence by the judgment debtor to prove his net worth is further supported by the use of that same standard under Texas Rule of Appellate Procedure 20.1. *See* TEX. R. APP. P. 20.1(e). Thus, the judgment debtor need only prove its net worth by a preponderance of the evidence.

2. Judgment Creditor Has No Burden

However, the rule does not seem to place any burden upon the judgment creditor requiring only that the judgment creditor file a contest that need not even be sworn. *See* TEX. R. APP. P. 24.2(c)(2), (3). Thus, it appears that the judgment creditor can chose to offer no evidence or argument at the hearing. *See id.*

3. Types of Evidence Admissible at Hearing

The hearing on the judgment creditor's net worth contest is akin to a mini-trial where the judgment debtor needs to offer both documentary and testamentary evidence to prove its net worth. *See* TEX. R. APP. P. 24.2(c)(3).

a. Documentary Evidence

The debtor should offer documentary evidence to support the value of his assets and liabilities. *See* TEX. R. APP. P. 24.2(c)(3) (providing that the judgment debtor has the burden of proof to prove its net worth). To demonstrate the value of its assets, a judgment debtor may need to admit (1) statements for checking and savings accounts; (2) property appraisals for homestead, rental, or business property; (3) purchase invoices and any corresponding depreciation schedules for any business equipment; (4) inventory statements; (5) statements of accounts receivable and the corresponding bad debt ratio; (6) National Automobile Dealers Association ("NADA") or Kelley Blue Book values for automobiles; (7) statements for investment accounts, retirement accounts, or insurance policies; (8) financial statements showing interests in other business entities; (9) documentation of any prepaid expenses; (10) documentation of intangible assets such as goodwill and patents; and (11) tax returns.

To demonstrate the value of its liabilities, the judgment debtor will need to admit (1) account payable statements including credit cards; (2) loan statements for automobiles, mortgaged property, and other encumbered property; (3) property tax statements; and (4) statements showing accrued benefits and payroll obligations.

b. Testimonial Evidence

The judgment debtor may need to provide testimony regarding the value of its assets and liabilities in addition to providing expert accounting testimony to explain valuation of the assets and liabilities and the corresponding calculation of net worth. *See* TEX. R. APP. P. 24.2(c)(3) (providing that the judgment debtor has the burden of proving its net worth).

(1) Testimony from Judgment Debtor

The judgment debtor or a representative of the judgment debtor can testify regarding the value of its assets and liabilities. A property owner is qualified to testify to the market value of his property. *Redman Homes, Inc. v. Ivy*, 920 S.W.2d 664, 669 (Tex. 1996) (*citing Porras v. Craig*, 675 S.W.2d 503, 504 (Tex. 1984)) (allowing opinion testimony by an owner to establish market value of his property). The evidence is probative if based on the owner's estimate of market value and not some intrinsic value or replacement cost value. *Id.* (*citing Porras*, 675 S.W.2d at 504-05).

(2) Testimony from an Accountant

The judgment debtor may also need to offer expert testimony especially from an accountant, who can explain the proper valuation of its assets and liabilities in accordance with the accounting method utilized by the judgment debtor. However, the use of expert testimony presents the possibility of a *Daubert/Robinson* challenge. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579,

113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

(a) Factors Examined in Determining Reliability of Expert Testimony

An expert's testimony must be reliable. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of opinion or otherwise." *Pleasant Glade Assembly of God v. Schubert*, 174 S.W.3d 388, 400 (Tex.App.–Fort Worth 2005, pet. filed). Accordingly, if the judgment debtor wishes to admit testimony from its accountant to explain the preparation of its financial statements and reports and consequently its net worth statement, the judgment debtor will need to ensure that the proffered testimony is reliable.

To gauge reliability, the trial court must evaluate the methods, analysis, and principles relied upon in reaching the opinion and should ensure that the expert's opinion comports with applicable professional standards outside the courtroom and that it has a reliable basis in the knowledge and experience of the discipline. *Pleasant Glade Assembly of God*, 174 S.W.3d at 401 (*citing Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629 (Tex. 2002); *Gammill*, 972 S.W.2d at 725-26; *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 499 (Tex. 2001)).

The Texas Supreme Court has crafted two approaches for determining whether expert testimony is reliable: (1) the *Robinson* factors, and (2) the *Gammill* analytical gap test. *Pleasant Glade Assembly of God*, 174 S.W.3d at 401. For expert testimony to be admissible (1) the expert must be qualified, and (2) the expert opinion must be relevant to the issues involved in the case and based on a reliable foundation. *See* TEX. R. EVID. 702; *Robinson*, 923 S.W.2d at 556; *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 720-21, 726-27 (Tex. 1998). The non-exclusive factors set out in *Robinson* include as follows: (1) the extent to which the theory has been or can be tested; (2) the extent to which the technique relies upon the subjective interpretation of the expert; (3) whether the theory has been subjected to peer review and/or publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the non-judicial uses which have been made of the theory or technique. *Robinson*, 923 S.W.2d at 557.

(b) Judgment Debtor Will Need to Preserve Challenge to Judgment Creditor's Expert Testimony, If Any

Conversely, the judgment debtor will need to preserve any challenge to expert testimony proffered by the judgment creditor. To preserve a complaint that expert opinion evidence is inadmissible due to unreliability, the judgment debtor must object to the evidence either before trial or when the evidence is offered. *Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245, 251-52 (Tex. 2004); *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409 (Tex. 1998).

The judgment debtor should file a written objection prior to the hearing on the judgment creditor's net worth contest setting out (1) the expert, (2) the opinion it is seeking to exclude, and (3) the reasons it is seeking exclusion. *See Merrell Dow Pharms. v. Havner*, 953 S.W.2d 706, 709 (Tex. 1997). Once the judgment debtor objects to the expert testimony, it is the judgment creditor's burden to respond to each objection and to establish that the testimony is admissible by a preponderance of the evidence. *See Robinson*, 923 S.W.2d at 557.

XII. ORDER ON NET WORTH CONTEST

Following a hearing on the judgment creditor's net worth contest, the trial court must issue an order. TEX. R. APP. P. 24.2(c)(3).

A. Requirements of Order

1. Amount of Net Worth

First, the trial court must state a net worth amount for each judgment debtor to enable each debtor to calculate what amount of the judgment must be superseded to forestall enforcement of the judgment pending appeal. *Id.*

2. Factual Basis for Determination

The trial court must also state with particularity the factual basis for its determination of each judgment debtor's net worth. *Id.* This requirement can be met if the trial court sets out the value of the debtor's assets and liabilities from which it determined the debtor's net worth. *See id.* It would also be helpful for the trial court to provide its determination of the value of each of the judgment debtor's assets and liabilities. *See id.*

B. Findings of Fact and Conclusions of Law

1. Initial Request for Findings

Following the trial court's issuance of an order on the judgment creditor's net worth contest, the judgment debtor may request that the trial court issue findings of fact and conclusions of law if unsatisfied with the trial court's ruling. TEX. R. CIV. P. 296 ("[i]n any case tried in the district or county court without a jury, any party may request the court to state in writing its findings of fact and conclusions of law"). The judgment debtor must file any request within twenty days after the trial court issues its order on the contest. *See id.*

The trial court should file findings within twenty days after the judgment debtor makes a timely request. TEX. R. CIV. P. 297.

2. Winning Party Should Draft Findings

If the judgment creditor succeeds in its challenge of the judgment debtor's net worth and the judgment debtor has requested findings, the creditor should then draft findings of fact and conclusions of law providing with specifity the basis for the trial court's sustaining its challenge. *See Vickery v. Commission for Lawyer Discipline*, 5 S.W.3d 241, 254 (Tex.App.–Houston [14th Dist.] 1999, pet. denied). If the proposed findings submitted by the judgment creditor are inadequate, then the judgment debtor needs to file objections to the findings to preserve error on appeal. *See Belcher v. Belcher*, 808 S.W.2d 202, 206 (Tex.App.–El Paso 1991, no writ).

3. Notice of Past Due Findings

If the trial court fails to timely file findings, the judgment debtor will then need to file a notice of past due findings. *See* TEX. R. CIV. P. 297. The filing of this notice then extends the deadline for the trial court to file its findings to forty days from the date of the judgment debtor's original request for findings. *Id.* The judgment debtor must file such a notice to avoid waiving any complaint to the trial court's failure to file findings. *See Curtis v. Commission for Lawyer Discipline*, 20 S.W.3d 227, 232 (Tex.App.–Houston [14th Dist.] 2000, no pet.); *Las Vegas Pecan & Cattle Co. v. Zavala County*, 682 S.W.2d 254, 255 (Tex. 1984).

4. Request for Additional Findings

The judgment debtor may also need to request additional findings if the trial court's original findings are inadequate or omit a controlling issue.

a. Judgment Debtor Must File Request Within Ten Days of Trial Court Filing Initial Findings

Once the trial court issues findings, the judgment debtor may need to request additional findings when the trial court does not adequately detail its findings and the particularized basis for its finding of net worth as to each judgment debtor. *See* TEX. R. CIV. P. 298; *Jamestown Partners v. City of Fort Worth*, 83 S.W.3d 376, 386 (Tex.App.–Fort Worth 2002, pet. denied); *Alvarez v. Espinoza*, 844 S.W.2d 238, 241-42 (Tex.App.–San Antonio 1992, writ dism'd w.o.j.) (holding that the requesting party must submit specific proposed findings). The judgment debtor must make such a request within ten days of the trial court's filing its initial findings. *See id.* Further, the judgment debtor should inform the trial court of any omitted findings, request and submit specific proposed additional findings consistent with the trial court's order, and inform the trial court it does not agree with the requested findings but that the findings are necessary for it to pursue appeal. *See Alvarez v. Espinoza*, 844 S.W.2d 238, 242 (Tex.App.–San Antonio 1992, writ dism'd); *Vickery v. Commission for Lawyer Discipline*, 5 S.W.3d 241, 254 (Tex.App.–Houston [14th Dist.] 1999, pet. denied).

b. When Are Additional Findings Required?

Additional findings are required on ultimate or controlling issues. *See Kirby v. Chapman*, 917 S.W.2d 902, 909 (Tex.App.–Fort Worth 1996, no pet.); *Limbaugh v. Limbaugh*, 71 S.W.3d 1, 6 (Tex.App–Waco 2002, no pet.); *In the Interest of S.A.W.*, 131 S.W.3d 704, 707 (Tex.App.–Dallas 2004, no pet.). Thus, the trial court need not make additional findings that are unsupported in the record, relate merely to evidentiary matters, or are contrary to other previous findings; if the original findings succinctly relate the ultimate findings of fact and law necessary to apprise the party of adequate information for the preparation of his appeal; or if the requested findings will not result in a different judgment. *See Rafferty v. Finstad*, 903 S.W.2d 374, 376 (Tex.App.–Houston [1st Dist.] 1995, writ denied) (noting that the trial court is not required to make additional findings unsupported in the record, that relate merely to evidentiary matters, or that are contrary to other previous findings); *In re Marriage of Morris*, 12 S.W.3d 877, 886 (Tex.App.–Texarkana 2000, no pet.) (providing that the trial court is not required to file additional findings where the original findings succinctly set out basis for ultimate issues and allow party to prepare for appeal); *Tamez v. Tamez*, 822 S.W.2d 688, 693 (Tex.App.–Corpus Christi 1991, writ denied) (opining

that no additional findings are needed if they will not result in a different judgment).

An ultimate fact issue is one that is essential to the right of the action and seeks a fact that would have a direct effect on the judgment. *Limbaugh*, 131 S.W.3d at 6; *S.A.W.*, 131 S.W.3d at 707. An evidentiary issue is one that the trial court may consider in deciding the controlling issue, but that is not a controlling issue itself. *Limbaugh*, 131 S.W.3d at 6; *S.A.W.*, 131 S.W.3d at 707.

c. Showing Harm Due to Failure to File Additional Findings

If the trial court fails to file additional findings, the question on appeal becomes whether the record shows that the trial court's refusal to file additional findings of fact and conclusions of law as requested was reasonably calculated to cause and did cause rendition of an improper judgment. TEX. R. APP. P. 44.1(a). Reversal is required where failure to file additional findings prevents an adequate presentation on appeal. *Id.*; *Huber v. Buder*, 434 S.W.2d 177, 181 (Tex.Civ.App.–Fort Worth 1968, writ ref'd n.r.e.). The issue is whether the circumstances are such that the appellant is forced to guess at the reasons for the trial court's decision. *Goggins v. Leo*, 849 S.W.2d 373, 379 (Tex.App.–Houston [14th Dist.] 1993, no writ). If the judgment debtor does not have the benefit of the trial court's particularized findings under Texas Rule of Appellate Procedure 24.2(c)(3), the judgment debtor will be able to show harm if prevented from properly briefing its issues on appeal.

XIII. SUBSTANTIAL ECONOMIC HARM EXCEPTION

A. Texas Rule of Appellate Procedure 24.2(b)

The trial court must lower the amount of security required by (a) 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) is likely to cause the judgment debtor substantial harm.

TEX. R. APP. P. 24.2(b); *see also* TEX. CIV. PRAC. & REM. CODE § 52.006(c).

B. Showing by Judgment Debtor

The party seeking to have the amount of supersedeas lowered has the burden of proof. *Kajima Intern., Inc.*, 139 S.W.3d 107, 111 (Tex. App.–Corpus Christi 2004, orig. proceeding); *McDill Columbus Corp. v. University Woods Apts.*, 7 S.W.3d 923, 926 (Tex. App.–Texarkana 2000, no pet.).

C. Substantial Economic Harm Standard

1. Judgment Debtor Must Now Show Substantial Economic Harm, Not Irreparable Harm

When requesting that the trial court lower the amount of security, the judgment debtor previously faced the burden of establishing irreparable harm. *See McDill*, 7 S.W.3d at 924-25. Now, the judgment debtor must only show that posting supersedeas in the full amount of the judgment or in the full amount of its net worth will cause substantial economic harm. *See* TEX. R. APP. P. 24.2(b).

a. What Is Irreparable Harm?

Rule 24.2(b) previously allowed the trial court to order a lesser amount of security only upon a finding that posting the required bond, deposit, or security would irreparably harm the judgment debtor, and that posting a bond, deposit, or security in a lesser amount would not substantially impair the judgment creditor's ability to recover under the judgment after all appellate remedies are exhausted. *See McDill*, 7 S.W.3d at 924-25. These provisions for reduced and alternate security were adopted to guard against the possibility that a judgment debtor would be denied its right to appeal and to protect the judgment creditor's right to collect on the judgment. *See Isern v. Ninth Court of Appeals*, 925 S.W.2d 604, 605 (Tex. 1996).

(1) Showing of Irreparable Harm

In *Isern*, the Texas Supreme Court examined whether the trial court abused its discretion by setting alternate security. *Isern*, 925 S.W.2d at 606. The trial court found that the full supersedeas bond would be approximately $3.1 million; the debtor could only post a bond in the amount of $500,000; the debtor has assets worth $500,000, which included a $150,000 homestead; the debtor would be forced into bankruptcy if alternate security was not allowed; and if the debtor, in fact, filed for bankruptcy, the judgment creditor would be left with a bankrupt debtor and no security for any portion of the judgment. *Id.* Thus, the Supreme Court held that the trial court did not abuse its discretion by finding that the debtor would suffer irreparable harm if alternate security

was denied and that the judgment creditor would not suffer substantial harm. *Id.*

(2) No Showing of Irreparable Harm

The Fort Worth Court of Appeals reviewed the sufficiency of a supersedeas bond set by the trial court. *Harvey v. Stanley*, 783 S.W.2d 217, 218 (Tex.App.–Fort Worth 1989, no writ). The judgment debtor sought to have the amount of the supersedeas bond modified because the debtor had no assets and was heavily in debt. *Id.* at 619. The reduced bond had been posted by the debtor's insurance company and closely matched the policy limits. *Id.* The debtor contended he did not have the ability to supersede the full amount of the judgment beyond the policy limits. *Id.*

However, the court of appeals noted that this evidence did not establish that the judgment debtor would be irreparably harmed if required to post supersedeas in full and that the rule did not allow a modified supersedeas simply because the debtor was unable to post the bond–but that the bond must cause irreparable harm. *Id.*

In *McDill*, the Texarkana Court of Appeals reviewed the trial court's refusal to lower the amount of security. *McDill*, 7 S.W.3d at 924. The court of appeals noted that the judgment debtor produced an unaudited financial statement from McDill Columbus Corporation and two witnesses: (1) an independent insurance agent who testified regarding whether the insurance company would issue a supersedeas bond for the debtor after based on financial statement, and (2) a certified public accountant ("CPA"), who testified that after reviewing the statements he believed McDill had no option other than to file for bankruptcy if it was unable to obtain a supersedeas bond. *Id.* at 925.

However, the court of appeals noted that the CPA did not state that if McDill were required to post bond in the full amount of the judgment that it would be forced into bankruptcy. *Id.* Further, the unaudited financial statements showed that McDill had assets worth $27 million and equity worth $12 million, and none of the witnesses were familiar with the actual market value of the company's assets or the nature of its liabilities. *Id.* at 925-26.

The judgment debtor argued that because it had a low liquidity that it should not be required to post supersedeas for the full amount of the judgment. *Id.* at 926. However, in its analysis, the court concluded that this was not a situation as was present in *Isern* where irreparable harm existed because the judgment exceeded the net worth of the debtor or as in *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1136-41 (2d Cir. 1986), where the judgment was astronomically large, but that the evidence showed that "at least from a dollar valuation point of view," the judgment debtor had "sufficient assets to cover the amount of the judgment." *Id.* Thus, the court concluded that evidence of low liquidity was only one factor in evaluating irreparable harm and that the judgment debtor had not met its burden of proof to have the amount of security lowered. *Id.*

Under the irreparable harm standard, inability to post bond in the full amount of the judgment did not establish irreparable harm. *See Harvey*, 783 S.W.2d at 219. Instead the evidence had to establish (1) that the debtor would be required to file for bankruptcy if forced to post supersedeas in full or (2) that the judgment exceeded the debtor's net worth. *See McDill*, 7 S.W.3d at 925-26; *Isern*, 925 S.W.2d at 606. Accordingly, under irreparable harm standard, the judgment debtor had a higher burden to meet to have the amount of security lowered.

b. What Is Substantial Economic Harm?

While "substantial harm" is not defined by statute, it is clear that it is something less than "irreparable harm," which is the legal standard used before the statutory amendment. *Ramco Oil*, 171 S.W.3d at 916. In fact, one legal commentator has observed:

> The recent legislative modifications to supersedeas requirements effective as to all cases in which a final judgment is signed on or after September 1, 2003, reflect a shift in concern from that of protecting the judgment creditor's ability to collect the judgment if affirmed on appeal, to protecting the judgment debtor from substantial economic harm by appellate security requirements that may effectively preclude the ability to seek appellate review.

Id. at 916-17 (*citing* Elaine A. Carlson, *Reshuffling the Deck: Enforcing and Superseding Civil Judgments On Appeal After House Bill 4*, 46 S. Tex. L. Rev. 1035, 1093 (2005)).

The amendment not only replaced the "irreparable harm standard" for reducing supersedeas security with a "substantial economic harm" standard but also

eliminated the requirement that a judgment debtor show "harm" would occur if the supersedeas was not lowered. *Id.* Last, the judgment debtor does not now have to demonstrate that allowing lower security will not substantially decrease the degree to which a judgment creditor's recovery would be secured. *Id.* Consequently, now the court need not consider how lowering the security will affect the judgment creditor. *Id.*

2. Factors Examined in Determining Substantial Economic Harm

In discussing the substantial economic harm standard, the Fourteenth Court of Appeals suggested that the trial court could examine a number of factors affecting a judgment debtor's ability to post bond or other security based on a case-by-case basis. *Id.* The Court of Appeals, in fact, concluded that the primary focus of the examination was the judgment debtor's ability to post supersedeas based on its available assets–not the market value of the company. *Id.*

The Court of Appeals found that the following factors were the sort of inquiries that would reveal whether a judgment debtor was likely to suffer substantial economic harm:

> (1) How much cash or other resources would it take to post a supersedeas bond in the amount in question?;
>
> (2) Does the judgment debtor have sufficient cash or other assets on hand to post a supersedeas bond in this amount or to post a deposit in lieu of bond in this amount?;
>
> (3) Does the judgment debtor have any other source of funds available?;
>
> (4) Does the judgment debtor have the ability to borrow funds to post the requisite security?;
>
> (5)Does the judgment debtor have unencumbered assets to sell or pledge?;
>
> (6)What economic impact is such a transaction likely to have on the judgment debtor?;
>
> (7) Would requiring the judgment debtor to take certain action likely trigger liquidation or bankruptcy or have other harmful consequences?;
>
> (8) Would the attorney's fees and costs of appealing further drain the judgment debtor's resources?

Id.

3. Impact on Judgment Debtor

Accordingly, the substitution of the substantial economic harm standard for irreparable harm lowers the burden placed on the judgment debtor. *Compare Ramco*, 171 S.W.3d at 917 (setting out factor for trial court to examine in determining substantial economic harm) *with McDill*, 7 S.W.3d at 925-26 *and Isern*, 925 S.W.2d at 606. The judgment debtor no longer must demonstrate lowering the security will not adversely affect the judgment creditor. *Ramco*, 171 S.W.3d at 916-17.

This change memorializes the legislature's stated purpose of the enactment of Texas Civil Practice and Remedies Code section 52.006 and the resulting amendments to Rule 24.2 of the Texas Rules of Appellate Procedure as balancing the interests of the judgment debtor to pursue appeal and the interests of the judgment creditor to collect on the judgment. *See* HOUSE RESEARCH ORGANIZATION, H.B. 4 Bill Analysis 368 (March 25, 2003).

D. Standard of Review

The trial court's "substantial economic harm" determination under Rule 24.2(b) is reviewed by an abuse of discretion standard. *Ramco*, 171 S.W.3d at 909-10 (*citing Isern*, 925 S.W.2d at 606 (stating that trial court had discretion to allow alternate security under former Texas Rule of Appellate Procedure 47 and section 52.002 of the Texas Civil Practice and Remedies Code)).

XIV. INJUNCTION

A. Trial Court Has Power to Prevent Dissipation of Assets

Once the judgment debtor has fully superseded enforcement of the judgment, the trial court still has power to prevent the dissipation or transfer of assets not in the ordinary course of business. Rule 24.2(d) provides as follows:

> 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 in the normal course of business.

TEX. R. APP. P. 24.2(d); *see also* TEX. CIV. PRAC. & REM. CODE § 52.006(e). Accordingly, questions arise regarding what relief the trial court can grant a judgment creditor to prevent the dissipation of assets.

The San Antonio Court of Appeals has concluded that the trial court has jurisdiction to grant a post-judgment injunction even where the judgment debtor has posted a cash deposit securing actual or compensatory damages but has not secured the punitive damages awarded in the judgment, pursuant to Rule 24.2(a)(1) and section 52.006(a) (providing that no security must be posted for punitive damages). *Emeritus Corp. v. Ofczarzak*, __S.W.3d__, 2006 WL 467976, *1, *3 (Tex.App.–San Antonio 2006, no pet.) (involving security for $1.725 million in compensatory damages and leaving unsecured $18 million in punitive damages awarded). The court of appeals reasoned that the legislative history to House Bill 4 revealed that while the Legislature realized the trial court had the authority to enjoin waste or disposal of assets subject to collection, the Legislature still expressly provided the court with the authority to grant an injunction. *Id.* The court also noted that the language of the rule sought to prevent dissipation of all assets that could satisfy the judgment, not simply assets to satisfy the compensatory portion of the judgment. *Id.* Accordingly, the court held that the trial court's injunction authority was not limited when the judgment debtor posted a cash deposit covering the compensatory portion of the judgment, but leaving unsecured the punitive damages awarded. *Id.*

1. Can the Trial Court Order Monthly or Quarterly Financial Statements or Discovery

Can the trial court order the judgment debtor to provide monthly or quarterly statements detailing what assets have been dissipated or transferred and for what purpose? Can the trial court order the judgment debtor to answer discovery on a monthly or quarterly basis to address dissipation or transfer of assets?

Rule of Civil Procedure 621a provides as follows:

> At any time after rendition of judgment, and so long as said judgment has not been superseded by a supersedeas bond or by order of a proper court and has not become dormant . . ., the successful party may, for the purpose of obtaining information to aid in enforcement of such judgment, initiate and maintain in the trial court in the same suit in which said judgment was rendered any discovery proceeding authorized by these rules for pre-trial matters. Also, at any time after rendition of judgment, either party may, for the purpose of obtaining information relevant to motions allowed by Texas Rule of Appellate Procedure 47[4] and 49 initiate and maintain in the trial court in the same suit in which judgment was rendered any discovery proceeding authorized by these rules for pre-trial matters.

TEX. R. CIV. P. 621a; *see also* TEX. R. APP. P. 24.1(f) (providing "[e]nforcement of the judgment must be suspended if the judgment is superseded"). Thus, all post-judgment enforcement discovery is foreclosed once the judgment is superseded. *See id.* Further, net worth discovery is allowed in conjunction with the judgment creditor's net worth challenge under Texas Rule of Appellate Procedure 24.2(c)(2). *Id.*, *see also* TEX. R. APP. P. 24.2(c)(2). However, neither Rule 621a of the Texas Rules of Civil Procedure nor Rule 24 of the Texas Rules of Appellate Procedure specifically allow a judgment creditor to demand discovery in conjunction with an injunction obtained under Rule 24.2(d) to enjoin the judgment debtor from dissipating or transferring assets. *See* TEX. R. CIV. P. 621a; TEX. R. APP. P. 24.2(d).

Requiring the judgment debtor to endure such an onerous task as responding to discovery on a monthly or even quarterly basis and providing detailed financial information concerning the dissipation and transfer of its assets, including those transactions undertaken in the ordinary course of business, vitiates the stated intent of the legislature's amendments. *See* Senate Committee Hearing on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 1448-51 (April 15, 2003). The legislature intended to balance the interests of the judgment debtor in pursuing an appeal and the judgment creditor's rights in collecting on the judgment, not enhance the burden of the judgment debtor in seeking appellate relief. *See id.* Thus, the judgment debtor should not have to waste time and resources in undertaking such an onerous task when the judgment has been fully superseded. *See* TEX. R. APP. P. 24.2(d); *but see Emeritus Corp.*, 2006 WL 467976, at *3-4 (concluding that the trial court did not abuse its discretion by granting a post-judgment

[4] Texas Rules of Appellate Procedure 47 and 49 are now collectively Texas Rule of Appellate Procedure 24.

injunction preventing the judgment debtor from dissipating or wasting assets and allowing discovery regarding same).

2. Does Requiring a Judgment Debtor to Answer Discovery or Provide Financial Information Following Suspension of the Judgment Constitute an Interference with the Judgment Debtor's Ordinary Business Affairs?

Does requiring the judgment debtor to provide detailed financial information or respond to discovery constitute an interference with the judgment debtor's use, transfer, conveyance, or dissipation in the normal course of business? What about the expense the debtor must incur in preparing such statements and responses?

Requiring a judgment debtor to respond to discovery regarding the dissipation and transfer of its assets on a monthly or quarterly basis constitutes interference with the judgment debtors's use, transfer, conveyance, and dissipation of its assets **in the ordinary course of business**. *See* TEX. CIV. PRAC. & REM. CODE § 52.006(c); TEX. R. APP. P. 24.2(d). During the legislative process, a representative expressed concern about whether giving the trial court unfettered discretion to grant the judgment creditor an injunction against the judgment debtor would swallow the intent of the amendments. *See* Senate Committee Hearing on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 2013 (May 7, 2003). The legislature added a provision disallowing the trial court from interfering in the ordinary course of the judgment debtor's business. *See id.*; TEX. CIV. PRAC. & REM. CODE § 52.006(c); TEX. R. APP. P. 24.2(d). Thus, requiring disclosure of transfers in the ordinary course of a judgment debtor's business either through production of financial statements or responses to discovery violates the clear intent of the legislature in allowing alternate security and easier appellate access for judgment debtors..

XV. MOTION TO REVIEW IN THE COURT OF APPEALS

A. Texas Rule of Appellate Procedure 24.4

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

1. the sufficiency of the excessiveness of the amount of security, but when the judgment is for money, the appellate court must not modify the amount of security to exceed the limits imposed by rule 24.2(a)(1);

B. the sureties on any bond;

C. the type of security;

D. the determination whether to permit suspension of enforcement; and

E. 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 the appellate court. The motion must be heard at the earliest practicable time. The appellate court may require that the amount of the 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 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. 24.4.

(2) Method of Seeking Review

1. Motion

Thus, if the judgment debtor is unsatisfied with the trial court's finding of net worth under Texas Rule of Appellate Procedure 24.2(c)(3) or the trial court's injunction under Texas Rule of Appellate Procedure 24.2(d), the judgment debtor can file a Rule 24.4 Motion in the court of appeals seeking review of the trial court's determination or injunction. TEX. R. APP. P. 24.4(a); *see also City of Fort Worth v. Johnson*, 71 S.W.3d 470, 471 (Tex.App.–Waco 2002, no pet.) (*citing* TEX. R. APP. P. 24.4(d) (providing that seeking review by a Rule 24 Motion represents a more efficient and expeditious manner of review because the appellate court is able to hear the motion at the earliest practical time)); *Emeritus Corp.*, 2006 WL 467976 at *2 (finding that the court had jurisdiction to review a post-judgment injunction under Rule 24.4 because the injunction was a "type of security" in this context).

2. Immediate Consideration

In conjunction with its motion, the judgment debtor may also request that the court of appeals immediately consider the merits of the motion and can file a motion for emergency relief requesting that the court of appeals stay any discovery ordered by the trial court or execution on the judgment pending the court's review of the trial court's net worth determination. *See id.* 24.4(c), (d).

3. Request for Remand

Further, if the trial court fails to state a net worth amount for each individual judgment debtor and/or to state with particularity the factual basis for its determination of each judgment debtor's net worth, the judgment debtor should request that the court of appeals remand the proceeding back to the trial court for entry of findings. *See id.* 24.4(d). The judgment debtor should also request permission to re-brief its issues in the event that the court of appeals decides to remand for entry of findings. *See id.*

(3) Standard of Review of Rule 24.4 Motion

The trial court's determination of the amount of security under Rule 24.4 of the Texas Rules of Appellate Procedure is reviewed under an abuse of discretion standard. *Ramco*, 171 S.W.3d at 909 (*citing In re Kajima Intern., Inc.*, 139 S.W.3d 107, 112 (Tex. App.–Corpus Christi 2004, orig. proceeding)).

Under section 52.006, the trial court's discretion is limited by the lesser of fifty percent of the judgment debtor's net worth or $25 million or an amount that is likely to cause the judgment debtor substantial economic harm. TEX. CIV. PRAC. & REM. CODE § 52.006(b), (c); *Bocquet v. Herring*, 972 S.W.2d 19, 20-21 (Tex. 1998). The trial court abuses its discretion if the evidence is legally or factually insufficient to support its findings under section 52.006(b) or (c). *Ramco*, 171 S.W.3d at 910 (*citing Bocquet*, 972 S.W.2d at 20-21; *Bass v. Walker*, 99 S.W.3d 877, 883 (Tex.App.–Houston [14th Dist.] 2003, pet. denied) (although court of appeals reviews sanctions under abuse-of-discretion standard, if there is legal or factually insufficient evidence to support the trial court's fact finding under the relevant legal standard, then the trial court abused its discretion); *Hunt v. Baldwin*, 68 S.W.3d 117, 135 n. 8 (Tex.App.–Houston [14th Dist.] 2001, no pet.)).

Testimony from interested witnesses may establish a fact as a matter of law only if the testimony could be readily contradicted if untrue, and is clear, direct, and positive, and there are no circumstances tending to discredit or impeach it. *Ramco*, 171 S.W.3d at 911 (*citing Lofton v. Texas Brine Corp.*, 777 S.W.2d 384, 386 (Tex. 1989); *City of Keller v. Wilson*, 168 S.W.3d 802, 820 (Tex. 2005) (stating that the factfinder cannot ignore undisputed testimony that is clear, positive, direct, otherwise credible, free from contradictions and inconsistencies, and could have been readily controverted)).

In regard to the trial court's grant of a post-judgment injunction to prevent dissipation and waste of assets, the San Antonio Court of Appeals has concluded that the "applicable standard is a factual matter requiring the trial court to determine whether the judgment debtor is likely to dissipate or transfer its assets to avoid satisfaction of the judgment. The trial court abuses its discretion in ordering a post-judgment injunction if the only reasonable decision that could be drawn from the evidence is that the judgment debtor would not dissipate or transfer its assets." *Emeritus Corp.*, 2006 WL 467976 at *4 (concluding that the trial court did not abuse its discretion in granting a post-judgment injunction against dissipation of assets where the same judge that presided over the trial entered the injunction and was well versed in the judgment debtor's corporate structure and procedural activities).

(4) What Actions Can the Court of Appeals Take?

In addition to remanding the trial court for entry of findings or for the taking of evidence, the court of appeals is given authority to require that the amount of the judgment debtor's deposit be either increased or

decreased, that another deposit be provided and approved by the clerk, or that other changes be made to the trial court's order under Rule 24.2(c)(3). TEX. R. APP. P. 24.4(d).

If the court orders that additional security be posted, the judgment debtor will have the benefit of suspension of the judgment for an additional twenty days so that it may comply with the court of appeals' order. *See id.* 24.4(e).

XVI. APPEAL TO SUPREME COURT

If the judgment debtor is unsatisfied with the court of appeals' ruling on a Rule 24.4 Motion, the debtor can appeal the determination to the Texas Supreme Court. *See* TEX. R. APP. P. 24.4; *see also* TEX. R. APP. P. 3.1 (defining "appellate court" to be the court of appeals, Court of Criminal Appeals, or Supreme Court).

A. The Judgment Debtor Must Establish Jurisdiction

If pursuing review in the Texas Supreme Court, the judgment debtor will need to establish that the Court has jurisdiction. The judgment debtor should first provide that the Court has jurisdiction to review its motion under section 52.006 of the Texas Civil Practice and Remedies Code and Rule 24.4 of the Texas Rules of Appellate Procedure. TEX. CIV. PRAC. & REM. CODE § 52.006(d); TEX. R. APP. P. 24.4(a).

The judgment debtor should also provide that the Court has jurisdiction under the Texas Constitution and the Texas Government Code. Section 22.001 of the Government Code provides as follows:

> **(a)** The supreme court has appellate jurisdiction, except in criminal law matters, coextensive with the limits of the state and extending to all questions of law arising in the following cases when they have been brought to the courts of appeals from appealable judgment of the trial courts:
>
> (1) a case in which the justices of a court of appeals disagree on a question of law material to the decision;
>
> (2) a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case;
>
> (3) a case involving the construction or validity of a statute necessary to a determination of the case;
>
> (4) a case involving state revenue;
>
> (5) a case in which the railroad commission is a party; and
>
> (6) any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction, but excluding those cases in which the jurisdiction of the court of appeals is made final by statute.
>
> **(b)** A case over which the court has jurisdiction under Subsection (a) may be carried to the supreme court either by writ of error or by certificate from the court of appeals, but the court of appeals may certify a question of law arising in any of those cases at any time it chooses, either before or after the decision of the case in that court.
>
> **(c)** An appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state. It is the duty of the supreme court to prescribe the necessary rules of procedure to be followed in perfecting the appeal.
>
> **(d)** The supreme court has the power, on affidavit or otherwise, as the court may determine, to ascertain the matters of fact that are necessary to the proper exercise of its jurisdiction.
>
> **(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.

TEX. GOV'T CODE ANN. §22.001 (Vernon 2004). The most common indicia of jurisdiction in a Rule 24.4 Motion proceeding will involve situations (1) where the

court of appeals has reviewed the judgment debtor's Rule 24.4 Motion and the justices of the court of appeals disagreed on a question of law material to the decision, (2) the construction or validity of section 52.006 and Rule 24.2 is at issue, and (3) an error of law committed by the court of appeals is of such importance to the jurisprudence of the state that it requires correction. *See id.* § 22.001(a)(1), (3), (6). However, until the Supreme Court considers its jurisdiction, in addition to filing a Rule 24.4 Motion, the judgment debtor may consider filing contemporaneously a petition for writ of mandamus raising the same issues. *See Swinney v. Tenth Dist. Court of Appeals*, 749 S.W.2d 50 (Tex. 1988) (under former rule, presenting supersedeas issue to the Texas Supreme Court through an original proceeding); *Isern v. Ninth Court of Appeals*, 925 S.W.2d 604, 606 (Tex. 1996).

B. What Actions May the Supreme Court Take?

The Supreme Court has the power to review both the trial court determination's of net worth under Texas Rule of Appellate Procedure 24.2(c)(3) and the court of appeals' decision after reviewing the judgment debtor's Rule 24.4 Motion under Texas Rule of Appellate Procedure 24.4(d). *See* TEX. R. APP. P. 24.4(d); TEX. GOV'T CODE ANN. §22.001(1), (3).

The judgment debtor may also request emergency temporary relief in the Supreme Court seeking to stay all proceedings including execution on the judgment and responses to discovery. *See* TEX. R. APP. P. 24.4(c) (giving the appellate court authority to grant any temporary orders to preserve rights of the parties).

XVII. ETHICAL CONSIDERATIONS IN POSTING SUPERSEDEAS BASED ON THE NET WORTH OF THE JUDGMENT DEBTOR

A. What Must the Judgment Debtor Post As Supersedeas When It Has Zero or Negative Net Worth and Does it Matter if the Judgment Debtor Has Insurance Coverage?

A problematic situation arises when the judgment debtor has a zero or negative net worth. Section 52.006 and Rule 24.2 state that a judgment debtor must supersede the judgment in an amount **not to exceed fifty percent of its net worth**. TEX. CIV. PRAC. & REM. CODE § 52.006(b)(1); TEX. R. APP. P. 24.2(a)(1)(A). Thus, under section 52.006 and Rule 24.2 when the judgment debtor has a zero or negative net worth, the judgment debtor can presumably pursue appeal **without posting any security.**

1. Testimony in Legislature and Supreme Court Rules Committee

There was some testimony before the Senate expressing concern about the new supersedeas requirements:

> [T]hat if you have an insolvent defendant, someone who's already defaulted on a loan, in all likelihood is gonna cause some substantial economic harm to try to supersede the judgment. They'll be able to get the supersedeas reduced to virtually nothing and forestall collection efforts by the banks on collecting the debt. This will only lead to increased cost of lending money, as bank security dwindles, the, it come, it becomes harder for them, they have to wait an extra two years to even get a ticket in line to try to execute on the, the judgment debtor's assets.

Senate Committee Hearing on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 1459 (April 15, 2003).

The Supreme Court Rules Committee also recognized that this particular problem could arise:

> You know, there's a problem that's going to come up under here that I don't think is generally appreciated. We are going to have a lot of people with no net worth who are saying "I don't owe a supersedeas bond."

TEX. SUP. CT. ADVISORY COM. MTG. 9944 (Aug. 21, 2003) (afternoon session). However, no solution to the problem arising when a judgment debtor has zero or negative net worth was addressed in either section 52.006 or Rule 24.2. *See id.*

Moreover, testimony before the legislature showed that some attorneys did not believe insolvency would be an issue where the judgment debtor had insurance coverage. In addressing the irreparable harm standard under the previous enactment, Dan Byrne provided as follows:

> Another thing that struck me as puzzling about, about the bill is it seems to be designed to prevent irreparable harm to defendants who are gonna be out outta business, and

> independently, the issue of whether we have an adequate current system in place for that. In, in, in many cases, even in the commercial field where, where I practice, you've got an insurance policy out there that is providing coverage to, to the, the business involved in the dispute. The business may be insolvent. I've got a case right now where my, my client has a negative net worth of, of millions of dollars, but has an insurance policy behind it, and the reason the case continues to proceed is, is because of insurance and I, I was struck by the fact that in evaluating how big the bond should be, the availability of, of insurance coverage to ultimately pay the judgment was completely ignored in the statutory framework.

Senate Committee Hearing on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 1467 (April 15, 2003). When a judgment debtor has a zero or negative net worth, Byrne cautioned that justice could be delayed by the zero or minimal supersedeas requirements in these cases, resulting in harm to plaintiffs. *Id.* at 1468.

Later, Byrne explained the impact of the judgment debtor's insurance coverage:

> As I understand the purpose of, of this, these modification of rules relating to supersedeas bonds, it's primarily designed to protect, to preserve access to the appellate courts for unsuccessful parties and judgment debtors, in, in litigation, and the concern has been that the financial hardship associated with posting a 100 percent supersedeas bond sometimes ha–has the effect of depriving parties of meaningful access. In much of my work, and I think much of work, real, real world litigation that goes on out there, you know, insurance is a big factor in, in fashioning appe–supersedeas bond relief. The statute now focuses entirely on the net worth of the judgment debtor. A lot of times insolvent judgment debtors will have plenty of insurance and, and there will be no issue about, about that.

Senate Committee Hearing on Tex. H.B. 4 on the Floor of the Senate, 78th Leg., R.S. 1959 (May 7, 2003).

2. Intent of the Legislature in Lowering Bonding Requirements

One commentator has characterized House Bill 4 as reflecting a new balance between the interests of the judgment debtor and the judgment creditor:

> The legislature made sweeping changes to Chapter 52, making the posting of alternate security to suspend judgment enforcement on appeal substantially easier for the judgment loser, reflecting a new balance between the judgment creditor's right in the judgment and the dissipation of the judgment debtor's assets during the appeal against the judgment debtor's right to meaningful and easier access to appellate review.

Elaine A. Carlson, *Reshuffling the Deck: Enforcing and Superseding Civil Judgments On Appeal After House Bill 4*, 46 S. Tex. L. Rev. 1038.

Indeed, the legislative history of House Bill 4, the enactment of section 52.006, and the corresponding amendments to Texas Rule of Appellate Procedure 24.2 evidence an intent by the legislature to strike a balance between the interests of a judgment debtor and judgment creditor due to the addition of alternate security allowing the judgment debtor to post supersedeas in an amount not exceeding the lesser of fifty percent of its net worth or $25 million and a provision giving the trial court authority to nevertheless prevent the fraudulent transfer of the judgment debtor's assets while appeal is pending. *See* TEX. CIV. PRAC. & REM. CODE § 52.006; TEX. R. APP. P. 24.2; Debate on Tex. H.B. 4 on the Floor of the House, 78th Leg., R.S. 199-201 (February 26, 2003).

Thus, the question arises whether a judgment debtor, who has insurance coverage, but nevertheless proceeds to post alternate security under section 52.006 and Rule 24.2 in an amount not exceeding fifty percent of its net worth when it has a negative or zero net worth is thwarting the intent of the legislature in enacting House Bill 4. If the legislature intended to secure easier appellate access for judgment debtors who would be forced into bankruptcy if required to bond the entire judgment, a judgment debtor with an insurance policy covering the judgment would not seem to fall under the purview of the legislature's intended purpose for use of alternate security.

B. Are there Ethical Considerations When a Insurer Refuses to Post a Bond?

Ethical considerations can also be implicated when a judgment debtor, with insurance coverage but who has a negative, zero, or low net worth, wants the insurance company to post a bond to supersede the entire judgment, but the insurance company refuses to do so, instead requiring the judgment debtor to proceed on a net worth determination. Is it reasonable for the insurer to request the insured go through the net worth proceeding to obtain a determination and lowered bond amount?

1. Possible Bad Faith Claim Against Insurer

If an insurer refuses to post a supersedeas bond to suspend enforcement of the judgment and the judgment debtor incurs further liability or damages during post-judgment proceedings, the insured potentially has a bad faith claim against the insurer for any damages suffered as a result of the insurer's failure to post supersedeas. It should be emphasized that there are many variables, including the duty to post supersedeas that controls this issue.

a. Elements of a Bad Faith Claim

For an insured to have a claim for bad faith against an insurer, there must have first been a contract between the insured and insurer that created a duty of good faith and fair dealing. *See Universe Life Ins v. Giles*, 950 S.W2d 48, 50-51 (Tex. 1997). An insurer breaches its duty of good faith and fair dealing by failing to settle with the insured by refusing to pay a claim or delaying payment of a claim or by cancelling an insured's policy without reasonable basis. *See Giles*, 950 S.W.2d at 56; *Union Bankers Ins. Co. v. Shelton*, 889 S.W.2d 278, 283 (Tex. 1994); *see also Aranda v. Insurance Co. of N. Am.*, 748 S.W.2d 210, 212-13 (Tex. 1988) (stating that when an insured enters into an insurance contract with the insurer, there is also a common law duty for the insurer to deal fairly and in good faith with the insured)). Last, any damage suffered by the insured must have been proximately caused by the insurer's breach. *See Chitsey v. National Lloyds Ins. Co.*, 738 S.W.2d 641, 643 (Tex. 1987).

b. What Damages Can the Insured Recover?

The judgment debtor must prove that the damages it suffered were different than the benefits owed under the insurance contract with the insurer because a bad faith claim sounds in tort, not contract. *Aranda*, 748 S.W.2d at 214. Further, the judgment debtor can only sue for actual damages, including economic injury or personal injury. *Pena v. State Farm Lloyds*, 980 S.W.2d 949, 958 (Tex.App.–Corpus Christi 1998, no pet.). Economic and personal injury damages include damages for mental anguish, loss of credit reputation or increased business costs, and damages for loss of policy benefits. *See Giles*, 950 S.W.2d at 54 (providing that to recover for mental anguish damages the judgment debtor must introduce direct evidence of the nature, duration, and severity of its mental anguish to establish a substantial disruption in its daily routine); *St. Paul Lines Co. v. Dal-Worth Tank Co.*, 974 S.W.2d 51, 53 (Tex. 1998) (stating that the judgment debtor must suffer actual damage and mere inability to obtain a loan is insufficient, absent a showing that such inability resulted in injury and proof of the amount of that injury); *Twin City Fire Ins. v. Davis*, 904 S.W.2d 663, 666 (Tex. 1995).

If the judgment debtor recovers damages independent of its loss of policy benefits, it can then seek exemplary damages if the insurer's conduct was fraudulent, malicious, or grossly negligent. *Giles*, 950 S.W.2d at 54. The debtor can also recover pre and post-judgment interest and court costs but may recover attorney's fees only if allowed by statute, contract, or equity. *Holland v. Wal-Mart*, 1 S.W.3d 91, 95 (Tex. 1999) (allowing recovery of fees by statute or contract); *Knebel v. Capital Nat'l Bank*, 518 S.W.2d 795, 799 (Tex. 1974) (allowing recovery of fees by equity).

c. Any Defenses for Insurer?

However, the insurer does have defenses against a bad faith claim by the judgment debtor. For example, the insurer may contend that the judgment debtor's own acts or omissions caused or contributed to the injury even though Texas has not recognized the doctrine of comparative bad faith. For example, the judgment debtor might have contributed to the imposition of sanctions due to filing a misleading net worth affidavit that either omitted or mis-valued assets and liabilities.

Further, the insurer may argue that it had a reasonable basis for denying or delaying the posting of supersedeas. *See Provident Am. Ins. Co. v. Castaneda*, 988 S.W.2d 189, 194 (Tex. 1998) (concluding that "when medical evidence is conflicting, liability is not reasonably clear, and it cannot be said that the insurer had no reasonable basis for denying the claim unless the medical evidence on which the insurer based its denial is unreliable and the insurer knew or should have known that to be the case"); *American Motorists Ins. Co. v. Fodge*, 63 S.W.3d 801, 804 (Tex. 2001) (stating that there is no bad faith liability when benefits to which the claimant is not entitled are denied). For instance, the

insurer may be denying coverage of the judgment debtor's claim.

2. Breach of Contract Action Against Insurer

If an insurer refuses to post a supersedeas bond to suspend enforcement of the judgment and was required to do so by contract, the judgment debtor may also have a claim against the insurer for breach of contract if the contract provided that the insurer would post bond to supersede enforcement of a judgment rendered against the judgment debtor.

a. Elements of Breach of Contract

The judgment debtor must first prove there was an enforceable contract and that the insurer breached that contract. *Wright v. Christian & Smith*, 950 S.W.2d 411, 412 (Tex.App.–Houston [1st Dist.] 1997, no writ); *Southwell v. University of the Incarnate Word*, 974 S.W.2d 351, 354-55 (Tex.App.–San Antonio 1998, pet. denied).

An insurer breaches the insurance contract where it refuses to perform a contractual obligation. *Tennessee Gas Pipeline Co. v. Lenape Res. Corp.*, 870 S.W.2d 286, 302 (Tex.App.–San Antonio 1993), *rev'd in part on other grounds*, 925 S.W.2d 565 (Tex. 1996) (*citing Townewest Homeowners Ass'n, Inc. v. Warner Communication Inc.*, 826 S.W.2d 638, 640 (Tex.App.—Houston [14th Dist.] 1992, no writ)).

The judgment debtor must also show that the insurer's breach caused its injury. *Southwell*, 974 S.W.2d at 354-55. The debtor can recover nominal damages, actual damages, and liquidated damages. *See Hauglum v. Durst*, 769 S.W.2d 646, 651 (Tex.App.–Corpus Christi 1989, no writ) (allowing recovery of nominal damages); *Mead v. Johnson Group*, 615 S.W.2d 685, 687 (Tex. 1981) (providing that actual damages may be recovered when the loss is the natural, probable, and foreseeable consequence of the insurer's conduct); *Arthur's Garage, Inc. v. Racal-Chubb Sec. Sys.*, 997 S.W.2d 803, 810 (Tex.App.–Dallas 1999, no pet.) (concluding that a liquidated damages clause could be enforced where the harm caused by the breach is incapable of being estimated or is difficult to estimate at the time of entry into the agreement, and the amount of liquidated damages called for is a reasonable forecast of just compensation). The judgment debtor can also collect pre and post-judgment interest, court costs, and attorney fees by statute or contract. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (allowing recovery of attorney's fees in a contract action).

3. Miscellaneous Claims

a. Claim under the Insurance Code

The judgment debtor may also have a claim under Chapter 541 of the Insurance Code for unfair or deceptive insurance practices. *Great Am. Ins. Co. v. North Austin MUD*, 908 S.W.2d 415, 420 (Tex. 1995). The judgment debtor must prove that the insurer violated Chapter 541, Texas Business and Commerce Code section 17.46(b), or a tie-in provision of the Texas Insurance Code.

Under Chapter 541, the insurer can be liable for unfair competition, false advertising, misrepresentations about insurance policies, and unfair settlement practices. *See* TEX. INS. CODE §§ 541.051 (prohibiting specific misrepresentation regarding the terms of any policy or the benefits and advantages promised by any policy); 541.061 (prohibiting misrepresentations regarding material facts as to insurance policies; 541.060 (prohibiting unfair settlements practices).

b. Claim under the Deceptive Trade Practices Act

Section 17.46(d) of the Deceptive Trade Practices Act prohibits a laundry list of false, misleading, and deceptive acts and practices. *See* TEX. BUS. & COM. CODE § 17.46(d). To pursue relief under section 17.46, the judgment debtor must show that the insurer committed one of the prohibited acts and that it detrimentally relied on that act. TEX. INS. CODE § 541.151.

c. Recovery of Damages

Under these claims, the judgment debtor can recover for actual damages, including damages for economic injury and personal injury and may be entitled to equitable relief. TEX. INS. CODE § 541.152(a)(1), (a)(2). The debtor may also recover for pre and post-judgment interest, court costs, and attorney fees. TEX. INS. CODE § 541.152.

C. Conflict of Interest for Attorney Representing Both Insured and Insurer

A conflict may arise where the insurer requires the judgment debtor to submit to the net worth procedure of Chapter 52 and Rule 24, exposing the insured to financial disclosure and court proceedings regarding the financial

condition of the insured for purposes of lowering the amount of the bond required to suspend judgment enforcement. The insurer's benefit is that it will tie up less collateral with a reduced bond amount, will increase reserves available for other claims, potentially allowing more issues to be reached on appeal. The benefit must be weighed against risk to the insured of protracted ancillary ligation regarding its financial condition.

The Eastland Court of Appeals has described the relationship created by representation of the insured at the behest of the insurer as follows:

> Insureds purchase liability insurance to protect against the risk of defending a lawsuit and to protect against the risk of having to pay a money judgment as a result of that lawsuit. The defense of a lawsuit covered by liability insurance involves a "tripartite" relationship consisting of the insured, the insurer, and the defense counsel. Because this tripartite relationship may involve conflicts, there has been an ongoing national debate concerning the ethical obligations of defense counsel and the role of the insurer in providing defense counsel.

American Home Assur. Co., Inc. v. Unauthorized Practice of Law Committee, 121 S.W.3d 831, 833-34 (Tex.App.–Eastland 2003, rev. granted). The court cited the following as examples of conflicts that could arise between an insured and insurer:

> For example, there may be disagreements between the insurer and the insured over conduct of the litigation due to (1) the insured's concern over the side effects of litigation, such as publicity and reputation, or about a personal or business relationship with the plaintiff; (2) the preference of the insured for a more expensive effort than the insurer is willing to make; and (3) the possibility that the insurer has some additional interest in the outcome of a particular lawsuit, such as its desire to obtain a precedential ruling that will benefit the insurer in other cases.

Id. at 834 n. 3 (*citing* Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255, 266 (1995)).

1. Insurer Retains Attorney for Insured

An insurance company retains an attorney for the insured, controls the insured's legal defense, decides whether the insured's claim should be settled, and pays the judgment or any settlement offer as to policy limits. *Id.* at 838. However, the insured is the attorney's **primary client**. *Id.* Accordingly, the attorney has a duty to protect the interest of the insured if those interests would be compromised by the insurer's instructions so that the attorney must resolve ethical concerns in favor of the insured. *Id.*

Thus, where the insurer instructs the attorney to post a cash deposit or supersedeas in an amount not to exceed fifty percent of the judgment debtor's net worth and doing so instead of posting a bond in the full amount would compromise the judgment debtor's interests, a conflict of interest arises between the attorney's representation of the interests of the insurance company and the judgment debtor as the insured. *See id.* Therefore, because the attorney owes the insured an unqualified duty of loyalty, the attorney must immediately inform the judgment debtor of any conflict between the insurer's interests and the judgment debtor's interests. *See Employers Casualty Co. v. Tilley*, 496 S.W.2d 552 (Tex. 1973) (*citing Automobile Underwriters' Ins. Co. v. Long*, 63 S.W.2d 356 (Tex. Comm. App. 1933).

XVIII. CONCLUSION

In conclusion, attorneys may encounter several pitfalls under Texas Civil Practice and Remedies Code section 52.006 and Texas Rule of Appellate Procedure 24.2 when superseding money judgments. Many of these pitfalls arise due to the legislature's failure to anticipate problems with alternate security such as a judgment debtor with very low, a zero or negative net worth.

Other pitfalls arise from the difficulty faced in defining terms utilized in the statute and rule such as "net worth." Only time will tell whether the courts will formulate a working definition of net worth that can be used by judgment debtors in calculating fifty percent of their net worth suitable for both individual and business judgment debtors, United States and non-United States debtors, and judgment debtors using different accounting methods. The courts will also be faced with answering the question of what assets and liabilities a judgment debtor's net worth will encompass, such as insurance coverage and the judgment.

XIX. INSURER'S RIGHTS TO INTERVENE

Any party may intervene by filing a pleading, subject to being struck by the court for sufficient cause on the motion of any party. TEX. R. Civ. P. 60. An intervenor is not required to secure the court's permission to intervene; the party who opposed the intervention has the burden to challenge it by a motion to strike. It is an abuse of discretion to strike a plea in intervention if:

(1) the intervenor could have brought some or all of the same action in its own name, or, if the action had been brought against it, it could defeat some or all of the recovery,
(2) the intervention will not complicate the case by an excessive multiplication of the issues, and
(3) the intervention is almost essential to effectively protect the intervenor's interest. *Guaranty Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652,657 (Tex. 1990).

There have been several situations where insurers intervened both at the trial court level and the appellate level.

XX. PREJUDGMENT INTERVENTIONS[5]

A. Intervene to Protect Subrogated Interests

Graco v. CRC, Inc. of Texas, 47 S.W.3d 742 (Tex. App.-Dallas, 2001, pet. denied)

Injured plaintiff, Lacina, brought a products-liability action against the manufacturer, Graco, and seller, CRC, of a hydraulic ram. CRC filed a cross claim for indemnity against the manufacturer. The underlying claim was settled. CRC's insurer, State Farm, intervened in the cross-claim, seeking attorney's fees that might be awarded to the seller. State Farm had incurred $107,859.82 in attorney's fees and expenses in defending CRC in the *Lacina* case. The court conducted a bench trial concerning damages in CRC's statutory indemnification claim. Carlyle Chapman testified that State Farm retained him and his law firm to represent CRC in the *Lacina* action. The trial court's final judgment awarded CRC $107,859.82 for attorney's fees and expenses and granted Graco's motion to strike State Farm's intervention. The court found that CRC retained Chapman and CRC incurred attorney's fees and expenses recoverable under the indemnification statute. *Graco*, 47 S.W.3d at 744.

Graco appealed, arguing that State Farm rather than CRC retained Chapman. According to Graco, the statute allows compensation only for losses incurred by sellers, not the sellers' insurance company. CRC therefore did not incur any compensable loss. CRC asserted the collateral source rule allows it to recover fees incurred by State Farm on CRC's behalf. Under the collateral source rule, Graco would not be relieved of its duty to pay CRC's attorney's fees merely because CRC's defense was provided by State Farm. The appellate court concluded that CRC incurred the legal fees and expenses that were provided by CRC's insurance company. *Id.* at 745.

When CRC purchased insurance from State Farm, CRC paid State Farm to provide legal representation for CRC in such litigation. Chapman, although retained and paid by State Farm, provided services to State Farm's insured, CRC, valued at $107,859.82. Graco's argument about disallowing payment of attorney's fees when the seller's defense was provided by its insurance carrier, would defeat the purpose underlying the indemnification statute. It would encourage manufacturers to make bogus claims of negligence against innocent sellers in an attempt to avoid a duty to indemnify. Because the collateral source rule applies, the appellate court concluded that the evidence supported the trial court's finding CRC incurred $107,859.82 in legal fees and expenses in this cause. *Id.* at 746. The court explained that the claim for attorney's fees belongs to the litigant, not to his attorney. *Goodyear Tire & Rubber Co. v. Portilla*, 836 S.W.2d 664, 671 (Tex. App.-Corpus Christi 1992), *aff'd* , 879 S.W.2d 47 (Tex. 1994); *see also Transp. Ins. Co. v. Franco*, 821 S.W.2d 751, 755-756 (Tex. App.-Amarillo 1992, writ denied) (although attorney's fees should be awarded to party rather than his attorney, defendant who has been ordered to pay attorney's fees has no standing to complain if fees are awarded directly to claimant's attorney). Likewise the court concluded in this case that the claim for attorney's fees belonged to CRC rather than to State Farm. *Id.* at 747.

B. Intervene to Determine Coverage

State Farm Fire v. Taylor, 832 S.W.2d 645 (Tex. App.-Fort Worth 1992, writ denied)

During a heated and vigorous difference of opinion, Larry Anglin caused the discharge of a firearm. The result of such discharge was the death of Herman Taylor. Anglin was indicted for the offense of homicide and subsequently pled guilty to the offense of involuntary manslaughter and received a probated sentence of ten

[5] The authors thank Dottie Sheffield for her assistance in preparing the intervention information contained in this paper.

years.

The children and widow of the late Mr. Taylor filed suit against Anglin, alleging that Mr. Taylor's injuries and death were the result of Anglin's negligence. Anglin called upon his homeowner's insurer, State Farm, to defend and indemnify him in this suit. State Farm's insurance policy, while covering negligent acts of its insured, specifically excluded coverage for intentional acts. *Taylor* at 832 S.W.2d 647.

State Farm agreed to defend Anglin under a reservation of rights. Prior to trial, the insurance company filed an intervention in the lawsuit, claiming the right to do so as a means of advancing its claim that Anglin had intentionally (and thus, not negligently) brought about the demise of Mr. Taylor. The insurer sought a severance of this intervention and requested trial of same prior to the main trial. A severance was sought because the insurer was sure that counsel for the children and widow would not bring up "intentional" acts as such would defeat their recovery on the policy under negligence and also that counsel for Anglin could not bring up "intentional" acts as such would be inimical to his client's interest by defeating the insurance coverage upon which he depended to pay the loss (if any) resulting from the litigation.

Upon motion by the plaintiffs to strike the intervention, the trial court removed the insurer from the lawsuit. State Farm appealed the ruling of the trial court striking the intervention (and thereby refusing to sever the insurer's claim and to grant a preliminary trial testing the right of the insured to receive benefits under the policy). The appellate court held that current statutory and decisional law supported the action of the trial court in striking State Farm as intervenor. The insurance company nevertheless asked the appellate court to overrule such precedent on the broad constitutional ground that it had been denied access to the courts and thereby due process of law. State Farm cited a number of cases on collateral issues and the rights of a person or corporation to defend against liability. Because State Farm cited no settled legal precedent, the appellate court affirmed the trial court's decision on the intervention.

State Farm continued to defend Anglin in the underlying suit and it went to trial while State Farm's petition for writ of error in the matter of the denial of its plea for intervention was pending in the Texas Supreme Court. Taylor's estate obtained a judgment in excess of State Farm's policy limits based upon a finding of negligence in Anglin's shooting of Taylor.

State Farm initiated a declaratory judgment action, stating it had no liability for the judgment obtained in the wrongful death action because the shooting was intentional, and therefore excluded from coverage under the terms of the homeowner policy. *Taylor*, 832 S.W.2d at 647. Anglin subsequently brought a counterclaim against State Farm for violating Art 21.21 of the Insurance Code, alleging that State Farm failed to settle and therefore prejudiced him by allowing a judgment to be entered against him in excess of his policy limits. *See Id.* at 647. Anglin sought a declaration that State Farm was obligated to pay the judgment. The insured moved for summary judgment, alleging that State Farm, by foregoing a determination of the coverage question that it sought to raise through the declaratory judgment action and by providing a defense to its insured, is estopped from denying coverage. The insured also alleged that State Farm was estopped from proceeding with its declaratory judgment action because of assertions it made in its unsuccessful attempts to intervene in the wrongful death lawsuit, including its assertion that refusal to allow the intervention would leave the insured with no other remedy in law.

State Farm responded by asserting its right to have properly determined the issue of whether the insured intentionally shot the decedent. *Id.* at 648. The Court of Appeals held that State Farm was not estopped from proceeding with the declaratory judgment that its insured's actions were intentional rather than negligent, even though it did not seek to abate the wrongful death action until the declaratory judgment action was determined. The court held the insurer's liability never became reasonably clear, as a matter of law, in view of its contention that its insured's actions were intentional; therefore, it did not violate article 21.21. *Id.* at 650. Thus, the findings of negligence in the underlying wrongful death case were not determinative of the coverage issue, and the insurer was not precluded from asserting its coverage defense that its insured's actions were intentional, rather than negligent, despite the findings of negligence after an adversarial trial in the wrongful death action. *Id.* at 650.

C. Intervene to Apportion Damages

American Home Assurance Co. v. Stephens, 130 F.3d 123 (5th Cir. 1997)

Ross filed suit against Stephens, her therapist, for negligence for failing to diagnose and treat her condition properly and that he had rendered improper treatment for her condition as a victim of child abuse and incest. Ross

did not allege sexual misconduct. American Home, Stephens' professional malpractice insurer, agreed to defend Stephens pursuant to a reservation of rights. The reservation of rights letter quoted from the sexual misconduct provision and stated that any damages for sexual misconduct would be limited to $25,000. Nine months after filing suit, Ross filed a written complaint against Stephens with the Texas State Board of Medical Examiners of Professional Counselors, alleging among other incidents of misconduct, that Stephens had engaged her in sexual relations on five to seven occasions during their therapeutic relationship. Thereafter, Ross filed a motion in the malpractice action in which she stated that in addition to mishandling her treatment, Stephens used his position and influence over her to have her engage in sexual activities while acting in a position of fiduciary. Stephens admitted in his deposition that he had engaged in sexual intercourse with Ross while she was his client. American Home filed a declaratory action seeking a declaration that its total liability under the policy was limited to $25,000 because Ross had asserted claims of sexual misconduct. American Home filed a summary judgment which was granted by the district court. Stephens appealed. The appellate court among other issues presented, addressed apportionment of damages between sexual and non-sexual claims that exist independently. The trier of fact has the task of separating multiple claims and apportioning damages. The court did state," if needed, the insurer may intervene to defend its interest with regard to the damage apportionment." *American Home Assurance Co. v. Cohen*, 815 F. Supp. 365 (W.D. Wash. 1993). The appellate court held that the sexual misconduct exclusion was against public policy and reversed the trial court's decision. In the Supreme Court on certified question, the exclusion was held not to be against public policy. The Supreme Court held that parties are free to contract as they wish, and the court will enforce the terms of the contract as written. *American Home Assurance Co. v. Stephens*, 982 S.W.2d 370 (Tex. 1998).

XXII. POST JUDGMENT INTERVENTIONS

Recent decisions by the Fifth Circuit Court of Appeals and the Texas Supreme Court affirm that an insurer has the right to seek intervention at the appellate stage to challenge the underlying judgment against its insured, if certain criteria are met.

A. Virtual Representation

Generally the right to appeal is only available to parties of record. The virtual representation doctrine is an exception to this rule. Virtual representation allows non-parties to an action to exercise the right of appeal. The Fifth Circuit Court of Appeals has stated that virtual representation comes into play when "a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative." *Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir.), *cert denied*, 423 U.S. 908 (1975). Similarly, Texas courts have consistently recognized intervention via the virtual representation doctrine in limited situations. *See Motor Vehicle Bd. of the Tex. v. El Paso Indep. Auto. Dealers Ass'n, Inc.*, 1 S.W.3d 108, 110-11 (Tex. 1999) (generally an appeal is only available to parties of record, but an exception exists when the appellant is deemed to be a party under the doctrine of virtual representation); *Gunn v. Cavanaugh*, 391 S.W. 2d 723, 725 (Tex. 1965) (a person who is a party under doctrine of virtual representation may appeal); *Robertson v. Blackwell Zinc Co.*, 390 S.W.2d 472, 472 (Tex. 1965) (parties who are not named defendants, but considered parties under doctrine of virtual representation may appeal by a writ of error); *Smith v. Gerlach*, 2 Tex. 424, 426 (1847) ("one whose privity of estate, title or interest appears from the record...or who may be the legal representative of such party may appeal"); *Specia v. Specia*, 292 S.W. 2d 818, 819 (Tex. Civ. App.-San Antonio 1956, writ ref'd n.r.e.) (beneficiary in a will contest was a party even though not personally named as a party); *Knioum v. Slattery*, 239 S.W.2d 865, 868 (Tex. Civ. App.-San Antonio 1951, writ ref'd) (in a case involving a restrictive covenant, a person bound by the judgment and not named as party may appeal under the virtual representation doctrine). Although virtual representation has been recognized in Texas for quite some time, it has only been recently that the doctrine has been expanded to include insurers.

B. Party bound to the Judgment

The Texas Supreme Court held that the most important consideration in determining whether a non-party should be allowed to assert its rights on appeal was whether that party was bound to the judgment in the case. *City of San Benito v. Rio Grande Valley Gas Co.*, 109 S.W.3d 750, 754-55 (Tex. 2003).

1. Dwayne Ross, et al. v. Matthew Curtis Marshall, et al., 426 F.3d 745 (5th Cir. 2005)

In a first-of-its-kind ruling, the 5th Circuit Court of Appeals held recently that an insurer can intervene post-judgment in a suit against its insured, because the insured abandoned his appeal. The decision reverses a

$10 million judgment awarded to an African-American family victimized by a cross-burning incident in 2000. The judgment was awarded against the father of one of the perpetrators. The three-judge panel of the 5th Circuit held that Allstate Texas Lloyds Insurance Co. had a right to intervene in the suit to challenge the judgment against its insured, a father whom the trial court held vicariously liable for his son's act of "racial terrorism."

In its opinion, the 5th Circuit noted the following: Kent Mathews' son, Wayne, was a 20-year-old college student when he gathered with a group of friends for a night of drinking outside his parents' home in Katy on June 18, 2000. The father instructed his son to "wrap things up" and then went to bed around 10:30 p.m. Instead, Wayne Mathews, and Matthew Curtis Marshall, the named defendants in the suit, and several of their friends decided to build a wooden cross using materials from the Mathews' garage, and burned it in front of the Ross family home. The cross-burning incident occurred in the early morning hours of June 19 -- known as Juneteenth, which celebrates the day in 1865 when a Union general read the Emancipation Proclamation in Galveston, freeing the slaves in Texas. Wayne Mathews pleaded guilty in 2000 to one charge of conspiracy to commit civil rights violations in *United States v. Mathews, et al.* Mathews pleaded guilty in connection with the cross-burning incident and received a sentence of 15 months in a federal prison. After Wayne Mathews pleaded guilty, the Ross family filed the civil suit against Wayne Mathews, Marshall, and their friends, alleging various intentional torts and civil rights violations. The Rosses also named Wayne Mathews' parents as defendants in the civil suit. Wayne Mathews' parents owned a homeowner's insurance policy issued by Allstate that covered "damages because of bodily injury ... caused by an occurrence" for which coverage was provided. The Rosses sought to recover damages from Wayne Matthews' parents on the grounds they "knew or should have known that their properties and household effects were being used in a reckless and negligent manner."

Allstate provided an attorney to defend Wayne Matthews' parents subject to a reservation of the insurance company's rights. Allstate also filed a declaratory judgment suit asking the judge to find that the insurance company had no obligation under the homeowner's policy to indemnify or defend the parents against the Rosses' suit.

At the trial of the Rosses' suit, the jury found Wayne Mathews and his friends liable for $10 million in damages and also found that Kent Mathews was negligent when he delegated authority over the Mathews' property to his son on the night of the cross-burning. However, the jury found that the negligent delegation of authority did not cause the cross-burning.

The trial judge originally entered a take-nothing judgment as to Kent Mathews but subsequently amended the judgment, finding as a matter of law that the father was vicariously liable for the son's conduct. Kent Mathews, through an attorney hired by Allstate, filed a notice of appeal, and Allstate filed a supersedeas bond for $300,000 -- the limit in Kent Mathews' homeowner's policy. Allstate also filed its post judgment answer, notice of appeal and a motion to intervene in the case. The trial judge struck Allstate's answer and notice of appeal and denied the insurer's motion to intervene and Kent Mathews' motion to amend the judgment.

Kent Mathews changed his mind about pursing an appeal. After reaching an agreement with the Ross family, the father fired the appellate attorney Allstate had hired to represent him, dropped his appeal and agreed to assign his rights against the insurance company to the Rosses. Allstate then appealed to the 5th Circuit,

In deciding whether intervention was proper in this case, the court points out that in the absence of a federal statute, a motion to intervene as of right is governed by Federal Rule of Civil Procedure 24(a)(2). *Id.* at 753.

A motion to intervene under Rule 24(a)(2) is proper when: (1) the motion to intervene is timely, (2) the potential intervener (sic) asserts an interest that is related to the property or transaction that the forms the basis of the controversy in the case into which she seeks to intervene; (3) the disposition of that case may impair or impede the potential intervener's ability to protect her interest; and (4) the existing parties do not adequately represent the potential intervener's interest.[citation omitted] *Id.*

In applying the above rule, the first task is to determine whether the motion to intervene is timely. The Fifth Circuit Court of Appeals cited four factors to consider in evaluating the timeliness of a motion to intervene. The four factors are:

Factor 1. The length of time during which the would-be intervenor actually or reasonably should have known of his interest in the case before he petitioned for leave to intervene.

Factor 2. The extent of prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case.

Factor 3. The extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied.

Factor 4. The existence of unusual circumstances militating either for or against a determination that the application is timely.

Id. at 754 (citation omitted).

In finding Allstate's motion for intervention timely, the court noted that Allstate filed its appeal after the rendering of the judgment and not before it because up until that point its interests were being properly represented. *Id.* at 754. It was only after the judgment and within the time a named party could have taken an appeal that Allstate sought to intervene to protect its interests. The court cites several cases in support of the timeliness of Allstate's motion to intervene and seems to establish that a motion to intervene is timely when the intervenor's interests are no longer protected by the named parties, the granting of the motion would not prejudice the named parties and the intervention would not interfere with the orderly processes of the court. *Id.* at 755.

In applying the second factor, the court concludes that the additional resources and inconvenience associated with Allstate filing an appeal are not prejudicial to the parties, but those commonly associated with defending a ruling or judgment on appeal. *Id.* at 755-56. Further, the essence of the second factor is really whether the parties will suffer prejudice as a result of Allstate's failure to intervene earlier. *Id.*

The third factor focuses on whether Allstate would suffer prejudice if not allowed to intervene. *Id.* at 756. Initially, Allstate did not post a supersedeas bond and on a later attempt the district court rejected this action. As such, the contention is that Allstate no longer has a stake in the present suit. However, the court concluded that Allstate will suffer substantial prejudice if it is not allowed to intervene because an uncontested judgment may expose Allstate to significant liability both in a subsequent coverage suit and in a suit for extra-contractual damages. *Id.* The court stated:

> Allstate's interest in protecting itself from liability by minimizing the liability of its insured is strong, particularly in light of the fact that Allstate provided Mathews with a defense in this case subject to a reservation of rights and is bound by the district court's judgment. [citation omitted] Allstate will suffer considerable prejudice if it is denied the opportunity to challenge this judgment on appeal.

Id.

The fourth factor weighs any unusual circumstances present in the case that may point for or against the timeliness of the intervention. *Id.* The court found Allstate's motion to be timely precisely because of the unusual circumstances in this case. Those circumstances include the insured abandoning his appeal and firing his appellate counsel as the behest of the plaintiffs and the plaintiff's subsequent attempt to deny Allstate the opportunity to seek appellate review of the district court's amended judgment. *Id.*

After determining that a motion to intervene is timely, the next task is whether the intervenor has an interest related to the property or transaction at issue in the case. *Id.* at 757.

The court explained that in order to meet this requirement an applicant must point to an interest that is "direct substantial, [and] legally protectable." [citation omitted] This requires a showing of something more than a mere economic interest; rather, the interest must be "one which the substantive law recognizes as belonging to or being owned by the applicant." [citation omitted] In addition, "the intervenor should be the real party in interest regarding his claim." [citation omitted] Despite these requirements, the court observed that "the interest 'test' is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." [citation omitted] *Id.*

The court concluded Allstate had a sufficient interest in this matter because it is potentially liable for the amount of the judgment against its insured up to its policy limits and possibly beyond. *Id.* In deciding this issue, the court noted that it was a close call. The court did not directly conclude whether the posting of a supersedeas bond would have given Allstate a greater interest in this matter. The court did state that "[w]ithout question, an insurer has a financial stake in securing a

favorable outcome for its insured in a lawsuit alleging potentially covered claims." *Id.* Further, the financial interest is substantial when the insurer is given the opportunity to defend the suit against its insured.

Secondly, the court concluded that although Allstate still has the pending coverage action that could potentially allow it to avoid liability for the judgment, this contingency is insufficient to preclude liability. *Id.* at 759. In the cases from the Second and First Circuit Courts of Appeal the insureds had two contingencies available to them; their respective coverage actions and the ability to prevent or influence the judgment against their insured. *Id.* In this regard, their interests diverged from those of their insured and precluded intervention. *Id.* The court reasoned that because Allstate is already bound by the judgment and not able to re-litigate its insured's liability in a subsequent lawsuit, intervention at the appellate stage is necessary to protect its interests. *Id.*

In discussing this concept further, the court acknowledged that there is a dearth of authority on whether an insurer that reserves its rights has a sufficiently direct interest to intervene as of right in a suit against its insured for the purpose of appealing the judgment. *Id.* The court noted that a handful of courts have held that "insurers may intervene to contest various aspects of judgments entered against their insured following a reservation of rights." *Id.* at 760. The court stated:

> These cases point up the absence of a monolithic opposition to insurers intervening in cases brought against their insured, and are consistent with the toleration shown in our case law for some degree of contingency in the interests of persons seeking intervention as of right. [citation omitted]

Id. Finally, the court stated that because the insured assigned his rights to the plaintiff, Allstate's interest in challenging the judgment on appeal is that much more significant. *Id.* Thus, the court held that Allstate had a sufficient interest to merit intervention as of right for the purpose of appealing the judgment against its insured.

The third criterion centers on whether the disposition of the case may impair or impede the potential intervener's ability to protect her interest. *Id.* The court concluded that the disposition of the underlying suit significantly affects Allstate's interests because once its insured settled with the plaintiffs after entry of judgment Allstate was left with a potential liability exposure in its coverage suit up to its policy limits and with "potential liability exposure for additional amounts in a bad faith suit-all without being afforded the opportunity to appeal a judgment in a suit which it defended." *Id.* at 761.

The final criterion an intervenor must satisfy is whether the existing parties adequately represent his interest. *Id.* This burden is minimal and the intervenor need only show that representation by the existing parties may be inadequate. *Id.* (citation omitted). Allstate met this burden by showing that its insured abandoned the appeal and fired the appellate counsel provided by Allstate. The court states that it does not matter that these events occurred after the district court denied Allstate's motion to intervene because Allstate's motion was based on the well-founded belief that the insured had ceased to cooperate and would not pursue an appeal. *Id.*

After undertaking this analysis, the court concluded that Allstate had a sufficient interest in the suit to merit intervention as of right for the purpose of appealing the judgment against its insured. The court held that the trial judge erred in denying the insurance company's motion to intervene in the suit. The Fifth Circuit also held that the trial court abused its discretion when it amended the judgment in Ross to hold, as a matter of law, that Kent Mathews was vicariously liable for his son's conduct in the cross-burning incident. The Fifth Circuit reversed the trial court's order denying intervention and the judgment against Kent Mathews, and remanded Ross to the trial court with instructions that the Rosses take nothing in their suit against Kent Mathews.

2. *In re Lumbermens Mutual Casualty Company*, No. 04-0245, 49 Tex. Sup. Ct. J. 329, 2006 WL 249979 (Tex. 2006)

On February 3, 2006, the Texas Supreme Court decided *In re Lumbermens Mutual Casualty Company*, 2006 WL 249979 (Tex. Feb. 3, 2006), permitting an insurer to intervene in an appeal and file a separate brief raising an argument that had been abandoned by its insured. The *Lumbermens* decision stemmed from Cudd's agreement to indemnify, and to secure coverage for, Sonat in connection with well-servicing operations. When Cudd employees sued Sonat for personal injury, Cudd refused to indemnify Sonat, and Cudd's insurer, Lumbermens, refused to provide coverage. Given this breach, Sonat settled with the injured employees and pursued indemnity against Cudd. It also filed a separate breach of contract action against Lumbermens and Cudd.

Sonat prevailed on its indemnity claim, causing Lumbermens to put up a $29 million supersedeas bond for Cudd for an appeal. Meanwhile, in the other breach of contract action, Sonat was pressing on certain claims for which Cudd would not have coverage. Thus, they worked a deal. Sonat would dismiss certain uncovered claims in the breach of contract suit, and Cudd would agree not to pursue the choice-of-law issue on appeal in the indemnity action. This was a pivotal decision, for under Louisiana law, the indemnity claim would be unenforceable, yet it would be valid under Texas law.

Once Cudd filed a brief of appellant that did not attack choice-of-law, Lumbermens sought leave to intervene on appeal. (The ten-week delay in seeking leave was not found by the court to be material in this case). The court of appeals denied leave to intervene, and Lumbermens filed a petition for writ of mandamus with the Texas Supreme Court. The writ of mandamus was conditionally granted.

The Texas Supreme Court held that the insurer was entitled to intervene and file a brief separately attacking the choice-of-law issue, and the court of appeals had abused its discretion in denying the intervention. While the court cautioned that intervention was required "under the unique facts presented," the reality is that the *Lumbermens* decision may frequently provide a basis for intervention in suits where potential coverage issues are interwined the facts-and not just on appeal. The court concluded that contractual defenses for non-cooperation or a potential declaratory judgment action regarding coverage were not sufficient legal remedies to avoid mandamus relief. Thus, while Texas Rule Civil Procedure 38(c) and 51(b) generally prevent the joinder of an insurer, the practicalities of the situation-coupled with the *Lumbermens* decision-may prompt even more involvement and control for the insurer.

Finally, in discussing the public policy implications in allowing an insurer to intervene on appeal or at the trial level, the court explained:

> We agree that every disagreement between an insured and its liability insurer would not justify separate appeals. As we recently acknowledged, the insurance policy determines whether an insurer or its insured has the right to control litigation, a contract right that would be defeated if every disagreement between the two justified each in filing its own appeal. [citation omitted] However, our procedural rules favor the resolution of cases based upon substantive principles. [citations omitted] We reiterate that whether a would-be intervenor is entitled to appeal under the virtual-representation doctrine is an equitable determination that must be decided on a case-by-case basis. Our decision today is limited to the situation presented.

Id.

RULES GOVERNING THE PROCEDURE FOR MAKING A RECORD OF CIVIL COURT PROCEEDINGS IN THE COUNTY COURTS OF HARDIN COUNTY, TEXAS, BY ELECTRONIC AUDIO OR VIDEO RECORDING

1. **Application.** The following rules govern the procedures in the County Courts of Hardin County in proceedings in civil matters in which a record is made by electronic audio or video recording, and appeals from such proceedings.

2. **Duties of Court Recorders.** No stenographic record shall be required of any civil proceedings electronically recorded. The court shall designate one or more persons as court recorders, whose duties shall be:

   a. Assuring that the recording system is functioning and that a complete, distinct, clear and transcribable recording is made;

   b. Making a detailed, legible log for all proceedings while recording, indexed by time of day, showing the number and style of the proceeding before the court, the correct name of each person speaking, the nature of the proceeding (e.g., voir dire, opening, examination of witnesses, cross-examination, argument, bench conferences, whether in the presence of the jury, etc.), and the offer, admission or exclusion of all exhibits;

   c. Filing with the clerk the original electronic recording including all exhibits;

   d. Storing or providing for storage of the electronic audio or video recording to assure its preservation as required by law;

   e. Prohibiting or providing for prohibition of access by any person to the original recording without written order of the presiding judge of the court;

   f. Preparing or obtaining a certified copy of the original recording of any proceeding, upon full payment of $150.00 per copy imposed therefor, at the request of any person entitled to such recording, or at the direction of the presiding judge of the court, or at the direction of any appellate judge who is presiding over any matter involving the same proceeding, subject to the laws of this state, rules of procedure, and the instructions of the presiding judge of the court; and

   g. Performing such other duties as may be directed by the judge presiding.

3. **Reporter's Record.** The reporter's record on appeal from any proceeding of which an electronic recording has been made shall be labeled to reflect clearly the numbered contents certified by the court recorder to be a clear and accurate copy of the original

recording of the entire proceeding. Any exhibits designated by the parties for inclusion in the reporter's record shall be arranged in numerical order and firmly bound together so far as practicable, together with an index consisting of a brief description identifying each exhibit.

4. **Time for Filing.** The court recorder shall file the reporter's record with the court of appeals within fifteen days after the perfection of an appeal. No other filing deadlines as set out in the Texas Rules of Appellate Procedure are changed.

5. **Appendix.** Each party shall file with his brief an appendix containing a written transcription of all portions of the recorded reporter's record and a copy of all exhibits relevant to the issues raised on appeal. Transcriptions shall be presumed to be accurate unless objection is made. The form of the appendix and transcription shall conform to any specifications of the Supreme Court.

6. **Presumption.** The appellate court shall presume that nothing omitted from the transcriptions in the appendices is relevant to any issues raised or to the disposition of the appeal. The appellate court shall have no duty to review any part of an electronic audio/ video recording.

7. **Supplemental Appendix.** The appellate court may direct a party to file a supplemental appendix containing a written transcription of additional portions of the recorded reporter's record.

8. **Paupers.** Texas Rule of Appellate Procedure 20.1(j) shall be interpreted to require the court recorder to transcribe or have transcribed the recorded reporter's record and file it as appellant's appendix.

9. **Accuracy.** Any inaccuracies in the transcriptions of the recorded reporter's record may be corrected by agreement of the parties. Should any dispute arise after the reporter's record or appendices are filed as to whether an electronic audio or video recording or any transcription of it accurately discloses what occurred in the trial court, the appellate court may resolve the dispute by reviewing the audio or video recording, or submit the matter to the trial court, which shall, after notice to the parties and hearing, settle the dispute and make the reporter's record or transcription conform to what occurred in the trial court.

10. **Costs.** The expense of appendices shall be taxed as costs at the rate prescribed by law. The appellate court may disallow the cost of portions of appendices that it considers surplusage or that do not conform to any specifications prescribed by the Supreme Court.

11. **Other Provisions.** Except to the extent inconsistent with these rules, all other statutes and rules governing the procedures in civil actions shall continue to apply to those proceedings of which a record is made by electronic audio or video recording.

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 06-9043

APPROVAL OF LOCAL RULES OF HARDIN COUNTY GOVERNING THE PROCEDURE FOR MAKING A RECORD OF CIVIL COURT PROCEEDINGS BY ELECTRONIC AUDIO OR VIDEO RECORDING

ORDERED that:

Pursuant to Texas Rule of Civil Procedure 3a, the following Local Rules of Hardin County Governing the Procedure for Making a Record of Civil Court Proceedings by Electronic Audio or Video Recording are approved.

In Chambers, this 22nd day of February, 2006.

Wallace B. Jefferson, Chief Justice

Nathan L. Hecht, Justice

Harriet O'Neill, Justice

J. Dale Wainwright, Justice

Scott Brister, Justice

David M. Medina, Justice

Paul W. Green, Justice

Phil Johnson, Justice

Don R. Willett, Justice

WordPerfect Document Compare Summary

Original document: H:\Rules Attorney\electronic recording\Electronic Recording.wpd
Revised document: @PFDesktop\:MyComputer\H:\Rules Attorney\electronic recording\Hardin Co.elec recording.updated.wpd
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Deleted text is shown as full text.
Insertions are shown with the following attributes and color:
Double Underline, Redline, Red RGB(255,0,0).

The document was marked with 31 Deletions, 26 Insertions, 0 Moves.