SCAC MEETING
November 21-22, 2008
9:00 a.m.

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5. Judicial Administration Rule 12 - Proposed Amendments (Peterson)

5a. Email from Kennon Peterson drafted 11/14/08

5b. Redline draft of proposed changes

6. Issue Regarding Small Claims Court and TRCP (Lawrence/Peterson)

6a. 11/18/08 Email from Kennon Peterson

6b. 10/14/08 Letter from Dr. Thomas Ellis to Supreme Court of Texas

6c. 10/27/08 Letter from Dr. Thomas Ellis to SCAC

6d. 10/30/08 Letter from Dr. Thomas Ellis to SCAC w/two attachments

7. Proposed Amendments to Rules 296-329(b) (Duggins/Dorsaneo/Cortell)

8. Civil Cover Sheets (Peterson)

8a. 11/18/08 email from Kennon Peterson

8b. County Civil Cover Sheet

8c. District Civil Cover Sheet

8d. Family Civil Cover Sheet

9. Update: Classification of Appellate Cases (Civil or Criminal) (Gaultney)

10. Update on State Bar Court Administration Task Force's Final Report (Albright)
(please see bound green report distributed Wednesday, November 19, 2008)

Summary of Justice Hecht's SCAC Status Report
~November 21, 2008~

RECENT AMENDMENTS

1. Article III of State Bar Rules

- At the end of the last meeting, I told you that the proposed version of Article III of the State Bar Rules conflicted with section 552.1176(a) of the Public Information Act. The statute makes an attorney's home address and phone number confidential *if* the attorney chooses; the proposed amendment made that information confidential *unless* the attorney chose otherwise.

- The Court conferred with State Bar President Harper Estes and State Bar General Counsel Elizabeth Rogers. On October 3, 2008, the Bar Board met and reviewed a revised version of the rule that did not include the language conflicting with the Public Information Act.

- On October 6, 2008, in Misc. Docket No. 08-9148, the Court adopted the revised version of the rule and an accompanying note.

ARTICLE III—MEMBERSHIP

SECTION 2. Enrollment in the State Bar

A. Each person who ~~becomes~~ is licensed to practice law in Texas shall, in accordance with the applicable Supreme Court rules governing admission to the bar, ~~no earlier than ten (10) days prior to~~ and no later than ten (10) days following the date of admission, (I) file with the clerk an enrollment form stating his or her name, ~~permanent place of residence, principal place of practice~~ preferred physical address or post office box, telephone number, facsimile number, e-mail address, and such other information as may be required by the clerk and (ii) pay all fees and assessments then required.~~, and t~~ This filing and payment shall constitute enrollment in the State Bar. The preferred physical address or post office box shall constitute the member's registered address and will be used for receiving official notices from the State Bar, including membership compliance information, member benefits, and disciplinary matters. A member is mandated to notify the State Bar of any change in the information required above within thirty (30) days of such change.

Notes:

Section 552.1176 of the Government Code prescribes the confidentiality of certain information maintained by the State Bar, including the home address, home telephone number, e-mail address, social security number, and date of birth of a person licensed to practice law in Texas.

2. Rule of Judicial Administration 12.7(a)(2)

- On November 17, 2008, in Misc. Docket No. 08-9165, the Court adopted an amendment to Rule of Judicial Administration 12.7(a)(2) to correct outdated references to the Texas Administrative Code and the General Services Commission.

12.7 Costs for Copies of Judicial Records; Appeal of Assessment.

(a) *Cost.* The cost for a copy of a judicial record is either:

(1) the cost prescribed by statute, or

(2) if no statute prescribes the cost, the ~~actual~~ cost~~,~~ ~~as~~ the Office of the Attorney General prescribes by rule ~~defined~~ in the ~~section 111.62, Title 1,~~ Texas Administrative Code~~, not to exceed 125 percent of the amount prescribed by the General Services Commission for providing public information under Title 1, Texas Administrative Code, Sections 111.63, 111.69, and 111.70~~.

Comment to 2008 change: The Attorney General's rule, adopted in accordance with Section 552.262 of the Government Code, is in Section 70.3 of Title 1 of the Texas Administrative Code.

PROGRESS ON FUTURE AMENDMENTS

1. Ancillary Proceedings Task Force

- As you know, on February 12, 2008, the Court created the Ancillary Proceedings Task Force and charged it with "reviewing and recommending any revisions to the ancillary proceedings rules necessary to clarify the procedures described, modernize the language of the rules, resolve conflicts with other civil procedure rules, and reflect developments of the law." Misc. Docket No. 08-9010.

- The task force has met six times and is scheduled to meet one last time on December 8. After that meeting, the Chair Professor Elaine Carlson, the heads of the subcommittees, and Kennon Peterson will meet to finalize the contents of the report and recommendations.

- The task force's goal is to deliver the report and recommendations to the Court by the end of February 2009. I'll defer to Professor Carlson to provide any additional information regarding the task force's progress and upcoming meetings.

2. Disciplinary Rules

- The Court is in the process of analyzing recommendations from the Supreme Court Task Force (chaired by Tom Watkins) and the State Bar Disciplinary Rules of Procedural Conduct

Committee (formerly chaired by Linda Eads and currently chaired by Lillian Hardwick).

- In some instances, there are significant differences between the recommendations from the task force and committee. Analyzing these differences and determining the best course of action has proven to be a complicated, time-intensive process. But the Court will continue to move forward as promptly as possible. Meanwhile, the committee is in the process of drafting comments for the rules that the task force and committee more or less agree upon.

3. Sensitive Data and E-Access

- The Court is also in the process of revisiting the proposed Rules of Judicial Administration relating to sensitive data in court records and e-access to court records.

- During the past couple months, Court representatives (e.g., Alice McAfee, Blake Hawthorne, and Kennon Peterson) have met with legislative representatives and constituents to address the potential interplay between these rules and existing and proposed legislation. The Court hopes to discuss revised drafts of the rules during its conferences in December.

4. Jury Procedure Issues

- As evidenced by the materials for agenda item 3, the Court is monitoring legislative developments related to jury procedure issues.

- By letter (item 3c), I informed the Senate Jurisprudence Committee that the Advisory Committee has been considering rule amendments addressing jury procedures. But, as the Senate Jurisprudence Committee's interim report (item 3h) makes clear, the committee is going forward with recommendations for legislation allowing jurors to take notes and submit questions to witnesses. So, in the upcoming weeks or months, we may see a bill resembling Senate Bill 1300 (item 3d), which was proposed during the last legislative session. But my understanding is that the Senate Jurisprudence Committee may recommend dropping the bill if the Court amends and/or promulgates applicable rules before the end of the session.

- On November 13, the House Judiciary Committee met and discussed, among other things, jury procedure issues. The committee heard testimony from several people, including Judge Orlinda Naranjo (who will be here later this morning), Harper Estes, Lisa Hobbs, and Richard Trabulsi. At this point, it is not clear what the House Judiciary Committee will recommend but at least two people — Harper Estes and Lisa Hobbs — asserted a preference to address jury procedure issues in rules, not statutes.

- There is an approved TEX-ABOTA resolution (item 3f) that supports proposals allowing jurors to take notes and submit written questions to witnesses through judges. I'll defer to Judge Naranjo to provide additional information regarding this resolution.

- There is also a pending Texas Judicial Council resolution (item 3g) recommending legislation allowing jurors to take notes and submit questions to witnesses. I suspect that the TJC's action on this resolution will depend, at least in part, on what the Advisory Committee accomplishes today.

- On a related note, the State Bar Committee on Court Rules met last Friday and discussed (among other things) a draft bill of rights prepared by the State Bar Committee on Jury Service. In an e-mail message (item 3i), Chair of the State Bar Committee on Court Rules, Ann Diamond, described her committee's reactions to that bill of rights. Judge Barbara Walther, of the 51st Judicial District Court, has provided a copy of that bill of rights and is here to observe the Advisory Committee's meeting and provide input, if requested to do so.

Report to SCAC on Jury Innovations

Judge Tracy Christopher, 295th District Court

Nov. 21-22, 2008

We have been asked to review several jury innovations for civil cases. Several other committees and task forces have also looked at these issues. I have done a short survey of trial judges[1] to get their feelings on the issues, reviewed the ABA and National Center for State Courts publications, made a review of some of the other states instructions[2] and included some cursory legal research too.

1. Note Taking

A. SB 1300[3]

SB 1300 calls for a mandatory instruction to the jury that they make take notes and use them during deliberations to refresh their memories. The court is to provide materials for note taking and is to destroy the notes at the end of the day. The notes may not be used on appeal or for any other reason.

B. Senate Jurisprudence Committee

The Senate Jurisprudence Committee's Interim Report calls for juror note taking during civil trials but prohibit juror notes during deliberations. The court would keep all notes confidential and destroy them after the verdict.

C. PJC Oversight

Recommended that 226a include an instruction to the jury on taking notes to make it clear that note taking is permissible in civil cases. The previous PJC instruction was changed to delete the sentence "Your personal recollection of the evidence takes precedence over any notes you have taken."

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[1] Using the Texas Center for the Judiciary, I sent an email to all district judges that tried civil cases. I received over 100 responses with many responses coming from smaller counties. In fact, the more urban counties are underrepresented. I have a separate compilation of all responses but will summarize the results in this report.

[2] In 2007, my law clerk, Daniel Wilson, gathered the pattern jury charge basic instructions from a number of states: Alabama, California, Florida, Illinois, Indiana, Maryland, Massachusetts, Michigan, Mississippi, Nevada, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Tennessee and Virginia. I have not updated his research, nor should anyone consider it definitive research for each state.

[3] I am using the version of SB 1300 that was distributed to everyone. I understand there may be some changes when it is next proposed.

D. SCAC discussions

Recommended some restrictions on the use of notes during deliberations and decided to remain silent on the issue of what to do with the notes after trial.

E. State Bar Committee on Jury Service

Drafting a juror bill of rights that would include the right to take notes in the trial judge's discretion, incorporating some of the *Price* elements (see below).

F. State Bar Court Administration Task Force

The Task Force recommended that the Supreme Court amend the rules of civil procedure to expressly allow in appropriate cases, juror note-taking.

G. The Texas Chapter of the American Board of Trial Advocates TEX-ABOTA

Supports juror note taking with the decision left to the sound discretion of the trial judge.

H. Texas Judicial Council TJC

Its draft resolution supports juror note taking in the discretion of the trial judge with appropriate safeguards. (Vote scheduled for Dec. meeting)

I. Trial Judges Survey

The vast[4] majority of trial judges surveyed already allow juror note taking in civil trials. The vast majority do not allow jurors to show their notes to others during deliberations. A few do not allow notes back into the jury room during deliberations. A solid[5] majority have the policy of note destruction at the end of trial.

J. ABA, National Center for State Courts (NCSC) and other States

The ABA *Principles for Juries and Jury Trials* (August 2005) mandates that jurors be told that they may take notes, be given appropriate instructions about the use of notes and destroy the notes at the end of trial. Juror note taking should be encouraged because it enhances recall of the evidence.

The NCSC *Jury Trial Innovations* (Second Edition 2006) outlines the pros and cons of juror note taking and identifies as the only con that jurors who take notes may participate more effectively in jury deliberations that those who do not. The pros include: aids memory, encourages more

[4] A vast majority is in the 85% range. I am not giving the exact numbers as answers continue to come in.

[5] A solid majority is in the 60-65% range.

active participation in deliberation, decreases deliberation time, keeps jurors alert in trial, increases juror confidence and reduces the number of requests for read back portions of testimony.

The majority of other states surveyed indicated a right to take notes, with cautionary instructions and was about 50/50 on destruction of notes at the end of trial.

K. Texas case law on note taking

In *Price v. State*, 887 S.W. 2d 949 (Tex. Crim. App. 1994) the Texas Court of Criminal Appeals overturned previous case law that prohibited note taking in criminal cases and left note taking to the discretion of the trial judge in appropriate cases. It included a list of requirements that the trial judge had to meet before allowing note taking and approved instructions about note-taking. Here are the requirements: "*First,* determine if juror note-taking would be beneficial in light of the factual and legal issues to be presented at the trial. If the trial is to be relatively short and simple, the need for note-taking will be slight. On the other hand, if a long and complex trial is anticipated, note-taking could be extremely beneficial. *Second,* the trial judge should inform the parties, *prior to voir dire,* if the jurors will be permitted to take notes. If note-taking is to be allowed, the parties should be permitted to question the venire as to their ability to read, write or take notes." *Id.* at 954

Here are the pre-trial instructions:

"1. Note taking is permitted, but not required. Each of you may take notes. However, no one is required to take notes.

2. Take notes sparingly. Do not try to summarize all of the testimony. Notes are for the purpose of refreshing memory. They are particularly helpful when dealing with measurements, times, distances, identities, and relationships.

3. Be brief. Overindulgence in note taking may be distracting. You, the jurors, must pass on the credibility of witnesses; hence, you must observe the demeanor and appearance of each person on the witness stand to assist you in passing on his or her credibility. Note taking must not distract you from that task. If you wish to make a note, you need not sacrifice the opportunity to make important observations. You may make your note after having made the observation itself. Keep in mind that when you ultimately make a decision in a case you will rely principally upon your eyes, your ears, and your mind, not upon your fingers.

4. Do not take your notes away from court. At the end of each day, please place your notes in the envelope which has been provided to you. A court officer will be directed to take the envelopes to a safe place and return them at the beginning of the next session on this case, unopened.

5. Your notes are for your own private use only. It is improper for you to share your notes with any other juror during any phase of the trial other than jury deliberations. You may, however, discuss the contents of your notes during your deliberations."

Id. at 954-955

Here are the pre-deliberation instructions:

"You have been permitted to take notes during the testimony in this case. In the event any of you took notes, you may rely on your notes during your deliberations. However, you may not share your notes with the other jurors and you should not permit the other jurors to share their notes with you. You may, however, discuss the contents of your notes with the other jurors. You shall not use your notes as authority to persuade your fellow jurors. In your deliberations, give no more and no less weight to the views of a fellow juror just because that juror did or did not take notes. Your notes are not official transcripts. They are personal memory aids, just like the notes of the judge and the notes of the lawyers. Notes are valuable as a stimulant to your memory. On the other hand, you might make an error in observing or you might make a mistake in recording what you have seen or heard. Therefore, you are not to use your notes as authority to persuade fellow jurors of what the evidence was during the trial.

Occasionally, during jury deliberations, a dispute arises as to the testimony presented. If this should occur in this case, you shall inform the Court and request that the Court read the portion of disputed testimony to you from the official transcript. You shall not rely on your notes to resolve the dispute because those notes, if any, are not official transcripts. The dispute must be settled by the official transcript, for it is the official transcript, rather than any juror's notes, upon which you must base your determination of the facts and, ultimately, your verdict in this case."

Id. at 955

The tone of the opinion was to discourage note-taking. "We note that trial judges who do *not* permit juror note-taking will eliminate review of the matter on appeal and probably save many hours of trial and appellate court time." *Id.* at 954.

In *Manges v. Willoughby*, 505 S.W 2d 379 (Tex. Civ. App.-San Antonio 1974, writ ref'd n.r.e.) the court held that juror note taking was probably not error and was harmless. Civil cases after *Manges* all found no error or harmless error.

L. Recommendation

The SCAC is already vetting the changes to Rule 226a on note taking. Finalize the language submitted. This appears to be the appropriate rule to use. Should we tackle the issue of destruction of notes and use of notes for appellate issues? This issue could also tie into jury misconduct.

2. Questions by Jurors During Trial

A. SB 1300, PJC Oversight, State Bar Jury Service Committee

Silent on this issue.

B. Senate Jurisprudence Committee's Interim Report

The committee recommends allowing juror questions during civil trials by permitting anonymous written questions before deliberations. Counsel would object outside the presence of the jury and witnesses. After ruling on admissibility, judges could recall the jury and witnesses. Questions would be read verbatim and counsel would have the opportunity to cross-examine each witness.

C. State Bar Court Administration Task Force

The Task Force recommended that the Supreme Court amend the rules of civil procedure to expressly allow in appropriate cases, juror questions.

D. The Texas Chapter of the American Board of Trial Advocates TEX-ABOTA

Supports juror questions, in writing, with objections outside the presence of the jury, with the decision as to whether the procedure should be used to be left to the sound discretion of the trial judge.

E. Texas Judicial Council TJC

Its draft resolution supports juror questions in the discretion of the trial judge with appropriate safeguards. (Vote scheduled for Dec. meeting)

F. Trial Judges Survey

A few[6] trial judges already allow juror questions with limitations (some only with consent of the parties.) The questions must be in writing, the lawyers and judge review them and objections are made at the bench. A solid majority of the trial judges (with an opinion) felt juror questions were a bad idea but many did not have an opinion.

For those who thought it was a good idea or that they might consider it with safeguards, all agreed that the questions should be written, not shown to other jurors, with the lawyers having a right to object and perhaps having the court re-phrase the questions. The judge then asks the question with ability to follow-up by the lawyers if they wanted to. Some variations included the idea of just showing the notes to the lawyers and letting them decide whether to incorporate the

[6] Roughly 10%

ideas into their own questions. Some thought the lawyers ought to agree to the process before it is done and some thought the judge should have the discretion to say no questions at all.

For those who felt it was a bad idea, here are some of their objections: could create error; the lawyers should be the ones in charge of their case presentation; it causes the jurors to become advocates; it could lead to juror discussion before hearing all of the evidence; delay of the trial; you do learn what the jurors are thinking which can be a problem if they are thinking of inadmissible evidence (insurance, did he take a polygraph, income tax ramifications); it would unintentionally assist one side or the other; it would help the party with the burden of proof.

G. ABA, NCSC and other States

The ABA recommends that jurors be allowed to ask questions with the safeguards outlined above; written questions, opportunity to object outside the presence of the jury, with the court or the lawyers then asking the question. The rationales for this rule are that questions can materially advance the pursuit of truth and enhance juror satisfaction.

The NSCS reports that juror questions are most useful in complex cases and that the jury should be instructed to ask questions to clarify a witness's testimony if the testimony was confusing or complicated. Advantages include: the questions alert the lawyers when jurors do not understand and gives them an opportunity to correct the misunderstanding, will increase juror comprehension and keeps jurors engaged and alert. Disadvantages include: jurors may become advocates, jurors may interpret the court's failure to ask their question as an indication that the witness's testimony should be discounted; jurors may be offended if their questions are not asked; adds to trial length.

Eight states (of the ones that I reviewed) have pattern instructions for juror questions. There is an entire ALR on this issue. 31 ALR 3d 872 "The view has been expressed by some courts that the practice of jurors asking questions in open court during trial should be encouraged on the theory that it is of prime importance for jurors to obtain a fair comprehension of the issues and clarification of any facts which will promote a better understanding of the evidence. Other courts have taken the position that juror questioning should be discouraged, reasoning that laymen are not well qualified to conduct an examination and that a complaining counsel may be placed in the unreasonable tactical position of not being able to raise an objection for fear of alienating the questioning juror."

H. Federal case law

In *United States v. Cassiere*, 4 F.3d 1006 (1st Cir. 1993), the First Circuit held it was not plain error to allow juror questions where the case was complex, the defendant did not object, questions were put in writing and the jurors were told not all questions would be asked and the questions asked were bland and were designed to clarify testimony already given. The court stated that juror questions should be reserved for exceptional cases and should not be routine.

Other circuits have found no reversible error in juror questions with safeguards but all discourage

the routine use of questions: *States v. Lewin,* 900 F.2d 145 (8th Cir. 1990); *DeBededetto v. Goodyear Tire &Rubber Co.*, 754 F.2d 512 (4th Cir. 1985); *United States v. Callahan*, 588 F. 2d 1078 (5th Cir.) *cert denied*, 444 U.S. 826 (1979); *United States v. Collins*, 226 F. 3d 457(6th Cir. 2000)

In *United States v. Ajmal*, 67 F. 3d 12 (2nd Cir. 1995) the Second Circuit held that the trial judge abused his discretion in allowing juror questions in a routine drug case. The court conceded that the "practice of allowing juror questioning of witnesses is well entrenched in the common law and in American jurisprudence. Indeed, the courts of appeals have uniformly concluded that juror questioning is a permissible practice, the allowance of which is within a judge's discretion." *Id.* at 14. In this case the district court "encouraged juror questioning throughout the trial by asking the jurors at the end of each witness's testimony if they had any queries to pose. Not surprisingly, the jurors took extensive advantage of this opportunity to question witnesses, including [the defendant] himself. Such questioning tainted the trial process by promoting premature deliberation, allowing jurors to express positions through non-fact-clarifying questions, and altering the role of the jury from neutral fact-finder to inquisitor and advocate. Accordingly, the district court's solicitation of juror questioning absent a showing of extraordinary circumstances was an abuse of discretion." *Id.* at 15.

I. Texas case law

In *Morrison v State*, 845 S.W. 2d 882 (Tex. Crim. App.1992), the Court of Criminal Appeals held that it was per se harmful error to allow jurors to question witnesses.

The few civil cases on point have declined to follow the Court of Criminal Appeals. In *Fazzino v. Guido*, 836 S.W. 2d 271, 275 (Tex. App.-Houston [1st Dist.] 1991, writ denied), the Houston Court of Appeals concluded that juror questions, with appropriate safeguards, are permissible. Here were the steps:

1. After both lawyers had concluded their respective direct and cross-examination, the trial court asked the jurors for written questions.

2. The jury and witness left the courtroom while the admissibility of the question was determined.

3. The trial court read the question to both lawyers and they were given the opportunity to object to the questions.

4. The jury and witness were brought back into the courtroom and the admissible questions were read to the witness verbatim.

5. After the witness answered, both lawyers were allowed to ask follow-up questions limited to the subject matter of the juror's question.

The Dallas court of Appeals agreed. *Hudson v. Markum,* 948 S.W. 2d 1 (Tex. App.—Dallas 1997, pet denied)

J. Recommendation

Full discussion of this issue by the SCAC. Perhaps obtain names of lawyers who have participated in the trials with jury questions and get their opinions on the process. Perhaps talk to the few judges that have used the procedure. If supported by a majority draft a new rule on juror questions-could be Rule 265.1-with safeguards as outlined in the *Fazzino* case. Also should rule be discretionary with the court? At the request of either side? Only with agreement on both sides? Should jurors be instructed that questions should only be asked if the testimony needed to be clarified?

3. Interim Summation/Argument

A. SB 1300

SB 1300 provides that the court may, at the request of either party or on its own initiative, allow counsel to make interim summations after opening and before closing.

Note the use of the word "summation" in the statute which according to Black's Law Dictionary is equal to closing argument.

B. PJC Oversight and State Bar Committee on Jury Service

Silent on this issue.

C. State Bar Court Administration Task Force

The Task Force recommended that Supreme Court amend the rules of civil procedure to expressly allow in appropriate cases, interim statements by counsel.

Note the use of the word "statement" which is generally used in connection with opening statement-a preview of the evidence.

D. The Texas Chapter of the American Board of Trial Advocates TEX-ABOTA

Supports interim summation with the decision left to the sound discretion of the trial judge as to whether it is appropriate for the case.

E. Trial Judges Survey

I may have skewed the survey process by asking the judges about interim "argument" rather than statements. Argument more closely tracks the "summation" language in SB 1300. The judges, who have actually done it, liken it more to a summary of the evidence.

A few judges have allowed interim statements of some sort in long trials or when there was a long break between days of trial. Most judges felt it might be appropriate only in very long trials, where a break in the days of trial occurred or where the trial was bifurcated in some manner but doubted they would ever try a case that needed it. Many judges thought it would never be appropriate. A couple of judges thought it might be more useful to have essentially a progressive opening statement, especially with experts, where a lawyer might get 5 minutes to explain what this expert was going to talk about and why his testimony was important, rather than a summation.

Objections to the process included: inserting argument during the trial confuses the jury as to the difference between argument and evidence; allowing argument without knowledge of the charge is a waste of time for the jurors; jurors should listen to all of the evidence before someone tries to persuade them; even if the rule was to only summarize the evidence it will lead to "argument" and more chances for error; this will encourage the jurors to discuss the case before they have heard all of the evidence.

F. Other states

I did not survey other states on this issue. The Manuel for Complex Litigation, (Fourth) §12.34 (2004) recommends interim statements in complex cases as an aid to juries. "In a lengthy trial, it can be helpful if counsel can intermittently summarize the evidence that has been presented or can outline forthcoming evidence. Such statements may be scheduled periodically (for example, at the start of each trial week) or as the judge and counsel think appropriate, with each side allotted a fixed amount of time. Some judges, in patent and other scientifically complex cases, have permitted counsel to explain to the jury how the testimony of an expert will assist them in deciding an issue. Although such procedures are often described as "interim arguments," it may be more accurate to consider them "supplementary opening statements," since the purpose is to aid the trier of fact in understanding and remembering the evidence and not to argue the case."

In *AcandS, Inc. v. Godwin*, 667 A.2d 116 (Md. 1995) the trial court allowed interim summaries but the summaries became argumentative leading to frequent mistrial motions. At one point the trial judge "punished" the plaintiffs and did not allow them interim argument due to their conduct. Ultimately because the court reversed the punitive damages finding, any error as to the nature of the summation was moot.

G. Texas law

In *Parker v. State,* 51 S.W 3d 719 (Tex. App.—Texarkana 2001), the court held that there is no right to interim argument in criminal cases but that the error was harmless in this case.

I have been unable to find any civil cases on point.

H. Recommendation

Full discussion of this issue with the SCAC-particularly the distinction between statements and argument. Perhaps further discussion with trial judges or lawyers that have used this procedure. If supported by a majority, draft rule could be placed in Rule 265. Should we include criteria for granting interim argument? Also should rule be discretionary with the court? At the request of either side? Only with agreement on both sides?

4. Juror Discussions about the evidence before deliberations

A. SB 1300

SB 1300 calls for jurors to be able to discuss the evidence before deliberations with all of the other jurors as long as they reserve judgment about the outcome of the case.

B. PJC Oversight

The committee did not recommend changing our current rule that prevents this. The new draft of 226a adds language explaining why we do not want jurors to do this.

C. SCAC discussions

We had a brief discussion about this rule, recognizing that we think many jurors already do this in secret. Consensus of the group was that we did not want to change the prohibition. No vote taken.

D. State Bar Committee on Jury Service and Task Force

No discussions about this.

E. The Texas Chapter of the American Board of Trial Advocates TEX-ABOTA

Does not support interim deliberation.

F. Trial Judges

Not surveyed on this point.

G. ABA, NCSC and other States

The ABA recommends that jurors in civil cases be allowed to discuss the evidence when all are present "as long as they reserve judgment about the outcome of the case." This rule recognizes jurors' natural desire to talk about their shared experience. The ABA cited several studies that indicated that these discussions did not lead to premature judgments by the jurors, enhanced juror understanding in complicated cases and decreased the amount of "fugitive" discussion that jurors had with family members.

The NCSC reports that this innovation has been extensively studied since Arizona started the practice in 1995. The studies indicate that it does not cause any pre-judgment of the case. The studies also showed that the innovation is best for longer, complex cases-there is no advantage in shorter trials.

Of the states I surveyed, only Indiana allowed early discussions. The rest followed Texas' procedure. Indiana's specific instruction is as follows:
"When you are in the jury room, you may discuss the evidence with your fellow jurors only when all of you are present, so long as you reserve judgment about the outcome of the case until your final deliberations begin. Until you reach a verdict, do not communicate about this case or your deliberations with anyone else."

As indicated above, Arizona also allows this procedure with this instruction: Do not form final opinions about any fact or about the outcome of the case until you have heard and considered all of the evidence, the closing arguments, and the rest of the instructions I will give you on the law. Both sides have the right to have the case fully presented and argued before you decide any of the issues in the case. Keep an open mind during the trial. Form your final opinions only after you have had an opportunity to discuss the case with each other in the jury room at the end of trial.

H. Texas law

In *Golden Eagle Archery, Inc. v. Jackson,* 24 S.W.3d 362 (Tex. 2000), the court clarified TRCP 327 and TRE 606 as to when testimony of jurors is admissible to show misconduct. Specifically the court held that statements that a juror made to another juror before deliberations were admissible to show juror misconduct but held that the statements in that case did not rise to reversible error. Statements made by jurors during deliberations continue to be inadmissible to show jury misconduct.

I. Recommendation

Any further discussion necessary? (Any modification of the discussion rule would also invoke the issues in TRCP 327 and TRE 606)

Kennon L. Peterson

From: Kennon L. Peterson

Sent: Monday, October 13, 2008 4:01 PM

To: 'cbabcock@jw.com'; 'tracy_christopher@justex.net'; 'aalbright@mail.law.utexas.edu'; 'asenneff@jw.com'

Cc: Nathan Hecht

Subject: SCAC - Legislative Interest in Jury Procedure Issues

Attachments: SB01300S.PDF; Justice Hecht's Letter to Senate Jurisprudence Committee (9.30.08).pdf

Chip, Judge Christopher, Professor Albright, and Angie:

Senator Wentworth, chair of the Senate Jurisprudence Committee, has been interested in jury procedure issues for several years. (Chip, you may recall that Justice Hecht invited him to attend the Jury Summit in Houston two years ago.) During the last session, he introduced SB 1300, a copy of which is attached.

For the next session, an interim charge to his committee is to "[s]tudy practices intended to enhance the jury experience and increase jury participation, including: [1] allowing jurors to ask questions of witnesses by submitting them to the judge in writing; [2] allowing lawyers to periodically summarize testimony for the jury; [3] allowing jurors to take notes during trial; and [4] allowing jurors to discuss evidence among themselves during trial." The committee added other issues to this list, but they have not yet been made public.

The committee took evidence on these issues in Lubbock and discussed them at its October 1 hearing. See: http://www.senate.state.tx.us/75r/Senate/commit/c550/c550.htm. The relevant discussion is located toward the end of the recording, and it includes references to the attached letter that Justice Hecht wrote to the committee about the work the SCAC is doing to address jury procedure issues.

The committee appears to be leaning in favor of note-taking with limitations — prohibiting use of notes during deliberations, keeping notes confidential, and requiring courts to destroy notes after trial. The committee's position on other issues is not yet clear. But the committee's position on all jury procedure issues should be clear in its final report, which is expected to issue on October 31.

On a related note, the House Committee on Judiciary is scheduled to meet on November 13 to discuss its interim charges, including: "Examine the current Texas jury system. Consider possible changes to enhance the jury experience and increase citizen participation on juries." The notice of the hearing is available at this link: http://www.capitol.state.tx.us/tlodocs/80R/schedules/html/C3302008111309301.HTM.

Justice Hecht would like to be sure that the SCAC fully addresses jury procedure issues at its next meeting so that its work will be available for use in the next session. This should be a priority item for the agenda. I will keep you informed of any legislative developments between now and the next meeting.

Best Regards,
Kennon

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September 30, 2008

The Senate Jurisprudence Committee
The Capitol of Texas
Austin, Texas 78701

hand delivered

The Honorable Jeff Wentworth, Chair, and
Members of the Senate Jurisprudence Committee:

I understand that the Senate Jurisprudence Committee's interim charges include a study of "practices intended to enhance the jury experience and increase jury participation". The Supreme Court, as part of its responsibility for the rules of civil procedure and judicial administration, has been engaged in a study of the same issues, assisted by its Advisory Committee.

The Advisory Committee has been in existence for nearly seventy years. It currently has 52 members — academics, judges, lawyers, and court support personnel — chosen from a variety of backgrounds for their breadth of experience and knowledge of the civil justice system in all parts of the State. The Advisory Committee's charter is to "assist[] the Supreme Court in the continuing study, review, and development of rules and procedures for the courts of Texas, taking into consideration the rules and procedures of other courts in the United States and proposals for changes from whatever source received." See Order dated March 1, 2006, Misc. Docket 06-9019. A verbatim record is made of all its proceedings, available online at http://www.supreme.courts.state.tx.us/rules/scac.asp.

Since last year, the Advisory Committee has been considering proposals by the State Bar's Pattern Jury Charge Oversight Committee to rewrite the standard mandatory jury instructions in plain English so that they can be better understood by jurors. These instructions are set out in Rule 226a of the Texas Rules of Civil Procedure. Writing clear instructions requires a clear understanding of jury procedures, which has led the Advisory Committee to revisit those jury procedures and whether they can be improved.

This has been an ongoing process, and proposals have been refined over time. The Supreme Court's Jury Task Force recommended in September 1997 that trial judges have discretion to allow jurors to take notes, and some trial judges have experimented with this. Since 1994, the Court of Criminal Appeals has permitted juror note-taking in criminal cases, but subject to procedural restrictions and strict supervision by the trial judge. *Price v. State*, 887 S.W.2d 949 (Tex. Crim. App. 1994). Experience in actual trials as well as mock trials seems to indicate that juror note-taking can be beneficial to the process but only in the trial court's sound discretion and with its careful

oversight. The Task Force also recommended that lawyers be allowed to summarize the evidence during the trial, but that jurors not be permitted to discuss the evidence among themselves until the end of the trial. The Task Force recommended against allowing juror questions to witnesses without clear procedural safeguards to the parties.

The Advisory Committee has considered these proposed changes and others in the past and has revisited them in earnest this last year. Earlier this month, the Advisory Committee voted to recommend to the Supreme Court that jurors be instructed that they may take notes but may not show them to each other, and that a juror's notes are not evidence and should not be given any more weight than another juror's memory. In the lengthy debate, members acknowledged the benefits of note-taking but expressed concerns that juror notes could also be misused in myriad ways. It remains unclear whether jurors can keep their notes, whether notes can ever be made part of the record to show misuse, or whether they must be destroyed. Like the Task Force, the Advisory Committee does not recommend allowing jurors to discuss the evidence before the end of the trial, but it is still discussing whether the reasons for this prohibition should be better explained to jurors so that they can appreciate its importance.

Transcripts of the Advisory Committee's debates, which are available to you, reflect the difficulties involved in these issues and the care with which they are being considered. I expect the Advisory Committee will also consider whether jurors should be allowed to submit written questions for witnesses and whether counsel should be allowed to summarize testimony for the jury as the case proceeds.

The simplicity with which proposals for changes in jury procedures can be stated belies the nuanced complexities involved in their application. This is especially true in Texas, with the breadth of civil cases in its courts and the differences in actual practice across 254 counties. Changes in jury procedures affect the very core of the civil justice system. They offer possibilities of improvement but could also create serious unfairness and injustice in some cases. The Supreme Court, like its Advisory Committee, has been cautious in changing jury procedures to protect against any adverse affect on parties' rights. National study of the issues has also been very beneficial, such as the National Center for State Courts in its *National Program to Increase Citizen Participation in Jury Service Through Jury Innovations*, which was presented at a *Texas Civil Jury Trial Summit* in Houston in October 2006.

The Supreme Court is grateful for the Legislature's interest in these issues. Frequently, the Legislature has made policy choices to be implemented through the Court's rule-making process. This ensures that legislative policies become fully effective through detailed procedural rules hammered out by judges and lawyers who must practice under them. The Court's staff and I, as well as the Advisory Committee, stand ready to provide you any assistance we can.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

By: Wentworth S.B. No. 1300

(In the Senate - Filed March 7, 2007; March 19, 2007, read first time and referred to Committee on Jurisprudence; May 11, 2007, reported adversely, with favorable Committee Substitute by the following vote: Yeas 4, Nays 1; May 11, 2007, sent to printer.)

COMMITTEE SUBSTITUTE FOR S.B. No. 1300 By: Wentworth

A BILL TO BE ENTITLED
AN ACT

relating to juries.

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

SECTION 1. Subtitle B, Title 2, Civil Practice and Remedies Code, is amended by adding Chapter 25 to read as follows:

CHAPTER 25. JURY TRIAL PROCEDURES

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 25.001. APPLICABILITY. This chapter applies to a civil trial by jury in this state.

Sec. 25.002. CHAPTER GOVERNS OVER RULES. Notwithstanding Section 22.004, Government Code, the supreme court may not amend or adopt rules in conflict with this chapter.

[Sections 25.003-25.050 reserved for expansion]

SUBCHAPTER B. JURY PROCEDURES

Sec. 25.051. PRELIMINARY INSTRUCTIONS TO JURY. (a) Immediately after a jury is sworn, the court shall instruct the jury concerning:

(1) its duties;

(2) its conduct;

(3) the order of proceedings; and

(4) the elementary legal principles that will govern the proceeding.

(b) The court shall read the charge to the jury in the manner provided by Rule 275, Texas Rules of Civil Procedure.

Sec. 25.052. JUROR DISCUSSIONS. (a) Except as provided by Subsection (b), if the jurors are permitted to separate during the trial, the court shall admonish them that it is their duty not to converse with or permit themselves to be addressed by any person on any subject connected with the trial, except that they are permitted to discuss the evidence among themselves in the jury room during recesses from trial when all jurors are present, as long as they reserve judgment about the outcome of the case until deliberations commence.

(b) The court may, for good cause, prohibit or limit the discussion of the evidence by jurors among themselves during recesses.

Sec. 25.053. NOTE-TAKING BY JURORS. (a) The court shall instruct the jurors that they:

(1) may take notes regarding the evidence;

(2) may use the notes during the time the court is in session for the purpose of refreshing their memory for use during recesses, discussions, and deliberations; and

(3) must turn in the notes to the bailiff at the end of each day when the court is not in session or when deliberations have ended for that day.

(b) The court shall provide materials suitable for the purpose described in Subsection (a).

(c) After the jury has rendered its verdict, the bailiff or clerk shall collect the notes and promptly destroy them.

(d) The notes may not be used in evidence on appeal or in any other proceeding.

Sec. 25.054. INTERIM SUMMATIONS. The court may, at the request of either party or on its own initiative, allow counsel for each party to make interim summations after opening statements and before closing arguments.

SECTION 2. Subsection (b), Section 62.011, Government Code, is amended to read as follows:

(b) A plan authorized by this section for the selection of names of prospective jurors must:

(1) be proposed in writing to the commissioners court by a majority of the district and criminal district judges of the county at a meeting of the judges called for that purpose;

(2) specify that the source of names of persons for jury service is the same as that provided by Section 62.001 and that the names of persons listed in a register of persons exempt from jury service may not be used in preparing the record of names from which a jury list is selected, as provided by Sections 62.108 and 62.109;

(3) provide a fair, impartial, and objective method of selecting names of persons for jury service with the aid of electronic or mechanical equipment;

(4) designate the district clerk as the officer in charge of the selection process and define his duties; [~~and~~]

(5) provide that the method of selection either will use the same record of names for the selection of persons for jury service until that record is exhausted or will use the same record of names for a period of time specified by the plan; and

(6) require that the name of a prospective juror who is not impaneled due to an excuse be immediately returned to the jury wheel.

SECTION 3. Subsection (a), Section 62.106, Government Code, is amended to read as follows:

(a) A person qualified to serve as a petit juror may establish an exemption from jury service if the person:

(1) is over 70 years of age;

(2) has legal custody of a child younger than 10 years of age and the person's service on the jury requires leaving the child without adequate supervision;

(3) is a student of a public or private secondary school;

(4) is a person enrolled and in actual attendance at an institution of higher education;

(5) is an officer or an employee of the senate, the house of representatives, or any department, commission, board, office, or other agency in the legislative branch of state government, and the date of the trial or jury selection is:

(A) within 30 days of a date when the legislature is to be in session; or

(B) on a date when the legislature:

(i) is in session; or

(ii) sits as a constitutional convention;

(6) is summoned for service in a county with a population of at least 200,000, unless that county uses a jury plan under Section 62.011 and the period authorized under Section 62.011(b)(5) exceeds two years, and the person has served as a petit juror in the county during the 24-month period preceding the date the person is to appear for jury service;

(7) is the primary caretaker of a person who is an invalid unable to care for himself;

(8) except as provided by Subsection (b), is summoned for service in a county with a population of at least 250,000 and the person has served as a petit juror in the county during the three-year period preceding the date the person is to appear for jury service; or

(9) is a member of the United States military forces serving on active duty and deployed to a location away from the person's home station and out of the person's county of residence.

SECTION 4. Section 62.110, Government Code, is amended by amending Subsection (c) and adding Subsection (d) to read as follows:

(c) The court or the court's designee as provided by this section may not excuse a prospective juror for an economic reason unless each party of record is present and approves excusing [~~the release of~~] the juror for that reason. The court may not inform a

prospective juror of the reason the prospective juror is not excused under this subsection.

(d) The name of a prospective juror who is not impaneled due to an excuse shall be immediately returned to the jury wheel.

SECTION 5. (a) Except as provided by Subsection (b) of this section, this Act applies to a case in which a jury is sworn on or after the effective date of this Act, without regard to whether the case commenced before, on, or after that date.

(b) The change in law made by this Act to Sections 62.106 and 62.110, Government Code, applies only to a person summoned to appear for jury service who is required to appear on or after the effective date of this Act. A person who is summoned to appear before the effective date of this Act is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 6. This Act takes effect September 1, 2007.

* * * * *

Kennon L. Peterson

From: Kennon L. Peterson

Sent: Monday, November 17, 2008 11:55 AM

To: 'Babcock, Chip'; 'tracy_christopher@justex.net'; 'aalbright@mail.law.utexas.edu'; 'Senneff, Angie'

Cc: Nathan Hecht

Subject: SCAC - Update Re. Legislative Interest in Jury Issues

Attachments: TEX-ABOTA Board Resolution on Jury Procedures.PDF; TJC Resolution Re. Jury Issues.pdf; Interim Report of Senate Jurisprudence Committee (11.17.08).doc

Chip, Judge Christopher, Professor Albright, and Angie:

I am writing to provide an update on legislative developments related to jury issues. Attached please find (1) a resolution from the Texas Chapter of the American Board of Trial Advocates ("TEX-ABOTA"); (3) a draft resolution from the Texas Judicial Council ("TJC"); and (3) the Senate Jurisprudence Committee's Interim Report.

The TEX-ABOTA Resolution, adopted approximately two weeks ago, provides that TEX-ABOTA supports proposals allowing jurors to take notes and submit written questions to witnesses through judges, who will hear objections out of the hearing of the jury. TEX-ABOTA also supports interim summation of evidence during certain trials. It does not, however, support interim deliberation by the jury. As provided in the attached resolution, "'It is the position of TEX-ABOTA that the final decision on using these procedures be left to the sound discretion of the trial judge . . . [who] is in the best position to decide which, if any, of these procedures would best assist jurors in a specific case.'" Last Thursday, the House Judiciary Committee met and discussed (among other things) the following interim charge: "Examine the current Texas jury system. Consider possible changes to enhance the jury experience and increase citizen participation on juries." Judge Orlinda Naranjo testified during the hearing and provided a copy of the attached TEX-ABOTA Resolution.

The draft TJC Resolution provides that the TJC supports and recommends statutory changes that "expressly give judges the discretion to permit jurors to take notes during trial (with appropriate safeguards) . . . [and] ask written questions to witnesses (with appropriate safeguards)." TJC members are scheduled to vote on this resolution during their meeting on December 12, 2008.

For convenience, here is the relevant text from pages 26-29 of the Senate Jurisprudence Committee's Interim Report.

Charge 5: ***Study practices intended to enhance the jury experience and increase jury participation, including:***

- ***allowing jurors to ask questions of witnesses by submitting them to the judge in writing;***
- ***allowing lawyers to periodically summarize testimony for the jury;***
- ***allowing jurors to take notes during trial; and***
- ***allowing jurors to discuss evidence among themselves during trial.***

Recommendations

1. **Allow juror questions during civil trials by permitting jurors to anonymously submit additional questions in writing before they begin deliberations. Outside the presence of the jury and witnesses, judges could allow counsel to object to the submitted questions. After ruling on admissibility, judges could recall the jury and witnesses. Questions would be read verbatim, and counsel would have the opportunity to cross-examine each witness.**

2. **Allow juror notetaking during civil trials, but prohibit juror notes during deliberations. The court**

would keep all notes confidential, destroy them after the jury reaches a verdict, and omit them from the record.

Background

The Supreme Court of Texas established the Jury Assembly and Administration Task Force (Task Force) in July 2006 to evaluate the need for reliable jury lists, uniform statewide jury plans, trained officials, summons enforcement procedures, and juror exemption processing.[i] The order creating the Task Force also encouraged the elimination of opportunities for local manipulation that could jeopardize random jury selection. The Supreme Court appointed a wide range of professionals to the 29-member panel, including judges, jury administrators, attorneys, and law professors.

The Task Force issued a final report on February 2, 2007 which recognized the need to re-establish integrity in the jury process, technologically update jury selection, minimize opportunities for experimentation, and harmonize conflicting statutory provisions regarding summoning and qualifying jurors in civil and criminal cases.[ii] In addition, the report recommended that the Secretary of State govern certain aspects of the juror process while leaving the establishment and implementation of written jury plans to individual counties, pending approval by the Supreme Court. This approach offered increased uniformity throughout the state, yet allowed for local control.

Senate Bill 1300

Senate Bill 1300, 80th Legislative Session, addressed certain recommendations from the 2007 Task Force report, such as juror exemptions and how to maintain an inclusive, reliable jury pool.[iii] The bill also authorized juror notetaking, juror discussions; submission of written questions by jurors, and interim summations by attorneys. Specifically, the bill required the name of a prospective juror not impaneled due to an excuse be immediately returned to the jury wheel, and it provided limitations to jury service exemptions for legislators and legislative staff. Senate Bill 1300 passed the Jurisprudence Committee last session and was placed on the intent calendar, but the bill was not taken up on the Senate floor.

The proposed changes in Senate Bill 1300 would have increased juror participation and comprehension, and assisted jurors in reconstructing evidence during deliberations with the aid of notes and prior discussion. Various studies support that such jury innovations serve as useful memory aids, increase juror confidence, and enhance the quality of deliberations.[iv] In addition, the Texas Court of Appeals ruled that allowing jurors in civil cases to submit questions to witnesses does not constitute fundamental error.[v] The Court additionally found that there is nothing inherently improper about allowing occasional questions from jurors in conjunction with appropriate procedural safeguards to protect rights of parties and to prevent undue trial delay. A list of states that allow juror questions and juror notetaking can be found in Appendix J.

Opponents believe that juror notetaking and discussion could encourage jurors to form premature judgments, distract them during the trial, and adversely affect the quality of juror discussions during deliberations. In addition, critics also caution that interim summations may decrease jurors' focus throughout the trial due to an increased reliance on attorneys' summaries rather than the presented evidence.

Conclusion

At the interim hearing in Lubbock, the Committee received public testimony from numerous witnesses regarding the advantages and disadvantages of juror questions and juror notetaking. Most witnesses supported both concepts, offered relevant examples, and suggested various implementation methods for these innovations.[vi] In addition, testimony highlighted a growing frustration that the Supreme Court Jury Task Force suggested similar jury reforms as early as 1997, but the Texas Supreme Court has yet to adopt any of the recommendations.[vii]

In contrast, several witnesses objected to juror notes in the deliberation room or juror discussions of evidence during the trial due to the potential bias created by such practices. Certain witnesses expressed concern that juror notes may create a reversible error if they become part of the official court record. Additionally, many witnesses cautioned that interim summations could cause unnecessary delays and create an unfair advantage for certain parties.

In light of this testimony, the Committee recommends that juror questions and juror notetaking may be permitted during all civil trials, allowing the courts to implement such practices at their discretion. Jurors could submit written questions before deliberation, and after the judge rules on admissibility, the questions would be read aloud. Witnesses could be recalled to answer the question, and counsel would be given a brief cross-examination period. In addition, juror notetaking could be permitted to aid in memory recall and participation, but those notes would be excluded from the deliberation room and would not be part of the official court record. The court would keep the notes confidential and destroy them at the trial's conclusion.

In order to preserve judicial discretion, these recommendations would be permissive, and applied on a case-by-case basis. Allowing juror questioning should increase juror participation and engagement prior to the deliberation phase of the trial. Furthermore, testimony and research support that notetaking should increase jurors' recall of important details and evidence during deliberation, since jurors would rely exclusively on their memory at that time.

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[i] Texas Supreme Court, Resolution No. 06-9057 (July 11, 2006).
[ii] Task Force on Jury Assembly and Administration, *Task Force on Jury Assembly and Administration Report to the Supreme Court of Texas* (February 2, 2007).
[iii] Texas Senate Bill 1300, 80th Legislature (2007).
[iv] Shari Seidman-Diamond et al., "Inside the Jury Room: Evaluating Juror Discussions During Trial," *Judicature*, vol. 87, no. 2 (September-October, 2003), pp. 54-58; Larry Heuer and Steven Penrod, "Increasing Jurors' Participation in Trials: A Field Experiment with Jury Notetaking and Question Asking," *Law and Human Behavior*, vol. 12, no. 3 (September 1988), pp. 231-261; Leonard B. Sand and Steven Alan Reiss, "A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit," *New York University Law Review*, vol. 60 (June 1985), pp. 423-497; and "Developments in the Law: The Civil Jury," *Harvard Law Review* v. 110 (May 1997) pp. 1408-1536.
[v] *Hudson v. Markum*, 948 S.W. 2d 1 (Tex. App. - Dallas 1997).
[vi] See Appendices K, L, and M for examples of juror questions, procedure, and format.
[vii] Texas Supreme Court Jury Task Force, *Executive Summary of the Report of the Supreme Court Jury Task Force* (September 8, 1997).

Please let Justice Hecht or me know if you have any questions or concerns regarding this message or the attached documents. Angie, I will bring copies of the documents to the meeting on Friday.

Best Regards,
Kennon

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TEX-ABOTA Board Resolution

on Jury Procedures

TEX-ABOTA Resolution

"TEX-ABOTA is supportive of proposals that improve the jury system. We encourage measures that enhance a juror's experience in a positive manner and procedures that assist a jury's comprehension of the evidence. In order to obtain these goals, in appropriate cases, and at the discretion of the trial judge, we support the following:

1. Jury note-taking - Note-taking aids juror memory, encourages more active participation, and helps to decrease deliberation time by allowing jurors to more efficiently consider evidence.

2. Allowing jurors to submit written questions – Written jury questions enable the jury to be more attentive during trial, help jurors resolve questions they have about the evidence, and allow attorneys to identify and resolve issues troubling the jury. These questions should be submitted in writing to the judge and attorneys should be allowed to object out of the hearing of the jury.

3. Interim summation - Long, complex trials often lend themselves to a periodic summary of the evidence presented.

"It is the position of TEX-ABOTA that the final decision on using these procedures be left to the sound discretion of the trial judge. The trial judge is in the best position to decide which, if any, of these procedures would best assist jurors in a specific case.

"TEX-ABOTA does not support interim deliberation by the jury. Our members believe that jurors should have the benefit of all the evidence prior to discussing the case."

STATE OF TEXAS

RESOLUTION

of the

TEXAS JUDICIAL COUNCIL

Jury Note-Taking and Juror Questions to Witnesses

WHEREAS, the Texas Judicial Council is the policymaking body for the Texas Judicial Branch, created under Chapter 71, Texas Government Code; and

WHEREAS, the Judicial Council Legislative Committee reviews Judicial Branch legislative proposals and has reviewed the proposal related to jury note-taking and written questions to witnesses from jurors;

NOW THEREFORE, BE IT RESOLVED, that the Texas Judicial Council supports, and recommends that the Texas Legislature enact statutory changes in keeping with the following statement of the Background and Purpose of such legislation:

Background

Current Texas statutes neither authorize nor prohibit note-taking by jurors. Similarly, the Texas statutes do not address the practice of allowing jurors to direct written questions to witnesses. The practice of allowing note-taking by jurors and the practice of allowing jurors to direct written questions to witnesses varies from court to court.

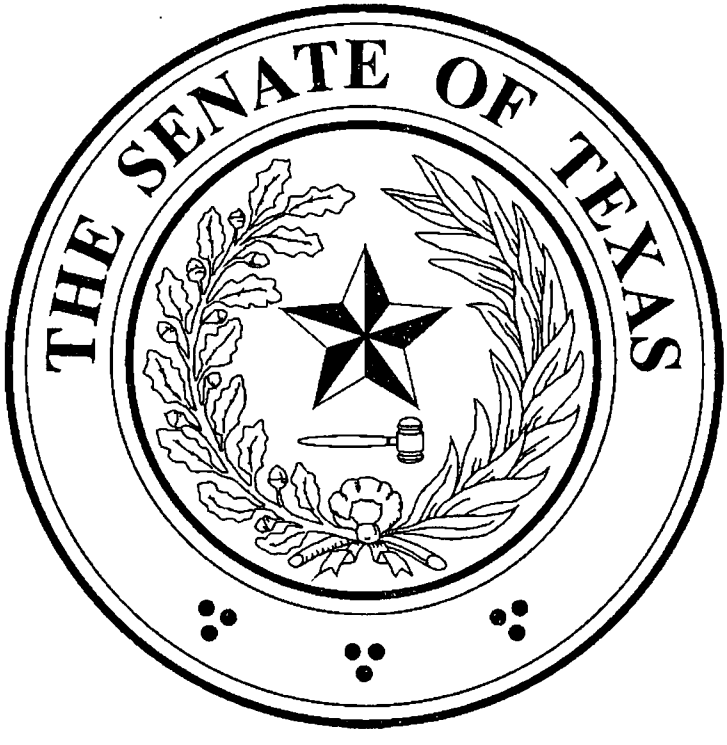
Purpose

Allowing jurors to take notes aids juror memory, encourages more active participation, and helps to decrease deliberation time by allowing jurors to more efficiently consider evidence. The practice of permitting jurors to ask written questions to witnesses enables jurors to be more attentive during trial. Additionally, the practice helps jurors resolve questions they have about evidence and assists attorneys in identifying and resolving issues that may be troubling the jury. Accordingly, statutes should be enacted that expressly give judges the discretion to permit jurors to take notes during trial (with appropriate safeguards). Similarly, statutes should be enacted that expressly gives judges the discretion to permit jurors to ask written questions to witnesses (with appropriate safeguards).

Honorable Wallace B. Jefferson
Chief Justice, Supreme Court of Texas
Chairman, Texas Judicial Council

Senate Committee on Jurisprudence

Interim Report



Report to the 81st Legislature

December 2008

Interim Charges

The Senate Jurisprudence Committee is charged with conducting a thorough and detailed study of the following issues.

1. Study the laws governing suits affecting the parent-child relationship involving non-parents, including suits for possession of or access to a child by a grandparent, and make recommendations for providing the best care and protection for the children involved. Provide an assessment of the constitutional issues involved with these suits.

2. Study the management and storage of adoption records, including the costs and benefits of converting records into digital format. Study ways to increase access by adopted persons and their children and spouses to important family medical history information and ensure that medical history information is updated, while maintaining privacy and anonymity of records.

3. Examine the role of heir finders in Texas and make recommendations regarding professional standards and fees for heir finders.

4. Identify and study best practices for representation of children in child abuse and neglect cases and determine whether to implement further training, oversight, or other requirements for judges, attorneys, and others responsible for child abuse and neglect cases, including child sexual abuse cases.

   Develop and implement tools for children's advocacy centers (CACs) and prosecutors to successfully investigate and prosecute child abusers. Include the following:
   - Explore changes to the rules of evidence that could facilitate the presentation of child testimony in court;
   - Explore making prior extraneous sex offenses admissible during determination of guilt, as has been adopted in the federal court system; and
   - Explore possible expansion of the rules regarding how cases are consolidated and punishments are stacked in a single trial involving a crime committed against a child.

5. Study practices intended to enhance the jury experience and increase jury participation, including:
    - allowing jurors to ask questions of witnesses by submitting them to the judge in writing;
    - allowing lawyers to periodically summarize testimony for the jury;
    - allowing jurors to take notes during trial; and
    - allowing jurors to discuss evidence among themselves during trial.

6. Study and make recommendations relating to the jurisdiction, authority, power and discretion of probate judges in Texas, including the authority of a probate judge to intervene in a non-probate case.

7. Study administrative and legal procedures used by municipalities to exert regulatory authority beyond city limits and extraterritorial jurisdiction. Determine whether conflicts exist with agencies' regulatory authority and regulatory authority delegated to home-rule municipalities, and make recommendations for appropriate delegation and clarification of respective authorities.

8. Monitor the implementation of legislation addressed by the Jurisprudence Committee, 80th Legislature, Regular Session, and make recommendations for any legislation needed to improve, enhance, and/or complete implementation.

Reports

The Committee shall submit copies of its final report no later than December 1, 2008. The printing of reports should be coordinated through the Secretary of the Senate. Copies of the final report should be sent to the Lieutenant Governor (5 copies), Secretary of the Senate, Senate Research, Legislative Budget Board, Legislative Council, and Legislative Reference Library.

The final report should include recommended statutory or agency rulemaking changes, if applicable. Such recommendations must be approved by a majority of the voting members of the Committee. Recommendations should also include state and local fiscal cost estimates,

where feasible. The Legislative Budget Board is available to assist in this regard.

Budget and Staff

Travel costs shall be paid from the operating budgets of Senate members. All other costs shall be borne by the Senate Jurisprudence Committee's interim budget, as approved by the Senate Administration Committee. The Committee should also seek the assistance of legislative and executive branch agencies where appropriate.

Interim Appointments

Pursuant to section 301.041, Government Code, it may be necessary to change the membership of a committee if a member is not returning to the Legislature in 2009. This will ensure that the work of interim committees is carried forward into the 81st Legislative Session.

Hearings by the Senate Committee on Jurisprudence

Date	Location	Charge
May 23, 2008	Houston University of Houston Hilton Hotel	Charges 1 & 4
June 16, 2008	Fort Worth City Council Chamber	Charges 2 & 3
July 16, 2008	Edinburg University of Texas Pan-American	Charge 7
August 5, 2008	San Antonio City Council Chamber	Charge 6
September 17, 2008	Lubbock Texas Tech University School of Law	Charge 5
October 1, 2008	Austin Capitol Extension, E1.012	Decision Meeting
October 27, 2008	Austin Capitol Extension, E1.012	Decision Meeting

Executive Summary of Recommendations

Executive Summary of Recommendations

Charge 1

Study the laws governing suits affecting the parent-child relationship involving non-parents, including suits for possession of or access to a child by a grandparent, and make recommendations for providing the best care and protection for the children involved. Provide an assessment of the constitutional issues involved with these suits.

No recommendations were adopted.

Charge.2

Study the management and storage of adoption records, including the costs and benefits of converting records into digital format. Study ways to increase access by adopted persons and their children and spouses to important family medical history information and ensure that medical history information is updated, while maintaining privacy and anonymity of records.

1. If requested by the birth parent, this recommendation would prohibit release of a birth certificate of an adopted child until the death of the birth parent, regardless of the other birth parent's preference. The birth parent may file an updated medical history and contact preference form with the state registrar indicating the level of contact by the adopted child, if any.

   If the birth parent requests contact via an intermediary, the birth parent must provide contact information for the intermediary. Finally, DFPS or adoption agencies must provide notice to the adoptive parents relating to the birth parent contact preference, as well as the adoptive child's right to obtain a noncertified copy of their birth certificate.

Charge 3

Examine the role of heir finders in Texas and make recommendations regarding professional standards and fees for heir finders.

1. Clarify time limitations on the establishment of heir finder contracts if such contracts request payment, property, or an assigned portion of a decedent's estate.

2. Void an heir finder contract or other agreement that is established within the initial six months that an unclaimed estate is being processed if the contract requests payment, property, or an assigned portion of a decedent's estate.

3. Add enforcement provisions to section 74.507 of the Texas Property Code, which specifies that heir finders may not collect more than 10 percent of a decedent's unclaimed net estate for expenses and services.

4. Specify the liabilities and remedies when a personal representative commits a breach of fiduciary duty to a beneficiary of an unclaimed estate, including but not limited to imposing a lien against the estate or denying payment to the representative.

5. Clearly define penalties for heir finders who operate without a license or violate the provisions of their private investigator's license.

6. Create a licensing, registration, and enforcement program for heir finders at the Texas Department of Public Safety, possibly within the Private Security Bureau which currently licenses private investigators.

Charge 4

Identify and study best practices for representation of children in child abuse and neglect cases and determine whether to implement further training, oversight, or other requirements for judges, attorneys, and others responsible for child abuse and neglect cases, including child sexual abuse cases.

Develop and implement tools for children's advocacy centers (CACs) and prosecutors to successfully investigate and prosecute child abusers. Include the following:

- ***Explore changes to the rules of evidence that could facilitate the presentation of child testimony in court;***
- ***Explore making prior extraneous sex offenses admissible during determination of guilt, as has been adopted in the federal court system; and***
- ***Explore possible expansion of the rules regarding how cases are consolidated and punishments are stacked in a single trial involving a crime committed against a child.***

1. Direct the Permanent Judicial Commission for Children, Youth and Families to conduct a study of best practices for representation of children in child abuse and neglect cases, and determine whether further training, oversight or other requirements are necessary.

2. Increase funding to help recruit and develop CASA volunteers to ensure Court Appointed Special Advocates can be appointed for every child in the system.

3. Increase training, including a drug and alcohol component, for judges and attorneys involved in CPS cases.

4. Require the appointed attorney to meet with the child client sufficiently in advance of the hearing to adequately represent the child witness. If the judge finds the attorney is not meeting this requirement, deny eligibility for the appointment list.

5. Increase training requirements for judges and attorneys ad litem.

6. Authorize judges to remove ad litems who fail to meet education and performance requirements.

7. Require the Permanent Judicial Commission for Children, Youth and Families to compile a comprehensive list that includes all the attorneys ad litem, as well as their qualifications and training. The list should be made available to the public at the courthouse and on the Internet.

8. Limit the total number of cases an attorney ad litem is working on at any one time.

9. Require the Supreme Court to develop rules and procedures that make the courtroom environment more child friendly, such as technology for closed circuit testimony for children, and court companions to sit near the child in the courtroom and while testifying.

Charge 5

Study practices intended to enhance the jury experience and increase jury participation, including:

- ***allowing jurors to ask questions of witnesses by submitting them to the judge in writing;***
- ***allowing lawyers to periodically summarize testimony for the jury;***
- ***allowing jurors to take notes during trial; and***
- ***allowing jurors to discuss evidence among themselves during trial.***

1. Allow juror questions during civil trials by permitting jurors to anonymously submit additional questions in writing before they begin deliberations. Outside the presence of the jury and witnesses, judges could allow counsel to object to the submitted questions. After ruling on admissibility, judges could recall the jury and witnesses. Questions would be read verbatim, and counsel would have the opportunity to cross-examine each witness.

2. Allow juror notetaking during civil trials, but prohibit juror notes during deliberations. The court would keep all notes confidential, destroy them after the jury reaches a verdict, and omit them from the record.

Charge 6

Study and make recommendations relating to the jurisdiction, authority, power and discretion of probate judges in Texas, including the authority of a probate judge to intervene in a non-probate case.

1. Allow transfer of non-probate cases to probate court when it would serve judicial economy AND when venue is permissive in both the court of first filing and the statutory probate court.

Charge 7

Study administrative and legal procedures used by municipalities to exert regulatory authority beyond city limits and extraterritorial jurisdiction. Determine whether conflicts exist with agencies' regulatory authority and regulatory authority delegated to home-rule municipalities, and make recommendations for appropriate delegation and clarification of respective authorities.

No recommendations were adopted.

Charge One

Charge 1: ***Study the laws governing suits affecting the parent-child relationship involving non-parents, including suits for possession of or access to a child by a grandparent, and make recommendations for providing the best care and protection for the children involved. Provide an assessment of the constitutional issues involved with these suits.***

Recommendations

No recommendations were adopted.

Background

Currently, provisions in Chapter 153 of the Texas Family Code place a high burden on grandparents seeking access to their grandchildren.[1] The grandparent is required to show that denying access to the child would significantly impair the child's physical health or emotional well-being; the grandparent's child (one of the parents of the child in question) is either in jail, incompetent, dead, or does not have actual possession of the child; and at least one of the parents has not had parental rights terminated.

Originally, the Family Code gave courts the discretionary power to grant reasonable visitation rights to grandparents. Grandparents had standing to request reasonable access to their grandchildren and simply had to show that access would be in the best interests of the child. However, in 2000, the U.S. Supreme Court ruled that it was unconstitutional to allow third parties' access to children over the objection of their parents, unless the parents could be proved to be unfit. *Troxel v. Granville*, 530 U.S. 57 (2000).[2]

If both of the parents of a child are deceased, the court may consider appointment of a parent, sister, or brother of a deceased parent as a managing conservator of the child, but that consideration does not alter or diminish the discretionary power of the court.[3]

A biological or adoptive grandparent may request possession of or access to a grandchild by filing an original suit or a suit for modification as provided by Chapter 156. The court shall order reasonable possession of or access to a grandchild by a grandparent if: (1) at the time the relief is requested, at least one biological or adoptive parent of the child has not had their parental rights terminated; (2) the grandparent requesting possession of

or access to the child overcomes the presumption that a parent acts in the best interest of the child by proving by a preponderance of the evidence that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being; and (3) a parent of the child has been incarcerated in jail or prison during the three-month period preceding the filing of the petition has been found by a court to be incompetent, is dead, or does not have actual or court-ordered possession of or access to the child.[4]

A biological or adoptive grandparent may not request possession of or access to a grandchild if: (1) each of the biological parents of the grandchild has died, had the person's parental rights terminated, or executed an affidavit of waiver of interest in child or an affidavit of relinquishment of parental rights under Chapter 161 and the affidavit designates an authorized agency, licensed child-placing agency, or person other than the child's stepparent as the managing conservator of the child; and (2) the grandchild has been adopted, or is the subject of a pending suit for adoption, by a person other than the child's stepparent.[5]

Troxel v. Granville

Troxel v. Granville was brought about by the deceased father's parents who sought to have visitation rights with their two granddaughters. The mother informed the grandparents that they could no longer see the children every weekend and instead sought to limit visitation to once a month. The grandparents filed suit, citing a Washington state law that allowed standing to any person, at any time, to file suit seeking visitation rights so long as visitation might serve in the best interest of the child.[6] The grandparents won in state court but the decision was later reversed in the Washington Court of Appeals on the grounds that the ruling interfered with the rights of parents in raising their children.[7]

The U.S. Supreme Court in a plurality opinion held that state laws granting visitation rights to nonparents may not be overly broad and must respect the substantive component of the Due Process Clause that protects against state interference with certain rights and liberty interests. Therefore, the Supreme Court construed that the Washington law violated the fundamental right of parents to make decisions concerning care, custody, and control of their children.[8]

Texas Attorney General Opinion

In 2004, Senator Wentworth asked the Texas Attorney General for an opinion regarding the constitutionality of Texas statutes granting visitation rights to grandparents.[9] General Abbott opined that the statutes were constitutional if applied according to the standards set by *Troxel*.[10]

In 2005, the Texas Legislature amended Family Code provisions to clearly articulate the presumption that parents act in the best interests of their children – a presumption that must be overcome by proving by a preponderance of the evidence that denial of a grandparent's petition for possession of or access to a child would significantly impair that child's physical or emotional well-being.[11]

Conclusion

At the interim hearing in Houston, the Committee received testimony from parents seeking to tighten perceived loopholes in the Family Code, as well as grandparent advocates who believe they face a high threshold in seeking access to their grandchildren.

Based on this testimony, the Committee focused on whether or not current law meets the fundamental requirements mandated in *Troxel v. Granville*. Existing provisions in the Texas Family Code are compliant with the ruling; therefore, the Committee declined to recommend any changes to current law.

Charge Two

Charge 2: ***Study the management and storage of adoption records, including the costs and benefits of converting records into digital format. Study ways to increase access by adopted persons and their children and spouses to important family medical history information and ensure that medical history information is updated, while maintaining privacy and anonymity of records.***

Recommendation

1. **If requested by the birth parent, this recommendation would prohibit release of a birth certificate of an adopted child until the death of the birth parent, regardless of the other birth parent's preference. The birth parent may file an updated medical history and contact preference form with the state registrar indicating the level of contact by the adopted child, if any.**

   If the birth parent requests contact via an intermediary, the birth parent must provide contact information for the intermediary. Finally, DFPS or adoption agencies must provide notice to the adoptive parents relating to the birth parent contact preference, as well as the adoptive child's right to obtain a noncertified copy of their birth certificate.

Background

Under current law, when an adoption is finalized, the original birth certificate of the child being adopted is sealed and they are issued a supplemental birth certificate, which replaces the name of their birth parents with the names of their adoptive parents.[12] Supplementary birth certificates differ from standard birth certificates because they do not divulge the name or location of the birth parents, regardless of the wishes of the adopted parents, child or court.

The original birth certificate cannot be accessed without an order issued by the same court that originally granted the adoption. In some cases, an adoptee may not be aware of which court granted his or her adoption, in which case the adoptee must pay a fee to register with the Central Adoption Registry in order to ascertain the court's name.[13] The Central Adoption Registry, maintained by the Department of State Health Services (DSHS)

reunites adult adoptees with birth parents or siblings who register in order to look for them.[14]

Senate Bill 221

Senate Bill 221, 80th Session, enabled adults who were adopted as children to access their original birth certificate without having to go through the courts.[15] The bill established a procedure for adopted persons over the age of 18, or if the adopted person is deceased, his or her adult descendant, adult sibling, or surviving spouse, to obtain a copy of the original birth certificate. In addition, the bill required the Department of Family and Protective Services (DFPS) or a licensed adoption agency to inform the birth parents about the rights of an adopted child to obtain a noncertified copy of the birth certificate.

Senate Bill 221 also created a centralized registry at the Department of State Health Services where birth parents could record their wishes relating to contact and relay health concerns without exposing their identity. Senate Bill 221 created a contact preference form to allow birth parents to communicate with adopted children. In addition, birth parents who do not wish to be reunited with an adopted child could express that preference, or request communication with their adopted child through an intermediary.

The Jurisprudence Committee passed Senate Bill 221 with two important changes. The substitute required adoption entities to provide the contact preference form to the birth parents, and the petition for adoption would not have been granted until the parents had filed a completed form. In addition, the substitute changed the requirements for birth parents prior to January 2008. Instead of opting out of the contact preference form requirement, birth parents could opt in by going onto the DSHS website and filling out the contact preference form/medical history if they choose.

Senate Bill 221 bill died in the House of Representatives.

Conclusion

At the interim hearing in Fort Worth, the Committee received testimony from adoptees who wish to know more about their birth parents, as well as adoption advocates, whose main concern was maintaining the privacy and confidentiality of birth parents.

A required contact preference form would notify birth parents of the contact options available, and allow for updates to any important medical history information. All adoptions after the effective date of the recommendation would require the adoption placement agency to notify the birth parents about the contact preference and updated medical history forms. Birth parents would have the option to fill out the form as "no contact" if they do not wish to be contacted in the future. In addition, birth parents could choose to communicate directly to the adoptee, or through a confidential intermediary.

All adoptions before the effective date of the recommendation would not be affected, and would continue with the current practice for notification preferences. Therefore, birth parents could go onto the Department of State Health Services website and fill out the contact preference form and medical history information if they choose.

The Committee's recommendation should balance the interests of adoptee contact versus birth parent confidentiality by allowing adoptees to communicate to birth parents, yet protect the privacy of birth parents who do not wish to be contacted.

Charge Three

Charge 3: *Examine the role of heir finders in Texas and make recommendations regarding professional standards and fees for heir finders.*

Recommendations

1. **Clarify time limitations on the establishment of heir finder contracts if such contracts request payment, property, or an assigned portion of a decedent's estate.**

2. **Void an heir finder contract or other agreement that is established within the initial six months that an unclaimed estate is being processed if the contract requests payment, property, or an assigned portion of a decedent's estate.**

3. **Add enforcement provisions to section 74.507 of the Texas Property Code, which specifies that heir finders may not collect more than 10 percent of a decedent's unclaimed net estate for expenses and services.**

4. **Specify the liabilities and remedies when a personal representative commits a breach of fiduciary duty to a beneficiary of an unclaimed estate, including but not limited to imposing a lien against the estate or denying payment to the representative.**

5. **Clearly define penalties for heir finders who operate without a license or violate the provisions of their private investigator's license.**

6. **Create a licensing, registration, and enforcement program for heir finders at the Texas Department of Public Safety, possibly within the Private Security Bureau which currently licenses private investigators.**

Background

Heir finders compose a little-known profession of researchers, search firms or, in some cases, detectives who track down relatives of people who have died without a will or known next of kin. In addition, heir finders seek missing owners of unclaimed property for a fee. Fees for heir finders can be

considerable, typically charging 10 to 33 percent of an estate's value. Many states, however, place caps on the amount an heir finder can claim.[16]

Thirty-six states statutorily limit the fees charged by heir finders. These restrictions on the percentage of value of the property reported, recovered, collected, or claimed range from 5 percent in Washington to 35 percent in New Jersey. Fourteen states do not regulate the charges assessed by heir locators.[17] Section 74.507 of the Texas Property Code states that heir finders may not contract for more than 10 percent of the value of the unclaimed property. This is the only statutory regulation regarding heir finders in Texas.[18]

Thirteen states require an heir finder to be a licensed private investigator.[19] The Texas Department of Public Safety, Private Security Bureau, licenses heir finders, requiring a Class A - Private Investigation Company license to operate as an heir finder.[20] In five other states, heir finders are required to register with the state office responsible for unclaimed property. States such as Washington and Vermont have much more stringent guidelines. Both states require registration, but Washington requires a Unified Business Identifier and Master Business License, while Vermont insists on a performance bond of not less than $10,000 for each heir finder.[21]

The Texas Comptroller of Public Accounts handles unclaimed property in Texas. Unclaimed property in Texas is defined as an abandoned financial asset of at least one year or more, including stocks, escrow accounts, checks and bonds.[22] Businesses, governmental agencies, and financial institutions are required to report abandoned property in their custody.[23] Published lists of unclaimed property owners are available online and in newspapers. The Comptroller's Office holds the property in trust until claimed.

Eight states, including Texas, have no statutory provisions regarding the form, terms, or restrictions imposed on a contract to locate property. (See Appendix H for a sample heir finder contract.) During the 80th Legislative Session, House Bill 2479 would have created a liability for certain personal representatives who breach their fiduciary duties to beneficiaries.[24] In addition, the bill attempted to prohibit contracts involving heir finders in Texas in the first six months after filing a pleading. House

Bill 2479 did not pass as several members believed the issue deserved closer examination.

Conclusion

The Committee considered public testimony from probate judges, the Texas Comptroller of Public Accounts, the Texas Department of Public Safety (DPS), and professional heir finder companies. Most witnesses expressed frustration pertaining to the lack of heir finder regulation, the tendency of heir finders to become prematurely involved in the estate distribution process, and the exorbitant fees charged by some heir finder companies.

To ensure appropriate supervision, the Committee recommends that Texas heir finder companies register with DPS to obtain a professional license. Heir finders operating without a license in Texas would be subject to certain penalties. Once a company registers with the Private Security Bureau, DPS could collaborate with the Comptroller to monitor heir finders and enforce fee limitations.

In addition, the Committee recommends requiring a six-month waiting period before the establishment of new heir finder contracts to allow sufficient time for probate courts to initiate the estate distribution process without interruption. Heir finders could offer supplementary information for unlocated heirs after that time, and could charge up to 10 percent of a decedent's unclaimed net estate for expenses and services. For added protection, heir finders could be liable if they breach a fiduciary duty to a beneficiary of an unclaimed estate.

These recommendations should clarify the process for obtaining an heir finder's license, and clearly define their duties and responsibilities in Texas. Furthermore, the recommendations should bring adequate oversight and consistency to the heir finder industry.

Charge Four

Charge 4: ***Identify and study best practices for representation of children in child abuse and neglect cases and determine whether to implement further training, oversight, or other requirements for judges, attorneys, and others responsible for child abuse and neglect cases, including child sexual abuse cases.***

Develop and implement tools for children's advocacy centers (CACs) and prosecutors to successfully investigate and prosecute child abusers. Include the following:

- ***Explore changes to the rules of evidence that could facilitate the presentation of child testimony in court;***
- ***Explore making prior extraneous sex offenses admissible during determination of guilt, as has been adopted in the federal court system; and***
- ***Explore possible expansion of the rules regarding how cases are consolidated and punishments are stacked in a single trial involving a crime committed against a child.***

Recommendations

1. **Direct the Permanent Judicial Commission For Children, Youth and Families to conduct a study of best practices for representation of children in child abuse and neglect cases, and determine whether further training, oversight or other requirements are necessary.**

2. **Increase funding to help recruit and develop CASA volunteers to ensure Court Appointed Special Advocates can be appointed for every child in the system.**

3. **Increase training, including a drug and alcohol component, for judges and attorneys involved in CPS cases.**

4. **Require the appointed attorney to meet with the child client sufficiently in advance of the hearing to adequately represent the child witness. If the judge finds the attorney is not meeting this requirement, deny eligibility for the appointment list.**

5. **Increase training requirements for judges and attorneys ad litem.**

6. **Authorize judges to remove ad litems who fail to meet education and performance requirements.**

7. **Require the Permanent Judicial Commission for Children, Youth and Families to compile a comprehensive list that includes all the attorneys ad litem, as well as their qualifications and training. The list should be made available to the public at the courthouse and on the Internet.**

8. **Limit the total number of cases an attorney ad litem is working on at any one time.**

9. **Require the Supreme Court to develop rules and procedures that make the courtroom environment more child friendly, such as technology for closed circuit testimony for children, and court companions to sit near the child in the courtroom and while testifying.**

Background

Prior to September 2007, a judge was required to complete eight hours of training in family violence, sexual assault and child abuse during the first term of office. Judicial officers were required to complete the training within the first four years of service. Judges and judicial officers also had to complete an additional three hours of training every four years thereafter. Currently, the Texas Center for the Judiciary (TCJ) oversees judicial education for district and county court at law judges, and monitors the annual training for active judges and judges eligible for assignment. The TCJ notifies the presiding judges and the Court of Criminal Appeals of judges who have failed to meet the educational requirements. If judges fail to comply with the educational and training requirements, their names are referred to the State Commission on Judicial Conduct for disciplinary action.

Last session, House Bill 3505 amended section 22.110 of the Texas Government Code to require inclusion of certain subjects like child neglect, family violence, sexual assault, and child abuse as part of the judicial training.[25] The bill also added certain subtopics to the mandatory child abuse and neglect instruction, such as the physical and emotional impact on child development. House Bill 3505 required the organization providing the training to have at least three years experience in training professionals on

child abuse and neglect issues or have personnel or planning committee members who have at least five years experience working directly in the field of child abuse and neglect prevention and treatment.

Finally, House Bill 3505 increased the minimum amount of training required from eight to 12 hours. At least four of those hours must be dedicated to issues related to child abuse and neglect, and cover at least two of five required subtopics. The bill also increased continuing education requirements from three to four hours, with at least two of those hours dedicated to issues related to child abuse and neglect.

Rule 2d of the Rules of Judicial Education and Government Code, Section 74.055(c)(5) require former or retired judges who are subject to assignment to comply with the same education requirements that apply to active judges. However, a judge can be exempted from these requirements by filing an affidavit stating that the judge does not hear any cases involving family violence, sexual assault, or child abuse and neglect.

All attorneys licensed in Texas are required to complete 15 hours of continuing legal education (CLE) each year. There are no specific requirements regarding the subject matter unless the attorney is board certified in a specific area. Currently there is no board certification for child abuse and neglect.[26]

Texas Family Code, section 107.004(b) requires an attorney ad litem appointed to represent a child in a CPS case to complete a minimum of three CLE hours relating to child advocacy, including best practices for a removal proceeding. However, this requirement may be waived if a court finds that the attorney ad litem has sufficient experience equivalent to the required education.

Children's Advocacy Centers

Children's Advocacy Centers (CACs) offer safe, neutral settings for the assessment of children and families who have fallen victim to child abuse. CACs perform comprehensive evaluations to determine what services are necessary and available for restoring the lives of the victims. CACs also provide medical and mental health services for the children and their families.

Children's Advocacy Centers also collaborate with agencies investigating and prosecuting child abuse and neglect. CACs coordinate the activities of governmental entities relating to child abuse investigations and facilitate the delivery of services to child abuse victims and their families. A multidisciplinary team is appointed to ensure the efficient and appropriate disposition of child abuse cases through the civil and criminal justice systems.

Child Testimony

In certain cases that involve sex crimes against children, Article 38.072 of the Texas Code of Criminal Procedure provides an exception to the hearsay rule by allowing testimony from an outcry witness. An outcry witness is the first person over the age of 18 to whom the child victim mentioned details of the offense. Common examples of outcry witnesses are family members, teachers, and medical personnel.

CACs employ forensic interviewers who use research-based techniques in a developmentally appropriate manner to help ascertain from child victims the level and type of abuse alleged. However, forensic interviewers rarely qualify as an outcry witness, so they are unable to testify at trial unless called upon to explain and narrate the recorded interviews of the alleged victims, which may not be used at trial due to other statutory restrictions.

Admissibility of Prior Extraneous Offenses

Rule 413 of the Federal Rules of Evidence pertains to admissibility of similar, previously committed crimes in sexual assault cases. In federal sexual assault cases, evidence of the defendant's commission of another offense of sexual assault is admissible, and may be considered on any matter to which it is relevant. In contrast, current Texas law does not allow for admission of similar offenses in sexual assault cases where the victim is an adult.[27]

Rule 414 of the Federal Rules of Evidence allows prosecutors to admit prior evidence of the defendant's commission of a similar offense against another child into criminal cases. Under the Texas Code of Criminal Procedure, however, such evidence is admitted only if the prior bad acts were against the child who is the victim in the alleged offense.[28]

Case Consolidation and Stacked Punishments

Chapter 3 of the Texas Penal Code states that if cases are consolidated and heard together at one trial, then each of the sentences arising out of convictions for those cases must run concurrently.[29] In order to stack sentences so that they run consecutively, each case must be tried separately. In addition, if the prosecution files a motion to consolidate a defendant's cases into one proceeding, the defendant has an absolute right to veto that decision and sever the cases. However, any resulting sentences from those separate trials can be stacked to run consecutively.

One exception to this general rule is found in Penal Code, section 3.03, which allows sentences for the following offenses to be stacked, even if multiple charges were consolidated and tried in one proceeding:

- Intoxication Assault
- Intoxication Manslaughter
- Online Solicitation of a Minor
- Continuous Sexual Assault of a Young Child*
- Indecency with a Child*
- Sexual Assault of a Child*
- Aggravated Sexual Assault of a Child*
- Prohibited Sexual Conduct*
- Sexual Performance by a Child*
- Improper Photography or Visual Recording
- Possession or Promotion of Child Pornography

*Only if the victim was under 17 years of age at the time of the offense.

In these cases, the prosecutor may try every allegation in one trial, but request that the sentences, if any, be stacked. However, the ultimate decision whether the sentences run concurrently or consecutively is entirely up to the judge.

Another exception to this general rule concerns drug crimes prosecuted under the Texas Controlled Substances Act. Health and Safety Code, section 481.132 allows a defendant to be prosecuted in a single criminal action for all offenses arising out of the same criminal episode.

Unlike Texas, the federal rules provide that sentences arising from consolidated cases can be stacked, with only a few exceptions. 18 U.S.C.

Chapter 227, section 3584 states that multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. In other words, multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

Conclusion

At the interim hearing in Houston, the Committee heard from various stakeholders seeking to improve outcomes for children in child abuse and neglect cases. The Committee received testimony offering methods to strengthen the judicial process in child abuse and neglect cases, improve the representation of children, and increase specialized education for judges and attorneys.

The Committee heard from various witnesses on the need for increased training requirements for both judges and attorneys ad litem. Child Protective Services (CPS) cases commonly involve many issues in addition to abuse and neglect, specifically drug or alcohol abuse. To address these concerns, the Committee recommends increased education and training requirements for judges and attorneys ad litem involved in CPS cases. The additional training should include, at a minimum, a drug and alcohol component in its curriculum to address common, tangential problems regarding child abuse.

To prevent attorneys ad litem from assuming an excessive caseload, many witnesses suggested a limit on the number of cases that can be handled concurrently by any one attorney ad litem. The Committee recommends a reasonable case limit that will promote more efficient, effectual representation, resulting in better outcomes for children.

Current law requires an attorney ad litem to meet with the child-client within a reasonable time after the appointment. The Committee made recommendations to strengthen this requirement, and ensure enforcement by giving judges the ability to deny appointment eligibility when attorneys fail to meet this responsibility.

In an effort to encourage judges to appoint qualified attorneys, the Committee recommends adopting procedures for judges to remove an attorney who fails to meet mandatory education and performance

requirements. In addition, the Committee directs the Permanent Judicial Commission for Children, Youth and Families to compile a comprehensive list that includes all local attorneys ad litem, as well as their qualifications and completed training requirements. To increase public awareness of available, qualified attorneys in the region and ensure attorneys ad litem are being appointed on a rotational basis, the list would be available at the courthouse and on the Internet.

To determine further best practices for judges and attorneys ad litem in CPS cases, the Committee recommends the Permanent Judicial Commission for Children, Youth and Families study best practices for representation of children in child abuse and neglect cases, appropriate training and education requirements for judges and attorneys involved in CPS cases, and the potential need for more oversight and enforcement. The Commission would issue a report containing suggested statutory or rule changes by September 1, 2009, allowing the Committee sufficient time to review the recommendations during the interim.

Texas courts depend heavily on Court Appointed Special Advocate (CASA) volunteers to provide effective and efficient guardian ad litem and volunteer advocate services for children in CPS cases.[30] CASA receives federal funding from the Victims of Crime Fund; however, these funds have recently been reduced. Recognizing the importance of CASA in the CPS process, the Committee recommends increased state funding to help recruit and develop more CASA volunteers.

Texas judges currently have the authority to implement certain procedures to create a more supportive setting for children testifying in criminal proceedings, such as closed caption television and court companions. To encourage the proliferation and use of such methods, the Committee recommends requiring the Supreme Court to develop rules and procedures to make the courtroom environment more accommodating to young witnesses.

Charge Five

Charge 5: ***Study practices intended to enhance the jury experience and increase jury participation, including:***

- ***allowing jurors to ask questions of witnesses by submitting them to the judge in writing;***
- ***allowing lawyers to periodically summarize testimony for the jury;***
- ***allowing jurors to take notes during trial; and***
- ***allowing jurors to discuss evidence among themselves during trial.***

Recommendations

1. **Allow juror questions during civil trials by permitting jurors to anonymously submit additional questions in writing before they begin deliberations. Outside the presence of the jury and witnesses, judges could allow counsel to object to the submitted questions. After ruling on admissibility, judges could recall the jury and witnesses. Questions would be read verbatim, and counsel would have the opportunity to cross-examine each witness.**

2. **Allow juror notetaking during civil trials, but prohibit juror notes during deliberations. The court would keep all notes confidential, destroy them after the jury reaches a verdict, and omit them from the record.**

Background

The Supreme Court of Texas established the Jury Assembly and Administration Task Force (Task Force) in July 2006 to evaluate the need for reliable jury lists, uniform statewide jury plans, trained officials, summons enforcement procedures, and juror exemption processing.[31] The order creating the Task Force also encouraged the elimination of opportunities for local manipulation that could jeopardize random jury selection. The Supreme Court appointed a wide range of professionals to the 29-member panel, including judges, jury administrators, attorneys, and law professors.

The Task Force issued a final report on February 2, 2007 which recognized the need to re-establish integrity in the jury process,

technologically update jury selection, minimize opportunities for experimentation, and harmonize conflicting statutory provisions regarding summoning and qualifying jurors in civil and criminal cases.[32] In addition, the report recommended that the Secretary of State govern certain aspects of the juror process while leaving the establishment and implementation of written jury plans to individual counties, pending approval by the Supreme Court. This approach offered increased uniformity throughout the state, yet allowed for local control.

Senate Bill 1300

Senate Bill 1300, 80th Legislative Session, addressed certain recommendations from the 2007 Task Force report, such as juror exemptions and how to maintain an inclusive, reliable jury pool.[33] The bill also authorized juror notetaking, juror discussions, submission of written questions by jurors, and interim summations by attorneys. Specifically, the bill required the name of a prospective juror not impaneled due to an excuse be immediately returned to the jury wheel, and it provided limitations to jury service exemptions for legislators and legislative staff. Senate Bill 1300 passed the Jurisprudence Committee last session and was placed on the intent calendar, but the bill was not taken up on the Senate floor.

The proposed changes in Senate Bill 1300 would have increased juror participation and comprehension, and assisted jurors in reconstructing evidence during deliberations with the aid of notes and prior discussion. Various studies support that such jury innovations serve as useful memory aids, increase juror confidence, and enhance the quality of deliberations.[34] In addition, the Texas Court of Appeals ruled that allowing jurors in civil cases to submit questions to witnesses does not constitute fundamental error.[35] The Court additionally found that there is nothing inherently improper about allowing occasional questions from jurors in conjunction with appropriate procedural safeguards to protect rights of parties and to prevent undue trial delay. A list of states that allow juror questions and juror notetaking can be found in Appendix J.

Opponents believe that juror notetaking and discussion could encourage jurors to form premature judgments, distract them during the trial, and adversely affect the quality of juror discussions during deliberations. In addition, critics also caution that interim summations may decrease jurors'

focus throughout the trial due to an increased reliance on attorneys' summaries rather than the presented evidence.

Conclusion

At the interim hearing in Lubbock, the Committee received public testimony from numerous witnesses regarding the advantages and disadvantages of juror questions and juror notetaking. Most witnesses supported both concepts, offered relevant examples, and suggested various implementation methods for these innovations.[36] In addition, testimony highlighted a growing frustration that the Supreme Court Jury Task Force suggested similar jury reforms as early as 1997, but the Texas Supreme Court has yet to adopt any of the recommendations.[37]

In contrast, several witnesses objected to juror notes in the deliberation room or juror discussions of evidence during the trial due to the potential bias created by such practices. Certain witnesses expressed concern that juror notes may create a reversible error if they become part of the official court record. Additionally, many witnesses cautioned that interim summations could cause unnecessary delays and create an unfair advantage for certain parties.

In light of this testimony, the Committee recommends that juror questions and juror notetaking may be permitted during all civil trials, allowing the courts to implement such practices at their discretion. Jurors could submit written questions before deliberation, and after the judge rules on admissibility, the questions would be read aloud. Witnesses could be recalled to answer the question, and counsel would be given a brief cross-examination period. In addition, juror notetaking could be permitted to aid in memory recall and participation, but those notes would be excluded from the deliberation room and would not be part of the official court record. The court would keep the notes confidential and destroy them at the trial's conclusion.

In order to preserve judicial discretion, these recommendations would be permissive, and applied on a case-by-case basis. Allowing juror questioning should increase juror participation and engagement prior to the deliberation phase of the trial. Furthermore, testimony and research support that notetaking should increase jurors' recall of important details and

evidence during deliberation, since jurors would rely exclusively on their memory at that time.

Charge Six

Charge 6: ***Study and make recommendations relating to the jurisdiction, authority, power and discretion of probate judges in Texas, including the authority of a probate judge to intervene in a non-probate case.***

Recommendation

1. **Allow transfer of non-probate cases to probate court when it would serve judicial economy AND when venue is permissive in both the court of first filing and the statutory probate court.**

Background

Since 1983, statutory probate courts have had the power to transfer cases filed elsewhere that are appertaining or incident to an estate pending in a statutory probate court to themselves for trial and disposition.[38] One of the key reasons for this power is to permit these specialty probate courts to resolve issues upon which the value of the estate depends, promoting the prompt and efficient administration of estates.

The use of this power has been largely uncontroversial, except in personal injury and wrongful death tort cases. Occasionally, a statutory probate court has transferred a personal injury or wrongful death case to itself, even in situations where venue may not otherwise have been proper in the county where the probate court sits. Use of the transfer power in these cases has given rise to accusations of forum shopping.

In 1995, the Legislature enacted section 15.007 of the Civil Practice and Remedies Code (CPRC). This section makes certain that provisions of the CPRC trump conflicting venue provisions of the Probate Code regarding personal injury, death and property damage claims. The enactment of this law failed to eliminate the practice of statutory probate courts transferring tort cases, however, because many probate judges did not consider the current provisions in the Probate Code to be venue provisions.

Gonzalez v. Reliant Energy[39]

Both proponents and opponents of the power of statutory probate judges to transfer tort cases filed suit, and the courts of appeal split on the issue. Finally, in 2005, the Supreme Court of Texas conclusively upheld CPRC §15.007 in *Gonzalez v. Reliant Energy*, 159 S.W.3d 615 (Tex. 2005).

The Court ruled that sections 5(b) and 608 of the Probate Code are transfer provisions, and do not confer venue, concluding that CPRC §15.007 controls in connection with the attempted transfer of personal injury, death, or property damage suits.

Therefore, under section 15.007, a statutory probate court cannot effectuate such a transfer unless venue in the county in which the probate court is located would be proper under general venue provisions found under §15.002 of the Civil Practice and Remedies Code.

Senate Bill 392

Senate Bill 392, filed last session, attempted to clarify that a statutory probate court may hear and transfer to themselves non-tort causes of action appertaining or incident to an estate being administered, regardless of whether the venue would otherwise be proper. This bill, and its companion, House Bill 660, were both left pending in the Jurisprudence Committee last session.

Conclusion

At the interim hearing in San Antonio, the Committee heard from several probate judges, who believe the current practice allowing transfers promotes efficiency and judicial economy. However, other witnesses testified that when non-probate cases are transferred to an inappropriate venue, it can constitute forum-shopping.

Texas Probate Code, sections 5B and 608 do not confer venue upon a probate court, instead only provide a mechanism to transfer the case. Therefore, sections 5B and 608 do not allow a statutory probate court to override mandatory venue provisions found in section 15.001(b) of the Texas Civil Practice and Remedies Code.

The Committee agrees with the Texas Supreme Court ruling in *Gonzalez v. Reliant Energy*, and believes that the purpose of sections 5B and 608 should not supplant well-established mandatory venue provisions by conferring venue when it would not otherwise be permissible. Therefore, this recommendation would allow the court of original filing to transfer a case to statutory probate court only if venue is proper in the county where the statutory probate court is located.

Charge Seven

Charge 7: ***Study administrative and legal procedures used by municipalities to exert regulatory authority beyond city limits and extraterritorial jurisdiction. Determine whether conflicts exist with agencies' regulatory authority and regulatory authority delegated to home-rule municipalities, and make recommendations for appropriate delegation and clarification of respective authorities.***

Recommendations

No recommendations were adopted.

Background

During the 80th Regular Session, Senate Bill 1317 was the most recent attempt to limit extraterritorial jurisdiction and the ability of municipalities to exert regulatory authority beyond city limits, and addressed the relationship between the unique regulatory authority of state agencies and home-rule municipalities.[40]

According to section 217.042 of the Local Government Code, a municipality may define and prohibit any nuisance within the limits of the municipality and within 5,000 feet outside those limits. In addition, Article XI, section 5 of the Texas Constitution forbids municipal ordinances from conflicting with general law. Finally, case law provides that an ordinance of a home-rule that attempts to regulate a subject matter preempted by a state statute is consequently unenforceable to the extent that it conflicts with state law.[41]

Proposed Ordinance

Last year, the City of Houston proposed to regulate air pollution outside of its corporate city limits through a local nuisance ordinance. In February 2007, Houston Mayor Bill White proposed amending the City's nuisance ordinance to help reduce the amount of hazardous pollutants in Houston's air.[42] The proposed ordinance would have allowed Houston to levy fines of up to $2,000 per day against polluting industrial facilities located outside of its corporate boundaries. In addition, the ordinance would have treated certain pollutants, like benzene and chlorine, more stringently than they are treated under state or federal law.

To prohibit the use of city nuisance ordinances for such purposes, Senate Bill 1317, filed last session, authorized a home-rule municipality to define and prohibit a nuisance within 5,000 feet outside the limits of the municipality. However, the definition could not address levels of emissions authorized in an air permit issued by the Texas Commission on Environmental Quality (TCEQ). Senate Bill 1317 passed the Senate, but later died in the House Calendars Committee.

Houston Regional Air Quality Task Force

The Houston Regional Air Quality Task Force was organized to develop a comprehensive understanding of the state of air quality in the region, the human health impacts and risks, and key contributors to air quality. The 18-member Task Force was specifically charged with identifying effective regulatory mechanisms and voluntary initiatives that could help reduce air toxin emissions and to make recommendations to enhance air quality improvement efforts in the greater Houston area.

The City of Houston agreed to set aside the proposed amendment to the nuisance ordinance while the Task Force studied alternatives. The Task Force issued its report in September 2007, containing 18 recommendations for the City of Houston, Harris County, the Texas Commission on Environmental Quality, and the Environmental Protection Agency aimed at reducing toxic air pollutants in Houston's air.[43]

In May 2008, Houston Mayor Bill White renewed efforts to reduce air pollution in Houston by issuing a Benzene Action Plan, and requesting local plants to set five-year public goals for reducing emissions, and promised to file objections when plants apply for emission permits or renewals.[44]

Conclusion

At the interim hearing in Edinburg, the Committee heard testimony from various interested parties, including residents and mayors of cities surrounding the Port of Houston, air quality interest groups, representatives from petrochemical companies, City of Houston staff, as well as experts from the Texas Commission on Environmental Quality.

The Committee does not wish to interfere with long-standing principles regarding extraterritorial jurisdiction and nuisance law. In

addition, many of the recommendations suggested were not germane to the scope of the interim charge, nor within the Committee's jurisdiction. Therefore, the Committee declined to make any changes to current law regarding this issue.

Endnotes

Endnotes

[1] Texas Family Code, §153.002.
[2] See Appendix A.
[3] Texas Family Code, §153.431.
[4] Texas Family Code, §153.433.
[5] Texas Family Code, §153.444.
[6] Wash Rev. Code, §26.10.160(3).
[7] *In re Troxel*, 87 Wash. App. 131, 133, 940 P.2d 698, 698-699 (1997).
[8] *Troxel v. Granville*, 530 U.S. 57 (2000).
[9] See Appendix B.
[10] Op. Tex. Atty Gen. GA-0260 (2004).
[11] Texas Family Code, §153.002.
[12] Texas Health & Safety Code, §192.008.
[13] See Appendix C.
[14] See Appendix D.
[15] Texas Senate Bill 221, 80th Legislature (2007).
[16] See Appendix E.
[17] Memorandum from the Texas Legislative Council to the Texas Senate Jurisprudence Committee, November 20, 2007.
[18] See Appendix F.
[19] Memorandum from the Texas Legislative Council to the Texas Senate Jurisprudence Committee, November 20, 2007.
[20] Texas Occupations Code, Title 10, Ch. 1702, Rule 1702.103.
[21] Memorandum from the Texas Legislative Council to the Texas Senate Jurisprudence Committee, November 20, 2007.
[22] Texas Property Code, Title 6, Ch. 72-75.
[23] See Appendix G.
[24] Texas House Bill 2479, 80th Legislature (2007).
[25] Texas House Bill 3505, 80th Legislature (2007).
[26] State Bar of Texas, Minimum Continuing Legal Education, http://www.texasbar.com/Template.cfm?Section=Minimum_Continuing_Legal_Ed. Accessed October 13, 2008.
[27] Texas Code of Criminal Procedure, Art. 38.37.
[28] Texas Code of Criminal Procedure, Art. 38.37.
[29] Texas Penal Code, §3.03.
[30] See Appendix I.
[31] Texas Supreme Court, Resolution No. 06-9057 (July 11, 2006).
[32] Task Force on Jury Assembly and Administration, *Task Force on Jury Assembly and Administration Report to the Supreme Court of Texas* (February 2, 2007).
[33] Texas Senate Bill 1300, 80th Legislature (2007).
[34] Shari Seidman-Diamond et al., "Inside the Jury Room: Evaluating Juror Discussions During Trial," *Judicature*, vol. 87, no. 2 (September-October, 2003), pp. 54-58; Larry Heuer and Steven Penrod, "Increasing Jurors' Participation in Trials: A Field Experiment with Jury Notetaking and Question Asking," *Law and Human Behavior*, vol. 12, no. 3 (September 1988), pp. 231-261; Leonard B. Sand and Steven Alan Reiss, "A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit," *New York University Law Review*, vol. 60 (June 1985), pp. 423-497; and "Developments in the Law: The Civil Jury," *Harvard Law Review* v. 110 (May 1997) pp. 1408-1536.
[35] *Hudson v. Markum*, 948 S.W. 2d 1 (Tex. App. – Dallas 1997).
[36] See Appendices K, L, and M for examples of juror questions, procedure, and format.
[37] Texas Supreme Court Jury Task Force, *Executive Summary of the Report of the Supreme Court Jury Task Force* (September 8, 1997).
[38] Texas Probate Code, §§5(b) and 608.
[39] See Appendix N.

[40] Texas Senate Bill 1317, 80th Legislature (2007).
[41] *Dallas Merchant's and Concessionaire's Association v. City of Dallas*, 852 S.W. 2d 489 (1993).
[42] Memorandum from the City of Houston, March 6, 2007.
[43] See Appendix O.
[44] See Appendix P.

Kennon L. Peterson

From: Ann L. Diamond [adiamond@tarrantcounty.com]
Sent: Tuesday, November 18, 2008 3:03 PM
To: Barbara Walther; Kennon L. Peterson
Cc: Russ Meyer
Subject: SBOT Court Rules Committee's input on Jury Innovation issues

Judge Barbara Walther, Chair, SBOT Committee on Jury Service
Ms. Kennon Peterson, Rules Attorney, Texas Supreme Court

Dear Judge Walther and Kennon,

You asked for input of the SBOT Standing Committee on Court Rules regarding the jury proposals from the Committee on Jury Service. The SBOT Standing Committee on Court Rules met on Friday, November 14, 2008.

The SBOT Committee on Court Rules has asked that I convey that there is a difference of opinion on the matters presented, especially regarding whether there should be a guarantee that juror notes are to be permitted to be taken back into deliberations. The concern most often raised is that individuals take notes with varying degrees of accuracy and a person who took notes is likely to have undue credibility during deliberations compared to other jurors if a dispute arises. This credibility boost was considered by many on the Committee to be unlikely to correlate to actual accuracy. Instead, several Committee members felt that, in lieu of expanded note taking, consideration should be given to making it easier for jurors to hear or see a playback of the actual testimony to clarify or reconcile juror recollection.

Some members of the Committee liked the idea of jurors taking notes and of permitting them to be taken back into deliberation, reasoning that the purpose of note taking is not clear if the notes are not permitted to be referred to during deliberations. Others on the Committee pointed out that note taking can be part of the concentration and learning process, as some people learn better taking notes than they do just listening. Still others were concerned that people can obsess about their own note taking, losing much of what goes on in trial in the quest to write copious notes.

Those who opposed the notes being guaranteed to be taken back into deliberations outnumbered those who supported notes being taken back into deliberations. Even when the matter is left to the trial judge, Committee members generally felt that great caution should be used in determining which cases were suited for taking notes into deliberations.

Some suggested that there are really two kinds of juror rights/concerns. Concerns such as getting an escort to their mode of transportation or the availability of counseling after trial and other creature comfort-type issues seem quite different from concerns such as note taking (the latter relating directly to the case, the former more to the security and personal comfort of the jurors). Some members of the Committee felt that the two kinds of concerns may not need to be all treated the same -- perhaps the creature comfort issues are more appropriate to a bill of rights and the case-related issues such as note taking are best left to the trial judge.

Regarding all matters that relate to actual trial procedure (juror note taking, for example) the Committee has deep concerns about having what are essentially trial court procedural rules contained in a bill of rights or any other law outside the TRCP. As a structural matter, consistent with good drafting principles, anything that is essentially a trial procedure requirement should be contained in a properly enacted Rule of Procedure and not in some other law. A bill of rights outside of the TRCP is not the proper format for enacting new trial procedural rules.

As to juror notes in particular, it was suggested by a Committee member that perhaps the Court of Criminal Appeals case you shared with us regarding juror note taking is sufficient guidance and introducing anything beyond or different from that would open up challenges or ambiguities without advancing justice.

Another matter: it was pointed out that requiring courts to provide notebooks may be a cost burden on smaller

counties, if no funding is provided for this mandate.

Thank you for inviting our input. Please let us know if we may be of further service.

Ann Diamond
Chair
SBOT Standing Committee on Court Rules
adiamond@tarrantcounty.com
817.884.1233

cc: Russ Meyer, Vice Chair, SBOT Standing Committee on Court Rules

DRAFT JUROR BILL OF RIGHTS

Elements

1. Jurors have a right to receive instructions from the judge or court staff on their privacy rights as jurors.

2. Jurors have a right to be advised of how the information they provide will be used, how it will be retained, and who will have access to that information.

3. Jurors have a right to be advised of their right to provide answers to sensitive questions privately to the judge and the attorneys for parties in the case.

4. Jurors have a right to be kept informed of the process, the schedule planned for the day, and any changes to the schedule as those changes occur.

***5. Jurors have a right to take notes for their personal use during trial *at the discretion of the court* in any case that the testimony is expected to last at least three (3) or more days. In any case, where the court allows note taking the court shall provide materials suitable for the purpose of note taking. The court may also authorize trial notebooks for the use of the jurors. The notebook may contain copies of all documents and photos that are admitted into evidence as exhibits. The judge may allow jurors shall be allowed access to their notes and notebooks during their deliberations.

If note-taking is allowed, the court shall instruct the jurors that their notes should not be used as a substitute for the official record of the proceeding and the court should instruct the jurors that if they are unclear as to a particular individual's testimony on a particular matter then the jurors should certify to the court that they need that portion of a particular witness's testimony to be transcribed by the court reporter and provided to them for their review.

If note-taking is allowed, at the conclusion of the trial and after the jury

has been dismissed but before the jurors are released all notes taken by the jurors and all juror notebooks shall be collected by the bailiff who shall promptly destroy them.

6. Jurors have a right to give comments to the court staff concerning their jury service.

7. Jurors have a right to counseling services if they are disturbed by the evidence presented during trial.

8. Jurors have the right to be instructed that at the conclusion of the trial, they have the right to talk to anyone about any aspect of the case, or that they have the right to not talk with any one about the trial, if they so choose. Jurors should also be instructed that the Judge may not be able to discuss the case with them.

9. Jurors have the right to be advised of the right to receive an escort to their mode of transportation after dismissal from trial.

10. Jurors have a right to receive an expression of gratitude from the staff of the court and the judge for appearing for jury service.

I think that we need to modify the note taking section so that it follows the rules for note taking announced by the Court of Criminal Appeals in Price v. State 887 S.W. 2d 949 (Tex.Crim App. 1994)

We are confident the inherent risks of note-taking can be avoided if the trial judge takes the following steps.
First, determine if juror note-taking would be beneficial in light of the factual and legal issues to be presented at the trial. Jumpp, 619 A.2d at 609. If the trial is to be relatively short and simple, the need for note-taking will be slight. On the other hand, if a long and complex trial is anticipated, note-taking could be extremely beneficial.
Second, the trial judge should inform the parties, prior to *voir dire*, if the jurors will be permitted to take notes. If note-taking is to be allowed, the parties should be permitted to question the venire as to their ability to read, write or take notes. Triplett, 421 S.E.2d at 519-520 (W.Va.1992).
Third, the trial judge should admonish the jury, at the time it is impaneled, on note-taking. MacLean, 578 F.2d at 66; DiLuca, 448 N.Y.S.2d at 735.

Having reviewed the jury instructions used by many jurisdictions, we believe the following admonition, or one substantially similar, should be given:

Ladies and Gentlemen of the Jury:
Because of the potential usefulness of taking notes, you may take notes during the presentation of evidence in this case. However, you may not take notes during the arguments of the lawyers, or when the jury charge is read to you.
Moreover, to ensure a completely fair and impartial trial, I will instruct you to observe the following limitations:

1. Note taking is permitted, but not required. Each of you may take notes. However, no one is required to take notes.
2. Take notes sparingly. Do not try to summarize all of the testimony. Notes are for the purpose of refreshing memory. They are particularly helpful when dealing with measurements, times, distances, identities, and relationships.
3. Be brief. Overindulgence in note taking may be distracting. You, the jurors, must pass on the credibility of witnesses; hence, you must observe the demeanor and appearance of each person on the witness stand to assist you in passing on his or her credibility. Note taking must not distract you from that task. If you wish to make a note, you need not sacrifice the opportunity to make important observations. You may make your note after having made the observation itself. Keep in mind that when you ultimately make a decision in a case you will rely principally upon your eyes, your ears, and your mind, not upon your fingers.
4. Do not take your notes away from court. At the end of each day, please place your notes in the envelope which has been provided to you. A court officer will be directed to take the envelopes to a safe place and return them at the beginning of the next session on this case, unopened.
5. Your notes are for your own private use only. It is improper for you to share your notes with any other juror during any phase of the trial other than jury deliberations. You may, however, discuss the contents of your notes during your deliberations.

Fourth, the trial judge should provide the following instruction, or one substantially similar, in the jury charge at each phase of the trial:

> You have been permitted to take notes during the testimony in this case. In the event any of you took notes, you may rely on your notes during your deliberations. However, you may not share your notes with the other jurors and you should not permit the other jurors to share their notes with you. You may, however, discuss the contents of your notes with the other jurors. You shall not use your notes as authority to persuade your fellow jurors. In your deliberations, give

no more and no less weight to the views of a fellow juror just because that juror did or did not take notes. Your notes are not official transcripts. They are personal memory aids, just like the notes of the judge and the notes of the lawyers. Notes are valuable as a stimulant to your memory. On the other hand, you might make an error in observing or you might make a mistake in recording what you have seen or heard. Therefore, you are not to use your notes as authority to persuade fellow jurors of what the evidence was during the trial.

Occasionally, during jury deliberations, a dispute arises as to the testimony presented. If this should occur in this case, you shall inform the Court and request that the Court read the portion of disputed testimony to you from the official transcript. You shall not rely on your notes to resolve the dispute because those notes, if any, are not official transcripts. The dispute must be settled by the official transcript, for it is the official transcript, rather than any juror's notes, upon which you must base your determination of the facts and, ultimately, your verdict in this case.

See generally, MacLean, 578 F.2d at 67; DiLuca, 448 N.Y.S.2d at 735; and, Tex.Code Crim.Proc.Ann. art. 36.28.

I would suggest that we modify 5 to read:

5. If the Trial Judge determines in light of the nature of the trial that note-taking would assist the Jurors in meeting their responsibility as Jurors the Trial Judge will prior to voir dire inform the attorneys and parties that note-taking will be permitted. The Trial Judge will provide instructions to the Jurors prior to the beginning of testimony about their use of note-taking during the trial and in their deliberations of the case.

Nov. 17, 2008

To: SCAC

From: Judge Tracy Christopher, Chair, PJC Oversight Committee

Re: Bias and Prejudice language in 226a and other updates

The latest draft of 226a is the November draft. Revisions are noted in the comment section as Nov. 08 changes.

The Pattern Jury Charge Oversight Committee has provided a definition of bias and prejudice pursuant to a previous vote of the SCAC. However the committee still thinks that a definition is unnecessary.

Providing a plain language definition of prejudice was not difficult and all members of the committee agreed with the definition. Providing a plain language definition of bias was more difficult given its definition in case law. Here is the pertinent law:

Government Code 62.105(4) (formerly art. 2134)

A person is disqualified to serve as a petit juror in a particular case if he:

(4) has a bias or prejudice in favor of or against a party in the case.

Case Law

Bias or prejudice is extended to subject matter of the suit and not just the parties. *Compton v. Henrie,* 364 S.W.2d 179, 181-182 (Tex. 1963) The court held:

> To a greater or lesser extent, bias and prejudice form a trait common in all men; however, to fall within the disqualifying provision of Article 2134, s 4, supra, certain degrees thereof must exist. Bias, in its usual meaning, is an inclination toward one side of an issue rather than to the other, but to disqualify, it must appear that the state of mind of the juror leads to the natural inference that he will not or did not act with impartiality. Prejudice is more easily defined for it means prejudgment, and consequently embraces bias; the converse is not true.

This definition of bias is repeated in more recent Supreme Court cases. *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 751 (Tex. 2006).

Plain Language

The PJC tries to stick to Supreme Court language when possible in drafting jury charges. The committee felt that using the language of *Compton* would only serve to confuse the jury panel. First-we struggled with inclination (which is a leaning) but the court has held

that leaning is not enough to disqualify. Second we struggled with impartiality-a word that the jury panel almost always thinks has the opposite meaning. Finally the definition requires that it appear to someone (to the judge or to the public?) that the juror will not act with impartiality.

The definition that we have now provided reflects our attempt to make the idea of bias understandable to the jury. We were not trying to establish the legal definition of when a juror should be struck for cause.

Here is our proposed definition:

> A juror is biased if a juror's prior experiences, thoughts or beliefs are so strong that a juror cannot follow the law provided by the court or if a juror cannot decide the case based only on the evidence seen and heard in court. A juror is prejudiced if a juror has prejudged a party or the case and will not follow the law or will not decide the case based only on the evidence.

We used the words "cannot" and "will not" because these are the words most often used by jurors, lawyers and judges when questioning jurors.

With this definition, a minority of our group feels we will confuse practitioners and judges. The minority believes that if the court adopts this definition that it should provide a comment to judges and practitioners, pointing out that this definition does not change current case law. Here is the proposed comment.

> Although this instruction refers to jurors who "cannot follow the law" or "cannot decide the case based only on the evidence" or "will not follow the law or will not decide the case based only on the evidence," this is not intended to change the legal standard for the disqualification of jurors for cause. Potential jurors are disqualified for cause if they have "an inclination toward one side of an issue rather than to the other" to a degree "that the state of mind of the juror leads to the natural inference that he will not or did not act with impartiality." Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 751 (Tex. 2006) (citing Compton v. Henrie, 364 S.W.2d 179, 182 (Tex. 1963)).

Admonitory Instruction Subcommittee
PJC Oversight Committee

Report to Supreme Court Advisory Committee
On Plain Language Rewrite of Admonitory Instructions

Draft of
November 2008

After discussion at SCAC at October 18, 2007 meeting
April 4, 2008, and September 5, 2008

Proposed Texas Rule of Civil Procedure 226a(I) (PJC 100.1)
Instructions to the panel before jury selection

Members of the Jury Panel [*or* Ladies and Gentlemen of the Jury Panel]: Thank you for being here. We are here to select a jury. Twelve [six] of you will be chosen for the jury. Even if you are not chosen for the jury, you are performing a valuable service that is your right and duty as a citizen of a free country.

Before we begin: Turn off all mobile phones and electronic devices. Do not record or photograph any part of these court proceedings, because it is prohibited by law.

Here is some background about this case. This is a civil case, which means it is a lawsuit that is not a criminal case. The parties are as follows: The plaintiff is _____, and the defendant is _____. Representing the plaintiff is _____, and representing the defendant is _____. They will ask you some questions during jury selection which we call voir dire. Before we begin, I must give you some instructions for jury selection.

Every juror must obey these instructions. You may be called into court to testify about any violations of these instructions. If you do not follow these instructions, you will be guilty of juror misconduct and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial.

These are the instructions:

1. Do not mingle or talk with the lawyers, the witnesses, the parties, or anyone involved in the case to avoid looking like you are friendly with one side of the case. You can exchange casual greetings like "hello" and "good morning." Other than that, do not talk with them at all. They have to follow these instructions too, so you should not be offended when they follow the instructions.

2. Do not accept any favors from the lawyers, the witnesses, the parties, or anyone involved in the case, and do not do any favors for them. This includes favors such as giving rides and food.

3. Do not discuss this case with anyone, even your spouse or a friend. Do not allow anyone to discuss the case with you or in your hearing. If anyone tries to discuss the case with you, tell me immediately. We do not want you to be influenced by something other than the evidence admitted in court.

4. The parties, through their attorneys, have the right to ask you questions about your background, experiences, and attitudes. They are not trying to meddle in your affairs. They are just being thorough and trying to choose fair jurors who do not have any bias or prejudice in this particular case.

Comment [T1]: New intro

Comment [T2]: Old 226a "whether you are selected as a juror for this case or not you are performing a significant service which only free people can perform."

Comment [T3]: New per SCAC discussion

Comment [T4]: Nov.08 new transition language

Comment [T5]: Old 226a. In this case, as in all cases, the actions of the judge, parties, witnesses, attorneys and jurors must be according to law. The Texas law permits proof of any violation of the rules of proper jury conduct. By this I mean that jurors and others may be called upon to testify in open court about acts of jury misconduct. I instruct you, therefore, to follow carefully all instructions which I am now going to give you, as well as others which you will receive while this case is on trial. If you do not obey the instructions I am about to give you, it may become necessary for another jury to re-try this case with all of the attendant waste of your time here and the expense to the litigants and the taxpayers of this county for another trial.

Nov. 08 change: added back open court

Comment [T6]: Old 226a. Do not mingle with nor talk to the lawyers, the witnesses, the parties, or any other person who might be connected with or interested in this case, except for casual greetings. They have to follow these same instructions and you will understand it when they do.

Nov.08 change: reworded reasoning

Comment [T7]: Old 226a. Do not accept from, nor give to, any of those persons any favors however slight, such as rides, food or refreshments.

Comment [T8]: Old 226a. Do not discuss anything about this case, or even mention it to anyone whomsoever, including your wife or husband, nor permit anyone to mention it in your hearing until you are discharged as jurors or excused from this case.

Nov.08, change: reworded reasoning

Comment [T9]: Old 226a. The parties through their attorneys have the right to direct questions to each of you concerning your qualifications, background, experiences and attitudes. In questioning you, they are not meddling in your personal affairs, but are trying to select fair and impartial jurors who are free from any bias or prejudice in this particular case. ... [1]

A juror is biased if a juror's prior experiences, thoughts or beliefs are so strong that a juror cannot follow the law provided by the court or if a juror cannot decide the case based only on the evidence seen and heard in court. A juror is prejudiced if a juror has prejudged a party or the case and will not follow the law or will not decide the case based only on the evidence.

Comment [T10]: New for Nov.08

5. Remember that you took an oath that you will tell the truth, so be truthful when the lawyers ask you questions, and always give complete answers. If you do not answer a question that applies to you, that violates your oath. Sometimes a lawyer will ask a question of the whole panel instead of just one person. If the question applies to you, raise your hand and keep it raised until you are called on.

Comment [T11]: Old 226a. Do not conceal information or give answers which are not true. Listen to the questions and give full and complete answers. If the attorneys ask some questions directed to you as a group which require an answer on your part individually, hold up your hand until you have answered the questions.

Do you understand these instructions? If you do not, please tell me now.

The lawyers will now begin asking questions.

Proposed Texas Rule of Civil Procedure 226a(II) (PJC 100.2)
Instructions for the jury after it has been selected

Members of the Jury [*or* Ladies and Gentlemen]: You have been chosen to serve on this jury. Because of the oath you have taken and your selection for the jury, you become officials of this court and active participants in our justice system.

[Hand out the written instructions]

You have received a set of written instructions. I am going to read them with you now. Some of them you have heard before and some are new.

1. Turn off all mobile phones and electronic devices. Do not communicate with anyone electronically during court proceedings. [I will give you a number where others may contact you in case of an emergency.] Do not record or photograph any part of these court proceedings, because it is prohibited by law.

2. Do not mingle or talk with the lawyers, the witnesses, the parties, or anyone involved in the case to avoid looking like you are friendly with one side of the case. You can exchange casual greetings like "hello" and "good morning." Other than that, do not talk with them at all. They have to follow these instructions too, so you should not be offended when they follow the instructions.

3. Do not accept any favors from the lawyers, the witnesses, the parties, or anyone involved in the case, and do not do any favors for them. This includes favors such as giving rides and food.

4. Do not discuss this case with anyone, even your spouse or a friend. Do not allow anyone to discuss the case with you or in front of you. If anyone tries to discuss the case with you, tell me immediately. We do not want you to be influenced by something other than the evidence admitted in court.

5. Do not talk about the case with anyone during the trial, not even with the other jurors, until the end of the trial. You should not discuss the case with your fellow jurors until the end of the trial so that you do not form opinions about the case before you have heard everything.

   After you have heard all the evidence, received all of my instructions, and heard all of the lawyers' arguments, you will then go to the jury room to discuss the case with the other jurors and reach a verdict.

6. Do not investigate this case on your own. Do not inspect places or items from this case unless they are presented as evidence in court. Do not let anyone do those things for you.

Comment [T12]: Old 226a By the oath which you take as jurors, you become officials of this court and active participants in the public administration of justice: I now give you further instructions which you must obey throughout this trial.

Comment [T13]: New per SCAC discussions.

Comment [T14]: Old 226a . Do not mingle with nor talk to the lawyers, the witnesses, the parties, or any other person who might be connected with or interested in this case, except for casual greetings. They have to follow these same instructions and you will understand it when they do:

Nov. 08 change: reworded reasoning

Comment [T15]: Old 226a. Do not accept from, nor give to, any of those persons any favors however slight, such as rides, food or refreshments.

Comment [T16]: Old 226a. Do not discuss anything about this case, or even mention it to anyone whomsoever, including your wife or husband, nor permit anyone to mention it in your hearing until you are discharged as jurors or excused from this case

Nov. 08 change: reworded reasoning

Comment [T17]: Old 226a Do not even discuss this case among yourselves until after you have heard all of the evidence, the court's charge, the attorneys' arguments and until I have sent you to the jury room to consider your verdict.

November 08 slight change

This rule is very important because we cannot have a trial based on evidence not presented in open court. Your conclusions about this case must be based only on what you see and hear in this courtroom. All the evidence must be presented in open court so the parties and their lawyers can test it and object to it. For example:

- Do not try to get information about the case, the lawyers, the witnesses or the issues from outside this courtroom.
- Do not go to places mentioned in the case to inspect the places.
- Do not look things up in law books, dictionaries, or public records.
- Do not look things up on the Internet.

7. Do not tell other jurors your own experiences or other people's experiences. For example, you may have special knowledge of something in the case, such as business, technical, or professional information. You may even have expert knowledge or opinions, or you may know what happened in this case or another similar case. Do not tell the other jurors about it. Telling other jurors about it is wrong because it means the jury will be considering things that were not presented in court.

8. Do not consider attorneys' fees unless I tell you to. Do not guess about attorneys' fees.

9. Do not consider or guess about insurance or who might be covered by insurance unless I tell you to.

10. During the trial, if taking notes will help focus your attention on the evidence, you may take notes. If taking notes will distract your attention from the evidence, you should not take notes. Your notes are for your own personal use. Do not show or read your notes to anyone, including other jurors.

11. It is your duty to listen to and consider the evidence and to determine fact issues that I may submit to you at the end of the trial. After you have heard all the evidence, I will give you instructions to follow as you make your decision. The instructions also will have questions for you to answer. You will not be asked and you should not consider which side will win. Instead, you will need to answer the specific questions I give you.

Every juror must obey my instructions. If you do not follow these instructions, you would be guilty of juror misconduct and I may have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial.

Do you understand these instructions? If you do not, please tell me now.

Comment [T18]: Old 226a. Do not make any investigation about the facts of this case. Occasionally we have a juror who privately seeks out information about a case on trial. This is improper. All evidence must be presented in open court so that each side may question the witnesses and make proper objection. This avoids a trial based upon secret evidence. These rules apply to jurors the same as they apply to the parties and to me. If you know of, or learn anything about, this case except from the evidence admitted during the course of this trial, you should tell me about it at once. You have just taken an oath that you will render a verdict on the evidence submitted to you under my rulings. Do not make personal inspections, observations, investigations, or experiments nor personally view premises, things or articles not produced in court. Do not let anyone else do any of these things for you.

Comment [T19]: Old 226a. Do not tell other jurors your own personal experiences nor those of other persons, nor relate any special information. A juror may have special knowledge of matters such as business, technical or professional matters or he may have expert knowledge or opinions, or he may know what happened in this or some other lawsuit. To tell the other jurors any of this information is a violation of these instructions.

Comment [T20]: Old 226a. Do not discuss or consider attorney's fees unless evidence about attorney's fees is admitted.

Comment [T21]: Old 226a. Do not consider, discuss, nor speculate whether or not any party is or is not protected in whole or in part by insurance of any kind.

Comment [T22]: New per SCAC discussion

Nov. 08 rewording with further instructions later in the charge

Comment [T23]: Old 226a. At the conclusion of all the evidence, I may submit to you a written charge asking you some specific questions. You will not be asked, and you should not consider, whether one party or the other should win. Since you will need to consider all of the evidence admitted by me, it is important that you pay close attention to the evidence as it is presented.

Comment [T24]: Same as first part

Please keep these instructions and review them as we go through this case. If anyone does not follow these instructions, tell me.

Proposed Texas Rule of Civil Procedure 226a(III) (PJC 100.3)
General Instructions to the jury before answering the questions and reaching a verdict

Charge of the Court

Members of the Jury [*or* Ladies & Gentlemen of the Jury]: After the argument, you will go to the jury room to decide the case, answer the questions that are attached, and reach a verdict. You may discuss the case with other jurors only when you are all together in the jury room.

Remember my previous instructions: Do not discuss the case with anyone else. Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your mobile phone or any other electronic devices during your deliberations.

Any notes you have taken are for your own personal use and may be taken back into the jury room and consulted by you during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely upon your independent recollection of the evidence and not be influenced by the fact that another juror has taken notes.

Comment [T25]: Re-enforcement of previous instructions needed and cell phone and note taking added.

Nov. 08 note taking cautions included

Here are the instructions for answering the questions:

1. Do not let bias, prejudice, or sympathy play any part in your decision.

2. Base your answers only on what was presented in court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not presented in the courtroom.

Comment [T26]: Old 226a In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case

3. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of my instructions.

Comment [T27]: Old 266a You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge.

4. If my instructions use a word in a way that is different from its ordinary meaning, use the meaning I give you, which will be a proper legal definition.

Comment [T28]: Old 226a When words are used in this charge in a sense that varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

5. All the questions and answers are important. No one should say that any question or answer is not important.

Comment [T29]: Old 226a Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

6. Answer "yes" or "no" to all questions unless you are told otherwise. A "yes" answer must be based on a preponderance of the evidence [unless you are told otherwise.] Whenever a question requires an answer other than "yes" or "no", your answer must be based on a preponderance of the evidence [unless you are told otherwise.]

   - The term "preponderance of the evidence" means the greater weight of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a "yes" answer, then answer "no." A preponderance of the

evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

7. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

8. Do not answer questions by drawing straws or by any method of chance.

9. Some questions might ask you for a dollar amount. Do not agree in advance to decide on a dollar amount by adding up each juror's amount and then figuring the average.

10. Do not trade your answers. For example, do not say "I will answer this question your way if you answer another question my way."

11. [Unless otherwise instructed] The answers to the questions must be based on the decision of at least 10 of the 12 jurors. The same 10 jurors must agree on every answer. Do not agree to be bound by a vote of anything less than 10 jurors, even if it would be a majority

As I have said before, if you do not follow these instructions, you will be guilty of juror misconduct and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial. It is also possible that you might be held in contempt or punished in some other way. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.

[Definitions, questions and special instructions given to the jury will be transcribed here.]

Comment [T30]: Not actually in 226a but in all charges per the PJC. Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence unless otherwise instructed. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." The term "preponderance of the evidence" means the greater weight and degree of credible evidence admitted in this case. Whenever a question requires an answer other than "Yes" or "No," your answer must be based on a preponderance of the evidence unless otherwise instructed.
Also include new more likely than not language approved by the SCAC and all of the PJC committees

Comment [T31]: Old 226a You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

Comment [T32]: Old 226a You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

Nov. 08 revised

Comment [T33]: Approved by SCAC to beef up contempt issue here.

Presiding Juror

1. When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.
2. The presiding juror has these duties:
    a. Read the complete charge aloud.
    b. Preside over your deliberations. This means the presiding juror will take the lead in discussions, and see that you follow the instructions.
    c. Give written questions or comments to the bailiff who will give them to the judge.
    d. Write down the answers you agree on.
    e. Get the signatures for the verdict certificate.
    f. Notify the bailiff that you have reached a verdict.

Do you understand the duties of the presiding juror? If you do not, please tell me now.

Instructions for Signing the Verdict Certificate

1. [Unless otherwise instructed]You may answer the questions on a vote of 10 jurors. The same 10 jurors must agree on every answer in the charge. This means you cannot have one group of 10 jurors agree on one answer and a different group of 10 jurors agree on another answer.
2. If 10 jurors agree on every answer, those 10 jurors sign the verdict.
   If 11 jurors agree on every answer, those 11 jurors sign the verdict.
   If you are unanimous (all 12 of you agree on every answer) only the presiding juror signs the verdict.
3. All jurors should deliberate on every question. You may end up with all 12 of you agreeing on some answers, while only 10 or 11 of you agree on other answers. But when you sign the verdict, only those 10 who agree on **every** answer will sign the verdict.
4. [added if the charge requires some unanimity] There are some special instructions before Questions _____ as to how to answer the questions. Please follow those instructions. If all 12 of you unanimously answer those questions, you will need to complete a second verdict certificate for those questions.

Do you understand these instructions? If you do not, please tell me now.

_____
Judge Presiding

Comment [T34]: Not in 226a. Current instructions from PJC. After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.
It is the duty of the presiding juror-
1.to preside during your deliberations,
2:to see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge,
3:to write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the judge,
4.to vote on the questions,
5.to write your answers to the questions in the spaces provided, and
6.to certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.
You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact.
When you have answered all the questions you are required to answer under the instructions of the judge and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signatures, you will inform the bailiff at the door of the jury room that you have reached a verdict, and then you will return into court with your verdict.

Nov. 08 completely re-written

Verdict Certificate

Check one:

____ Our verdict is unanimous. All twelve of us have agreed to each and every answer. The presiding juror has signed the certificate for all 12 of us.

_____ _____

Signature of Presiding Juror Printed name of Presiding Juror

____ Our verdict is not unanimous. Eleven of us have agreed to each and every answer and have signed the certificate below.

____ Our verdict is not unanimous. Ten of us have agreed to each and every answer and have signed the certificate below.

	SIGNATURE	NAME PRINTED
1.	_____	_____
2.	_____	_____
3.	_____	_____
4.	_____	_____
5.	_____	_____
6.	_____	_____
7.	_____	_____
8.	_____	_____
9.	_____	_____
10.	_____	_____
11.	_____	_____

Comment [T35]: New certificate to clarify the 10-2 votes and the unanimous issue.

Nov. 08 revised

If you have answered Question No. _____[the exemplary damages amount], then you must sign this certificate also.

Additional Certificate
[used when some questions require unanimous answers]

I certify that the jury was unanimous in answering the following questions. All 12 of us agreed to the answers. The presiding juror has signed the certificate for all 12 of us.

[Judge to list questions that require a unanimous answer, including the predicate liability question.]

_____ _____
Signature of Presiding Juror Printed name of Presiding Juror

Comment [T36]: New certificate to clarify unanimous vote

Nov. 08 added predicate and revised slightly

IV.
Instructions to the Jury After Verdict

Thank you for your verdict.

I have told you that the only time you can discuss the case is with the other jurors in the jury room. I now release you from jury duty. Now you can discuss the case with anyone. But you can choose not to discuss the case; that is your right.

After you are released from jury duty, the lawyers and others can ask you questions to see if the jury followed the instructions, and they can ask you to give a sworn statement. You are free to discuss the case with them and to give a sworn statement if you want. But you may choose not to discuss the case and not to give a sworn statement; that is your right.

Comment [T37]: Old 226aThe court has previously instructed you that you should observe strict secrecy during the trial and during your deliberations and that you should not discuss the case with anyone except other jurors during your deliberations. I am now about to discharge you. After your discharge, you are released from your secrecy. You will then be free to discuss the case and your deliberations with anyone. However, you are also free to decline to discuss the case and your deliberations if you wish. After you are discharged it is lawful for the attorneys or other persons to question you to determine whether any standards for jury conduct which I have given you during the course of this trial were violated. You are free to discuss or not to discuss these matters and to give or not give an affidavit.

Nov. 08 added this section which was missing from prior draft.

Page 2: [1] Comment [T9] Tracy_Christopher 8/29/2008 9:45:00 AM

Old 226a. The parties through their attorneys have the right to direct questions to each of you concerning your qualifications, background, experiences and attitudes. In questioning you, they are not meddling in your personal affairs, but are trying to select fair and impartial jurors who are free from any bias or prejudice in this particular case.

From: Kennon L. Peterson [mailto:Kennon.Peterson@courts.state.tx.us]
Sent: Friday, November 14, 2008 5:42 PM
To: Senneff, Angie
Subject: SCAC Agenda Item - Rule of Judicial Administration 12

Angie,

The attached document contains proposed, redlined amendments to Rule of Judicial Administration 12. Margaret Bennett — General Counsel for the Office of Court Administration (OCA) — drafted the amendments with my assistance. Last week, a majority of the Presiding Judges approved a substantially similar version of the amendments. None of the Presiding Judges opposed the amendments. Ms. Bennett will be at the meeting next Friday to explain why the OCA is proposing the amendments and to answer any questions from the Committee.

As always, please do not hesitate to contact me if you have any questions or concerns.

Thanks,
Kennon

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Rule 12. Public Access to Judicial Records.

* * *

12.3 Applicability. This rule does not apply to:

(a) records or information to which access is controlled or required by:

(1) a state or federal court rule, including:

(A) a rule of civil or criminal procedure, including Rule 76a, Texas Rules of Civil Procedure;

(B) a rule of appellate procedure;

(C) a rule of evidence;

(D) a rule of administration;

(2) a state or federal court order not issued merely to thwart the purpose of this rule;

(3) the Code of Judicial Conduct;

(4) Chapter 552, Government Code, or another statute; Deleted: or provision of law

(5) the United States Constitution or the Texas Constitution; or

(6) court decisions.

* * *

Comment to 2008 change: Rule 12.3(a) is amended to clarify that information that is not subject to Rule 12 may be required to be disclosed under other law, including constitutional law or case law. *See, e.g., Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589 (1978); *Express-News Corp. v. MacRae*, 787 S.W.2d 451 (Tex. App.—San Antonio 1990, no writ).

12.4 Access to Judicial Records.

(a) *Generally.* Judicial records other than those excluded by Rule 12.3 or exempted by Rule 12.5 are open to the general public for inspection and copying during regular business hours. But this rule does not require a court, judicial agency, or records custodian to: Deleted: covered by Rules Deleted: and

(1) create a record, other than to print information stored in a computer;

(2) retain a judicial record for a specific period of time;

(3) allow the inspection of or provide a copy of information in a book or publication commercially available to the public; or

(4) respond to or comply with a request for a judicial record from or on behalf of an individual who is imprisoned or confined in a correctional facility as defined in Section 1.07(a), Penal Code, or in any other such facility in any state, federal, or foreign jurisdiction.

(b) *Voluntary Disclosure.* A records custodian may voluntarily make part or all of the information in a judicial record available to the public, subject to Rules 12.2(e)(2) and 12.2(e)(4), unless the disclosure is expressly prohibited by law or the information is confidential under law. Information voluntarily disclosed must be made available to any person who requests it.

Deleted: exempt under this rule, or

Comment to 2008 change: Rule 12.4(a) is amended to clarify that Rule 12.3 excludes certain records from Rule 12, and Rule 12.5 provides exemptions from disclosure. Because the prior version of Rule 12.4(b) could be interpreted to simultaneously grant and prohibit voluntary disclosure of records exempt from disclosure under Rule 12.5, the phrase "or exempt under this rule" is removed to clarify that the rule permits voluntary disclosure under any of the exemptions of Rule 12.5 except Rule 12.5(i).

12.5 Exemptions from Disclosure. The following records are exempt from disclosure under this rule:

* * *

(d) *Personal Identification Information.* Any record reflecting any person's home address, home or personal telephone number, personal e-mail address, social security number, or family members.

Deleted: *Home Address and Family*

* * *

Comment to 2008 change: The title of Rule 12.5(d) is amended to reflect the scope of the exemption, and personal e-mail addresses are included as information exempt from disclosure.

* * *

12.8 Denial of Access to a Judicial Record.

* * *

(c) *Contents of Notice of Denial.* A notice of denial must be in writing and must:

(1) state the reason for the denial;

(2) inform the person of the right of appeal provided by Rule 12.9;

Deleted: and

(3) include the name and address of the Administrative Director of the Office of Court Administration; and

(4) include a certificate of the date and means of providing notice of the denial to the requester.

(d) *Method of Providing Notice.* A records custodian shall deliver the notice of denial to the requester (or the requester's duly authorized agent or attorney of record) either in person or by an agent or by courier-receipted delivery or by certified, registered, or first-class mail, to the address provided by the requester, or by fax to the fax number provided by the requester, or by e-mail to the e-mail address provided by a requester who agrees to e-mail notification. Providing notice by mail shall be complete upon deposit of the notice, enclosed in a postpaid, properly addressed envelope or wrapper, in a post office or official depository under the care and custody of the United States Postal Service. If the notice of denial is provided by mail, fax, or e-mail, three days shall be added to the requester's deadline for filing a petition for review.

(e) *Constructive Denial.* If a person who requests a judicial record does not receive a response to the request within 30 days of making the request, then the request is deemed to have been denied.

Comment to 2008 change: Rule 12.8(c) is amended to require documentation of the date and means of sending notice, in order to facilitate calculation of deadlines and application of a mailbox rule modeled after Texas Rule of Civil Procedure 21a. Rule 12.8(d) is incorporated to describe the methods from which the records custodian can choose to provide notice of denial of access to a judicial record, and to allow the use of e-mail notification in limited circumstances. Rule 12.8(e) is added to clarify that a requester has the right to appeal a denial of access even when the requester does not receive a response from the records custodian.

12.9 Relief from Denial of Access to Judicial Records.

* * *

(b) *Contents of Petition for Review.* The petition for review:

(1) must include a copy of the request to the records custodian and the records custodian's notice of denial, if provided;

(2) must include a certificate of the date and means of sending the petition for review to the Administrative Director of the Office of Court Administration;

(3) may include any supporting facts, arguments, and authorities that the petitioner believes to be relevant; and

Deleted: 2

(4) may contain a request for expedited review, the grounds for which must be stated.

Deleted: 3

(c) *Method of Filing.* The petition must be filed with the Administrative Director of the Office of Court Administration by delivering a copy to the Office of Court Administration in person, by agent, by courier-receipted delivery, by certified, registered, or first-class mail, or by fax. The petition may not be filed by e-mail unless the Administrative Director establishes and publishes an e-mail address to be used only for the purpose of receiving Rule 12 petitions and correspondence.

(d) *Time for Filing.* --The petition must be filed not later than 30 days after the date that the records custodian provides notice of the denial of access to the judicial record, or 30 days after the request is deemed denied under Rule 12.8(e). If the petition for review is timely sent by first-class United States mail in an envelope or wrapper properly addressed and stamped and timely deposited in the mail, and is received by the Office of Court Administration within ten days of the mailing date, then it shall be deemed timely filed. A legible postmark affixed by the United States Postal Service shall be prima facie evidence of the mailing date.

Deleted: c

Deleted: petitioner receives

Deleted: a

(e) [renumbered; no change to rule text]

(f) [renumbered; no change to rule text]

(g) [renumbered; no change to rule text]

(h) [renumbered; no change to rule text]

(i) [renumbered; no change to rule text]

(j) [renumbered; no change to rule text]

(k) [renumbered; no change to rule text]

(l) [renumbered; no change to rule text]

(m) [renumbered; no change to rule text]

(n) [renumbered; no change to rule text]

(o) [renumbered; no change to rule text]

Comment to 2008 change: Rule 12.9(c) is added to specify the acceptable methods of filing a petition for review and to allow filing by e-mail in limited circumstances. Rule 12.9(b) is amended to require documentation of the date and means of sending the petition for review to the Administrative Director of the Office of Court Administration, in order to enable calculation of the filing deadlines and application of a mailbox rule modeled after Texas Rules of Civil Procedure 5 and 21a.

From: Kennon L. Peterson [mailto:Kennon.Peterson@courts.state.tx.us]
Sent: Tuesday, November 18, 2008 2:08 PM
To: Senneff, Angie
Subject: SCAC Agenda Item - Materials Re. Small Claims Courts

Angie,

Attached please find three letters from Dr. Thomas J. Ellis regarding a case he filed in a small claims court. The first letter, dated October 14, is addressed to the Court. The other two letters, dated October 27 and 30 respectively, are addressed to the Supreme Court Advisory Committee. (Note that the third letter contains two attachments.) I am sending all of these letters to provide as much context as possible. If necessary, I will provide additional information at the meeting on Friday.

As indicated by the attached letters, there is confusion about whether the Texas Rules of Civil Procedure apply in cases filed in small claims courts. The Court would like the Advisory Committee's recommendations on amending the Texas Rules of Civil Procedure to clarify whether and to what extent the rules apply in this context.

Please include the attached letters in the agenda materials for the next meeting, and please do not hesitate to contact me if you have any questions or concerns.

Thanks,
Kennon

Kennon L. Peterson
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P.O. Box 12248
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Office of Rules and Standards
Supreme Court of Texas
P.O. Box 12248
Austin, TX 78711

October 14, 2008

I am writing to the Court in order to bring to its attention a situation that may prove to be a widespread violation of both the "letter" and the "spirit" of the Law governing Small Claims Court here in the state of Texas. I believe some of the violations are due to Courts being unfamiliar with Small Claims cases while other instances are intentional violations by Attorneys for the purpose of gaining an advantage over a regular citizen unfamiliar with the Rules of Evidence and the Rules of Civil Procedures. I realize that an unsolicited letter from a citizen is likely quite unusual, I hope the Court considers the issue I am attempting to bring to light and takes whatever action is necessary to ensure the citizens of this state are afforded the rights and protection the Law seems to have been designed to ensure.

To briefly explain my experience:

- I filed a Small Claims suit in Dallas (JS-07003860-01) which was heard on March 7, 2008. The Attorney hired by the defendant argued that since I did not present my "evidence" to the Court according to the Rules of Evidence, none of it could be considered, and since no "evidence" was offered my case was frivolous and the RCP dictated they must be awarded attorney fees. The Justice bought the argument and awarded the defendant Attorney fees, stating he had no choice since I had not officially submitted any evidence. I requested a retrial afterwards, pointing out that the RCP and the Rules of Evidence did not govern Small Claims, that the trial was informal, but the request was ignored.

- I appealed the case to the County Court (CC-08-03056-D) where the Attorney again used the RCP to his advantage, filing a "Motion to Dismiss – No Evidence Summary Judgment". The attorney professed his knowledge of Small Claims cases and convinced the Judge (who admitted being unfamiliar with Small Claims) to dismiss my case. While I believe I have convinced the Judge to re-instate my claims, the issue here is that (in theory) I had both my Small Claims trial *and* Appeal yet I have still never had the case actually heard based on the facts, it has all been about the legal tricks being used against me.

In researching the issue I have discovered that while the Rules of Evidence clearly specify that they do not apply to Small Claims cases, there does not seem to be a similar explicit disclaimer for the RCP. While the intent of the Law has been clearly identified in various Rulings and Briefs, the fact remains that some attorneys are using the Rules of Evidence and RCP against private citizens in Small Claims trials in order to deny them the Justice they are entitled to. In fact, there is even a sign posted outside one room in the Dallas County Court building that states if a Small Claims case is appealed to that Courtroom, the Rules of Civil Procedure are in full force in spite of the clear intention (and explicit statements) of the Government Code.

I would respectfully request the Court to consider that citizens in Texas are being denied their right to be heard according to the Law and take whatever actions are necessary to clarify the procedures for Texas Courts throughout the State.

Thank you for your time and consideration.

Sincerely,

Dr. Thomas J. Ellis

3225 Turtle Creek Blvd. #1208 • Dallas, TX • 75219
PHONE: 214-929-0067 • EMAIL: tellis@icec.org

Supreme Court Advisor Committee
Supreme Court of Texas
Austin, TX 78711

October 27, 2008

Committee Members,

I realize it is probably unlikely that you get direct requests from private citizens to address legal issues, but I would appreciate your consideration and apologize ahead of time if this request does not meet any specific procedural or wording requirements a licensed attorney would be familiar with.

On February 14th I sent in a letter to inform the Supreme Court that the Small Claims provision of the Government Code do not appear to be being followed and are potentially being misused by attorneys in order to take unfair advantage of others. I would like to formally request this topic be included on the next agenda of your committee. While I understand you have many issues to address, and each person feels their issue is very important, I would ask that the Committee consider the issue I raise could potentially be affecting a great many people who cannot afford to hire expensive attorneys or firms in order to protect themselves.

I provided the County Court with documentation that seems to clearly show I was not required to respond in writing to the attorney's Motion, and that Small Claims proceedings are supposed to be "informal". However, I was not able to convince the Judge to reconsider his decision, meaning that I was unable to have my case heard in either JP or County Court the way the law intended. Instead, the HOA Board gave over $55,000 of homeowner's money to their attorney who used legal "tricks" not allowed by Law to get my suit dismissed.

I have done some pretty extensive research on the matter of Small Claims in Texas and feel there is no ambiguity as to the intentions of the Law. There would clearly be no point in having a Small Claims system that allows an attorney to use complicated legal tricks against a citizen who could not afford their own. The attorney here knew exactly what to say, and when to say it, to convince the Judges to dismiss my suit at both Court levels, it was clearly not the first time the tactic had been used.

The Courts maintain an enormous amount of authority over citizens. I feel with that authority comes the responsibility to ensure a person receives the rights the Law prescribes. Given that the people who are most likely to be affected by situations like this are not the ones who can pay high-priced attorneys, I would ask the Committee consider the situation and take whatever steps are necessary to ensure that both the "spirit" and the "letter" of the law is enforced properly in the future.

I am again willing to provide any information or documentation the Committee feels would assist its discussions. Thank you for your time and consideration.

Sincerely,

Dr. Thomas J. Ellis

3225 Turtle Creek Blvd. #1208 • Dallas, TX • 75219
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Supreme Court Advisor Committee
Supreme Court of Texas
Austin, TX 78711

October 30, 2008

Committee Members,

I am attaching two documents for your reference related to my request to have the issue of Small Claims procedures included on the upcoming November meeting Agenda. I would be happy to provide any additional documentation or information the Committee may feel is needed, but wanted to include these two letters at least as a beginning.

The first letter is being sent to the County Court Judge explaining the reasons I will be appealing his decision. I honestly appreciate his patience and sincerity in that he appears to be doing what he feels the law requires him to, and has consistently allowed me to voice my arguments and supporting reasoning uninterrupted.

The second letter is what was originally submitted to the JP Judge after the trial requesting the case be re-tried at the JP level as the Court had applied the Rules of Evidence and Rules of Civil Procedure to a case that I felt they were not supposed to be. The Clerk presented the request to the JP Judge but he just denied the request verbally and walked away, leaving me no choice but to appeal the case to County Court.

What seems clear is that as a citizen I filed a Small Claims suit in good faith but because the HOA hired an expensive, experienced attorney I have been denied my right to have the case actually heard according to the guidelines the Law requires. I respectfully request that the Committee consider that it is at least possible that mine is not a singular instance of such an event and it take action to ensure all of the Courts in Texas are familiar with and comply with the requirements of the Small Claims law.

Thank you again for your time and consideration.

Sincerely,

Dr. Thomas J. Ellis

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October 30, 2008

Judge Ken Tapscott
County Court at Law 4
600 Commerce Street
Dallas, TX 75202

Your Honor:

I write this letter to inform you of my intention to appeal your decision to dismiss my Small Claims suit without it being heard to the Appellate Court. This is not a request for you to reverse your decision; I sincerely appreciate that you have always me to argue my position and that you've treated me with respect - I felt I owed you the same.

I feel I must appeal your Ruling not only because it affects my case, but in general it would affirm that Attorneys throughout the State are free to use legal tricks and procedures to overwhelm a citizen and gain an unfair advantage that the Small Claims statute seems to specifically prohibit. The people who most need such protection are the ones who cannot afford an attorney or the enormous legal fees that often accompany them. The attorney has cost my HOA close to $60,000 so far on this case, with the Board claiming that the attorney has assured them that case law allows them to collect every penny back from me – few citizens can afford to pay $60,000 for an attorney to handle a small claims case worth a few hundred or even a few thousand dollars.

In the hearing to discuss my request, the attorney showed up claiming case-law did not allow my motion to be heard at all, claiming that once you ruled in their favor, the decision could not be changed as it is "final". After looking up that case I was confused; the information in it appeared to support my position, not his.

I am requesting your decision be reviewed not because it was "not the answer I wanted", but because it appears to be inconsistent with the Law and past higher-Court rulings. I base that conclusion on the following:

- The Small Claims case was filed according to Chapter 28 of the Government Code. Section 28.031 indicates the Judge may dismiss the case if the Plaintiff does not appear at the trial. There does not appear to be any other mechanism which allows for an outright dismissal.

- Section 28.033 requires that if both parties appear at the time and place of the trial, the case shall proceed. It does not appear that the County Court has discretion, referring to 28.052(b) which requires the appeal be handled in the same way as Justice Court.

- Section 28.033 further states the hearing is "informal, with the sole objective being to dispense speedy justice between the parties". Applying the complex Rules of Civil Procedure is just not consistent with this requirement, as higher Courts appear to have previously affirmed.

- Referring back to the attorney's "case law" as well as Section 28.053 – the Ruling that a Small Claims case cannot be appealed was based on the 28.053(d) where the Judgment of the County Court on appeal is final, this in spite of 51.012 of the Civil Practice and Remedies Code allowing for appeals of all cases over a set limit. The conflict was resolved by the Court applying the Rule of Statutory Construction in which a specific Statute controls over a more general one. In the present case, 28.053(b) clearly specifies that no further pleadings are required and prevails over the Rules of Civil Procedure that the attorney claims I violated.

I understand your analogy that if a party files a frivolous lawsuit against someone, the defendant should have the means to have it removed quickly, without it "hanging over their head", but I believe Section 28.053 addresses that by dictating the Court "dispose of small claims appeals with all convenient speed". I do not believe the attorney would have been able to successfully file a "No Evidence Summary Judgment" motion in the Small Claims Court at the JP level, nor should he have been able to do it on the appeal in your Court.

What makes this particular case of even more importance is that the attorney in question was able to prevail in the JP Court by convincing the Justice that none of the evidence I submitted during the trial was admissible as I had not followed the proper Rules of Evidence, and since there was "officially" no evidence the case was considered frivolous so the Law required the award of legal fees. Since this is surely going to be their position when the case does finally go to trial, they would have succeeded in wrongfully tricking the Courts into denying me my right to have a Small Claims suit heard fairly according to the law.

As a scientist I constantly second-guess myself in order to be sure the conclusions I reach are sound. In this case I have been concerned I must simply be "missing something" since the Law (in this case) seems quite clear and unambiguous – how could the Court with so much experience with Law miss something so clear? I believe the ironic answer is it is *because* I am unfamiliar with the complex Rules and Procedures usually employed that such a plainly written Law, designed for the average citizen, is so clear.

I will be filing the appeal with no disrespect towards Your Honor, nor do I blame the County Court for being unfamiliar with Small Claims proceedings. The attorneys began this process by professing their expertise in Small Claims matters and as you pointed out previously, the Court cannot possibly be familiar with every Law that exists; it must rely on attorneys to accurately and honestly present facts of law to it. Since this does not appear to be the case in all circumstances, I have also requested that the Supreme Court Advisory Counsel review the present situation and consider what, if any actions, are needed to clarify the Small Claims law and ensure that it is enforced and followed properly throughout all of Texas.

In any case, I thank you for your time and appreciate all the consideration you have given me in this matter. I look forward to the time when all of these issues are fully resolved one way or the other.

Sincerely,

Dr. Thomas J. Ellis

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March 14, 2008

Luis D. Sepulveda, Justice of the Peace
Precinct 5 Place 1, Dallas County Court
410 South Beckley
Dallas, TX 75203

CASE NO: JS-07003860

Request for Retrial

Your Honor:

I wish to respectfully submit this Motion to have the Small Claims case heard before your Court retried. I sincerely appreciated that you took the time to explain your decision and why you reached it. As a similar courtesy, I now ask that I be allowed to explain properly the reasons I am requesting a retrial.

I submit the request based on the following reasons:

Initial Claim:

As I understood, Your honor reached the final decision in part because I did not "submit" any evidence of damages. With all due respect to the Court, I feel I was wrongly kept from having my evidence considered by the Court because of a procedural technicality that Attorney Riddle raised that should not have applied to the proceedings under the "small claims" status. Prior to filing the suit, I did extensive research into the requirements of Small Claims and based on available information on County Court web sites, neither the Rules of Evidence nor the strict procedural requirements of a regular Court case applied. Even though the Defendant chose to retain Counsel, it is my understanding the trial was still "informal". As such, I was not concerned or "on guard" for any strict procedural issue and based on published information, it seemed clear that a Judge would ask for clarification if any was needed so that a fair decision could be reached.

While Attorney Riddle was well versed and able to quote statues by law, in the informal setting my evidence should have been considered as the issue was clearly raised prior to the Court adjourning to consider all of the facts and reach a decision. If I am mistaken, and each individual Court has different Rules, then I apologize but would still ask for the retrial as I feel it was not unreasonable for me to expect the conditions stated above since several different Counties within Texas all publish the same information. I have enclosed two printouts from County Court web sites as reference (Item **A** and Item **B**)

Counter Claim:

Attorney Riddle argued that because my claim was filed under the Texas Uniform Condominium Act, the prevailing party must be paid for Attorney fees. My claim was not filed under this Law, and none of the basis of my arguments involved this law, it is merely one Mr. Riddle uses repeatedly in his line of work. My right to file Suit is clearly defined in the HOA governing documents, my "contract" with the HOA. I have enclosed the page from the HOA Declarations with the relevant portion highlighted (Item **C**) and would respectfully remind the Court that Attorney Riddle used this same document as his basis for defending the HOA. My suit was not frivolous and was filed in good faith; the HOA is not entitled to recover damages had there actually been any (see next item).

More importantly is the claim from Attorney Riddle that he was required to do "extensive research" on the issues of the Building Code and Sound requirements in order to prepare for the case since it was not normally something he handles, accruing 30 hours of his time but being willing to "cap" the bill at 20 hours. I submit that is a knowingly false statement based on the following:

1) Attorney Riddle was first requested to begin investigating the Building Code and Sound requirements by our HOA back in November, 2006 by our HOA president (Item **D**).
2) By July, 2007, Attorney Riddle had done sufficient research to legally advise our Board of Directors that no violation or problem existed (Item **E**).
3) By August, 2007 Attorney Riddle had taken possession of all the documents on my condo, which included all of the "evidence" he presented to the Court (Item **F**).
4) The "research' on the Building Codes and Sound problems was ironically done by myself, at the direct request of Attorney Riddle (Item **G**). I have never been paid for my time.
5) During the remainder of the year, Mr. Riddle regularly interacted with me regarding the problems I had, and in fact insisted that I not contact the HOA for any reason, that any communication would need to go through him. He was intimately involved with this issue for almost a calendar year before I filed suit (item **H** inclusive).
6) Mr. Riddle has already been paid for literally all of the time he has spent on the issues I filed suit for. HOA records show his firm was paid over $50,000 during the 2007 calendar year, with at least $20,000 spent on issues like mine not related to the lawsuit filed against the developer. (Item **J**). I requested from the HOA copies of all invoices pertaining to Unit 1208 prior to the trial to show this but the request was refused.

I am sincerely hurt that an Attorney would stand before the Court and make false claims regarding damages in retaliation for a longstanding disagreement we have had. In addition to the retrial, I would ask the Court to consider what Attorney Riddle has done in this instance and take whatever steps Your Honor feels are necessary to keep this from happening to other citizens. I went to Court expecting to be treated fairly and told the whole truth, to the best of my ability; for the defendant's Counsel to claim $5,000 in fees that have mostly been paid for already, and for "research" that I did for the Attorney in a good-faith effort to resolve the matter outside of Court, is unacceptable.

As I stated previously, I am not an attorney, but have tried to form this request to meet the Court's expectations. If I have not met a procedural requirement, or need to supply additional information, I ask that the Court give me the opportunity to respond and correct the oversight.

Thank you for your time and assistance in this matter.

Sincerely,

Dr. Thomas J. Ellis

3225 TURTLE CREEK BLVD #1208 • DALLAS, TX • 75219
214-929-0067

[Current Rule]

RULE 296. REQUESTS FOR FINDINGS OF FACTS AND CONCLUSIONS OF LAW

In 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. 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.

[Proposed New Rule]

RULE 296. REQUESTS FOR FINDINGS OF FACTS AND CONCLUSIONS OF LAW

In any case (i) tried to the Court without a jury or (ii) tried to a jury in which one or more ultimate issues are tried to the Court, any party may request the Court to state in writing findings of fact and conclusions of law. Any request shall be filed with the Clerk within five days from the date the final judgment is signed. The Clerk shall promptly deliver a copy of such request to the judge who tried the case. A request for findings of fact and conclusions of law, and any proposed findings of fact and conclusions of law, shall be served on all parties in accordance with Rule 21a.

[Current Rule]

RULE 297. TIME TO FILE FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court shall file its findings of fact and conclusions of law within twenty days after a timely request is filed. The court shall cause a copy of its findings and conclusions to be mailed to each party in the suit.

If the court fails to file timely findings of fact and conclusions of law, the party making the request shall, within thirty days after filing the original request, file with the clerk and serve on all other parties in accordance with Rule 21 a a "Notice of Past Due Findings of Fact and Conclusions of Law" which shall be immediately called to the attention of the court by the clerk. Such notice shall state the date the original request was filed and the date the findings and conclusions were due. Upon filing this notice, the time for the court to file findings of fact and conclusions of law is extended to forty days from the date the original request was filed.

[Proposed New Rule]

RULE 297. FILING OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

a. Time to File.

The Court with whom a timely request for findings of fact and conclusions of law has been filed shall issue and file findings of fact and conclusions of law within twenty days from the date of filing of the request. The Clerk shall cause a copy of any findings and conclusions to be promptly mailed to each party.

b. Form of Findings and Conclusions.

The Court shall state in broad form findings of fact on each cause of action and defense raised by the pleadings. Each finding of fact and conclusion of law should be stated by a separately numbered paragraph.

[Current Rule]

RULE 298. ADDITIONAL OR AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

After the court files original findings of fact and conclusions of law, any party may file with the clerk of the court a request for specified additional or amended findings or conclusions. The request for these findings shall be made within ten days after the filing of the original findings and conclusions by the court. Each request made pursuant to this rule shall be served on each party to the suit in accordance with Rule 21a.

The court shall file any additional or amended findings and conclusions that are appropriate within ten days after such request is filed, and cause a copy to be mailed to each party to the suit. No findings or conclusions shall be deemed or presumed by any failure of the court to make any additional findings or conclusions.

[Proposed New Rule]

RULE 298. ADDITIONAL OR AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

a. Time for Request.

After the Court files findings of fact and conclusions of law, any party may file a request for specified additional findings or conclusions or propose specified amendments to the findings or conclusions within twenty days of the filing of the findings and conclusions.

b. Time for Response.

Within ten days from the date on which a request for additional or amended findings and conclusions is filed, the Court shall file any additional or amended findings and conclusions that it determines to be appropriate. The Clerk shall cause a copy of any additional or amended findings and conclusions to be mailed promptly to each party.

[Current Rule]

RULE 299. OMITTED FINDINGS AND PRESUMED FINDINGS

When findings of fact are filed by the trial court they shall form the basis of the judgment upon all grounds of recovery and of defense embraced therein. The judgment may not be supported upon appeal by a presumed finding upon any ground of recovery or defense, no element of which has been included in the findings of fact; but when one or more elements thereof have been found by the trial court, omitted unrequested elements, when supported by evidence, will be supplied by presumption in support of the judgment. Refusal of the court to make a finding requested shall be reviewable on appeal.

[Proposed New Rule]

RULE 299. OMITTED FINDINGS

When findings of fact are filed by the court they shall form the basis of the judgment. The judgment may not be supported upon appeal by a presumed finding upon any ground of recovery or defense no element of which has been requested or found.

[Current Rule]

RULE 299a. FINDINGS OF FACT TO BE SEPARATELY FILED AND NOT RECITED IN A JUDGMENT

Findings of fact shall not be recited in a judgment. If there is a conflict between findings of fact recited in a judgment in violation of this rule and findings of fact made pursuant to Rules 297 and 298, the latter findings will control for appellate purposes. Findings of fact shall be filed with the clerk of the court as a document or documents separate and apart from the judgment.

[Proposed New Rule]

299a. FINDINGS OF FACT TO BE SEPARATELY FILED AND NOT RECITED IN A JUDGMENT.

Findings of fact should not be recited in a final judgment. If findings of fact are recited in a final judgment, and findings of fact are made pursuant to Rules 297 or 298, findings of fact made pursuant to Rules 297 or 298 shall control for appellate purposes.

[Current Rule]
RULE 300. COURT TO RENDER JUDGMENT

Where a special verdict is rendered, or the conclusions of fact found by the judge are separately stated the court shall render judgment thereon unless set aside or a new trial is granted, or judgment is rendered notwithstanding verdict or jury finding under these rules.

[Proposed New Rule]
RULE 300. JUDGMENTS AND DECREES

a. Issuance.

The court shall sign a judgment on the facts found, whether by findings of fact, or jury verdict, unless set aside, a new trial is granted, or a judgment is rendered notwithstanding the verdict.

b. Final Judgment.

A final judgment shall be in writing and shall dispose of all parties and claims. When less than all the parties or all the claims are disposed of by written orders, no one of which disposes of all parties and claims, none of the orders is final until a judgment or order is signed that disposes of the remaining parties and claims.

c. Form and Substance.

A final judgment should:

1. Contain the names of each of the parties;
2. Explain the disposition of the causes of action and defenses; and state any relief granted or denied, to or against, each party.

[Current Rule]
RULE 301. JUDGMENTS

The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity. Provided, that upon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any jury finding on a question that has no support in the evidence. Only one final judgment shall be rendered in any cause except where it is otherwise specially provided by law. Judgment may, in a proper case, be given for or against one or more of several plaintiffs, and for or against one or more of several defendants or intervenors.

[Proposed New Rule]
RULE 301. MOTIONS RELATING TO JUDGMENTS

(a) Motion for Judgment on the Verdict. A party may move for judgment on the verdict of the jury.

(b) Motion for Judgment as a Matter of Law. A party may move for judgment as a matter of law, and include a request to disregard a jury finding as a matter of law, on a claim or defense:

(1) if the evidence, after the adverse party rests its evidence, or at the close of all of the evidence, or after the verdict in a jury case and before judgment, (i) is legally insufficient for a reasonable jury to find against the movant on a particular issue of fact or if the evidence conclusively establishes the issue in the movant's favor, and (ii) if, under the controlling law, a judgment cannot properly be rendered against the movant on that claim or defense without a finding adverse to the movant on an issue that has been disregarded, and a judgment as a matter of law should be rendered for movant as to that claim or defense; or

(2) if the application of controlling law to a claim or defense otherwise determines a claim or defense as a matter of law, unless the movant waived application of controlling law by failing to preserve a complaint that the court's charge affirmatively misstates controlling law.

(c) Motion to Modify Judgment. A party may move to modify a judgment as a matter of law, including a request to disregard a jury finding as a matter of law, after a judgment has been rendered:

(1) if the evidence is legally insufficient for a reasonable jury to find against the movant on a particular issue of a fact or if the evidence conclusively establishes the issue in the movant's favor;

(2) if the application of controlling law to a claim or defense otherwise determines a claim or defense as a matter of law, unless the movant waived application of controlling law by failing to preserve a complaint that the court's charge affirmatively misstates controlling law; or

(3) if the judgment should be vacated, modified, reformed, or corrected in any respect for any reason.

A motion for judgment as a matter of law is not a prerequisite to a motion to modify a judgment.

(d) Motion for New Trial. A party may move to set aside a judgment and seek a new trial pursuant to Rule 302.

(e) Motion for Judgment Record Correction. A party may move, with written notice to all parties interested in a judgment, for correction or reformation of clerical mistakes made in reducing to writing the judgment rendered by the judge.

(f) Motion Practice. A motion identified in this rule must state the specific complaint or request for relief in such a way that the matter can be understood by the judge. A party may file one or more motions identified in this rule and may renew or refile an additional motion of the same type containing additional complaints and requests for relief despite the denial of any previous motion. A party may also submit a proposed judgment or order with the motion.

[Current Rule]

RULE 302. ON COUNTERCLAIM

If the defendant establishes a demand against the plaintiff upon a counterclaim exceeding that established against him by the plaintiff, the court shall render judgment for defendant for such excess.

[Proposed New Rule]

RULE 302. MOTIONS FOR NEW TRIAL

(a) Grounds. For good cause, a new trial, or partial new trial under paragraph (f), may be granted and a judgment may be set aside on motion of a party or on the judge's own motion, in the following instances, among others:

(1) when the evidence is factually insufficient to support a jury finding;

(2) when a jury finding is against the overwhelming preponderance of the evidence;

(3) when the damages awarded by the jury are manifestly too small or too large because of the factual insufficiency or overwhelming preponderance of the evidence;

(4) when the trial judge has made an error of law that probably caused rendition of an improper judgment;

(5) when injury to the movant has probably resulted from: (i) misconduct of the jury; or (ii) misconduct of the officer in charge of the jury; or (iii) improper communication to the jury; or (iv) a juror's erroneous or incorrect answer on voir dire examination;

(6) when new, non-cumulative evidence has been discovered that was not available at the trial by the movant's use of reasonable diligence and its unavailability probably caused the rendition of an improper judgment;

(7) when a default judgment should be set aside upon either legal or equitable grounds;

(8) when a judgment has been rendered on citation by publication, the defendant did not appear in person or by an attorney selected by the defendant and good cause for a new trial exists;

(9) when there is a material and irreconcilable conflict in jury findings;

(10) when any improperly admitted evidence, error in the court's charge, argument of counsel, or other trial court occurrence or ruling probably caused rendition of an improper judgment;

(11) when any other ground warrants a new trial in the interest of justice.

(b) Form. Complaints in general terms shall not be considered. Each complaint in a motion for new trial shall identify the matter of which complaint is made in such a way that the complaint can be understood by the judge.

(c) Affidavits. Supporting affidavits are required for complaints based on facts not otherwise in the record, such as:

(1) jury misconduct;

(2) newly discovered evidence;

(3) equitable grounds to set aside a default judgment; or

(4) good cause to set aside a judgment after citation by publication.

(d) Procedure For Jury Misconduct.

(1) Hearing. When the ground of the motion for new trial, supported by affidavit, is misconduct of the jury or of the officer in charge of the jury, or improper communications made to the jury, or a juror's erroneous or incorrect answer on voir dire examination, the judge shall hear evidence from members of the jury or others in open court and may grant a new trial if it reasonably appears from the evidence both on the hearing of the motion and from the record as a whole on the trial of the case that injury probably resulted to the complaining party.

(2) Testimony Of Jurors. A juror may not testify as to any matter or statement occurring during the jury's deliberations, or on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict. 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 whether: (i) any outside influence was improperly brought to bear upon any juror; or (ii) the juror was qualified to serve.

(e) Excessive Damages; Remittitur

(1) Excessive Damages. If the judge is of the opinion that the damages found by the jury are not supported by factually sufficient evidence, the judge may determine the greatest amount of damages supported by the evidence and may, as a condition of overruling a motion

for new trial, suggest that the party claiming such damages file a remittitur of the excess within a specified period.

(2) Remittitur By Party. Any party in whose favor a judgment has been rendered may remit any part thereof in open court, or by executing and filing with the clerk a written remittitur signed by the party or the party's attorney of record, and duly acknowledged by the party or the party's attorney. Such remittitur shall be a part of the record of the cause. Execution may issue only for the balance of such judgment.

(f) Partial New Trial. If the judge is of the opinion that a new trial should be granted on a point or points that affect only a part of the matters in controversy that is clearly separable without unfairness to the parties, the judge may grant a new trial as to that part only, but a separate trial on unliquidated damages alone shall not be ordered if liability issues are contested.

[Current Rule]

RULE 303. ON COUNTERCLAIM FOR COSTS

When a counterclaim is pleaded, the party in whose favor final judgment is rendered shall also recover the costs, unless it be made to appear on the trial that the counterclaim of the defendant was acquired after the commencement of the suit, in which case, if the plaintiff establishes a claim existing at the commencement of the suit, he shall recover his costs.

[Proposed New Rule]

RULE 303. PRESERVATION OF COMPLAINTS

(a) General Preservation Rule. As a prerequisite to the presentation of a complaint for appellate review, a timely request, objection, or motion must appear of record, stating the specific grounds for the ruling that the complaining party desired the trial court to make if the specific grounds were not apparent from the context. No complaint shall be considered waived if the ground stated is sufficiently specific to make the judge aware of the complaint. The judge's ruling upon the complaining party's request, objection or motion must also appear of record provided that the overruling by operation of law of a motion for new trial or a motion to modify the judgment is sufficient to preserve for appellate review the complaints properly made in the motion, unless the taking of evidence is necessary for proper presentation of the complaint in the trial court. A ruling may be shown in the judgment, in a signed separate order, in the statement of facts, or in a formal bill of exceptions. If the trial judge refuses to rule, an objection to the judge's refusal to rule is sufficient to preserve the complaint. Formal exceptions to rulings or orders of the trial court are not required.

(b) When a Motion for New Trial is Required. As a prerequisite to appellate review, the following complaints shall be made in a motion for new trial:

(1) jury misconduct, newly discovered evidence, equitable grounds to set aside a judgment, or any other complaint on which evidence must be heard;

(2) the evidence is factually insufficient to support a jury finding;

(3) a jury finding is against the overwhelming preponderance of the evidence;

(4) the damages awarded by the jury are manifestly too large or too small because of the factual insufficiency or overwhelming preponderance

of the evidence;

(5) an incurable jury argument, if not otherwise ruled on by the trial court;

(6) good cause to set aside a judgment after citation by publication; or

(7) a jury verdict that will not support any judgment.

(c) Nonjury Cases: Legal and Factual Sufficiency of Evidence. In a nonjury case, a complaint regarding the legal or factual insufficiency of the evidence, including a complaint that the damages found by the court are excessive or inadequate, as distinguished from a request that the judge amend a fact finding or make additional finding of fact, may be made for the first time on appeal in the complaining party's brief.

(d) Informal Bills of Exception and Offers of Proof. When evidence is excluded, the offering party shall as soon as practicable, but before the charge is read to the jury or before the judgment is signed in a nonjury case, be allowed to make, in the absence of the jury, an offer of proof in the form of a concise statement. The judge may, or at the request of a party shall, direct the making of the offer in question and answer form. A transcription of the reporter's notes or of the electronic tape recording showing the offer, whether by concise statement or question and answer, showing the objections made, and showing the ruling, when included in the statement of facts certified by the reporter or recorder, shall establish the nature of the evidence, the objections and the ruling. The judge may add any other or further statement showing the character of the evidence, the form in which offered, the objection made and the ruling. No further offer need be made. No formal bills of exception are needed to authorize appellate review of exclusion of evidence. When the judge hears objections to offered evidence out of the presence of the jury and rules that the evidence be admitted, the objections are deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating them.

(e) Formal Bills of Exception. The preparation and filing of formal bills of exception shall be governed by the following rules:

(1) No particular form of words shall be required in a bill of exception, but the objection to the ruling or action of the judge and the ruling complained of shall be stated with such circumstances, or so much of the evidence as may be necessary to explain and no more, and the whole as briefly as possible.

(2) When the statement of facts contains all the evidence requisite to explain the bill of exception, evidence need not be set out in the bill; but it shall be sufficient to refer to the same as it appears in the statement of facts.

(3) The ruling of the judge in giving or qualifying instructions to the jury shall be regarded as approved unless a proper and timely objection is made.

(4) Formal bills of exception shall be presented to the judge for his allowance and signature.

(5) The judge shall submit the bill to the adverse party or the adverse party's counsel, if in attendance at the court, and if the adverse party finds it to be correct, the judge shall sign it without delay and fits it with the clerk.

(6) If the judge finds the bill incorrect, the judge shall suggest to the parties or their counsel such corrections as the judge deems necessary, and if they are agreed to the judge shall make such corrections, sign the bill and file it with the clerk.

(7) Should the parties not agree to the judge's suggested corrections, the judge shall return the bill to the complaining party with the judge's refusal endorsed on it, and shall prepare, sign and file with the clerk such a bill of exception as well, in the judge's opinion, present the ruling of the court as it actually occurred.

(8) Should the complaining party be dissatisfied with the bill filed by the judge, the complaining party may, upon procuring the signatures of three respectable bystanders, citizens of this State, attesting to the correctness of the bill as originally presented, have it filed as part of the record of the cause. The truth of the matter may be controverted and maintained by affidavits, not exceeding five in number on each side, filed with the papers of the cause, within ten days after the filing of the bill. On appeal the truth of the bill shall be determined from the affidavits so filed.

(9) In the event of conflict between a formal bill and the statement of facts, the bill shall control.

(10) Anything occurring in open court or in chambers that is reported or recorded and so certified by the court reporter or recorder may be included in the statement of facts rather than in a formal bill of exception. A party requesting that all or part of the jury arguments or the voir dire examination of the jury

panel be included in the statement of facts shall pay the cost thereof, which shall be separately listed in the certified bill of costs, and may be taxed in whole or in part by the appellate court against the party to the appeal.

(11) Formal bills of exception shall be filed in the trial court within sixty days after the judgment is signed or if a timely motion for new trial, motion to modify, request for findings, or motion to reinstate pursuant to Rule 165a has been filed, formal bills of exception shall be filed within ninety days after the judgment is signed. When a formal bill of exception is filed, it may be included in the transcript or in a supplemental transcript.

[Current Rule]

RULE 304. JUDGMENT UPON RECORD

Judgments rendered upon questions raised upon citations, pleadings, and all other proceedings, constituting the record proper as known at common law, must be entered at the date of each term when pronounced.

[Proposed New Rule]

RULE 304. TIMETABLES

(a) Motion for Judgment on Jury Verdict. A motion for judgment on the jury verdict may be presented at any time before a final judgment has been signed. A motion for judgment on the jury verdict is overruled by operation of law when a final judgment is signed that does not grant the motion.

(b) Motion for Judgment as a Matter of Law. A motion for judgment as a matter of law may be presented after the adverse party rests its evidence, or at the close of all the evidence, or after the verdict in a jury case and before judgment, and shall not be considered waived if not presented earlier. A motion for judgment as a matter of law shall not be presented after a final judgment has been signed. A ground in a motion for judgment as a matter of law is overruled by operation of law when a final judgment is signed that does not grant that ground.

(c) Motion to Modify a Judgment and Motion for New Trial.

(1) Time to File. A motion to modify a judgment and a motion for new trial shall be filed within thirty days after the final judgment is signed. One or more amended or additional motions may be filed without leave of court within thirty days after the final judgment is signed regardless of whether a prior motion containing requests for the same relief has been overruled.

(2) When Motion Overruled. If a motion to modify a judgment or a motion for new trial is not determined by order signed within seventy-five days after the final judgment was signed, any such motion shall be considered overruled by operation of law on expiration of that period.

(3) Special Deadline; Publication. In a case when judgment has been rendered on citation by publication and the defendant did nto appear in

person or by an attorney selected by the defendant, a motion for new trial shall be filed within two years after the final judgment was signed, unless a motion has been previously filed by such defendant or attorney pursuant to paragraph (c)(1).

(d) Motion to Correct Judgment Record. A motion to correct the judgment record may be filed at any time after a final judgment is signed, but if the motion is filed within thirty days after the final judgment is signed, the motion shall be considered a motion to modify a judgment filed within thirty days pursuant to paragraph (c) (1).

(e) Effective Dates and Beginning of Periods

(1) Beginning of Periods. The date a final judgment or appealable order is signed as shown of record determines the beginning of the period during which (i) the court may exercise plenary power to grant a motion to modify, a motion for new trial or a motion to correct the judgment record, a motion to reinstate a case dismissed for want of prosecution and a request for findings of fact and conclusions of law or to vacate a judgment, and (ii) a party may timely file any post-judgment document necessary to preserve the rights of the party on appeal.

(2) Date to be Shown. All judgments, decisions, and orders of any kind shall be reduced to writing and signed by the trial judge with the date of signing expressly stated in it. If the date of signing is not recited in the judgment or order, it may be shown in the record by a certificate of the judge or otherwise; the absence of a showing of the date in the record does not invalidate a judgment or an order.

(3) Notice of Judgment. When the final judgment or appelable order is signed, the clerk of the court shall immediately give notice of the signing to each party or the party's attorney by first-class mail. Failure to comply with this rule shall not affect the periods mentioned in paragraph (e)(1), except under paragraph (e)(4).

(4) No Notice of Judgment; Additional Time. If a party affected by a final judgment or appealable order, or the party's attorney, has not within twenty days after the final judgment or appealable order was signed, received the notice required by paragraph (e)(3) and has not acquired actual knowledge of the signing of the final judgment or appealable order, then all

periods provided in these rules that run from the date of the final judgment or appealable order is signed shall begin for that party on the date that party, or the party's attorney, received notice or acquired actual knowledge of the signing of the final judgment or appealable order, which ever occurred first; provided, however, that in no event shall the periods begin more than ninety days after the final judgment or appealable order was signed.

(5) Procedure to Gain Additional Time. To establish the application of paragraph (e)(4), the party adversely affected must file a motion in the trial court stating the date on which the party or the party's attorney first either received a notice of the final judgment or appealable order or acquired actual knowledge of the signing of the final judgment or appealable order and that this date was more than twenty days after the final judgment or appealable order was signed. The trial judge shall promptly set the motion for hearing and after conducting a hearing on the motion, shall find the date the party or the party's attorney first either received a notice of the final judgment or appealable order or acquired actual knowledge of the signing of the final judgment or appealable order and include this finding in a written order.

(6) Periods Affected by Modified Judgment. If a judgment is modified in any respect during the period of the trial court's plenary power, all periods provided in these rules that run from the date the final judgment is signed shall run from the time the modified judgment is signed. If a correction to a judgment is made pursuant to Rule 301(e) after expiration o the trial court's plenary power, all periods provided in these rules which run from the date the judgment is signed shall run from the date of the signing of the corrected judgment for any complaint that would not apply to the original judgment.

(7) Citation by Publication. For a motion for new trial filed more than thirty days but within two years after the final judgment was signed under paragraph (c)(3) when citation was served by publication; the periods shall be computed as if the judgment were signed on the date of filing the motion.

(8) Premature Filing. A prematurely filed motion to modify a judgment or a motion for new trial is effective to preserve the complaints made in the motion and is deemed to have been overruled by operation of law on the date of, but subsequent to, the signing of the judgment the motion

attacks. No motion to modify a judgment or a motion for new trial filed prior to the signing of the final judgment extends the trial court's plenary power provided in Rule 305 or any timetable prescribed in the Texas Rules of Appellate Procedure. A motion filed on the same day as the judgment is signed is not prematurely filed.

[Current Rule]

RULE 305. PROPOSED JUDGMENT

Any party may prepare and submit a proposed judgment to the court for signature.

Each party who submits a proposed judgment for signature shall serve the proposed judgment on all other parties to the suit who have appeared and remain in the case, in accordance with Rule 21a.

Failure to comply with this rule shall not affect the time for perfecting an appeal.

[Proposed New Rule]

RULE 305. PLENARY POWER OF THE TRIAL COURT

(a) Definition. Plenary power is the complete power of the court to act, within its jurisdiction, according to law or equity, on any issue of procedure or substances as to any party before the court. After the expiration of plenary power, a court may exercise only such power as is expressly authorized by rule or statute.

(b) Duration. Regardless of whether an appeal has been perfected, the trial court has plenary power to modify or vacate a judgment or grant a new trial:

(1) within thirty days after the judgment is signed, or

(2) if any party has timely filed a (i) motion for new trial, (ii) motion to modify the judgment, (iii) motion to reinstate a judgment after dismissal for want of prosecution, or (iv) request for findings of fact and conclusions of law, one hundred and five days after the judgment is signed.

(c) After Expiration. After expiration of the time prescribed by paragraph (b), the trial court cannot modify or vacate the judgment or grant a new trial, but the court may, after expiration of that time:

(1) correct a clerical error in the record of the judgment and;

(2) sign an order declaring a previous judgment or order to be void because signed after the court's power as prescribed in paragraph (b) has expires;

(3) issue any order or process or entertain any proceeding for

enforcement of the judgment within the time allowed for execution;

(4) file findings of fact and conclusions of law if a timely request for such findings and conclusions has been filed;

(5) entertain and act for sufficient cause on any bill of review filed within the time allowed by law;

(6) grant a new trial for good cause on a motion filed within the time allowed by Rule 304(e)(7) if citation was served by publication;

(7) grant a new trial or modify the judgment within the time allowed by Rule 304(e)4) when the moving party did not have timely notice or knowledge of the judgment.

[Current Rule]

RULE 306. RECITATION OF JUDGMENT

The entry of the judgment shall contain the full names of the parties, as stated in the pleadings, for and against whom the judgment is rendered.

[Proposed New Rule]

[None – covered by New Rule 300(c)]

[Current Rule]

RULE 306a. PERIODS TO RUN FROM SIGNING OF JUDGMENT

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.

2. **Date to Be Shown.** Judges, attorneys and clerks are directed to use their best efforts to cause all judgments, decisions and orders of any kind to be reduced to writing and signed by the trial judge with the date of signing stated therein. If the date of signing is not recited in the judgment or order, it may be shown in the record by a certificate of the judge or otherwise; provided, however, that the absence of a showing of the date in the record shall not invalidate any judgment or order.

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.** 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.

6. **Nunc Pro Tunc Order.** When a corrected judgment has been signed after expiration of the court's plenary power pursuant to Rule 316, the periods mentioned in paragraph (1) of this rule shall run from the date of signing the corrected judgment with respect of any complaint that would not be applicable to the original document.

7. **When Process Served by Publication.** With respect to a motion for new trial filed more than thirty days after the judgment was signed pursuant to Rule 329 when process has been served by publication, the periods provided by paragraph (1) shall be computed as if the judgment were signed on the date of filing the motion.

[Proposed New Rule]

[Repeal – covered by New Rule 304]

[Current Rule]

RULE 306c. PREMATURELY FILED DOCUMENTS

No motion for new trial or request for findings of fact and conclusions of law shall be held ineffective because prematurely filed; but every such motion shall be deemed to have been filed on the date of but subsequent to the time of signing of the judgment the motion assails, and every such request for findings of fact and conclusions of law shall be deemed to have been filed on the date of but subsequent to the time of signing of the judgment.

[Proposed New Rule]

[Repeal. Partially covered by New Rule 304(e)(8)]

[Current Rule]

RULE 307. EXCEPTIONS, ETC., TRANSCRIPT

In non jury cases, where findings of fact and conclusions of law are requested and filed, and in jury cases, where a special verdict is returned, any party claiming that the findings of the court or the jury, as the case may be, do not support the judgment, may have noted in the record an exception to said judgment and thereupon take an appeal or writ of error, where such writ is allowed, without a statement of facts or further exceptions in the transcript, but the transcript in such cases shall contain the conclusions of law and fact or the special verdict and the judgment rendered thereon.

[Proposed New Rule]

[Repeal. Covered by New Rule 303(a)]

[Current Rule]

RULE 308. COURT SHALL ENFORCE ITS DECREES

The court shall cause its judgments and decrees to be carried into execution; and where the judgment is for personal property, and it is shown by the pleadings and evidence and the verdict, if any, that such property has an especial value to the plaintiff, the court may award a special writ for the seizure and delivery of such property to the plaintiff; and in such case may enforce its judgment by attachment, fine and imprisonment.

[Proposed New Rule]

[Current Rule]

RULE 308a. IN SUITS AFFECTING THE PARENT-CHILD RELATIONSHIP

When the court has ordered child support or possession of or access to a child and it is claimed that the order has been violated, the person claiming that a violation has occurred shall make this known to the court. The court may appoint a member of the bar to investigate the claim to determine whether there is reason to believe that the court order has been violated. If the attorney in good faith believes that the order has been violated, the attorney shall take the necessary action as provided under Chapter 14, Family Code. On a finding of a violation, the court may enforce its order as provided in Chapter 14, Family Code.

Except by order of the court, no fee shall be charged by or paid to the attorney representing the claimant. If the court determines that an attorney's fee should be paid, the fee shall be adjudged against the party who violated the court's order. The fee may be assessed as costs of court, or awarded by judgment, or both.

[Proposed New Rule]

[Current Rule]

RULE 309. IN FORECLOSURE PROCEEDINGS

Judgments for the foreclosure of mortgages and other liens shall be that the plaintiff recover his debt, damages and costs, with a foreclosure of the plaintiffs lien on the property subject thereto, and, except in judgments against executors, administrators and guardians, that an order of sale shall issue to any sheriff or any constable within the State of Texas, directing him to seize and sell the same as under execution, in satisfaction of the judgment; and, if the property cannot be found, or if the proceeds of such sale be insufficient to satisfy the judgment, then to take the money or any balance thereof remaining unpaid, out of any other property of the defendant, as in case of ordinary executions.

[Proposed New Rule]

[Current Rule]

RULE 310. WRIT OF POSSESSION

When an order foreclosing a lien upon real estate is made in a suit having for its object the foreclosure of such lien, such order shall have all the force and effect of a writ of possession as between the parties to the foreclosure suit and any person claiming under the defendant to such suit by any right acquired pending such suit; and the court shall so direct in the judgment providing for the issuance of such order. The sheriff or other officer executing such order of sale shall proceed by virtue of such order of sale to place the purchaser of the property sold thereunder in possession thereof within thirty days after the day of sale.

[Proposed New Rule]

[Current Rule]

RULE 311. ON APPEAL FROM PROBATE COURT

Judgment on appeal or certiorari from any county court sitting in probate shall be certified to such county court for observance.

[Proposed New Rule]

[Current Rule]

RULE 312. ON APPEAL FROM JUSTICE COURT

Judgment on appeal or certiorari from a justice court shall be enforced by the county or district court rendering the judgment.

[Proposed New Rule]

[Current Rule]

RULE 313. AGAINST EXECUTORS, ETC.

A judgment for the recovery of money against an executor, administrator or guardian, as such, shall state that it is to be paid in the due course of administration. No execution shall issue thereon, but it shall be certified to the county court, sitting in matters of probate, to be there enforced in accordance with law, but judgment against an executor appointed and acting under a will dispensing with the action of the county court in reference to such estate shall be enforced against the property of the testator in the hands of such executor, by execution, as in other cases.

[Proposed New Rule]

[Current Rule]

RULE 314. CONFESSION OF JUDGMENT

Any person against whom a cause of action exists may, without process, appear in person or by attorney, and confess judgment therefor in open court as follows:

(a) A petition shall be filed and the justness of the debt or cause of action be sworn to by the person in whose favor the judgment is confessed.

(b) If the judgment is confessed by attorney, the power of attorney shall be filed and its contents be recited in the judgment.

(c) Every such judgment duly made shall operate as a release of all errors in the record thereof, but such judgment may be impeached for fraud or other equitable cause.

[Proposed New Rule]

[Current Rule]

RULE 315.
REMITTITUR

Any party in whose favor a judgment has been rendered may remit any part thereof in open court, or by executing and filing with the clerk a written remittitur signed by the party or the party's attorney of record, and duly acknowledged by the party or the party's attorney. Such remittitur shall be a part of the record of the cause. Execution shall issue for the balance only of such judgment.

[Proposed New Rule]

[Current Rule]

RULE 316. CORRECTION OF CLERICAL MISTAKES IN JUDGMENT RECORD

Clerical mistakes in the record of any judgment may be corrected by the judge in open court according to the truth or justice of the case after notice of the motion therefor has been given to the parties interested in such judgment, as provided in Rule 21 a, and thereafter the execution shall conform to the judgment as amended.

[Proposed New Rule]

[Repeal. Covered by Rule 305]

[Current Rule]

RULE 320. MOTION AND ACTION OF COURT THEREON

New trials may be granted and judgment set aside for good cause, on motion or on the court's own motion on such terms as the court shall direct. New trials may be granted when the damages are manifestly too small or too large. When it appears to the court that a new trial should be granted on a point or points that affect only a part of the matters in controversy and that such part is clearly separable without unfairness to the parties, the court may grant a new trial as to that part only, provided that a separate trial on unliquidated damages alone shall not be ordered if liability issues are contested. Each motion for new trial shall be in writing and signed by the party or his attorney.

[Proposed New Rule]

[Repeal. Covered by Rule 301-2]

[Current Rule]

RULE 321. FORM

Each point relied upon in a motion for new trial or in arrest of judgment shall briefly refer to that part of the ruling of the court, charge given to the jury, or charge refused, admission or rejection of evidence, or other proceedings which are designated to be complained of, in such a way that the objection can be clearly identified and understood by the court.

[Proposed New Rule]

[Repeal. Covered by Rule 302]

[Current Rule]

RULE 322. GENERALITY TO BE AVOIDED

Grounds of objections couched in general terms - as that the court erred in its charge, in sustaining or overruling exceptions to the pleadings, and in excluding or admitting evidence, the verdict of the jury is contrary to law, and the like - shall not be considered by the court.

[Proposed New Rule]

[Repeal. Covered by Rule 303]

[Current Rule]

RULE 324. PREREQUISITES OF APPEAL

(a) **Motion for New Trial Not Required.** A point in a motion for new trial is not a prerequisite to a complaint on appeal in either a jury or a nonjury case, except as provided in subdivision (b).

(b) **Motion for New Trial Required.** A point in a motion for new trial is a prerequisite to the following complaints on appeal:

(1) A complaint on which evidence must be heard such as one of jury misconduct or newly discovered evidence or failure to set aside a judgment by default;

(2) A complaint of factual insufficiency of the evidence to support a jury finding;

(3) A complaint that a jury finding is against the overwhelming weight of the evidence;

(4) A complaint of inadequacy or excessiveness of the damages found by the jury; or

(5) Incurable jury argument if not otherwise ruled on by the trial court.

(c) **Judgment Notwithstanding Findings; Cross-Points.** When judgment is rendered non obstante verdicto or notwithstanding the findings of a jury on one or more questions, the appellee may bring forward by cross-point contained in his brief filed in the Court of Appeals any ground which would have vitiated the verdict or would have prevented an affirmance of the judgment had one been rendered by the trial court in harmony with the verdict, including

although not limited to the ground that one or more of the jury's findings have insufficient support in the evidence or are against the overwhelming preponderance of the evidence as a matter of fact, and the ground that the verdict and judgment based thereon should be set aside because of improper argument of counsel.

The failure to bring forward by cross-points such grounds as would vitiate the verdict shall be deemed a waiver thereof; provided, however, that if a cross-point is upon a ground which requires the taking of evidence in addition to that adduced upon the trial of the cause, it is not necessary that the evidentiary hearing be held until after the appellate court determines that the cause be remanded to consider such a cross-point.

[Proposed New Rule]

[Repeal.]

[Current Rule]

RULE 326. NOT MORE THAN TWO

Not more than two new trials shall be granted either party in the same cause because of insufficiency or weight of the evidence.

[Proposed New Rule]

[Current Rule]

RULE 327. FOR JURY MISCONDUCT

a. When the ground of a motion for new trial, supported by affidavit, is misconduct of the jury or of the officer in charge of them, or because of any communication made to the jury, or that a juror gave an erroneous or incorrect answer on voir dire examination, the court shall hear evidence thereof from the jury or others in open court, and may grant a new trial if such misconduct proved, or the communication made, or the erroneous or incorrect answer on voir dire examination, be material, and if it reasonably appears from the evidence both on the hearing of the motion and the trial of the case and from the record as a whole that injury probably resulted to the complaining party.

b. 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 his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict concerning his mental processes in connection therewith, except that a juror may testify whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

[Proposed New Rule]

[Repeal. Covered by Rule 302]

[Current Rule]

RULE 329. MOTION FOR NEW TRIAL ON JUDGMENT FOLLOWING CITATION BY PUBLICATION

(a) The court may grant a new trial upon petition of the defendant showing good cause, supported by affidavit, filed within two years after such judgment was signed. The parties adversely interested in such judgment shall be cited as in other cases.

(b) Execution of such judgment shall not be suspended unless the party applying therefor shall give a good and sufficient bond payable to the plaintiff in the judgment, in an amount fixed in accordance with Appellate Rule 47 relating to supersedeas bonds, to be approved by the clerk, and conditioned that the party will prosecute his petition for new trial to effect and will perform such judgment as may be rendered by the court should its decision be against him.

(c) If property has been sold under the judgment and execution before the process was suspended, the defendant shall not recover the property so sold, but shall have judgment against the plaintiff in the judgment for the proceeds of such sale.

(d) If the motion is filed more than thirty days after the judgment was signed, the time period shall be computed pursuant to Rule 306a(7).

[Proposed New Rule]

[Repeal. Covered by Rule 302]

(c) In the event an original or amended motion for new trial or a motion to modify, correct or reform a judgment is not determined by written order signed within

[Current Rule]

RULE 329a. COUNTY COURT CASES

If a case or other matter is on trial or in the process of hearing when the term of the county court expires, such trial, hearing or other matter may be proceeded with at the next or any subsequent term of court and no motion or plea shall be considered as waived or overruled, because not acted upon at the term of court at which it was filed, but may be acted upon at any time the judge may fix or at which it may have been postponed or continued by agreement of the parties with leave of the court. This subdivision is not applicable to original or amended motions for new trial which are governed by Rule 329b.

[Proposed New Rule]

[Current Rule]

RULE 329b. TIME FOR FILING MOTIONS

The following rules shall be applicable to motions for new trial and motions to modify, correct, or reform judgments (other than motions to correct the record under Rule 316) in all district and county courts:

(a) A motion for new trial, if filed, shall be filed prior to or within thirty days after the judgment or other order complained of is signed.

(b) One or more amended motions for new trial may be filed without leave of court before any preceding motion for new trial filed by the movant is overruled and within thirty days after the judgment or other order complained of is signed seventy-five days after the judgment was signed, it shall be considered overruled by operation of law on expiration of that period.

(d) The trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed.

(e) If a motion for new trial is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after all such timely-filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.

(f) On expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause, filed within the time allowed by law; provided that the court may at any time correct a clerical error in the record of a judgment and render judgment nunc pro tunc under Rule 316, and may also sign an order declaring a previous judgment or order to be void because signed after the court's plenary power had expired.

(g) A motion to modify, correct, or reform a judgment (as distinguished from motion to correct the record of a judgment under Rule 316), if filed, shall be filed and determined within the time prescribed by this rule for a motion for new trial and shall extend the trial court's plenary power and the time for perfecting an appeal in the same manner as a motion for new trial. Each such motion shall be in writing and signed by the party or his attorney and shall specify the respects in which the judgment should be modified, corrected, or reformed. The overruling of such a motion shall not preclude the filing of a motion for new trial, nor shall the overruling of a

motion for new trial preclude the filing of a motion to modify, correct, or reform.

(h) If a judgment is modified, corrected or reformed in any respect, the time for appeal shall run from the time the modified, corrected, or reformed judgment is signed, but if a correction is made pursuant to Rule 316 after expiration of the period of plenary power provided by this rule, no complaint shall be heard on appeal that could have been presented in an appeal from the original judgment.

[Proposed New Rule]

[Repeal.]

From: Kennon L. Peterson [mailto:Kennon.Peterson@courts.state.tx.us]
Sent: Tuesday, November 18, 2008 5:10 PM
To: Babcock, Chip; Senneff, Angie
Cc: Nathan Hecht
Subject: SCAC Agenda Item - Civil Cover Sheets

Chip and Angie,

The attached cover sheets were developed as a component of a joint Texas Judicial Council ("TJC") and Office of Court Administration ("OCA") project known as the Judicial Data Project. The project, which involved an extensive review of the data elements used by trial courts in reporting case activity, began in 2002 when the TJC Committee on Judicial Data Management asked OCA data workgroups to recommend various changes to the OCA. As part of the project, the OCA data workgroups were tasked with developing a civil cover sheet, intended to take the burden off clerks in categorizing cases and make the attorney or litigant responsible for indicating what type of case is being filed. Dallas County, which has required a civil cover sheet in its district courts for several years, offered its sheet as an example. Members of the OCA data workgroups and TJC Committee on Judicial Data Management responded positively to that sheet.

Angela Garcia — Manager of OCA's Judicial Information Department — developed draft civil and family case cover sheets using Dallas County's cover sheet as the primary base. She also obtained samples of cover sheets used by other Texas counties, other states, and the federal government and incorporated elements from those sheets into the model cover sheets. The case categories included in the model cover sheets were structured around the case categories included in the new OCA monthly reports for district and county-level courts (effective September 1, 2010).

When the initial drafts of the model cover sheets were complete, Judge Sharolyn Wood — the former chair of the TJC Committee on Judicial Data Management and a longtime civil district judge in Harris County — circulated the drafts among civil and family judges in Harris County. Judge Wood and other judges suggested a few changes, which Ms. Garcia made. Prior to the TJC's meeting on September 19, 2008, the cover sheets were forwarded to Blake Hawthorne, Alice McAfee, and me for our review. Mr. Hawthorne suggested a couple of changes to the civil cover sheets, which were made prior to the meeting. Then, the draft civil and family law cover sheets were presented to the TJC at its meeting on September 19. The TJC approved the cover sheets as model forms that could be modified for local use.

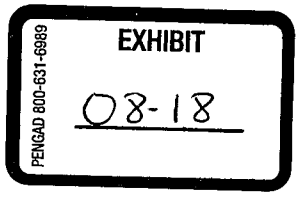
After the TJC approved the draft cover sheets, Mary Cowherd — Deputy Director of OCA and Director of Research and Court Services — presented the cover sheets to Mr. Hawthorne and me for further consideration. Concurrently, Ms. Cowherd asked the Court to promulgate a rule that requires parties to file cover sheets containing the following information, at a minimum: the style of the case, name of the attorney or party filing the case, contact information for the attorney or party filing the case, state bar number of the attorney (if applicable), names of the parties, and case type (to be selected by local jurisdictions). Justice Hecht and I decided and conveyed that it would be best to refer this matter to the Supreme Court Advisory Committee. The drafters of the cover sheets agreed with that approach.

In the last few weeks, the draft cover sheets were revised to address concerns raised by clerks, primarily Sheri Woodfin and Clyde Lemon. The TJC reviewed the cover sheets (with the changes proposed by the clerks) at its meeting on November 7, 2008 and approved the clerks' proposed changes. Then, the Judicial Council on Information Technology ("JCIT") reviewed the revised drafts on November 13, 2008. In response to a suggestion from JCIT member Judge Steve King, Ms. Cowherd made the "style of the case" line more general by removing "Plaintiff v. Defendant" designations. The attached cover sheets incorporate that revision.

To summarize, the TJC and JCIT have approved substantially similar versions of the attached cover sheets. Now, the Court requests that the Advisory Committee:

(1) review the attached cover sheets and provide feedback;

(2) recommend a Texas Rule of Civil Procedure addressing the cover sheets;



(3) consider whether the attorney or party filing a case must sign the completed cover sheet and, if so, what the consequences of no signature will be; and

(4) consider the consequences of not filing a cover sheet with an initial pleading.

The Court would like to thank the Advisory Committee in advance for its invaluable input on these issues. Please let me know if you have any questions or concerns.

Best Regards,

Kennon

Kennon L. Peterson

Rules Attorney, Supreme Court of Texas

P.O. Box 12248

Austin, TX 78711

512.463.1353 (phone)

512.475.2774 (fax)

Kennon.Peterson@courts.state.tx.us

Kennon L. Peterson

From: Mary Cowherd
Sent: Thursday, November 20, 2008 9:13 AM
To: Kennon L. Peterson
Cc: Angela Garcia
Subject: question re. cover sheets
Attachments: District Comparison New and Current Reports.xls

Hi Kennon:

Not a stupid question at all. In the instructions for the monthly case activity reporting forms submitted by the district and county clerks to our office, we indicate what type of cases fall under the respective case type categories. While counties may call cases different things, they can see the case type category where a case would fit. Below are excerpts from the district court monthly report instructions (effective 9/1/2010) in which the civil case type categories and family case type categories are defined. In addition, Angela has prepared the attached charts for the clerks listing examples of what types of cases should be put under each case type catetgory.

Also, for their own needs and purposes, many counties maintain more granulated case type category information in their case management systems than that reported in the monthly reports submitted to OCA. We have provided for that more granulated information in the model cover sheets. For example, in the model district civil cover sheet, we have provided for multiple types of malpractice (i.e., accounting, legal, medical, other professional liability). Yet in the monthly report submitted to OCA, they will only report medical malpractice and other professional malpractice cases. If a county maintains information on accounting, legal, medical and other professional malpractice cases in their case management systems, the accounting, legal and other professional malpractice case information will be rolled up into the "Other Professional Liability" category when they report their case activity statistics to our office.

Because counties call cases different things and their needs for granulated case type category information varies, that is why we want to allow the counties the flexibility to modify the cover sheets for their local use.

If this does not make sense to you, please give me a call. I really appreciate your concern and hard work on this -- this will be a huge step in improving the accuracy of the statistics reported to our office.

Thanks,
Mary

Civil Case Categories

1. **INJURY OR DAMAGE—MOTOR VEHICLE:** All cases for damages associated in any way with a motor vehicle (automobile, truck, motorcycle, etc.), with or without accompanying personal injury. Examples include personal injury, property damage, and wrongful death cases that involve motor vehicles.

2. **INJURY OR DAMAGE—MEDICAL MALPRACTICE:** Cases that allege misconduct or negligence by a person or entity in the medical profession (doctors, nurses, physician assistants, dentists, etc. and their firms: hospitals, nursing homes, etc.) acting in a professional capacity, thereby causing physical or financial harm.

3. **INJURY OR DAMAGE—OTHER PROFESSIONAL MALPRACTICE:** Cases that allege misconduct or negligence by a person or entity not

in the medical profession (lawyers, accountants, architects, etc. and their firms) acting in a professional capacity, thereby causing physical or financial harm.

4. **INJURY OR DAMAGE—PRODUCT LIABILITY—ASBESTOS/SILICA:** Cases involving the alleged responsibility of the manufacturer or seller for an injury caused to a person or property by exposure to, or ingestion of, asbestos or silica or an alleged breach of duty to provide suitable instructions to prevent injury.

5. **INJURY OR DAMAGE—OTHER PRODUCT LIABILITY:** All other cases, not involving asbestos or silica, involving the alleged responsibility of the manufacturer or seller of an article for an injury caused to a person or property by a defect in, or the condition of, the article sold or an alleged breach of duty to provide suitable instructions to prevent injury.

6. **OTHER INJURY OR DAMAGE:** All other cases not falling into categories 1 through 5 above alleging an injury or wrong committed against a person, their reputation, or their property by a party who either did something that he was obligated not to do or failed to do something that he was obligated to do. Examples include damages on premises, "slip-and-fall" cases, construction damages, assault, battery, animal attack, vandalism, slander/libel/defamation, malicious prosecution, and false imprisonment.

7. **REAL PROPERTY—EMINENT DOMAIN:** Suits by a unit of government or a corporation with the power of eminent domain for the taking of private land for public use; or cases in which a property owner challenges the amount of remuneration offered by the government for the taking of a parcel of land.

8. **OTHER REAL PROPERTY:** All other cases involving real property. Examples include disputes over the ownership, use, boundaries, or value of real property, including trespass to try title.

9. **CONTRACT—CONSUMER/COMMERCIAL/DEBT:** Cases involving a buyer of goods or services bringing a suit against the seller for failure either to deliver said goods or services or to honor a warranty as promised in an expressed or implied contract. Also, cases involving a seller of goods or services bringing a suit against a buyer for failure to pay for said goods or services as promised in an expressed or implied contract (debt collection). Examples include agreements, breach of contract, contracts, fraud, notes, sworn accounts, debts, and assignment of creditors.

10. **OTHER CONTRACT:** All other cases involving a dispute over an agreement, express or implied, between two parties. Examples include employment cases (including discrimination, retaliation, termination, and other employment cases), landlord/tenant disputes, mortgage foreclosures, home owners' association disputes, etc.

11. **CIVIL CASES RELATING TO CRIMINAL MATTERS:** All civil cases associated with criminal matters, including bond forfeiture, expunction, nondisclosure, occupational license, seizure and forfeiture, extradition, contempt (in criminal cases only), and writ of habeas corpus (in criminal cases only) cases.

12. **OTHER CIVIL CASES:** All non-tax civil cases not clearly identifiable as belonging in one of the preceding categories. Include occupational license cases in civil and family matters and cases appealing the finding of a lower court, department, or administrative agency (e.g., workers' compensation, business dissolution, liquor license appeal, etc.).

13. **TAX CASES:** Suits brought by governmental taxing entities against an individual or business for the collection of taxes.

Family Law Case Categories

1. **DIVORCE—CHILDREN:** Suits brought by a party to a marriage to dissolve the marriage pursuant to Ch. 6, Family Code that also include a suit affecting the parent-child relationship due to the existence of children born or adopted of the marriage who are under 18 years of age or who are otherwise entitled to support as provided by Ch. 154, Family Code. Include petitions for annulment and petitions to declare a marriage void.

2. **DIVORCE—NO CHILDREN:** Suits brought by a party to a marriage to dissolve the marriage pursuant to Ch. 6, Family Code. Include petitions for annulment and petitions to declare a marriage void.

3. **PARENT-CHILD—NO DIVORCE:** Cases involving issues of custody, support, paternity, visitation (by parents, grandparents or other family members) that do not involve a current or previously decided divorce/marriage dissolution case. Include voluntary legitimation of paternity (Section 160.201, Family Code). **Do not include cases filed by the Title IV-D Agency (Office of Attorney General).**

4. **CHILD PROTECTIVE SERVICES:** Cases filed under Ch. 262 of the Family Code on behalf of the Department of Family and Protective Services; a motion in aid of investigation filed under Section 261.303 of the Family Code; or a motion to participate filed under Section 264.203 of the Family Code.

5. **TERMINATION OF PARENTAL RIGHTS:** Cases filed under Ch. 161 of the Family Code requesting that the court extinguish the legal relationship of parent and child. ***NOTE:*** If a case also includes a petition for adoption, do not report the case in this category; report the case under Adoption. If a case also includes a child protection matter (defined above), do not report the case in this category; report the case under Child Protection.

6. **ADOPTION:** Cases filed under Ch. 162 of the Family Code requesting the establishment of a new, permanent relationship of parent and child between persons not having that relationship naturally. Include gestation agreements. ***NOTE:*** Report all adoption cases here, whether or not they also include a petition for termination of parental rights.

7. **PROTECTIVE ORDERS—NO DIVORCE:** Cases filed under Ch. 82, Family Code, requesting an order designed to limit or eliminate contact between two or more family/household members or individuals involved in a dating relationship. ***NOTES:*** Report applications for protective orders filed in suits for dissolution of marriage under Protective Orders Signed (Line 24), if relevant. Report cases involving protective orders for victims of sexual assault (Art. 7A.01, Code of Criminal Procedure) under All Other Civil Cases in the CIVIL section. Report all protective orders **signed** in any type of case, including those mentioned above, under Protective Orders Signed (Line 24).

8. **TITLE IV-D—PATERNITY:** Cases filed by the Title IV-D Agency (Office of Attorney General) requesting a determination of parentage under Ch. 160, Family Code and the setting of a child support obligation. These cases may also involve custody and visitation issues. The pleading is most often styled *Petition to Establish the Parent-Child Relationship.*

9. **TITLE IV-D—SUPPORT ORDER**: Cases filed by the Title IV-D Agency (Office of Attorney General) requesting the setting of a child support obligation where the parentage of the child has been established by an Acknowledgment of Paternity or the child was born during the marriage. These cases may also involve custody and visitation issues. The pleading is most often styled *Suit Affecting the Parent-Child Relationship.*

10. **TITLE IV-D—UIFSA:** Cases filed by the Title IV-D Agency (Office of the Attorney General) seeking to establish a Texas child support order. The issue of paternity may be addressed. UIFSA cases are distinguished by the fact that not all parties reside in Texas. Issues of custody and visitation are not generally involved.

NOTES: Report suits or motions to enforce or modify a Texas or non-Texas order under Ch. 159, Family Code in *Post-Judgment Actions: Title IV-D.*

Report UIFSA suits not filed by the Title IV-D Agency under:

- *Parent-Child—No Divorce*, if the case does not involve a current or previously decided divorce/marriage dissolution case;
- *Post-Judgment Actions: Modification—Other,* if the case involves a previously decided divorce/marriage dissolution case and a modification is being sought; or
- *Post-Judgment Actions: Enforcement,* if the case involves a previously decided divorce/marriage dissolution case and an enforcement action is being sought.

If the suit is filed as part of a current divorce/marriage dissolution case, the UIFSA petition should not be counted.

11. **ALL OTHER FAMILY CASES:** Includes all cases filed under the Family Code that are not reported elsewhere, including, but not limited to:

a. Judicial bypass of parental notification of abortion (Sec. 33.003, Family Code);

b. Changes of name (Ch. 45, Family Code);

c. Adult adoptions (Sec. 152.502, Family Code);

d. Removal of disability of minority (Ch. 31, Family Code);

e. Removal of disability of minority for marriage (Section 2.103, Family Code);

f. Suits for parental liability for damages caused by conduct of child (Ch. 41, Family Code); and

g. Suits for liability for interference with possession of a child (Ch. 42, Family Code).

Also include changes of information on birth certificate (Ch. 192, Health and Safety Code).

POST-JUDGMENT ACTIONS

1. **MODIFICATION—CUSTODY:** Post-judgment suits or motions filed pursuant to Subchapter B, Ch. 156, Family Code, for modification of an order the

2. **MODIFICATION—OTHER:** Post-judgment suits or motions requesting modification of orders not involving custody of a child, including, but not limited to:

a. Suits filed pursuant to Subchapter B, Ch. 156, Family Code for modification of an order that provides for the access to a child (motions to modify visitation privileges; motions to modify rights, privileges and duties of conservator);

b. Suits filed pursuant to Subchapter C, Ch. 156, Family Code for modification of an order that provides for the support of a child (motions to modify or set child support; motions to terminate wage withholding; motions for further orders of the court); and

c. Suits filed pursuant to Section 8.057, Family Code for modification of an order that provides for spousal maintenance (petition to terminate/modify order/writ of income withholding).

3. **ENFORCEMENT:** Post-judgment suits or motions requesting the enforcement of a final order, including, but not limited to:

a. Motions filed pursuant to Ch. 157, Family Code to enforce a final order for conservatorship, child support, possession of or access to a child, property

b. Suits to enforce a divorce or annulment decree filed pursuant to Ch. 9, Family Code (petition for enforcement of property division; petitions to divide a

c. Suits to enforce spousal maintenance filed pursuant to Ch. 8, Family Code.

NOTE: If a suit contains both a motion for modification and a motion for enforcement, count the case as a **Modification** under the appropriate category.

4. **TITLE IV-D:** Suits or motions filed by the Title IV-D agency (Office of the Attorney General) pursuant to Chs. 156, 157 or 159, Family Code, to enforce and/or modify a child support obligation.

From: Kennon L. Peterson
Sent: November 19, 2008 7:12 PM
To: Mary Cowherd
Subject: question re. cover sheets

Mary,

I have a potentially stupid question. I understand that the district and county-level courts identify cases in different ways and that as a result, the courts need to be able to modify the case categories in the model cover sheets. How will the OCA decode the various court-specific categorizations to fit within the case categories included in the new OCA monthly reports for district and county-level courts? I'm just trying to understand how all of this will work in practice. Thanks!

Kennon

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Kennon L. Peterson

From: Mary Cowherd
Sent: Friday, November 14, 2008 10:55 AM
To: Kennon L. Peterson
Cc: Blake Hawthorne
Subject: Model Cover Sheets

Hi Kennon:

An issue was raised by Amalia Rodriguez-Mendoza, the district clerk in Travis County, at the JCIT meeting yesterday. She wanted to know whether the cover sheet needed to be time stamped by the clerk when a pleading is electronically filed. David Slayton who is the court administrator in Lubbock County said that he used to work for the federal courts. He said that when a pleading is electronically filed, the feds do not time stamp the cover sheet -- it is filed as part of the pleading. Also, Peter Vogel said that the complaint is always the first document filed when a pleading is electronically filed in federal court and that the cover sheet is the second or third document behind it.

Thought you needed to know that this issue was raised.

Mary

Kennon L. Peterson nanetet@county.org

From: Mary Cowherd
Sent: Wednesday, November 12, 2008 1:23 PM
To: Kennon L. Peterson
Cc: Angela Garcia
Subject: FW: Revisions to Model Cover Sheets Approved by Judicial Council on 11/7/08

Importance: High

Attachments: County Civil Cover Sheet110708.doc; District Civil Cover Sheet 110708.doc; Family Cover Sheet 110708.doc

fyi

From: Mary Cowherd
Sent: November 12, 2008 1:23 PM
To: 'pvogel@gardere.com'
Cc: Bruce Hermes; Carl Reynolds
Subject: Revisions to Model Cover Sheets Approved by Judicial Council on 11/7/08
Importance: High

Hi Peter:

At their meeting last Friday, the Judicial Council approved several changes to the model civil and family law cover sheets that they previously approved on September 19 (the changes are shaded in gray).

On the **county and district civil cover sheets**, the following changes were approved:

1) a new section entitled "Related to Criminal Matters" has been created. All the items in that section were previously listed under "Other Civil." The change will make it easier for an attorney or litigant to find those items on the form; and

2) the category "Name Change" has been removed from the "Other Civil" section and moved to the family cover sheet.

On the **family cover sheet**, the following changes were approved:

1) "Name Change" has been added under "Other Family;"
2) the request for a child's date of birth has been removed; and
3) a note has been added that only a child's initials should be indicated on the form.

The cover sheets with the latest revisions are attached.

If you have any questions, please let me know.

Mary


County Civil Cover Sheet110708...


District Civil Cover Sheet 110...


Family Cover Sheet 110708.doc ...

Kennon L. Peterson

From: Mary Cowherd
Sent: Friday, November 14, 2008 10:43 AM
To: 'smking@tarrantcounty.com'
Cc: Angela Garcia; Carl Reynolds; Kennon L. Peterson; Blake Hawthorne
Subject: Revisions to Style of Case in Model Civil and Family Cover Sheets

Attachments: County Civil Cover Sheet 111408.doc; District Civil Cover Sheet 111408.doc; Family Cover Sheet 111408.doc

Hi Judge King:

Per your suggestion at the JCIT meeting yesterday, we have made the "style of the case" line in the model cover sheets generic. I asked Angela to list some examples below the "style of case" line -- the thought being this may be helpful to pro se litigants. Are you ok with the revision to the cover sheets?

I really appreciate your attention to detail and bringing this to my attention. As I explained to you yesterday, the Judicial Council approved the cover sheets as model forms, which can be modified for local use. But we definitely want to have a good model for everyone to work from.

Thanks,
Mary


County Civil Cover Sheet 11140...


District Civil Cover Sheet 111...


Family Cover Sheet 111408.doc ...

Kennon L. Peterson

From: Mary Cowherd
Sent: Thursday, October 30, 2008 4:19 PM
To: Kennon L. Peterson
Cc: 'Sheri Woodfin'; Angela Garcia; Carl Reynolds; Blake Hawthorne
Subject: FW: Signature on Cover Sheets

Hi Kennon:

Sheri Woodfin has contacted Dallas and Lubbock counties, which both currently use cover sheets, to ask them the questions she has regarding signatures on cover sheets. Below for your information are the emails that she has sent to me.

Also, another question that Sheri had, which is not in the list below, is whether the cover sheet must be kept in the case file or can it be thrown away.

After reviewing the emails, please let me know whether it would be helpful for you, me, Sheri, and Blake (if he would like to be included) to discuss by phone.

Thanks much,
Mary

-----Original Message-----

From: Sheri Woodfin [mailto:sheri.woodfin@co.tom-green.tx.us]

Sent: October 30, 2008 2:17 PM

To: Mary Cowherd

Subject: FW: Cover sheet for case pleadings

Here are the answers to the questions I asked Dallas County. Might be helpful.

-----Original Message-----

From: Virginia Etherly [mailto:VEtherly@dallascounty.org]

Sent: Thursday, October 30, 2008 1:57 PM

To: Sheri Woodfin

Cc: Gary Fitzsimmons

Subject: Cover sheet for case pleadings

Below are answers to the questions regarding the Dallas County Case Filing Cover Sheet.

1. The cover sheet is provided about 50% of the time.

2. When the cover sheet is not submitted we process the case without it. If the filer is in the office, they are asked to complete the cover sheet.

3. We do not verify the signature.

4. We process the filing even if the cover sheet is not signed.

5. If staff determines that there is incorrect information on the cover sheet, they will change it after verification with the filer or request that a new cover sheet be submitted.

I hope this helps in your efforts.

From: Sheri Woodfin [mailto:sheri.woodfin@co.tom-green.tx.us]
Sent: October 30, 2008 12:17 PM
To: Mary Cowherd
Subject: RE: Signature on Cover Sheets

Sorry Mary, for not getting back with you. I had asked a few clerks what their experiences have been and wanted to share those with you.

I e-mail the District Clerk from Dallas County and asked a few question concerning their procedures if a cover sheet is not included and if certain items are not complete, what enforcement his office does to have it completed. I have not heard back from him. I also spoke with Barbara Sussey, District Clerk in Lubbock as they have already implemented the requirement of a Cover Sheet and Sensitive Data Sheet in Local Rules. Her comments were that they are very helpful if the attorney includes them with the initial filing. In their local rules the attorney has a 10 day time line to complete and return a cover sheet if it is not included with the filing, but they do not have any way of enforcing it. If they are not provided at the time of filing is useless for the purpose. She also stated that the signature is required but that has pretty much turned into a stamped or electronic signature for most. Additionally she mentioned, if they receive a filing by mail without a coversheet, they send a cover sheet to the party with a memo asking them to complete the cover sheet and return it within 10 days in accordance with their Local Rules, which she believes is a waste of time.

That said I would leave it up to you all as this issue has come up in counties that currently use cover sheets and various solutions have been created to remedy the problem.

I have included the e-mail I sent to Dallas County. It outlines a few items that may need to be considered in the drafting of a rule or numerous clerks who want to insure they are doing this right will ask some of the same questions.

E-Mail to Dallas County DC:

Hi Gary,
I am working with OCA regarding a cover sheet for possible adoption into the Supreme Court Rules of Court. Cover sheets from Dallas County and a few other counties are being used as examples for designing the final version.

Here are my Questions:

1) Are the litigants good about providing the cover sheet?
2) If a filing is received without a cover sheet, what does your office do?
3) The attorney or petitioner's signature is required on a cover sheet. Is the signature verified?

4) When a cover sheet is received without a signature what is the process?
5) If your staff determines that the cover sheet is not completed properly, does your staff correct the information for case filing purposes or return it to the filer?

Thanks for answering these questions,

Regards,
Sheri Woodfin
District Clerk of Tom Green County

Kennon L. Peterson

From: Mary Cowherd
Sent: Wednesday, October 29, 2008 2:17 PM
To: Carl Reynolds
Cc: Angela Garcia; Kennon L. Peterson; Meredith Higgins
Subject: Revised Model Cover Sheets for Meeting Book - 11/7/08 Judicial Council Meeting

Attachments: County Civil Cover Sheet102708.doc; District Civil Cover Sheet 102708.doc; Family Cover Sheet 2.doc


County Civil Cover Sheet102708...


District Civil Cover Sheet 102...


Family Cover Sheet 2.doc (61 K...

Carl:

Angela has made several small proposed revisions to the model cover sheets, pursuant to suggestions by Sheri Woodfin. We think her suggestions are good ones. The revisions are shaded in gray.

On the **county and district civil** cover sheets, the following changes have been made:

1) a new section entitled "Related to Criminal Matters" has been created. All the items in that section are currently listed under "Other Civil." The change will make it easier for an attorney or litigant to find those items on the form; and

2) the category "Name Change" has been removed from the "Other Civil" section and moved to the family cover sheet. These are family law matters. However, Judge Wood insisted that name changes be put under "Other Civil," as she once in a blue moon handles a case where a transgender person requests a name change. She wanted to get credit for those cases.

On the **family** cover sheet, the following changes have been made:

1) "Name Change" has been added under "Other Family;"

2) the request for a child's date of birth has been removed; and

3) a note has been added that only a child's initials should be indicated on the form.

At the meeting, we can ask the Judicial Council to approve the revisions.

Mary

Kennon L. Peterson

From: Mary Cowherd
Sent: Wednesday, October 29, 2008 9:36 AM
To: 'Sheri Woodfin'
Cc: Kennon L. Peterson; Angela Garcia; Carl Reynolds; Blake Hawthorne
Subject: Signature on Cover Sheets

Hi Sheri:

Thanks for following up on this. I appreciate you raising your concerns about the cover sheet requirements. The clerks are the ones who know how all this will work in the "real world."

When the OCA data workgroups discussed the development of cover sheets a couple of years ago, several clerks said that attorneys would not complete the cover sheets but just have their runners or secretaries do it. As a result, the cover sheets would be pretty worthless in terms of achieving better accuracy in the identification of the type of case being filed. They suggested that by requiring the attorney to sign the cover sheet, this would help prevent this from happening.

You indicated that JM 727 answers part of your worry. What else concerns you about requiring a signature? I assume that when a pleading is e-filed, the same rules that apply to signature requirements for the pleading would also apply to the cover sheet.

Mary

From: Sheri Woodfin [mailto:sheri.woodfin@co.tom-green.tx.us]
Sent: October 29, 2008 9:11 AM
To: Mary Cowherd
Subject:

Mary,
There is an AG opinion JM 727, that my good friend Clyde pointed out to me. It clarifies something I commented about yesterday. A clerk should not reject a document if it is unsigned, so there is part of the answer to my worry.

Sheri

Kennon L. Peterson

From: Mary Cowherd
Sent: Wednesday, October 22, 2008 11:11 AM
To: Kennon L. Peterson
Cc: Angela Garcia; Blake Hawthorne; Carl Reynolds
Subject: Civil and Family Law Cover Sheets

Attachments: Sensitive data . Bill Draft 08.pdf

Hi Kennon:

I have heard back from all the members of the Implementation Team. They all agree that the Supreme Court Advisory Committee should be asked to consider a rule that requires the following minimum information on the civil and family cover sheets: the style of the case, name and contact information of the attorney or party filing the suit, state bar number of the attorney (if applicable), names of the parties, and case type (the case types to be used will be selected by the local jurisdictions), with the case types to be selected by the local jurisdictions.

However, Sheri Woodfin, the district clerk in Tom Green County who is a member of the Implementation Team, and Clyde Lemons with the district clerk's office in Harris County, both have pointed out that children's DOBs, and even their full names, should be included in the sensitive data sheet, rather than in the family law cover sheet. Angela Garcia and I both agree with that. Below for your information are the comments that I received from Sheri and Clyde.

Also, I have attached for your information the "sensitive data sheet" draft bill proposed by the Clerks Association, which was provided to me by Sheri. Sheri appears to have backed off the idea of merging the family cover sheet with the sensitive data sheet -- I will follow up with her about that.

If you have any questions, please let me know.

Thanks,
Mary

Sensitive data . Bill Draft 08...

Mary,

One question.... Is there a reason for the Family Cover Sheet to contain Children's DOB's, even children's names? Unless a necessity, this might be better covered under the Sensitive Data Sheet. Not the names so much as the DOB's....Just a thought..

Thanks,

Sheri

Our office is okay with the cover page. I point out that our **legislative proposal** deals with social security numbers, dates of birth of children, bank account numbers. The family law cover page only request children's name and date of birth. I think we should make the **family law** page confidential if it will list the children's full name and date of birth.

I was advised that the forms you are reviewing were designed with input from the Harris County Office of Court Administration.

Thanks for allowing my input.

Harris County

By: _____ __.B. No. _____

A BILL TO BE ENTITLED

AN ACT

relating to certain personal information contained in a decree of dissolution of a marriage or an order in a suit affecting the parent-child relationship; providing penalties.

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

SECTION 1. Subchapter H, Chapter 6, Family Code, is amended by adding Section 6.712 to read as follows:

Sec. 6.712. PERSONAL INFORMATION IN DECREE. (a) In this section, "personal information" means:

(1) an individual's social security number;

(2) an individual's bank account number and similar financial information; and

(3) the name and birth date of each child of an individual.

(b) A final decree of dissolution of a marriage, and any modification of the decree, may not contain personal information with regard to any party to the decree. Any personal information that is required by this title or any other law to be in the decree or modification must be listed in a separate document titled "CONFIDENTIAL DATA PAGE" in bold type.

(c) The separate document described by Subsection (b) must include the cause number and style of the proceeding.

(d) The personal information in the separate document described by Subsection (b) is confidential and may be disclosed

only to:

(1) a party to the proceeding or an attorney for a party to the proceeding;

(2) a law enforcement agency, the Title IV-D agency, or another governmental entity conducting a criminal investigation or establishing or enforcing a child support order; or

(3) another person authorized to obtain the information by a court order that includes a finding of good cause for disclosing the information to that person.

(e) A person commits an offense if the person knowingly discloses or releases confidential personal information in violation of this section to a person not authorized to obtain the information. An offense under this subsection is a Class A misdemeanor.

(f) This section does not require a court to grant access to confidential personal information if access is restricted by other law.

SECTION 2. Section 105.006(a), Family Code, is amended to read as follows:

(a) A final order, other than in a proceeding under Chapter 161 or 162, must contain:

(1) the [~~social security number and~~] driver's license number of each party to the suit, including the child, except that the child's [~~social security number or~~] driver's license number is not required if the child has not been assigned a [~~social security number or~~] driver's license number; and

(2) each party's current residence address, mailing

Q: Why not the clerk?

address, home telephone number, name of employer, address of employment, and work telephone number, except as provided by Subsection (c).

SECTION 3. Chapter 105, Family Code, is amended by adding Section 105.010 to read as follows:

Sec. 105.010. PERSONAL INFORMATION IN CERTAIN ORDERS. (a) In this section, "personal information" means:

(1) an individual's social security number;

(2) an individual's bank account number and similar financial information; and

(3) the name and birth date of each child of an individual.

(b) An order in a suit affecting the parent-child relationship may not contain personal information with regard to any party to the suit. Any personal information that is required by this title or any other law to be in the order must be listed in a separate document titled "CONFIDENTIAL DATA PAGE" in bold type.

(c) The separate document described by Subsection (b) must include the cause number and style of the proceeding.

(d) The personal information in the separate document described by Subsection (b) is confidential and may be disclosed only to:

(1) a party to the suit or an attorney for a party to the suit;

(2) a law enforcement agency, the Title IV-D agency, or another governmental entity conducting a criminal investigation or enforcing a child support order; or

(3) another person authorized to obtain the information by a court order that includes a finding of good cause for disclosing the information to that person.

(e) A person commits an offense if the person knowingly discloses or releases confidential personal information in violation of this section to a person not authorized to obtain the information. An offense under this subsection is a Class A misdemeanor.

(f) This section does not require a court to grant access to confidential personal information if access is restricted by other law.

SECTION 4. The changes in law made by this Act apply only to a decree of dissolution of a marriage or order in a suit affecting the parent-child relationship that is rendered or issued on or after the effective date of this Act. A decree or order rendered or issued before the effective date of this Act is governed by the law in effect on the date the decree or order was rendered or issued, and the former law is continued in effect for that purpose.

SECTION 5. This Act takes effect September 1, 2009.

Kennon L. Peterson

From: Carl Reynolds
Sent: Tuesday, October 21, 2008 4:05 PM
To: Kennon L. Peterson
Subject: RE: Model Civil and Family Law Cover Sheets - Supreme Court Rule

Thanks Kennon, I agree. Note that the draft has a Legislative Council identifier on it, which means a member requested it.

-Carl

From: Kennon L. Peterson
Sent: Tuesday, October 21, 2008 3:23 PM
To: Carl Reynolds
Subject: RE: Model Civil and Family Law Cover Sheets - Supreme Court Rule

Thank you, Carl. This is very good to know.

Kennon L. Peterson
Rules Attorney, Supreme Court of Texas
P.O. Box 12248
Austin, TX 78711
512.463.1353 (phone)
512.475.2774 (fax)
Kennon.Peterson@courts.state.tx.us

From: Carl Reynolds
Sent: Tuesday, October 21, 2008 3:17 PM
To: Alice McAfee; Blake Hawthorne; Kennon L. Peterson
Subject: FW: Model Civil and Family Law Cover Sheets - Supreme Court Rule

The clerks are pursuing the attached bill draft.

-Carl

From: Mary Cowherd
Sent: Tuesday, October 21, 2008 2:45 PM
To: Angela Garcia; Carl Reynolds
Subject: FW: Model Civil and Family Law Cover Sheets - Supreme Court Rule

Looks like we are still "good to go" with the Supreme Court rule.

From: Sheri Woodfin [mailto:sheri.woodfin@co.tom-green.tx.us]
Sent: October 21, 2008 1:24 PM
To: Mary Cowherd
Cc: Joy Streater (E-mail)
Subject: RE: Model Civil and Family Law Cover Sheets - Supreme Court Rule

We have two different issues here, "Cover Sheet" and "Sensitive Data Sheet". The "Cover Sheets" that are being proposed by OCA will be providing filing information for reporting purposes. The "Sensitive Data Sheet" that is being sought legislatively is in family law cases and is for cases that are required by statute to contain personal information of the parties. I had mentioned the possibility of combining the family *cover sheet* and the *sensitive data sheet*, but there were legitimate concerns regarding the legality of keeping the information, and confusion of varying issues that presented obstacles. The proposed family cover sheet does not contain all the "sensitive data" information.

County & District Clerks Association of TX

The bill the association is filing is strictly dealing with sensitive data issue and the identity theft issue that has plagued our legislation and has been a consideration before the Supreme Court for six + years. I have included a draft of the proposed bill for the "sensitive data sheet".

That said I do not see any problem with OCA going forward to seek a Supreme Court order requiring the *cover sheets* be submitted with filings. It does not in anyway jeopardize the proposal from Harris County and the Clerk's association.

From: Mary Cowherd [mailto:Mary.Cowherd@courts.state.tx.us]
Sent: Tuesday, October 21, 2008 12:43 PM
To: Sheri Woodfin
Subject: FW: Model Civil and Family Law Cover Sheets - Supreme Court Rule

Hi Sheri:

I just received the below email from Joy Streater. Since you serve on the clerks' legislative committee, I thought you might have some insight regarding this legislation.
If the clerks are going to seek a law, then we should probably not try to obtain a Supreme Court rule. Seems to me, like you previously said, that a Supreme Court rule would be easier to accomplish than legislation.

Thanks,
Mary

From: Streater, Joy [mailto:cckajs@co.comal.tx.us]
Sent: October 21, 2008 12:28 PM
To: Mary Cowherd
Subject: RE: Model Civil and Family Law Cover Sheets - Supreme Court Rule

Mary: I was waiting for a response from Harris County who is anticipating legislation requiring a cover sheet. I feel these are better because it appears they track the new reporting that will be implemented. Plus. If the attorneys are required to fill it out, the chances of getting it wrong rests on their shoulders, not the clerks. I am all for the Supreme Court being the driver but out of courtesy to one of my legislative co-harts I wanted to get their input. That would be Clyde Lemons who works for the District Clerk in Harris County.

Honorable Joy Streater
Comal County Clerk
150 N. Seguin #101
New Braunfels, Texas, 78130

830-221-1234
830.620-3410- FAX

Kennon L. Peterson

From: Angela Garcia
Sent: Thursday, October 16, 2008 3:47 PM
To: Kennon L. Peterson
Cc: Mary Cowherd
Subject: FW: Model Civil and Family Law Cover Sheets - Supreme Court Rule

A multi-year, joint Judicial Council and OCA project (known as the Judicial Data Project) involving the extensive review of the data elements used by trial courts in reporting case activity was begun several years ago. OCA data workgroups were asked to make recommendations for changes to the Judicial Council Committee. As part of the Judicial Data Project, the Judicial Council's Committee on Judicial Data Management also asked the OCA data workgroups to develop a civil cover sheet, the purpose of which was to take the burden off clerks in categorizing cases and make the attorney or litigant responsible for indicating what type of case is being filed. Dallas County, which has required a civil cover sheet in its district courts for years, offered its sheet as an example, and members of the OCA data workgroups and Judicial Council Committee responded very positively to this sheet.

Angela Garcia, Manager of OCA's Judicial Information Department, developed draft civil and family case cover sheets, using Dallas County's cover sheet as the model. She also obtained a few samples of cover sheets used by other Texas counties, other states, and the federal government and incorporated elements from those into the model. The case categories included in the model cover sheets were structured around the case categories included in the new OCA monthly reports for district and county-level courts (effective September 1, 2010).

Judge Sharolyn Wood, the former chair of the Judicial Council's Committee on Judicial Data Management and a long time civil district judge in Harris County, then circulated the drafts among civil and family judges in Harris County. Judge Wood and other judges suggested a few changes, which were made by Ms. Garcia.

The proposed civil and family law cover sheets were presented to the Judicial Council at its meeting on September 19, 2008, where they received very positive feedback and were approved by the Judicial Council as model forms, which can be modified for local use.

Kennon L. Peterson

From: Mary Cowherd
Sent: Thursday, October 16, 2008 10:51 AM
To: 'jbelalcazar@cco.hctx.net'; 'mblake@tarrantcounty.com'; 'Lisa David'; 'mflores@goliadcountytx.gov'; 'khilger@tarrantcounty.com'; 'coclerk@burlesoncounty.org'; cckajs@co.comal.tx.us; 'Linda Uecker'; 'Wilson, Latonia'; 'Sheri Woodfin'
Cc: Angela Garcia; Kennon L. Peterson; Carl Reynolds; 'Bonnie Wolbrueck'
Subject: Model Civil and Family Law Cover Sheets - Supreme Court Rule

Attachments: County Civil Cover Sheet3.doc; District Civil Cover Sheet3.doc; Family Cover Sheet.doc

Hi all:

Kennon Peterson, the rules attorney for the Supreme Court, has advised me that she will ask the Supreme Court Advisory Committee to consider the adoption of a rule requiring the submission of a cover sheet when a civil or family law case is filed. The Committee is scheduled to meet on November 21-22, 2008.

As you will recall, the Implementation Team recommended at its meeting on August 26, that items 6, 7 and 8 on the attached model civil cover sheets, and items 6, 7, 8, and 9 on the attached model family law cover sheet, be optional. At its meeting on September 19, the Texas Judicial Council agreed with your recommendation when it approved the civil and family law cover sheets as model forms, which can be modified for local use.

Kennon believes that the Advisory Committee and Court may be more likely to approve a rule (and the accompanying cover sheets) if there are no discretionary items involved. I explained to her that the Implementation Team will most likely agree that items 6, 7, and 8 on the model civil cover sheets, and items 6, 7, 8, and 9 on the model family cover sheet, can be removed entirely from the cover sheets. But I also explained to her that the case types that are used on the cover sheets should remain discretionary, as the terminology for case types varies throughout the State and counties will want the ability to decide what case types are used.

In an effort to obtain approval of a rule, Kennon and I agree that the Adivsory Committee should be asked to consider a rule that requires certain minimum information to be included in the cover sheet (rather than a rule that covers both required and discretionary information). The minimum information that would be required is the following: *the style of the case, name and contact information of the attorney or party filing the suit; state bar number of the attorney (if applicable), names of the parties, and case type (the case types to be used will be selected by the local jurisdictions).* If the Advisory Committee approves a rule of this nature, then the rule will go to the Court for consideration and approval.

Please let me know by **5:00 p.m., Friday, October 17**, if you agree that the Advisory Committee should be asked to consider a rule that requires the minimum information listed above to be included in the cover sheets, with the case types to be selected by the local jurisdictions.

Thanks,
Mary


County Civil Cover Sheet3.doc ...


District Civil Cover Sheet3.do...


Family Cover Sheet.doc (61 KB)...

Kennon L. Peterson

From: Mary Cowherd
Sent: Wednesday, September 17, 2008 2:44 PM
To: Angela Garcia
Cc: Carl Reynolds; Blake Hawthorne; Alice McAfee; Kennon L. Peterson
Subject: RE: Model Cover Sheets

This looks like what Blake had in mind. Is that correct, Blake?

Also, Blake, below for your information are the definitions for civil cases that were approved by the Judicial Council Committee on Judicial Data Management and the full Judicial Council:

Definition of Civil Cases
A civil case, unlike a criminal case, does not depend on the number of persons involved. For the purpose of these reports, a single civil case is counted and reported when:
1. An original petition is filed (no matter how many parties are involved), or
2. Some other case is filed.

Civil Case Categories
1. **INJURY OR DAMAGE—MOTOR VEHICLE:** All cases for damages associated in any way with a motor vehicle (automobile, truck, motorcycle, etc.), with or without accompanying personal injury. Examples include personal injury, property damage, and wrongful death cases that involve motor vehicles.
2. **INJURY OR DAMAGE—MEDICAL MALPRACTICE:** Cases that allege misconduct or negligence by a person or entity in the medical profession (doctors, nurses, physician assistants, dentists, etc. and their firms: hospitals, nursing homes, etc.) acting in a professional capacity, thereby causing physical or financial harm.
3. **INJURY OR DAMAGE—OTHER PROFESSIONAL MALPRACTICE:** Cases that allege misconduct or negligence by a person or entity not in the medical profession (lawyers, accountants, architects, etc. and their firms) acting in a professional capacity, thereby causing physical or financial harm.
4. **INJURY OR DAMAGE—PRODUCT LIABILITY—ASBESTOS/SILICA:** Cases involving the alleged responsibility of the manufacturer or seller for an injury caused to a person or property by exposure to, or ingestion of, asbestos or silica or an alleged breach of duty to provide suitable instructions to prevent injury.
5. **INJURY OR DAMAGE—OTHER PRODUCT LIABILITY:** All other cases, not involving asbestos or silica, involving the alleged responsibility of the manufacturer or seller of an article for an injury caused to a person or property by a defect in, or the condition of, the article sold or an alleged breach of duty to provide suitable instructions to prevent injury.
6. **OTHER INJURY OR DAMAGE:** All other cases not falling into categories 1 through 5 above alleging an injury or wrong committed against a person, their reputation, or their property by a party who either did something that he was obligated not to do or failed to do something that he was obligated to do. Examples include damages on premises, "slip-and-fall" cases, construction damages, assault, battery, animal attack, vandalism, slander/libel/defamation, malicious prosecution, and false imprisonment.
7. **REAL PROPERTY—EMINENT DOMAIN:** Suits by a unit of government or a corporation with the power of eminent domain for the taking of private land for public use; or cases in which a property owner challenges the amount of remuneration offered by the government for the taking of a parcel of land.
8. **OTHER REAL PROPERTY:** All other cases involving real property. Examples include disputes over the ownership, use, boundaries, or value of real property, including trespass to try title.
9. **CONTRACT—CONSUMER/COMMERCIAL/DEBT:** Cases involving a buyer of goods or services bringing a suit against the seller for failure either to deliver said goods or services or to honor a warranty as promised in an expressed or implied contract. Also, cases involving a seller of goods or services bringing a suit against a buyer for failure to pay for said goods or services as promised in an expressed or implied contract (debt collection). Examples include agreements, breach of contract, contracts, fraud, notes, sworn accounts, debts, and assignment of creditors.
10. **OTHER CONTRACT:** All other cases involving a dispute over an agreement, express or implied, between two parties. Examples include employment cases (including discrimination, retaliation, termination, and other employment cases), landlord/tenant disputes, mortgage foreclosures, home owners' association disputes, etc.
11. **CIVIL CASES RELATING TO CRIMINAL MATTERS:** All civil cases associated with criminal matters, including bond forfeiture, expunction, nondisclosure, occupational license, seizure and forfeiture, extradition, contempt (in criminal cases only), and writ of habeas corpus (in criminal cases only) cases.
12. **OTHER CIVIL CASES:** All non-tax civil cases not clearly identifiable as belonging in one of the preceding categories. Include occupational license cases in civil and family matters and cases appealing the finding of a lower court, department, or administrative agency (e.g., workers' compensation, business dissolution, liquor license appeal, etc.).
13. **TAX CASES:** Suits brought by governmental taxing entities against an individual or business for the collection of taxes.

From: Angela Garcia
Sent: September 17, 2008 2:35 PM
To: Mary Cowherd
Cc: Carl Reynolds; Blake Hawthorne; Alice McAfee; Kennon L. Peterson
Subject: RE: Model Cover Sheets

<< File: District Civil Cover Sheet3.doc >>

From: Mary Cowherd
Sent: Wednesday, September 17, 2008 2:18 PM
To: Angela Garcia
Cc: Carl Reynolds; Blake Hawthorne; Alice McAfee; Kennon L. Peterson
Subject: FW: Model Cover Sheets

Angela:

Did you and Judge Wood happen to discuss any of the items that Blake raises when developing the civil cover sheets? Also, he has sent a subsequent email indicating that he sees the family cover sheet.

Mary

From: Blake Hawthorne
Sent: September 17, 2008 2:15 PM
To: Carl Reynolds; Alice McAfee; Kennon L. Peterson
Cc: Mary Cowherd
Subject: RE: Model Cover Sheets

For the district civil cover sheets I have a couple of suggestions. As a former state tax practitioner, I'd suggest an "other tax" check box. There are all kinds of other tax actions than those listed. Most of them have to be brought in Travis County, but there are plenty of exceptions. Also, the box relating to employment actions might need a heading at the top to indicate it is the employment box (like the Injury or Damage box next to it). Employment is currently a subpart of Contract—but Texas is a "right to work" state and I wouldn't categorize most employment claims as contract cases. Worker's Comp might more appropriately be a subcategory in the employment box than the catch all that it is in. I think most employment lawyers consider worker's comp part of their bread and butter.

What about Family Code cases? Do we just not track those cases? I don't see divorce and other family cases. I would think that family cases would make up a big part of the district court docket.

I'm really glad that OCA is doing this. There is a real lack of consistency and valid data out there to study our state dockets. I recall when I was in law school that a professor wrote an article about an increase in employment litigation which she conceded was based entirely on anecdotal evidence because of a lack of valid data. I think this kind of data is really necessary to have meaningful conversation about needed reforms to the legal system—so kudos to OCA for working on this.

From: Carl Reynolds
Sent: Wednesday, September 17, 2008 1:25 PM
To: Alice McAfee; Kennon L. Peterson; Blake Hawthorne
Cc: Mary Cowherd
Subject: FW: Model Cover Sheets

Please take a look at these proposed cover sheets for consideration by Judicial Council on Friday (and then headed to the Court). Mary has worked with Sheri Woodfin on this project, and you'll recall Sheri is the clerk from San Angelo that Barbara Salyers mentioned. We probably need to merge this idea with the sensitive data sheet in some fashion, and I understand Sheri has thought of that too. thanks,
Carl

From: Mary Cowherd
Sent: Thursday, September 11, 2008 2:28 PM
To: Carl Reynolds
Subject: Model Cover Sheets

Carl:

Attached for your review are the proposed model cover sheets for civil and family cases.

The development of a civil cover sheet was something that the Judicial Council's Committee on Judicial Data Management tasked the OCA data workgroups with:

> *The Texas Judicial Council's Committee on Judicial Data Management asked OCA in June 2002 to:*
>
> *...assemble a workgroup of clerks and other interested persons or entities to make recommendations regarding: (1) the elimination of one or more of the current data elements; (2) the addition of one or more data elements; (3) the revision of one or more of the current data elements; (4) the development of a clear and concise definition for each data element; (5) the development of a civil cover sheet; and (6) the improvement of the quality and accuracy of the annual report of the Texas judicial system.*

Angela worked closely with Judges Sharolyn Wood and Doug Warne in developing the model civil and family cover sheets. They were still being developed by Angela when the full Judicial Council approved the new monthly reporting forms and instructions. Thus, the model cover sheets have never been formally approved by the Judicial Council's Committee on Judicial Data Management nor the full Judicial Council.

I don't think the Committee necessarily needs to approve the model cover sheets. However, I think we should include them on the agenda for next week's Judicial Council meeting. We would ask the Council to approve them as model forms, which can be modified for local use. (*Please note that the county and district clerks on the Implementation Team recommend that items 6, 7 and 8 on the district and county civil cover sheets, and items 6, 7, 8 & 9 on the family cover sheet, not be mandatory. While these items are helpful, I agree with the clerks that it should be up to each jursidiction whether to include them.)*

We would then ask the Supreme Court to adopt a rule requiring a cover sheet to be submitted when a civil or family case is filed. The minimum information that should be included on the cover sheet is: the style of the case, name/contact information/state bar no. of the attorney or party filing the suit; names of parties; and case type (the case types to be selected by the local jurisidictions).

Thanks,
Mary

<< File: District Civil Cover Sheet.doc >> << File: County Civil Cover Sheet.doc >> << File: Family Cover Sheet.doc >>

Kennon L. Peterson

From: Carl Reynolds
Sent: Wednesday, September 17, 2008 1:25 PM
To: Alice McAfee; Kennon L. Peterson; Blake Hawthorne
Cc: Mary Cowherd
Subject: FW: Model Cover Sheets

Attachments: District Civil Cover Sheet.doc; County Civil Cover Sheet.doc; Family Cover Sheet.doc

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Sent: Thursday, September 11, 2008 2:28 PM
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> *The Texas Judicial Council's Committee on Judicial Data Management asked OCA in June 2002 to:*
>
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Angela worked closely with Judges Sharolyn Wood and Doug Warne in developing the model civil and family cover sheets. They were still being developed by Angela when the full Judicial Council approved the new monthly reporting forms and instructions. Thus, the model cover sheets have never been formally approved by the Judicial Council's Committee on Judicial Data Management nor the full Judicial Council.

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We would then ask the Supreme Court to adopt a rule requiring a cover sheet to be submitted when a civil or family case is filed. The minimum information that should be included on the cover sheet is: the style of the case, name/contact information/state bar no. of the attorney or party filing the suit; names of parties; and case type (the case types to be selected by the local jurisidictions).

Thanks,
Mary

CIVIL CASE COVER SHEET

COURT: _____ **CAUSE NUMBER:** _____

This Civil Cover Sheet should be completed and filed with the original petition. The information should be the best available at the time of filing, understanding that the information may change before trial.

This information does not constitute a discovery request, response, or supplementation, and is not admissible at trial.

1. Styled _____ (Plaintiff) v. _____ (Defendant)

2. Party filing this cover sheet:

Check one: ☐ Attorney for Plaintiff(s) ☐ Plaintiff(s)

Name: _____

Address: _____

City/St/ZIP: _____

Telephone: _____

Fax: _____

Email: _____

State Bar No.: _____

Signature: _____

3. Plaintiff(s) (list separately)

a. _____

b. _____

c. _____

4. Defendant(s) (list separately)

a. _____

b. _____

c. _____

[Attach additional page as necessary to list all parties.]

5. Indicate case type (check only one):

CONTRACT

Debt/Contract
- ☐ Consumer/DTPA
- ☐ Debt/Contract
- ☐ Fraud/Misrepresentation
- ☐ Other Debt/Contract: _____

Foreclosure
- ☐ Home Equity - Expedited
- ☐ Other Foreclosure

- ☐ Franchise
- ☐ Insurance
- ☐ Landlord/Tenant
- ☐ Non-Competition
- ☐ Partnership
- ☐ Other Contract: _____

INJURY OR DAMAGE

- ☐ Assault/Battery
- ☐ Construction
- ☐ Defamation

Malpractice
- ☐ Accounting
- ☐ Legal
- ☐ Medical
- ☐ Other Professional Liability: _____

- ☐ Motor Vehicle Accident
- ☐ Premises
- ☐ Product Liability
  List product: _____
- ☐ Other Injury or Damage: _____

REAL PROPERTY

- ☐ Eminent Domain/Condemnation
- ☐ Partition
- ☐ Quiet Title
- ☐ Trespass toTry Title
- ☐ Other Property: _____

TAX

- ☐ Tax Appraisal
- ☐ Tax Delinquency
- ☐ Other Tax

OTHER CIVIL

- ☐ Administrative Appeal
- ☐ Antitrust/Unfair Competition
- ☐ Code Violations
- ☐ Expunction
- ☐ Foreign Judgment
- ☐ Intellectual Property
- ☐ Lawyer Discipline
- ☐ Name Change
- ☐ Perpetuate Testimony
- ☐ Securities/Stock
- ☐ Tortuous Interference
- ☐ Seizure/Forfeiture
- ☐ Other: _____

EMPLOYMENT

- ☐ Discrimination
- ☐ Retaliation
- ☐ Termination
- ☐ Worker's Comp
- ☐ Other Employment: _____

PROBATE & MENTAL HEALTH

- ☐ Guardianship – Adult
- ☐ Guardianship – Minor
- ☐ Probate/Wills/Intestate Administration
- ☐ Other: _____
- ☐ Mental Health

6. Indicate sub-topic, if relevant:

- ☐ Appeal from municipal/justice court
- ☐ Attachment
- ☐ Bill of Review
- ☐ Certiorari
- ☐ Class Action
- ☐ Declaratory Judgment
- ☐ Garnishment
- ☐ Interpleader
- ☐ License
- ☐ Mandamus
- ☐ Post-Judgment
- ☐ Prejudgment Remedy
- ☐ Receiver
- ☐ Sequestration
- ☐ TRO/Injunction
- ☐ Turnover

7. Has this case been previously filed, or is it related to a case previously filed, in this county, or in another county or state?

- ☐ No
- ☐ Yes, in this county: Court: _____ Cause #: _____
- ☐ Yes, in another county or state:
  County: _____ State: _____ Cause #: _____

8. Level of Discovery: ☐ Level 1 ☐ Level 2 ☐ Level 3

DISTRICT COURT CIVIL CASE COVER SHEET

_____ DISTRICT COURT CAUSE NUMBER: _____

This Civil Cover Sheet should be completed and filed with the original petition. The information should be the best available at the time of filing, understanding that the information may change before trial.

This information does not constitute a discovery request, response, or supplementation, and is not admissible at trial.

1. Styled _____
(e.g., John Doe v. XYZ Insurance Co.; In re Jane Doe; In the matter of the Estate of John Doe)

2. Party filing this cover sheet:

Check one: ☐ Attorney for Plaintiff(s) ☐ Plaintiff(s)

Name: _____
Address: _____
City/St/ZIP: _____
Telephone: _____
Fax: _____
Email: _____
State Bar No.: _____
Signature: _____

3. Plaintiff(s) (list separately)

a. _____
b. _____
c. _____

4. Defendant(s) (list separately)

a. _____
b. _____
c. _____

[Attach additional page as necessary to list all parties.]

5. Indicate case type (check only one):

CONTRACT

Debt/Contract
- ☐ Consumer/DTPA
- ☐ Debt/Contract
- ☐ Fraud/Misrepresentation
- ☐ Other Debt/Contract: _____

Foreclosure
- ☐ Home Equity - Expedited
- ☐ Other Foreclosure

☐ Franchise
☐ Insurance
☐ Non-Competition
☐ Partnership
☐ Other Contract: Need landlord/tenant _____

EMPLOYMENT
- ☐ Discrimination
- ☐ Retaliation
- ☐ Termination
- ☐ Worker's Comp
- ☐ Other Employment: _____

INJURY OR DAMAGE

☐ Assault/Battery
- ☐ Construction
- ☐ Defamation

Malpractice
- ☐ Accounting
- ☐ Legal
- ☐ Medical
- ☐ Other Professional Liability: _____

☐ Motor Vehicle Accident
☐ Premises
☐ Product Liability
List product: _____
☐ Other Personal Injury or Damage: _____

REAL PROPERTY
- ☐ Eminent Domain/Condemnation
- ☐ Partition
- ☐ Quiet Title
- ☐ Trespass toTry Title
- ☐ Other Property: _____

RELATED TO CRIMINAL MATTERS
- ☐ Expunction
- ☐ Judgment Nisi
- ☐ Non-Disclosure
- ☐ Seizure/Forfeiture
- ☐ Writ of habeas corpus – pre-indictment
- ☐ Other: _____

TAX
- ☐ Tax Appraisal
- ☐ Tax Delinquency
- ☐ Other Tax

OTHER CIVIL
- ☐ Administrative Appeal
- ☐ Antitrust/Unfair Competition
- ☐ Code Violations
- ☐ Foreign Judgment
- ☐ Intellectual Property
- ☐ Lawyer Discipline
- ☐ Perpetuate Testimony
- ☐ Securities/Stock
- ☐ Tortuous Interference
- ☐ Other: _____

6. Indicate sub-topic, if relevant:

- ☐ Attachment
- ☐ Bill of Review
- ☐ Certiorari
- ☐ Class Action
- ☐ Declaratory Judgment
- ☐ Garnishment
- ☐ Interpleader
- ☐ License
- ☐ Mandamus
- ☐ Post-Judgment
- ☐ Prejudgment Remedy
- ☐ Receiver
- ☐ Sequestration
- ☐ TRO/Injunction
- ☐ Turnover

7. Has this case been previously filed, or is it related to a case previously filed, in this county, or in another county or state?

☐ No
☐ Yes, in this county: Court: _____ Cause #: _____
☐ Yes, in another county or state:
County: _____ State: _____ Cause #: _____

8. Level of Discovery: ☐ Level 1 ☐ Level 2 ☐ Level 3

COUNTY-LEVEL COURT CIVIL CASE COVER SHEET

COURT: _____ **CAUSE NUMBER:** _____

This Civil Cover Sheet should be completed and filed with the original petition. The information should be the best available at the time of filing, understanding that the information may change before trial.

This information does not constitute a discovery request, response, or supplementation, and is not admissible at trial.

1. Styled _____
(e.g., John Doe v. XYZ Insurance Co.; In re Jane Doe; In the matter of the Estate of John Doe)

2. Party filing this cover sheet:

Check one: ☐ Attorney for Plaintiff(s) ☐ Plaintiff(s)

Name: _____
Address: _____
City/St/ZIP: _____
Telephone: _____
Fax: _____
Email: _____
State Bar No.: _____
Signature: _____

3. Plaintiff(s) (list separately)

a. _____
b. _____
c. _____

4. Defendant(s) (list separately)

a. _____
b. _____
c. _____

[Attach additional page as necessary to list all parties.]

5. Indicate case type (check only one):

CONTRACT

Debt/Contract
- ☐ Consumer/DTPA
- ☐ Debt/Contract
- ☐ Fraud/Misrepresentation
- ☐ Other Debt/Contract: _____

Foreclosure
- ☐ Home Equity - Expedited
- ☐ Other Foreclosure

☐ Franchise
☐ Insurance
☐ Landlord/Tenant
☐ Non-Competition
☐ Partnership
☐ Other Contract: _____

INJURY OR DAMAGE

☐ Assault/Battery
☐ Construction
☐ Defamation
Malpractice
- ☐ Accounting
- ☐ Legal
- ☐ Medical
- ☐ Other Professional Liability: _____

☐ Motor Vehicle Accident
☐ Premises
☐ Product Liability
List product: _____
☐ Other Injury or Damage: _____

REAL PROPERTY

☐ Eminent Domain/Condemnation
☐ Partition
☐ Quiet Title
☐ Trespass toTry Title
☐ Other Property: _____

JP: Tenant/landlord lawsuits (in contract now)

TAX

☐ Tax Appraisal
☐ Tax Delinquency
☐ Other Tax

RELATED TO CRIMINAL MATTERS

☐ Expunction
☐ Judgment Nisi
☐ Non-Disclosure
☐ Seizure/Forfeiture
☐ Writ of habeas corpus – pre-indictment
☐ Other: _____

OTHER CIVIL

☐ Administrative Appeal
☐ Antitrust/Unfair Competition
☐ Code Violations
☐ Foreign Judgment
☐ Intellectual Property
☐ Lawyer Discipline
☐ Perpetuate Testimony
☐ Securities/Stock
☐ Tortuous Interference
☐ Other

EMPLOYMENT

☐ Discrimination
☐ Retaliation
☐ Termination
☐ Worker's Comp
☐ Other Employment: _____

PROBATE & MENTAL HEALTH

☐ Guardianship – Adult
☐ Guardianship – Minor
☐ Probate/Wills/Intestate Administration
☐ Other: _____
☐ Mental Health

6. Indicate sub-topic, if relevant:

☐ Appeal from municipal/justice court
☐ Attachment
☐ Bill of Review
☐ Certiorari
☐ Class Action
☐ Declaratory Judgment
☐ Garnishment
☐ Interpleader
☐ License
☐ Mandamus
☐ Post-Judgment
☐ Prejudgment Remedy
☐ Receiver
☐ Sequestration
☐ TRO/Injunction
☐ Turnover

7. Has this case been previously filed, or is it related to a case previously filed, in this county, or in another county or state?

☐ No
☐ Yes, in this county: Court: _____ Cause #: _____
☐ Yes, in another county or state:
County: _____ State: _____ Cause #: _____

8. Level of Discovery: ☐ Level 1 ☐ Level 2 ☐ Level 3

FAMILY CASE COVER SHEET

_____ COURT CAUSE NUMBER: _____

This Family Cover Sheet should be completed and filed with an original petition, counterclaim, petition in intervention, or motion to modify final orders. The information should be the best available at the time of filing, understanding that the information may change before trial.

This information does not constitute a discovery request, response, or supplementation, and is not admissible at trial.

1. Styled _____ Petitioner v. _____ Respondent

2. Party filing this cover sheet:

Check one: ☐ Petitioner ☐ Counter-Petitioner ☐ Intervenor
Check one: ☐ Attorney ☐ Pro Se

Name: _____
Address: _____
City/St/ZIP: _____
Telephone: _____
Fax: _____
Email: _____
State Bar No.: _____
Signature: _____

3. Respondent(s) (list separately):

a. _____
b. _____

4. Child(ren):

Name: _____
DOB: _____ Minor? ☐ Yes ☐ No
Name: _____
DOB: _____ Minor? ☐ Yes ☐ No
Name: _____
DOB: _____ Minor? ☐ Yes ☐ No

Attach additional pages as necessary to list all parties.

5. Indicate case type (check only one):

MARRIAGE RELATIONSHIP	PARENT-CHILD RELATIONSHIP	TITLE IV-D
☐ Annulment ☐ Declare Marriage Void *Divorce* ☐ With Children ☐ No Children	☐ Adoption/Adoption with Termination ☐ Child Protection ☐ Child Support ☐ Gestational Parenting ☐ Grandparent Access ☐ Parentage ☐ Termination of Parental Rights ☐ Other Parent-Child: _____	☐ Parentage ☐ Reciprocals (UIFSA) ☐ Support Order **ALL OTHER FAMILY LAW** ☐ Enforce Foreign Judgment ☐ Habeas Corpus ☐ Name Change ☐ Protective Order ☐ Removal of Disabilities of Minority ☐ Other: _____

6. Indicate sub-topic, if relevant:

		Post-Judgment
☐ Bill of Review	☐ Garnishment	☐ Enforcement
☐ Declaratory Judgment	☐ Protective Order	☐ Modification

7. Has this case been previously filed, or is it related to a case previously filed, in this county, or in another county or state?

(If this is **a suit for adoption**, note the court, county and cause number, if known, for the termination.)

☐ No
☐ Yes, in this county: Court: _____ Cause #: _____
☐ Yes, in another county or state: County: _____ State: ____
Court: _____ Cause #: _____

8. Case Management

☐ Uncontested (finalized within 6 months of filing) ☐ Contested (finalized within 1 year of filing)	**Requested Temporary Hearing** ☐ None ☐ TRO only ☐ Temporary Orders Only ☐ TRO and Temporary Orders	**Estimated Length of Temporary Hearing** ☐ < 30 minutes ☐ ½ day ☐ 30 minutes – 1 hours ☐ 1 hour – 2 hours

9. Service Type

☐ Personal Service ☐ Publication ☐ Posting ☐ Certified Mail ☐ Waiver of Service to be Filed	Name and Address for service: