MAY 1989

#4 of 4

SCAC SUBCOMMITTEE RECOMMENDATION

~~RULE 296.--CONCLUSIONS OF FACT AND LAW~~

~~-----In any case tried in the district or county court without a jury, the judge shall, at the request of either party, state in writing his findings of fact and conclusions of law.--Such request shall be filed within ten days after the final judgment is signed. Notice of the filing of the request shall be served on the opposite party as provided in Rule 21a.~~

[Rule 296. Requests for Finding 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 with the clerk of the court who shall immediately call such request to the attention of the court.

Time for Filing. Such request shall be filed within twenty (20) days after judgment is signed.

Notice of Filing. Each request made pursuant to this rule shall be served on the court and each party to the suit in accordance with Rule 21a.]

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MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

WRITER'S DIRECT DIAL NUMBER:
(512) 299-5444

February 6, 1989

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 296

Dear Hadley:

Enclosed herewith please find a copy of a letter from Judge George M. Thurmond regarding changes to Rule 296. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan Hecht
Honorable George M. Thurmond

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 2020
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
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‡ BOARD CERTIFIED CIVIL APPELLATE LAW
• BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

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District Judge
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Del Rio, Texas 78841 - 1089
512 774-3611 - Ext. 231

JOHN R. PRICE
Official Court Reporter
P. O. Box 1156
Del Rio, Texas 78841 - 1156
512 774-3611 - Ext. 233

BLANCA S. BRIONES
Court Coordinator-Administrator
P. O. Drawer 1089
Del Rio, Texas 78841 - 1089
512 774-3611 - Ext. 232

SIXTY-THIRD JUDICIAL
DISTRICT OF TEXAS

COUNTIES COMPRISING
63RD JUDICIAL DISTRICT:

EDWARDS (ROCKSPRINGS)

KINNEY (BRACKETTVILLE)

TERRELL (SANDERSON)

VAL VERDE (DEL RIO)

2/4
WJH,
SCAC R. 296 Sub C
Agenda

February 1, 1989

Hon. Stanton B. Pemberton
Chairman, Administration of Justice Committee
P.O. Box 747
Belton, Texas 76513

Xc Judge Thurmond

RE: Proposed amendment to Rule 296, T.R.C.P., regarding filing request for findings of fact and conclusions of law in non-jury trials

Dear Stan:

Last night I read the opinion of our Chief Justice in the case of Cherne Industries, Inc. vs. Juan Magallanes, Guardian Ad Litem, an unanimous decision of our Supreme Court rendered on January 25, 1989. Chief Justice Phillips's opinion clearly states that counsel need only file a request for findings of fact and conclusions of law initially with the clerk of the court, and there is no requirement in the Rules that the request be "presented" to the judge of the court, to trigger the necessity for the court to file such findings and conclusions within thirty days after the signing of the judgment in the case. As you know, if the failure to file findings and conclusions is brought the attention of the court in timely manner, then the judge has only five days after such complaint to file same, Rule 297.

I believe that most if not all trial and appellate courts have been following the rule of Lassiter vs. Bliss, 559 S.W. 2d 353 (Tex. 1977) and have assumed that a request for findings and conclusions must be presented or personally brought to the attention of the trial judge before both triggering the further provisions of the Rules, and giving rise to the methods of review of the case on appeal where the request for findings and conclusions was not "presented" to the judge.

I can visualize a problem in the trial courts with the request for findings and conclusions in a non-jury case being only filed with the clerk of the court, and with a copy of the request being served only upon opposing counsel. In many instances a judge will not know that he has been requested to make findings and conclusions until the second request for same is brought to his attention, and then he has only five days to prepare same - a rather short time in most cases. I do not think it is appropriate to have the clerk call the filing of the request to the attention of the court.

I would suggest that the Committee on Administration of Justice consider an amendment to Rule 296. The Rule presently reads as follows:

> In any case tried in the district or ocunty court without a jury, the judge shall, at the request of either party, state in writing his findings of fact and conclusions of law. Such request shall be filed within ten days after the final judgment is signed. Notice of the filing of the request shall be served on the opposite party as provided in Rule 21a.

My suggested amendment would simply change the period at the end of the present Rule to a comma and add this language to the Rule: "and a copy of the request shall be delivered to the judge by the party making the request."

I believe that then the judge will promptly learn of the request and thus have 20 to 30 days time from the date of the judgment to formulate and file his findings and conclusions, and will hold down second requests and a short five day schedule being imposed on the trial judge through no fault or neglect on his part.

I am taking the liberty of sending a copy of this letter to Luke Soules, Chairman of the Supreme Court Advisory Committee on Rules of Civil Procedure, and to our committee's secretary, Mrs. Evelyn Avent. I am also sending Evelyn a copy of the Supreme Court opinion in Cherne Inudustries, Inc., and she might want to transmit copies of these materials to members of the appropriate subcommittee of our committee. Perhaps my suggestions could come up as new matter in our next meeting, which I believe is scheduled for March 11th.

With best personal regards, I remain,

Sincerely yours,

George M. Thurmond

GMT:ccm
cc: Mr. Luke Soules, III
Mrs. Evelyn Avent

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(512) 224-7073

November 1, 1988

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 296, 297, 306a(3) and 306a(4)

Dear Hadley:

Enclosed herewith please find a copy of a letter forwarded to me by Justice William W. Kilgarlin regarding proposed changes to Rules 296, 297, 306a(3) and 306a(4). Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

October 24, 1988

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Reed
800 Milam Building
San Antonio, TX 78205

Dear Luke:

Enclosed is a copy of a letter from Wendell Loomis, as well as copy of my response.

Please see that the matter is presented to the Supreme Court Advisory Committee.

Sincerely,

William W. Kilgarlin

WWK:sm

Encl.

01004

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

October 24, 1988

Mr. Wendell S. Loomis
Attorney at Law
3707 F.M. 1960 West
Suite 250
Houston, Texas 77068

Dear Wendell:

Your letter of October 19 has been forwarded to me, as I serve as the court's liaison to the Supreme Court Advisory Committee, the body that recommends Rules changes.

I understand your concern, and I have forwarded a copy of your letter to Luther H. Soules, III, Chairman of the Supreme Court Advisory Committee.

Sincerely,

William W. Kilgarlin

WWK:sm

xc: Mr. Luther H. Soules, III

WENDELL S. LOOMIS
Attorney at Law
3707 F.M. 1960 WEST, SUITE 250
HOUSTON, TEXAS 77068
(713) 893-6600
FAX (713) 893-5732

October 19, 1988

Supreme Court of Texas
Supreme Court Building
P.O. Box 12248
Austin, Texas 78711

Attention: Rules Committee

Re: Rules 72, 73, 74, 296, 297, 306a(3), and 306a(4)

Gentlemen:

A matter has recently come up which, because of some diligence, did not cause a loss of rights, however because of the interaction of the above-described rules a serious problem may have been created.

To explain: The Cause No. 394,741; McQuiston, et al. vs. Texas Workers' Compensation Assigned Risk Pool was tried before Judge Dibrell on September 7, 1988. Shortly thereafter Mr. Charles Babb of the firm Babb & Hanna submitted a proposed judgment to the Court for the Court's signature on September 22, 1988. Mr. Babb did not send me a copy of the proposed judgment or his letter to the Court.

On October 3, 1988, I wrote Mr. Babb about the proposed judgment. Enclosed is a copy of my letter of October 3, 1988, to Mr. Babb.

Enclosed is copy of Mr. Babb's letter and photocopy of judgment which was signed on October 4, 1988, by Judge Dibrell. Because the judgment was signed on October 4 and Mr. Babb did not communicate with me until October 12, I had to immediately prepare and have Federal Expressed to Austin my Request for Findings of Fact and Conclusions of Law. Enclosed is a photocopy of that request and letter.

On October 14, I received a postcard from Mr. John Dickson, District Clerk, mailed October 13, 1988.

Conclusion: As can be seen Rule 72 does not include a proposed judgment. It only refers to pleadings, pleas, or motions. Nowhere other than by Rule 306a is the losing party entitled to a

copy of the judgment, nor is the winning party who prepared the proposed judgment to be submitted to the Court required to furnish a copy of this proposal to opposing counsel.

Since Rules 296 and 297 require the demand for findings and conclusions to be within 10 days after the signing of the judgment and the clerk, being quite busy with other matters, apparently interpreted "immediately" as 9 or 10 days, my right to findings and conclusions may very well have been precluded.

I suggest that either Rule 72 be amended to incude "all documents" submitted to the Court including judgments or proposed judgments and correspondence or Rule 306 be amended to require the winning party to submit the copy of the proposed judgment to opposing counsel so that he can stay on top of the date that the Judge has signed it.

I would further suggest, however, that notice and demand for findings and conclusions be amended to 20 or 30 days instead of the 10 day "short fuse".

Further, I don't see any reason for having the preparation and submission of the findings and conclusion to be but 30 days after judgment and, upon failure to comply, 5 days additional demand.

Of course in this case, we are in different cities and a day or two is lost in mail delivery. Also, with cities the size of Houston or Dallas or San Antonio where lawyers are scattered all over, intra-city mail sometimes requires 3 or 4 or 5 days.

I have now been practicing 29 1/2 years before the Texas Courts. I liked the old method of practice much more than I do today. It used to be that, irrespective of the requirements of the rules, counsel were sufficiently courteous to each other so that such a situation as here described probably would not happen.

Very truly yours,

Wendell S. Loomis

WSL:slm

WENDELL S. LOOMIS
Attorney at Law
3707 F.M. 1960 WEST, SUITE 250
HOUSTON, TEXAS 77068
(713) 893-6000
FAX (713) 893-5732

October 13, 1988

Mr. John Dickson
District Clerk, Travis County
Post Office Box 1748
Austin, Texas 78701

RE: Cause No. 394,741; Marvin L. McQuiston and Jacquelyn McQuiston vs. Texas Workers' Compensation Assigned Risk Pool; 201st Judicial District Court, Travis County, Austin, Texas

Dear Sir:

Enclosed please find the original and one copy of the following document for filing in the above-described cause:

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

By copy of this letter and Certificate of Service on document, we certify that opposing counsel has been served with a true and correct copy of this document.

Please acknowledge receipt of this letter and advise date of filing by returning to us with your file stamp the enclosed extra copy of this document in the enclosed self-addressed stamped envelope.

Very truly yours,

Wendell S. Loomis

WSL:slm

enclosure

cc: Babb & Hanna
Mr. & Mrs. Marvin L. McQuiston

01008

10-13-9?

[illegible] R. Loomis	(713) 8?3-6800
[illegible] & LOOMIS ATTY	Department/Floor No.
?707 FM 1960 WEST STE 250	
HOUSTON, State TX	ZIP Required For Correct Invoicing 77068

John Dickson, Clerk	(512) 473-?4?7
Company: District Court, Travis County	Department/Floor No.
Exact Street Address (Use of P.O. Boxes or P.O. Zip Codes Will Delay Delivery And Result in Extra Charge): 1000 Guadalupe	
City: Austin, State: TX	ZIP Street Address Zip Required: 78767

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McQuiston vs TWCARP

PAYMENT [X] Bill Sender [ ] Bill Recipient's FedEx Acct No. [ ] Bill 3rd Party FedEx Acct No. [ ] Bill Credit Card [ ] Cash

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Street Address (See Service Guide or Call 800-238-5355)
City State
ZIP * Zip Code of Street Address Required

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Base Charges
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SERVICES CHECK ONLY ONE BOX
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- [X] OVERNIGHT LETTER*
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- Courier-Pak Overnight Envelope*
- Overnight Box A
- Overnight Tube B
- * Declared Value Limit $100
- STANDARD AIR Delivery not later than second business day

SERVICE COMMITMENT

DELIVERY AND SPECIAL HANDLING CHECK SERVICES REQUIRED
1. [ ] HOLD FOR PICK-UP
2. [X] DELIVER WEEKDAY
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PACKAGES	WEIGHT	YOUR DECLARED VALUE	OVER SIZE
	LBS		
	LBS		
	LBS		
	LBS		
Total	Total	Total	

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SENDER'S COPY/RETAIN FOR TRACE PURPOSES

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01009

NO. 394,741

MARVIN L. MCQUISTON AND JACQUELYN MCQUISTON	}	IN THE DISTRICT COURT OF
VS.	}	TRAVIS COUNTY, TEXAS
TEXAS WORKERS' COMPENSATION ASSIGNED RISK POOL	}	201ST JUDICIAL DISTRICT

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Plaintiffs in the above-entitled and numbered cause and on this day, a time within 10 days of the signing of the judgment, Plaintiffs request findings of fact and conclusions of law in accordance with Rule 296, said findings and conclusions to be prepared and filed within 30 days of October 4, 1988, that is, November 3, 1988.

Plaintiffs respectfully request the Court and counsel either honor the time specified by Rule 297 or alternatively agree in writing for a time certain for the filing of said findings and conclusions so as to comply with Rule 297. In this connection it is called to the Court's and counsel's attention that counsel for Plaintiffs' offfice is in Houston, Texas and that mail and/or courier takes at least 1 to 2 days and that Rule 297 provides a very "short fuse" of 5 days.

RESPECTFULLY SUBMITTED this the 13th day of October, 1988.

WENDELL S . LOOMIS
TBA NO. 12552000
3707 FM 1960 West, Suite 250
Houston, Texas 77068
(713) 893-6600

01010

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW was deposited in the U.S. mail to BABB & HANNA, attorneys for Defendant, on the 13th day of October, 1988, first class mail, postage prepaid and certified mail, return receipt requested.

WENDELL S. LOOMIS

LAW OFFICES OF
BABB & HANNA
A PROFESSIONAL CORPORATION

CHARLES M. BABB
MARK T. HANNA
CHARLES F. DAILY, JR.
F. RICHARD HARRIS
JUDITH L. HART
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CATHERINE L. TABOR
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IAN FERGUSON

505 CONGRESS AVENUE
P. O. DRAWER 1968
AUSTIN, TEXAS 78767
512/473-8600
TELECOPIER
322-9274

October 10, 1988

Mr. Wendell S. Loomis
3707 FM 1960 West, Suite 250
Houston, Texas 77068

Re: Cause No. 394,741; Marvin L. McQuistion and Jacquelyn McQuistion v. Texas Workers' Compensation Assigned Risk Pool; In the 201st Judicial District Court of Travis County, Texas

Dear Wendell:

Enclosed please find a copy of the Judgment regarding the above-referenced cause which was submitted to Judge Dibrell on September 22, 1988.

Sorry for the delay in sending you an executed copy of the Judgment, but Judge Dibrell did not sign it until October 4, 1988.

Very truly yours,

Charles M. Babb

Charles M. Babb

Enclosure
CMB/pg
CMB1/073

Cause No. 394,741

MARVIN L. McQUISTON and JACQUELYN McQUISTON	§	IN THE DISTRICT COURT OF
vs.	§	TRAVIS COUNTY, TEXAS
TEXAS WORKERS' COMPENSATION ASSIGNED RISK POOL	§	201ST JUDICIAL DISTRICT

JUDGMENT

On the 7th day of September, 1988, came on to be heard the above-entitled and numbered cause. The plaintiffs, Marvin L. McQuiston and Jacquelyn McQuiston, appeared in person and by their attorney of record and announced ready for trial, and defendant, Texas Workers' Compensation Assigned Risk Pool, appeared in person and by its attorney of record and announced ready for trial, and no jury having been demanded, all matters of fact and things in controversy were submitted to the Court.

The Court, after hearing the evidence and arguments of counsel, is of the opinion that plaintiffs had made no showing on which it could grant their equitable bill of review as prayed for in their pleadings on file in this cause, and that plaintiffs' petition should be in all things denied, and judgment granted for defendant.

It is therefore ORDERED, ADJUDGED, AND DECREED by the Court that plaintiffs' petition for equitable bill of review and all other relief prayed for in plaintiffs' pleadings on file herein are in all things denied, and judgment is hereby granted for defendant.

All costs of Court expended or incurred in this cause are hereby adjudged against plaintiffs. All other relief not expressly granted herein is denied.

Signed this 4th day of October, 1988.

/s/ Judge Joe Dibrell
JUDGE PRESIDING

WENDELL S. LOOMIS
Attorney at Law
3707 F.M. 1960 WEST, SUITE 250
HOUSTON, TEXAS 77068
(713) 893-6600
FAX (713) 893-5732

October 3, 1988

Babb & Hanna, P.C.
905 Congress Avenue
P.O. Drawer 1963
Austin, Texas 78767

Attention: Hon. Charles Babb

Re: No. 394,741; Marvin L. McQuiston, et al.
vs. Texas Worker's Compensation Assigned Risk Pool;
201st Judicial District Court, Travis County, Texas.

Dear Charles:

Following the Trial it was my understanding that you were going to submit a Judgment for entry by the Court.

I have heard nothing from you nor have I received notification by the clerk that the Judgment has been submitted for entry or has been entered.

I am quite anxious to move forward with this case, either by appeal or wiping out this debt plus some other obligations for my client by a bankruptcy proceeding, whichever will be the easiest and cheapest on client's part.

I am inclined to believe that we will go ahead with an appeal as there are some interesing aspects I would like to have the Third Court of Appeals look at and write on.

In any event, may we please hear from your by return mail.

Very truly yours,

Wendell S. Loomis

WSL:slm

cc: Mr. & Mrs. Marvin McQuiston

LAW OFFICES

SOULES & REED

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(512) 224-7073

October 10, 1988

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 296, 297, 298 and 306a

Dear Hadley:

Enclosed herewith please find copies of letters forwarded to me by William A. Dudley and Jimmy W. Nettles regarding proposed changes to Rules 296, 297, 298 and 306a. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

SCOTT T. COOK & Associates, P.C.
A PROFESSIONAL CORPORATION

Attorneys at Law
Suite 290
2820 South Padre Island Drive
Corpus Christi, Texas 78415

(512) 855-6655

Scott T. Cook
Board Certified in Family Law
Texas Board of Legal Specialization

William A. Dudley
Associate

September 27, 1988

Mr. Luther H. Soules, III
SOULES & REED
10th Floor
Two Republic Bank Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Dear Mr. Soules:

I attended your lecture on the 1988 Rules changes at the Advanced Family Law Seminar in Dallas. You mentioned during your lecture that you welcomed comments on the Rules of Civil Procedure and possible need for change. In my opinion, there exists a serious defect in the present Rules of Civil Procedure of which I have been confronted on two occasions.

As I understand Rule 306a, the date a judgment or order is signed is the date which determines the beginning of periods prescribed by other Rules of Civil Procedure for the Court's plenary power and for perfecting an appeal. Paragraph 4. states, "If no notice of the judgment or order is received by the adverse party within 20 days after execution by the trial court, that party's time periods begin to run from the date that party received notice or actual knowledge of the order or judgment." Stated otherwise, if a party first receives notice of judgment on the 21st through 90th day, his plenary and appellate time table begin on whatever day he actually receives notice. On the other hand, if the party receives notice at any time during the first 20 days after the judgment is signed, the day the judgment is actually signed is used to calculate a court's plenary power, or rather, time to perfect an appeal.

An often overlooked, but crucial, element in winning an appeal, is requesting findings of fact and conclusions of law. In fact, the case law says if no findings of fact and conclusions of law were requested nor filed, the appellate court must affirm the trial court if it may do so on any theory of recovery supported by the record. Findings of fact and conclusions of law are governed by Rules of Civil Procedure 296 et. seq. Rule 296 requires that a request for findings of fact and conclusions of law shall be filed within 10 days after the final judgment is signed. This presents

enough of a problem for a party who has had timely notice of an adverse order entered against them when they are aware the judgment or order has been signed. However, if the adverse party is unaware and has not been given notice that a judgment or order has been signed for 10 days after the order is signed, that party may very well be without an adequate recourse, and may very well stand to lose an appeal of said judgment, no matter how much merit the appeal might have.

I recently found myself being faced with such a situation. Neither opposing counsel, nor the trial court, delivered notice to me that an order had been signed. It was not until 17 days after the trial court signed an order that I discovered that an order had, in fact, been entered. Under Rule 306a, paragraph 4, because I received actual notice within 20 days, by the time I discovered an order had been entered against my client, it was already too late to demand findings of fact and conclusions of law. As I understand the present state of these two rules, an adverse party who received notice of judgment any time between the 11th day and 20th day, has no right to demand findings of fact and conclusions of law. While he may request them, the trial court is not bound to accomodate, under a literal interpretation of these rules.

In my research, I have found no case or other dissertation analyzing this situation. I do believe, however, it is something for the Rules Committee to review.

Thank you for your patience in reviewing the above.

Sincerely,

William A. Dudley

WD/dc

LAW OFFICES

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(512) 224-7073

October 10, 1988

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 296, 297, 298 and 306a

Dear Hadley:

Enclosed herewith please find copies of letters forwarded to me by William A. Dudley and Jimmy W. Nettles regarding proposed changes to Rules 296, 297, 298 and 306a. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

JIMMY W. NETTLES
ATTORNEY AT LAW
6690 CALDER AVE.
CALDER AT DOWLEN RD.
BEAUMONT TEXAS 77706
PHONE A/C (409) 860-3005

September 26, 1988

Luther H. Soules, III
Soules & Reed
Attorneys at Law
10th Floor
Two Republicbank Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Re: Suggested Amendments: Rules 296, 297, 298, Tex. R. Civ. Pro.

Dear Mr. Soules:

Mr. Gilbert I. Low, of Beaumont has advised me that you are the coordinator for the Supreme Court's committee on suggestions for changes or amendments to the Texas Rules of Civil Procedure. I wish to point out some practical realities applicable to Rules 296-298, Tex. R. Civ. Pro. concerning the filing of conclusions of fact and law by the trial court on trials before the bench.

As a mechanical matter whenever a bench trial occurs, and a losing party requests a trial court to file such findings the prevailing party always prepares and presents the proposed findings of fact and conclusions of law to the trial court. I have on only one occasion known of the trial court preparing the findings. This is all right except for one thing, and that is the rules do not require notice of filing to the requesting party.

I understand that other rules require us to monitor and inspect the papers on file with the clerk of each court, but only a few firms have the resources and man power to send someone to each courthouse in the mornings or evenings to inspect the court papers on a daily basis; and it is unrealistic and physically impossible for each attorney to do this on a daily basis. There should be a requirement that the court or the prevailing party have to serve notice of filing on the requesting party, and that the time schedules set forth within such rules should not be triggered until notice is complied with.

Rule 306a., Tex. R. Civ. Pro. as pertaining to judgments was appropriately amended as to notice before certain time periods are started into motion for a party litigant, and such needs to be the case under Rules 296-298. In fifteen years I have only on one occasion had an attorney forward to me copies of proprosed findings, and have never had an attorney advise me of the date of signing of same by the trial court. The patent response I have always received upon inquiring has been, "Oh, you didn't get a copy," or, "I thought I told you". This was the obvious basis for the amendment to rule 306a.-judgment notice.

In todays modern practice it is physically impossible to monitor the court papers as required under the status of rules 296-298 as currently written, and a greater service would be provided for the public welfare if simple notice requirements were added to these particular rules of procedure.

Sincerely yours,

Jimmy W. Nettles

JWN/ml

cc: Mr. Gilbert I. Low

SCAC SUBCOMMITTEE RECOMMENDATION

~~RULE 297.--TIME TO FILE FINDINGS AND CONCLUSION~~

~~-----When demand is made therefor, the court shall prepare its findings of fact and conclusions of law and file same within thirty days after the judgment is signed.--Such findings of fact and conclusions of law shall be filed with the clerk and shall be part of the record.--If the trial judge shall fail so to file them, the party so demanding, in order to complain of the failure, shall in writing, within five days after such date, call the omission to the attention of the judge, whereupon the period for preparation and filing shall be automatically extended for five days after such notification.~~

[Rule 297. Time to Respond to Request for Finding of Facts and Conclusions of Law.

(a) When timely request is filed, the court shall prepare and file its findings of fact and conclusions of law within thirty (30) days after such request is filed. The court shall cause a copy of its response to be mailed to each party in the suit.

(b) If the court fails to respond timely to such request, the party making the request shall, within thirty-five (35) days after filing the original request, file with the clerk a NOTICE OF PAST DUE RESPONSE TO REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW which shall be immediately called to the attention of the judge by the clerk. Such notice shall inform the judge the date the original request was filed and the date the response was due.

LAW OFFICES

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(512) 224-7073

November 1, 1988

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 296, 297, 306a(3) and 306a(4)

Dear Hadley:

Enclosed herewith please find a copy of a letter forwarded to me by Justice William W. Kilgarlin regarding proposed changes to Rules 296, 297, 306a(3) and 306a(4). Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

October 24, 1988

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Reed
800 Milam Building
San Antonio, TX 78205

Dear Luke:

Enclosed is a copy of a letter from Wendell Loomis, as well as copy of my response.

Please see that the matter is presented to the Supreme Court Advisory Committee.

Sincerely,

William W. Kilgarlin

WWK:sm

Encl.

October 24, 1988

Mr. Wendell S. Loomis
Attorney at Law
3707 F.M. 1960 West
Suite 250
Houston, Texas 77068

Dear Wendell:

Your letter of October 19 has been forwarded to me, as I serve as the court's liaison to the Supreme Court Advisory Committee, the body that recommends Rules changes.

I understand your concern, and I have forwarded a copy of your letter to Luther H. Soules, III, Chairman of the Supreme Court Advisory Committee.

Sincerely,

William W. Kilgarlin

WWK:sm

xc: Mr. Luther H. Soules, III

WENDELL S. LOOMIS
Attorney at Law
3707 F.M. 1960 WEST, SUITE 250
HOUSTON, TEXAS 77068
(713) 893-6600
FAX (713) 893-5732

October 19, 1988

Supreme Court of Texas
Supreme Court Building
P.O. Box 12248
Austin, Texas 78711

Attention: Rules Committee

Re: Rules 72, 73, 74, 296, 297, 306a(3), and 306a(4)

Gentlemen:

A matter has recently come up which, because of some diligence, did not cause a loss of rights, however because of the interaction of the above-described rules a serious problem may have been created.

To explain: The Cause No. 394,741; McQuiston, et al. vs. Texas Workers' Compensation Assigned Risk Pool was tried before Judge Dibrell on September 7, 1988. Shortly thereafter Mr. Charles Babb of the firm Babb & Hanna submitted a proposed judgment to the Court for the Court's signature on September 22, 1988. Mr. Babb did not send me a copy of the proposed judgment or his letter to the Court.

On October 3, 1988, I wrote Mr. Babb about the proposed judgment. Enclosed is a copy of my letter of October 3, 1988, to Mr. Babb.

Enclosed is copy of Mr. Babb's letter and photocopy of judgment which was signed on October 4, 1988, by Judge Dibrell. Because the judgment was signed on October 4 and Mr. Babb did not communicate with me until October 12, I had to immediately prepare and have Federal Expressed to Austin my Request for Findings of Fact and Conclusions of Law. Enclosed is a photocopy of that request and letter.

On October 14, I received a postcard from Mr. John Dickson, District Clerk, mailed October 13, 1988.

Conclusion: As can be seen Rule 72 does not include a proposed judgment. It only refers to pleadings, pleas, or motions. Nowhere other than by Rule 306a is the losing party entitled to a

copy of the judgment, nor is the winning party who prepared the proposed judgment to be submitted to the Court required to furnish a copy of this proposal to opposing counsel.

Since Rules 296 and 297 require the demand for findings and conclusions to be within 10 days after the signing of the judgment and the clerk, being quite busy with other matters, apparently interpreted "immediately" as 9 or 10 days, my right to findings and conclusions may very well have been precluded.

I suggest that either Rule 72 be amended to incude "all documents" submitted to the Court including judgments or proposed judgments and correspondence or Rule 306 be amended to require the winning party to submit the copy of the proposed judgment to opposing counsel so that he can stay on top of the date that the Judge has signed it.

I would further suggest, however, that notice and demand for findings and conclusions be amended to 20 or 30 days instead of the 10 day "short fuse".

Further, I don't see any reason for having the preparation and submission of the findings and conclusion to be but 30 days after judgment and, upon failure to comply, 5 days additional demand.

Of course in this case, we are in different cities and a day or two is lost in mail delivery. Also, with cities the size of Houston or Dallas or San Antonio where lawyers are scattered all over, intra-city mail sometimes requires 3 or 4 or 5 days.

I have now been practicing 29 1/2 years before the Texas Courts. I liked the old method of practice much more than I do today. It used to be that, irrespective of the requirements of the rules, counsel were sufficiently courteous to each other so that such a situation as here described probably would not happen.

Very truly yours,

Wendell S. Loomis

WSL:slm

10-13-87

Sender: [illegible] R. Loomis — 713 893-6800

[illegible] & LOOMIS ATTY

707 FM 1960 WEST STE 250

HOUSTON — State: TX — ZIP Required For Correct Invoicing: 77068

Recipient: John Dickson, Clerk — 512 473-9457

Company: District Court, Travis County

Exact Street Address (Use of P.O. Boxes or P.O. Zip Codes Will Delay Delivery And Result in Extra Charge): 1000 Guadalupe

City: Austin, — State: TX — ZIP Street Address Zip Required: 78767

YOUR BILLING REFERENCE INFORMATION (FIRST 24 CHARACTERS WILL APPEAR ON INVOICE.)

McQuiston vs TNCARP

PAYMENT [X] Bill Sender [ ] Bill Recipient's FedEx Acct. No. [ ] Bill 3rd Party FedEx Acct. No. [ ] Bill Credit Card [ ] Cash

HOLD FOR PICK-UP AT THIS FEDERAL EXPRESS LOCATION
Street Address (See Service Guide or Call 800-238-5355)
City — State
ZIP + Zip Code of Street Address Required

Federal Express Use
Base Charges
Declared Value Charge
Origin Agent Charge
Other
Total Charges

SERVICES — CHECK ONLY ONE BOX

- PRIORITY 1
- [X] 6 OVERNIGHT LETTER*
- OVERNIGHT DELIVERY USING OUR PACKAGING
- [ ] Courier-Pak Overnight Envelope*
- [ ] Overnight Box A
- [ ] Overnight Tube B
- *Declared Value Limit $100
- STANDARD AIR
- SERVICE COMMITMENT

DELIVERY AND SPECIAL HANDLING — CHECK SERVICES REQUIRED

1. [ ] HOLD FOR PICK-UP
2. [X] DELIVER WEEKDAY
3. [ ] DELIVER SATURDAY (Extra charge)
4. [ ] DANGEROUS GOODS
5. [ ] CONSTANT SURVEILLANCE SERVICE (CSS)
6. [ ] DRY ICE ____ Lbs.
7. [ ] OTHER SPECIAL SERVICE
8. [ ]
9. [ ] SATURDAY PICK-UP (Extra charge)
10. [ ]

PACKAGES	WEIGHT	YOUR DECLARED VALUE	OVER SIZE
	LBS		
	LBS		
	LBS		
	LBS		
Total	Total	Total	

Received At: 1 [ ] Regular Stop 2 [ ] On-Call Stop 3 [ ] Drop Box 4 [ ] B.S.C. 5 [ ] Station

Federal Express Corp. Employee No.

Date/Time For Federal Express Use

YOUR DECLARED VALUE

DAMAGE OR LOSS

DELAY

CONSEQUENTIAL DAMAGES

DO NOT SHIP CASH OR CURRENCY

SENDER'S COPY/RETAIN FOR TRACE PURPOSES

PRINTED U.S.A.

007

01028

WENDELL S. LOOMIS
Attorney at Law
3707 F.M. 1960 WEST, SUITE 250
HOUSTON, TEXAS 77068
(713) 893-6668
FAX (713) 893-5732

October 13, 1988

Mr. John Dickson
District Clerk, Travis County
Post Office Box 1748
Austin, Texas 78701

RE: Cause No. 394,741; Marvin L. McQuiston and Jacquelyn McQuiston vs. Texas Workers' Compensation Assigned Risk Pool; 201st Judicial District Court, Travis County, Austin, Texas

Dear Sir:

Enclosed please find the original and one copy of the following document for filing in the above-described cause:

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

By copy of this letter and Certificate of Service on document, we certify that opposing counsel has been served with a true and correct copy of this document.

Please acknowledge receipt of this letter and advise date of filing by returning to us with your file stamp the enclosed extra copy of this document in the enclosed self-addressed stamped envelope.

Very truly yours,

Wendell S. Loomis

WSL:slm

enclosure

cc: Babb & Hanna
Mr. & Mrs. Marvin L. McQuiston

NO. 394,741

MARVIN L. MCQUISTON AND JACQUELYN MCQUISTON	}	IN THE DISTRICT COURT OF
VS.	}	TRAVIS COUNTY, TEXAS
TEXAS WORKERS' COMPENSATION ASSIGNED RISK POOL	}	201ST JUDICIAL DISTRICT

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Plaintiffs in the above-entitled and numbered cause and on this day, a time within 10 days of the signing of the judgment, Plaintiffs request findings of fact and conclusions of law in accordance with Rule 296, said findings and conclusions to be prepared and filed within 30 days of October 4, 1988, that is, November 3, 1988.

Plaintiffs respectfully request the Court and counsel either honor the time specified by Rule 297 or alternatively agree in writing for a time certain for the filing of said findings and conclusions so as to comply with Rule 297. In this connection it is called to the Court's and counsel's attention that counsel for Plaintiffs' offfice is in Houston, Texas and that mail and/or courier takes at least 1 to 2 days and that Rule 297 provides a very "short fuse" of 5 days.

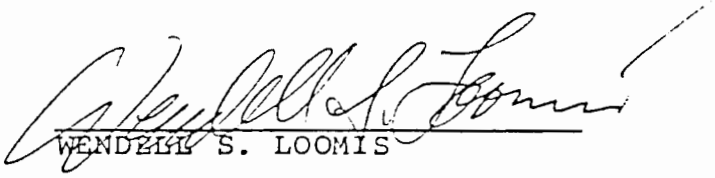
RESPECTFULLY SUBMITTED this the 13th day of October, 1988.

WENDELL S. LOOMIS
TBA NO. 12552000
3707 FM 1960 West, Suite 250
Houston, Texas 77068
(713) 893-6600

01030

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW was deposited in the U.S. mail to BABB & HANNA, attorneys for Defendant, on the 13th day of October, 1988, first class mail, postage prepaid and certified mail, return receipt requested.



WENDELL S. LOOMIS

LAW OFFICES OF
BABB & HANNA
A PROFESSIONAL CORPORATION

CHARLES M. BABB
MARK T. HANNA
CHARLES F. DAILY, JR.
J. RICHARD HARRIS
JUDITH L. HART
WOFFORD DENIUS
CATHERINE L. TABOR
SUZANNE UNDERWOOD
IAN FERGUSON

505 CONGRESS AVENUE
P. O. DRAWER 1967
AUSTIN, TEXAS 78767
512-473-8600
TELECOPIER
322-9274

October 10, 1988

Mr. Wendell S. Loomis
3707 FM 1960 West, Suite 250
Houston, Texas 77068

Re: Cause No. 394,741; Marvin L. McQuistion and Jacquelyn McQuistion v. Texas Workers' Compensation Assigned Risk Pool; In the 201st Judicial District Court of Travis County, Texas

Dear Wendell:

Enclosed please find a copy of the Judgment regarding the above-referenced cause which was submitted to Judge Dibrell on September 22, 1988.

Sorry for the delay in sending you an executed copy of the Judgment, but Judge Dibrell did not sign it until October 4, 1988.

Very truly yours,

Charles M. Babb

Charles M. Babb

Enclosure
CMB/pg
CMB1/073

Cause No. 394,741

MARVIN L. McQUISTON and JACQUELYN McQUISTON	§	IN THE DISTRICT COURT OF
vs.	§	TRAVIS COUNTY, TEXAS
TEXAS WORKERS' COMPENSATION ASSIGNED RISK POOL	§	201ST JUDICIAL DISTRICT

JUDGMENT

On the 7th day of September, 1988, came on to be heard the above-entitled and numbered cause. The plaintiffs, Marvin L. McQuiston and Jacquelyn McQuiston, appeared in person and by their attorney of record and announced ready for trial, and defendant, Texas Workers' Compensation Assigned Risk Pool, appeared in person and by its attorney of record and announced ready for trial, and no jury having been demanded, all matters of fact and things in controversy were submitted to the Court.

The Court, after hearing the evidence and arguments of counsel, is of the opinion that plaintiffs had made no showing on which it could grant their equitable bill of review as prayed for in their pleadings on file in this cause, and that plaintiffs' petition should be in all things denied, and judgment granted for defendant.

It is therefore ORDERED, ADJUDGED, AND DECREED by the Court that plaintiffs' petition for equitable bill of review and all other relief prayed for in plaintiffs' pleadings on file herein are in all things denied, and judgment is hereby granted for defendant.

All costs of Court expended or incurred in this cause are hereby adjudged against plaintiffs. All other relief not expressly granted herein is denied.

Signed this 4th day of October, 1988.

/s/ Judge Joe Dibrell
JUDGE PRESIDING

WENDELL S. LOOMIS
Attorney at Law
3707 F.M. 1960 WEST, SUITE 250
HOUSTON, TEXAS 77068
(713) 893-6600
FAX (713) 893-5732

October 3, 1988

Babb & Hanna, P.C.
905 Congress Avenue
P.O. Drawer 1963
Austin, Texas 78767

Attention: Hon. Charles Babb

Re: No. 394,741; Marvin L. McQuiston, et al.
vs. Texas Worker's Compensation Assigned Risk Pool;
201st Judicial District Court, Travis County, Texas.

Dear Charles:

Following the Trial it was my understanding that you were going to submit a Judgment for entry by the Court.

I have heard nothing from you nor have I received notification by the clerk that the Judgment has been submitted for entry or has been entered.

I am quite anxious to move forward with this case, either by appeal or wiping out this debt plus some other obligations for my client by a bankruptcy proceeding, whichever will be the easiest and cheapest on client's part.

I am inclined to believe that we will go ahead with an appeal as there are some interesing aspects I would like to have the Third Court of Appeals look at and write on.

In any event, may we please hear from your by return mail.

Very truly yours,

Wendell S. Loomis

WSL:slm

cc: Mr. & Mrs. Marvin McQuiston

LAW OFFICES

SOULES & REED

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October 10, 1988

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 296, 297, 298 and 306a

Dear Hadley:

Enclosed herewith please find copies of letters forwarded to me by William A. Dudley and Jimmy W. Nettles regarding proposed changes to Rules 296, 297, 298 and 306a. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

JIMMY W. NETTLES
ATTORNEY AT LAW
6690 CALDER AVE.
CALDER AT DOWLEN RD.
BEAUMONT TEXAS 77706
PHONE A/C (409) 860-3005

Copy to LHS
Orig to file
9/28/88

10/9

HSH
① COAJ
② SCAC Sub C
③ SCAC Agenda.

September 26, 1988

Luther H. Soules, III
Soules & Reed
Attorneys at Law
10th Floor
Two Republicbank Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Re: Suggested Amendments: Rules 296, 297, 298, Tex. R. Civ. Pro.

Dear Mr. Soules:

Mr. Gilbert I. Low, of Beaumont has advised me that you are the coordinator for the Supreme Court's committee on suggestions for changes or amendments to the Texas Rules of Civil Procedure. I wish to point out some practical realities applicable to Rules 296-298, Tex. R. Civ. Pro. concerning the filing of conclusions of fact and law by the trial court on trials before the bench.

As a mechanical matter whenever a bench trial occurs, and a losing party requests a trial court to file such findings the prevailing party always prepares and presents the proposed findings of fact and conclusions of law to the trial court. I have on only one occasion known of the trial court preparing the findings. This is all right except for one thing, and that is the rules do not require notice of filing to the requesting party.

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Rule 306a., Tex. R. Civ. Pro. as pertaining to judgments was appropriately amended as to notice before certain time periods are started into motion for a party litigant, and such needs to be the case under Rules 296-298. In fifteen years I have only on one occasion had an attorney forward to me copies of proprosed findings, and have never had an attorney advise me of the date of signing of same by the trial court. The patent response I have always received upon inquiring has been, "Oh, you didn't get a copy," or, "I thought I told you". This was the obvious basis for the amendment to rule 306a.-judgment notice.

In todays modern practice it is physically impossible to monitor the court papers as required under the status of rules 296-298 as currently written, and a greater service would be provided for the public welfare if simple notice requirements were added to these particular rules of procedure.

Sincerely yours,

Jimmy W. Nettles

JWN/ml

cc: Mr. Gilbert I. Low

THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

May 12, 1988

Elaine Carlson
South Texas College of Law
1303 San Jacinto
Houston, Texas 77002

Dear Professor Carlson:

A friend of mine, Mike Churgin, suggested that I might write you about a minor area of the Texas Rules of Civil Procedure that I think needs to be simplified. (Mike, by the way, sends his regards.)

Rule 297 effectively requires a party to personally serve the trial judge a reminder to prepare requested findings of fact and conclusions of law if the party is to preserve error for failure to file them. Requiring a reminder at all seems unnecessarily burdensome and expensive, but, assuming that a reminder provision is needed, this one is the wrong one. Filing with the clerk's office should suffice. Having to obtain some notation on the written reminder which will firmly establish for the record that the trial judge personally was reminded is very cumbersome and wastes both the trial judge's and the lawyer's time. The problems become especially acute when the lawyer is at some distance from the trial judge.

A personal story may highlight some of the complications. I once had an important case of first impression in which findings of fact would prove crucial. I was based in Austin and had to file the reminder with the clerk in a small town east of Houston. The trial judge was a retired judge designated to sit in the case who lived in a rural area many miles from where the case was and was rarely home. With only five days to get the reminder personally served, and with other litigation duties requiring me to be in Austin, I had to ask my client to take the reminder to the judge. He was not home

512/463-2100 SUPREME COURT BUILDING AUSTIN, TEXAS 78711-2548

the first few trips. When he finally was found, he refused to sign a notation that he had been personally notified, and, along with the reminder, the client had to file an affidavit of personal notification.

I realize that this is a minor matter, but I do think that a modification is in order. Thanks for listening.

Sincerely,

Renea Hicks

Renea Hicks
Special Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2085

RH/av

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ASSOCIATED COUNSEL

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(512) 224-7073

July 19, 1988

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 297

Dear Hadley:

Enclosed herewith please find a copy of a letter I received from Professor Elaine Carlson regarding Rule 297. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

~~RULE-298.--ADDITIONAL-OR-AMENDED-FINDINGS~~

~~-----After-the-judge-so-files-original-findings-of-fact-and conclusions-of-law,-either-party-may,-within-five-days,-request-of him-specified-further,-additional-or-amended-findings,-and-the judge-shall,-within-five-days-after-such-request,-and-not-later, prepare-and-file-such-further,-other-or-amended-findings-and conclusions-as-may-be-proper,-whereupon-they-shall-be-considered as-filed-in-due-time.--Notice-of-the-filing-of-the-request provided-for-herein-shall-be-served-on-the-opposite-party-as provided-in-Rule-21a-or-21b.~~

[Rule 298. Additional or Amended Findings of Fact and Conclusion of Law; Notice; Response.

(a) After the court original findings of facts and conclusions of law, any party may file with the clerk of the court a request for specified additional or amended findings, or both, in accordance with the procedures set forth in Rules 296 and 297. The request for these findings shall be made within ten (10) days after the filing of the original findings and conclusions by the court and shall be served on the court and all parties in accordance with Rule 21a.

(b) The court shall respond to a request for such findings and conclusions within ten (10) days after such request is filed, file such response with the clerk, and cause a copy to be mailed to all parties to the suit.

(c) All requests, responses and notices relating to findings of fact and conclusions of law shall be filed by the

clerk and become a part of the record on appeal when written designation therefor is made and filed with the clerk.]

Note to Advisory Committee: If the amendments to Tex.R.Civ.P. Rule 296-98 are adapted as recommended, Tex.R.App.P. 41(a)(1) and 54(a) should be amended to extend the time for perfecting the appeal and filing the transcript and statement of facts in non-jury cases. Our subcommittee recommends that these latter rules be amended to provide the same time limits for the appeal of non-jury and jury cases.

(c) Upon filing the notice in (b) above the time for the court to respond is extended to forty-five (45) days from the date the original request was filed.

(d) Notice of filing. The notice provided by this rule shall be served on the court and each party to the suit in accordance with Rule 21a.]

LAW OFFICES

SOULES & REED

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LUTHER H. SOULES III
THOMAS G. WHITE

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

October 10, 1988

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 296, 297, 298 and 306a

Dear Hadley:

Enclosed herewith please find copies of letters forwarded to me by William A. Dudley and Jimmy W. Nettles regarding proposed changes to Rules 296, 297, 298 and 306a. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

JIMMY W. NETTLES
ATTORNEY AT LAW
6690 CALDER AVE.
CALDER AT DOWLEN RD.
BEAUMONT TEXAS 77706
PHONE A/C (409) 860-3005

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WSH
1 COAS
2 SCAC Supp
3 SCAC Agenda.

September 26, 1988

Luther H. Soules, III
Soules & Reed
Attorneys at Law
10th Floor
Two Republicbank Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Re: Suggested Amendments: Rules 296, 297, 298, Tex. R. Civ. Pro.

Dear Mr. Soules:

Mr. Gilbert I. Low, of Beaumont has advised me that you are the coordinator for the Supreme Court's committee on suggestions for changes or amendments to the Texas Rules of Civil Procedure. I wish to point out some practical realities applicable to Rules 296-298, Tex. R. Civ. Pro. concerning the filing of conclusions of fact and law by the trial court on trials before the bench.

As a mechanical matter whenever a bench trial occurs, and a losing party requests a trial court to file such findings the prevailing party always prepares and presents the proposed findings of fact and conclusions of law to the trial court. I have on only one occasion known of the trial court preparing the findings. This is all right except for one thing; and that is the rules do not require notice of filing to the requesting party.

I understand that other rules require us to monitor and inspect the papers on file with the clerk of each court, but only a few firms have the resources and man power to send someone to each courthouse in the mornings or evenings to inspect the court papers on a daily basis; and it is unrealistic and physically impossible for each attorney to do this on a daily basis. There should be a requirement that the court or the prevailing party have to serve notice of filing on the requesting party, and that the time schedules set forth within such rules should not be triggered until notice is complied with.

Rule 306a., Tex. R. Civ. Pro. as pertaining to judgments was appropriately amended as to notice before certain time periods are started into motion for a party litigant, and such needs to be the case under Rules 296-298. In fifteen years I have only on one occasion had an attorney forward to me copies of proprosed findings, and have never had an attorney advise me of the date of signing of same by the trial court. The patent response I have always received upon inquiring has been, "Oh, you didn't get a copy," or, "I thought I told you". This was the obvious basis for the amendment to rule 306a.-judgment notice.

In todays modern practice it is physically impossible to monitor the court papers as required under the status of rules 296-298 as currently written, and a greater service would be provided for the public welfare if simple notice requirements were added to these particular rules of procedure.

Sincerely yours,

Jimmy W. Nettles

JWN/ml

cc: Mr. Gilbert I. Low

~~RULE 305.--DRAFT~~

~~-----Counsel of the party for whom a judgment is rendered shall prepare the form of the judgment to be entered and submit it to the court.~~

[Rule 305 - Proposed Judgment

~~Either~~ Any party may submit a proposed judgment to the court for signature.

Each person who submits a proposed judgment for signature shall certify thereon that a true copy has been delivered to each attorney or pro se party to the suit and indicate thereon the date and manner of delivery.

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

LAW OFFICES

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LUTHER H. SOULES III

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TELECOPIER
(512) 224-7073

November 1, 1988

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 296, 297, 306a(3) and 306a(4)

Dear Hadley:

Enclosed herewith please find a copy of a letter forwarded to me by Justice William W. Kilgarlin regarding proposed changes to Rules 296, 297, 306a(3) and 306a(4). Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

October 24, 1988

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Reed
800 Milam Building
San Antonio, TX 78205

Dear Luke:

Enclosed is a copy of a letter from Wendell Loomis, as well as copy of my response.

Please see that the matter is presented to the Supreme Court Advisory Committee.

Sincerely,

William W. Kilgarlin

WWK:sm

Encl.

01050

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

October 24, 1988

Mr. Wendell S. Loomis
Attorney at Law
3707 F.M. 1960 West
Suite 250
Houston, Texas 77068

Dear Wendell:

Your letter of October 19 has been forwarded to me, as I serve as the court's liaison to the Supreme Court Advisory Committee, the body that recommends Rules changes.

I understand your concern, and I have forwarded a copy of your letter to Luther H. Soules, III, Chairman of the Supreme Court Advisory Committee.

Sincerely,

William W. Kilgarlin

WWK:sm

xc: Mr. Luther H. Soules, III

WENDELL S. LOOMIS
Attorney at Law
3707 F.M. 1960 WEST, SUITE 250
HOUSTON, TEXAS 77068
(713) 893-6600
FAX (713) 893-5732

October 19, 1988

Supreme Court of Texas
Supreme Court Building
P.O. Box 12248
Austin, Texas 78711

Attention: Rules Committee

Re: Rules 72, 73, 74, 296, 297, 306a(3), and 306a(4)

Gentlemen:

A matter has recently come up which, because of some diligence, did not cause a loss of rights, however because of the interaction of the above-described rules a serious problem may have been created.

To explain: The Cause No. 394,741; McQuiston, et al. vs. Texas Workers' Compensation Assigned Risk Pool was tried before Judge Dibrell on September 7, 1988. Shortly thereafter Mr. Charles Babb of the firm Babb & Hanna submitted a proposed judgment to the Court for the Court's signature on September 22, 1988. Mr. Babb did not send me a copy of the proposed judgment or his letter to the Court.

On October 3, 1988, I wrote Mr. Babb about the proposed judgment. Enclosed is a copy of my letter of October 3, 1988, to Mr. Babb.

Enclosed is copy of Mr. Babb's letter and photocopy of judgment which was signed on October 4, 1988, by Judge Dibrell. Because the judgment was signed on October 4 and Mr. Babb did not communicate with me until October 12, I had to immediately prepare and have Federal Expressed to Austin my Request for Findings of Fact and Conclusions of Law. Enclosed is a photocopy of that request and letter.

On October 14, I received a postcard from Mr. John Dickson, District Clerk, mailed October 13, 1988.

Conclusion: As can be seen Rule 72 does not include a proposed judgment. It only refers to pleadings, pleas, or motions. Nowhere other than by Rule 306a is the losing party entitled to a

copy of the judgment, nor is the winning party who prepared the proposed judgment to be submitted to the Court required to furnish a copy of this proposal to opposing counsel.

Since Rules 296 and 297 require the demand for findings and conclusions to be within 10 days after the signing of the judgment and the clerk, being quite busy with other matters, apparently interpreted "immediately" as 9 or 10 days, my right to findings and conclusions may very well have been precluded.

I suggest that either Rule 72 be amended to incude "all documents" submitted to the Court including judgments or proposed judgments and correspondence or Rule 306 be amended to require the winning party to submit the copy of the proposed judgment to opposing counsel so that he can stay on top of the date that the Judge has signed it.

I would further suggest, however, that notice and demand for findings and conclusions be amended to 20 or 30 days instead of the 10 day "short fuse".

Further, I don't see any reason for having the preparation and submission of the findings and conclusion to be but 30 days after judgment and, upon failure to comply, 5 days additional demand.

Of course in this case, we are in different cities and a day or two is lost in mail delivery. Also, with cities the size of Houston or Dallas or San Antonio where lawyers are scattered all over, intra-city mail sometimes requires 3 or 4 or 5 days.

I have now been practicing 29 1/2 years before the Texas Courts. I liked the old method of practice much more than I do today. It used to be that, irrespective of the requirements of the rules, counsel were sufficiently courteous to each other so that such a situation as here described probably would not happen.

Very truly yours,

Wendell S. Loomis

WSL:slm

10-12-92

Randall S. Loomis — 713 893-6600

John Dickson, Clerk — 512 473-9457

District Court, Travis County

1000 Guadalupe

Austin, TX 78767

HOUSTON TX 77068

YOUR BILLING REFERENCE INFORMATION (FIRST 24 CHARACTERS WILL APPEAR ON INVOICE.)

McQuiston vs TWCARP

PAYMENT ☒ Bill Sender ☐ Bill Recipient's FedEx Acct No. ☐ Bill 3rd Party FedEx Acct No ☐ Bill Credit Card ☐ Cash

HOLD FOR PICK-UP AT THIS FEDERAL EXPRESS LOCATION

Street Address (See Service Guide or Call 800-238-5355)

City State

ZIP * Zip Code of Street Address Required

Federal Express Use

Base Charges

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PRIORITY 1 ☒ OVERNIGHT LETTER*

OVERNIGHT DELIVERY USING OUR PACKAGING

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* Declared Value Limit $100

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1 ☐ HOLD FOR PICK-UP

2 ☒ DELIVER WEEKDAY

3 DELIVER SATURDAY Extra charge ☐

4 ☐ DANGEROUS GOODS

5 ☐ CONSTANT SURVEILLANCE SERVICE (CSS)

6 ☐ DRY ICE

7 ☐ OTHER SPECIAL SERVICE

8 ☐

9 ☐ SATURDAY PICK-UP

10 ☐

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	LBS		
	LBS		
	LBS		
	LBS		
Total	Total	Total	

Received At

1 ☐ Regular Stop

2 ☐ On-Call Stop

3 ☐ Drop Box 4 ☒ B.S.C. 5 ☐ Station

Federal Express Corp. Employee No.

Date/Time For Federal Express Use

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DAMAGE OR LOSS

DELAY

CONSEQUENTIAL DAMAGES

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SENDER'S COPY/RETAIN FOR TRACE PURPOSES

PART #100-REV 6/91 PRINTED U.S.A.

007

01054

WENDELL S. LOOMIS
Attorney at Law
3707 F.M. 1960 WEST, SUITE 250
HOUSTON, TEXAS 77068
(713) 893-6666
FAX (713) 893-5732

October 13, 1988

Mr. John Dickson
District Clerk, Travis County
Post Office Box 1748
Austin, Texas 78701

RE: Cause No. 394,741; Marvin L. McQuiston and Jacquelyn McQuiston vs. Texas Workers' Compensation Assigned Risk Pool; 201st Judicial District Court, Travis County, Austin, Texas

Dear Sir:

Enclosed please find the original and one copy of the following document for filing in the above-described cause:

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

By copy of this letter and Certificate of Service on document, we certify that opposing counsel has been served with a true and correct copy of this document.

Please acknowledge receipt of this letter and advise date of filing by returning to us with your file stamp the enclosed extra copy of this document in the enclosed self-addressed stamped envelope.

Very truly yours,

Wendell S. Loomis

WSL:slm

enclosure

cc: Babb & Hanna
Mr. & Mrs. Marvin L. McQuiston

NO. 394,741

MARVIN L. MCQUISTON AND JACQUELYN MCQUISTON	}	IN THE DISTRICT COURT OF
VS.	}	TRAVIS COUNTY, TEXAS
TEXAS WORKERS' COMPENSATION ASSIGNED RISK POOL	}	201ST JUDICIAL DISTRICT

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Plaintiffs in the above-entitled and numbered cause and on this day, a time within 10 days of the signing of the judgment, Plaintiffs request findings of fact and conclusions of law in accordance with Rule 296, said findings and conclusions to be prepared and filed within 30 days of October 4, 1988, that is, November 3, 1988.

Plaintiffs respectfully request the Court and counsel either honor the time specified by Rule 297 or alternatively agree in writing for a time certain for the filing of said findings and conclusions so as to comply with Rule 297. In this connection it is called to the Court's and counsel's attention that counsel for Plaintiffs' offfice is in Houston, Texas and that mail and/or courier takes at least 1 to 2 days and that Rule 297 provides a very "short fuse" of 5 days.

RESPECTFULLY SUBMITTED this the 13th day of October, 1988.

WENDELL S. LOOMIS
TBA NO. 12552000
3707 FM 1960 West, Suite 250
Houston, Texas 77068
(713) 893-6600

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW was deposited in the U.S. mail to BABB & HANNA, attorneys for Defendant, on the 13th day of October, 1988, first class mail, postage prepaid and certified mail, return receipt requested.

WENDELL S. LOOMIS

LAW OFFICES OF
BABB & HANNA
A PROFESSIONAL CORPORATION

CHARLES M. BABB
MARK I. HANNA
CHARLES F. DAILY, JR.
J. RICHARD HARGIS
JUDITH L. HART
WOFFORD DENIUS
CATHERINE L. TABOR
SUZANNE UNDERWOOD
IAN FERGUSON

900 CONGRESS AVENUE
P. O. DRAWER 1968
AUSTIN, TEXAS 78767
512-473-8600
TELECOPIER
322-9274

October 10, 1988

Mr. Wendell S. Loomis
3707 FM 1960 West, Suite 250
Houston, Texas 77068

Re: Cause No. 394,741; Marvin L. McQuistion and Jacquelyn McQuistion v. Texas Workers' Compensation Assigned Risk Pool; In the 201st Judicial District Court of Travis County, Texas

Dear Wendell:

Enclosed please find a copy of the Judgment regarding the above-referenced cause which was submitted to Judge Dibrell on September 22, 1988.

Sorry for the delay in sending you an executed copy of the Judgment, but Judge Dibrell did not sign it until October 4, 1988.

Very truly yours,

Charles M. Babb

Charles M. Babb

Enclosure
CMB/pg
CMB1/073

Cause No. 394,741

MARVIN L. McQUISTON and JACQUELYN McQUISTON	§	IN THE DISTRICT COURT OF
vs.	§	TRAVIS COUNTY, TEXAS
TEXAS WORKERS' COMPENSATION ASSIGNED RISK POOL	§	201ST JUDICIAL DISTRICT

JUDGMENT

On the 7th day of September, 1988, came on to be heard the above-entitled and numbered cause. The plaintiffs, Marvin L. McQuiston and Jacquelyn McQuiston, appeared in person and by their attorney of record and announced ready for trial, and defendant, Texas Workers' Compensation Assigned Risk Pool, appeared in person and by its attorney of record and announced ready for trial, and no jury having been demanded, all matters of fact and things in controversy were submitted to the Court.

The Court, after hearing the evidence and arguments of counsel, is of the opinion that plaintiffs had made no showing on which it could grant their equitable bill of review as prayed for in their pleadings on file in this cause, and that plaintiffs' petition should be in all things denied, and judgment granted for defendant.

It is therefore ORDERED, ADJUDGED, AND DECREED by the Court that plaintiffs' petition for equitable bill of review and all other relief prayed for in plaintiffs' pleadings on file herein are in all things denied, and judgment is hereby granted for defendant.

01059

All costs of Court expended or incurred in this cause are hereby adjudged against plaintiffs. All other relief not expressly granted herein is denied.

Signed this 4th day of October, 1988.

/s/ Judge Joe Dibrell
JUDGE PRESIDING

01060

WENDELL S. LOOMIS
Attorney at Law
3707 F.M. 1960 WEST, SUITE 250
HOUSTON, TEXAS 77068
(713) 893-6600
FAX (713) 893-5732

October 3, 1988

Babb & Hanna, P.C.
905 Congress Avenue
P.O. Drawer 1963
Austin, Texas 78767

Attention: Hon. Charles Babb

Re: No. 394,741; Marvin L. McQuiston, et al.
vs. Texas Worker's Compensation Assigned Risk Pool;
201st Judicial District Court, Travis County, Texas.

Dear Charles:

Following the Trial it was my understanding that you were going to submit a Judgment for entry by the Court.

I have heard nothing from you nor have I received notification by the clerk that the Judgment has been submitted for entry or has been entered.

I am quite anxious to move forward with this case, either by appeal or wiping out this debt plus some other obligations for my client by a bankruptcy proceeding, whichever will be the easiest and cheapest on client's part.

I am inclined to believe that we will go ahead with an appeal as there are some interesing aspects I would like to have the Third Court of Appeals look at and write on.

In any event, may we please hear from your by return mail.

Very truly yours,

Wendell S. Loomis

WSL:slm

cc: Mr. & Mrs. Marvin McQuiston

01061

LAW OFFICES

SOULES & REED

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October 10, 1988

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 296, 297, 298 and 306a

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As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

SCOTT T. COOK & Associates, P.C.
A PROFESSIONAL CORPORATION

Attorneys at Law
Suite 290
2820 South Padre Island Drive
Corpus Christi, Texas 78415

(512) 855-6655

Scott T. Cook
Board Certified in Family Law
Texas Board of Legal Specialization

William A. Dudley
Associate

September 27, 1988

Mr. Luther H. Soules, III
SOULES & REED
10th Floor
Two Republic Bank Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Dear Mr. Soules:

I attended your lecture on the 1988 Rules changes at the Advanced Family Law Seminar in Dallas. You mentioned during your lecture that you welcomed comments on the Rules of Civil Procedure and possible need for change. In my opinion, there exists a serious defect in the present Rules of Civil Procedure of which I have been confronted on two occasions.

As I understand Rule 306a, the date a judgment or order is signed is the date which determines the beginning of periods prescribed by other Rules of Civil Procedure for the Court's plenary power and for perfecting an appeal. Paragraph 4. states, "If no notice of the judgment or order is received by the adverse party within 20 days after execution by the trial court, that party's time periods begin to run from the date that party received notice or actual knowledge of the order or judgment." Stated otherwise, if a party first receives notice of judgment on the 21st through 90th day, his plenary and appellate time table begin on whatever day he actually receives notice. On the other hand, if the party receives notice at any time during the first 20 days after the judgment is signed, the day the judgment is actually signed is used to calculate a court's plenary power, or rather, time to perfect an appeal.

An often overlooked, but crucial, element in winning an appeal, is requesting findings of fact and conclusions of law. In fact, the case law says if no findings of fact and conclusions of law were requested nor filed, the appellate court must affirm the trial court if it may do so on any theory of recovery supported by the record. Findings of fact and conclusions of law are governed by Rules of Civil Procedure 296 et. seq. Rule 296 requires that a request for findings of fact and conclusions of law shall be filed within 10 days after the final judgment is signed. This presents

enough of a problem for a party who has had timely notice of an adverse order entered against them when they are aware the judgment or order has been signed. However, if the adverse party is unaware and has not been given notice that a judgment or order has been signed for 10 days after the order is signed, that party may very well be without an adequate recourse, and may very well stand to lose an appeal of said judgment, no matter how much merit the appeal might have.

I recently found myself being faced with such a situation. Neither opposing counsel, nor the trial court, delivered notice to me that an order had been signed. It was not until 17 days after the trial court signed an order that I discovered that an order had, in fact, been entered. Under Rule 306a, paragraph 4, because I received actual notice within 20 days, by the time I discovered an order had been entered against my client, it was already too late to demand findings of fact and conclusions of law. As I understand the present state of these two rules, an adverse party who received notice of judgment any time between the 11th day and 20th day, has no right to demand findings of fact and conclusions of law. While he may request them, the trial court is not bound to accomodate, under a literal interpretation of these rules.

In my research, I have found no case or other dissertation analyzing this situation. I do believe, however, it is something for the Rules Committee to review.

Thank you for your patience in reviewing the above.

Sincerely,

William A. Dudley

WD/dc

LAW OFFICES

SOULES & REED

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October 10, 1988

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 296, 297, 298 and 306a

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As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

JIMMY W. NETTLES
ATTORNEY AT LAW
6690 CALDER AVE.
CALDER AT DOWLEN RD.
BEAUMONT TEXAS 77706
PHONE A/C (409) 860-3005

Copy to Nits
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9/25/88 Lyle

10/9

WSH
(1) COAS
(2) SCAC Supp
(3) SCAC Agenda.

September 26, 1988

Luther H. Soules, III
Soules & Reed
Attorneys at Law
10th Floor
Two Republicbank Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Re: Suggested Amendments: Rules 296, 297, 298, Tex. R. Civ. Pro.

Dear Mr. Soules:

Mr. Gilbert I. Low, of Beaumont has advised me that you are the coordinator for the Supreme Court's committee on suggestions for changes or amendments to the Texas Rules of Civil Procedure. I wish to point out some practical realities applicable to Rules 296-298, Tex. R. Civ. Pro. concerning the filing of conclusions of fact and law by the trial court on trials before the bench.

As a mechanical matter whenever a bench trial occurs, and a losing party requests a trial court to file such findings the prevailing party always prepares and presents the proposed findings of fact and conclusions of law to the trial court. I have on only one occasion known of the trial court preparing the findings. This is all right except for one thing, and that is the rules do not require notice of filing to the requesting party.

I understand that other rules require us to monitor and inspect the papers on file with the clerk of each court, but only a few firms have the resources and man power to send someone to each courthouse in the mornings or evenings to inspect the court papers on a daily basis; and it is unrealistic and physically impossible for each attorney to do this on a daily basis. There should be a requirement that the court or the prevailing party have to serve notice of filing on the requesting party, and that the time schedules set forth within such rules should not be triggered until notice is complied with.

Rule 306a., Tex. R. Civ. Pro. as pertaining to judgments was appropriately amended as to notice before certain time periods are started into motion for a party litigant, and such needs to be the case under Rules 296-298. In fifteen years I have only on one occasion had an attorney forward to me copies of proprosed findings, and have never had an attorney advise me of the date of signing of same by the trial court. The patent response I have always received upon inquiring has been, "Oh, you didn't get a copy," or, "I thought I told you". This was the obvious basis for the amendment to rule 306a.-judgment notice.

In todays modern practice it is physically impossible to monitor the court papers as required under the status of rules 296-298 as currently written, and a greater service would be provided for the public welfare if simple notice requirements were added to these particular rules of procedure.

Sincerely yours,

Jimmy W. Nettles

JWN/ml

cc: Mr. Gilbert I. Low

Texas Tech University

School of Law
Lubbock, Texas 79409-0004 / (806) 742-3791 Faculty 742-3785

March 8, 1989

3/13

H-J-H,

SCAO Sub C R 295 + 324
Agenda
CB & I
Prof Edgar.

Mr. Luther H. Soules III
Tenth Floor
Republic of Texas Plaza
175 East Houston Street
San Antonio, TX 78205-2230

Re: Conflicting Answers and
T.R.C.P. 295 and 324

Dear Luke:

While the opportunity for conflicting answers has lessened, Little Rock Furniture Co. v. Dunn, 222 S.W.2d 985 (Tex. 1949) bothers me each time I teach it. You will recall that one of the Court's holdings was that a party could wait until after the jury had been discharged to complain of the conflict. Id. at 991.

When, then, must the loser complain? As a result of the recent amendment to Rule 324, one could argue that a motion for new trial is not required. Thus, can the judgment loser wait and complain for the first time in an appellant's brief? I hope not.

The problem can be cured in one of two ways. Since I disagree with the Little Rock holding, I would prefer that we add a sentence to Rule 295 to incorporate waiver for failure to call the conflict to the judge's attention before the jury is discharged. My subcommittee will consider this possibility.

An alternative would be to require that a complaint be made mandatory in Rule 324. Would you please refer this suggestion to the appropriate subcommittee so that we can resolve the matter at our next meeting?

Thanks.

No change

Sincerely,

Hadley

J. Hadley Edgar
Robert H. Bean Professor of Law

What judgment would be entered.

JHE/nt

CO A recommends

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

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JAMES P. WALLACE ‡

March 14, 1989

Mr. Harry Tindall
Tindall & Foster
2801 Texas Commerce Tower
Houston, Texas 77002

Re: Tex. R. Civ. P. 324

Dear Mr. Tindall:

Enclosed herewith please find a copy of a letter I received from J. Hadley Edgar regarding Rule 324. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan Hecht
Professor J. Hadley Edgar
Honorable Stanley Pemberton

01069

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‡ BOARD CERTIFIED CIVIL APPELLATE LAW
* BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

REPORT December 1, 1988

of the

COMMITTEE ON THE ADMINISTRATION OF JUSTICE

The Committee on the Administration of Justice has been divided into subcommittees which tract those of the Supreme Court Advisory Committee to which it reports its proposals regarding the Texas Rules of Civil Procedure. The first meeting of the new bar year was held September 10, 1988 at which time there was discussion of proposed Local Rules following a report by Luther Soules, Chairman of the Supreme Court Advisory Committee and the Court's Subcommittee on Local Rules. Mr. Soules presented a proposed draft of the rules for consideration and input. Professor William V. Dorsaneo, III, Chairman of COAJ's Subcommittee on Local Rules, has done a considerable amount of work on the project. A number of other matters came before the committee for discussion and various proposed Rules changes were referred to appropriate subcommittees.

At its meeting held November 19, Judge George Thurmond, Chairman of the Judicial Section, reported that a draft of the Local Rules was presented during the recent Judicial Conference in Fort Worth. He stated that the members attending the Conference were divided into five groups to study the draft and a member of the Advisory Committee acted as moderator to each group. The final work product will serve as a guide for judges over the state after its approval.

A report was made by Judge Don Dean, a member of the Subcommittee on Rules 1-165a. Some changes were proposed to Rule 21a to bring approved delivery practices more current as delivery means and technologies have significantly changed since 1941. The changes will be put into written form and presented to the full committee at its January meeting for action as required under the committee's bylaws. Changes to Rule 72 were also proposed which will bring copy service more current and this amendment will be presented in written form at the next meeting.

Four Rules changes are being considered by the Subcommittee on Rules 166-215 which is chaired by Guy Hopkins. Mr. Hopkins was unavoidably absent from the November meeting and reports on these Rules were deferred.

Charles Tighe, Chairman of the Subcommittee on Rules 216-314, reported that the group has considered Rule 245 and, on the recommendation of Mr.

Soules, would recommend a revision at the next meeting to change notice of "not less than ten days" to "not less than forty-five days" as the period prior to trial for jury fee and demand was extended from ten to thirty days and the increase from ten to forty-five days would permit a party who receives a non-jury setting together with an answer to preserve its right to trial by jury and avoid an otherwise essential but burdensome practical requirement to make demand and pay the jury fee in all cases when they are filed, thus clogging the jury dockets unrealistically and unnecessarily. Mr.Tighe said it would be necessary to consider this change along with Rule 216 which provides for the filing of a jury fee. He said the subcommittee was also considering Rules 223 and 224 which deal with the jury list.

Mr. James O'Leary said his Subcommittee on Rules 315-331 was looking at Rule 324(b) where motion for a new trial is required. A question has arisen with regard to venue for a new trial and the group feels this needs study.

With regard to the Texas Rules of Appellate Procedure, Judge J. Curtiss Brown, chairman, reported that a proposal has been received regarding TRAP Rules 4 and 5 which relate to the question of the time of filing of records, briefs and other instruments. He said the subcommittee did not feel that a real problem existed with these two Rules but would look at them more closely to determine if revisions should be made.

A complaint regarding Rules 40 and 53j was received from a district judge regarding a problem faced by a court reporter in his jurisdiction who prepared a lengthy statement of facts for an indigent party as required under Rule 40 but who was refused payment for his services under Rule 53j. The subcommittee considered the matter but recommended that no action be taken on these Rules at this time and that the matter be removed from the docket, recognizing that there may be a greater problem with the Rules in the future.

With regard to TRAP Rule 100, Judge Brown referred to a copy of a proposed change to the Rule which has been circulated to the full committee. The proposed amendment will clarify the Rule by providing that en banc review may be conducted at any time within a period of plenary jurisdiction of a court of appeals. He moved that the change be approved and his motion was seconded and adopted.

The meeting was then held open for discussion of any Rules problems which might need to be addressed. It was mentioned that "legal holidays" differ from county to county, and discussion was also held on certain Rules of discovery and the possibility of having a limit on the number of interrogatories that may be made.

The Committee will meet again on January 14, 1989 at which time final action will probably be taken on a number of the items presently under consideration.

Stanton B. Pemberton

Stanton B. Pemberton, Chairman

PROPOSED RULE CHANGES

RULE 329b, Tex.R.Civ.P., 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~~ twenty-eight 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~~ twenty-eight days after the judgment or other order complained of is signed.

(c) In the event an original or amended motion for new trial or a motion of modify, correct or reform a judgment is not determined by written order signed within ~~seventy-five~~ seventy 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~~ twenty-eight 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 appeals has been perfected, has plenary power to grant a new trial

or to vacate, modify, correct, or reform the judgment until ~~thirty~~ twenty-eight days after all such timely-filed motions are overruled, either by written and signed order or by operation of law, whichever occurs first.

(f) [Same.]

(g) [Same.]

(h) [Same.]

REASONS FOR THE CHANGES

Every year numbers of appeals are dismissed or lost because lawyers miscalculated the time for filing documents in the appellate courts. As an appellate lawyer, I counted and recounted periods, marking up numbers of calendars, and still miscalculated the time.

I propose Rule 329b, Tex.R.Civ.P., and all other rules dealing with appeals, should be amended so that all time limits are figured in seven day increments. This will provide a simple way to figure filing dates.

This system of computing time is the system used in England, where all time limits are computed in seven day increments. The advantages are obvious: If something is filed on a Wednesday, the response will be due on a Wednesday. No longer will the last day for any action fall on a weekend. The only odd days will be the holidays.

I first encountered this system when I handled an appeal in the Alabama Supreme Court. The Alabama Supreme Court adopted the English system in their 1985 rules. The system is simple and effective.

01074

In order to adopt this change, the Supreme Court would have to amend all the rules of appellate procedure which contain time limits. Those rules include: Tex.R.App.P. 41 (time to perfect the appeal), 42 (accelerated appeals), 52 (bills of exception), 54 (time to file record), 71 (motion re informalities in record), 72 (motion to dismiss), 73 (motion for extension of time), 74(k) (appellant's brief), 74(m) (appellee's brief), 100 (motion for rehearing to court of appeals), 130(b) (application for writ of error), 136 (application for writ by other party), 136 (respondent's answer), 190 (motion for rehearing to supreme court), 86 (mandate), 186 (mandate).

Besides Rule 329b, Tex.R.Civ.P., there are probably other rules of civil procedure that would have to be amended.

If the Advisory Committee is interested in this proposal, I will be glad to submit proposed rule changes for all of these rules.

Please contact me if this suggestion is placed on the docket of the Advisory Committee.

MICHOL O'CONNOR, Justice
First Court of Appeals
1307 San Jacinto Street
10th Floor
Houston, Texas 77002
(713) 655-2700

01075

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February 15, 1989

Mr. Harry Tindall
Tindall & Foster
2801 Texas Commerce Tower
Houston, Texas 77002

Re: Tex. R. Civ. P. 329(b)

Dear Mr. Tindall:

Enclosed herewith please find a copy of a letter I received from Judge Michol O'Connoer regarding Rule 329(b). Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan Hecht
Honorable Michol O'Connor

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Court of Appeals
First Supreme Judicial District
1307 San Jacinto, 10th Floor
Houston, Texas 77002

Copy to file
2-10-89

KATHRYN COX
CLERK

LYNNE LIBERATO
STAFF ATTORNEY

PHONE 713-655-2700

Rule 329

February 10, 1989

Mr. Luke Soules
800 Milam Building
San Antonio, Texas 78205

Dear Luke:

Here is another rule proposal. I think this change would dramatically reduce the number of cases lost for late filing.

Sincerely

Michol O'Connor

Rule 329. Motion for New Trial on Judgment Following Citation by Publication

In cases in which judgment has been rendered on service of process by publication, when the defendant has not appeared in person or by attorney of his own selection:

(a) The court may grant a new trial upon petition of the defendant showing good cause, supported by affidavit, filed within two years such after 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 an interest in property has been leased under the judgment, before the process was suspended, the defendant shall not be allowed to rescind the lease, but shall have judgment against the plaintiff for the proceeds resulting from the lease of such interest."

(e) 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).

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August 31, 1988

Mr. Harry Tindall
Tindall & Foster
2801 Texas Commerce Tower
Houston, Texas 77002

Re: Tex. R. Civ. P. 329

Dear Mr. Tindall:

Enclosed herewith please find a copy of a letter I received from Skipper Lay regarding Rule 329. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin
Mr. Skipper Lay

Copy to HTS
Orig to file
8-18-88
sja

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HJH
SBA Sub C
+ Agenda

August 16, 1988

Mr. Robert W. Fuller
Cotton, Bledsoe, Tighe & Dawson
Attorneys at Law
Suite 300
United Bank Building
500 West Illinois
Midland, TX 79701

RE: Proposed "Fuller-Cummings" Amendments to Statute and Texas Rules of Civil Procedure

Dear Bob:

Thank you for your submittal of July 28, 1988, a copy of which was sent to me. We have now placed your proposed amendment to the Texas Civil Practice & Remedies Code §64.091 with the State Bar, hopefully for inclusion in the State Bar legislation package.

As I understand your submittal, you actually submitted a proposed revision to the Texas Civil Practice & Remedies Code, and also to Rule 329 of the Texas Rules of Civil Procedure. The scope of the Oil, Gas & Mineral Law Section's work this year involved statutory revisions and revisions or amendments to rules for consistency with the statutes. As we read your proposed addition to Rule 329, it has no connection with your submission for revision of the Texas Civil Practice & Remedies Code.

Therefore we return to you the materials you submitted concerning Rule 329, and the proposed addition. We encourage you to submit this proposed revision directly to the Supreme Court Advisory Committee. A copy of the listing of committee membership (valid at least through June 1, 1988) is enclosed with this letter.

In addition, I am sending some slightly different wording to your Rules amendment than you previously submitted. Accordingly, you may do with them as you see fit.

Thank you again for your submittal of the statutory revision materials.

Sincerely yours,

LAY & COFFEY, P.C.

By: Skipper Lay
Skipper Lay

SL/fdw
Enclosure
cc: Mr. Jan E. Rehler
Chairman
Oil, Gas & Mineral Law Section
Feferman & Rehler
P. O. Box 23041
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1990

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**Public Member*

SUPREME COURT APPOINTED COMMITTEES

THE SUPREME COURT ADVISORY COMMITTEE

Purpose: To advise the Supreme Court on proposed changes in the Texas Rules of Civil Procedure.

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Continued on next page

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Court Rules Member:
Hon. James P. Wallace
Justice, Supreme Court of Texas
P.O. Box 12248, Capitol Station
Austin 78711

Rule 329c Motions to Set Aside Default Judgments

Rule 329b and the following rule shall be the exclusive rules applicable to motions for new trial designed to effect the setting aside of a default judgment:

(a) The motion must be supported by affidavit testimony alleging facts within the personal knowledge of the affiant reflecting that the default was not intentional or the result of conscious indifference; that the movant has a meritorious defense to the action; and that setting aside the default will not prejudice the nonmovant except by depriving him of the default judgment;

(b) The trial court can require a hearing on the motion for new trial on any just terms consistent with this rule and Rule 329b; and the trial court must hold a hearing on the motion for new trial if requested by the movant or the nonmovant, but the mere holding of a hearing shall have no effect on the evidentiary value of affidavits filed prior to the hearing;

(c) The movant's affidavit testimony may be controverted by affidavits (which, for the purposes of this rule, constitute evidence if filed prior to the hearing) reflecting personal knowledge of relevant facts or by other evidence of facts which would be admissible at trial under the Rules of Evidence, but the filing of opposing affidavits shall not be a prerequisite to the introduction of evidence at the hearing;

(d) If the movant's affidavit testimony is not controverted by any facts proved prior to or during the hearing, if any, or prior to the ruling on the motion for new trial if no hearing is held, and the testimony otherwise is sufficient to satisfy the requirements of subsection (a) of this rule, the trial court must grant the motion and set aside the default judgment on such terms as it deems just; and

(e) If the movant's affidavit testimony is controverted in the manner and at the time(s) permitted in this rule, the trial court must find the facts and render a decision consistent with those findings and the requirements of subsection (a) of this rule.

LH&S
Info.
Copy

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January 6, 1987

1-15-88
Holly
R339b State Secr
XC Jackson

Ms. Holly Halfacre
State Bar of Texas
800 Milam Building
Austin, Texas 78705

Dear Ms. Halfacre:

Enclosed is a copy of an article which will be published in the Baylor Law Review next month with the title "Default Judgments: Procedure(s) for Alleging or Controverting Facts on the Conscious Indifference Issue." The article concerns a proposed new rule of civil procedure which, for your convenience, I have copied and placed at the front of the article. I would appreciate it if you would submit the rule and the article to the State Bar's Advisory Committee on the Rules of Procedure for their consideration.

Thank you for your cooperation in this matter.

Very truly yours,

Aaron L. Jackson

ALJ:tes

Enclosures

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January 18, 1988

Mr. Harry L. Tindall
Tindall & Foster
2801 Texas Commerce Tower
Houston, Texas 77002

RE: Rule 329b

Dear Harry:

Enclosed herewith please find a copy of a letter I received from Aaron L. Jackson regarding Rule 329b. Please review this matter and be prepared to speak on same at our next committee meeting. I am including same on our agenda.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Mr. Aaron L. Jackson
Justice James P. Wallace

In any case involving an appeal from a default judgment, appellate courts slavishly cite the three-pronged test from Craddock v. Sunshine Bus Lines, Inc.,[1] as "the guiding rule or principle which trial courts are to follow in determining whether to grant a motion for new trial."[2] According to that test, a default judgment should be set aside if (1) failure of the defendant to answer before judgment was not intentional or the result of conscious indifference; (2) the motion for new trial sets up a meritorious defense to the plaintiff's cause(s) of action; and (3) setting aside the default judgment will not cause delay or otherwise prejudice the plaintiff.[3]

Despite the unanimity on the substance of the Craddock test, however, reported appellate court decisions reflect different beliefs about the procedure(s) the advocate must use in various contexts to comply with the test or to demonstrate the movant's noncompliance with it. In particular, no consensus seems to exist among appellate courts concerning the proper procedure for controverting facts alleged by the defaulting party in an attempt to show that the default was not intentional or the result of conscious indifference.

According to their published opinions, appellate courts would not agree on the answers to the following questions: Must the nonmovant file opposing affidavits as a prerequisite for introducing live testimony or other evidence at an evidentiary hearing on the motion for new trial?[4] If the movant submits uncontroverted affidavits to show the default was not intentional or the result of conscious indifference, are those affidavits sufficient to defeat the default judgment even if the trial court

holds a hearing on the motion for new trial?[5] If the movant submits affidavits which meet all the requirements of the Craddock test, are those affidavits sufficient to defeat the default judgment even if they are controverted?[6]

In an attempt to describe for the practitioner the proper procedure for showing or disputing that the failure to answer was intentional or the result of conscious indifference, this article offers two things:

1. An analysis of case law before and after the Supreme Court's watershed decision in Strackbein v. Prewitt;[7] and
2. A new rule of civil procedure designed to elucidate in detail the proper procedures for defending and opposing default judgments before the trial court.

Strackbein

In Strackbein v. Prewitt, supra, the Supreme Court reversed a default judgment upheld by the San Antonio Court of Appeals. The trial court refused to set the judgment aside after a hearing in which the defaulting party presented oral argument on his motion for new trial. Neither the movant nor the nonmovant made a record of the hearing;[8] so, when the case came to the appellate courts, the record contained only the uncontroverted affidavits of the movant. Accordingly, the Supreme Court held:

> Where factual allegations in a movant's affidavit are not controverted, a conscious indifference question must be determined in the same manner as a claim of meritorious defense. It is sufficient that the movant's motion and affidavit set forth facts which, if true, would negate intentional or consciously indifferent conduct.[9]

The Supreme Court does not say in this passage (or anywhere else in the opinion) that the nonmovant must controvert the movant's affidavits by filing controverting affidavits as opposed to other types of controverting evidence. Both the Supreme Court opinion in Strackbein, and the Supreme Court file in the case, indicate that the nonmovant had made no attempt of any kind to controvert the movant's affidavits.[10]

In such a context, it is easy to accept the following broad language which appears at the very end of the Strackbein opinion:

> Finally, Strackbein contends that if the trial court conducts a hearing on a defaulting defendant's motion for new trial, the appellate court should not substitute its discretion for that of the trial court. The issue is not one of which court's discretion shall prevail. Rather, it is a matter of the appellate court reviewing the acts of the trial court to determine if a mistake of law was made. The law in the instant case is set out in Craddock. That law requires the trial court to test the motion for new trial and the accompanying affidavits against the requirements of Craddock. If the motion and affidavits meet these requirements, a new trial should be granted. In this case those requirements have been met.[11]

Taken alone outside the context of the particular facts in Strackbein, however, this language can support such a broad reading of Strackbein that neither an evidentiary hearing nor controverting affidavits can defeat a motion supported by affidavit testimony indicating an absence of conscious indifference. See, Southland Paint v. Thousand Oaks Racket Club.[12]

After Strackbein: Southland

In Southland, the movant requested a hearing on the motion for new trial. Because Strackbein did not require the hearing simply because the nonmovant had filed conclusory affidavits

opposing the movants, and the opposing affidavits contained no facts about the events leading up to the default, the hearing need not have been requested for evidentiary reasons. Instead, the hearing simply could have given Southland an oral opportunity to persuade Judge Rivera to set aside the default judgment if the written motion for new trial had not persuaded him on its own.

A record on the proceedings in the hearing was presented to the appellate court. The record reflects that the nonmovant presented live testimony. The movant argued this testimony did not controvert the affidavit testimony supporting the motion for new trial because the testimony did not come from someone with personal knowledge of facts leading to the default, and because the evidence was in the form of an opinion grounded upon an erroneous definition of conscious indifference. The San Antonio court's majority opinion in Southland does not explicitly reject or accept the movant's argument in this regard. Instead, the court, citing Strackbein, simply broadly held that the movant's affidavits met the Craddock test and, therefore, the default had to be reversed.

Neither the majority nor the dissenting opinion in Southland addresses the effect of the nonmovant's affidavits or testimony. According to the weight of authority, the nonmovant's affidavits and testimony may have been irrelevant because neither controverted the facts leading up to the default, as alleged in the movant's affidavits. Because the San Antonio court does not make this clear in its opinion in Southland, however, the opinion could be read to support an argument that, once the movant files affidavit testimony which, if true, meets the Craddock test,

controverting evidence of any kind, even on the conscious indifference issue, is irrelevant, and the trial court must grant the motion for new trial.

In dissent in Southland, Chief Justice Cadena also did not mention the issue of controverting evidence. Instead, the Chief Justice opined that because the movant presented no testimony at the hearing, it had failed to discharge the burden it was required to bear to get the default set aside.[13] This dissent reflects a broad reading of Reedy Co., Inc. v. Garnsey,[14] according to which the movant's affidavits automatically become insufficient (become nonevidence) to support a motion for new trial upon request by the nonmovant for a hearing on the motion.

On May 13, 1987, the Supreme Court ruled that the San Antonio court had committed no reversible error in Southland. In so doing, the Supreme Court left standing the San Antonio's court broad language interpreting Strackbein, according to which controverting evidence of any kind is irrelevant as long as the movant files an affidavit which meets the requirements of Craddock.[15]

After Strackbein: Barber

In Peoples Sav. and Loan Ass'n v. Barber,[16] the San Antonio court offered another interpretation of Strackbein which may create problems for the practitioner. The procedural history of Barber provides a good introduction to the problems. The movant requested a hearing on the motion for new trial and called its own affiants live to supplement their affidavit testimony. The nonmovant filed a reply to the motion for new trial, but did not offer and could not have offered affidavits to controvert the

factual allegations of the movant's affiants. The nonmovant's inability in this regard may not have been significant at the time because the movant's affidavits seemed fatally deficient on the meritorious defense issue[17] (as pointed out in the reply to the motion for new trial).[18] At the time, Strackbein did not appear to require the filing of counter-affidavits before the nonmovant could take advantage of any controverting testimony elicited during cross-examination of the affiants at the hearing.

At the hearing, the nonmovant did elicit from the affiants testimony which contradicted their affidavit testimony. For example, as one of the excuses for the default, one of the movant's witnesses testified that, in a telephone conversation designed to notify him that the movant had been served with citation, he mistakenly thought he was being told only about a letter that had been previously sent by Mr. Barber.[19] This testimony impeached the witness' affidavit in which he admitted under oath that, on the ocassion in question, he was actually advised that the movant had been served with court papers concerning Mr. Barber's suit.[20]

During cross-examination, the trial court also asked questions of the impeached witness, questions which the witness avoided. The trial court denied the motion for new trial, and the movant appealed.

The San Antonio court, in an opinion by Justice Chapa, took a broad view of Strackbein and reversed the default judgment. The court held:

> Barber filed no controverting affidavits to the motion for new trial . . . . Since Barber filed no controverting affidavits, the trial court could only look to the record

before him at that time which included the motion for new trial and the attached affidavits . . . .[21]

* * *

Barber asserts that we should consider the evidence adduced at the evidentiary hearing [of which the court had a record] on the motion for new trial in reviewing the trial court's denial of the motion . . . . The Supreme Court, faced with the same contention [sic], held:

> Finally, Strackbein contends that if the trial court conducts a hearing on a defaulting defendant's motion for new trial the appellate court should not substitute its discretion for that of the trial court. The issue is not one of which court's discretion shall prevail. Rather, it is a matter of the appellate court reviewing the acts of the trial court to determine if a mistake of law was made. The law of the instant case is set out in Craddock. That law requires the trial court to test the motion for new trial and the accompanying affidavits against the requirements of Craddock. If the motion and affidavits meet those requirements, a new trial should be granted.[22]

(Emphasis added.)

The San Antonio court's holding in Barber creates at least the following problems for the practitioner in this area:

1. For the first time it seems to require that the nonmovant file controverting affidavits as a prerequisite for the introduction of other controverting evidence;
2. If for whatever reason, controverting or opposing affidavits are not available to the nonmovant, cross-examination testimony of the movant's affiants themselves cannot be considered by the trial court on the conscious indifference issue; and
3. If controverting or opposing affidavits are not available to the nonmovant, he has no way to defend the

default against an artfully worded, but false movant's affidavit.

Under most circumstances, as was true in Barber, the allegations made in the supporting affidavits as to intent or conscious indifference are wholly within the knowledge of the affiant(s) and concern facts which cannot be known personally to the nonmovant. For example, in Barber, to explain the default, the movant relied solely upon evidence of a telephone conversation during which a misunderstanding allegedly arose that resulted in the default. The only witnesses to this alleged telephone conversation were the two participants in it, and they were the only affiants offered in support of the motion for new trial.[23]

In the Barber situation, which experience has shown to be typical, the nonmovant can test the movants' proof only by cross-examining the affiant(s) regarding the truth or falsity of the facts alleged in affidavit testimony. According to the San Antonio court's holding in Barber, a nonmovant is effectively deprived of his right to cross-examine the movant's affiants in the vast majority of default judgment cases. In those cases, the nonmovant is left completely to the mercy of the affiants' conscience or lack thereof.

Of course, in the motion for rehearing and in the application for writ of error in Barber, the nonmovant argued that the live cross-examination testimony from the affiants themselves did controvert their affidavits; that the court did have before it a record of the controverting evidence; that the appellate courts in Strackbein did not have such a record; that the nonmovant had offered no controverting evidence of any kind in Strackbein;[24]

that, accordingly, Strackbein was not in point; and that the absence of controverting affidavits was irrelevant. At least three members of the Supreme Court agreed with these arguments when they granted the application for writ of error on October 7, 1987. Because the application was later withdrawn by agreement as a result of the settlement, however, the Supreme Court did not have a chance to address intermediate appellate court interpretations of the opinion in Strackbein.

If the Supreme Court had addressed the issues in Barber, it could have defended the following rules:

1. The nonmovant must controvert the movant's affidavits on the issue of conscious indifference; otherwise, they are taken as true;[25]
2. The nonmovant can controvert the movant's affidavits on the conscious indifference issue either by filing affidavits, or by adducing testimony live at a hearing as long as either contradicts the facts alleged by the movant's affidavits on the conscious indifference issue;[26]
3. The controverting evidence, if any, must be incorporated in the record presented to the appellate court; otherwise, the appellate courts will accept the movant's affidavits as true.[27]
4. An "evidentiary" hearing has no effect on the movant's affidavits if no evidence is presented at the hearing to controvert the facts alleged in the affidavits on the conscious indifference issue;[28]

5. If the movant's affidavits are controverted, the trial court must find facts, which findings will not be disturbed on appeal if supported by some evidence;[29] and

6. If the movant's affidavits are not controverted, the motion for new trial must be granted if no reasonable interpretation of the affidavits would suggest the default was intentional or the result of conscious indifference.[30]

These rules avoid the problematic holdings and statements in Barber and Southland. For example, contrary to the ruling in Barber, it seems self-evident that, without requiring prerequisites, the trial court should be able to consider admissions by the affiants themselves, admissions made during cross-examination at a hearing on the motion for new trial. Before Barber, no Texas court had established prerequisites for cross-examination of witnesses called by the other side,[31] and it would seem extremely unjust if affidavit testimony need be taken as true in the teeth of the affiant's live admission or testimony during cross-examination indicating the affidavit testimony was not actually true. Likewise, contrary to the apparent ruling by the majority in Southland, it seems unjust to accept artfully worded affidavits on the conscious indifference issue if evidence is offered (at least by the time of the hearing on the motion for new trial) to controvert the affidavits. Finally, it seems unjust to exalt form over substance as does the dissent in Southland in opining that a mere request for a hearing automatically negates the force of the movant's affidavits.

According to the views expressed in Barber and Southland, the key issue seems to be form and not substance. According to the Supreme Court's views, however, as reflected in the Strackbein opinion read as a whole, the key issue seems to be the absence or presence of controverting facts of any kind on the issue of conscious indifference, whether these facts are in the movant's affidavits themselves and reflect internal inconsistencies; or whether the facts alleged in the movant's affidavits are inconsistent with facts alleged in opposing affidavits; or whether facts alleged in the movant's affidavits are inconsistent with facts established other than by affidavit, for instance, during live testimony at the evidentiary hearing. The facts developed as of the time of the hearing should control.

There should be and usually is a "symmetry" in the risks of any given action in litigation. For example, if an advocate calls a witness to prove a favorable fact, X, the witness may admit Y, which is unfavorable. Likewise, if the advocate's opponent calls a witness to prove Y, which favors the opponent, the witness may prove X, which disfavors the opponent.

Similarly, if the advocate does not call a witness to prove X, the factfinder may consider other evidence to be too weak to support the advocate's position on X. Likewise, if the opponent fails himself to call the advocate's witness adversely, the factfinder may find other evidence to be strong enough to support the advocate's position.

The views expressed by the San Antonio court in Southland and Barber alter the natural symmetry of risks with respect to witnesses called or not called in connection with an attempt to

effect the setting aside of a default judgment. The majority view in Southland, for instance, if read literally, eliminates entirely the risk in a movant's decision not to call witnesses live to prove the absence of conscious indifference. This is true because, according to the Southland majority's view, the movant's witness(es)' affidavit testimony must be taken as true and, as long as the affidavit is artfully worded, the trial court must grant the motion for new trial.

Likewise, the dissent in Southland, if read literally, eliminates entirely the risk in the nonmovant's decision not to call or to depose the movant's witness(es) on the conscious indifference issue. This is true because, according to the Southland dissent's view, the nonmovant, simply by requesting a hearing, can force the movant to call his witness(es) live to prove the absence of conscious indifference.

Similarly, the majority opinion in Barber, if read literally, eliminates entirely the risk in the movant's decision affirmatively to call witnesses live at the hearing to prove the absence of conscious indifference. This is true because, as long as the nonmovant files no controverting affidavits, nothing the movant's witnesses say can be used against the movant.

An argument that the views in Southland and Barber destroy "symmetry of risks" in litigation is, at bottom, an argument that the views are unfair. The following rule is proposed as a reasonably fair guideline for defending and opposing default judgments. It is respectfully commended for consideration by the State Bar Advisory Committee on the Rules of Civil Procedure.

Rule 329c Motions to Set Aside Default Judgments

Rule 329b and the following rule shall be the exclusive rules applicable to motions for new trial designed to effect the setting aside of a default judgment:

(a) The motion must be supported by affidavit testimony alleging facts within the personal knowledge of the affiant reflecting that the default was not intentional or the result of conscious indifference; that the movant has a meritorious defense to the action; and that setting aside the default will not prejudice the nonmovant except by depriving him of the default judgment;

(b) The trial court can require a hearing on the motion for new trial on any just terms consistent with this rule and Rule 329b; and the trial court must hold a hearing on the motion for new trial if requested by the movant or the nonmovant, but the mere holding of a hearing shall have no effect on the evidentiary value of affidavits filed prior to the hearing;

(c) The movant's affidavit testimony may be controverted by affidavits (which, for the purposes of this rule, constitute evidence if filed prior to the hearing) reflecting personal knowledge of relevant facts or by other evidence of facts which would be admissible at trial under the Rules of Evidence, but the filing of opposing affidavits shall not be a prerequisite to the introduction of evidence at the hearing;

(d) If the movant's affidavit testimony is not controverted by any facts proved prior to or during the hearing, if any, or prior to the ruling on the motion for new trial if no hearing is held, and the testimony otherwise is sufficient to satisfy the requirements of subsection (a) of this rule, the trial court must grant the motion and set aside the default judgment on such terms as it deems just; and

(e) If the movant's affidavit testimony is controverted in the manner and at the time(s) permitted in this rule, the trial court must find the facts and render a decision consistent with those findings and the requirements of subsection (a) of this rule.

ENDNOTES

1. 134 Tex. 388, 133 S.W.2d 124 (1939).

2. Strackbein v. Prewitt, 671 S.W.2d 37 (Tex. 1984).

3. Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124.

4. Yes--People's Savings & Loan Assoc. v. Barber, 733 S.W.2d 679 (Tex. App.--San Antonio 1987, writ dism'd by agr.);

No--Royal Zenith Corp. v. Martinez, 695 S.W.2d 327 (Tex. App.--Waco 1985, no writ); Reedy Co., Inc. v. Garnsey, 608 S.W.2d 755 (Tex. Civ. App.-Dallas 1980, writ ref'd n.r.e.)

5. Yes--Strackbein v. Prewitt, 671 S.W.2d 37; Southland Paint Co., Inc. v. Thousand Oaks Racket Club, 724 S.W.2d 809 (Tex. App.--San Antonio 1987, writ ref'd n.r.e.);

No--Reedy Co., Inc. v. Garnsey, 608 S.W.2d 755 (Tex. Civ. App.--Dallas 1980, writ ref'd n.r.e.)

6. Yes--Southland Paint Co., Inc. v. Thousand Oaks Racket Club, 724 S.W.2d 809 (Tex. App.--San Antonio 1987, writ ref'd n.r.e.);

No--Reedy Co., Inc. v. Garnsey, 608 S.W.2d 755 (Tex. Civ. App.--Dallas 1980, writ ref'd n.r.e.); Royal Zenith Corp. v. Martinez, 695 S.W.2d 327 (Tex. App.--Waco 1985, no writ).

7. Strackbein v. Prewitt, 671 S.W.2d 37; Order in Cause No. 82-CI-0794, signed October 1, 1982 (Strackbein v. Prewitt).

8. Strackbein v. Prewitt, 671 S.W.2d 37, 39.

9. Id. at 38-9.

10. The fact that the Strackbein case did not involve an evidentiary hearing, or at least no record of such was made, is documented in the transcript and pleadings found in the Supreme Court's file in Strackbein. The trial court's Order denying the Motion for New Trial states:

> The Court having considered the pleadings, affidavits and arguments of counsel, is of the opinion that the Motion for New Trial should be denied. Order in Cause No. 82-C1-0794, signed October 1, 1982 (Supreme Court File No. C-2883).

Also, the movant in Strackbein described the procedural history of that case:

> Mr. Strackbein [non-movant] did not file or offer any affidavits to controvert Mr. Prewitt's motion nor did he present any evidence at the hearing on the Motion for New Trial. Respondent's Answer to Application for Writ of Error, Statement of Facts, p. 5 (Supreme Court File No. C-2883).

(Emphasis added).

Furthermore, no record was made of the hearing on the Motion for New Trial in Strackbein. 671 S.W.2d at 38.

11. Strackbein v. Prewitt, 671 S.W.2d 37, 39.

12. 724 S.W.2d 809 (Tex. App.--San Antonio 1987, writ ref'd n.r.e.)

13. Id. at 811.

14. 608 S.W.2d 755 (Tex. Civ. App.--Dallas 1980, writ ref'd n.r.e.), cited erroneously by Chief Justice Cadena as a decision of the Texas Supreme Court. 724 S.W.2d at 811. In Reedy, the movants filed a supporting affidavit on the conscious indifference issue, and the nonmovant presented controverting testimony at the evidentiary hearing on the Motion for New Trial. In its opinion,

the Dallas Court of Civil Appeals said nothing that would lead the reader to believe the nonmovant had filed opposing affidavits as a prerequisite for introducing the live testimony. The court did hold that the movants' affidavit on the conscious indifference issue was not evidence once controverted by the live testimony. 608 S.W.2d at 757. This seems to be unarguable based upon the weight of authority. However, the language in the Reedy opinion seems to go farther than a mere holding that, once controverted by live testimony or otherwise, a supporting affidavit is not evidence on the conscious indifference issue. At the very end of the opinion appears the following language:

> We hold that when a hearing is held on a motion to set aside a default judgment, . . . the movant has the burden of proving by a preponderance of the evidence that his failure to answer was not intentional or due to conscious indifference, but rather was due to mischance or mistake.

(Emphasis in original.)

Id. This language is not limited to a situation in which controverting evidence of some kind is presented at the hearing on the Motion for New Trial. Consequently, in Southland, the Chief Justice opined that merely because a hearing had been held on Southland's Motion for New Trial, Southland's affidavits on the conscious indifference issue lost their evidentiary value. 724 S.W.2d at 811. If this was a holding in Reedy, the Supreme Court in Strackbein seemed to repudiate it. There the Supreme Court held that the movant's affidavits on the conscious indifference issue constituted evidence even in the face of a hearing held in that case on the Motion for New Trial. 671 S.W.2d at 39. No controverting evidence was presented at the hearing in Strackbein.

15. Southland Paint Co., Inc. v. Thousand Oaks Racket Club, 724 S.W.2d 809 (Tex. App.--San Antonio 1987, writ ref'd n.r.e.)

16. 733 S.W.2d 679.

17. It is well-established that the rule of Craddock does not require proof of a meritorious defense but rather a new trial should be granted if the motion for new trial "sets up a meritorious defense." Ivy v. Carrell, 407 S.W.2d 212, 214 (Tex.

1966). No controverting evidence of any kind may be considered on the meritorious defense issue. Guaranty Bank v. Thompson, 632 S.W.2d 338, 340 (Tex. 1982).

18. Barber's Reply To People's Motion For New Trial, Barber v. People's Savings & Loan Assoc. and People's Mortgage Co., No. 86-CI-01820A (1986). Barber's Reply To People's Motion For New Trial asserted that the motion for new trial was fatally deficient because the motion failed to allege facts which, if true, would constitute a meritorious defense to the causes of action alleged. In particular, Barber's reply alleged that the motion for new trial contained mere conclusory allegations and other legal conclusions, which did not sufficiently set up a meritorious defense as required by the Supreme Court's decision in Ivy v. Carrell, 407 S.W.2d 212 (Tex. 1966).

19. Cause No. 04-86-00315-CV, Peoples Savings & Loan Assoc. and Peoples Mortgage Co. v. Barber, Byron (Tex. App.--San Antonio), Statement of Facts for April 30, 1986, P. 62, L. 17-25.

20. Id., Transcript at 18.

21. The language in the Barber opinion appears to track very

closely the language used in the Strackbein opinion, substituting the names from the Barber case where the names from the Strackbein case had been used previously.

22. People's Savings & Loan Assoc. v. Barber, 733 S.W.2d 679, 681.

23. Cause No. 04-86-00315-CV, Peoples Savings & Loan Assoc. and Peoples Mortgage Co. v. Barber, Byron (Tex. App.--San Antonio), Transcript, at 13-20.

24. Order in Cause No. 82-CI-0794, signed October 1, 1982 (Supreme Court File No. C-2883); Respondent's Answer To Application For Writ Of Error, Statement of Facts, p. 5 (Supreme Court File No. C-2883); Strackbein v. Prewitt, 671 S.W.2d 37.

25. Strackbein v. Prewitt, 671 S.W.2d 37; Dallas Heating Co., Inc. v. Pardee, 561 S.W.2d 16 (Tex. Civ. App.--Dallas 1977, writ ref'd n.r.e.)

26. Royal Zenith Corp. v. Martinez, 695 S.W.2d 327; Reedy Co., Inc. v. Garnsey, 608 S.W.2d 755.

27. Strackbein v. Prewitt, 671 S.W.2d 37.

28. Implied in Strackbein v. Prewitt, id.

29. Royal Zenith Corp. v. Martinez, 695 S.W.2d 327; Strackbein v. Prewitt, 671 S.W.2d 37.

30. Strackbein v. Prewitt, 671 S.W.2d 37; Dallas Heating Co., Inc. v. Pardee, 561 S.W.2d 16.

31. Cases recognizing the fundamental right to cross-examination are legion. As a former Chief Justice of the San Antonio Court put it in 1952, "ordinarily parties are entitled to cross-examine witnesses and test their opportunity to know what they profess to know. . . ." City of Corpus Christi v. McCarver, 253 S.W.2d 456, 459 (Tex. Civ. App.--San Antonio 1952, no writ). A party's right to cross-examine witnesses would be meaningless if the trial court could not consider the admissible testimony produced by the cross-examination.

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May 17, 1989

Mr. Harry Tindall
Tindall & Foster
2801 Texas Commerce Tower
Houston, Texas 77002

Re: Tex. R. Civ. P. 330

Dear Mr. Tindall:

Enclosed herewith please find a copy of a letter I received from Justice Nathan L. Hecht regarding Rule 330. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Stanley Pemberton

THE SUPREME COURT OF TEXAS

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May 15, 1989

Luther H. Soules III, Esq.
Soules & Wallace
Republic of Texas Plaza, 19th Floor
175 East Houston Street
San Antonio TX 78205-2230

Dear Luke:

Please include on the Advisory Committee's next agenda the following issues which have arisen recently during conferences of the Supreme Court:

1. Regarding TRCP 267 and TRE 614: May "the rule" be invoked in depositions?

2. Regarding TRCP 330: Should there be general rules for multi-district litigation generally? Should there be rules prescribing some sort of comity for litigation pending in federal courts and courts of other states?

2. Regarding TRAP 4-5: Should the filing period be extended when the last day falls on a day which the court of appeals observes as a holiday even though it is not a Saturday, Sunday, or legal holiday?

3. Regarding TRAP 84 and 182(b): Should an appellate court be authorized to assess damages for a frivolous appeal against counsel in addition to a party?

4. Regarding TRAP 90(a): Should the courts of appeals be required to address the factual sufficiency of the evidence whenever the issue is raised, unless the court of appeals finds the evidence legally insufficient?

5. Regarding TRAP 130(a): What is the effect of filing an application for writ of error before a motion for rehearing is filed and ruled upon by the court of

appeals? Does the court of appeals lose jurisdiction of the case immediately upon the filing of an application for writ of error, or may the appellate court rule on a later-filed motion for rehearing, even if the ruling involves a material change in the court's opinion or judgment? *See Doctors Hospital Facilities v. Fifth Court of Appeals*, 750 S.W.2d 177 (Tex. 1988).

Two additional matters I would appreciate the Committee considering are whether to incorporate rules on professional conduct, such as those adopted in *Dondi Properties Corp. v. Commercial Savings and Loan Ass'n*, 121 F.R.D. 284 (July 14, 1988), and whether the electronic recording order should be included in the rules.

Also, please include on the agenda the issues raised in the enclosed correspondence.

Thank you for your dedication to the improvement of Texas rules.

Sincerely,

Nathan L. Hecht
Justice

Copy to LHS
Orig to HTH
5/10/89 hfl

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May 9, 1989

FILE NO.:

FEDERAL EXPRESS

Honorable Luther H. Soules, III,
Chairman
Supreme Court Advisory Committee
SOULES & WALLACE
Tenth Floor
Republic of Texas Plaza
175 E. Houston Street
San Antonio, TX 78205-2230

RE: Standing Subcommittee on Rules 523-591, T.R.C.P.

Dear Luke:

This is the report of the referenced subcommittee.

Two matters were brought to this subcommittee's attention since the last meeting of the Supreme Court Advisory Committee ("Advisory Committee"), and these matters were addressed to the members of this subcommittee for action. The action taken is reflected as follows.

1. Proposal to delete the provision in Rule 534 T.R.C.P. which states as follows: "The Citation shall further direct that if not served within ninety (90) days after date of its issuance, it shall be returned unserved." This provision pertains to the Citation in justice court proceedings. The source of the proposal is a letter dated February 9, 1988 addressed to Chairman Soules from Val D. Huvar, County Clerk, Victoria County, Texas.

Subcommittee Action. The proposed change of deleting the ninety (90) day provision is recommended to the Advisory Committee for favorable recommendation to the Supreme Court. Those members of the subcommittee favoring the proposed change were Edgar, Morris and O'Quinn. Those members oppossed to the proposed change were Ragland and Walker. Specific comments were made by the following persons which I purport to summarize as follows: Morris voted in favor of the proposed change to place it on the Agenda for debate reserving the right to take a different position in debate of the full committee. Ragland opposed the proposed change indicating the provision may be helpful to those who institute suits in the

justice court without the services of an attorney where the provision would eliminate the necessity of party tracking down unexecuted papers and instead would impose the duty upon the officer to return the unexecuted paper. Walker states there is no value in removing the 90 day provision and no harm in its presence.

The suggested form of the Advisory Committee to reflect this subcommittee's action is enclosed.

2. Proposal to create a uniform method of numbering of the Texas Rules of Civil Procedure. The source of the proposal is a letter dated July 21, 1987 addressed to Chairman Soules from F. John Wagner, Jr. of the firm Walsh, Squires & Tompkins, Houston, Texas. This proposal was presented to each of the subcommittees. There were no rules within the purview of this standing subcommittee that appeared to be affected. Therefore this subcommittee's report is one embracing the concept of the proposal.

Subcommittee Action: The subcommittee opposes the proposal. Those against the proposal are Morris, Walker and Edgar. Those favoring the proposal are Ragland and O'Quinn.

Specific comments were made which I purport to summarize as follows: Walker states, there appears to be no difficulty in locating a pertinent rule as they are presently numbered. Rule changes invariably create confusion. Ragland states he made the recommendation of a uniform system in connection with work on the 1988 amendments and feels that it should still be a viable consideration and moves that the Supreme Court adopt a uniform numbering system for the Texas Rules of Civil Procedure and the Texas Rules of Evidence with the same numbering system to be used by the Courts of Appeals and trial courts in formulating their local rules. O'Quinn states that the numbering system for our rules should be changed to be consistent.

This concludes the report of this subcommittee and with same I express my appreciation for the support of Chairman Soules and the work of the members of this subcommittee.

With best regards I am,

Yours sincerely,

SULLIVAN, KING & SABOM, ~~P.C.~~

By: _____
Anthony J. Sadberry

AJS/stb
enclosure

cc: Mr. Charles Morris
Mr. John M. O'Quinn
Professor J. Hadley Edgar
Mr. Sam Sparks
Professor Orville C. Walker
Mr. Tom L. Ragland

√Copy to LHS
orig to file
3/3/88 hjh

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*BOARD CERTIFIED - COMMERCIAL REAL ESTATE LAW
TEXAS BOARD OF LEGAL SPECIALIZATION
**BOARD CERTIFIED - ESTATE PLANNING AND PROBATE LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

March 1, 1988

FILE NO.:

SCAC Agenda

Mr. Charles Morris
Morris, Craven & Sulak
600 Congress Avenue, Suite 2350
Austin, Texas 78701-3234

Mr. John M. O'Quinn
O'Quinn, Hagans & Wettman
2300 Texas Commerce Tower
Houston, Texas 77002

Professor J. Hadley Edgar
Texas Tech University
School of Law
Lubbock, Texas 790409

Mr. Sam Sparks
P. O. Drawer 1271
San Angelo, Texas 76902-1271

Professor Orville C. Walker
St. Mary's University School at Law
One Camino Santa Maria
San Antonio, Texas 78284

Mr. Tom L. Ragland
Clark, Gorin, Ragland & Mangrum
P. O. Box 329
Waco, Texas 76703

Re: Supreme Court Advisory Committee - Standing Committee on Rules 523-591

Dear Members:

Welcome to a new committee year. I am contacting you with respect to our committee work. There are two mattes that need to be brought to your attention, on which I request your response.

Enclosed is a cover letter from our Chairman, Luke Soules, dated August 10, 1987, transmitting a letter from Mr. John Wagner, dated July 21,1987, pertaining to a request to make uniform the references in our rules in alphabetizing and numbering. I have made a brief review of the rules that fall within our purview,

and do not find any rules that would be subject to any necessary changes in the event changes of this nature are preferred. Therefore, I would think our response would be no need to make any changes. However, please make a check on your own and confirm whether my observations are accurate. For your convenience I am enclosing a copy of this letter and asking as to this item whether you approve a recommendation to the advisory committee of "no change", or alternatively, whether you would propose to make a change, and if so, what that change should be.

Also, enclosed is a copy of Chairman, Luke Soules's letter, dated February 12, 1988, transmitting a copy of Mr. Vale Huvar's letter dated February 9, 1988, concerning Rule 534.

In my brief review of the matter, it appears that Mr. Huvar has correctly pointed out that Texas Rules of Civil Procedure Rule 101, which provided that the citation shall further direct that if it is not served within 90 days after date of its issuance it shall be returned unserved, was replaced by order of July 15, 1987, effective January 1, 1988. Thus, it appears that under the Rules for District and County Courts, the 90 day provision is not to be included in the citation, although it is still present in a provision under Rule 117a, Citations and Suits for Delinquent Ad Valorem Taxes, Section 6, which is a suggested form of citation of personal service in or out of state.

Mr. Huvar also correctly points out that Rule 534, pertaining to citaton in Justice Courts retains the 90 day provision, and his suggestion I suppose is that for consistency, the Justice Court's procedure on citations should be uniform with that of the County and District courts.

Therefore, I submit to you as members of this committe the proposition of whether this change should be made, and presuming Mr. Huvar's letter to be a request for same, I will consider the motion as being one in favor of the change to delete the 90 days privision in Rule 534 and request by your return of a copy of this letter whether you agree with that request or oppose it, or if you have some other suggestion separate form those two alternatives.

These are all of the matters that have been brought to my attention as of this date. I will continue to contact you and update you with material as it is received.

I look forward to your early response or comments.

Yours sincerely,

Anthony J. Sadberry

AJS/SD1001/kf

cc: Luther H. Soules, III, Esq.

1) Agree with no Change_____
Propose change as follows:_____

2) Agree with proposed change of deleting the 90 day provision:_____
Oppose the proposed change of deleting the 90 day provision:_____

OTHER COMMENTS:_____

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W. W. TORREY

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

February 12, 1988

Mr. Anthony J. Sadberry
Sullivan, King & Sabom
5005 Woodway
Suite 300
Houston, Texas 77056

RE: Proposed Change to Rule 534

Dear Tony:

I have enclosed a copy of a letter from Val D. Huvar, County Clerk of Victoria County, Texas regarding a proposed change to Rule 534. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure

COUNTY OF VICTORIA
TELEPHONE (512) 575-1478
VICTORIA COUNTY COURTS BLDG.
115 N. BRIDGE
VICTORIA, TEXAS

VAL D. HUVAR
COUNTY CLERK

MAILING
P. O. BOX 2410
VICTORIA, TEXAS 77902

February 9, 1988

Mr. Luther H. Soules III
800 Milam Building
San Antonio, Texas 78205

Dear Mr. Soules:

It was a pleasure to hear you speak on the Rules of Civil Procedures. You asked that I write and remind you of the statement I asked you about return dates on citations, the rule governing this County and District Courts the statement is "if not served in 90 days after issuance it shall be returned unserved" was repealled but was left in Rule 534 which pertains to Justice Court.

Yours truly,

Val D. Huvar, County Clerk
Victoria County, Texas

VH:nlb

01120

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ASSOCIATED COUNSEL

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TELECOPIER
(512) 224-7073

August 10, 1987

TO ALL SUBCOMMITTEE CHAIRPERSONS:

Enclosed is a letter from Mr. F. John Wagner, Jr., requesting that the alphabetical and numerical designations of the Rules of Civil Procedure be conformed. Please have your subcommittee review the rules within your purview to ascertain whether such changes are necessary and prepare a report to be given at our next scheduled meeting.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
enclosure
cc: Justice James P. Wallace
Mr. F. John Wagner, Jr.

Walsh, Squires & Tompkins
a professional corporation
Attorneys at Law
900 Marathon Oil Tower
5555 San Felipe
Houston, Texas 77056

AREA CODE 713
961-4103
FACSIMILE NO
713/961-4147

July 21, 1987

Mr. Luther H. Soules, III
Law Office of Soules & Reed
800 Milam Building
East Travis at Soledad
San Antonio, Texas 78205

Re: Alphanumerical designation of the Texas Rules of Civil Procedure

Dear Mr. Soules:

I received information from the Texas State Bar that you are the Chairman of the Advisory Committee to the Supreme Court. I am not certain if your Committee is the proper one to receive this recommendation; if it is not, I would appreciate it if you would place it before the proper committee or agency. I am recommending that, prior to January 1, 1988, the Supreme Court uniformally subdivide the Texas Rules of Civil Procedure throughout.

As you probably know, a substantial amendment to the Rules taker effect on January 1, 1988. In reviewing these amendments I noticed tha Rule 166-A will become Rule 166a, in keeping with other alphanumeric designations throughout the Rules. However, when you look at the subparts of what will be Rule 166a, you will see that the first division thereunde has a small alpha designation within parenthesis; i.e. (a), (b), etc. Bu when you examine Rule 166b as it presently exists, you see that the first division is followed by a simple numerical, the second division by a simpl small alpha, the third division by a parenthetical numerical and so forth i.e., 2.e.(1). This kind of helter-skelter alphanumeric designation exists throughout the Rules. For instance, see Rule 113, where the first divisior is a parenthesized small alpha, while Rule 167 has unparenthesize numericals and alphas as its division.

It seems, that with the amendment of the Rules coming up shortly, no would be an ideal time to standardize the manner by which the Rules ar subdivided. It is much easier to cite a subdivided rule if all division begin with a parenthetical, such as is the system in the Federal Rules c Civil Procedure. I.e., Federal Rule of Civil Procedure 12(h)(1) is muc less susceptible to citation error as would be Texas Rule of Civi Procedure 167.1.b.

I hope this suggestion proves to have some merit for the State Bar, and I believe its implementation would assist those of use who use the Rules in our daily practice. Thank you for your attention to this matter.

Very truly yours,

WALSH, SQUIRES & TOMPKINS

By: _____
F. John Wagner, Jr.

FJW/ga
(LTR7)

cc: Mr. James H. Leeland
Walsh, Squires & Tompkins

Standing Subcommittee - Rules 523-591

TEXAS SUPREME COURT ADVISORY COMMITTEE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE -
TEXAS RULES OF CIVIL PROCEDURE.

I. Exact wording of existing Rule:

Rule 534. CITATION

When a claim or demand is lodged with a justice for suit, he shall issue forthwith citations for the defendant or defendants. The citation shall require the defendant to appear and answer plaintiff's suit at or before 10:00 a.m. on the Monday next after the expiration of ten days from the date of service thereof, and shall state the place of holding the court. It shall state the number of the suit, the names of all the parties to the suit, and the nature of plaintiff's demand, and shall be dated and signed by the justice of the peace. The citation shall further direct that if it is not served within 90 days after date of its issuance, it shall be returned unserved.

II. Proposed Rule: Mark through deletions to existing rule with dashes; underline proposed new wording.

Rule 534. CITATION

When a claim or demand is lodged with a justice for suit, he shall issue forthwith citations for the defendant or defendants. The citation shall require the defendant to appear and answer plaintiff's suit at or before 10:00 a.m. on the Monday next after the expiration of ten days from the date of service thereof, and shall state the place of holding the court. It shall state the number of the suit, the names of all the parties to the suit, and the nature of plaintiff's demand, and shall be dated and signed by the justice of the peace. The citation shall further direct that if it is not served within 90 days after date of its issuance, it shall be returned unserved.

Brief statement of reasons for requested changes and advantages to be served by proposed new Rule:

The proponent suggested this deletion would make Rule 534 consistent with Rule 101, T.R.C.P., in which the 90 day provision was deleted effective January 1, 1988.

Respectfully submitted,

ANTHONY J. SADBERRY
Sullivan, King & Sabom, P.C.
5005 Woodway, Suite 300
Houston, TX 77056

For the Subcommittee

Date: 9 May, 1989

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(512) 224-7073

February 12, 1988

Mr. Anthony J. Sadberry
Sullivan, King & Sabom
5005 Woodway
Suite 300
Houston, Texas 77056

RE: Proposed Change to Rule 534

Dear Tony:

I have enclosed a copy of a letter from Val D. Huvar, County Clerk of Victoria County, Texas regarding a proposed change to Rule 534. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther Soules III

LUTHER H. SOULES III

LHSIII/hjh
Enclosure

01126

COUNTY OF VICTORIA
TELEPHONE (512) 575-1478
VICTORIA COUNTY COURTS BLDG.
115 N. BRIDGE
VICTORIA, TEXAS

VAL D. HUVAR
COUNTY CLERK

MAILING
P. O. BOX 2410
VICTORIA, TEXAS 77902

February 9, 1988

Mr. Luther H. Soules III
800 Milam Building
San Antonio, Texas 78205

Dear Mr. Soules:

It was a pleasure to hear you speak on the Rules of Civil Procedures. You asked that I write and remind you of the statement I asked you about return dates on citations, the rule governing this County and District Courts the statement is "if not served in 90 days after issuance it shall be returned unserved" was repealled but was left in Rule 534 which pertains to Justice Court.

Yours truly,

Val D. Huvar, County Clerk
Victoria County, Texas

VH:nlb

01127

Rule 680. Temporary Restraining Order

No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by ~~it/tefms/within/such/time/after/signing//not/to/exceed/ten/days/as/the/court/fixes~~ [the Friday next after the expiration of two days, excluding the date of service], unless within the time so fixed by order, for good cause shown, be extended for a like period ~~or~~ unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. No more than one extension may be granted unless subsequent extensions are unopposed. In case a temporary restraining order is granted without notice, the application for a temporary injunction shall be set down for hearing at the earliest possible date and take precedence of all matters except older matters of the same character, and when the application comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a temporary injunction and, if he does

not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party a the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Every restraining order shall include an order setting a certain date for hearing on the temporary or permanent injunction sought.

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

November 12, 1987

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Reed & Butts
800 Milam Building
San Antonio, Tx 78205

Mr. Doak Bishop, Chairman
Administration of Justice Committee
Hughes & Luce
1000 Dallas Bldg.
Dallas, Tx 75201

Re: TEX. R. CIV. P. 680.

Dear Luke and Doak:

I am enclosing a letter from Judge John M. Marshall, of the Fourteenth Judicial District Court at Dallas, regarding the above rule.

Will you please place this matter on your Agenda for the next meeting so that it might be given consideration in due course.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Honorable John M. Marshall
Judge, Fourteenth Judicial District Court
Government Center
Dallas, Tx 75202

01130

FOURTEENTH JUDICIAL DISTRICT COURT
JOHN M. MARSHALL, JUDGE

TEXAS SESQUICENTENNIAL 1836-1986

November 9, 1987

Re: Suggested New Rule 680, T.R.C.P.

Dear Mr. Chief Justice:

Pursuant to the suggestion of Allen Landerman, Esq., an attorney of our city, I am writing to you to propose that Rule 680, Texas Rules of Civil Procedure, be modified to cause the writ, since it is effective only upon service, to be returnable on "the Friday next after the expiration of two days, excluding the date of service." Enclosed is the suggested change.

This would recognize the encreasing workload of the courts and constables that often results in the paperwork's not being processed for service until a day or so before the setting date on the face of the order. At the same time, no violence would be done to the defendants rights to notice and an opportunity to be heard.

Elimination of the ten day period for the initial TRO, though not the extension, in fact shortens the overall time for the temporary injunction and should help minimize damage to the reastrained party.

With my thanks for your attention, I have the honor to remain

Very truly yours,

John McClellan Marshall

Hon. John L. Hill
Chief Justice,
Supreme Court of Texas
Supreme Court Bldg.
P.O. Box 12248
Austin, TX 78711

Encl.

JMM/jn

Government Center Dallas, Texas 75202 749-8337

incorporated or joint stock company, have been delivered to any sheriff or constable as provided for in Rule 669.

(Amended by order of Aug. 18, 1947, eff. Dec. 31, 1947.)

Source: Art. 4101, unchanged.

Rule 679. Amendment

Clerical errors in the affidavit, bond, or writ of garnishment or the officer's return thereof, may upon application in writing to the judge or justice of the court in which the suit is filed, and after notice to the opponent, be amended in such manner and on such terms as the judge or justice shall authorize by an order entered in the minutes of the court (or noted on the docket of the justice of the peace), provided such amendment appears to the judge or justice to be in furtherance of justice.

Source: New rule.

SECTION 5. INJUNCTIONS

Rule 680. Temporary Restraining Order

No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after signing, not to exceed ten days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. No more than one extension may be granted unless subsequent extensions are unopposed. In case a temporary restraining order is granted without notice, the application for a temporary injunction shall be set down for hearing at the earliest possible date and takes precedence of all matters except older matters of the same character; and when the application comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a temporary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Every restraining order shall include an order setting a certain date for hearing on the temporary or permanent injunction sought.

(Amended by order of Dec. 5, 1983, eff. April 1, 1984.)

Source: Federal Rule 65(b), with minor textual change, superseding Art. 4654.

Change by amendment effective April 1, 1984: The rule is changed to avoid successive restraining orders and to require an order setting the date for hearing on the injunction.

Rule 681. Temporary Injunctions: Notice

No temporary injunction shall be issued without notice to the adverse party.

Source: Federal Rule 65(a), with minor textual change.

Rule 682. Sworn Petition

No writ of injunction shall be granted unless the applicant therefor shall present his petition to the judge verified by his affidavit and containing a plain and intelligible statement of the grounds for such relief.

(Amended by order of March 31, 1941, eff. Sept. 1, 1941.)

Source: Art. 4647, unchanged.

Rule 683. Form and Scope of Injunction or Restraining Order

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Every order granting a temporary injunction shall include an order setting the cause for trial on the merits with respect to the ultimate relief sought. The appeal of a temporary injunction shall constitute no cause for delay of the trial.

(Amended by order of Dec. 5, 1983, eff. April 1, 1984.)

Source: Federal Rule 65(d), unchanged.

Change by amendment effective April 1, 1984: The last paragraph is added.

Rule 684. Applicant's Bond

In the order granting any temporary restraining order or temporary injunction, the court shall fix

RULE 687. Requisites of Writ

The writ of injunction shall be sufficient if it contains substantially the following requisites:

(a) [no change]

(b) [no change]

(c) [no change]

(d) [no change]

(e) If it is a temporary restraining order, it shall state the day and time set for hearing, which shall not exceed fourteen ~~ten~~ days from the date of the court's order granting such temporary restraining order; but if it is a temporary injunction, issued after notice, it shall be made returnable at or before ten o'clock a.m. of the Monday next after the expiration of twenty days from the date of service thereof, as in the case of ordinary citations.

(e) [no change]

COAJ Recommends

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 687. Requisites of Writ

The writ of injunction shall be sufficient if it contains substantially the following requisited: No change

(a) No change

(b) No change

(c) No change

(d) No change

(e) If it is a temporary restraining order, it shall state the day day and time set for hearing, which shall not exceed fourteen ~~ten~~ days from the date of the court's order granting such temporary restraining order; but if it is a temporary injunction, issued after notice, it shall be made returnable at or before ten o'clock a.m. of the Monday next after the expiration of twenty days from the date of service thereof, as in the case of ordinary citations.

(f) No change

COMMENT: This change was made to bring Rule 687 into conformity with the 1988 change in Rule 680.

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

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WRITER'S DIRECT DIAL NUMBER:

TELEFAX

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(512) 224-7073

AUSTIN
(512) 327-4105

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CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

April 12, 1989

Mr. Steve McConnico
Scott, Douglass & Keeton
12th Floor, First City Bank Building
Austin, Texas 78701-2494

Re: Proposed Change to Texas Rule of Civil Procedure 687(e)

Dear Steve:

Enclosed herewith please find a copy of a letter forwarded to me by Justice William Kilgarlin regarding T.R.C.P. 687(e). Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan Hecht
Honorable Stanley Pemberton

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

April 25, 1988

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Reed
800 Milam Building
San Antonio, Texas 78205

Dear Luke:

1. Enclosed is a memo discussing problems with Tex. R. App. P. 49(a) and 49(b). The memo concludes that the supreme court may not have the authority to review a supersedeas bond for excessiveness.

2. Tex. R. Civ. P. 687(e) still says 10 days on TRO's. It needs to conform with new Tex. R. Civ. P. 680.

3. Enclosed are the new rules for the Dallas CA. Please look over them and advise me if they can be approved.

4. Tex. R. Civ. P. 201-5 states that "depositions of a party . . . may be taken in the county of suit subject to the provisions of paragraph 4 of Rule 166b." I can't for the life of me see how Tex. R. Civ. P. 166b-4 is involved.

Sincerely,

William W. Kilgarlin

WWK:sm

Encl.

should be "5"

Rule 686. Citation

Upon the filing of such petition and order not pertaining to a suit pending in the court, the clerk of such court shall issue a citation to the defendant as in other civil cases, which shall be served and returned in like manner as ordinary citations issued from said court; provided, however, that when a temporary restraining order is issued and is accompanied with a true copy of plaintiff's petition, it shall not be necessary for the citation in the original suit to be accompanied with a copy of plaintiff's petition, nor contain a statement of the nature of plaintiff's demand, but it shall be sufficient for said citation to refer to plaintiff's claim as set forth in a true copy of plaintiff's petition which accompanies the temporary restraining order; and provided further that the court may have a hearing upon an application for a temporary restraining order or temporary injunction at such time and upon such reasonable notice given in such manner as the court may direct.

(Amended by orders of June 16, 1943, eff. Dec. 31, 1943; Aug. 18, 1947, eff. Dec. 31, 1947.)

Source: Art. 4655.

Rule 687. Requisites of Writ

The writ of injunction shall be sufficient if it contains substantially the following requisites:

(a) Its style shall be, "The State of Texas."

(b) It shall be directed to the person or persons enjoined.

(c) It must state the names of the parties to the proceedings, plaintiff and defendant, and the nature of the plaintiff's application, with the action of the judge thereon.

(d) It must command the person or persons to whom it is directed to desist and refrain from the commission or continuance of the act enjoined, or to obey and execute such order as the judge has seen proper to make.

(e) If it is a temporary restraining order, it shall state the day and time set for hearing, which shall not exceed ~~ten~~ days from the date of the court's order granting such temporary restraining order; but if it is a temporary injunction, issued after notice, it shall be made returnable at or before ten o'clock a.m. of the Monday next after the expiration of twenty days from the date of service thereof, as in the case of ordinary citations.

(f) It shall be dated and signed by the clerk officially and attested with the seal of his office and the date of its issuance must be indorsed thereon.

Source: Art. 4651.

Rule 688. Clerk To Issue Writ

When the petition, order of the judge and bond have been filed, the clerk shall issue the temporary restraining order or temporary injunction, as the case may be, in conformity with the terms of the order, and deliver the same to the sheriff or any constable of the county of the residence of the person enjoined, or to the applicant, as the latter shall direct. If several persons are enjoined, residing in different counties, the clerk shall issue such additional copies of the writ as shall be requested by the applicant.

Source: Art. 4652, with minor textual change.

Rule 689. Service and Return

The officer receiving a writ of injunction shall indorse thereon the date of its receipt by him, and shall forthwith execute the same by delivering to the party enjoined a true copy thereof. The original shall be returned to the court from which it issued on or before the return day named therein with the action of the officer indorsed thereon or annexed thereto showing how and when he executed the same.

Source: Art. 4653, unchanged.

Rule 690. The Answer

The defendant to an injunction proceeding may answer as in other civil actions; but no injunction shall be dissolved before final hearing because of the denial of the material allegations of the plaintiff's petition, unless the answer denying the same is verified by the oath of the defendant.

Source: Art. 4657, unchanged.

Rule 691. Bond on Dissolution

Upon the dissolution of an injunction restraining the collection of money, by an interlocutory order of the court or judge, made in term time or vacation, if the petition be continued over for trial, the court or judge shall require of the defendant in such injunction proceedings a bond, with two or more good and sufficient sureties, to be approved by the clerk of the court, payable to the complainant in double the amount of the sum enjoined, and conditioned to refund to the complainant the amount of money, interest and costs which may be collected of him in the suit or proceeding enjoined if such injunction is made perpetual on final hearing. If such injunction is so perpetuated, the court, on motion of the complainant, may enter judgment against the principal and sureties in such bond for such amount as may be shown to have been collected from such defendant.

Source: Art. 4659, unchanged.

Rule 771. Objections to Report

[Any] party to the suit may file [a written] objections to [the] report [at any time within 30 days of the date the report is filed and not thereafter. In the event that no written objection is filed by any party, then the Court shall enter a final decree partitioning said land in accordance with the report.] [In the event that a written objection is filed by any party to the suit, then] a trial of the issues thereon shall be had as in other cases. If [on trial of the issues] the report [is] found to be erroneous in any material respect, or unequal and unjust, the same shall be rejected, and other commissioners shall be appointed by the Court [or the Court may correct on its own motion any material error in the report. If other Commissioners are appointed], and the same proceedings [shall be] had as in the first instance.

COPY TO LTTS 11/24/87 TCT

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

November 23, 1987

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Reed & Butts
800 Milam Building
San Antonio, Tx 78205

Mr. Doak Bishop, Chairman
Administration of Justice Committee
Hughes & Luce
1000 Dallas Bldg.
Dallas, Tx 75201

Re: TEX. R. CIV. P. 771

Dear Luke and Doak:

I am enclosing a letter from Mr. Emerson Stone of Jacksonville, regarding the above rule.

Will you please place this matter on your Agenda for the next meeting so that it might be given consideration in due course.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. Emerson Stone
Stone And Stone
P. O. Box 60
Jacksonville, Tx 75766-4906

01139

LAW OFFICES OF
STONE AND STONE
A PROFESSIONAL CORPORATION
P.O. BOX 60
JACKSONVILLE, TEXAS
75766-4906

W. E. STONE (1894-1978)
EMERSON STONE
RICHARD L. STONE

306 EAST COMMERCE
PHONE (214) 586-2591

November 19, 1987

Supreme Court of the State of Texas
Supreme Court Building
P. O. Box 12248
Austin, Texas 78711

Re: Proposed Rule Change

Gentlemen:

It is submitted that Rule 771 of the Texas Rules of Civil Procedure that deals with objections to the Report of Special Commissioners needs to be revised so that the Judges of the courts and the litigants can know when to act. As the rule now reads, there is no time limit within which a party must act to file his objections. The Court does not know when the report is final so that a judgment can be entered that effectively partitions the land.

Suggested language:

Rule 771. Objections to Report

Any party to the suit may file a written objection to the report at any time within 30 days of the date the report is filed and not thereafter. In the event that no written objection is filed by any party, then the Court shall enter a final decree partitioning said land in accordance with the report. In the event that a written objection is filed by any party to the suit, then a trial of the issues thereon shall be had as in other cases. If on the trial of the issues the report is found to be erroneous in any material respect, or unequal and unjust, the same shall be rejected and other Commissioners shall be appointed by the Court or the Court may correct on its own motion any material error in the report. If other Commissioners are appointed, then the same proceedings shall be had as in the first instance.

01140

There is no pride of authorship involved in this suggestion, and any improvement in clarity would be welcomed.

Respectfully submitted,

Emerson Stone

ES:sd

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A PROFESSIONAL CORPORATION

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SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

May 8, 1989

Professor Elaine Carlson
South Texas College of Law
1303 San Jacinto, Suite 224
Houston, Texas 77002

Re: Tex. R. Civ. P. 781

Dear Elaine:

Enclosed herewith please find a redlined version of Rule 781. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan Hecht
Honorable Stanton Pemberton

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

Rule 781. Proceedings as in Civil Cases

Every person or corporation who shall be cited as hereinbefore provided shall be entitled to all the rights in the trial and investigation of the matters alleged against him, as in cases of trial in civil cases in this State. Either party may prosecute an appeal or writ of error from any judgment rendered, as in other civil cases, subject, however, to the provisions of Rule ~~384~~ [42, Texas Rules of Appellate Procedure], and the appellate court shall give preference to such case, and hear and determine the same as early as practicable.

Holly –

Reference in TRCP 781 to TRCP384 needs to be changed to TRAP42.

Thanks,

Jake

STATE BAR OF TEXAS

4/25

HJH,
Make a separate SCAC ~~notice~~ Tab for "COAJ Action 87/88 and 88/89" and put in back of Agenda book pls.
thx

April 24, 1989

Mr. Luther H. Soules, III
Tenth Floor, Republic of Texas Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Dear Luke:

On April 21 I received from Judge Pemberton a copy of your letter enclosing a summary of actions taken by the Committee on Administration of Justice during 1987-1988 and requesting copies of the various rules referred to in the summary. Enclosed is a copy of the summary to which I have attached the related rules changes which were adopted by COAJ as well as the explanatory comments on proposed rules changes which were not adopted.

I will prepare a summary of actions of the committee for the 1988-1989 year just after the May 13 meeting so that you will have the information prior to the May 26-27 meeting of the Advisory Committee.

Sincerely yours,

Evelyn

Evelyn A. Avent

Enclosures

Copies with enclosures to:
Judge Stanton B. Pemberton
Professor J. Patrick Hazel

01145

ACTIONS TAKEN BY THE

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

1. Committee voted to recommend amendments to the following Rules: (The finally adopted version of each Rule with appropriate comments is attached)

Rule 107	Return of Citation
Rule 166b	Forms and Scope of Discovery; Protective Orders; Supplementation of Responses
Rule 167	Discovery and Production of Documents and Things for Inspection, Copying or Photographing
Rule 168	Interrogatories to Parties
Rule 169	Requests for Admission
Rule 208	Depositions Upon Written Questions
Rule 245	Assignment of Cases for Trial
Rule 269	Argument
TRAP Rule 15a	Grounds for disqualification and Recusal of Appellate Judges
TRAP Rule 121	Mandamus, Prohibition and Injunction in Civil Cases
TRAP Rule 182	Judgment on Affirmance or Rendition
Rule 687	Requisites of Writ

2. Committee voted to recommend that no change be made in the following Rules: (Comments are attached)

Rule 38(c)	Third Party Practice
Rule 51(b)	Joinder of Claims and Remedies
Rule 62	Amendment Defined
Rule 63	Amendments
Rule 103	Who May Serve
Rule 206	Certification by Officer; Exhibits; Copies; Notice of Delivery
Rule 239a	Notice of Default Judgment
Rule 279	Submission of Issues
Rule 680	Temporary Restraining Orders
Rule 771	Objections to Report
Unpublished Opinions	

01146

3. Committee voted to recommend elimination of the following Rule: (Comment attached)

Rule 260	In Case of New Counties

4. The following Rules were deferred until the 1988-89 year as a more complete study of the Notice Rules is being undertaken by Judge Don Dean:

Rule 21a	Notice
Rule 72	Filing Pleadings; Copy Delivered to all Parties or Attorneys
Rule 120a	Special Appearance

5. Local Rules - Following discussion of the model local rules, the Committee ADOPTED a MOTION by Judge Curtiss Brown that the draft presented by Professor Bill Dorsaneo constituted the approach the Committee wished to take with regard to the local rules.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 107. RETURN OF ~~CITATION~~ SERVICE

The return of the officer or authorized person ... if he can ascertain. NO CHANGE.

Where citation is executed by an alternative ... by the court. NO CHANGE.

No default judgment shall be granted in any cause until the citation, or process under Rule 108 or 108a, with proof of service as provided by this rule or by Rule 108 or 108a, or as ordered by the court in the event citation is executed under Rule 106, shall have been on file with the clerk of the court ten days, exclusive of the day of filing and the day of judgment.

COMMENT: The above amendment to Rule 107 is designed to clearly provide that a default judgment can be obtained where the defendant has been served with process in a foreign country pursuant to the provisions of Rule 108a.

PROPOSED RULE CHANGE
Adopted by the
COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 166b. Forms and Scope of Discovery; Protective Orders; Supplementation of Responses

1. Forms of Discovery. No change

2. Scope of Discovery. Except as provided in paragraph 3 of this rule, unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follow: No change

   a. In General. No change

   b. Documents and Tangible Things. No change

   c. Land. No change

   d. Potential Parties and Witnesses. No change

   e. Experts and Reports of Experts. Discovery of the facts known, mental impressions and opinions of experts, otherwise discoverable because the information is relevant to the subject matter in the pending action but which was acquired or developed in anticipation of litigation and the discovery of the identity of experts from whom the information may be learned may be obtained only as follows: No change

   (1) In General. A party may obtain discovery of the identity and location (name, address and telephone number) of an expert who may be called as a witness, the subject matter on which the witness is expected to testify, the mental impressions and opinions held by the expert and the facts known to the expert (regardless of when the factual information was acquired) which relate to or form the basis of the mental impressions and opinions held by the expert. The disclosure of the same information concerning an expert used for consultation and who is not expected to be called as a witness at trial is required if the expert's work product forms a basis either in whole or in part of the opinions of an expert who is to be called a witness <u>or if the consulting expert's opinions or impressions have been reviewed by a testifying expert</u>.

   (2) Reports. A party may also obtain discovery of documents and tangible things including all tangible reports, physical models,

compilation of data and other material prepared by an expert or for an expert in anticipation of the expert's trial and deposition testimony. The disclosure of material prepared by an expert used for consultation is required even if it was prepared in anticipation of litigation or for trial when ~~it forms a basis either in whole or in part of the opinions of an expert who is to be called as a witness~~ the expert's work product forms a basis either in whole or in part of the opinions of an expert who is to be called a witness or if the consulting expert's opinions or impressions have been reviewed by a testifying expert.

(3) Determination of Status. No change

(4) Reduction of Report to Tangible Form. No change

f. Indemnity, Insuring and Settlement Agreements. No change

g. Statements. No change

h. Medical Records: Medical Authorization. No change

3. Exemptions: The following matters are protected from disclosure by privilege:

a. Work Product. No change

b. Experts. The identity, mental impressions and opinions of an expert who has been informally consulted or of an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial or any documents or tengible things containing such information if the expert will not be called as a witness, except that the identity, mental impressions and opinions of an expert who will not be called to testify and any documents or tangible things containing such impressions and opinions are discoverable if the expert's work product forms a basis either in whole or in part of the opinions of an expert who will be called as a witness or if the consulting expert's opinions or impressions have been reviewed by a testifying expert.

c. Witness Statements. No change

d. Party Communications. ~~With the exception of discoverable communications prepared by or for experts, and other discoverable communications,~~ Communications between agents or representatives or the employees of a party to the action or communications between a party and that party's agents, representatives or employees, when made subsequent to the occurrence or transaction upon which the suit is based, and in anticipation of the prosecution or defense of the

claims made a part of the pending litigation. This exemption does not include communications prepared by or for experts that are otherwise discoverable. For the purpose of this paragraph, a photograph is not a communication.

e. Other Privileged Information. No change

4. Presentation of Objections. No change

5. Protective Orders. No change

6. Duty to Supplement. No change

COMMENT: To eliminate the contradiction between Rule 166b 2.e(1) and (2) and corresponding Rule 166b 3.b, the three areas have been modified to make discoverable the impressions and opinions of a consulting expert if a testifying expert had reviewed these opinions and material, regardless of whether or not the opinions and material formed a basis for the opinion of a testifying expert.

With regard to Rule 166b 3.d, there has been some confusion over the meaning of the phrase "and other discoverable communications" as published by West Publishing Company in its current Texas Rules of Civil Procedure handbook. To eliminate this confusion, the rule was been redrafted and deletes the confusing phrase. As modified, the intent of the rule with regard to communications between employees of a party is now clear. To further improve upon the language of the rule, it is suggested that the provision with regard to experts be separately stated at the end of the Rule.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 167. Discovery and Production of Documents and Things for Inspection, Copying or Photographing.

1. Procedure. No change
2. Time. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the citation and petition upon that party. The request shall be then served upon every party to the action. The party upon whom the request is served shall serve a written response and objections, if any, within 30 days after the service of the request, except that if the request accompanies citation, a defendant may serve a written response and objections, if any, within 50 days after service of the citation and petition upon that defendant. Objections served after the date on which a response is to be served are waived unless an extension of time has been obtained by agreement or order of the court or good cause is shown for the failure to object within such period. The time for making a response may be shortened or lengthened by the court upon a showing of good cause.
3. Custody of Originals by Parties. No change
4. Order. No change
5. Nonparties. No change

COMMENT: The purpose of the modification of Rule 167(2) is to provide for a waiver of objections provision so that Rule 167 and Rule 168 conform. Absent such a revision, it is unclear whether objections are waived under Rule 167, if not served on or before the date a response is to be served. The modification, as suggested, will not permit objections to be served after the date on which a response is to be served without agreement, order of the court or good cause. The amendment follows the similar provision of Rule 168.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 168. Interrogatories to Parties

Any party may serve upon any other party written interrogatories to be answered by the party served, or, if the party served is a public or private corporation or a partnership or association, or governmental agency, by an officer or agent who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after the service of the citation and petition upon the party. No change

1. Service. When a party is represented by an attorney, service of interrogatories and answers to interrogatories shall be made on the attorney unless service upon the party himself is ordered by the court. No change

A party serving interrogatories or answers under this rule shall not file such interrogatories or answers with the clerk of the court unless the court upon motion, and for good cause, permits the same to be filed.

2. Scope. No change
3. Procedure. No change
4. Time to Answer. No change
5. Number of Interrogatories. No change
6. Objections. No change

COMMENT: Prior to the 1988 amendments to the Texas Rules of Civil Procedure, Rule 168 provided for the filing of interrogatories or answers with the clerk of the court. The 1988 amendment deleted that part of Rule 168 and accordingly, no longer imposed a filing requirement. The suggested modication will therefore not change the existing rule but merely clarify the intent of the amendment and expressly prohibit the filing of interrogatories or answers with the clerk of the court without court order. Also, the suggested modification of Rule 168 will conform this rule to the similar provision contained in Rule 167 with regard to the filing of interrogatories or answers with the clerk of the court.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 169. Requests for Admission

1. Request for Admission. At anytime after the defendant has made appearance in the cause, or time therefor has elapsed, a party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 166b set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of the documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Whenever a party is represented by an attorney of record, service of a request for admissions shall be made on his attorney unless service on the party himself is ordered by the court. A true copy of a request for admission or of a written answer or objection, together with proof of the service thereof as provided in Rule 21a, shall be filed promptly in the clerk's office by the party making it. No change

Each matter of which an admission is requested shall be separately set forth. The matter is admitted without necessity of a court order unless, within thirty (30) days after service of the request, or within such time as the court may allow, or as otherwise agreed to by the parties, the party to whom the request is directed serves upon the party requesting the admission, a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of forty-five (45) days after service of the citation and petition upon him. No request shall be deemed admitted unless the request contains a notice that the matters included in the request will be deemed admitted if the recipient fails to answer or object within

the time allowed by this rule and stated in the request. If objection is made, the reason therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons that the ansering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An ansering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or easily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission is requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of paragraph 3 of Rule 215, deny the matter or set forth reasons why he cannot admit or deny it.

2. Effect of Admission. No change

COMMENT: The change in Rule 169 is designed to provide notice to recipients of requests for admissions that failure to respond within the allowable time will result in the requests being deemed admitted without the necessity of a court order. This will prevent the potential for abuse of Rule 169 in actions involving pro se parties. The rule is also amended to provide for an agreement of the parties for additional time for the recipient of the requests to file answers or objections. This change will allow the parties to agree to additional time within which to answer without the necessity of obtaining a court order.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 208. Depositions Upon Written Questions

1. Serving Questions; Notice. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. Leave of court, granted with or without notice, must be obtained only if a party seeks to take a deposition prior to the appearance day of any defendant. The attendance of witnesses and the production of designated items may be compelled as provided in Rule 201.

A party proposing to take a deposition upon written questions shall serve them upon every other party or his attorney with a written notice ten days before the deposition is to be taken. The notice shall state the name and if known, the address of the deponent, the suit in which the deposition is to be used, the name or descriptive title and address of the officer before whom the deposition is to be taken, and if the production of documents or tangible things in accordance with Rule 201 is desired, a designation of the items to be produced by the deponent either by individual item or by category and which describes each item and category with reasonable particularity.

A party may in his notice name as the witness a poublic or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors or managing agents, or other persons to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The person so designated shall testify as to matters known or reasonably available to the organization. This paragraph does not preclude taking a deposition by any other procedure authorized in these tules.

2. Notice by Publication. No change

3. Cross-Questions, Redirect Questions, Recross Questions and Formal Objections. No change

4. Deposition Officer; Interpreter. No change

5. Officer to take Responses and Prepare Record. No change

COMMENT: Rule 208 is silent as to whether a deposition on written questions of a defendant could be taken prior to the appearance date. Rule 200 permits depositions upon oral examination of defendants prior to appearance date with permission of the court. As modified, Rule 208 will conform to Rule 200 and permit the deposition on written questions of dedendant prior to appearance date with permission of the court.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 245. ASSIGNMENT OF CASES FOR TRIAL

Unless otherwise provided, the court may set contested cases on motion of any party, or on the court's own motion, with reasonable notice of not less than forty-five ~~ten~~ days to the parties, or by agreement of the parties. Provided, however, that when a case previously has been set for trial, the court may reset said contested case to a later date on any reasonable notice to the parties or by agreement of the parties. No ncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 269. Argument

(a) No changge

(b) No change

(c) No change

(d) No change

(e) No change

(f) No change

(g) The court will not be required to wait for objections to be made when the rules as to arguments are violated; but ~~by~~ should they not be noticed and corrected by the court, opposing counsel may ask leave of the court to rise and present his point of objection. But the court shall protect counsel from any unnecessary interruption made on frivolous and unimportant ground.

(h) No change

COMMENT: This change was made simply to correct a typographical error.

Rule 15a. Grounds For Disqualification and Recusal of Appellate Judges

(1) (No Change)

(2) Recusal

Appellate judges should recuse themselves in proceedings in which their impartiality might reasonably be questioned, including but not limited to, instances in which they have a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. In the event the court is evenly divided the motion to recuse shall be denied.

COMMENT: The present rule does not contain a provision dealing with an en banc evenly divided court on a motion to recuse. The proposed amendment will deal with that situation without the necessity of bringing in a visiting judge to break the tie. The bringing in of another judge would cause unnecessary difficulties and delays and potential embarrassment.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Texas Rules of Appellate Procedure

Rule 121. Mandamus, Prohibition and Injunction in Civil Cases.

(a) Commencement. An original proceeding for a writ of mandamus, prohibition or injunction in an appellate court shall be commenced by delivering to the clerk of the court the following:

(1) No change

(2) Petition. The petition shall include this information and be in this form:

(A) No change

(B) If any judge, court, tribunal or other person or intity ~~respondent~~ in the discharge of duties of a public character is required by law to be made a party, ~~named as respondent,~~ the petition shall disclose the names of the parties to the cause below and the real parties ~~party~~ in interest, if any, ~~or the party~~ whose interests would be directed affected by the proceeding. In such event, the caption of the petition shall, in lieu of the name of the judge, court, tribunal or other person or entity acting in the discharge of duties of a public character, name as relator or respondent the parties to the cause below who would be affected by the proceeding, according to their respective alignment in the matter. The body of the motion or petition shall state the name and address of each relator and respondent, including any judge, court, tribunal or other person or entity acting in the discharge of duties of a public character and each party to the cause below who would be affected by the proceeding, and real party in interest whose interest would be directly affected by the proceeding. A real party in interest is a person or entity other than a party to the cause below, but does not include any judge, court, tribunal or other person or entity in the discharge of the duties of a public character.

COMMENT: The proposed amendment eliminates a misleading impression created by the existing rule. Under the current version of subdivision (a)(2)(B) the judge or the court involved is named as respondent. This creates the erroneous impression in the minds of the public that the judge or court is being sued in the traditional sense. An even more serious problem arises where a trial judge files a petition for mandamus against a court of appeals in the Supreme Court to seek "review" of the respondent's previously rendered order granting a litigant's petition for mandamus filed in the respondent court. As Judge Michael Schattman so aptly stated: "This allows a credulous press and public to write and believe that the judges are suing each other. It is bad form and bad public relations."

The proposed amendment requires the caption to name as petitioner the parties to the cause below adversely affected by the court's action complained of, instead of the actual petitioning judge, if any, and the name of the respondent to be that of the parties to the cause below favored by such action, instead of the actual respondent judge or court. In situations where there is no party to the cause below aligned with the actual petitioner or respondent who is a public official or entity, such as where no law suit is pending and the petition is directed to an executive officer or some agency official, that officer or official would be the named respondent in the caption as well as disclosed in the body of the petition as the actual respondent.

An example of a real party in interest as defined in the proposed amendment is a child who is the subject of a motion to modify child support and the managing conservator has filed a petition for mandamus to compel the trial judge to transfer the cause to the county of the child's residence. The child's name and address must be disclosed in the petition. The managing conservator is the actual petitioner and the petitioner named in the caption. The trial judge is the actual respondent, but the possessory conservator is named as respondent in the caption because he is the party to the cause below who was favored by the trial court's action, i.e., the denial of the motion to transfer.

Rule 182. Judgment on Affirmance or Rendition

(a) (No change)

(b) Damages for Delay.

Whenever the Supreme Court shall determine that application for writ of error has been taken for delay and without sufficient cause, then the court may [~~,—as—part—of—its judgment,~~] award each prevailing respondent an amount not to exceed ten percent of the amount of damages awarded to such respondent as damages against such petitioner. If there is no amount awarded to the prevailing respondent as money damages, then the court may award [~~,—as—part—of—its—judgment,~~] each prevailing respondent an amount not to exceed ten times the total taxable costs as damages against such petitioner.

A request for damages pursuant to this rule, or an imposition of such damages without request, shall not authorize the court to consider allegations of error that have not been otherwise properly preserved or presented for review.

COMMENT: Justice Kilgarlin raised the question on whether or not the Supreme Court under this rule was required to grant a writ and enter a judgment before being able to assess the sanction authorized by the rule. By deleting the language noted from the rule, the court will have authority to assess sanctions without granting a writ and entering a judgment in the case.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 687. Requisites of Writ

The writ of injunction shall be sufficient if it contains substantially the following requisited: No change

(a) No change

(b) No change

(c) No change

(d) No change

(e) If it is a temporary restraining order, it shall state the day day and time set for hearing, which shall not exceed <u>fourteen</u> ~~ten~~ days from the date of the court's order granting such temporary restraining order; but if it is a temporary injunction, issued after notice, it shall be made returnable at or before ten o'clock a.m. of the Monday next after the expiration of twenty days from the date of service thereof, as in the case of ordinary citations.

(f) No change

COMMENT: This change was made to bring Rule 687 into conformity with the 1988 change in Rule 680.

PROPOSED RULES CHANGES

Considered by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

The Committee voted to recommend to the Supreme Court Advisory Committee that NO CHANGE be made in the following Rules:

Rule 38(c) and Rule 51(b) - The subcommittee felt that if the language regarding direct actions is eliminated from the Rules, it might give the impression that a cause of action of that nature now exists. Since the Supreme Court Advisory Committee is considering "Direct Actions", the subcommittee recommended that no change be made by COAJ at this time.

Rule 62 and Rule 63 - These Rules deal with amendments to pleadings and a question was raised as to whether the filing of a counterclaim is considered to be an amended pleading. Prof. Dorsaneo said a counterclaim is not considered to be separate from the answer and is a pleading. A straw vote by held and the Committee voted to make no change in the Rules.

Rule 103 - Royce Coleman, an attorney from Denton, had requested a change in this Rule, which deals with the officer who may serve, which would allow the present procedure set out in the Rule or for service by any private individual. The Rule was amended January 1, 1988 to permit service by mail by an officer of the county in which the case is pending or the party is found and also service by the clerk of the court. It was the Committee's consensus that the 1988 amendment took care of the problem.

Rule 206 - George Pletcher of Houston expressed his concern about Rule 206 with reference to the original of a deposition being delivered to the attorney or party who asked the first question and thereafter, "upon reasonable request, make the original deposition transcript available for inspection or photocopying by any other party to the suit." The subcommittee felt the Rule should be left as it is insofar as the oblication of the custodial attorney to permit any party to review the deposition. If copying is to be done, it must be done by the reporter who made the transcript. Committee voted no change.

Rule 239a - Attorney Ralph Kinsey of Lamesa had suggested that it would be helpful if the clerk in compliance with Rule 239a would send a copy of the notice to the plaintiff or attorney and file a copy of the notice in the file of the case. The subcommittee agreed unanimously that there was no immediate reason to change Rule 239a at this time.

Rule 279 - New language added to the Rule on January 1, 1988 stated that a claim that the evidence was legally or factually insufficient to warrant the submission of any questions made be made for the first time after verdict, regardless of whether the submission of such question was requested by the complainant. Several people had objected to the new language because "factual insufficiency" is never a valid complaint to the submission of any issue but only to the answer. An amendment was offered that the last sentence of the Rule be amended to read: A claim

that a question should not have been submitted because either the evidence was legally insufficient to warrant its submission or the answer was conclusively established by the evidence as a matter of law may be made for the first time after verdict, regardless of whether the submission of such question was requested by the complainant." A MOTION to TABLE the proposed amendment was ADOPTED by a vote of 8 to 4.

Rule 680 - Judge John Marshall of Dallas had requested that this Rule be modified to cause the writ, since it is effective only upon service, to be returnable on the Friday next after the expiration of two days, excluding the date of service. Mr. Baggett, chairman of the subcommittee, talked with Judge Marshall about the Rule and recommended that no change be made.

Rule 771 - Emerson Stone of Jacksonville stated that this Rule does not provide a time limit within which a party must act to file his objections. The subcommittee considered the request but voted to make no change in the Rule.

Unpublished Opinions - Some members of the Court felt that the Supreme Court should promulgate a rule authorizing the current practice of ordering an unpublished court of appeals' opinion to be published in appropriate circumstances and had asked COAJ to look at the matter. Judge Brown stated that he felt the Court of Appeals needed to control these matters as opposed to the Supreme Court. If the Supreme Court wants to have an opinion published it has the power to enter an order. The Committee voted to make no change at this time.

PROPOSAL

Considered by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

The Committee voted to recommend to the Supreme Court Advisory Committee elimination of Rule 260 from the Texas Rules of Civil Procedure:

Rule 260. In Case of New Counties - Judge Charles Bleil of Texarkana pointed out the Rule appeared to be obsolete. He said in looking through annotations, he found that only one case had been cited on this Rule and this was in 1891 and that case held that the Rule did not apply. The subcommittee recommended that the Rule be eliminated and the recommendation was ADOPTED.