A G E N D A

ADVISORY COMMITTEE
FOR
THE SUPREME COURT OF TEXAS

NOVEMBER 12-13, 1982 -- 9:30 A.M.

TEXAS BAR CENTER
AUSTIN, TEXAS

ADVISORY COMMITTEE
FOR
THE SUPREME COURT OF TEXAS

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TEXAS BAR CENTER
AUSTIN, TEXAS

Presiding	George W. McCleskey, Chairman
Comments	Joe R. Greenhill, Chief Justice

Introduction of New Committee Members:

1. Mr. David J. Beck, Houston
2. Professor Newell Blakely, Houston
3. Professor William V. Dorsaneo, III, Dallas
4. Professor J. Hadley Edgar, Lubbock
5. Mr. Franklin Jones, Marshall
6. Mr. Steve McConnico, Austin
7. Mr. Russell McMains, Corpus Christi
8. Mr. Harold W. Nix, Daingerfield

A G E N D A

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Discovery and Deposition -- GROUP I

Appellate and Related Rules -- GROUP II

Trial Court Rules -- GROUP III

Corrective Rules -- GROUP IV

SUPPLEMENTAL NUMERICAL INDEX
Advisory Committee - November 12-13, 1982

Supplemental Numerical Index
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Supplemental Numerical Index
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Supplemental Numerical Index
(Continued)

Art. 1731a. Rules of practice; power of Supreme Court in civil judicial proceedings

Section 1. In order to confer upon and relinquish to the Supreme Court of the State of Texas full rule-making power in civil judicial proceedings, all laws and parts of laws governing the practice and procedure in civil actions are hereby repealed, such repeal to be effective on and after September 1, 1941. Provided, however, that no substantive law or part thereof is hereby repealed.

Supreme Court to make rules for practice and procedure

Sec. 2. The Supreme Court is hereby invested with the full rule-making power in the practice and procedure in civil actions. Such rules shall not abridge, enlarge or modify the substantive rights of any litigant. Such rules, after promulgation by the Supreme Court, shall be filed with the Secretary of State and a copy thereof mailed to each elected member of the Legislature on or before December 1st immediately preceding the next Regular Session of the Legislature and shall be reported by the Secretary of State to the Legislature, and, unless disapproved by the Legislature, such rules shall become effective upon September 1, 1941; provided, however, the Supreme Court may, from time to time after September 1, 1941, promulgate any specific rule or rules or any amendment or amendments to any specific rule or rules and make the same effective, except as hereinafter provided, at such time as the Supreme Court may deem expedient in the interest of a proper administration of justice, the same to remain in effect unless and until disapproved by the Legislature. Any such specific rule or rules, or any such amendment or amendments to any specific rule or rules, shall be filed by the Clerk of the Supreme Court with the Secretary of State, and a copy thereof mailed by the said Clerk to each registered member of the State Bar of Texas, at least sixty (60) days before the effective date thereof, and reported by the Secretary of State to the next succeeding Regular Session of the Legislature in the same manner as hereinabove provided.

Supreme Court to file list of laws repealed by its rules

Sec. 3. At the time it files the rules, the Supreme Court shall file with the Secretary of State a list of all articles or sections of the General Laws of the State of Texas, and parts of articles and sections of such General Laws, which, in its judgment, are repealed by Section 1 of this Act. Such list giving the construction of the Supreme Court as to the General Laws and parts of laws repealed by Section 1 shall constitute, and have the same weight and effect, as any other decision of the Supreme Court.

Rules to be published with Supreme Court reports

Sec. 4. Such rules shall be published in the official reports of the Supreme Court; and the Supreme Court is authorized to adopt such method as it may deem expedient for the printing and distributing of such rules.

Severability of this Act

Sec. 5. If any sentence, paragraph or section of this Act shall be held invalid or unconstitutional, such holding shall not invalidate any other sentence, paragraph or section hereof, and the Legislature hereby expressly declares that it would have passed such remaining sentences, paragraphs, and sections despite such invalidity. Acts 1939, 46th Leg., p. 201.

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July 20, 1982

TO: MEMBERS OF THE TEXAS SUPREME COURT ADVISORY COMMITTEE

FROM: GEO. W. McCLESKEY, Chairman

A date has been set for the next meeting of the Supreme Court Advisory Committee and we want you to know as early as possible the date of this meeting.

THE MEETING IS CALLED FOR NOVEMBER 12 and NOVEMBER 13, 1982, BEGINNING AT 9:30 a.m. ON THE 12TH AND WILL BE HELD IN THE COURTROOM OF THE SUPREME COURT IN AUSTIN, TEXAS.

Please mark your calendars now and make plans to attend. An Agenda will be furnished as soon as it is ready.

MEMORANDUM

FROM: Jack Pope, Rules Member
Supreme Court of Texas

TO: Supreme Court Advisory Committee

DATE: November 12, 1982

Rule making is a process; it is never finished.

This large agenda is the product of many persons and several study committees. You will find in this agenda some new concepts and new rules, but most of the rules that are submitted to you are corrections, improvements, revisions and the repeal of old rules. Some rules have been collected into a single rule. Many rules have been rewritten in an effort to remove inconsistencies, clarify the language, codify existing practice, or to simplify the practice.

The Supreme Court could not perform this important work without the study and drafting by the Committee on Administration of Justice, the Supreme Court Advisory Committe, and many other people who are concerned about simplifying the law. We cannot name everybody who has helped in this endeavor, but we especially acknowledge the service by the members of the Committee on Administration of Justice. That committee has completed its study and revision of all of the Discovery and Deposition rules after three years of hard research and work. Luther H. Soules, III has served as Chairman of the Committee during the last year. As Chairman, he pressed to get the heavy docket to a conclusion. He has generously devoted his time to regular meetings, extra meetings, and has personally drafted many of the rules in this agenda. Professor William Dorsaneo, III served as reporter for the Discovery and Deposition rules, and he put those rules with the comments in final form. Every member of the committee has worked diligently.

The appellate rules were substantially rewritten in 1980. We asked Justice Clarence Guittard to restudy all of the rules which became effective in 1981 and to review the other appellate rules so we could complete the review of the entire body of appellate rules. Most of the revision suggestions by Justice Guittard are corrective, but there are some policy considerations which you will confront as you study this agenda. Justice Guittard has done his usual thorough study and makes yet another contribution to the fair administration of justice.

There will be a third wide-ranging group of rules that are grouped separately, because they may require special consideration.

A fourth group includes rules that need relatively minor corrections. Judge Tom Phillips, Judge of the 280th District Court, at my request, examined all of the rules to search out obsolescence, inconsistencies, and needed revisions.

This group of revisions and recommended repeals of rules may not reach the Advisory Committee by reason of time limitations. We still urge you to read them. We need your insights and suggested revisions about style of the text.

Significant changes and simplification of the rules have been achieved in recent years. The rules are divided into eight parts as appears from your Desk Copy. Parts III through VIII have been generally reviewed, revised and rewritten. The important parts of Part I (General Rules), consisting of only 14 rules have had frequent revisions, but they still need to be examined. Part II (Rules of Practice in District and County Courts) have been reviewed and the important rules have been revised, but there has not been a general revision. The numbering system for the rules generally is in need of restudy. There is no consistency in the numbering system of the rules or their internal designation of sections.

We are hearing complaints about the proliferation of local rules. Courts even within the same city and courthouse are adopting rules that differ. This is a problem that needs serious study.

In this, my valedictory communication, I also acknowledge the service to the state by Ms. Peggy Hodges, Administrative Assistant. Ms. Hodges has maintained files and a docket of incoming revisions and recommendations and their progress through the rule-making process. She has drafted scores of rules and created the style and form for the agendas which enables the Advisory Committee more easily to comprehend and follow new proposals. She has largely organized and referenced this agenda that is here submitted as well as those that have been previously submitted. She has made it possible for me to discharge my regular court duties while also serving as the Supreme Court Rules Member.

The Honorable George McCleskey has continuously worked hard and cooperated with the court and with me in planning the agenda and conducting the business of the Advisory Committee. He is only the second person who has chaired the Advisory Committee since its inception in 1939.

Finally, I express my gratitude to Chief Justice Greenhill who has maintained an ongoing and lively interest in the state of the rules and their improvement. I am grateful for his appointing me to serve as the Rules Member of the Supreme Court.

I thank the Committee for the opportunity to work together in this important matter of public interest.

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DISCOVERY AND DEPOSITION

Reasons for General Revisions of Discovery Rules

William V. Dorsaneo, III
September, 1982

As first promulgated, the discovery provisions of the Texas Rules of Civil Procedure bear little resemblance to the current rules. Major revisions were made in them in 1957, 1973 and 1981. Many of the revisions have been patterned upon provisions of the federal rules of civil procedure or proposals which were suggested at the federal level but which were not adopted. Similarly, many provisions of the federal rules have themselves been revised, without corresponding revisions in the Texas counterparts.

For the past two years, the Committee on Administration of Justice of the State Bar of Texas has worked on a project intended to revamp the discovery provisions of the Texas Rules in light of the knowledge and experience obtained by the bench and bar during the nearly four and one-half decades that have passed since the adoption of the Texas Rules of Civil Procedure.

Committee Objectives

The Committee on Administration of Justice approached its task with the following major goals in mind:

1. the incorporation of all scope of discovery principles in one place thereby eliminating an elaborate system of cross-referencing;
2. the development of one rule of procedure concerning the consequences of discovery abuse which clearly advises lawyers and their clients of the cost of noncompliance;
3. the simplification of the discovery timetables in the nondeposition rules such that a "thirty-day rule" is generally applicable to responses required in the discovery process;
4. the reorganization and clarification of the deposition rules including their modernization and simplification;
5. the elimination of archaic, outdated and nonuniform language which creates unnecessary and expensive interpretive problems for the bench and bar;
6. an examination of developments in other procedural systems for the purpose of making corresponding revisions in the Texas discovery rules when desirable;
7. the treatment of technical problems which occurred as a by-product of previous piecemeal revisions.

Summaries of Proposed Changes

The following summaries are included to provide a simplified overview of the recommendations. The Summary of Revisions of Nondeposition Rules indicates the nature of the changes in them. The Summary of Revisions of Current Deposition Rules notes the proposed new ordering of the deposition rules. The deposition rules begin with oral depositions and proceed chronologically from notice to filing to use at trial. The written deposition rules follow the oral deposition rules and incorporate by reference from them where appropriate. A brief comment follows each proposed change in the current rules in order to explain the specific suggested change.

SUMMARY OF REVISIONS OF NONDEPOSITION RULES

Rule 166b	Forms and Scope of Discovery; Protective Orders and Supplementation of Responses. New rule.
Rule 167	Revised. "Scope" material moved to 166b. "Sanction" language to 215a.
Rule 167a	Physical and Mental Examination of Persons. No change.
Rule 168	Revised. "Scope" material moved to 166b. "Sanction" language to 215a.
Rule 169	Revised to conform to Rule 166b; timetable changed to 30 days; noncompliance information moved to Rule 215a.
Rule 170	Repealed. See Rule 215a for all sanction information.
Rule 171	Master in Chancery. No change.
Rule 172	Audit. No change.
Rule 173	Guardian Ad Litem. No change.
Rule 174	Consolidation; Separate Trials. No change.
Rule 175	Issue of Law and Dilatory Pleas. No change.
Rules 176-185	No changes.

SUMMARY OF REVISIONS OF DEPOSITION RULES

Rules 186, 186a, 186b	Repealed. See Proposed Rule 166b.
Rule 187	Retained in present form.
Rule 188	Depositions in Foreign Jurisdictions. New rule.
Rules 189-192	Repealed. See Proposed Rule 208.
Rules 193-195	Repealed previously.
Rules 196-198	Repealed. See Proposed Rule 208.
Rule 199	Repealed.
Rule 200	Revised.
Rule 201	Revised.
Rule 202	Non-Stenographic Recording; Deposition by Telephone. (Old Rule 215c plus new deposition by telephone material.)
Rule 203	Failure of Party or Witness to Attend; Expenses. (Old Rule 215b with modification)

Rule 204	Examination, Cross-Examination and Objections. (Old Rules 204-207 with modifications). Should old Rule 212 (as revised) be included in part 4?
Rule 205	Submission to Witness; Changes; Signing. (Old Rule 209).
Rule 206	Certification and Filing by Officer; Exhibits; Copies; Notice of Filing.
Rule 207	Use of Depositions in Court Proceedings. (Old Rule 212 and Rule 213). Should old Rule 212 (as revised) be located in new Rule 204?
Rule 208	Depositions Upon Written Questions. (Old Rules 189-192; 196-198).
Rules 209-215	Repealed.
Rule 215a	Abuse of Discovery; Sanctions. New rule.

DISCOVERY AND DEPOSITION

LIST OF GROUP I RULES

[Proposed] RULE 166b. FORMS AND SCOPE OF DISCOVERY; PROTECTIVE ORDERS AND SUPPLEMENTATION OF RESPONSES

1. Forms of Discovery. Permissible forms of discovery are (a) oral or written depositions of any party or non-party, (b) written interrogatories to a party, (c) requests of a party for admission of facts and the genuineness or identity of documents or things, (d) requests and motions for production, examination, and copying of documents or other tangible materials, (e) requests and motions for entry upon and examination of real property and (f) motions for a mental or physical examination of a party or person under the legal control of a party.

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 follows:

a. In General. Parties may obtain discovery regarding any matter which is relevant to the subject matter in the pending action whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. It is also not ground for objection that an interrogatory propounded pursuant to Rule 168 involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time. It is also not ground for objection that a request for admission propounded pursuant to Rule 169 relates to statements or opinions or of the application of law to fact or mixed questions of law and fact or that the documents referred to in a request may not be admissible at trial.

b. Documents and Tangible Things. A party may obtain discovery of the existence, description, nature, custody, condi-

tion, location and contents of any and all documents, (including papers, books, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, and any other data compilations from which information can be obtained and translated, if necessary, by the person from whom production is sought, into reasonably usable form) and any other tangible things which constitute or contain matters relevant to the subject matter in the action. A person is not required to produce a document or tangible thing unless it is within that person's possession, custody or control. Possession, custody or control includes constructive possession such that the person need not have actual physical possession. As long as the person has a superior right to compel the production from a third party (including an agency, authority or representative), the person has possession, custody or control.

c. Land. A party may obtain a right of entry upon designated land or other property in the possession or control of a person upon whom a request or motion to produce is served when the designated land or other property is relevant to the subject matter in the action for the purpose of inspection and measuring, surveying, photographing, testing or sampling the property or any designated object or operation thereon. If a person has a superior right to compel a third person to permit entry, the person with the right has possession or control.

d. Potential Parties and Witnesses. A party may obtain discovery of the identity and location (name and address) of any potential party and of persons having knowledge of relevant facts, including a specification of the persons having knowledge of relevant facts who are expected to be called to testify as witnesses in the action. A person has knowledge of relevant facts when he or she has or may have knowledge of any discoverable matter. The information need not be admissible in order to satisfy the requirements of this subsection and personal knowledge is not required.

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:

(1) In General. A party may obtain discovery of the identity and location (name and address) of an expert who is to be called as a witness, the subject matter of his testimony, 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 as a witness.

(2) Reports. A party may also obtain discovery of documents and tangible things including all tangible reports, physical models, compilations 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 part of the opinions of an expert who is to be called as a witness.

(3) Determination of Status. The trial judge has discretion to compel a party to make the determination of whether an expert will be called to testify within a reasonable time before the date of trial.

(4) Reduction of Report to Tangible Form. If the

discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert who will be called as a witness have not been recorded and reduced to tangible form, the trial judge may order these matters reduced to tangible form and produced within a reasonable time before the date of trial.

f. Indemnity, Insuring and Settlement Agreements.

(1) The existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(2) The existence and contents of any settlement agreement. Information concerning the settlement agreement is not by reason of disclosure admissible in evidence at trial.

g. Statements. Any person, whether or not a party, shall be entitled to obtain, upon written request, his own statement previously made concerning the subject matter of a lawsuit, which is in the possession, custody, or control of any party. For the purpose of this paragraph, a statement previously made is (a) a written statement signed or otherwise adopted or approved by the person making it, and (b) a stenographic, mechanical, electrical or other type of recording, or any transcription thereof which is a substantially verbatim recital of a statement made by the person and contemporaneously recorded.

h. Medical Records; Medical Authorization. Any party alleging physical or mental injury and damages arising from the occurrence which is the subject of the case shall be required, upon written request, to produce, or furnish an authorization permitting the full disclosure of, medical records not thereto-

fore furnished to the requesting party which are reasonably related to the injury or damages asserted. Copies of all medical records, reports, x-rays or other documentation obtained by virtue of an authorization furnished in response, shall be furnished by the requesting party, without charge, to the party who furnished the authorization in response to the request and copies of all medical records, reports, x-rays or other documentation obtained by virtue of the written request or by virtue of the authorization shall be made available by the requesting party for inspection and photographing and/or copying to all parties to the action under reasonable terms and conditions. If such information, so obtained, is to be used or offered in evidence upon trial, it shall be furnished by the requesting party to the party who furnished the authorization and made available for inspection by all parties not less than thirty (30) days prior to trial, except as may be excused by a showing of good cause. The mailing of written notice by the requesting party that he has obtained medical records, reports, x-rays or other documentation by virtue of the written request or by virtue of an authorization furnished in response constitutes making them available if the mailing is done thirty (30) days prior to trial and if it prescribes reasonable terms and conditions for inspection of them.

3. Exemptions. The following matters are not discoverable:

a. the work product of an attorney;

b. the written statements of potential witnesses and parties, except that any person, whether a party or not, shall be entitled to obtain, upon request, a copy of a statement he has previously made concerning the action or its subject matter and which is in the possession, custody or control of any party;

c. 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 tangible 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 them 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;

d. with the exception of discoverable communications prepared by or for experts, any communication passing between agents or representatives or the employees of any party to the action or communications between any party and his agents, representatives or their employees, when made subsequent to the occurrence or transaction upon which the suit is based, and made in connection with the prosecution, investigation or defense of the claim or the investigation of the occurrence or transaction out of which the claim has arisen or information obtained in the course of an investigation by a person employed to make such investigation; and

e. any matter protected from disclosure by privilege.

Nothing in this paragraph 3 shall be construed to render non-discoverable the identity and location of any potential party or of persons having knowledge of relevant facts (including persons having knowledge of relevant facts who will be called to testify as witnesses), except that the identity of a consulting expert who acquired or developed knowledge of discoverable matter solely as a result of a consultation in anticipation of litigation or preparation for trial is controlled by part c of paragraph 3 of this rule.

4. Protective Orders. On motion by any person against or from whom discovery is sought under these rules, the court may make any order in the interest of justice necessary to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property

rights. Specifically, the court's authority as to such orders extends to, although it is not necessarily limited by, any of the following:

a. ordering that discovery not be sought at all, in whole or in part, or that the event or subject matter of discovery be limited, or that it not be undertaken at the time or place specified.

b. ordering that the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court.

c. ordering that results of discovery be sealed or otherwise adequately protected; that its distribution be limited; or that its disclosure be restricted.

5. Duty to Supplement. A party who has responded to a request for discovery that was complete when made is under no duty to supplement his response to include information thereafter acquired, except the following shall be supplemented not less than thirty days prior to the beginning of trial unless the court finds that a good excuse exists for permitting or requiring later supplementation.

a. A party is under a duty seasonably to supplement his response if he obtains information upon the basis of which:

(1) he knows that the response was incorrect when made;

(2) he knows that the response though correct when made is no longer true and the circumstances are such that failure to amend the answer is in substance a knowing concealment or misrepresentation; or

(3) if the party expects to call a witness when the identity and in the case of an expert witness when the identity or the subject matter of such expert witness' testimony has not been previously disclosed in response to an appropriate

inquiry directly addressed to these matters, such response must be supplemented to include the name, address and telephone number of the witness and in the case of an expert witness the substance of the testimony concerning which the witness is expected to testify, as soon as is practical, but in no event less than thirty (30) days prior to the beginning of trial except on leave of court.

b. In addition, a duty to supplement answers may be imposed by order of the court or agreement of the parties, or at any time prior to trial through new requests for supplementation of prior answers.

COMMENT: This is a new rule. Proposed Rule 166b combines "all" scope of discovery concepts in one rule. It incorporates provisions currently located in Rules 167, 186a and 186b. In this process, the Committee on the Administration of Justice recommended that the current provisions be modified in the following significant respects:

(a) in the provisions concerning production of documents or tangible things for inspection contained in proposed Rule 166b, possession, custody or control is defined in terms of a "superior right to compel" from a third party;

(b) the existence and contents of settlement agreements are made discoverable;

(c) the proposed rule validates the use of interrogatories and admissions that involve the application of law to fact or so-called mixed questions by providing that they are not objectionable on that basis;

(d) the proposed rule contains a redraft of the medical authorization provisions of current Rule 167;

(e) the text of the proposal clarifies rules concerning experts and their reports. Under proposed Rule 166B the disclosure of information concerning an expert used for consultation and who is not expected to be called as a witness at trial is generally not discoverable but would be required if the experts' work product forms a basis either in whole or in part of the opinions of an expert who is to be called as a witness. The proposed rule is not intended to change the opinion of the Supreme Court in Barker v. Dunham, 551 S.W.2d 41 (Tex. 1977) that the status of an expert as an employee does not insulate his identity and opinions from discovery. Similarly, it is not intended to affect the court's conclusion that "where a party does not positively aver that the expert will be used solely for consultation and will not be called as a

witness at the trial, the policy of allowing broad discovery in civil cases is furthered by permitting discovery of that expert's reports, factual observations and opinions." Nor is the rule intended to change the holding in Werner v. Miller, 579 S.W.2d 455 (Tex. 1978). It is intended to indicate when a non-testifying expert is not used "solely for consultation." The Miller case provides that the disclosure of the "mental impressions and opinions of experts used solely for consultation" and "the names of experts used only as consultants are irrelevant and immaterial." An expert whose work product forms a basis of the opinion of one who will testify presumably would not be characterized as one used "solely" or "only" as a consultant. However, under the Miller case and the proposed rule, the identity of one who has been informally consulted or one who was specially retained but whose mental impressions and opinions do not form a basis of another's testimony is not intended to be discoverable; and

(f) the proposed rule also seeks to clarify the meaning of the phrase "persons . . . having knowledge of relevant facts" currently contained in the last sentence of Rule 186a. The provision concerning the identity of persons having knowledge of relevant facts is also related to the discovery of the identity of experts. Under current Rule 186a, it is not really clear who is included within the class of persons having knowledge of "relevant facts." This phrase appeared initially in the text of federal rule 26 in 1937. The language remained the same until 1970 when federal rule 26 was amended to refer to persons having knowledge of any discoverable matter. It seems likely that this change was thought to be consistent with the extension of the scope of discovery to trial preparation methods including, for example, the reports of experts. It is intended that the identity of all persons who have knowledge of discoverable matter should be discoverable except that the identity of an expert who has acquired or developed knowledge subsequent to the transaction or occurrence which gave rise to the action during consultation with another party need not be disclosed unless the expert's work product forms the basis of either his or her testimony or the testimony of another. This is not intended to mean that the identity of personnel in a lawyer's office who learn about the case would need to be set forth in answer to an interrogatory which asks who has knowledge "about the accident." Presumably their only basis for knowing things would be within the protections provided in paragraph 3. However, the identity of employees who have acquired factual information before the transaction or occurrence is discoverable even if they happen to be experts. On the other hand, when an expert has acquired knowledge as a result of a consultation, this fact alone does not make his identity discoverable.

In addition, the last sentence of part d of paragraph 2 of the proposed rule, along with corresponding language in paragraphs 3 (exemptions) and 5 (duty to supplement) make the identity of witnesses a party intends to call at trial discoverable. This change is intended to overrule cases such as Employers Mut. Liability Ins. Co. of Wis. v. Butler, 511 S.W.2d 323 (Tex. Civ. App. - Texarkana 1974, writ ref'd n.r.e.) -- characterizing the identity of trial witnesses as distinguished from all persons having knowledge of relevant facts as "work product."

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

[The scope of discovery permitted herein is as provided by Rule 186a and subject to the protections of Rule 186b:]

1. Procedure. Any party may serve on any other party a REQUEST: (a) to produce and permit the party making the REQUEST, or someone acting on his behalf, to inspect, sample, test, photograph and/or copy, any designated documents [(including papers, books, accounts, writings, drawings, graphs, charts, photographs, any insurance agreement under which any person or entity carrying on an insurance business may be liable to satisfy part or all of a judgment which may be rendered in the action or to indemnify or reimburse for payments made to satisfy the judgment), recordings and other data compilations from which information can be obtained, translated, if necessary, by the respondent through appropriate devices into reasonably usable form, and to inspect, sample, test, photograph, or copy any] or tangible things which constitute or contain matters within the scope of Rule 166b which are in the possession, custody or control of the party upon whom the request is served; or

b. to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon within the scope of Rule 166b.

c. The REQUEST shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The REQUEST shall specify a reasonable time, place and manner for making the inspection and performing the related acts.

d. The party upon whom the REQUEST is served shall serve a written RESPONSE which shall state, with respect to each item or category of items, that inspection or other requested

action will be permitted as requested, and he shall thereafter comply with the REQUEST, except only to the extent that he makes objections in writing to particular items, or categories of items, stating specific reasons why such discovery should not be allowed.

e. All parties to the action shall be [~~provided~~] served with copies of each REQUEST and RESPONSE.

f. A party who produces documents for inspection shall produce them as they are kept in the usual course of business, or shall organize and label them to correspond with the categories in the request.

g. Testing or examination shall not extend to destruction or material alteration of an article without notice, hearing, and prior approval by the court.

2. Time. No REQUEST may be served on a party until that party has filed a pleading or time therefor has elapsed. Thereafter, the REQUEST shall be filed with the Clerk and served upon every party to the action. The RESPONSE to any REQUEST made under this rule and objections, if any, shall be served within thirty days after [~~receipt~~] service of the REQUEST. The time for making a RESPONSE may be shortened or lengthened by the court upon a showing of good cause.

3. Objection. If objection is made to a REQUEST or to a RESPONSE, either party may request a hearing. The court may order or deny production within the scope of this rule. If granted, the order shall specify the time, place, manner and other conditions for making the inspection, measurement or survey, and taking copies and photographs and may prescribe such terms and conditions as are just. [~~If the court finds that a REQUEST is not within the scope of this rule or is unreasonably frivolous or a harassment or that a RESPONSE is unreasonably frivolous or made for purpose of delay, then the court may tax the costs of the hearing, including a reasonable attorney's fee against the offending party.~~]

4. Nonparties. The court may order a person, organizational entity, governmental agency or corporation not a party to the suit to produce in accordance with this rule. However, such order shall be made only after the filing of a motion setting forth with specific particularity the request, necessity therefor and after notice and hearing. All parties and the nonparty shall have the opportunity to assert objections at the hearing.

~~[5. EXPERT REPORTS: If the discoverable factual observations, tests, supporting data, calculations, photographs or opinions of an expert witness have not been recorded or reduced to a tangible form, then the court, upon motion, hearing and for good cause may order such matters reduced to tangible form and produced.~~

~~6. STATEMENTS: Any person, whether or not a party, shall be entitled to obtain, upon written request, his own statement previously made concerning the subject matter of a lawsuit, which is in the possession, custody, or control of any party. For the purpose of this paragraph, a statement previously made is (a) a written statement signed or otherwise adopted or approved by the person making it, and (b) a stenographic, mechanical, electrical or other type of recording, or any transcription thereof which is a substantial verbatim recital of a statement made by the person and contemporaneously recorded.~~

~~7. INJURY DAMAGES: Any party alleging physical or mental injury and damages arising from the occurrence which is the subject of the case shall be required, upon request, to produce, or furnish an authorization permitting the full disclosure of, medical records not theretofore furnished the movant and reasonably related to the injury or damages asserted. Copies of all medical records, reports, X-rays or other documentation so obtained shall be furnished without charge to all parties to the action as soon as possible after receipt by the movant, and if such information is to be used or offered in evidence upon trial, it shall be furnished not less than fourteen days prior to trial, except as may be excused by a showing of good cause. Information so~~

~~obtained is for use in the pending litigation and may not be disseminated except as may be reasonably required for the purposes of such litigation.~~

~~8. CONSTRUCTIVE POSSESSION: Possession, custody or control includes constructive possession whereby the Respondent has a right to compel the production of a matter or entrance from a third party (including an agency, authority or representative).~~]

COMMENT: The portions of the rule which are deleted have all been incorporated in proposed Rule 166b, except for the last sentence of paragraph 3 concerning unreasonable requests or responses. See the Comment to proposed Rule 166b. Discovery abuse is dealt with in proposed Rule 215a. See the Comment to proposed Rule 215a. The addition to the rule in paragraph 1(c) is meant to make it clear that a request may identify the items requested by "category" but must do so with "reasonable particularity." This language is adapted from current federal rule 34, upon which the 1981 revisions to Texas Rule 167 were largely modeled. The other changes in Rule 167 serve to conform it to proposed Rule 166b. See Comment to proposed Rule 166b.

Rule 167a. Physical and Mental Examination of Persons.

No change.

Rule 168. Interrogatories to Parties

At any time after a party has made appearance in the cause, or time therefor has elapsed, any other party may serve upon such 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 any officer or agent who shall furnish such information as is available to the party.

1. Service. When a party is represented by an attorney, service of interrogatories and answers to interrogatories shall be made on the attorney unless [~~delivery to~~] service upon the party himself is ordered by the court.

2. Scope. Interrogatories may relate to any matters which can be inquired into under Rule [~~186a~~] 166b, but the answers, subject to any objections as to admissibility, may be used only against the party answering the interrogatories. Where the answer to an interrogatory may be derived or ascertained from:

a. public records; or

b. from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served; it is sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and, if applicable, to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. The specification of records provided shall include sufficient detail to permit the interrogating party [~~to readily identify the individual documents~~] to locate and to identify as readily as can the party served, the records from which the answers may be ascertained.

3. Procedure. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice requires.

4. Time to Serve. The party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within the time specified by the party serving the interrogatories, which specified time shall not be less than thirty days after the service of the interrogatories, unless the court, on motion and notice for good cause shown, enlarges or shortens the time.

5. Number of Interrogatories. The number of questions including subsections in a set of interrogatories shall be limited so as not to require more than thirty answers. No more than two sets of interrogatories may be served by a party to any other party, except by agreement or as may be permitted by the court after hearing upon a showing of good cause. The court may, after hearing, reduce or enlarge the number of interrogatories or sets of interrogatories if justice so requires. The provisions of Rule [~~186b~~] 166b are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.

The interrogatories shall be answered separately and fully in writing under oath. Answers to interrogatories shall be preceded by the question or interrogatory to which the answer pertains. The answers shall be signed and verified by the person making them and the provisions of Rule 14 shall not apply. True copies of the interrogatories, and objections thereto, and answers shall be served on all parties or their attorneys at the time that any interrogatories, objections, or answers are served, and a true copy of each shall be promptly filed in the clerk's office together with proof of service.

6. Objections. At the time answers to interrogatories are served, a party may serve written objections to specific inter-

rogatories or portions thereof. Answers only to those interrogatories or portions thereof, to which objection is made, shall be deferred until the objections are ruled upon and for such additional time thereafter as the court may direct. Either party may request a hearing as to such objections at the earliest possible time. [Upon hearing, the court, if it finds that the interrogatories are unreasonable, frivolous, or a harassment or if it finds the objections unreasonable, frivolous, made for the purpose or delay, or that a good faith effort to answer the interrogatories has not been made, may tax the costs of the hearing as well as a reasonable attorney's fee against the losing party at such hearing.

7. DUTY TO SUPPLEMENT. A party whose answers to interrogatories were complete when made is under no duty to supplement his answers to include information thereafter acquired, except the following shall be supplemented not less than fourteen days prior to the beginning of trial unless the court finds that good cause exists for permitting or requiring later supplementation.

a) A party is under a duty seasonably to amend his answer if he obtains information upon the basis of which:

(1) he knows that the answer was incorrect when made;

(2) he knows that the answer though correct when made is no longer true and the circumstances are such that a failure to amend the answer is in substance a knowing concealment or misrepresentation; or

(3) if the party expects to call an expert witness whose name and the subject matter of such witness' testimony has not been previously disclosed in response to an appropriate interrogatory, such answer must be amended to include the name, address, and telephone number of the witness and the substance of the testimony concerning which the witness is expected to testify, as soon as is practical, but in no event

~~less than fourteen (14) days prior to the beginning of trial except on leave of court. If such amendment is not timely made, the testimony of the witness shall not be admitted in evidence unless the trial court finds that good cause sufficient to require its admission exists; and~~

~~b) A duty to supplement answers may be imposed by order of the court or agreement of the parties, at any time prior to trial through new requests for supplementation to prior answers.~~

~~8. SANCTIONS: After notice and hearing, if the court finds a party is abusing the discovery process in seeking, making or resisting discovery under this Rule, in addition to costs and a reasonable attorney's fee the court may invoke the sanctions of Rules 170 and 215a.~~]

COMMENT: Section 7 of current Rule 168 concerning supplementation of interrogatories has been moved to proposed Rule 166b and modified so that it is generally applicable to the discovery process. Sanctions imposable for violating the duty to supplement are set forth in proposed Rule 215a(4). For a discussion of the provision see the Comment to proposed Rule 215a.

The provision regarding the identification of individual documents contained in current Rule 168(2) was proposed at the federal level in 1978 by the Advisory Committee on Civil Rules of the Judicial Conference of the United States. Subsequently, the proposal was withdrawn after it received criticism. See Schroeder & Frank, The Proposed Changes in the Discovery Rules, 1978 Arizona St. L. Rev. 475, 491 (1978). The suggested revision to Rule 168 corresponds with the language of the current federal rule ". . . to locate and to identify as readily as can the party served the records. . . ."

The provisions in the current rule concerning sanctions have been deleted because the subject is covered by proposed Rule 215a. The broad language contained in section 8 of current Rule 168 was taken substantially intact from the language of a Report [Section of Litigation of the American Bar Association, Report of the Special Committee for the Study of Discovery Abuse (Dec. 1977)]. The proposal received substantial criticism and was not adopted by the United States Supreme Court. Schroeder & Frank, The Proposed Changes in the Discovery Rules, 1978 Arizona St. L. Rev. 475, 487 (1978). ("This, we submit, is really throwing in the sponge. The court may assess heavy monetary penalties for undefined 'abuses.' This simply gives the judges a roving commission to punish evil. We submit that in any other context, the Supreme Court would find such a regulation void for vagueness.") The provision has received some interpretation by the courts and commentators. For a discussion of the impact of the

1981 amendments to Rule 168, see Pope & McConnico, Practicing Law with the 1981 Texas Rules, 32 Baylor L. Rev. 457, 480-483 (1980). "The new sanctions additions to Rule 168 do not change the holding that, if no interrogatory answers are filed, no motion to compel answers is required to impose sanctions. If only some interrogatory answers are filed, however, a motion to compel answers is still required to impose sanctions." See Lewis v. Ill. Employers Ins. Co., 590 S.W.2d 119 (Tex. 1979). See also Saldivar v. Facit-Addo, Incorporated, 620 S.W.2d 778, 779 (Tex. Civ. App. - El Paso 1981, no writ) -- concluding that the holding of the Lewis case survived the amendment; ". . . even though one partner failed to answer the interrogatories, we hold that, in this husband and wife partnership relation, the answer by the husband to the interrogatories [before the hearing on sanctions] prevents the imposition of the sanction of dismissal."

The proposed revisions to Rules 168, 170 and 215a would make it clearer under what circumstances the most severe sanctions under the rules are imposable. In this regard, it should be noted that proposed Rule 215a departs from the conclusion reached in the Lewis case [Lewis v. Ill. Employers Ins. Co., 590 S.W.2d 119 (Tex. 1979)] and the reaffirmation of that holding in the Saldivar case [Saldivar v. Facit-Addo, Incorporated, 620 S.W.2d 778, 779 (Tex. Civ. App. - El Paso 1981, no writ)] because a motion to compel answers (which may seek the imposition of an expense award) followed by the violation of the order granting the motion is prerequisite to the imposition of the more severe sanctions set forth in paragraph 2 of the proposed rule. See proposed Rule 215a(1) and (2).

Rule 169. Admission of Facts and of Genuineness of Documents

1. Request for Admission. At any time after the defendant has made appearance in the cause, or time therefor has elapsed, a party may [deliver or cause to be delivered to] serve upon any other party [or his attorney of record] a written request for the admission [by such party of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth by] , 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 [delivered] served with the request unless [copies have already been furnished] they have been or are otherwise furnished or made available for inspection and copying. Whenever a party is represented by an attorney of record, [delivery] service of a request for admissions shall be made [to] on his attorney unless [delivery to] service on the party himself is ordered by the court. [The request for admissions must state that it is made under this rule and that each of the matters of which an admission is requested shall be deemed admitted unless a sworn statement is delivered to the party requesting the admissions or his attorney as provided in this rule. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than ten days after delivery thereof or within such further time as the court may allow on motion and notice, the party to whom the request is directed delivers or causes to be delivered to the party requesting the admission or his attorney of record a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters.] A true copy of a request for admission or of a [sworn statement in reply thereto] written answer or objection, together with proof of the [delivery] service thereof as provided in Rule 21a, shall be

filed promptly in the clerk's office by the party making [such request or such sworn statement] it.

[The party who has requested the admissions may move to determine the sufficiency of the answers or reasons. Unless the court determines that the party to whom the request is directed has good reason for not admitting or denying a matter requested it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 215a apply to the award of expenses incurred in relation to the motion.]

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty (30) days after service of the request, or within such shorter time as the court may allow, 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 45 days after service of the citation and petition upon him. If objection is made, the reason therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering 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 answering 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 readily 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 215a, deny the matter or set forth reasons why he cannot admit or deny it.

2. Effect of Admission. Any matter admitted under this rule is conclusively established as to the party making the admission unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 166 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

COMMENT: This rule has been revised to conform it to proposed Rule 166b. Under the proposed amendment to Rule 169, a party may be required to admit or deny the truth of any matters within the scope of discovery [as defined in proposed Rule 166b] ". . . set forth in the request that relate to statements or opinions of fact or the application of law to fact, including the genuineness of any documents described in the request." This change follows the pattern established by the 1970 amendment to federal rule 36 and is based upon it.

It resolves conflicts in court decisions as to whether a request to admit matters of "opinion" and matters involving "mixed law and fact" is proper under the rule. See e.g. Texas Gen. Indem. Co. v. Lee, 570 S.W.2d 231 (Tex. Civ. App. - Eastland 1978, writ ref'd n.r.e.), per curiam, 584 S.W.2d 700 (Tex. 1979); compare Trevino v. Central Freight Lines, Inc., 613 S.W.2d 356 (Tex. Civ. App. - Waco 1981, no writ). Not only is it difficult to separate matters of "fact" from matters of "mixed law and fact," it is desirable to require admissions on these matters. For example, an admission that an employee was in the course of employment may remove a major issue from trial. See Sanchez v. Caroland, 274 S.W.2d 114 (Tex. Civ. App. - Fort Worth 1954, no writ). Moreover, if the matter is really in dispute, it can be denied without substantial fear that a penalty will be imposed. See proposed Rule 215a(3)(c). On the other hand, requests for admission involving the application of law to fact may involve disputes which cannot be properly resolved until other discovery has been completed. Consequently, the

proposed rules provide that the trial judge may determine that final disposition of the request should be delayed until a later time prior to trial. See proposed Rule 215a(3)(b).

Consistent with the view that all "sanction" information be set forth in one rule, noncompliance information has been moved to Rule 215a(3).

In addition, the time for making a response has been extended to thirty days. This modification is consistent with the overall objective of simplifying the discovery response timetable by making discovery responses generally due within thirty days.

[Rule 170. Refusal to Make Discovery; Consequences

If any party or an officer or managing agent of a party refuses to obey an order made under Rule 167 the court may make such orders in regard to the refusal as are just, and among others, the following:

1. an order that the matters regarding the character or description of the thing, or the contents of the paper, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

2. an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony;

3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party. If a party, after being served with a request under Rule 169 to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof. If in the course of such a hearing it shall appear to the satisfaction of the court that any party or his attorney is arbitrarily refusing to co-operate in disposing of questions of fact as to which there is no basis for bona fide controversy, the court shall tax all expenses of proving such facts, including reasonable attorneys' fees, against the party refusing to co-operate, subject to review upon appeal.]

COMMENT: Repealed. See Rule 215a for all sanction information. Under the proposed discovery rules, Rule

170 is deleted because 215a is revised to accommodate conduct in violation of Rule 167. The proposed revisions to Rules 168, 170 and 215a would make it clearer under what circumstances the most severe sanctions authorized under the rules are imposable and would authorize the imposition of sanctions (expenses) directly upon an attorney who is responsible for the violation of the discovery rules.

Rule 171. Master in Chancery. No Change.

Rule 172. Audit. No Change.

Rule 173. Guardian Ad Litem. No Change.

Rule 174. Consolidation; Separate Trials. No Change.

Rule 175. Issue of Law and Dilatory Pleas. No Change.

SECTION 9. EVIDENCE AND DEPOSITIONS

A. EVIDENCE

Rule 176. Witnesses Subpoened.

(Unchanged. Being studied by Committee on Administration of Justice.)

Rule 177. Form of Subpoena. No Change.

Rule 177a. Subpoena for Production of Documentary Evidence. No Change.

Rule 178. Service of Subpoenas. No Change.

Rule 179. Witness Shall Attend. No Change.

Rule 180. Refusal to Testify. No Change.

Rule 181. Party as Witness. No Change.

Rule 182. Testimony of Adverse Parties in Civil Suits. No Change.

Rule 182a. Court Shall Instruct Jury on Effect of Article 3716. No Change.

COMMENT: The court's action about the proposed Texas Rules of Evidence and Rule 601(b), the Dead Man Statute, will determine whether this rule should remain or be repealed. That proposed rule states:

"601(b). A witness is not precluded from giving evidence of or concerning any transaction with, any conversations with, any admissions of, or statement by, a deceased or insane party or person merely because the witness is a party to the action or a person interested in the event thereof."

Rule 183. Interpreters. No Change.

B. Depositions

Rule 186. Deposition of Witnesses — Repealed.

COMMENT: The Committee on Administration of Justice recommends that the rule be repealed. The substance of the first portion of Rule 186 is covered by current Rule 187 [Deposition to Perpetuate Testimony] and by new Rules 200 [Depositions Upon Oral Examination] and 208 [Depositions Upon Written Questions]. The last portion following the word "provided" has become the second paragraph of existing Rule 252, Application for Continuance.

[Rule 186a. Scope of Examination

Any party may take the testimony of any person, including a party, by deposition upon oral examination or written questions for the purpose of discovery [within the scope of Rule 166B] or for use as evidence in the action or for both purposes. Unless otherwise ordered by the court as provided by Rule 186b, the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons, including experts, having knowledge of relevant facts. It is not ground for objection that the testimony will not be admissible at the trial of the cause in which the deposition is taken if the testimony sought appears reasonably calculated to relate to the discovery of evidence admissible at such trial. The provisions of Rule 168 concerning the duty to supplement answers shall apply to a party whose testimony is taken by deposition. Provided, however, that subject to the provisions of the succeeding sentence, the rights herein granted shall not extend to the work product of an attorney or to communications passing between agents or representatives or the employees of either party to the suit, or communications between any party and his agents, representatives, or their employees, where made subsequent to the occurrence or transaction upon which the suit is based, and made in connection with the prosecution, investigation, or defense of such claim, or the circumstances out of which same has arisen, and shall not require the production of written statements of witnesses or disclosure of the mental impressions and opinions of experts used solely for consultation and who will not be witnesses in the case or information obtained in the course of an investigation of a claim or defense by a person employed to make such investigation. Provided, further, that information relating to the identity and location of any potential party and of persons,

~~including experts, having knowledge of relevant facts, and the reports, factual observations and opinions of an expert who will be called a a witness, are discoverable.~~]

COMMENT: Repealed. See Proposed Rule 166b.

[Rule 186b. Orders for Protection of Parties and Deponents

Notice to take the deposition of a party or a witness upon written or oral questions, other than depositions under Rule 187, shall not be given, served or published prior to appearance day, unless leave of court has been obtained upon a sworn motion showing good cause therefor, which leave may be granted with or without notice as the court may require. After notice is served for taking a deposition on written questions or by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may enlarge or shorten the time for taking the deposition, or may make an order that the deposition shall not be taken, or that it may be taken only before the court or at some designated place other than that stated in the notice or subpoena, or that it may be taken only on written questions, or that it may be taken only by oral examination, or that certain matters shall not be inquired into, or that the examination shall be held with no one present except the witness and his counsel and the parties to the action and their officers and counsel, or that the deposition shall not be taken by or before the officer designated, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court, or the court may make any other order which justice requires to protect the party or witness from undue annoyance, embarrassment, oppression or expense.]

COMMENT: Repealed. See Proposed Rule 166b.

Rule 187. Deposition to Perpetuate Testimony.

Retained in present form.

Rule 189. Notice and Service on Written Questions. Repealed.

COMMENT: Included in Rule 208.

Rule 190. Notice by Publication. Repealed.

COMMENT: Included in Rule 208.

Rule 191. When Citation Served by Publication. Repealed.

COMMENT: Included in Rule 208.

Rule 192. Cross-Questions. Repealed.

COMMENT: Included in Rule 208.

Rules 193, 194, 195. Previously Repealed.

Rule 196. Taking of Written Deposition. Repealed.

COMMENT: Included in Rule 208.

Rule 197. Interpreter. Repealed.

COMMENT: Included in Rule 208.

Rule 198. Return of Depositions. Repealed.

COMMENT: Rule 208 replaces this.

Rule 199. Oral Deposition. Repealed.

COMMENT: Replaced by Rule 200.

Rule 200. Depositions Upon Oral Examination

1. When Depositions May Be Taken. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination.

Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the appearance day of any defendant, except that leave is not required (a) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (b) if the plaintiff files a motion supported by an affidavit showing good cause for the taking of the deposition prior to appearance day. The affidavit may be based upon the affiant's information and belief that the facts contained in it are true.

~~[Rule 200. - Notice]~~

2. Notice of Examination: General Requirements; Notice of Deposition of Organization.

a. Ten days' notice must be given in writing by the party, or his attorney, proposing to take ~~[such]~~ a deposition upon oral examination, to ~~[the opposite]~~ every other party or his attorney of record ~~[, which]~~. The notice shall state the name of the [witness] deponent, the time and place of the taking of his deposition, and if ~~[a subpoena duces tecum as authorized by]~~ the production of documents or tangible things in accordance with Rule 201 is desired, a designation of the ~~[books, papers, documents and tangible things]~~ items to be produced by the ~~[witness]~~ deponent either by individual item or by category and which describes each item and category with reasonable particularity. ~~[In all cases in rem, the person having the agency or possession of the property at the time of the seizure shall be deemed the adverse party until a claim shall have been filed.]~~

~~[A public or private corporation or a partnership or association or governmental agency may be named in the notice as the witness, and in that event the organization named shall designate the persons to testify, and they shall give their testimony, as provided in Rule 189.]~~

b. A party may in his notice name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested.

COMMENT: The first sentence of paragraph one of the proposed rule is taken from current Rule 186a and Fed. R. Civ. P. 30(a). The second sentence is based upon current Rule 186b and Fed. R. Civ. P. 30(a) and (b)(2). Paragraph two has been redrafted to make it clear that all parties are entitled to notice of a deposition and to conform it to the provisions of Rule 201. The latter rule adopted by the Supreme Court effective January 1, 1981, in its current form deals with the subpoena duces tecum and designation of a witness by corporate deponents in clear terms. In this connection, the new language in the last sentence of part b of paragraph two is a verbatim adoption of the first sentence of federal rule 30(b)(6). Former Rules 199 and 200 are incorporated into this new rule.

Rule 201. Compelling Appearance; Production of Documents and Things; Deposition of Organization

Any person may be compelled to appear and give testimony by deposition in a civil action.

1. Subpoena. Upon proof of service of a notice to take a deposition, written or oral, the clerk or any officer authorized to take depositions and any certified shorthand reporter [~~certified pursuant to Article 2324b, TEX. REV. CIV. STAT. ANN.,~~] shall immediately issue and cause to be served upon the witness a subpoena directing him to appear before [~~said~~] the officer at the time and place stated in the notice for the purpose of giving his deposition.

2. Production. A witness may be compelled by subpoena duces tecum to produce items or things within his care, custody or control. The subpoena duces tecum shall direct with particularity the witness to produce, at such time and place designated documents [~~(including writings, papers, books, accounts, drawings, graphs, charts, photographs, recordings and other data compilations from which information can be obtained, translated, if necessary, by the Respondent through appropriate devices into reasonably usable form)~~ and] or tangible things which constitute or contain evidence or information relating to any of the matters within the scope of the examination permitted by Rule [~~186a~~] 166b; but in that event the subpoena will be subject to the provisions of Rules 177a and [~~186b~~] 166b.

3. Party. [Where] When the [witness] deponent is a party, [~~to the suit,~~ and] after the filing of a pleading in the party's behalf by an attorney of record, service of the notice upon [~~such~~] the attorney shall [~~suffice and~~] have the same effect as a subpoena served on the party. If the [witness] deponent is an agent or employee [and] who is subject to the control of a party, notice to take the [witness~~1~~] deposition [~~may be~~] which is served on [~~such~~] the party's attorney of record [and] shall have the same effect as a subpoena served on the [witness] deponent. A

party or a party's agents or employees or persons subject to that party's control, may be compelled to produce designated documents or tangible things, as in paragraph 2 hereof, if the notice sets forth the individual items or [~~things~~] categories of items to be produced with [~~the same~~] reasonable particularity. [~~as required for a subpoena duces tecum.~~]

4. Organizations. [~~Where~~] When the [~~witness~~] deponent named in the subpoena or notice is a public or private corporation, a partnership, association or governmental entity, the subpoena or notice shall direct the organization named to designate the person or persons to testify in its behalf, and, if it so desires, the matters on which each person designated will testify, and shall further direct that the person or persons [~~so~~] designated by the organization appear before the officer at the time and place stated in the subpoena or notice for the purpose of giving their testimony.

5. Time and Place. The time and place designated shall be reasonable. The place of taking a deposition shall be in the county of the witness' residence or, where he is employed or regularly transacts business in person or at such other convenient place as may be directed by the court in which the [~~suit~~] cause is pending; provided, however, the deposition of a party or the person or persons designated by a party under paragraph 4 above may be taken in the county of suit subject to the provisions of paragraph 4 of Rule ~~186b~~ 166b. A nonresident or transient person may be required to attend in the county where he is served with a subpoena, or within one hundred miles from the place of service, or at such other convenient place as the court may direct. The witness shall remain in attendance from day to day until such deposition is begun and completed.

COMMENT: A change has been made to limit the coverage of current Rule 201(5) such that the county of suit principle applies only to persons designated by organizations, etc., who are parties. In addition, the statutory references in paragraph 1 concerning persons who are authorized to take depositions have been deleted in their entirety because of the complexity of the issues presented by the several statutes on the subject. See proposed Rule 208(4) which makes it clear that a notary public is an officer authorized to take written depositions and to issue subpoenas in connection with them.

Rule [215e] 202. Non-Stenographic Recording; Deposition by Telephone

1. Non-Stenographic Recording. Any party may cause the testimony and other available evidence at a deposition upon oral examination to be recorded by [non-] other than stenographic means, [which term shall specifically include] including videotape recordings, without leave of court, and [such] the non-stenographic recording may be presented at trial in lieu of reading from [the written record] a stenographic transcription of the deposition, subject to the following rules:

a. Any party intending to [cause such] make a non-stenographic recording shall give five days' notice to all other parties by certified mail, return receipt requested, and shall specify in said notice the type of non-stenographic recording which will be used.

[d.] b. After [such] the notice is given, any party may make a motion for relief under Rule [186b] 166b. [and the court shall make such orders as are permitted under such rule, if the court finds that justice requires an order to be made. However, i]If a hearing is not [obtained] held prior to the taking of the deposition, the non-stenographic recording shall be made subject to the court's ruling at a later time.

c. Any party shall have reasonable access to the original recording, and may obtain a duplicate copy at his own expense.

[b.] d. The expense of a non-stenographic recording shall not be taxed as costs, unless before the deposition is taken, the parties so agree, or the court so orders on motion and notice.

e. The non-stenographic recording shall not dispense with the requirement of a [written record] stenographic transcription of the deposition unless the court shall so order on motion and notice before the deposition is taken, and such order shall also make such provision concerning the manner of taking, preserving and filing the non-stenographic recording as may be necessary to assure that the recorded testimony will be intelligible, accurate

and trustworthy. Such order shall not prevent any party from having a [~~written record~~] stenographic transcription made at his own expense. In the event of an appeal, the non-stenographic recording shall be reduced to writing.

2. Deposition by Telephone. The parties may stipulate in writing, or the court may upon motion order, that a deposition be taken by telephone. For the purposes of this rule and Rules 201, 215a(1)(a) and 215a(2)(a), a deposition taken by telephone is taken in the district and at the place where the deponent is to answer questions propounded to him.

COMMENT: Old Rule 215c plus new deposition by telephone material. The deposition by telephone paragraph was taken from federal rule 30(b)(7), which was revised in 1980 to authorize depositions by telephone. According to the United States Supreme Court's Advisory Committee's Note concerning the amendment to the federal rule the last sentence "...is added to make it clear that when a deposition is taken by telephone it is taken in the district and at the place where the witness is to answer the questions rather than that where the questions are propounded." Moore's Rules Pamphlet (1981).

Rule [~~215b~~] 203. Failure of Party or Witness to Attend or to Serve Subpoena; Expenses

1. Failure of Party Giving Notice to Attend. If the party giving the notice of the taking of an oral deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

2. Failure of Witness to Attend. If [~~the~~] a party [~~giving the~~] gives notice of the taking of an oral deposition of a witness [~~fails to serve a subpoena upon him~~] and the witness [~~because of such failure~~] does not attend because of the fault of the party giving the notice, [~~and~~] if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

COMMENT: Old Rule 215b with modification. The current language of Rule 215b was taken verbatim from current federal rule 30(g). Since parties do not serve subpoenas under our practice, the current language of Rule 215c does not mesh with current Rule 201(1). It is recognized that the "fault" standard will need judicial construction.

Rule 204. [~~Written Cross-Questions on Oral Examination~~]

Examination, Cross-examination and Objections

1. Written Cross-Questions on Oral Examination. At any time before the expiration of ten days from the date of the service of the notice provided for in Rule 200, any party, [~~upon whom such notice is served~~] in lieu of participating in the oral examination may serve [~~other parties with~~] written questions [~~to the witness, and~~] on the party proposing to take the deposition who shall cause [~~such written questions~~] them to be [~~presented~~] transmitted to the officer authorized to take the deposition [~~and the answers of the witness to be taken thereto and returned as a part of the deposition~~] who shall propound them to the witness and record the answers verbatim.

[~~Rule 205. Witness Sworn~~]

2. Oath. Every person [~~so deposing~~] whose deposition is taken upon oral examination shall be first cautioned and sworn to testify the truth, the whole truth and nothing but the truth.

[~~Rule 206. Examination~~]

3. Examination. The witness shall be carefully examined, his testimony shall be [~~reduced to writing or typewriting~~] recorded at the time it is given and thereafter transcribed by the officer taking the deposition, or by some person under his personal supervision.[~~, or by the deponent himself in the officer's presence, and by no other person, and shall, after it has been reduced to writing or typewriting, be subscribed by the deponent.~~]

[~~Rule 207. Objections to Testimony~~]

4. Objections to Testimony. The officer taking [~~such~~] an oral deposition shall not sustain objections made to any of the testimony [~~taken, nor exclude same, but~~] or fail to record the testimony of the witness because an objection is made by any of

the parties or attorneys engaged in taking the testimony. [~~may have a~~]Any objections [~~they may make~~] made when the deposition is taken shall be recorded with the testimony and reserved for the action of the court in which the cause is pending, but the court shall not be confined to objections made at the taking of the testimony.

COMMENT: Old Rules 204-207 with modifications.

Rule [~~209~~] 205. Submission to Witness; Changes; Signing

When the testimony is fully transcribed the deposition officer shall [~~be~~] submit[~~ted~~] the deposition to the witness [~~for examination and shall be read to or by him~~] or if the witness is a party with an attorney of record, to [~~such~~] the attorney of record, for examination and signature, unless such examination and [~~reading~~] signature are waived by the witness and by the parties.[~~; provided that when the witness is a party to the suit with an attorney of record the deposition officer shall notify such attorney of record in writing by registered mail that the deposition is ready for such examination and reading at the office of such deposition officer, and if the witness does not appear and examine, read and sign his deposition within twenty (20) days after the mailing of such notice the deposition shall be returned as provided herein for unsigned depositions.~~]

Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with the statement of the reasons given by the witness for making [~~them~~] such changes. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the [~~deposition is not signed by the witness~~] witness does not sign and return the deposition within twenty days of its submission to him or his counsel of record, the officer shall sign it and state on the record the fact of the waiver of examination and signature or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed; unless on motion to suppress, made as provided in Rule [~~212~~] ____, the Court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

COMMENT: Old Rule 209 with modification. The modification gives the court reporter authority to file an unsigned deposition for both party and non-party witnesses.

~~[Rule 208. Depositions Certified and Returned~~

~~Such depositions shall be certified and returned by the officer taking the same, and opened and used as is provided in case of depositions on written questions. The party taking a deposition shall give prompt notice of its filing to all other parties.]~~

~~[Rule 208a. Certification of Charges~~

~~The officer taking an oral or written deposition shall include as a portion of his certification the amount of his charges for preparation of the completed deposition. The clerk of the court where such deposition is filed shall tax as costs the charges for preparing the original copy of the deposition.]~~

~~[Rule 210. Depositions Opened~~

~~Depositions, after being filed, may be opened by the clerk or justice at the request of either party or his counsel, and the clerk or justice shall indorse on such depositions upon what day and at whose request they were opened, signing his name thereto, and they shall remain on file for the inspection of either party.]~~

Rule 206. Certification and Filing by Officer; Exhibits; Copies; Notice of Filing

1. Certification and Filing by Officer. The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. The officer shall include the amount of his charges for the preparation of the completed deposition in the certification. Unless otherwise ordered by the court, he shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it by registered or certified

mail to the clerk thereof for filing.

2. Exhibits. Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them he may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if he affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

3. Copies. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

4. Notice of Filing. The person filing the deposition shall give prompt notice of its filing to all parties.

5. Inspection of Filed Deposition. After it is filed, the deposition shall remain on file and be available for the purpose of being inspected by the deponent or any party and the deposition may be opened by the clerk or justice at the request of the deponent or any party.

COMMENT: This is a new rule patterned upon federal rule 30(f). Paragraph 5 is based upon old Rule 210.

[Rule 211. Either Party May Use Depositions

Regardless of whether cross-questions have been propounded either party has the right to use the depositions on the trial.]

Rule [213] 207. Use of Depositions in Court Proceedings

1. Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with the following provisions:

a. [Depositions may be read in evidence upon the trial of, or upon the hearing of a motion or other interlocutory proceeding in, the suit in which they are taken, subject to all legal exceptions which might have been made to the questions and answers were the witness personally present before the court giving evidence.] Any deposition may be used by any person for any purpose without a showing that the witness is unable to attend or testify unless the court finds: (1) that in the interest of justice, the presentation of the testimony of the witness orally in open court is necessary; and, (2) the witness is able to attend and available to testify without compulsion or his attendance may be compelled by subpoena.

b. Substitution of parties pursuant to these rules does not affect the right to use depositions previously taken; and, when a suit in a court of the United States or of this or any other state has been dismissed and another suit involving the same subject matter is brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former suit may be used in the latter as if originally taken therefor.

[Rule 212. Objections to Deposition]

c. When a deposition shall have been filed in the court and notice given at least one entire day before the day on which the case is called for trial, no objection to the form [~~thereof, or to~~] of the deposition, to the form of the questions or answers or to errors occurring at the oral examination in the manner of taking the [~~same~~] deposition, shall be [~~heard~~] sustained, unless such objections are in writing and notice [~~thereof~~] of them is given to the opposite counsel before the trial commences.

COMMENT: This is a new rule. Structurally it is similar to federal rule 32. However, it retains the Texas view that depositions may generally be used in lieu of live testimony without a showing of unavailability. See, e.g., Hall v. White, 525 S.W.2d 860 (Tex. 1975); compare Rogers v. Yarbrough Construction Co., 291 S.W.2d 459 (Tex. Civ. App. - Austin 1956, writ ref'd n.r.e.) concerning discretion of trial court with respect to the order of witnesses at trial.

Paragraphs b and c are based upon the current wording of Rules 212 and 213. The changes made in current Rule 212 are designed to make it clearer that objections to the form of the question require written objections before the trial commences in the absence of agreement to the contrary. See Bankers Multiple Line Ins. Co. v. Gordon, 422 S.W.2d 244 (Tex. Civ. App. - Houston (1st Dist.) 1967, no writ).

Rule [~~189~~] 208. [~~Notice and Service on Written Questions~~]

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. 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 [~~of record~~] with [~~ten days'~~] a written notice [~~in writing~~] ten days before the deposition is to be taken. The notice shall state the name and [~~residence~~] if known, the address of the [~~witness~~] deponent, [~~or the place where he is to be found,~~] 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 [~~a subpoena duces tecum as authorized by~~] the production of documents or tangible things in accordance with Rule 201 is desired, a designation of the [~~books, papers, documents and tangible things~~] items to be produced by the [~~witness~~] deponent either by individual item or by category and which describes each item and category with reasonable particularity. [~~Whenever the adverse party is a corporation or joint stock association, service may be made upon the president, secretary or treasurer of such corporation or association, or upon the local agent representing such corporation or association in the county in which the suit is pending, or by leaving a copy of the notice and attached questions at the principal office of such corporation or association during office hours.~~]

A party may in his notice name as the witness a public 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 rules.

[~~Rule 190. Notice by Publication~~]

2. Notice by Publication. In all civil suits where it shall be shown to the court, by affidavit [~~filed therein~~], that [~~either~~] a party is beyond the jurisdiction of the court, or that he cannot be found, or has died since the commencement of the suit, and such death has been suggested at a prior term of court, so that the notice and copy of written questions cannot be served upon him for the purpose of taking depositions, and such party has [~~not~~] no attorney of record upon whom they can be served, or if he be deceased and all the persons entitled to claim by or through such deceased defendant have not made themselves parties to the suit, and are unknown, the party wishing to take depositions may file his written questions in the court where [~~said~~] the suit is pending, and the clerk of such court or justice of the peace shall thereupon cause a notice to be published in some newspaper in the county where the suit is pending, if there be a newspaper published in said county, but if not, then in the nearest county where a newspaper is published, once each week for two (2) consecutive weeks, stating the number of the suit, the names of the original parties, in what court the suit is pending, name and residence of the witness to whom the written questions are propounded, and that a deposition will be taken on or after the fourteenth day after the first publication of such notice.

[~~Rule 191. When Citation Served by Publication~~]

In suits where service of citation has been made by publication, and the defendant has not answered within the time

prescribed by law, service of notice of depositions upon written questions may be made at any time after the day when the defendant is required to answer, by filing [~~such~~] the notice and questions among the papers of the suit at least twenty days before such depositions [~~is~~] are to be taken.[~~; service of notice may also be made in the manner prescribed in the preceding rule.~~]

[~~Rule 192. Cross-Questions~~]

3. Serving Cross-Questions, Redirect Questions and Recross Questions. [~~Whenever one party serves notice of the deposition of a witness on written questions, a~~]Any party may serve cross-questions upon all other parties within ten days after [~~such~~] the notice and direct questions are served. Within five days after being served with cross-questions [~~the~~] a party [~~proposing to take the deposition~~] may serve redirect questions[~~,~~] upon all other parties. [~~and w~~]Within three days after being served with redirect questions a party may serve recross questions upon [~~the party proposing to take the deposition~~] all other parties. [~~Copies of the cross-questions, redirect questions and recross questins shall accompany the direct questions and shall be answered and returned therewith.~~] The court may for cause shown enlarge or shorten the time.

[~~Rule 197. Interpreter~~]

4. Deposition Officer; Interpreter. Any person authorized to administer oaths including notaries public (whether or not the person is a certified shorthand reporter), is an officer who is authorized to issue a subpoena or subpoena duces tecum for a written deposition as provided in Rule 201 and is an officer before whom a written deposition may be taken. [~~The~~] An officer [~~taking such~~] who is authorized to take a written deposition shall have authority, when he deems it expedient, to summon and swear an interpreter to facilitate the taking of the deposition.

[Rule ~~196.~~ ~~Taking of Written Depositions~~]

5. Officer to Take Responses and Prepare Record. ~~[Upon the appearance of the witness any officer authorized to take depositions shall proceed to take his answers to the questions and cross-questions, if any, reduce to writing, and shall cause the same to be signed and sworn to by the witness. The officer shall certify that the answers were signed and sworn to by the witness before him, and shall seal them up in an envelope, together with the questions and cross-questions, if any, write his name across the seal, and indorse on the envelope the names of the parties to the suit and of the witnesses, and shall direct the package to the clerk of the court or justice of the peace where the action is pending. If the depositions be sent by mail, the officer taking the same shall certify on the envelope enclosing the depositions that he in person deposited same in the mail for transmission, stating the date when and the post office in which the same are so deposited.]~~

A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rules 204, 205, and 206, to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and questions received by him.

The person filing the deposition shall give prompt notice of its filing to all parties.

After it is filed, the deposition shall remain on file and be available for the purpose of being inspected by the deponent or any party and the deposition may be opened by the clerk or justice at the request of the deponent or any party.

COMMENT: This rule is intended to set forth all matters concerning written depositions except for their use in court proceedings. That matter is intended to be covered by proposed Rule 207. With respect to the taking of the deposition, its filing and related procedures, the provisions applicable to depositions upon oral examination are adopted by cross-reference where this is sensible. Paragraph 4 makes it clear that

a person who is authorized to administer oaths, such as a notary public, may take a written deposition, even though he or she is not a certified shorthand reporter.

As a result of the passage of Article 2324b, the language of current Rules 189, 196 and 201 concerning the issuance of subpoenas and the taking of written depositions in long hand by notaries public has been placed in question. The issues are whether a notary public is an "officer authorized to take [written] depositions" under current Rule 196 and whether a notary can issue a subpoena duces tecum. See Tex. R. Civ. P. 201.

Old Rule 201 contained the following: "Upon proof of service of a notice to take a deposition, written or oral, any officer authorized to take such deposition as provided in Art. 3746 and Art. 2324a, Vernon's Ann. Tex. Civ. Stat., shall immediately issue and cause to be served upon the witness a subpoena directing him to appear before said officer at the time and place stated in the notice for the purpose of giving his deposition;"

Article 3746 authorizes a "notary public of the proper county" to issue subpoenas and to take depositions. See also Tex. Rev. Civ. Stat. Ann. art. 5954 which provides "Notaries Public shall have the same authority to take acknowledgements or proofs of written instruments, protest instruments permitted by law to be protested, administer oaths, and take depositions, as is now or may hereafter be conferred by law upon County Clerks, and provided that all Notaries Public shall print or stamp their names and the expiration dates of their commissions under their signatures on all such written instruments, protest instrumnts, oaths, or depositions;"

Current Rule 201 provides: "Upon proof of service of a notice to take a deposition, written or oral, the clerk or any officer authorized to take depositions and any shorthand reporter certified pursuant to Article 2324b. . . Tex R. Civ. P. 201, sec. 1.

Article 2324b provides:

"Section 1. No person may be appointed an official court reporter or deputy court reporter or may engage in the practice of shorthand reporting for use in litigation in the courts of this state unless that person is the holder of a certificate in full force and effect issued by the Supreme Court of Texas. (emphasis supplied).

* * *

Section 3. In this Act, 'the practice of shorthand reporting for use in litigation in the courts of this state' means the making of a verbatim record of an oral court proceeding, deposition, or proceeding before a grand jury, referee, or court commissioner by means of written symbols or abbreviations in shorthand or machine shorthand writing or oral stenography. (emphasis supplied).

* * *

Section 14. Nothing in this Act shall be construed to prohibit the employment of a shorthand reporter not holding a certificate until a certified shorthand reporter is available. Oral depositions, however, may be reported by a person not certified under this act only if the non-certified reporter delivers to the parties or their counsel present at the deposition, an affidavit that no certified shorthand reporter is then available or, on stipulation on the record at the commencement of the deposition, by the parties or their counsel present at the deposition. The provisions of this section do not apply to depositions taken outside this state for use in this state."

Paragraph 4 of the proposed rule makes it plain that Article 2324b does not preclude a notary public from taking a written deposition in long hand. For a construction of Article 2324b, see Burr v. Shannon, 593 S.W.2d 677 (Tex. 1980).

[~~Rule 214.--Matter Not Responsive~~

~~If any deposition shall contain any testimony not pertinent to the direct and cross-questions propounded, such matter shall be deemed surplusage, and may be stricken out by the court upon objection thereto.~~]

COMMENT: This rule is repealed as unnecessary.

[~~Rule 215.--One's Own Deposition~~

~~The deposition of either party to a suit who is competent to testify therein may be taken in his own behalf in the same manner and with like effect with the depositions of other witnesses.~~]

COMMENT: This rule is repealed, because it is not necessary to repeat information set forth in proposed Rules 200 and 208.

[Proposed] Rule 215a. Abuse of Discovery; Sanctions

1. Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

a. Appropriate court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to any district court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

b. Motion.

(1) If a party or other deponent which is a corporation or other entity fails to make a designation under Rules 200(2)(b), 201(4) or 208; or

(2) if a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails:

(a) to appear before the officer who is to take his deposition, after being served with a proper notice; or

(b) to answer a question propounded or submitted upon oral examination or upon written questions; or

(3) if a party fails:

(a) to serve answers or objections to interrogatories submitted under Rule 168, after proper service of the interrogatories; or

(b) to answer an interrogatory submitted under Rule 168; or

(c) to serve a written response to a request for inspection submitted under Rule 167, after proper service of the request; or

(d) in response to a request for inspection submitted under Rule 167 fails to respond that

the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion pursuant to Rule 166B.

c. Evasive or Incomplete Answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

d. Disposition of Motion: Award of Expenses. If the motion is granted, the court shall, after opportunity for hearing, require a party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation

trial court shall award expenses which are reasonable in relation to the amount of work expended in obtaining an order compelling compliance or in opposing a motion which is denied.

2. Failure to Comply with Order.

a. Sanctions by court in district where deposition is taken. If a deponent fails to appear or to be sworn or to answer a question after being directed to do so by a district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

b. Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under Rules 200(2)(b), 201(4) or 208 to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under paragraph 1 of this rule or Rule 167a, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(1) An order disallowing any further discovery of any kind or of a particular kind by the disobedient party;

(2) An order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;

(3) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(4) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(5) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part

thereof, or rendering a judgment by default against the disobedient party;

(6) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(7) Where a party has failed to comply with an order under Rule 167a(1) requiring him to produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

c. Sanction against nonparty for violation of Rule 167. If a nonparty fails to comply with an order under Rule 167 the court which made the order may treat the failure to obey as contempt of court.

3. Failure to Comply with Rule 169.

a. Deemed Admission. Each matter of which an admission is requested shall be deemed admitted unless, within the time provided by Rule 169, the party to whom the request is directed serves upon the party requesting the admissions a sufficient written answer or objection in compliance with the requirements of Rule 169, addressed to each matter of which an admission is requested. For purposes of this subdivision an evasive or incomplete answer may be treated as a failure to answer.

b. Motion. The party who has requested the admission may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of Rule 169, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of paragraph d of subdivision 1 of this rule apply to the award of expenses incurred in relation to the motion.

c. Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 169 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 169(1), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

4. Failure to Make Supplementation of Discovery Response in Compliance with Rule 166b. A party who fails to seasonably supplement his response to a request for discovery in accordance with paragraph 5 of Rule 166b shall not be entitled to present evidence which the party was under a duty to provide in a supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter when the information required by Rule 166b concerning the witness has not been disclosed, unless the trial court finds that good cause sufficient to require admission exists.

COMMENT: This is a new rule. Under the proposed discovery rules, Rule 170 is deleted because Rule 215a is revised to accommodate conduct in violation of Rule 167. The proposed revisions to Rules 168, 170 and 215a are intended to make it clearer under what circumstances the most severe sanctions authorized under the rules are imposable and would authorize the imposition of sanctions (expenses) directly upon an attorney who is responsible for violation of the discovery rules. It should be noted that the new proposed Rule 215a departs from the conclusion reached in the Lewis case [Lewis . Ill. Employers Ins. Co., 590 S.W.2d 119 (Tex. 1979)] and the reaffirmation of that holding in the Saldivar case [Saldivar v. Facit-Addo, Incorporated, 620 S.W.2d 778, 779 (Tex. Civ. App. - El Paso 1981, no writ)] because a motion to compel answers and the violation of an order granting the motion is prerequisite to the imposition of the more severe sanctions set forth in paragraph 2 of the proposed rule. On the other hand, an award of expenses, including reasonable attorney's fees may be made in connection with the granting of the motion to compel. See proposed Rule 215a(1) and (2).

The proposed rule attempts to bring all discovery sanctions under one roof. It includes specific provisions concerning the consequences of failing to comply with Rule 169. It also contains a section spelling out penalties imposable upon a party who fails to supplement discovery responses. In this connection, the proposal retains the same standard currently set forth in Rule 168(7). While this "good cause" standard has generated some divergence of analysis in the appellate courts, the Committee on the Administration of Justice believed that a more wooden approach would be unwise. See Duncan v. Cessna Aircraft Co., 632 S.W.2d 375, 384-385 (Tex. Civ. App. - Austin 1982, no writ); compare National Surety Corp. v. Rushing, 628 S.W.2d 90, 92-93 (Tex. Civ. App. -Beaumont 1981, no writ) -- "it is equally clear that some discretion still remains in the trial court despite the amendment [to Rule 168]; or stating the matter conversely, mandatory exclusion of the testimony of the unnamed witness is not required."

Rule 252. Application for Continuance

If the ground of such application be the want of testimony, the party applying therefor shall make affidavit that such testimony is material, showing the materiality thereof, and that he has used due diligence to procure such testimony, stating such diligence, and the cause of failure, if known; that such testimony cannot be procured from any other source; and, if it be for the absence of a witness, he shall state the name and residence of the witness, and what he expects to prove by him; and also state that the continuance is not sought for delay only, but that justice may be done; provided that, on a first application for a continuance, it shall not be necessary to show that the absent testimony cannot be procured from any other source.

The failure to obtain the deposition of any witness residing within 100 miles of the courthouse of the county in which the suit is pending shall not be regarded as want of diligence when diligence has been used to secure the personal attendance of such witness by the service of subpoena or attachment, under the rules of law, unless by reason of age, infirmity or sickness, or official duty, the witness will be unable to attend the court, or unless such witness is about to leave, or has left, the State or county in which the suit is pending and will not probably be present at the trial.

COMMENT: The Committee on Administration of Justice recommended that the last portion of Rule 186 become a new and second paragraph of Rule 252.

Consideration of this proposal should be in the context of a recommendation by Judge Ben Z. Grant that Rule 176 be amended to repeal the limitation of subpoena for witnesses to persons within 100 miles of the courthouse of the county in which the suit is pending. Judge Grant states that the limitation has "become obsolete because of our modern mode of transportation."

II. APPELLATE AND RELATED RULES

Explanation of Proposed Amendments to Appellate Rules

by Clarence A. Guittard

The following proposals are the result of a request by Justice Pope to examine all the appellate rules and make suggestions for any needed revisions and adjustments following our 1981 revisions. On the whole, no substantial changes in current practice are proposed, although a number of curative amendments are suggested. A summary of the proposals follows.

I. Rules Repealed

From my study, some rules would be repealed as obsolete and unnecessary or because their material provisions would be incorporated into other rules.

Rule 390	Party to File Own Transcript
Rule 392	Filed Transcript A Court Record
Rule 444	Affidavit of Inability
Rule 449	Return of Execution
Rule 450	Officer Failing to Make Return
Rule 453	Conclusions of Fact and Law
Rule 454	To State Reasons for Reversal
Rule 455	Supplemental Findings
Rule 462	What Questions Certified
Rule 463	Certifying Dissent
Rule 464	Papers Sent to Supreme Court
Rule 506	Judgment Becomes Final
Rule 508	Affidavit of Inability to Pay
Rule 511	Execution
Rule 512	Execution Returnable
Rule 513	Officer Failing to Make Return

II. Clarifying and Conforming Amendments

The following rules would be revised for the purpose of clarity or to conform to current practice:

Rule 359	Petition for Writ of Error
Rule 361	Cost Bond on Writ of Error
Rule 366	When Party Fails to Comply
Rule 367	Insufficiency of Bond to Secure Costs
Rule 368	Judgment Stayed
Rule 387a	Disposition on Motion or By Agreement
Rule 394	Issuance of Process
Rule 396	Withdrawing Papers; Restrictions
Rule 398	Papers Not To Be Removed
Rule 399	Disposition of Papers When Appeal Dismissed
Rule 402	Docketing Causes
Rule 406	Evidence on Motions
Rule 407	Motion to Delay Cause
Rule 408	Notations of Motions
Rule 411	Submission in Order of Filing
Rule 412	Order of Hearing

Rule 447	Execution on Failure to Pay Costs
Rule 448	Appellant to Recover Costs
Rule 451	Decision and Opinion
Rule 458	Motion and Second Motion for Rehearing
Rule 461	Questions of Law Certified
Rule 465	Motion to Certify
Rule 466	Instruments to Accompany Certificate
Rule 476	Consideration by Supreme Court
Rule 482	May Refer Case Back
Rule 484	When Application Dismissed or Refused
Rule 497	Order of Submission
Rule 505	Decision
Rule 507	Mandate to Issue

III. Minor Practice Changes

In a number of rules, minor changes in current practice are proposed:

(1) Rule 324 (Prerequisites of Appeal) would be amended to give the trial judge an opportunity on motion for new trial to consider factual insufficiency of evidence to support jury findings which he has no opportunity to consider in rendering judgment.

(2) Rule 329b (Time to File Motions) would be amended to provide that a motion for new trial or motion to modify the judgment would be waived unless presented to the judge for a ruling within sixty days after the judgment.

(3) In Rule 354 (Cost Bond or Deposit) the amount of the cost bond or deposit would be raised to a more realistic figure from $500 to $1,000.

(4) In Rule 355(b) (Party Unable to Give Cost Bond) the failure of appellant to give notice of filing of an affidavit of inability to give security for costs would result in extension of the time for contesting the affidavit rather than nullification of the affidavit.

(5) The provision of present Rule 364(e) (Supersedeas Bond) requiring the trial court to fix the amount of a supersedeas bond where the judgment is for other than money or property, as in cases of permanent injunction, would be modified to authorize the judge to deny supersedeas on filing of an appropriate bond by the appellee.

(6) Rule 365 (Review of Bond or Deposit) would be revised to authorize the appellate court to review for excessiveness the amount fixed by the trial court, and the additional cost or supersedeas bond required by the appellate court pursuant to Rule 365 would be filed with and approved by the clerk of the trial court rather than the clerk of the appellate court, with a certified copy filed in the appellate court.

(7) A provision would be added to Rule 376 directing the clerk to disregard a designation of "all papers filed."

(8) Rule 377 (Statement of Facts) would be revised to require the appellant to make a written request of designated

evidence to the official reporter at the time of perfecting his appeal. Also, provisions concerning preparation by the reporter of a narrative statement of facts would be eliminated. Rule 380 (Free Statement of Facts on Appeal for Paupers) would be reworded accordingly.

(9) Rule 430 (Amendment: New Appeal Bond or Deposit) would be revised to provide for filing the new bond in the trial court, with certified copy on appeal.

(10) Rule 442 (Mandate) would specify the time for issuance of the mandate in lieu of the present confusing reference to when the judgment "has become final." A similar change would be made in Rule 507 (Mandate) with respect to the Supreme Court.

(11) Rule 446 (Recall of Mandate) would provide that in lieu of a recall of the mandate from the party to whom it was delivered, the clerk should give a notice to the clerk of the trial court. A similar change would be made in Rule 510 (Mandate Recalled) with respect to the Supreme Court.

(12) Rule 491 (Rules of Courts of Appeals Applicable) would be broadened to provide that all rules prescribed for the courts of appeals shall govern in the Supreme Court to the extent applicable and not inconsistent with other rules.

(13) Rule 385 (Accelerated Appeals) would be amended to authorize the appellate court to hear accelerated appeals on original papers sent up from the trial court rather than on a transcript prepared by the clerk.

IV. New Rules Proposed

(1) Proposed Rule 329c (No Notice of Judgment) would reconcile the provisions of Rules 165a (Dismissal for Want of Prosecution) and 245 (Assignment of Cases for Trial) with the provisions of Rule 329b as recently amended. The procedure in both of these exceptional cases would be made the same. Certain provisions of Rules 165a and 245 would be deleted accordingly.

(2) Proposed Rule 363a (Preliminary Statement) would authorize the courts of appeals to adopt a local rule requiring a preargument conference procedure such as that said to be successful in a number of other states to reduce docket congestion.

(3) Proposed Rule 377a (Premature Appeal) would obviate dismissal of an appeal and the filing of a new appeal when an appeal is taken from an order that is later changed or corrected by the trial court.

(4) Proposed Rule 385b (Orders Pending Interlocutory Appeal) undertakes to define the relative powers of the trial court and appellate court pending an interlocutory appeal. For the most part, the proposal codifies present law. Innovations include permitting the trial court to dissolve a temporary injunction (but not to issue another in its place), authorizing the appellate court to issue temporary orders pending appeal to preserve the parties' rights on motion rather than by original writ, permitting further appealable orders to be brought up by

supplemental record rather than by separate appeal, authorizing the appellate court to issue its mandate immediately after its decision.

(5) Proposed Rule 402a (Withdrawal of Counsel) would define the procedure for withdrawal of counsel so as to provide protection for the client.

(6) Proposed Rule 443 (Court's Power Over Judgments) would set a six-month limit on the appellate court's power to change its judgment, which now seems to extend to the end of the term. Proposed Rule 509 would give the Supreme Court similar power for a period of one year.

(7) Proposed Rule 384 (Filing) would give a justice of the appellate court the same authority to permit papers to be filed with him as now given to trial judges by Rule 74.

V. Late Records

Amendments are proposed to conform Rules 385 (Accelerated Appeals) and 386 (Time To File Transcript and Statement of Facts) to the decision of the Supreme Court in B. D. Click Co. v. Safari Drilling Corp., 25 Tex. Sup. Ct. J. 346 (June 2, 1982). The amendment to Rule 386 would make explicit the Click interpretation that the appellate court has no authority to consider a late filed transcript or statement of facts, except as permitted by Rule 21c. Rules 389 (Transcript: Duty of Clerk on Receiving) and 389a (Statement of Facts. Duty of Clerk on Receiving) would restore former provisions of these rules requiring the clerk to examine the record for compliance with time requirements and notify the appellant if the record is late.

As an alternative, a proposed amendment to Rule 21c (Extension of Time on Appeal) would authorize the appellate court to permit late filing of the statement of facts (but not the transcript) if no objection is made within ten days or if appellant shows affirmatively that the delay will not prejudice any other party or interfere with the business of the court.

Another proposed amendment to Rule 21c relates to timely motions, which are not affected by the Click decision. This amendment would relieve the appellate courts of a substantial burden under the present rule to determine the reasonableness of explanations where a timely motion is agreed to or is not opposed.

APPELLATE AND RELATED RULES

LIST OF GROUP II RULES

GROUP II RULES (Cont'd)

RULE 21c. EXTENSION OF TIME ON APPEAL

(a) [~~(1)~~] An extension of time may be granted for late filing in a court of appeals [~~court of civil appeals~~] of a transcript, statement of facts, motion for rehearing, or application for writ of error if an agreed motion or a motion reasonably explaining the need therefor is filed within fifteen [~~(15)~~] days of the last date for filing as prescribed by the applicable rule or rules. The court may grant the motion without respect to the sufficiency of the explanation if no objection is made within ten days after the notice provided by Rule 409 is mailed.

(b) After the expiration of such fifteen day period, the court may permit late filing of a statement of facts if no other party objects within ten days after notice of such filing, or if an affirmative showing is made that the delay will not prejudice any other party or unduly interfere with the business of the court.

(c) [~~(2)~~] A motion for late filing of an application for writ of error shall be filed in, directed to and acted upon by the Supreme Court. A copy of the motion shall be filed at the same time in the court of appeals, [~~court of civil appeals~~] and the clerk of the Supreme Court shall notify the court of appeals [~~court of civil appeals~~] of the action taken on the motion by the Supreme Court.

(d) [~~(3)~~] Motions for late filing of the other instruments designated herein shall be filed in, directed to and acted upon by the court of appeals [~~court of civil appeals~~] in which the cause is pending. Any order of the court of appeals [~~court of civil appeals~~] granting or denying a motion for late filing of any such instruments shall be reviewable by the Supreme Court for arbitrary action or abuse of discretion.

Change by amendment effective _____, 1983: The provisions in subdivision (a) concerning agreed motions and absence of objection have been added, and subdivision (b) is new.

Comment: (1) The proposed amendment to subdivision (a) would relieve the appellate courts of the considerable burden of

evaluating explanations when the appellee agrees or has no objection. Rarely do the motions in such cases provide information showing the necessary information, such as when the request for the statement of facts was made.

(2) The proposed subdivision (b) is alternative to the proposals for amending Rules 385(d), 386, 389 and 389a to conform to B. D. Click Co. v. Safari Drilling Corp., ___ S.W.2d ___, 25 Tex. Sup. Ct. J. 346 (June 2, 1982). The rationale is that since the jurisdiction of the appellate court has already been invoked by perfection of the appeal and filing of the transcript, the court should have control over what materials it considers in deciding the appeal and what sanctions it applies for violation of the rules. In this connection, compare Rule 415, which provides that if the appellant fails to file his brief within the time prescribed, the court may "decline to dismiss the appeal, whereupon it shall give such direction to the cause as it may deem proper." The rationale for applying a different rule to the statement of facts is supported principally by tradition.

(3) The same considerations may apply to the transcript, but no change is proposed in this respect, since most delays in this respect have been obviated by the provisions of Rule 376 requiring the clerk to prepare the transcript when the appeal is perfected and deliver it to the appellate court rather than to the appellant.

(4) The standard to be applied in considering a late motion is specified in view of the Supreme Court's concern for the absence of such a standard in B. D. Click Co. v. Safari Drilling Corp., ___ S.W.2d ___, 25 Tex. Sup. Ct. J. 346 (June 2, 1982). If the parties agree to the late filing, or no objection is made, the court may still refuse to consider a late statement of facts if it would unduly interfere with the business of the court.

(5) No further deadline is provided on the assumption that specification of any additional period would encourage further delay. The court may prevent inordinate delay in

RULE 21c. - Continued

termination of litigation by routine procedures for dismissal or affirmance on the court's own motion, as authorized by Rule 387(b).

[By Guittard]

Rule 324. Prerequisites of Appeal

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

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

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

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

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

(4) A complaint of inadequacy or excessiveness of the damages found by the jury; provided that a complaint of excessiveness of damages may also be presented by a motion to reform or correct the judgment.

(5) Incurable jury argument.

~~[A motion for new trial shall not be a prerequisite to the right to complain on appeal, in any jury or non-jury case. A motion for new trial may be filed by any party, however, and the omission of a point in such motion shall not preclude the right to make the complaint on appeal. Notwithstanding the foregoing, it shall be necessary to file a motion for new trial in order to present a complaint upon which evidence must be heard, such as one of jury misconduct or of newly discovered evidence.]~~

(c) Judgment Notwithstanding Findings; Cross-Points.

When judgment is rendered non obstante veredicto or notwithstanding the findings of a jury on one or more special issues, the appellee may bring forward by cross-point contained in his brief filed in the Court of ~~[Civil]~~ Appeals any ground which would have vitiated the verdict or would have prevented an affirmance of the judgment had one been rendered by the trial court in harmony with the verdict, including although not limited to the ground that one or more of the jury's findings have insufficient support in the evidence or are against the overwhelming preponderance of the evidence as a matter of law, and the ground that the verdict and judgment based thereon should be set aside because of improper argument of counsel. The failure to bring forward by cross-points such grounds as would vitiate the verdict should be deemed a waiver thereof, save and except such grounds as require the taking of evidence in addition to that adduced upon the trial of the cause.

Change by amendment effective_____:
The requirements concerning factual complaints of jury findings and excessive and inadequacy of damages and incurable jury argument have been added, and minor textual changes have been made.

COMMENT: Since the court must render judgment on the verdict if there is any evidence to support the findings of the jury, the judge has no opportunity to consider whether the evidence is factually sufficient to support such findings. Since he may be in a better position to evaluate the evidence than the appellate court, he should have an opportunity to pass on these questions before they are presented on appeal. The same problem does not arise when the judge, rather than the jury, has found the facts.

[By Guittard]

NOTE BY POPE: I had also prepared a revised rule. Professor Hadley Edgar has raised this same point. The present rule has produced some confusion. Compare Brown v. Brown, 590 S.W.2d 808 (Tex. Civ. App.--Eastland 1979, no writ), with Brock v. Brock, 586 S.W.2d 927 (Tex. Civ. App.--El Paso 1979, no writ). Also compare Howell v. Coca-Cola Bottling Company of Lubbock, Inc., 599 S.W.2d 801, 802 (Tex. 1980),

which disapproved Brock v. Brock. The Supreme Court more recently wrote in Pirtle v. Gregory, 629 S.W.2d 919 (Tex. 1982) saying, ". . . one should not be permitted to waive, consent to, or neglect to complain about an error at trial and then surprise his opponent on appeal by stating his complaint for the first time."

Professor Hadley Edgar recommends that the last sentence of this rule be revised to read:

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

Rule 329b. Time for Filing Motions

(a) (No change.)

(b) (No change.)

(c) In the event an original or amended motion for new trial or a motion to modify, correct or reform a judgment is not presented to the court for a ruling within sixty days after judgment is signed, it shall be considered waived; but such waiver shall not affect the time for perfecting an appeal or writ of error. If so presented, but not determined by written order signed within seventy-five days after the judgment was signed, it shall be considered overruled by operation of law on expiration of that period.

(d) (No change.)

(e) (No change.)

(f) (No change.)

(g) (No change.)

(h) If a judgment is modified, corrected or reformed in any respect, the time for appeal shall run from the time the modified, corrected, or reformed judgment is signed, but if a correction is made pursuant to Rule 316 or 317 after expiration of the period of plenary power provided by this rule, no complaint shall be heard on appeal that could have been presented in an appeal from the original judgment.

Change by amendment effective _____:
The provision for waiver of the motion if not presented within sixty days has been added to subdivision (c), and the last clause has been added to subdivision (h).

COMMENT: (1) Since the time for appeal no longer runs from the overruling of a motion for new trial, the principal application of the amendment to subdivision (c) would be when a motion for new trial or a motion to modify the judgment is a prerequisite to the presentation of a point on appeal. In such cases, as where jury misconduct is alleged or where a motion to modify raises a question not previously considered by the judge, the motion should be presented to the judge for ruling. (2) The proposed amendment would avoid opening the case for a general appeal years after the time for appeal has expired by the device of a corrected judgment nunc pro tunc pursuant to Rule 316 or 317.

RULE 329c. NO NOTICE OF JUDGMENT

(a) If neither the party adversely affected by a judgment nor his counsel have had actual notice of the signing of the judgment within twenty days after the judgment was signed, the periods provided in subdivisions (a), (b), (d) and (g) of Rule 329b, shall be deemed to have begun to run upon receipt by such party or his counsel of actual notice of the signing in the following situations:

(1) When a claim for affirmative relief has been dismissed for want of prosecution, and neither the party seeking such relief nor his counsel has had actual notice of the court's intention to dismiss the claim for want of prosecution, as required by Rule 165a, before the judgment was signed; or

(2) When a contested case was tried in the absence of a party and his counsel, neither of whom has had actual notice of the setting of the case for trial, as required by Rule 245, before the judgment was signed.

(b) Notwithstanding subdivision (a) of this rule, in no case shall the period provided by subdivision (a), (b), (d) or (g) of Rule 329b be extended to more than ninety days after the judgment was signed.

(c) This rule shall apply only upon a showing by evidence, on motion and notice, that the requirements of this rule have been met.

Source: This is a new rule embodying similar provisions of Rule 165a and 245.

Comment: (1) The proposal would give the same treatment to a party who had no notice of a setting for trial as to a party who had no notice of the court's intention to dismiss for want of prosecution.

(2) The ultimate limit of ninety days provided by Rule 245 is proposed for both kinds of cases, rather than the six-months limit of Rule 165a.

(3) The twenty-day provision of Rule 165a is proposed on the theory that in all such cases the party would have ten days in which to file a motion that would extend the time for the court to act under Rule 329b.

(4) Query: Should the limitations of Rules 165 and 245, as embodied in subdivisions (a)(1) and (a)(2), be eliminated, so that this rule would apply to all parties who have no notice of signing the judgment within twenty days? This result would be accomplished by deleting from subdivision (a) both subdivisions (1) and (2) and also the preceding phrase, "in the following situations." In this form the rule would afford relief when the clerk fails to send the notice provided by Rule 306d and the parties do not discover that the judgment has been signed until after thirty days has run. See Petro-Chemical Transport Inc. v. Carroll, 514 S.W.2d 240, 243 (Tex. 1974); Kollman Stone Industries, Inc. v. Keller, 574 S.W.2d 249 (Tex. Civ. App. - Beaumont 1978, no writ).

[By Guittard]

Rule 354. Cost Bond or Deposit

(a) Cost Bond. Unless excused by law, the appellant shall execute a bond payable to the appellee in the sum of $1000 [~~$500~~] unless the court fixes a different amount upon its own motion or motion of either party or any interested officer of the court. If the bond is filed in the amount of $1000 [~~$500~~], no approval by the court is necessary. The bond on appeal shall have sufficient surety and shall be conditioned that appellant shall prosecute his appeal or writ of error with effect[~~,~~] and shall pay all costs which have accrued in the trial court and the cost of the statement of facts and transcript. Each surety shall give his post office address. Appellant may make the bond payable to the clerk instead of the appellee, and same shall inure to the use and benefit of the appellee and the officers of the court, and shall have the same force and effect as if it were payable to the appellee.

(b) Deposit. In lieu of a bond, appellant may make a deposit with the clerk pursuant to Rule 14c in the amount of $1000 [~~$500 in cash~~], less such sums as have been paid by appellant on the costs, and in that event the clerk shall file among the papers his certificate showing that the deposit has been made and copy same in the transcript, and this shall have the force and effect of an appeal bond.

(c) Increase or Decrease of Amount. Upon the court's own motion or motion of any party or any interested officer of the court, the court may increase or decrease the amount of the bond or deposit required. The trial court's power to increase the amount [~~of the bond~~] shall continue for thirty days after the bond or certificate is filed, but no order increasing the amount [~~of the bond~~] shall affect perfecting of the appeal or the jurisdiction of the appellate court. If a motion to increase the amount

[~~of the bond~~] is granted, the clerk and official reporter shall have no duty to prepare the record until the appellant complies with the order [~~increasing the bond~~]. If the appellant fails to comply with such order, the appeal shall be subject to dismissal or affirmance under Rule 387. No motion to increase the amount [~~of the bond~~] shall be filed in the appellate court until thirty days after the bond or certificate is filed.

(d) Notice of Filing. [~~(b)~~] Notification of the filing of the bond or certificate of deposit shall promptly be given by counsel for appellant by mailing a copy thereof to counsel of record or each party other than the appellant or, if a party is not represented by counsel, to the party at his last known address. Counsel shall note on each copy served the date on which the appeal bond or certificate was filed. Failure to serve a copy shall be ground for dismissal of the appeal or other appropriate action if appellee is prejudiced by such failure.

Change by amendment effective _____:
The amount of the bond has been increased, and the provision for dismissal or other sanctions for failure to serve a copy on appellee has been added.

COMMENT: (1) The amount proposed is more realistic in view of the increased costs since the $500 figure was adopted in 1976. The increase will obviate some motions to increase the amount.

(2) The effect of failure to notify appellee that an appeal bond has been perfected has not been clear. The proposal is consistent with Valley International Properties, Inc. v. Brownsville Savings and Loan, 581 S.W.2d 222 (Tex. Civ. App.--Corpus Christi 1979, no writ); Harrison v. Harrison, 543 S.W.2d 176 (Tex. Civ. App.--Houston [14th Dist.] 1976, no writ).

[By Guittard]

NOTE BY POPE: Judge Paul S. Colley recommends that we add the words permitting the judge to increase the amount of the bond on his own motion.

Rule 360. Appeal by Writ of Error to Court of Appeals

A party may appeal a final judgment to the Court of Appeals by petition for writ of error by complying with the requirements set forth below:

1. Filing Petition. The party desiring to sue out a writ of error shall file with the clerk of the court in which the judgment was rendered a written petition signed by him or by his attorney, and addressed to the clerk.

2. No Participating Party at Trial. No party who participates either in person or by his attorney in the actual trial of the case in the trial court shall be entitled to review by the Court of Appeals through means of writ of error.

3. Requisites of Petition. The petition shall state the names and residences of the parties adversely interested, shall describe the judgment with sufficient certainty to identify it, and shall state that he desires to remove the same to the Court of [~~Civil~~] Appeals for revision and correction.

4. Time for Filing. The writ of error, in cases where the same is allowed, may be sued out at any time within six months after the final judgment is rendered and signed.

5. Cost Bond or Substitute. At the time of filing the petition, or within the six months provided by section 4, the appellant shall file with the clerk an appeal bond, cash deposit in lieu of bond, affidavit of inability to pay costs, or a notice of appeal if no bond is required, as provided by these rules for appeals.

6. Notice. When the petition for writ of error and cost bond, or the clerk's certificate showing cash deposit in lieu of bond, or affidavit of inability to pay costs, or the notice of appeal, if permitted, is filed, the clerk shall notify the parties by mailing a copy of the petition and bond, or the

Paragraph 5 is present Rule 361 with words added to cover other methods to perfect an appeal. It also conforms the language to the holding that simultaneous filing of the petition and bond are not required so long as both are filed within six months. Spears v. Brown, 552 S.W.2d 560 (Tex. Civ. App.--Dallas 1977, no writ).

Paragraph 6 is the first long sentence of Rule 362 broken into two sentences.

Paragraph 7 is the last two sentences of present Rule 362.

Paragraph 8 is Rule 363 shortened and modernized.

Rule 359 becomes section 1, Rule 360.

Rule 361 becomes section 5, Rule 360.

Rule 362 becomes sections 6 and 7, Rule 360.

Rule 363 becomes section 8, Rule 360.

[Prepared by Pope]

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Rule 359. Petition for Writ of Error. Repealed.

Rule 361. Cost Bond on Writ of Error. Repealed.

Rule 362. Notice of Petition for Writ of Error. Repealed.

Rule 363. Appeal or Writ of Error Perfected. Repealed.

Rule 363a. Preliminary Statement

In order to manage the docket more efficiently and to facilitate preliminary abbreviations of the record, limitation of points on appeal, and possible settlement, the appellate court may, by rule, require the appellant to file with the appellate court, at the time of perfecting his appeal or at some other specified time, a brief statement of the nature of the case, the questions that probably will be raised on the appeal, and other pertinent information. Such rule may also provide the procedure for such conferences and may direct the parties or their attorneys, or both, to appear for a conference with a member of the court or other staff person designated by the court. No member of the court or staff person so conferring shall divulge any information obtained at the conference to the justices of the court to whom the case may be assigned.

Source: New rule effective _____.

COMMENT: Several states have programs for preliminary conferences to discuss settlement and reduction of the scope of appeals. Such programs are said to be successful in a substantial proportion of appeals and thus to be important factors in reducing docket congestion. For maximum effect, the conferences should take place early, before expenses are incurred for briefing and preparing the record. Preliminary statements from counsel have been found to be indispensable to such a program. The First Court of Appeals in Houston already has such a local rule.

[Prepared by Guittard]

Rule 364. Supersedeas Bond or Deposit

(a) May Suspend Execution. Unless otherwise provided by law or these rules, an appellant may suspend the execution of the judgment [~~may do so~~] by filing [~~giving~~] a good and sufficient bond to be approved by the clerk, or making the deposit provided by Rule 14c, payable to the appellee in the amount provided below, [~~a sum at least the amount of the judgment, interest, and costs~~] conditioned that the appellant shall prosecute his appeal or writ of error with effect[~~,~~] and, in case the judgment of the Supreme Court or Court of [~~Civil~~] Appeals shall be against him, he shall perform its judgment, sentence or decree[~~,~~] and pay all such damages as said court may award against him.

(b) Money Judgment. When the judgment awards recovery of a sum of money, the amount of the bond or deposit shall be at least the amount of the judgment, interest, and costs.

(c) [~~(b)~~] Land or Property. When [~~Where~~] the judgment is for the recovery of land or other property, the bond or deposit shall be further conditioned that the appellant shall, in case the judgment is affirmed, pay to the appellee the value of the rent or hire of such property in any suit which may be brought therefor.

(d) [~~(c)~~] Foreclosure on Real Estate. When [~~Where~~] the judgment is for the recovery of or foreclosure upon real estate, the appellant may supersede the judgment insofar [~~in so far~~] as it decrees the recovery of or foreclosure against said specific real estate by filing [~~giving~~] a supersedeas bond or making a deposit in the amount to be fixed by the court below, not less than the rents and hire of said real estate; but if the amount of said supersedeas bond or deposit is less than the amount of the money judgment, with interest and costs, then the appellee shall be allowed to have his execution against any other property of appellant.

(e) [~~(d)~~] Foreclosure on Personal Property. When [~~Where~~] the judgment is for the recovery of or foreclosure upon specific personal property, the appellant may supersede the judgment insofar [~~in so far~~] as it decrees the recovery of or foreclosure against said specific personal property or by filing [~~giving~~] a supersedeas bond or making a deposit in an amount to be fixed by the court below, not less than the value of said property on the date of rendition of judgment, but if the amount of the supersedeas bond or deposit is less than the amount of the money judgment with interest and costs, then the appellee shall be allowed to have his execution against any other property of appellant.

(f) [~~(e)~~] Other Judgment. When [~~Where~~] the judgment is for other than money or property or foreclosure, the bond or deposit shall be in such amount to be fixed by the said court below as will secure the plaintiff in judgment in any loss or damage occasioned by the delay on appeal, [~~.~~] but the court may decline to permit the judgment to be suspended on filing by the plaintiff of a bond or deposit to be fixed by the court in such an amount as will secure the defendant in any loss or damage occasioned by any relief granted if it is determined on final disposition that such relief was improper.

(g) [~~(f)~~] Child Custody. When [~~Where~~] the judgment is one involving the care or custody of a child, the appeal, with or without a supersedeas bond or deposit shall not have the effect of suspending the judgment as to the care or custody of the child, unless it shall be so ordered by the court entering the jugment. However, the appellate court, upon a proper showing, may permit the judgment to be superseded in that respect also.

(h) [~~(g)~~] For State or Subdivision. When [~~Where~~] the judgment is in favor of the State, a municipality, a State agency,

or a subdivision of the State in its governmental capacity, and is such that the judgment holder has no pecuniary interest in it and no monetary damages can be shown, the bond or deposit shall be allowed and its amount fixed within the discretion of the trial court, and the liability of the appellant [~~on the bond~~] shall be for the [~~its~~] face amount if the appeal is not prosecuted with effect. The discretion of the trial court in fixing the amount [~~of the bond~~] shall be subject to review. Provided, that under equitable circumstances and for good cause shown by affidavit or otherwise, the court rendering judgment on the bond or deposit may allow recovery for less than its full face amount.

(i) [~~(b)~~] Certificate of Deposit. If the appellant makes a deposit in lieu of a bond, [~~where bond is permitted under this rule, appellant may deposit with the clerk cash equivalent to the amount of the required bond.~~], [~~T~~]the clerk's certificate that the deposit has been made shall be sufficient evidence thereof.

Change by amendment effective _____: The provision authorizing the court to decline to permit the judgment to be suspended has been added to subdivision (f), and references to the deposit have been made to conform to Rule 14c. The sections have been redesignated.

COMMENT: When a temporary injunction is granted, Rule 385(f) gives the trial court discretion as to whether to allow it to be suspended by a supersedeas bond pending an interlocutory appeal. Caldwell v. Kingsberry, 451 S.W.2d 252 (Tex. Civ. App.--Austin 1970, no writ). No such discretion exists in the case of a permanent injunction, although one of the grounds for injunctive relief may be inadequacy of the remedy of damages, which would be the only recovery on the bond. Burgher v. Chrisman, 604 S.W.2d 536, 537 (Tex. Civ. App.--Dallas 1980, no writ). On the other hand, unlimited discretion to permit suspension of a permanent injunction would be inappropriate in the absence of a bond to protect the defendant in the event of a reversal, as in the case of a temporary injunction. Consequently, the present proposal would authorize the court to deny the supersedeas on filing of a bond by the plaintiff.

This proposal would facilitate the policy of the appellate courts to encourage trial courts and lawyers to accelerate trial of injunction cases on the merits in lieu of temporary injunction hearings and appeals. This policy may be frustrated if the plaintiff prefers to have a temporary injunction because a permanent injunction, however promptly it may be granted, could be superseded pending appeal. See Burgher v. Chrisman, supra.

[Prepared by Guittard]

RULE 365. REVIEW OF BOND OR DEPOSIT [~~ADDITIONAL BOND~~]

(a) Sufficiency. The sufficiency of a cost or supersedeas bond or deposit shall be reviewable by the appellate court for [~~and said court may require additional bond or security in case of the~~] insufficiency of the amount [~~of said bond~~] or of the sureties [~~thereon~~] or of the securities deposited, whether arising from initial insufficiency [~~fixing of an inadequate amount in the trial court~~] or from any subsequent condition which may arise affecting the sufficiency of the [~~said~~] bond or deposit. The court in which the appeal is pending shall, upon motion [~~proper~~] showing [~~of~~] such insufficiency, require [~~the giving of~~] an additional bond or deposit to be filed in and approved by the clerk of the trial court, and a certified copy to be filed in the appellate court.

(b) Excessiveness. In like manner, the appellate court may review for excessiveness the amount of the bond or deposit fixed by the trial court and may reduce the amount if found to be excessive.

Change by amendment effective _____, 1983: Appellate review is extended to a deposit in lieu of bond, and to excessiveness of the amount. The additional bond is to be filed in the trial court, and a certified copy in the appellate court.

Comment: (1) The proposal states the current practice with respect to deposits in lieu of bond. Driscoll Foundation v. Nueces County, 445 S.W.2d 1, 2, n.1 (Tex. Civ. App. - Beaumont) writ dism'd and ref'd n.r.e., 450 S.W.2d 320 (TEx. 1969). See Woods Exploration & Producing Co. v. Arkla Equipment Co., 528 S.W.2d 568, 570 (Tex. 1975)(extending Rule 430 to deposits in lieu of bond).

(2) Review of sufficiency of the deposit would also extend to review of sufficiency of securities deposited in lieu of bond under Rule 14c.

(3) Clerks of appellate courts are not trained or equipped for the approval of bonds, which is routine for clerks of trial courts. Consequently, it is proposed that the appellant be required to file the additional bond in the trial court and a

certified copy in the appellate court.

(4) No remedy is now available if the trial court prevents supersedeas by requiring an excessive bond. Harrington v. Young Men's Christian Association, 440 S.W.2d 354, 357 (Tex. Civ. App. - Houston [1st Dist.] 1969), rev'd on other grounds, 452 S.W.2d 423 (Tex. 1970).

[Prepared by Guittard]

Rule 366. When Party Fails to Comply

~~[Upon failure to comply with the rule of the court ordering the execution of said additional supersedeas bond within a period of twenty days after such order is served, the court in which said appeal or writ of error is pending shall issue an order to the trial court, directing or permitting the issuance of execution on the judgment appealed from; but said appeal or writ of error shall not be dismissed, but continued upon the docket as if said cause had been appealed or writ of error granted upon cost bond, provided the clerk of the court in which said appeal or writ of error is pending is satisfied that the original bond is still sufficient when considered as a cost bond.~~]

If the appellate court requires additional bond or other security for supersedeas, execution of the judgment shall be suspended for twenty days after the order is served. If the appellant fails to comply with the order within that period, the clerk shall notify the trial court that execution may be issued on the judgment, but the appeal shall not be dismissed unless the clerk finds that the bond or deposit is sufficient under Rule 354 to secure the costs. The additional security shall not release the liability of the surety of the original bond.

Change by amendment effective _____:
The rule has been rewritten.

COMMENT: The proposal makes no change in the current practice, but makes clear that suspension of the judgment continues for the period allowed to comply with the order requiring additional bond.

[Prepared by Guittard]

Rule 367. Insufficiency of Bond to Secure Costs

~~[Bond Insufficient as Cost Bond]~~

~~[In the event that said clerk shall consider the original supersedeas bond insufficient when considered as a cost bond, then the said appeal or writ of error shall be dismissed, unless the appellant within twenty days after notice served by the clerk that the said bond is deemed insufficient for the purposes of the cost bond, shall execute a new bond satisfactory to such clerk, sufficient to secure the payment of the costs theretofore accrued, or that may thereafter accrue in the further prosecution of such appeal or writ of error. The giving of said additional original bond or bonds shall not release the liability of the sureties on the original supersedeas bond.]~~

If the clerk finds that the original supersedeas bond or deposit is insufficient to secure the costs, he shall notify appellant of such insufficiency. If appellant fails, within twenty days after such notice, to file a new bond or make a new deposit in the trial court sufficient to secure payment of the costs in compliance with Rule 354 and to file a certified copy of the bond or certificate of deposit in the appellate court, the appeal or writ of error shall be dismissed. The additional security shall not release the liability of the surety on the original supersedeas bond.

Change by amendment effective _____: The rule has been reworded and the reference to the deposit has been added.

COMMENT: No change in prevailing practice.

[Prepared by Guittard]

RULE 368. JUDGMENT STAYED

Upon the filing and approval of a [~~the~~]proper supersedeas bond or the making of a deposit in compliance with Rule 364 or Rule 365, execution of the judgment, or so much thereof as has been superseded, shall be suspended [~~stayed~~], and if [~~should~~] execution has [~~have~~] been issued [~~thereon~~], the clerk shall forthwith issue a writ of supersedeas.

Change by amendment effective , 1983: The reference to the deposit has been added, and minor textual changes have been made.

Comment: No change in current practice.

[Prepared by Guittard]

RULE 376. TRANSCRIPT

Upon perfection of an appeal or writ of error, as provided by Rule 363, [~~the filing of the cost bond or deposit~~] the clerk of the trial court shall prepare under his hand and seal of the court and immediately transmit to the appellate court designated by the appealing party a true copy of the proceedings in the trial court, and, unless otherwise designated by agreement of the parties, shall include the following: the live pleadings upon which the trial was held; [~~the order of the court upon any motions or exceptions as to which complaint is made;~~] the charge of the court and the verdict of the jury, or the findings of fact and conclusions of law; bills of exceptions; the judgment of the court; the motion for new trial and the order of the court thereon; the notice of limitation of appeal with the date of giving or filing the same; any statement of the parties as to the matter to be included in the record; the bond on appeal or the certificate, affidavit, or notice in lieu of bond; a certified bill of costs, including the cost of the transcript and the statement of facts, if any, and showing any credits for payments made thereon; and any filed paper either party may designate as material, but the clerk shall disregard any general designation, such as one for "all papers filed in the cause." [~~When a cost bond or deposit is excused by law, the clerk shall comply with this rule upon the filing of a notice of appeal filed pursuant to Rule 356.~~

[~~When an affidavit of inability to pay or secure costs of appeal is filed, the clerk shall comply with this rule when the prescribed period has passed without contest, or when a contest has been filed and overruled pursuant to Rule 355.~~] If no additional papers are designated by any party when the appeal has been perfected, the clerk shall treat the perfection of the appeal as a designation by the appellant of the papers specified in this rule and shall include any additional papers designated before the transcript has been completed.

Change by amendment effective , 1983: The last sentence has been added and minor textual changes have been made.

Comment: (1) This proposal would not change the present practice, but would make explicit the clerk's duty to prepare the transcript without waiting for designations by the parties.

(2) The provision that the clerk shall prepare the transcript "upon perfection of the appeal" would obviate separate provisions for the various methods of perfecting an appeal.

(3) The requirement to include "the order of the court upon any motion or exception as to which complaint is made" would be deleted because the clerk has no means to determine what complaints will be made on the appeal.

(4) The direction to disregard general designations is proposed because attorneys and clerks have persisted in this practice, notwithstanding occasional taxing of costs to the prevailing party under Rule 382.

[Prepared by Guittard]

Rule 377. Statement of Facts

(a) Appellant's Request. In order to present a statement of facts on appeal, the appellant, at or before the time of perfecting the appeal, shall make a written request to the official reporter designating the portion of the evidence and other proceedings to be included therein. A copy of such request shall be filed with the clerk of the trial court and another copy served on the appellee.

(b) Appellee's Request. Within ten days after service of a copy of appellant's request, any party may in the same manner request additional portions of the evidence and other proceedings to be included.

(c) [~~(b)~~] Abbreviation of Statement. All matters not essential to the decision of the questions presented on appeal shall be omitted. Formal parts of all exhibits and more than one copy of any document appearing in the transcript or the statement of facts shall be excluded. All documents shall be abridged by omitting all irrelevant and formal portions thereof.

(d) Partial Statement. If appellant requests or prepares a partial statement of facts, he shall include in his request or proposal a statement of the points to be relied on and shall thereafter be limited to such points. If such statement is filed, there shall be a presumption on appeal that nothing omitted from the record is relevant to any of the points specified or to the disposition of the appeal. Appellee may designate additional portions of the evidence to be included in the statement of facts.

(e) Unnecessary Portions. If either party requires [~~in either narrative or question and answer form~~] more of the testimony or other proceedings than is necessary, he shall be required by the appellate court to pay the costs thereof, regardless of the outcome of the appeal.

(f) [~~(e)~~] Certification by Court Reporter. The statement of facts shall be in sufficient form to be filed in the appellate court when it is certified by the official court reporter. Any inaccuracies may be corrected by agreement of the parties. Should any dispute arise, after filing in the appellate court as to whether the statement of facts accurately discloses what occurred in the trial court, the appellate court shall submit the matter to the trial court, which shall, after notice to the parties and hearing, settle the dispute and make the statement of facts conform to what occurred in the trial court.

(g) Reporter's Fees. The official court reporter shall include in his certification the amount of his charges for preparation of the statement of facts. The Supreme Court [~~of Texas~~] may from time to time make an order providing the fees which court reporters may charge in civil judicial proceedings.

(h) Form. The Supreme Court will make an order or orders directing the form of the statement of facts and the court reporter will prepare the same in conformity therewith.

(i) Narrative Statement. A statement of facts prepared by the official reporter shall be in question and answer form. In lieu of requesting such a statement of facts, [~~A~~] a party may prepare and file with the clerk of the trial court a condensed statement in narrative form of all or part of the testimony and deliver a true copy to the opposing party or his counsel, and such opposing party, if dissatisfied with the narrative statement, may within ten days after such delivery, require the testimony in question and answer form to be substituted for all or part thereof.

Change by amendment effective _____: Subdivisions (a), (b) and (i) are revisions of former subdivisions (a) and (c). Other subdivisions have been rearranged and designated. The requirement of a written request to the court reporter at or before the time of

perfecting the appeal has been added. The provision for preparation of a narrative statement by the court reporter has been eliminated.

COMMENT: (1) Present subdivision (a) assumes that preparation of a narrative statement is the normal procedure unless one of the parties expressly designates the testimony in question and answer form. The proposal would eliminate narrative statements by the official reporter as obsolete, but would retain a party's privilege to prepare and tender his own narrative statement on the theory that it may occasionally be useful.

(2) The present rule does not require that a statement of facts be requested in writing or specify when it must be requested. The date of such request is often material to motions for extension under Rule 21c. The proposal would make the request a matter of record and would require that it be made when the appeal is perfected. This provision is consistent with Rule 376, which provides that filing the bond triggers the duty of the clerk to prepare the transcript. If no request for a statement of facts is made until later, and insufficient time remains for its preparation, Rule 21c would require a reasonable explanation of the need for additional time. This proposal is consistent with existing case law. See Moore v. Davis, ___ S.W.2d ___ (Tex. App.--Dallas, No. 05-82-00269-CV, August 16, 1982). A requirement to explain a failure to make the request before filing the bond would require unnecessary effort of both lawyers and the appellate courts and would not substantially accelerate the appellate process.

[Prepared by Guittard]

RULE 377a. PREMATURE APPEAL

(a) Proceedings relating to an appeal need not be considered ineffective because of prematurity if a subsequent appealable order has been signed to which the premature proceedings may properly be applied.

(b) If the appellate court finds that the appeal is premature because the order appealed from is not final, it may permit the defect to be cured and any subsequent proceedings to be shown in a supplemental record.

(c) If the trial court has signed an order modifying, correcting or reforming the order appealed from, or has vacated that order and signed another, any proceedings relating to an appeal of the first order may be considered applicable to the second, but shall not prevent any party from appealing from the second order pursuant to Rule 329b(h). The second order and any proceedings concerning it may be included in either the original or a supplemental record.

Source: New rule effective _____, 1983.

Comment: This proposal would obviate dismissal of a premature appeal and filing of a new appeal when a subsequent appealable order is issued by the trial court. Some courts already follow this practice, although the rules do not authorize it.

[Prepared by Guittard]

RULE 380. FREE STATEMENT OF FACTS ON APPEAL FOR PAUPERS

In any case where the appellant has filed the affidavit [~~made the proof~~] required by Rule 355 to appeal his case without bond, and no contest is filed, or any contest is overruled, the court or judge upon application of appellant shall order the official reporter to prepare a statement of facts, [~~make a transcript in narrative form, in duplicate,~~] and to deliver it [~~the same~~] to appellant [~~said party~~], but the court reporter shall receive no pay for same.

Change by amendment effective _____, 1983: The provision for preparation of a narrative statement of facts has been eliminated. Minor textual changes have also been made.

Comment: An equal protection problem is raised if a party unable to pay costs is denied a statement of facts in question and answer form.

[Prepared by Guittard]

RULE 384. FILING

The filing of records, briefs and other papers in the appellate court as required by these rules shall be made by filing them with the clerk, except that any justice of the court may permit the papers to be filed with him, in which event he shall note thereon the filing date and time and forthwith transmit them to the office of the clerk.

Change by amendment effective , 1983: This is a new rule. (Former Rule 384 was repealed effective January 1, 1981.)

Comment: Appellate judges now have no authority, as trial judges have under Rule 74, to permit papers to be filed with them. In emergency situations, a clerk may not be available. The language of the rule is adopted from Rule 74.

[Prepared by Guittard]

RULE 385. ACCELERATED APPEALS

(a) (No change.)

(b) (No change.)

(c) (No change.)

(d) In all accelerated appeals, the bond, or the notice or affidavit in lieu thereof, shall be filed, or the deposit in lieu of bond shall be made, within thirty days after the judgment or order is signed. Likewise, the record shall be filed in the appellate court within thirty days after the judgment or order is signed. The appellant's brief shall be filed within twenty days after the record is filed and appellee's brief shall be filed within twenty days after appellant's brief is filed. Failure to file either the record or appellant's brief within the time specified, unless reasonably explained, shall be ground for dismissal or affirmance under Rule 387, but shall not affect the court's jurisdiction. [~~or its authority to consider material filed late.~~]

[~~(e) When the appeal is from an order sustaining a plea of privilege transfer of the venue and trial on the merits shall be suspended pending the appeal.~~]

(e) [~~(f)~~] ~~When the appeal is from an order granting or refusing a temporary injunction, or granting or overruling a motion to dissolve such an injunction,~~ [T]he court, on motion of any party or an order of the court, may advance the appeal and give it priority over other cases pending, may hear the appeal on the original papers sent up from the trial court or on sworn and uncontroverted copies of such papers in lieu of a transcript, and may shorten the time for filing briefs or allow the case to be submitted without briefs. [~~Such appeal shall not have the effect of suspending the order appealed from unless it shall be so ordered by the court or judge entering the order.~~]

Change by amendment effective _____, 1983: The provision that late filing of the record shall not affect the court's authority to consider material filed late and also the provisions concerning the effect of the appeal have been deleted.

The provision authorizing an accelerated hearing in subdivision (e) (formerly (f)) have been extended to all accelerated appeals, and the authority to consider original papers or sworn copies has been added.

Comments: (1) The deletion from subdivision (d) is proposed in view of B. D. Click & Co. v. Safari Drilling Corp., ___ S.W.2d ___, 25 Tex. Sup. Ct. J. 346 (June 2, 1982). (For an alternate see the proposed amendments to Rule 21c.)

(2) The provisions concerning the effect of the appeal have been incorporated into the proposed Rule 385b.

(3) The need for an advanced hearing without briefs may be equally urgent in other types of accelerated appeals, particularly in receivership and quo warranto cases.

(4) In such emergencies the provision for hearing the appeal on original papers or sworn copies would obviate any delay in preparing the transcript.

[Prepared by Guittard]

RULE 385b. ORDERS PENDING INTERLOCUTORY APPEAL

(a) Effect of Appeal. No order denying interlocutory relief shall be suspended or superseded by an appeal therefrom. The pendency of an appeal from an order sustaining a plea of privilege or from an order authorizing a cause to proceed as a class action suspends such order and also suspends trial on the merits in such cases. Otherwise, the pendency of an appeal from an order granting interlocutory relief does not suspend the order appealed from unless supersedeas is granted in accordance with subdivision (b).

(b) Supersedeas. Except as provided in subdivision (a), the trial court may permit an interlocutory order to be suspended pending an appeal therefrom by filing a supersedeas bond or making a deposit pursuant to Rule 364. Denial of such suspension may be reviewed for abuse of discretion on motion in the appellate court.

(c) Temporary Orders of Appellate Court. On perfection of an appeal from an interlocutory order, the appellate court may issue such temporary orders as it finds necessary to preserve the rights of the parties until disposition of the appeal and may require such security as it deems appropriate, but it shall not suspend the trial court's order if the appellant's rights would be adequately protected by supersedeas.

(d) Further Proceedings in Trial Court. Pending an appeal from an interlocutory order, the trial court retains jurisdiction of the cause and may issue further orders, including dissolution of the order appealed from, but the court shall make no order granting substantially the same relief as that granted by the order appealed from, or any order contrary to the temporary orders of the appellate court, or any order that would interfere with or impair the effectiveness of any relief sought or granted on appeal. The trial court may proceed with a trial on the merits, except as provided in subdivision (a).

(e) Enforcement of Temporary Orders. Pending an appeal from an interlocutory order, the order may be enforced only by the appellate court in which the appeal is pending, except that the appellate court may refer any enforcement proceeding to the

trial court with instructions to hear evidence and grant such relief as may be appropriate. The appellate court may also instruct the trial court to make findings and report them with his recommendations to the appellate court.

(f) Review on Further Orders. When an appeal is pending from an interlocutory order, any further appealable interlocutory order of the trial court concerning the same subject matter and any interlocutory order that would interfere with or impair the effectiveness of the relief sought or granted on appeal may be brought before the appellate court for review on motion, either on the original record or with a supplement thereto.

(g) Mandate. The order of the appellate court on appeal from an interlocutory order takes effect when the mandate is issued. The court may issue the mandate immediately on announcing its decision if the circumstances require, or it may delay the mandate until final disposition of the appeal. All further proceedings in the trial court shall conform to the mandate. If the appellate court modifies its decision after issuing a mandate, a new mandate shall be issued accordingly.

(h) Rehearing. The appellate court may either deny the right to file a motion for rehearing or shorten the time for filing, and in that event a motion for rehearing shall not be a prerequisite to any review available in the Supreme Court

Source: New rule, effective _____, 1983.

Comment: This proposal would clear up a number of questions of practice pending interlocutory appeals, particularly appeals from orders granting temporary injunctions and orders appointing receivers. It is based on the assumption that the trial court has general jurisdiction of parties and subject matter, that the appellate court has jurisdiction of the interlocutory order by reason of perfection of the appeal, and that definition of the areas within which each court may properly act to protect the rights of the parties pending final disposition of the suit is a matter of procedure within the Rule Making Act.

(1) Subdivision (a) incorporates provisions of present Rule 385 with respect to orders concerning temporary injunctions and pleas of privilege and further provides for suspension of the order and of the trial on the merits by an appeal from an order authorizing a cause to proceed as a class action.

(2) Subdivision (b) would give the appellate court authority on motion to review the trial court's denial of supersedeas, which would otherwise be reviewable, if at all, only by mandamus proceedings under article 1823. General Telephone Co. v. Carver, 474 S.W.2d 582 (Tex. Civ. App. - Dallas 1971, no writ). Moreover, the trial court's discretion in denying supersedeas has been held not reviewable by mandamus. Westware, Inc. v. Blackwell, 486 S.W.2d 599, 601 (Tex. Civ. App. - Austin 1972, no writ). If the appellate court already has jurisdiction by perfection of an appeal, a motion should be sufficient without regard to the limitations of writ jurisdiction and without invoking all the requirements of Rule 383 for original proceedings.

(3) Subdivision (c) would authorize the appellate court to issue temporary orders to preserve the rights of the parties pending the appeal, but not to dispense with the requirement of a supersedeas bond. Under present law, appellate courts have been limited by article 1823 to "writs necessary to enforce the jurisdiction of said courts," as where such relief is necessary to prevent the case from becoming moot in whole or part. Parsons v. Galveston County Employees Credit Union, 576 S.W.2d 99 (Tex. Civ. App. - Houston [1st Dist.] 1978, no writ); General Telephone Co. v. City of Garland, 522 S.W.2d 732, 734 (Tex. Civ. App. - Dallas 1975, no writ). Thus the court has no authority to stay the trial court's order solely to protect a party from damage pending appeal. Sobel v. City of Lacy Lakeview, 462 S.W.2d 344, 345 (Tex. Civ. App. - Waco 1971, no writ). The courts have disagreed as to whether the availability of supersedeas prevents the appellate court from exercising original jurisdiction. Compare Pace v. McEwen, 604 S.W.2d 231 (Tex. Civ. App. - San Antonio 1980, no writ) with Burch v. Johnson, 445 S.W.2d 631, 632 (Tex. Civ.

App. - El Paso 1969, no writ). The proposal would not authorize the appellate court to suspend the trial court's order if the appellant's rights would be adequately protected by supersedeas, but would permit temporary protective orders when necessary. When the trial court has denied a temporary injunction, this procedure would be in accordance with cases holding that the appellate court may preserve the status quo by issuing its own temporary injunction pending appeal, and may require a bond to protect the appellee. Riverside Mall, Inc. v. Larwin Mortgate Investors, 515 S.W.2d 5 (Tex. Civ. App. - San Antonio 1974, writ ref'd n.r.e.).

(4) Subdivision (d) would resolve a problem concerning the trial court's power to obviate the appeal by dissolving a temporary injunction or receivership. The trial court's power to dissolve a receivership pending appeal has been recognized, Tharp v. Lammons, 520 S.W.2d 951 (Tex. Civ. App. - Dallas 1975, no writ), but its power to dissolve a temporary injunction has been denied on the theory that the court has lost jurisdiction. Holst v. Newsletters, Inc., 578 S.W.2d 420, 421 (Tex. Civ. App. - Houston [1st Dist.] 11979, no writ). However, it has been held that the trial court may dissolve a temporary injunction for failure to give bond when the appellate court has determined that a bond was required. Evans Division - Royal Industries v. Jeffries, 516 S.W.2d 214, 215-16 (Tex. Civ. App. - Houston [14th Dist.] 1974, no writ). Since the trial court has continuing general jurisdiction of parties and subject matter, its authority should extend to dissolution of a temporary order so long as such dissolution does not interfere with any relief sought or granted on appeal. However, the judge should not be able to defeat appellate review by dissolving the temporary order and subsequently granting substantially the same relief.

(5) Subdivision (d) would also provide criteria as to what additional interlocutory relief the trial court may grant. Charlton Corp. v. Brockette, 534 S.W.2d 401, 404 (Tex. Civ. App. - Corpus Christi 1976, writ ref'd n.r.e.) recognizes the trial

court's right to grant additional interlocutory relief with respect to a receivership pending an appeal from an order appointing a receiver. Subdivision (f) would permit any such subsequent orders to be brought up for review without perfecting a separate appeal, contrary to the present rule that only the order originally appealed from may be considered by the appellate court. City of Corpus Christi v. Lone Star Fish & Oyster Co., 335 S.W.2d 621, 624 (Tex. Civ. App. - Corpus Christi 1960, no writ).

(6) Subdivision (e) undertakes to resolve the problem concerning enforcement of the trial court's order pending appeal. Under present decisions, the trial court has no authority to enforce its order, but the appellate court, in a contempt proceeding, may refer the matter to the trial court with instructions to hear evidence, find the facts, and report back to the appellate court. Ex parte Werblud, 536 S.W.2d 542, 544-45 (Tex. 1976). The trial court's authority to issue further orders to protect the subject matter pending appeal has been denied. Caldwell v. Meyers, 446 S.W.2d 709, 710 (Tex. Civ. App. - Austin 1969, no writ). The proposed subdivisions (c) and (e) would authorize the appellate court to decide whether to issue its own temporary orders or refer the matter to the trial court with such authority as the appellate court finds appropriate.

(7) Subdivision (g) would resolve the problem of whether the appellate court's order of an interlocutory appeal may be made effective immediately. An order dissolving a temporary injunction is effective immediately without issuance of a mandate. Poole v. Giles, 248 S.W.2d 464 (Tex. 1975); Alpha Pet. Co. v. Terrell, 59 S.W.2d 372, 373 (Tex. 1933). On the other hand, an early case held that an order dissolving a receivership is not immediately effective and that the receiver's authority under the order appointing him continues until the mandate is issued. New Birmingham Iron & Land Co. v. Blevins, 40 S.W. 829 (Tex. Civ. App. - 1897, writ ref'd). Under that holding irreparable damage may be done to a going business by a receiver improvidently

appointed before the appellate process can be completed and the mandate issued on expiration of the period provided by Rule 442. Recently the Blevins rule was rejected in an opinion applying the rule governing temporary injunctions to receiverships. Humble Exploration Co. v. Holloway, ___ S.W.2d ___, (Tex. App. - Dallas, July 23, 1982, No. 05-82-00879-CV). This holding also may have unfortunate results if the trial court has no power to protect the parties by further orders while the appeal is pending. Proposed subdivision (d) would authorize such orders within certain limits and subdivision (e) would reduce the danger of interference with the appellate court's authority by facilitating review. Proposed subdivision (g) would not make the order immediately effective, but would permit the court to issue the mandate immediately if it finds that the circumstances require.

(8) Subdivision (h) would permit the appellate court to reduce any delay that would be occasioned by an application for writ of error in the Supreme Court.

[Prepared by Guittard]

RULE 386. TIME TO FILE TRANSCRIPT AND STATEMENT OF FACTS

The transcript and statement of facts, if any, shall be filed in the appellate court within sixty days after the judgment is signed, or, if a timely motion for new trial or to modify the judgment has been filed by any party, within one hundred days after the judgment is signed, subject to the provisions of Rule 428. If a writ of error has been perfected, the record shall be filed within sixty days after perfection of the writ of error. Failure to file either the transcript or the statement of facts within such time shall not affect the jurisdiction of the court, [~~or its authority to consider material filed late,~~] but shall be ground for dismissing the appeal, affirming the judgment appealed from, disregarding materials filed, or applying presumptions against the appellant, either on appeal or on the court's own motion, as the court shall determine. The court shall have no authority to consider a late filed transcript or statement of of facts, except as permitted by Rule 21c.

Change by amendment effective _____, 1983: The last sentence has been added and the provision that late filing shall not affect the court's authority has been deleted.

Comment: The deleted provision is misleading in view of B. D. Click Co. v. Safari Drilling Corp., ___ S.W.2d ___, 25 Tex. Sup. Ct. J. 346 (June 2, 1982). This proposal would eliminate the "apparent conflict" of this rule with Rule 21c and 437. Addition of the last sentence would make the Click interpretation explicit.

(For an alternative, see the proposed amendment to Rule 21c.)

[Prepared by Guittard]

RULE 387a. DISPOSITION ON MOTION OR BY AGREEMENT

~~[DISMISSAL OR REVERSAL ON CERTIFICATE]~~

(a) The appellate court may finally dispose of an appeal or writ of error as follows:

(1) In accordance with an agreement signed by all parties or their attorneys and filed with the clerk; or

(2) On motion of appellant to dismiss the appeal or affirm the judgment appealed from, with notice to all other parties; provided, that no other party shall be prevented from seeking any appellate relief he would otherwise be entitled to.

(b) If no transcript has been filed, the agreement or motion shall be accompanied by certified or sworn copies of the judgment appealed from and of the appeal bond or other document perfecting or attempting to perfect the appeal or writ of error.

(c) A severable portion of the appeal may be disposed of in like manner without prejudice to the parties remaining.

(d) Such a disposition, if made after submission, shall not prevent issuance of an opinion by the court on the points presented if the court deems such an opinion appropriate.

Change by amendment effective _____, 1983: The rule has been rewritten to apply after as well as before the transcript has been filed and to provide for similar disposition of a severable portion of the judgment.

Comment: The proposal states the prevailing practice. The existing rule is applicable only "before the filing of the transcript." If the agreement or motion is filed after submission, the court may issue the opinion; otherwise, in a small case involving an important question, a party who thinks his position has not made a favorable impression on the court may attempt to defeat the announcement of an unfavorable decision. See Singleton v. Pennington, 568 S.W.2d 382 (Tex. Civ. App. - Dallas 1978) rev'd on other grounds, 606 S.W.2d 682 (Tex. 1979).

[Prepared by Guittard]

cover all costs in such proceedings, unless a record is later filed in the same proceeding, and in that event only an additional deposit of $15.00 shall be required.

(e) If the proper deposit for costs is not tendered, the clerk may decline to file the record, motion, or petition, or the court may dismiss the proceeding; provided that no such deposit shall be required of any party who, under these rules or any applicable statute, is not required to give security for costs. If the appellant has filed in the trial court an affidavit of inability to pay costs and has given the notice required by Rule 355, and any contest of such affidavit has been overruled, he shall be entitled to file the record in the Court of [~~Civil~~] Appeals without making any deposit for costs.

(f) The dollar amount for costs for the respective proceedings listed in the preceding sections of this rule may vary from time to time and shall be as set by Article 3924, Revised Civil Statutes, or other applicable statute or Supreme Court order or rule, if any.

[~~f~~] (g) In any proceeding or motion under subdivisions (b), (c), or (d) of this rule, if any party is unable to pay the costs as above required, he may make affidavit of his inability to do so and deliver it to the clerk of the Court of [~~Civil~~] Appeals simultaneously with the tender of the petition or motion. Notice of such affidavit and any contest thereof shall be governed by the provisions of Rule 355.

COMMENT: The 67th Legislature did not amend the basic costs for the proceedings in courts of appeals. The only amendment to Art. 3924, the Court of Appeals Cost Statute, was that made by S.B. No. 265, which changed the names to courts of appeals from courts of civil appeals. The last paragraph of that statute retains in the Supreme Court authority to provide by order or rule for the costs for services not specifically listed.

[Prepared by Pope]

RULE 389. TRANSCRIPT: DUTY OF CLERK ON RECEIVING

If a [~~the~~] transcript, properly endorsed, is received by the clerk within the time allowed by these rules, he shall endorse his filing thereon, showing the date of its reception, and shall notify both appellant and the adverse party of the receipt of the transcript. If it [~~the transcript or any supplemental transcript~~] is not [~~so~~] properly endorsed, or an original transcript is received after the time allowed, the clerk [~~he~~] shall, without filing it, make a memorandum upon it of the date of its reception and keep it in his office subject to the order of the person who applied for [~~sent~~] it or to the disposition of the court, and shall notify [~~at the same time notifying in writing~~] the person who applied for a transcript [~~sent it~~] why it has not been filed. [~~the clerk does not file it.~~] The transcript shall not be filed until a proper showing has been made to the court for it not being properly endorsed or received in proper time, and upon this being done it may be ordered by the court to be filed, if the rules have been complied with, upon such terms as may be deemed proper, having respect to the rights of the opposite party.

Change by amendment effective _____, 1983: The requirement that the clerk determine whether the transcript has been received in time has been restored.

Comment: This requirement was deleted by the 1981 amendment on the theory that timely filing of the transcript was no longer a matter of jurisdiction. It is restored in view of the holding in B. D. Click Co. v. Safari Drilling Corp., ___ S.W.2d ___, 25 Tex. Sup. Ct. J. 346 (June 2, 1982), that the court has no authority to consider a record filed late except pursuant to Rule 21c. In the absence of notice by the clerk, the appellant may not be aware of the late filing and thus may not be advised of the necessity of filing a motion to extend before expiration of the fifteen-day period.

[Prepared by Guittard]

RULE 389a. STATEMENT OF FACTS. DUTY OF CLERK ON RECEIVING

Upon receipt of a statement of facts, the clerk shall ascertain if it is presented within the time allowed and also if it has been properly authenticated in accordance with these rules. If the clerk finds that the statement of facts is presented in time and has been agreed to by the parties, or approved by the trial judge, or certified by the official court reporter, he shall file it forthwith; otherwise, he shall endorse thereon the time of the receipt of such statement of facts, hold the same subject to the order of the court of [~~civil~~] appeals, and notify the party (or his attorney) tendering the [~~such~~] statement of facts of his action and state his reasons therefor.

Change by amendment effective _____, 1983: The requirement that the clerk determine whether the statement of facts has been received in time has been restored.

Comment: This requirement was deleted by the 1981 amendment on the theory that under rule 386 as amended, timely filing of the statement of facts was no longer a matter affecting the authority of the court to consider it. It is restored in view of the holding in B. D. Click Co. v. Safari Drilling Co., ___ S.W.2d ___, 25 Tex. Sup. Ct. J. 346 (June 2, 1982), that the court has no authority to consider a record filed late except pursuant to Rule 21c. Unless the clerk determines whether the statement of facts is presented in time, and notifies the appellant if it is not, the appellant may let the fifteen-day period for filing a motion to extend expire without filing such a motion. This proposal would restore the practice prevailing before 1981.

[Prepared by Guittard]

RULE 390. PARTY TO FILE OWN TRANSCRIPT

Repealed

RULE 392. FILED TRANSCRIPT A COURT RECORD

Repealed

Comment: The filing of transcripts by more than one party has been made obsolete by Rule 376, which requires the clerk, when the appeal is perfected, to prepare a transcript including "any filed paper either party may designate as material," and transmit the transcript to the appellate court rather than to the party applying for it.

[Prepared by Guittard]

RULE 394. ISSUANCE OF PROCESS

(a) Any writ of process issuing from any Court of Appeals [~~Court of Civil Appeals~~] shall bear the teste of the c[C]hief j[J]ustice under the seal of said court and be signed by the clerk [~~thereof~~], and, unless otherwise expressly provided by law or by these rules, shall be directed to the party or court to be served, [~~and~~] may be served by the sheriff or any constable of any county of the State of Texas within which such person to be served may be found, and shall be returned to the court from which it issued. Whenever such writ or process shall not be executed, the clerk [~~of such court~~] shall issue another like process or writ upon the application of the party suing out the former writ or process.

(b) Any party who has appeared in person or by attorney in any proceeding in the court of appeals, or who has actual knowledge of the court's opinion, judgment, or order, shall be bound by such opinion, judgment, or order to the same extent as if personally served as provided in subdivision (a).

Change by amendment effective , 1983: Subdivision (b) has been added.

Comment: The proposal states the current practice. Actual service of process is rarely made on a party who is given a copy of the opinion or order under Rule 456.

[Prepared by Guittard]

RULE 396. SAME: RESTRICTIONS

While a case is [~~Cases while~~] under submission, either on the merits of the appeal or on motion, [~~are no longer under the control of the attorneys, and while so under submission,~~] the clerk will not let the record [~~transcripts of such cases~~] go out of his office, except on the order of one of the justices of the court. While not under submission, either before submission or after decision, the parties or their attorneys may, by complying with Rule 395, obtain possession of the record; [~~transcript~~] provided, however, that when a case has been decided upon the merits of the appeal, no one, except the losing party or his attorney, shall be allowed to take the record [~~transcript~~] out of the clerk's office until after said party has filed his motion for a rehearing, or until the time for filing such motion has expired.

Change by amendment effective _____, 1983: Minor textual change.

Comment: This proposal makes no change in the current practice. Deletion of "are no longer under the control of the attorneys" avoids the implication that the court has no control of the case until submission. "Transcript" in the original rule is probably intended to apply to the entire record.

[Prepared by Guittard]

RULE 398. PAPERS NOT TO BE REMOVED

No attorney shall take, or suffer to be taken any transcript, statement of facts or other papers for which he has receipted, out of the reach of the court, so that it can not be produced in court or in the clerk's office when needed.

Change by amendment effective _____, 1983: Minor textual change.

Comment: The proposal conforms to the current practice.

[Prepared by Guittard]

RULE 399. DISPOSITION OF PAPERS WHEN APPEAL DISMISSED

In all cases in which appeals or writs of error are dismissed, the appellant or party filing the transcript or statement of facts, without further leave of court, shall have the right to withdraw the transcript or statement of facts, unless it contains original papers belonging to an adverse party, in which leave of court shall be had before such original papers are withdrawn.

Change by amendment effective _____, 1983: Minor textual change.

Comment: This proposal is in accordance with the current practice.

[Prepared by Guittard]

RULE 402. DOCKETING CAUSES [~~Trial Docket~~]

(a) Each matter [~~cause~~] filed in [~~carried to~~] the Court of Appeals [~~Court of Civil Appeals~~], whether an [~~either by~~] appeal, [~~or~~] writ of error, or original proceeding, shall be docketed in the order of filing [~~received upon the trial docket~~]. A motion relating to an appeal perfected but not yet filed shall be docketed likewise and shall be assigned a number, which shall be also assigned to the appeal when filed.

(b) Before an [~~the~~] attorney has filed his brief he may notify the clerk in writing of the fact that he represents a named party to the appeal, which fact shall be by the clerk noted upon the [~~trial~~] docket, opposite the name of the party for whom he appears, and shall be regarded by the court as having whatever effect is given to the appearance of a party to a case without brief filed. After briefs have been filed, the name of the attorney or attorneys signed to the brief shall be entered by the clerk on the [~~trial~~] docket, opposite the name of the appropriate party if such names have not already been so entered. The clerk shall add the names of additional counsel on request. [~~The court will not enter upon the docket the name of attorneys in a case but counsel desiring their names entered shall see that it is done under the provisions of this rule.~~]

Change by amendment effective _____, 1983: The provisions concerning docketing of original proceedings and motions and for notation of additional counsel have been added.

Comment: This proposal is in accordance with current practice. The term "trial" has been deleted as inappropriate.

[Prepared by Guittard]

RULE 402a. WITHDRAWAL OF COUNSEL

Counsel shall be permitted to withdraw and other counsel may be substituted on written acknowledgement of acceptance of employment by new counsel. Counsel may be permitted to withdraw without immediate substitution of new counsel on motion for leave accompanied by a showing that a copy of the motion has been sent by certified mail to the party with a notice advising the party of any ensuing deadlines and settings in the cause.

Source: New rule.

Comment: In the absence of any rule governing withdrawal of counsel, motions for leave to withdraw rarely give the court the information necessary to protect the client.

[Prepared by Guittard]

RULE 406. EVIDENCE ON MOTIONS

Motions [~~made either to sustain or defeat the jurisdiction of the court,~~] dependent on facts not apparent in the record and not ex officio known to the court[,] must be supported by affidavits or other satisfactory evidence.

Change by amendment effective _____, 1983: The limitation to motions "made either to sustain or defeat the jurisdiction of the court" has been deleted.

Comment: Other motions, such as those concerning supersedeas bonds under Rule 365, may require evidence outside the record and should be supported by proper proof. The amendment would also bring Rule 21c motions within the requirements of this rule.

[Prepared by Guittard]

Rule 407. Motion to Delay Cause

Motions [~~made~~] to postpone the case to a future day, [~~or to continue it until the next term,~~] unless consented to by the opposite party, shall be supported by sufficient cause, verified by affidavit, unless such sufficient cause is apparent to the court.

Change by amendment effective : The provision for a continuance to the next term of court has been deleted.

COMMENT: References to continuances and term of court are inappropriate in the court of appeals.

[Prepared by Guittard]

RULE 408. NOTATIONS OF MOTIONS ~~[ON-MOTION-DOCKET]~~

The clerk shall file each motion under the docket number assigned to the appeal and make an appropriate notation on the docket of the filing of such motion and any answer thereto, together with the name of the attorney filing same, if not otherwise shown on the docket.

Change by amendment effective 1983: The rule has been rewritten to eliminate the requirement of a separate motion docket.

Comment: The proposal is in accordance with the current practice.

[Prepared by Guittard]

RULE 411. SUBMISSION IN ORDER OF FILING: SERVICE OF NOTICE

Causes [~~on the trial docket of the court of civil appeals which are~~] not advanced as otherwise provided shall be submitted in the order of [~~the date of~~] filing or in such other order as the court shall determine by rule. [~~and~~] T[~~t~~]he clerk shall notify the [~~parties or~~] attorneys and any party not represented by an attorney in writing [~~of the date of filing, and~~] of the date of submission and oral argument. [~~by letter delivered in person or through the mails.~~]

Change by amendment effective _____ 1983: Minor textual change. The provision for determination of the order by rule has been added.

Comment: Notification of the date of filing is provided by Rule 389. The provision for determination of the order of submission by rule gives the court greater flexibility in management of its docket. This proposal is consistent with Rule 410(f). See also Rule 497, which gives the Supreme Court discretion in determining the order of submission.

[Prepared by Guittard]

RULE 412. ORDER OF HEARING

Cases [~~upon the trial docket of the court~~] which have not been advanced shall be set for submission at least four weeks ahead of the date of submission and the parties or their attorneys of record shall be notified of the date of submission as provided by Rule 411.

Change by amendment effective _____ 1983: Minor textual change.

Comment: The deleted language is superflous and "trial" is inappropriate.

[Prepared by Guittard]

RULE 413. BURDEN ON APPELLANT ~~[PREPARATION OF CAUSE FOR SUBMISSION]~~

The burden is on the appellant, or other party seeking review, to see that a sufficient record is presented to show error requiring reversal.

Change by amendment effective _____ 1983: The rule has been rewritten.

Comment: The present rule has little effect and seems to cast an equal burden on the appellee. The proposal states the current practice. See Irrigation Const. Co. v. Motheral Contractors, Inc., 599 S.W.2d 336 (Tex. Civ. App. - Corpus Christi 1980, no writ).

[Prepared by Guittard]

Attachment B

Rule 418. Briefs: Contents

(d) Points of Error. A statement of the points upon which the appeal is predicated shall be stated in short form without argument and be separately numbered. In parenthesis after each point, reference shall be made to the page of the record where the matter complained of is to be found. Such points will be sufficient if they direct the attention of the court to the error relied upon. Complaints that the evidence is legally or factually insufficient to support a particular issue or finding, and challenges directed against any conclusions of law of the trial court based upon such issues or findings, may be combined under a single point of error raising both contentions. Any point that challenges the sufficiency of the evidence to support a particular issue or finding shall be treated as a contention that the evidence is both legally and factually insufficient unless otherwise expressly stated. [~~if the record references and the argument under such point sufficiently direct the court's attention to the nature of the complaint made regarding each such issue or finding or legal conclusion based thereon.~~] Complaints made as to several issues or findings relating to one element of recovery or defense may be combined in one point, if separate record references are made.

COMMENT: Sloan Blair submits this rule. He reasons that a point about evidence should invoke what jurisdiction the Court of Appeals has and also what jurisdiction the Supreme Court has.

Rule 423. Argument.

(a) Right to Argument. When a case is properly prepared for submission, any party who has filed briefs in accordance with the rules prescribed therefor may, upon the call of the case for submission, submit an argument to the court, either oral or plainly written or printed. [~~which,~~] If written or printed, six copies [~~may be left on file~~] shall be filed with the [~~transcript, copies of which need not be furnished, unless printed.~~] record.

(b) Subject Matter. The arguments must be upon the disputed points, whether of law or fact, in support of the points relied on, on one side, and objections and counter-points on the other, and it must be confined to them, avoiding any reference or comment upon positions taken in the trial court, or to other extraneous matters not involved in or pertaining to that which is found in the record.

(c) Requirement to Answer Questions. Counsel will be expected to answer questions propounded by members of the court relating to the matter in the record and to the law or authorities cited by counsel in the argument.

(d) Time Allowed. [~~After the case has been presented to the court by such explanation as may be necessary, each side may be allowed an hour in argument, with twenty minutes more in conclusion by the appellant; and, after being so presented, if the magnitude or importance of the case or the difficulty of the question seem to require it, a longer time may be allowed.~~]

In the argument of cases in the Court of Appeals, each side may be allowed thirty minutes in the argument at the bar, with fifteen minutes more in conclusion by the appellant. In cases involving difficult questions, the time allotted may be extended by the court, provided application is made before argument begins. [~~Provided, however, that any Court of Civil Appeals may, in its~~

~~discretion, by general rule, reduce the time allowed for oral argument in said court to conform to Rule 498.~~] The court may, in its discretion, shorten the time for argument. It may also align the parties for purposes of presenting oral argument.

Not more than two counsel on each side will be heard, except on leave of the court.

Counsel for an amicus curiae shall not be permitted to argue except that he may share time allotted to one of the counsel who consents and with leave of the court obtained prior to time for argument.

(e) With Only One Party Filing Brief. If counsel for but one party has filed briefs, an argument by him may be allowed, conformably to the preceeding [rules] provisions as nearly as practicable, under the direction of the court.

Comment. The rule is rewritten to consolidate into a single rule several other rules, and to identify clearly and group subjects under headings. It also follows the format of present Rule 418.

(a) Present Rule 423, with changes.

(b) Present Rule 424 unchanged.

(c) Present Rule 425 unchanged.

(d) This section is from present Rule 426 extensively revised. Restudy of this rule and the corresponding Rule 498, concerning argument in the Supreme Court, was prompted by a resolution adopted in 1981 by the Chief Justices of Courts of Appeals meeting in Corpus Christi during the Judicial Conference. That resolution was:

> Resolution #2. BE IT RESOLVED that the Rules of Civil Procedure and the Rules of Criminal Procedure be amended to allow the various courts of appeals, by local rule, to set the time allowed for oral argument, in either civil or criminal appeals or both, at not less than 20 minutes each for the appellant and the appellee, with an additional 10 minutes to the appellant for rebuttal.

The restudy showed that the rules concerning argument in the Courts of Appeals and the Supreme Court vary for no particularly good reason. An effort is made (1) to eliminate in Rule 426 the requirement for an hour-long argument, (2) to give Courts of Appeal discretion concerning enlargement as well as shortening time, (3) to authorize alignment of parties which is regularly done, and (4) to make Rules 426 and 498 similar in wording. The modified Rule 426 appears as this section (d) in the consolidated rule.

(e) Present Rule 427 unchanged.

Rule 424. Repealed by order of _____, effective _____.

Rule 425. Repealed by order of _____, effective _____.

Rule 426. Repealed by order of _____, effective _____.

Rule 427. Repealed by order of _____, effective _____.

[Prepared by Pope]

RULE 430. AMENDMENT: NEW APPEAL BOND OR DEPOSIT

On motion to dismiss an appeal or writ of error for [~~When there is~~] a defect of substance or form in any bond or deposit given as security for costs [~~appeal or writ of error bond, then on motion to dismiss the same for such defect,~~] the appellate court may allow [~~the same to be amended by~~] the filing of a new bond or the making of a new deposit in [~~such~~] the trial [appellate] court [~~a new bond~~] on such terms as the appellate court may prescribe. A certified copy of the new bond or certificate of deposit shall be filed in the appellate court.

Change by amendment effective _____ 1983: The references to the deposit for costs have been added, and the bond or deposit is to be made in the trial court. Also, minor textual changes have been made.

Comment: (1) The rule has been applied to deposits in lieu of bond in Woods Exploration & Producing Co. v. Arkla Equipment Co., 528 S.W.2d 568, 570 (Tex. 1975). The new bond or deposit should be made in the trial court, and compliance should be shown by a certified copy filed in the appellate court.

(2) This rule should be designated "Rule 363b" (or Rule 363a" if the proposed Rule 363a is not adopted) and inserted along with the other rules concerning review of bonds. Rule 430 would be repealed.

[Prepared by Guittard]

RULE 432. REPORTER TO HAVE ACCESS TO RECORDS

Repealed.

Comment: This rule is obsolete. It assumes that the appellate court has an official reporter.

[Prepared by Guittard]

RULE 442. MANDATE [~~ISSUED, WHEN~~]

(a) The clerk shall issue a mandate in accordance with the judgment and shall deliver it to the clerk of the trial court without waiting for the payment of costs upon expiration of one of the following periods:

(1) Forty-five days after the judgment, if no timely motion for rehearing has been filed;

(2) Forty-five days after the last timely motion for rehearing has been overruled, if no timely application for writ of error has been filed and no timely motion has been filed to extend the time for filing application for writ of error;

(3) Fifteen days after any timely motion to extend the time for filing an application for writ of error has been overruled by the Supreme Court;

(4) Fifteen days after receipt by the clerk of an order of the Supreme Court denying writ of error, as provided by Rule 484.

(b) The mandate may be issued earlier by agreement of the parties.

(c) If a writ of error has been denied by the Supreme Court, the petitioner may move for a stay of the mandate pending disposition by the Supreme Court of the United States of a petition for writ of certiorari. The motion shall show the grounds for such petition and the circumstances requiring a stay of the mandate. The Court of Appeals may grant such a stay if it finds that the grounds are substantial and that serious hardship would result to the petitioner or others from issuance of the mandate in the event of reversal by the Supreme Court of the United States.

(d) The mandate shall contain the file number of the case in the trial court.

Change by amendment effective 1983: The rule has been rewritten.

Comment: (1) The proposal avoids use of the ambiguous term "final." Present Rule 442 provides that the clerk shall issue the mandate "forty-five days from the date the judgment of the court of civil appeals has become final," whereas Rule 443 provides that it shall be issued "[w]hen a judgment of the court of appeals has become final."

(2) The provision for stay of the mandate on motion because of the pendency of a petition for writ of certiorari is in accordance with Bank of Texas v. John Childs, 634 S.W.2d 2 (Tex. App. - Dallas 1982, no writ).

(3) The provisions of Rule 443 are incorporated into this rule.

[Prepared by Guittard]

RULE 443. COURT'S POWER OVER JUDGMENTS ~~[PAYMENT-OF-COSTS]~~

The Court of Appeals has plenary power to vacate, modify, correct, or reform the judgment within six months of the time for issuance of the mandate prescribed by Rule 442, and not thereafter, except that it has no such power while an application for writ of error is pending or after such an application has been granted by the Supreme Court.

Change by amendment effective _____ 1983: This is a new rule.

Comment: This proposal eliminates the uncertainty as to the appellant court's power over its judgments. Presumably, that power continues until the end of the term, as fixed by Article 1816. Rule 446 assumes that the court may set aside the judgment after the mandate has been issued. This proposal would be in accordance with Rule 329(d), governing the trial court's power over its judgments. The provisions of former Rule 443 would be incorporated into Rule 442.

[Prepared by Guittard]

RULE 444. AFFIDAVIT OF INABILITY

Repealed.

Comment: This rule is without effect in view of the provision in Rule 443 which would be continued in amended Rule 442, requiring the clerk to issue the mandate "without waiting for payment of costs."

[Prepared by Guittard]

RULE 446. RECALL OF MANDATE. [~~WHEN-JUDGMENT-SET-ASIDE~~]

If a Court of Appeals [~~Court-of-Civil-Appeals~~] vacates, modifies, corrects or reforms [~~sets-aside~~] its judgment after the mandate has been issued, the mandate shall have no further effect and a new mandate may be issued. The clerk shall at once give notice of such act to the clerk of the trial court and to all parties. [~~notify-the-party-to-whom-the-mandate-was directed-to-return-it.~~]

Change by amendment effective _____ 1983: The notice nullifies the mandate rather than directing its return.

Comment: This proposal is in accordance with the current practice of delivering the mandate to the clerk. Since the mandate may already be recorded in the minutes of the trial court, it should be nullified by the notice rather than returned.

[Prepared by Guittard]

RULE 447. EXECUTION ON FAILURE TO PAY COSTS

If neither party pays the costs before the time prescribed by Rule 442 or Rule 506 for issuance of the mandate, the clerk of the appellate court shall prepare a bill of costs showing the party or parties against whom such costs have been adjudged and shall transmit it to the clerk of the trial court, who shall record such costs and issue execution for same as for costs in the trial court. On collection, any costs due to the clerk of the appellate court shall be remitted to such clerk.

Change by amendment effective , 1983: The rule has been rewritten to conform to current practice.

Comment: The practice of issuing executions from the appellate court is obsolete.

[Prepared by Guittard]

RULE 448. APPELLANT TO RECOVER COSTS

In any cause reversed by the Court of Appeals [~~Court of Civil Appeals~~], the appellant shall be entitled to an execution in the trial court against the appellee for costs occasioned by such appeal, including costs for the transcript and statement of facts, [~~said costs to be taxed by the clerk of said court.~~] Provided that nothing herein shall be construed to affect the present law with reference to the accrual and taxing of costs in tax suits. Provided further, that nothing herein shall be construed to limit or impair the power of the Court of Appeals [~~Court of Civil Appeals~~] to otherwise tax the costs for good cause.

Change by amendment effective 1983: The reference to the statement of facts has been inserted.

Comment: This change is in accordance with current practice.

[Prepared by Guittard]

RULE 449. RETURN OF EXECUTION

Repealed.

RULE 450. OFFICER FAILING TO MAKE RETURN

Repealed.

Comment: These rules will have no effect if Rule 447 is amended, as proposed, to provide for execution for appellate costs in the trial court. Rule 447 would be made applicable to the Supreme Court by the proposed amendment to Rule 491.

[Prepared by Guittard]

RULE 451. DECISION AND OPINION

The Court of Appeals [~~Court of Civil Appeals~~] shall decide all controlling issues presented [~~to them~~] by proper points or cross-points [~~assignment~~] of error [~~by either party whether such issue be of fact or of law~~] and announce its [~~in writing their~~] conclusions in a written opinion.

Change by amendment effective 1983: The rule has been reworded to harmonize with Rule 452.

Comment: The proposal harmonizes this rule with Rule 452 as amended in 1982 and requires a decision only on controlling issues.

[Prepared by Guittard]

RULE 453. CONCLUSIONS OF FACT AND LAW

Repealed.

Comment: The practice of filing conclusions of law and fact separate from the decision has long since become obsolete. It can have little, if any, effect, since the court has no jurisdiction to make original findings of fact, but can only "unfind" facts found by the trial court or jury. City of Beaumont v. Graham, 441 S.W.2d 829 (Tex. 1969). When the court concludes that a controlling fact finding is not supported by sufficient evidence, or is against the great weight and preponderance of the evidence, Rules 451 and 452 require that conclusion to be stated in the opinion.

[Prepared by Guittard]

Rule 454. To State Reasons For Reversal

(Repealed)

COMMENT: The subject matter of this rule is covered by Rules 451 and 452.

Rule 455. Supplemental Findings

(Repealed)

COMMENT: See Comment on repeal of Rule 453.

[Prepared by Guittard]

Rule 458. Motion and Second Motion for Rehearing

(a) [~~Any party desiring a rehearing of any matter determined by any Court of Civil Appeals may,~~] A motion for rehearing in the Court of Appeals shall not be a prerequisite to the right to complain in the Supreme Court of any matter that originated in the trial court or in the Court of Appeals. A motion for rehearing may be filed by any party, however, and the omission of a point in such motion shall not preclude the right to make the complaint in the Supreme Court. Such a motion may be filed within fifteen days after the date of rendition of the judgment [~~or decision~~] of the court, [~~or the filing of the findings of fact and conclusions of law,~~] whether such date be in the same or a succeeding term of said court, [~~file with the clerk of said court his motion in writing for a rehearing thereof, in which~~] and the points relied upon for the rehearing shall be distinctly specified. It shall also state [~~and~~] the name and residence of the counsel of the opposing party, if kown, and if not known, then the name and residence of the opposing party as shown in the record. The party filing such motion shall deliver or mail to each opposing party, or his attorney of record, a true copy of such motion, and shall note on the motion so filed with the clerk that such copies have been so furnished. Upon his failure to do so, he shall accompany his motion with, or furnish to the clerk on his request, a sufficient number of duplicates or copies thereof for the clerk to use in complying with the provisions of Rule 460. Failure to supply such copies on request of the clerk may result in a dismissal of the motion.

(b) If on rehearing the Court of [~~Civil~~] Appeals modifies its judgment, or vacates its judgment and renders a new judgment, or hands down an opinion in connection with the overruling

of a motion for rehearing, a further motion for rehearing may, if a party desires to complain of the action taken, be filed within fifteen days after such action occurs. [~~However, a further motion for rehearing shall not be required or necessary as a predicate for a point in the application for writ of error if the asserted point of error was overruled by the Court of Civil Appeals in a prior motion for rehearing.~~]

When a further motion for rehearing is filed, the regulations contained in Section (a) of this rule and Rules 460 and 468 shall apply to it as though it was a first motion for rehearing.

(c) Any motion for rehearing may be amended as a matter of right any time before the expiration of the fifteen-day period allowed for filing it, and with leave of the court any time before its final disposition.

(d) All motions and other matters filed in either the Supreme Court or the Court of [~~Civil~~] Appeals, and not finally disposed of at the end of the term, shall be automatically continued to the next succeeding term of court.

COMMENT: Sloan Blair submitted this rule along with Rules 418, 468, and 469.

This rule in section (a) would eliminate the requirement that a motion for rehearing is an essential predicate to the application for writ of error. Filing the motion is made optional. We have done the same thing with a motion for new trial. The first two sentences are taken from Rule 324.

Reference to filing of findings and conclusions is also eliminated in section (a).

The last sentence of (b) is deleted because of the change in (a).

RULE 461. QUESTIONS OF LAW CERTIFIED.

In exceptional cases urgently requiring accelerated disposition of the appeal, the court of appeals may certify one or more controlling questions of law to the Supreme Court for decision, but the Supreme Court may decline to decide the questions if it decides that the case should be presented by application for writ of error. After certification of such questions, the cause shall be retained for judgment in harmony with the decision of the Supreme Court on the questions certified.

Change by amendment effective 1983: The rule has been rewritten.

Comment: The proposal is in accordance with the current practice. See R. Calvert, The Mechanics of Judgment Making in the Supreme Court, 21 BAYLOR L. REV. 439, 444 (1969).

[Prepared by Guittard]

RULE 462. WHAT QUESTIONS CERTIFIED

Repealed.

RULE 463. CERTIFYING DISSENT

Repealed.

RULE 464. PAPERS SENT TO SUPREME COURT

Repealed.

Comment: In view of the 1953 amendments to the jurisdictional statutes, articles 1728 and 1821, the Supreme Court has writ-of-error jurisdiction to pass on cases involving dissents and conflicts of decisions. State v. Wynn, 157 Tex. 200, 301 S.W.2d 76, 78 (Tex. 1957). Consequently, the mandatory duty of the court of appeals to certify questions in such cases and the corresponding procedure of mandamus in the Supreme Court to require such certification is obsolete. See Duval v. Clark, 157 S.W.2d 626 (Tex. 1942). Norvell, Certification of Questions, Appellate Procedure in Texas, 1979, § 28.1.

[Prepared by Guittard]

RULE 465. MOTION TO CERTIFY

At any time within fifteen days after judgment in the Court of Appeals, [~~overruling the motion for rehearing~~] either party may file a motion asking the court to certify a question to the Supreme Court. [~~After the expiration of that date, if no motion is filed, the court may not be required by mandamus to certify.~~]

Change by amendment effective _____ 1983: The time for the motion is made to run from the date of judgment and the reference to mandamus has been deleted.

Comment: (1) Since current practice limits certified questions to emergency situations, a motion to certify is appropriate before the motion for rehearing is overruled. See comment on proposed amendment of Rule 461.

(2) On mandamus to certify, see comment on proposed repeal of Rules 462, 463 and 464.

[Prepared by Guittard]

RULE 466. INSTRUMENTS TO ACCOMPANY CERTIFICATE

When any Court of Appeals [~~Court of Civil Appeals~~] shall certify to the Supreme Court any question of law for determination, [~~or shall send to the Supreme Court any cause upon certificate of dissent~~], either upon its own motion or that of any party, the certificate shall be accompanied by the briefs filed in the Court of Appeals [~~Court of Civil Appeals~~]. Also, the Court of Appeals [~~Court of Civil Appeals~~] may accompany such certificate with the entire record in the case, or any part thereof that it deems advisable. The Court of Appeals [~~Court of Civil Appeals~~] shall also accompany the certificate with all or any part of the record that any party to the suit may request. Except in cases of emergency, the emergency to be stated in the certificate, all cases certified to the Supreme Court under Rule 461 shall be accompanied by a proposed or tentative opinion of the Court of Appeals [~~Court of Civil Appeals~~], which proposed or tentative opinion shall set forth the views and tentative opinion of the Court of Appeals [~~Court of Civil Appeals~~] on the questions certified. [~~In certifying questions under Rule 463, the provisions of Rule 464 shall be fully complied with.~~] [~~All cases certified under Rule 462 shall be accompanied by the opinion of the Court of Civil Appeals in such cases.~~]

Change by amendment effective _____ 1983: Textual change to conform to repeal of Rules 462, 463 and 464.

Comment: See comment on repeal of Rules 462, 463 and 464.

[Prepared by Guittard]

Rule 468. Filing of Application for Writ of Error

The application shall be filed with the clerk of the Court of [~~Civil~~] Appeals within thirty days after the [~~overruling of the motion for rehearing,~~] rendition of the judgment or decision of the court, or within thirty days after the overruling of a final motion for rehearing if timely filed under Rule 458, provided that when the thirtieth day falls on Saturday, Sunday or a legal holiday the petition may be filed on the next day following which is neither a Saturday, Sunday nor a legal holiday.

If any party files an application within the time specified, any other party who was entitled to file such an application within such time but failed to do so shall have ten days additional time within which to file it.

COMMENT: This was one of Sloan Blair's rules. This rule has to be changed if we amend Rule 458. The new words, "rendition of the judgment or decision of the court" is taken from Rule 458. We have had no problems identifying the beginning date for time to run under that phrase. Sloan suggests that it might run from the "date of its judgment." Clerks do not prepare judgments until some uncertain time later. I should think that attorneys become accustomed to computing time from the day they know the court meets and hands down decisions.

Rule 469. Requisites of Application

Applications for writs of error shall be as brief as possible. The respondent is urged to file a reply.

The application for writ of error shall be filed with the clerk of the Court of [~~Civil~~] Appeals. It shall be addressed to "The Supreme Court of Texas," and shall state the name of the party or parties applying for the writ. The parties shall be designated as "Petitioner" and "Respondent." The application shall contain the following:

(a) Unchanged.

(b) Unchanged.

(c) Statement of the Case. The application should contain a brief general statement of the nature of the suit,--for instance, whether it is a suit for damages, on a note, or in trespass to try title, and that the statement as contained in the opinion of the Court of [~~Civil~~] Appeals is correct, except in the particulars pointed out. Example: "This is a suit for damages in excess of $1000.00 for personal injuries growing out of an automobile collision. The opinion of the Court of [~~Civil~~] Appeals correctly states the nature and result of the suit, except in the following particulars: (If any.)" Such statement should seldom exceed one-half page. The details of the case should be reserved to be stated in connection with the points to which they are pertinent.

(d) Statement of Jurisdiction. Except in those cases in which the jurisdiction of the [~~Court~~] court depends on a conflict of decisions under Subdivision 2 of Article 1728, the petition should merely state that the Supreme Court has jurisdiction under a particular subdivision of Article 1728. Example: "The Supreme Court has jurisdiction of this suit under Subdivision 6 of Article 1728." [~~Where~~] When jurisdiction of the Supreme Court depends on a conflict of decisions, the conflict on the question of law should be clearly and plainly stated.

(e) Points of Error. A statement of the points upon which the application is predicated shall be stated in short form without argument and be separately numbered. In parentheses after each point, reference shall be made to the page of the record where the matter complained of is to be found. [~~Whether the matter complained of originated in the trial court or in the Court of Civil Appeals, it must be assigned as error in the motion for rehearing filed in the latter court.~~] Such points will be sufficient if they direct the attention of the court to the error relied upon. Complaints made as to several issues or findings relating to one element of recovery or defense may be combined in one point, if separate record references are made. Any point that challenges the sufficiency of the evidence to support a particular issue or finding shall be treated as a contention that the evidence is legally insufficient unless otherwise expressly stated.

(f) Brief of the Argument. The brief of the argument may present separately, or grouped if germane, the points of error relied upon for reversal, the argument to include such pertinent statements from the record as may be requisite, together with page references and such discussion of the authorities as is deemed necessary to make clear the points of error complained of. The opinion of the Court of [~~Civil~~] Appeals will be considered with the application, and statements therein, if accepted by counsel as correct, need not be repeated.

(g) Unchanged.

(h) The application shall be signed by at least one of the attorneys for the party, shall give the State Bar of Texas identification number, the mailing address and telephone number of each attorney whose name is signed thereto, and shall state that a copy of the application has been delivered or mailed to each group

of opposite parties or their counsel. A party not represented by an attorney shall sign his brief and give his address and telephone number. The statement of service on opposite parties by one who is not a licensed attorney shall be verified.

(i) Petitioner shall certify that he has complied with Rule 471.

[~~(h)~~] (j) If any brief or application for writ of error is unnecessarily lengthy or not prepared in conformity with these rules, the court may require same to be redrawn.

COMMENT: This rule was proposed by Sloan Blair. The change in Rule 458 demands this change too. It also adds the rule that an attack upon evidence in the Supreme Court will be treated as a legal insufficiency point.

(h) is new. It conforms this rule to Rule 414, briefs in the Court of Appeals. Present Rule 471 is obsolete. It provides for leaving copies with the clerk who delivers the copy to respondent. This is not the practice now.

(i) is new. It conforms this rule to Rule 414.

Rule 471. Service on Respondent

Repealed.

COMMENT: See Rule 469(h) and Comment.

[Prepared by Pope]

Rule 476. Consideration by Supreme Court

[~~Trial on Questions of Law~~]

The consideration of the Supreme Court shall be limited to questions of law raised by points in the application for writ of error or upon questions of law certified by a Court of Appeals.

Change by amendment effective _____:
Minor textual changes.

COMMENT: The proposal would harmonize this rule with Rule 469. The provision for sending up the transcript is deleted because it is unnecessary in view of Rule 472. Alternatively, the entire rule may be repealed as unnecessary.

[Prepared by Guittard]

RULE 482. MAY REFER CASE BACK

If a Court of Appeals shall fail to decide a question within its exclusive fact jurisdiction and properly raised before it, and the Supreme Court finds that such a decision is necessary to enable it to properly determine the rights of the parties, the Supreme Court may suspend action on the application for writ of error and remand the cause to the court of appeals with instructions to prepare a supplemental opinion deciding the questions specified by the Supreme Court and return such opinion to the Supreme Court.

Change by amendment effective _____ 1983: The rule has been rewritten to conform to the repeal of Rules 453 and 455.

Comment: This proposal is made as a substitute for the procedure of referring the case back to the court of appeals for findings of fact, which is obsolete or inappropriate. See comment on repeal of Rule 453.

[Prepared by Guittard]

Rule 484. [~~Where~~] When Application Dismissed or Refused

When the application shall have been filed for a period of ten days, if the court determines to refuse or [~~to~~] dismiss the same, whether the respondent has answered or not, the clerk of the court will retain the application, together with the record [~~transcript~~] and accompanying papers, for fifteen days from the date of rendition of the judgment refusing or dismissing the writ. At the end of that time, if no motion for rehearing has been filed, or upon the overruling or dismissal of such motion, in case one has been filed, the clerk of the Supreme Court shall transmit to the Court of [~~Civil~~] Appeals to which the writ of error is sought a certified copy of the orders denying or dismissing such application and of the order overruling the motion for a rehearing thereof, and shall return the papers which belong to that court to the clerk thereof, but shall retain the application for writ of error[.], any answer thereto, and any briefs filed in the Supreme Court.

Change by amendment effective _____:
Minor textual changes.

COMMENT: The proposal is in accordance with current practice.

[Prepared by Guittard]

Rule 485. Deposit for Costs

When an application for writ of error is filed with the clerk of the Court of [~~Civil~~] Appeals, the petitioner shall deliver to said clerk the sum of [~~$10.00~~] $50.00 as costs in the Supreme Court, and the clerk shall forward said deposit to the Supreme Court with the record. If the writ is granted, the petitioner shall deposit with the clerk of the Supreme Court the additional sum of [~~$25~~] $75.00 to cover the costs in the Supreme Court. In all proceedings for writs of mandamus, prohibition, injunction, and other like proceedings originating in the Supreme Court, the petitioner, upon the filing of the motion for leave to file, shall deposit with the clerk the sum of [~~$10.00~~] $50.00 as costs and if the leave to file is granted, he shall deposit the additional sum of [~~$15.00~~] $75.00 to cover the costs in the Supreme Court. In cases involving petitions for writs of habeas corpus, the petitioner upon the filing of the petition shall deposit with the clerk the sum of [~~$10.00~~] $50.00 as costs and if the case is set by the court for argument the petitioner shall deposit the additional sum of [~~$15.00~~] $75.00 to cover the costs in the Supreme Court. In [~~all other original~~] each and every other proceeding[s] filed in the Supreme Court, the petitioner shall deposit with the clerk the sum of [~~$25~~] $75.00; [~~and~~] provided that in all direct appeals from the district court as provided for in Rule 499a, the petitioner shall deposit, upon the filing of the petition or record, the sum of [~~$25~~] $100.00 to cover the costs in the Supreme Court.

The dollar amount for costs for the respective proceedings listed in the preceding paragraph of this rule may vary from time to time and shall be as set by Article 3923, Revised Civil Statutes, or other applicable statute or court order or rule, if any.

The Court reserves the right to dismiss the proceedings for failure to make proper deposit for costs; provided, however, that no such deposit shall be required of any petitioner who, under these rules or the statutes, is not required to give security for costs. If the petitioner is unable to pay the costs as above required, he may make affidavit of his inability to do so and deliver same to the clerk of the Court of [~~Civil~~] Appeals to be forwarded to the Supreme Court with the record, and mail a copy of the affidavit to the attorney of record for the respondent. Contest of such affidavit in the Supreme Court shall be governed by the provisions of Rule 355.

COMMENT: The 67th Legislature amended article 3923, the fee statute, by increasing the fees. It was effective August 31, 1981. The same Legislature also enacted S.B. No. 265 which granted criminal jurisdiction to the Courts of Appeals. One section of S.B. 265 incorporated the old fee structure into the new merger court statute. The Senate Bill was passed after the new higher fee bill. This was certainly an oversight and not the intent of the Legislature to retain the older and lower fees.

All courts are operating without problems under the new higher fee legislation as reflected by this rule. Corrective legislation should be sought at the next session.

[Prepared by Pope]

RULE 491. [~~CERTAIN~~] RULES OF COURTS OF [~~CIVIL~~] APPEALS APPLICABLE

The rules prescribed for the Courts of Appeals [~~Courts of Civil Appeals as to the custody of transcripts, as to the notices to attorneys of the disposition of cases, and as to amendments of the record, bonds, and briefs,~~] shall govern in the Supreme Court to the extent applicable and not inconsistent with these rules.

Change by amendment effective _____ 1983: The rule is broadened to cover other rules prescribed for the courts of appeals.

Comment: Rules other than those specified in the present Rule 491 may be helpful to the Supreme Court, such as Rule 387 (dismissal or affirmance for failure to comply with rules), Rule 394 (issuance of process), Rule 401 (correspondence with members of the court), and Rule 406 (evidence on motions).

[Prepared by Guittard]

RULE 497. ORDER OF SUBMISSION [~~ORDER OF TRIAL OF CAUSES~~]

Causes may be heard and submitted [~~tried~~] in such order as the [~~justices of the~~] Supreme Court may deem to be the best interest and convenience of the parties or their attorneys.

Change by amendment effective _____ 1983: Minor textual changes.

Comment: "Tried" seems to be an inappropriate term in an appellate court.

[Prepared by Guittard]

Rule 505. Decision

In each cause [~~case~~], the Supreme Court shall either affirm the judgment of the Court of Appeals, or reverse and render such judgment as the Court of [~~Civil~~] Appeals should have rendered, or remand the cause to the Court of Appeals, or reverse the judgment and remand the cause [~~case~~] to the trial [~~lower~~] court, if it shall appear that the justice of the cause [~~case~~] demands another trial. [~~subject to the provisions of Rule 503 and 504 relating to reversals.~~]

Change by amendment effective _____:
Minor textual changes.

COMMENT: The last phrase is deleted as unnecessary. This rule should probably be inserted immediately after Rule 500.

[Prepared by Guittard]

Rule 506. Judgment Becomes Final

(Repealed)

COMMENT: See proposed amendments to Rules 507 and 509.

[Prepared by Guittard]

RULE 507. MANDATE TO ISSUE

At the expiration of fifteen days from the rendition of judgment if no motion for rehearing has been filed, or at the expiration of fifteen days after overruling the motion for rehearing, [~~When a judgment or decree of the supreme court has become final,~~] the clerk [~~of the court~~] shall issue and deliver the court's mandate in the cause to the lower court without further payment of costs. In cases in which the Supreme Court declines to grant an application for writ of error, costs of the Supreme Court shall be paid in the Court of Appeals [~~court of civil appeals~~] and the mandate issued from that court. Every mandate issued by the Supreme Court shall contain the file number in the trial court.

Change by amendment effective _____ 1983: Expiration of the periods specified has been substituted for "final."

Comment: The proposal avoids use of the ambiguous term "final" and provides for cases in which a motion for rehearing is filed, not now provided in rule 506.

Query: Should this rule provide for a stay of mandate pending an appeal or petition for certiorari to the Supreme Court of the United States? See proposed amendment to Rule 442.

[Prepared by Guittard]

NOTE BY POPE: If we desire to provide for stay pending appeal or petition for certiorari, we may use this form as an additional paragraph:

A party may move for a stay of the mandate pending disposition by the Supreme Court of the United States of a petition for writ of certiorari. The motion shall show the grounds for such petition and the circumstances requiring a stay of the mandate. The Supreme Court may grant such a stay if it finds that the grounds are substantial and that serious hardship

would result to the party or others from issuance of the mandate in the event of reversal by the Supreme Court of the United States. The Supreme Court may stay the issuance of its mandate for not more than ninety days to permit the timely filing of an appeal or petition for writ of certiorari to the Supreme Court of the United States.

COMMENT: This paragraph incorporates the material from proposed new Rule 442. The Supreme Court rather routinely stays mandates for 90 days and then requires any additional order for stay to come from the United States Supreme Court.

Rule 508. Affidavit of Inability to Pay

(Repealed)

COMMENT: This rule has no effect in view of the provision of Rule 507 requiring the clerk to issue the mandate without further payment of costs.

[Prepared by Guittard]

Rule 509. Court's Power Over Judgments

The Supreme Court has plenary power to vacate, modify, correct, or reform the judgment within one year after the time for issuance of the mandate as provided by Rule 507, and not thereafter.

COMMENT: New Rule. Since Rule 510 contemplates that the Supreme Court may "set aside its judgment after the mandate has issued," a time limit on this power may be appropriate. See comment on proposed Rule 443.

[Prepared by Guittard]

RULE 510. MANDATE RECALLED

If [~~Should~~]the Supreme Court vacates, modifies, corrects, or reforms [~~set-aside~~] its judgment after the mandate has issued, the mandate shall have no further effect and a new mandate may be issued. The clerk shall at once give notice of such action to the clerk of the court to which the mandate was directed, and to all parties. [~~notify the party to whom the mandate was directed to return it.~~]

Change by amendment effective 1983: The notice nullifies the mandate rather than directing its return.

Comment: This proposal is in harmony with the proposed amendment to Rule 446.

[Prepared by Guittard]

RULE 511. EXECUTION

Repealed.

RULE 512. EXECUTION RETURNABLE

Repealed.

RULE 513. OFFICER FAILING TO MAKE RETURN

Repealed.

Comment: The proposed Rule 447 would provide for execution for costs in both the court of appeals and the Supreme Court and would be made applicable to the Supreme Court by the proposed amendment to Rule 491.

[Prepared by Guittard]

Rule 544. Jury Trial Demanded

Either party shall be entitled to a trial by jury. The party desiring a jury shall [~~before the case is called for trial make a demand for a jury, and also~~] deposit a jury fee of three dollars on or before the appearance day or, if thereafter, a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than five days in advance. The payment of such fee [~~which~~] shall be noted on the docket[~~,~~] and the [~~case~~] cause shall be set down as a jury case.

COMMENT: Judge Armando V. Rodriguez, Presiding Judge of the Harris County Justices of the Peace, recommended this and states:

"At the present time, Rule 544 permits the demand for a jury trial to be made on the date of the trial. As you well know, this practice can cause undue delays and inconvenience not only to the parties involved but also to the court. Rule 216 requires the party seeking a jury trial to make such a demand before the date set for trial of the cause on the non-jury docket, but not less than ten days in advance. We would, therefore, request that the following change be considered for the justice courts."

[Prepared by Pope]

Rule 627. Time for Issuance

If no supersedeas bond or notice of appeal, as required of agencies exempt from filing bonds, has been filed and approved, the clerk of the court or justice of the peace shall issue the execution upon such judgment upon application of the successful party or his attorney after the expiration of thirty days from the time a final judgment is signed. If a timely motion for new trial or in arrest of judgment is filed, the clerk shall issue the execution upon the judgment on application of the party or his attorney after the expiration of thirty days from the time the order overruling the motion is signed or <u>from the time the motion</u> is overruled by operation of law.

<u>COMMENT:</u> The words, "from the time the motion", are inserted after the word "or" in the second sentence.

[Prepared by Pope]

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 [~~i~~]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 entry, not to exceed ten days,~~] ten days after service or actual notice, or such shorter time 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. 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 the temporary or permanent injunction.

COMMENT: The first change was recommended by Judge Ben Grant. His reasoning is that until service or actual notice, the one enjoined does not know of the order and is not under the restraint. Rule 683. Time, therefore, should run from then. He reasons that it would avoid paper work to reissue the order served on the ninth day.

The second change is recommended by Luke Soules. He states: "Although the present rule provides that a temporary restraining order may be 'extended for a like period,' i.e., for 10 additional days after an initial 10 days, some trial courts believe that extensions may be granted for several successive 10-day periods. There is no clear pronouncement from any appellate court on the subject, probably because of mootness resulting from expiration before an appellate court could act on any temporary restraining order for which a party desires review."

The third change is to keep restraining orders from becoming temporary injunctions.

[Prepared by Pope]

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 upon the permanent injunction. The fact that a temporary injunction is on appeal shall constitute no cause for delay of the trial of the cause on the permanent injunction.

COMMENT: Restraining orders and temporary injunctions are often abused. Good reasons may exist for maintaining the status quo. That may justify an appeal to the Court of Appeals. Instead, orders on temporary injunctions are being increasingly used as a short-cut to decide the merits. The Supreme Court has discountenanced this practice, and now there is even more reason that it must stop.

Article 4662 previously authorized appeals to the Courts of Appeals as well as the Supreme Court. The statute was amended in 1981 to read:

> "Any party to a civil suit wherein a temporary injunction may be granted or refused or when motion to dissolve has been granted or overruled, under any provision of this title, in term time or in vacation, may appeal from such order of judgment to the Court of Appeals."

Trifling with courts with the temporary injunction vehicle should stop. Courts should proceed to the trials of permanent injunctions on the merits and the substantive law.

[Prepared by Pope]

Rule 708. Plaintiff May Replevy

When the defendant fails to replevy the property within ten days after the levy of the writ and service of notice on defendant, the officer having the property in possession shall at any time thereafter and before final judgment, deliver the same to the plaintiff upon his giving bond payable to defendant in a sum of money not less than ~~[double the value of the property replevied, as found by the court,]~~ the amount fixed by the court's order, with sufficient surety or sureties as provided by statute to be approved by such officer. If the property to be replevied be personal property, the condition of the bond shall be that he will have such property, in the same condition as when it is replevied, together with the value of the fruits, hire or revenue thereof, forthcoming to abide the decision of the court, or that he will pay the value thereof, or the difference between its value at the time of replevy and the time of judgment (regardless of the cause of such difference in value, and of the fruits, hire or revenue of the same in case he shall be condemned to do so). If the property be real estate, the condition of such bond shall be that the plaintiff will not injure the property, and that he will pay the value of the rents of the same in case he shall be condemned to do so.

On reasonable notice to the opposing party (which may be less than three days) either party shall have the right to prompt judicial review of the amount of bond required, denial of bond, sufficiency of sureties, and estimated value of the property, by the court which authorized issuance of the writ. The court's determination may be made upon the basis of affidavits, if uncontroverted, setting forth such facts as would be admissible in evidence; otherwise, the parties shall

submit evidence. The court shall forthwith enter its order either approving or modifying the requirements of the officer or of the court's prior order, and such order of the court shall supersede and control with respect to such matters.

COMMENT: William C. Boyd points out an apparent oversight in 1978 in harmonizing Rules 698 and 708 concerning sequestration bonds. Rule 698 requires a plaintiff in sequestration to make a bond "in the amount fixed by the court's order . . .." Rule 708 requires the plaintiff to make a replevy bond "in a sum of money not less than double the value of the property replevied . . .." His letter states:

"Clearly Rule 698 intended that plaintiff could avoid the extra expense of an additional bond by merely including the conditions of Rule 708 in his bond for writ of sequestration. This is clearly expressed. However, the amounts of the bond may not be the same. Rule 698 permits the court to set the amount of the bond in any amount that the court deems reasonable while Rule 708 requires specifically that the bond be not less than double the value of the property replevied, which value is to be found by the court in its order.

"It is my experience that judges are exercising their discretion in setting the amount of sequestration bonds and in many cases the amounts of these bonds are not double the value of the property. I know of one case in Harris County where this has occurred and the Constable has refused to allow the plaintiff to replevy the property because the bond was not double the value of the property determined by the court in its order."

This was referred to the Committee on Administration of Justice, but at this writing, we have had no response.

[Prepared by Pope]

TRIAL COURT RULES

LIST OF GROUP III RULES

Rule 3. Construction of Rules and Local Rules

(a) Unless otherwise expressly provided, the past, present or future tense shall each include the other; the masculine, feminine, or neuter gender shall each include the other; and the singular and plural number shall each include the other.

(b) [~~Rule 817. Rules by Other Courts~~] Each Court of [~~Civil~~] Appeals, and each district and each county court may, from time to time, make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made shall upon their promulgation be furnished to the Supreme Court of Texas. In all cases not provided for by these rules, the Court of [~~Civil~~] Appeals and district and county courts may regulate their practice in any manner not inconsistent with these rules.

COMMENT: The Committee on Administration of Justice examined Rule 817 in view of the growing number of local rules that are developing. The Committee on Administration of Justice determined that the rule should not be changed, but that it should be made a part of the opening General Rules rather than be lost among the Closing Rules. The Committee on Administration of Justice recommended that it be made a (b) part of Rule 3.

Rule 817. Rules by Other Courts. Repealed. Transferred to Rule 3.

Rule [~~18a~~] 18A. Recusal or Disqualification of [~~Trial~~] Judges

(a) At least ten days before the date set for trial or other hearing in [~~district~~] any court other than a Court of Appeals or the Supreme Court, any party may file with the clerk of the court a motion stating grounds why the judge before whom the case is pending should not sit in the case. The grounds may include any disability of the judge to sit in the case.

(b) (No change.)
(c) (No change.)
(d) (No change.)
(e) (No change.)
(f) (No change.)
(g) (No change.)

Rule 18B. Recusal or Disqualification of Justices of Courts of Appeals and the Supreme Court

(a) Within 30 days after the filing of a proceeding in a Court of Appeals or the Supreme Court, any party may file with the clerk of the court a motion stating grounds why a justice before whom the case is pending should not sit in the case. The court may allow the filing of a motion after the expiration of 30 days if the motion is grounded upon reasons not known within the 30 day period and upon a showing of good cause.

(b) On the day the motion is filed, copies shall be served on all other parties or their counsel of record, together with notice that movant expects the motion to be presented to the justice ten days after the filing of such motion unless otherwise ordered by the justice. Any other party may file with the clerk of the court an opposing or concurring statement at any time before the motion is decided.

(c) Prior to any further proceeding in the case, the justice shall either recuse himself or certify the matter to the entire court, which will decide the motion with a majority of the justices of the court sitting en banc. A justice who is challenged

shall not sit en banc to consider the motion. If a majority of the justices are challenged, the court shall nonetheless decide the motion as to each justice, one at a time, with a majority of the justices sitting en banc except the particular justice being considered each time shall not sit en banc to consider the motion as it directly affects that justice.

(d) To the extent that a motion to recuse is granted, the matter is not reviewable. To the extent that a motion to recuse is denied, the normal appellate review process shall apply.

COMMENT: To provide a procedure for recusal of all judges and justices of lower courts and appellate courts. These amendments are recommended by the Committee on Administration of Justice.

COMMENT to Rule 42 (continued):

"When the Texas Supreme Court revised this rule, however, reference to derivative actions was deleted. Instead, the new rule was modeled on the federal class action rule which does not control derivative suits. See Tex. R. Civ. P. 42, Comment. In light of the change in this rule, the supreme court clearly intended rule 42 to govern only class actions; derivative actions brought in the right of a corporation are governed solely by article 5.14 of the Texas Business Corporation Act. Consequently, appellant's failure to comply with rule 42 is immaterial to his maintenance of this suit. We turn now to the requirements of article 5.14(B) of the Texas Business Corporation Act, which controls derivative suits."

Article 5.14, Texas Business Corporation Act says:

"B. Prerequisites. A derivative suit may be brought in this State only if:

"(1) The plaintiff was a record or beneficial owner of shares, or of an interest in a voting trust for shares, at the time of the transaction of which he complains, or his shares or interest thereafter devolved upon him by operation of law from a person who was such an owner at that time, and

"(2) The initial pleading in the suit states:

"(a) The ownership required by Subsection (1), and

(b) With particularity, the efforts of the plaintiff to have suit brought for the corporation by the board of directors, or the reasons for not making any such efforts."

Recommended by the Committee on Administration of Justice.

Rule 89. Transferred if Plea Is Sustained

If a plea of privilege is sustained, the cause shall not be dismissed, but the court shall transfer said cause to the proper court; and the costs incurred prior to the time such suit is filed in the court to which said cause is transferred shall be taxed against the plaintiff. The clerk shall make up a transcript of all the orders made in said cause, certifying thereto officially under the seal of the court, and send it with the original papers in the cause to the clerk of the court to which the venue has been changed. Provided, however, if the cause be severable as to parties defendant and shall be ordered transferred as to one or more defendants but not as to all, the clerk, instead of sending the original papers, shall make certified copies of such filed papers as directed by the court and forward the same to the clerk of the court to which the venue has been changed. After the cause has been transferred, as above provided for, [~~the same~~] the clerk of the court to which the cause has been transferred shall mail notification to the plaintiff or his attorney that transfer of the cause has been completed, that the filing fee in the proper court is due and payable within thirty days from the mailing of such notification, and that the case may be dismissed if the filing fee is not timely paid; and if such filing fee is timely paid, the cause will be subject to trial at the expiration of [~~ten~~] thirty days after the mailing of notification to the parties or their attorneys by the clerk [~~or any party or his attorney~~] that the papers have been filed in the court to which the cause has been transferred; and if the filing fee is not timely paid, any court of the transferee county to which the case might have been assigned, upon its own motion or the motion of a party, may dismiss the cause without prejudice to the refiling of same.

COMMENT: Recommended by the Committee on Administration of Justice.

Rule 92. General Denial

A general denial of matters pleaded by the adverse party which are not required to be denied under oath, shall be sufficient to put the same in issue. ~~[Where~~] When the defendant has pleaded a general denial, and the plaintiff shall afterward amend his pleading, such original denial shall be presumed to extend to all matters subsequently set up by the plaintiff.

When a counterclaim or cross-claim is served upon a party who has made an appearance in the action, the party so served, in the absence of a responsive pleading, shall be deemed to have pleaded a general denial of the counterclaim or cross-claim, but the party shall not be deemed to have waived any special appearance or plea of privilege. In all other respects the rules prescribed for pleadings of defensive matter are applicable to answers to counterclaims and cross-claims.

COMMENT: The rule clarifies some ambiguity in the law and undertakes to codify the law. Recommended by the Committee on Administration of Justice.

Rule 97. Counterclaim and Cross-Claim

[Rule is unchanged except for (f) which will read:]

(f) ~~[Additional Parties May Be Brought In.]~~ ~~[When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action; provided that in tort cases this rule shall not be applied so as to permit the joinder of a liability or indemnity insurance company, unless such company is by statute or contract liable to the person injured or damaged.]~~ Additional Parties. Persons other than those made parties to the original action may be made parties to a third party action, counterclaim or cross-claim in accordance with the provisions of Rules 38, 39 and 40.

COMMENT: This was recommended by the Committee on Administration of Justice. The reason for the change is to make it clear that for the purpose of determining who must or may be joined as additional parties to a counterclaim or cross-claim, the party pleading the claim is to be regarded as a plaintiff and the additional parties as plaintiffs or defendants as the case may be, such that Rules 39 and 40 are applied the same way to counterclaims and cross-claims as they are to original claims. The reference to Rule 38 is meant to indicate that third party actions are governed by the provisions of that rule. The amendment is based upon Fed. R. Civ. P. 13(h).

Rule 108a. Service of Process in Foreign Countries

(1) Manner. Service of process may be effected upon a party in a foreign country if service of the citation and petition is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory or a letter of request; or (C) in the manner provided by Rule 106; or (D) pursuant to the terms and provisions of any applicable treaty or convention; or (E) by diplomatic or consular officials when authorized by the U. S. Department of State; or (F) by any other means directed by the court that is not prohibited by the law of the country where service is to be made. The method for service of process in a foreign country must be reasonably calculated, under all of the circumstances, to give actual notice of the proceedings to the defendant in time to answer and defend. A defendant served with process under this rule shall be required to appear and answer in the same manner and time and under the same penalties as if he had been personally served with citation within this state to the full extent that he may be required to appear and answer under the Constitution of the United States or under any applicable convention or treaty in an action either in rem or in personam.

(2) Return. Proof of service may be made as prescribed by the law of the foreign country, by order of the court, by Rule 107, or by a method provided in any applicable treaty or convention.

COMMENT: New Rule. Prepared and recommended by the Committee on Administration of Justice. Report to Committee prepared by R. Doak Bishop:

"Proposed rule 108a is primarily patterned after Rule 4(i) of the Federal Rules of Civil Procedure, although elements of § 2.01 of the Uniform Interstate and International Procedure Act and Rule 108 of the Texas Rules of Civil Procedure are included. The main differences between proposed Rule 108a and Federal Rule 4(i) lie in the last sentence of subsection (1), which is derived from the last sentence of present Rule 108, the reference to applicable treaties or conventions contained in subdivision (2) concerning return of service, and the inclusion of subdivisions (1)(D) and (E). Subdivisions (1)(C) and (D) of Federal Rule 4(i) are summarized in the proposal by the reference in subdivision (1)(C) to Rule 106.

"The purpose of the proposed rule is threefold: (1) to increase the chances that Texas judgments will be recognized and enforced in other countries; (2) to permit access to the mechanisms established by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters,[1] [footnotes at end] and eventually the Inter-American Convention on Letters Rogatory;[2] and (3) to provide the courts with additional flexibility for serving process abroad. The main tenets of the rule will be discussed below.

"The Hague Service Convention was negotiated in 1965, and it entered into force in the United States in 1969. Twenty nations are presently parties to this treaty.[3] While the Convention is self-executing and available for use by state as well as federal courts, there is presently no statutory or rule authority authorizing Texas courts to make service of process by the means allowed by the Convention. This is a serious oversight, because it provides the quickest, easiest, and least expensive procedure for making service of process in other countries.[4]

"Subdivision (1)(D) of the proposed rule will remedy this problem by allowing service abroad to be made by the terms and provisions of any applicable treaty or convention, and it will have the added advantage of calling to the attention of the bar the fact that there may be treaties or conventions that will aid them in obtaining service abroad. Similarly, subdivision (2) of proposed Rule 108a allows for return of service according to the means provided in any applicable treaty or convention, the Hague Service Convention providing its own procedure for return of service.[5] These provisions will allow sufficient flexibility for Texas courts to use any other bilateral treaties or multilateral conventions that may be negotiated by the United States, such as the Inter-American Convention on Letters Rogatory, which has been signed by the United States and is presently pending ratification.[6]

"One of the most serious difficulties in present Texas practice is the failure to provide that service may be made in the manner prescribed by the law of the foreign country where the service is to be executed. Many countries will not recognize or enforce judgments from other nations unless those

judgments are based upon service of process that is consistent with the methods used by the courts of that country.[7] Thus, if a defendant's assets are located in a foreign country, a Texas judgment based upon service of process inconsistent with the foreign country's procedures may prove to be worthless. Moreover, many countries consider service of process to be a public act, limited to the judiciary of the country where it is to be executed.[8] Its accomplishment by any other means is considered an infringement of that country's sovereignty, and may even be a violation of its criminal laws.[9] Subdivision (1)(A) of the proposed rule is designed to meet these problems.

"Subdivision (1)(B) will allow Texas courts to request service of process by means of letters rogatory or letters of request.[10] Traditionally, American courts have used letters rogatory only to seek evidence abroad, and not to serve process.[11] Many countries, however, use letters rogatory for serving judicial documents.[12] In countries that are not parties to the Hague Service Convention and who consider it a violation of their sovereignty for service to be made except through governmental authorities, this may be the only method of service available.[13] Subdivision (1)(B) will permit Texas courts to respond to this contingency. Subdivision (1)(C) simply allows for use of the methods set out in Rule 106 of the Texas Rules of Civil Procedure.

"Subdivision (1)(E) authorizes U. S. consular and diplomatic officers to serve process when permitted by the State Department. Generally, American diplomatic or consular officials are not allowed to make service of process in other countries,[14] with the notable exception of service upon foreign governments under the Foreign Sovereign Immunities Act (FSIA).[15] Nevertheless, consular and diplomatic officials are authorized to serve documents abroad if express permission is granted by the U. S. Department of State.[16] This provision will expressly allow these officers to make service under the terms of the FSIA for litigation pending in Texas courts, and it will provide needed flexibility when the other means of serving process abroad have failed.

"The last sentence of the proposed rule is the same as the last sentence in present Rule 108. It has been interpreted as converting Rule 108 into a long-arm provision.[17] Its purpose is to expand the scope of the rule to the limits allowed by the due process clause.[18]

"The validity of the 1975 amendment to Rule 108 has been challenged as violative of the Texas Constitution.[18] The argument in support of this position is that Texas statutes, especially Article 2031b, determine the long-arm jurisdiction of Texas, and Rule 108 is inconsistent with the statutes, because it enlarges the courts' jurisdiction over nonresidents and is outside the scope of the Texas Supreme Court's rule-making power under Article V, Section 25 of the Texas Constitution.

"But the original purpose of Article 2031b, as repeatedly held by the courts, was to expand in

personam jurisdiction over nonresidents to the extent permitted by the U. S. Constitution. To that end, courts have gradually enlarged the 'doing business' language until, finally, its construction was expanded to due process limits by the Texas Supreme Court's recent decision in U-Anchor Advertising, Inc. v. Burt.[20]

"Even though the U-Anchor decision came two years after the amendment of Rule 108, its effect is to make the scope of Article 2031b coextensive with that of Rule 108, thereby counteracting the argument that Rule 108 is an enlargement or extension of long-arm jurisdiction in Texas. Accordingly, the rule merely makes explicit for Texas jurisdiction what has already been achieved as a practical matter through the various decisions interpreting Article 2031b. The only real change, therefore, is in the means by which service can be effected. It provides a much-needed way of obtaining personal, rather than substituted, service upon a nonresident and is certainly a procedural matter within the court's rule-making authority. Under this analysis, the amendment is merely a house-keeping matter and is not an enlargement of Texas law.

"Even if the rule did expand Texas jurisdiction, it would be invalid under the Texas Constitution only if it is "inconsistent" with the statute. Since the purpose of the amendment and the oft-stated purpose of Article 2031b are exactly the same, they are not inconsistent. They are merely two different means of achieving the same goal.

"While it could be argued that Rule 108 is also broader than Article 2031b in that it does not require that the plaintiff's cause of action be connected with his contacts with the state, the answer is that the Court has imposed that requirement in its declaration of due process requisites.[20] Rule 108 provides a necessary procedure for foreign service of process and is valid. If Rule 108 is valid, then the proposed Rule 108a should be equally valid.

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1. 20 U.S.T. 361, T.I.A.S. 6638 (hereafter cited as either the "Convention" or the "Hague Service Convention"). The text of this Convention and the declarations and reservations of the contracting nations may be found at the end of Rule 4 in 28 U.S.C.A Rules 1-11 (Supp. 1981) and in 8 MARTINDALE-HUBBELL LAW DIRECTORY at 4617 (1982).

2. See Inter-American Convention on Letters Rogatory, 14 INT'L LEGAL MATERIALS 339 (1975) and the Additional Protocol to the Inter-American Convention on Letters Rogatory, 18 INT'L LEGAL MATERIALS 1238 (1979).

3. The contracting nations are: Barbados, Belgium, Botswana, Denmark, Egypt, Federal Republic of Germany, Fiji, Israel, Japan, Luxembourg, Malawi, Netherlands, Norway, Portugal, Sweden, Turkey, United Kingdom, and the United States.

4. Horlick, A Practical Guide to Service of United States Process Abroad, 14 INT'L LAW. 637, 638 (1980).

5. The Central Authority of the foreign country is required to execute, and send to the requesting authority, a model certificate stating that the document has been served and specifying the method of service, the place and date of service, and the name of the person to whom the document was delivered. Hague Service Convention, art. 6. The Convention also provides that a default judgment may not be taken until it is shown that the document was served in ample time to allow the defendant to appear and defend, the only exception being that a default may be awarded notwithstanding the absence of a certificate of service if the document was served pursuant to a method permitted by the Convention, at least six months have elapsed since transmission of the document, and every reasonable effort has been made to obtain a certificate of service. Hague Service Convention, art. 15. The Convention also permits the vacating of a default judgment if service was made under the Convention and the defendant, without any fault on his part, did not have either knowledge of the document in sufficient time to defend or knowledge of the judgment in sufficient time to appeal, provided that the defendant discloses a prima facie defense to the merits of the action; but an application for relief from a judgment must be made within a reasonable time after the defendant obtains knowledge of the judgment, and a time limit for filing such an application may be established by the forum jurisdiction, as long as it is not less than one year. Hague Service Convention, art. 16.

6. 20 INT'L LEGAL MATERIALS 312 (1981).

7. See, e.g., Brenscheidt, The Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany, 11 INT'L LAW. 261, 266 (1977).

8. See Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 YALE L.J. 515, 527-28 (1953).

9. See Gori-Montanelli & Botwinik, International Judicial Assistance--Italy, 9 INT'L LAW. 717, 719-20 (1975); Jones, supra note 8, at 520; Horlick, supra note 4, at 641; Justice Department Memo No. 386 at 17 (1979). In fact, an SEC staff attorney was indicted for serving an administrative subpoena in France and an Assistant U. S. Attorney was sued for malicious trespass for serving a subpoena in the Bahamas. Id. at 20.

10. "Letters of request" are the primary means of making service of process abroad under the Hague Service Convention. While they would be covered also by the reference in subdivision (1)(D) to applicable treaties and conventions, it is expressly referred to in this provision because of the likelihood that the term will be picked up and used generally by other nations, including many who are not parties to the Convention. "Letters rogatory" are the traditional means of requesting judicial assistance in foreign countries that are not parties to multilateral conventions on judicial cooperation. They have been defined as follows:

> Letters rogatory are the medium, in effect, whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court procedure peculiar thereto and entirely within the latter's control, to assist the administration of justice in the former country; such request being made, and being usually granted, by reason of the comity existing between nations in ordinary peaceful times.

The Signe, 37 F. Supp. 819, 820 (E.D. La. 1941).

11. Note, Taking Evidence Outside of the United States, 55 B.U.L. REV. 368, 383 n.92 (1975).

12. See, e.g., In re Letters Rogatory Out of First Civil Court of City of Mexico, 261 F. 562 (S.D.N.Y. 1919).

13. Horlick, supra note 4, at 641.

14. 22 C.F.R. §§ 92.85, 92.92 (1980).

15. 28 U.S.C.A. § 1608(a)(4) (Supp. 1981); 22 C.F.R. § 93.1 (1980); Department of State Memorandum on Judicial Assistance Under the Foreign Sovereign Immunities Act and Service of Process Upon a Foreign State of May 10, 1979, published at 18 INT'L LEGAL MATERIALS 1177 (1979).

16. 22 C.F.R. § 92.85 (1980). Usually, this permission is granted only for serving court-ordered subpoenas, 22 C.F.R. § 92.86 (1980); show cause orders on contempt proceedings, 22 C.F.R. § 92.87 (1980), and documents concerning proceedings to revoke naturalization certificates, 22 C.F.R. § 92.90 (1980). See Department of Justice Memo No. 386 at 18 (July 1979). But permission may be granted in exceptional circumstances when other methods have been tried and have failed, provided that the foreign law does not prohibit this means of service.

17. Comment, Long-Arm Jurisdiction: Rule 108 as an Alternative to "Doing Business" Under Article 2031b, 30 BAYLOR L. REV. 99, 109 (1978); Comment, Forum Non Conveniens: The Need for Legislation in Texas, 54 TEXAS L. REV. 737 (1976).

18. Comment by the Texas Supreme Court to the 1975 amendment to Rule 108, found in Civil Procedure Rules Amended: Official Court Order, 38 TEX. B.J. 823, 824 (1975). See also U-Anchor Advertising Inc. v. Burt, 553 S.W.2d 760, 762 n.1 (Tex. 1977) (". . . the purpose of the amendment is to permit acquisition of in personam jurisdiction to the constitutional limits.").

19. Letter to the Editor, from Prof. Hans W. Baade of the University of Texas Law School, published at 38 TEX. B.J. 988 (1975). See also Boyd v. Piper Aircraft Corp., _____ F. Supp. _____ (N.D. Tex. 1981).

20. 553 S.W.2d 760, 762 (Tex. 1977).

21. O'Brien v. Lanpar Co., 399 S.W.2d 340, 342 (Tex. 1966):

> (1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation (emphasis added).

Rule 109. Citation by Publication

[~~Where~~] When a party to a suit, his agent or attorney, shall make oath that the residence of any party defendant is unknown to affiant, [~~(~~] and to such party [~~where~~] when the affidavit is made by his agent or attorney, [~~)~~] or that such defendant is a transient person, and that after due diligence such party and the affiant have been unable to locate the whereabouts of such defendant, or that such defendant is absent from or is a nonresident of the State, and that the party applying for the citation has attempted to obtain personal service of nonresident notice as provided for in Rule 108, but has been unable to do so, the clerk shall issue citation for such defendant for service by publication. In such cases it shall be the duty of the court trying the case to inquire into the sufficiency of the diligence exercised in attempting to ascertain the residence or whereabouts of the defendant or to obtain service of nonresident notice, as the case may be, before granting any judgment on such service. [~~Provided, however, that where the affidavit shows that the defendant is not within the United States, and is not in the Armed Forces of the United States, it shall not be necessary for the party to show that the residence or whereabouts of the defendant is unknown or that an attempt has been made to procure service of nonresident notice.~~]

COMMENT: A memo prepared by R. Doak Bishop for the Committee on Administration of Justice gives the reasons for the change.

"The last sentence of Rule 109 of the Texas Rules of Civil Procedure provides that a defendant may be cited by publication in the first instance if he is outside the United States and is not in the U.S. Armed Forces, even though the plaintiff knows the defendant's residence or whereabouts and has not attempted to serve him by nonresident notice. Thus, a plaintiff can ambush a defendant residing abroad and obtain a judgment against him, although he is unaware of the proceedings.

"In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), the U.S. Supreme Court held that notice by publication is constitutionally permissible when the addresses of defendants are unknown to the plaintiff, but is constitutionally infirm insofar as it is used to provide notice to defendants whose residence is known. 339 U.S. at 318. The Court stated:

> "'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.'

339 U.S. at 314.

"Service by publication is not favored because it will not usually come to the attention of the defendant in time to respond. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950); Johnson, Citation by Publication: A Sham Upon Due Process, 36 TEX. B.J. 205, 206 (1973). Moreover, the fiction that citation by publication gives notice to the defendant is particularly attenuated when the defendant is out of the country, and especially so in the case of a national of a foreign country who is not resident within the United States. This is an unfair procedure and is offensive to our sense of justice and fair play.

"When the defendant's residence or whereabouts abroad are known or can be easily obtained by the use of due diligence, service by publication under the last sentence of Rule 109 probably violates due process requirements and is constitutionally invalid. It should be removed from the rule."

Recommended by the Committee on Administration of Justice.

Rule 124. No Judgment Without Service

In no case shall judgment be rendered against any defendant unless upon service, or acceptance or waiver of process, or upon an appearance by the defendant, as prescribed in these rules, except where otherwise expressly provided by law or these rules.

When a party asserts a counterclaim or a cross-claim against another party who has entered an appearance, the claim may be served in any manner prescribed for service of citation or as provided in Rule 21(a).

COMMENT: The purpose of this amendment is to clarify the present uncertainty as to whether service of a counterclaim must be by Citation. Widespread practice is to serve counterclaims pursuant to Rule 21(a) but some case authorities indicate a question as to whether that practice is sufficient to perfect service of counterclaims. This amendment will make clear that service of a counterclaim may be done in any manner prescribed for service of Citation and also pursuant to Rule 21(a).

Recommended by the Committee On Administration of Justice.

RULE 165a. DISMISSAL FOR WANT OF PROSECUTION

A case may be dismissed for want of prosecution on failure of any party seeking affirmative relief or his attorney to appear for any hearing or trial of which he had notice, or on failure of such party or his attorney to request a hearing, or take some other action specified by the court, within fifteen days after the mailing of notices of the court's intention to dismiss the case for want of prosecution. The notices of intention to dismiss shall be sent by the clerk to each attorney of record, and to each party not represented by an attorney and whose address is shown on the docket or in the papers on file, by posting same in the United States Postal Service. Notice of the signing of the order of dismissal shall be given as provided in Rule 306d. Failure to mail notices as required by this rule shall not affect the running of the periods provided in Rule 329b except as provided in Rule 329c. ~~[finality of any order of dismissal except as provided below.]~~

If a motion to reinstate is filed within the time allowed by Rules 329b and 329c, ~~[Within thirty days after the signing of the order of dismissal,]~~ the court shall reinstate the case upon finding, after hearing, that the failure of the party or his attorney was not intentional or the result of conscious indifference but was due to an accident or mistake. ~~[Where after a hearing the court finds that neither the party nor his attorney received a mailed notice, or acquired actual notice in any manner, of either the court's intention to dismiss or the order of dismissal prior to the expiration of twenty days after the signing of such order, the court may reinstate the case at any time within thirty days after the party or his attorney first received either a mailed notice or actual notice, but in no event later than six months after the date of signing the order of dismissal.]~~

A motion for reinstatement shall set forth the grounds thereof and be verified by the movant or his attorney. It shall be filed with the clerk, and a copy shall be served on each attorney of record and each party not represented by an attorney. The court shall set the motion for hearing as soon as practicable and

notify all parties or their attorneys of record of the date, time and place of the hearing.

This dismissal and reinstatement procedure shall be cumulative, independent of, and unaffected by the rules and laws governing any other procedures available to the parties in such cases.

Changed by amendment effective , 1983: The provision for extension of the time for the court to act on a motion to reinstate has been deleted and a similar provision has been made in Rule 329c.

Comment: Insofar as this rule affects operation of the periods provided by Rule 329b, it seems more appropriate to include this provision in proposed new Rule 329c.

[By Guittard]

Rule 184. Common Law Rules. No Change.

COMMENT: Rule 184 provides: "The common law of England as practiced and understood shall, in its application to evidence, be followed and practiced in the courts of this State, so far as the same may not be inconsistent with the provisions of the statutes or of these rules."

Rule 184a. Judicial Notice of Law of Other States, Etc.

The judge upon the motion of either party shall take judicial notice of the common law, public statutes, and court decisions of every other state, territory, or jurisdiction of the United States. Any party requesting that judicial notice be taken of such matter shall furnish the judge sufficient information to enable him properly to comply with the request, and shall give each adverse party such notice, if any, as the judge may deem necessary, to enable the adverse party fairly to prepare to meet the request. The rulings of the judge on such matters shall be subject to review.

COMMENT: The proposed Texas Rules of Evidence include Rule 202, Determination of Foreign Law:

"A party who intends to raise an issue concerning the law of a foreign country shall give reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Texas Rules of Evidence. The court's determination shall be treated as a ruling on a question of law."

This rule is accompanied with this note:

"Wellborn Note: The Court may wish to include in this Article, as Rule 203 (or renumbering this 202 as 203) present Tex. R. Civ. P. 184a. The proposed Texas Rules of Evidence, then has a rule in the exact words of Rule 184a, Tex. R. Civ. P. quoted above."

TWO COMMENTS: Rule 184a may appropriately be included in both places. Rule 184a probably should not be deleted from the rules of procedure, because it relates more to procedure than evidence. The other comment is that a judge should not be limited to matters that are shown to him.

Rule 184b. Determination of the Laws of Foreign Countries

A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice, and at least 30 days prior to the date of trial such party shall furnish to the opposing party or counsel copies of any written materials or sources that he intends to use as proof of the foreign law. If the materials or sources were originally written in a language other than English, the party intending to rely upon them shall furnish to the opposing party or counsel both a copy of the foreign language text and an English translation. The court, in determining the law of a foreign nation, may consider any material or source, whether or not submitted by a party or admissible under the rules of evidence, including but not limited to affidavits, testimony, briefs, and treatises. If the court considers sources other than those submitted by a party, it shall give the parties notice and a reasonable opportunity to comment on the sources and to submit further materials for review by the court. The court, and not a jury, shall determine the laws of foreign countries. Its determination shall be subject to review on appeal as a ruling on a question of law.

COMMENT: New rule. Prepared and recommended by the Committee on Administration of Justice. We need to compare proposed Rule 184b and also present Rules 184 and 184a with the proposed Code of Evidence pending before the Supreme Court. This looks more like procedure than evidence, but it would not hurt for the Evidence Code and the procedure rules to refer to each other. The report to the Committee was prepared by Doak Bishop.

Present Texas law represents the traditional, but increasingly out-of-step, view that foreign-country law must always be pleaded and proved as a fact.[1] A growing number of states have adopted a rule like rule 44.1 of the Federal Rules of Civil Procedure or a statute similar to sections 4.01-.03 of the Uniform Interstate and International Procedure Act (UIIPA).[2] These provisions effectively allow courts to take judicial notice of the laws of foreign nations, although the concept of judicial notice is not specifically mentioned.[3] Texas presently allows judicial notice to be taken of the laws of other states of the United States,[4] but not of foreign countries.[5]

One problem with present Texas law is that it permits juries to determine questions of foreign law resulting from conflicting expert opinions.[6] This is contrary to the majority rule.[7] Proposed rule 184b, like section 4.03 of the UIIPA, will make all such determinations questions for the court.

The proposed rule will also answer another longstanding dilemma: should appellate review of a foreign law determination be treated as a review of a factual finding or of a legal conclusion.[8] Review of factual findings is limited by the "no evidence" and "insufficient evidence" standards, [9] while review of legal conclusions is plenary.[10] The proposed rule will permit full appellate review of trial court determinations of foreign law by treating the court's ruling as a conclusion of law and not of fact.

Proposed rule 184b will relax the current strict rules of pleading foreign law,[11] while maintaining the requirement of giving notice of a party's intention to raise an issue of foreign law. Such notice can be given in the pleadings, but need not be. It may also be given by any other reasonable means as long as it is in writing.

The rule follows the general trend set by the federal rules and the UIIPA of permitting, but not requiring, courts to do independent research on foreign law questions,[12] just as they are allowed to do so with respect to domestic law. The intent is to change the nature of the inquiry into foreign law from a fact question to a legal one. But the federal approach has not been entirely satisfactory. Federal courts have sometimes considered unsworn letters and memoranda from foreign legal experts.[13] While the use of unsworn testimony from expert witnesses may be necessary in some cases when political or other restrictions prevent the expert from appearing in person and a sworn affidavit cannot be obtained, a showing of good cause should at least be required before receipt of the unsworn declarations. The proposal takes the best of both worlds by allowing sufficient flexibility to use unsworn evidence but requiring that the necessity for such testimony be demonstrated.

Finally, the proposal differs from the UIIPA and the federal rules in one other way. Unlike these provisions, rule 184b requires a Texas court, which intends to rely on foreign law sources and materials not cited by the parties, to give such parties notice of its intention to do so. The parties are then allowed a reasonable opportunity to comment on these sources and to submit further material if they so desire. This simply makes what is considered to be the preferred method under rule 44.1 and section 4.02 of the UIIPA a requirement under the Texas rule.[14]

In summary, proposed rule 184b will make a substantial contribution to Texas litigation with international aspects by increasing the flexibility of parties for proving foreign-country law and of courts for determining such law. At the same time, sufficient safeguards are maintained to assure fair procedures.

[1] Franklin v. Smallridge, 616 S.W.2d 655, 657 (Tex. Civ. App. - Corpus Christi 1981, no writ). See also Davis v. Davis, 521 S.W.2d 603, 606 (Tex. 1975); Huff v. Folger, Lamb & Co., Dallam's Decisions 530, 531 (Tex. 1843); Cass v. Estate of McFarland, 564 S.W.2d 107, 110 (Tex. Civ. App. - El Paso 1978, no writ); R. RAY, TEXAS LAW OF EVIDENCE § 173 at 215 (1980); Thomas, Proof of Foreign Law in Texas, 25 Sw. L.J. 544 (1971).

[2] States and territories that have adopted the UIIPA provisions on proving foreign law include Arkansas, Michigan, Pennsylvania, and the Virgin Islands. See Uniform Interstate and International Procedure Act, 13 U.L.A. 459, 496, 498-99 (1980), 106, 108 (West Supp. 1982). In addition, the following states have adopted the Uniform Judicial Notice of Foreign Law Act: Colorado, Delaware, Florida, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, New Jersey, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Washington, Wisconsin, and Wyoming. 13 U.L.A. 496 (1980).

[3] FED. R. CIV. P. 44.1, Advisory Committee Notes, 28 U.S.C.A. at 293 (1968).

[4] TEX. R. CIV. P. 184a.

[5] Huff v. Folger, Lamb & Co., Dallam's Decisions 530, 531 (Tex. 1843); Purvis v. Morehead, 304 S.W.2d 221, 224 (Tex. Civ. App. -Waco 1957, no writ); Garza v. Klepper, 15 S.W.2d 194, 198 (Tex. Civ. App. - San Antonio 1929, writ ref'd).

[6] Garza v. Klepper, 15 S.W.2d 194, 198-99 (Tex. Civ. App. - San Antonio 1929, writ ref'd).

[7] Commissioners' Comment to § 4.03 of the Uniform Interstate and International Procedure Act, 13 U.L.A. 498 (1980).

[8] See Comment, Determination of Foreign Law Under Rule 44.1, 10 TEX. INT'L L.J. 67, 84-88 (1975).

[9] See Calvert, "No Evidence" and "Insufficient Evidence" Points of Error, 38 TEXAS L. REV. 361 (1960).

[10] See Adams v. American Quarter Horse Ass'n, 583 S.W.2d 828, 834 (Tex. Civ. App. - Amarillo 1979, writ ref'd n.r.e.), 5 Tex. Jur. 3d Appellate Review § 689 at 544 (1980).

[11] See Thomas, supra note 1, at 561-62.

[12] Bartsch v. Metro-Goldwyn-Mayer, Inc., 391 F.2d 150, 155 n.3 (2d Cir. 1968).

[13] See Markakis v. S.S. Volendam, 475 F. Supp. 29, 32 n.8 (S.D.N.Y. 1979).

[14] Commissioners' Comment to § 4.02 of the Uniform Interstate and International Procedure Act, 13 U.L.A. 497-98 (1980); FED. R. CIV. P. 44.1, Advisory Committee Notes, 28 U.S.C.A. at 292-93 (1968).

PROPOSED CHANGE TO RULE 185, TEXAS RULES OF CIVIL PROCEDURE

"Rule 185. Suit on Sworn Account

When any action or defense is founded upon an open account or other claim for goods, wares and merchandise, including any claim for a liquidated money demand based upon written contract or founded on business dealings between the parties, or is for personal service rendered, or labor done or labor or materials furnished, on which a systematic record has been kept, and is supported by the affidavit of the party, his agent or attorney taken before some officer authorized to administer oaths, to the effect that such claim is, within the knowledge of affiant, just and true, that it is due, and that all just and lawful offsets, payments and credits have been allowed, the same shall be taken as prima facie evidence thereof, unless the party resisting such claim shall[~~, before an announcement of ready for trial in said cause,~~] timely file a written denial, under oath, stating that each and every item is not just or true, or that some specified item or items are not just and true.[~~; provided, that when such counter-affidavit shall be filed on the day of the trial the party asserting such verified claim shall have the right to postpone such cause for a reasonable time. When the opposite party fails to file such affidavit, he shall not be permitted to deny the claim, or any item therein, as the case may be.~~] A party resisting such a sworn claim shall comply with the rules of pleading as are required in any other kind of suit, provided, however, that if he does not timely file a written denial, under oath, as set forth above, he shall not be permitted to deny the claim, or any item therein, as the case may be. No particularization or description of the nature of the component parts of the account or claim is necessary unless demanded by the party resisting the claim."

Comment: Members of the commercial bar sponsored in the 67th Legislature Senate Bill No. 611 and House Bill No. 1238 in an effort to bring trials of sworn account cases under rules that apply to all other kinds of cases. Both bills were taken down when the Supreme Court insisted that it would prefer to handle the matter, because it concerned the wording and application of existing Rule 185.

Recent Practice History: The practice under Rule 185 has developed differently from that of other civil trials. Rule 91, which requires a defendant to except to the particularity of a defect, omission, obscurity, duplicity, generality, or other insufficiency in the allegations of pleadings, has generally not been followed. Rule 90, which states that general demurrers shall not be used and that defects, omissions or fault in pleading either of form or of substance which are not pointed out by exception in writing are waived, also has not been followed in sworn account cases. Rule 93(k), which requires a sworn denial, has not been followed. Courts have applied fundamental error to defects of pleadings even in default judgment cases. Courts apply Rule 185 to mean that a general demurrer need not even be in writing and filed. Unattacked pleadings after a default judgment have been held fatally defective for lack of particularity. Thus, fundamental error is applied to pleadings and is held to apply in these kinds of cases. Coffee v. Coffee, 589 S.W.2d 507 (Tex.Civ.App. - Corpus Christi 1979, no writ); Coon v. Pettijohn & Pettijohn Plumbing, Inc., 587 S.W.2d 551 (Tex.Civ. App. - Fort Worth 1979, no writ); Larcon Petroleum, Inc. v. Autotronic Systems, Inc., 576 S.W.2d 873 (Tex.Civ.App. - Houston [14th Dist.] 1979, no writ); Juarez v. Dunn, 567 S.W.2d 223 (Tex.Civ.App. - El Paso 1979, writ ref'd n.r.e.); DeWees v. Alsip, 546 S.W.2d 692, 694 (Tex.Civ.App. - El Paso 1977, no writ) (alternative holding or dictum); Kinnear v. Dixon, 543 S.W.2d 903, 905 (Tex.Civ.App. - Beaumont 1976, writ ref'd n.r.e.); and many others.

Examples of detailed but legally insufficient computerized invoices abound in the cases. In Hassler v. Texas Gypsum Co., 525 S.W.2d 53 (Tex.Civ.App. - Dallas 1975, no writ), the court held insufficient as an English language description the following statement:

Quantity Ordered	Unit	Quantity Shipped	Product Description	***	Total
484	484	484	1/2 TEMPLE REG TE		$***

Likewise, an example of the invoices held legally insufficient in Sherman v. Phillips Industries, Inc., 560 S.W.2d 154 (Tex.Civ.App. - Houston [1st Dist.] 1977, writ ref'd n.r.e.), includes this information:

Part Number	Description	Quantity
09376-02	BLWR C010 10A 1/2 HP 230 UNIVERSAL MOTOR STOCK 149 TO BE USED	24

The court held a worker's compensation statement for additional premiums based on a subsequent audit insufficient in Abe I. Brilling Insurance Agency v. Hale, 601 S.W.2d 403 (Tex.Civ.App. - Dallas 1980, no writ).

Haebecker v. Santa Rosa Medical Center, 609 S.W.2d 879 (Tex.Civ.App. - San Antonio 1980, no writ), held legally insufficient a 17-page detailed computer printout of medical services and supplies because it used medical abbreviations. The opinion noted that the pleadings contained "no key to abbreviations, or other explanation." Typical of the descriptions held insufficient is this partial list:

V.D.R.L.
C.P.K.
PPT
5% DEX 1000
SENSITIVITY
CULTURE DEFINITIVE
KEFZOL 1 GM INJ.

The patient, knowing the nature of his treatment, probably knew that "V.D.R.L." referred to a standard test for the presence of venereal

disease and that "5% DEX 1000" meant 1000 milliliters of 5% Dextrose solution. In fact, it seems reasonable to assume that in the other cases, the purchaser knew what he was buying, especially in transactions between merchants dealing in goods in a particular industry or a particular type of product.

Justice Keith, in Boots, Inc. v. Tony Lama Co., 584 S.W.2d 583, 585 (Tex.Civ.App. - Beaumont 1979, no writ), wrote concerning Rule 185:

> "Rule 185 was brought forward from the statutes, unchanged, where it had formerly been Tex.Rev.Civ. Stat.Ann. art. 3736 (1926), and the books disclose that the statute had not been amended since 1883. . . . Thus, we have a rule designed to facilitate disposition of litigation under pen and ink bookkeeping techniques of the nineteenth century now governing space-age computerized accounting systems."

Justice Keith then wrote that merchandisers have two options: (1) They may translate their computerized records into the nineteenth century bookkeeping systems or (2) "they can seek a revision of the rule by appropriate amendatory procedures."

Federal Rules Comparison. The federal rules avoid this complexity. Rule 8(a), F.R.C.P., provides in pertinent part:

> "A pleading which sets forth a claim for relief, . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment . . ."

The simplicity of the pleading requirements is illustrated by Official Form No. 5, which is:

(Title of Court and Cause)

1. (Allegation of Jurisdiction).

2. Defendant owes Plaintiff $_____ for goods sold and delivered by Plaintiff to Defendant between June 1, 19___ and December 1, 19___.

WHEREFORE, Plaintiff demands judgment against Defendant for the sum of $_____, interest, and costs.

Rule 55, F.R.C.P., then specifies that judgment is to be entered by default by the clerk if the amount due is liquidated and by the court upon determination of amount if the amount due is unliquidated. No difficulty appears to have arisen from the simplicity of the federal system which has now been in use for many years.

Other States Comparison. Inquiry and research as to the practice in the other major commercial states has been made. The states investigated include California, Illinois, Massachusetts, New Jersey, New York and Pennsylvania. None have any requirement similar to the fact pleading requirement in Texas as described above. All of the other states investigated follow substantially the notice system of pleading as in the federal system, with only minor local procedural variances.

Considerations of Efficiency and Economy. The increasing automation and computerization of business records for account and inventory control have produced a major crisis for debt collection suits under Rule 185. The accuracy, efficiency and economy of computerized records systems for businesses are established. Computer programmers represent inventory items in stock numer, model number, part number and codes that vary from machine to machine. Limited data storage capacity and other technical considerations mandate that the computer representation of a particular inventory item be short. Computer printer limitations, formatting (programming) problems, and other technical limitations mean, as Justice Keith wrote, that computers must be abandoned in favor of a different bookkeeping method or the creditor must forsake a suit on account.

Apart from considerations of computerized recordkeeping comes the realization that in a technological society, many goods and services are known between merchants by names which are not readily understood by the public generally. Many kinds of tools, electronic parts, chemicals, and other supplies are known by trade names, model numbers or some technical jargon which is readily understood within the trade or industry, but not otherwise. Billing practices follow industry practices. The purpose is to improve efficiency and economy in the billing process.

Effect of Present Rule 185. The result of Rule 185 on Texas business is to:

1. Increase the cost of doing business and thus the cost of goods and services.

2. Delay and increase litigation costs, in many cases denying economically feasible access to the system of justice.

3. Place Texas manufacturers and sellers at a competitive disadvantage to those operating in the other states, which have no such requirements.

Purpose of Proposed Changes. Rule 185 should be restored to the pleading and trial system of other litigation in these particulars:

1. Petition or complaint is filed which alleges in summary form, similar to the federal pleading, that goods were sold or services rendered without any further specificity, alleges the amount due and makes a demand for judgment.

2. If there is no answer, judgment by default is entered.

3. If there is an answer, there is still no need for further specificity or documentation unless the defendant places such matters in issue by defensive pleadings or by the pre-trial discovery process.

4. Timeliness of amended pleadings should conform to Rule 63, the same as in other forms of litigation.

RULE 188. DEPOSITIONS IN FOREIGN JURISDICTIONS

1. Whenever the deposition, written or oral, of any person is to be taken in a sister state or a foreign country, or in any other jurisdiction, foreign or domestic, for use in this state, such deposition may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the State of Texas, or (2) before a person commissioned by the court in which the action is pending, and such person shall have the power, by virtue of such person's commission, to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory or a letter of request, or (4) pursuant to the means and terms of any applicable treaty or convention.

A commission, a letter rogatory, or a letter of request shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission, a letter rogatory or a letter of request that the taking of the deposition in any other manner is impracticable or inconvenient; and a commission, a letter rogatory or a letter of request may all be issued in proper cases .

2. Upon the granting of a commission to take the oral deposition of a person under paragraph 1 above, the clerk of the court in which the action is pending shall immediately issue a commission to take the deposition of the person named in the application at the time and place set out in the application for the commission. The commission issued by the clerk shall be styled: "The State of Texas". The commission shall be dated and attested as other process; and the commission shall be addressed to the several officers authorized to take depositions as set forth in Article 3746 of the Revised Civil Statutes of Texas, as amended. The commission shall authorize and require the officer or officers to whom the commission is addressed immediately to issue and cause to be served upon the person to be deposed a subpoena directing that person to appear before said officer or

officers at the time and place named in the commission for the purpose of giving that person's deposition.

Upon the granting of a commission to take the deposition of a person on written questions under paragraph 1 above, the clerk of the court in which the action is pending shall, after the service of the notice of filing the interrogatories has been completed, issue a commission to take the deposition of the person named in the notice. Such commission shall be styled, addressed, dated and attested as provided for in the case of an oral deposition and shall authorize and require the officer or officers to whom the same is addressed to summon the person to be deposed before the officer or officers forthwith and to take that person's answers under oath to the direct and cross interrogatories, if any, a copy of which shall be attached to such commission, and to return without delay the commission, the interrogatories and the answers of the person thereto to the clerk of the proper court, giving his official title and post office address.

3. Upon the granting of a letter rogatory under paragraph 1 above, the clerk of the court in which the action is pending shall issue a letter rogatory to take the deposition of the person named in the application at the time and place set out in the application for the letter rogatory. The letter rogatory issued by the clerk shall be styled, dated and attested as provided for in the case of a commission. The letter rogatory shall be addressed: "To the Appropriate Authority in [here name the state, territory or country]". The letter rogatory shall authorize and request the appropriate authority to summon the person to be deposed before the authority forthwith and to take that person's answers under oath to the oral or written questions which are addressed to that person; the letter rogatory shall also authorize and request that the appropriate authority cause the deposition of the person to be reduced to writing, annexing to the writing any items marked as exhibits and to cause the written deposition, with all exhibits, to be returned to the

clerk of the proper court under cover duly sealed and addressed.

4. Upon the granting of a letter of request, or any other device pursuant to the means and terms of any other applicable treaty or convention, to take the deposition, written or oral, of any person under paragraph 1 above, the clerk of the court in which the action is pending shall issue a letter of request or other device to take the deposition of the person named in the application at the time and place set out in the application for the letter of request or other device. The letter of request or other device shall be styled in the form prescribed by the treaty or convention under which the deposition is to be taken, such form to be presented to the clerk by the party seeking the deposition. Any error in the form of the letter of request or other device shall be waived unless objection thereto is filed and served on or before the time fixed in the order granting the letter of request or other device.

5. Evidence obtained in response to a letter rogatory or a letter of request need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements of depositions taken within the State of Texas under these rules.

COMMENT: The State of Texas currently has a law which gives recognition to the requests of other jurisdictions to depose a Texas resident and to compel that person's attendance at a depositon for use in litigation pending in another jurisdiction. Tex. Rev. Civ. Stat. Ann. article 3769a (Vernon's Supp. 1981) Similar provisions have been adopted by other states to aid in the taking of the depositions of persons residing within the state for use in proceedings pending in other jurisdictions. Prior to the adoption of the Rules of Civil Procedure in 1939, the established procedure for taking depositions in the State of Texas was through issuance of a commission. Tex. Rev. Civ. Stat. Ann. articles 3744 and 3755 (repealed). When the Rules of Civil Procedure were adopted by the State of Texas, Rules 193 and 202 replaced Article 3744 and 3755, supra. Rules 193, 202, 194 and 203 set forth the procedures by which the practitioner obtained a commission from the court for the taking of a deposition. In particular, Rules 194 and 203 authorized the persons who received the commission to take the deposition of the witness wherever that witness might be found. Rules 193, 194, 202 and 203 were repealed by an order of the Texas Supreme Court entered on July 21, 1970 to be effective January 1, 1971. Since that time the Texas practitioner has had no established procedure by which he or she could take advantage of existing laws in other jurisdictions giving recognition to the requests of the State of Texas to depose a person in aid of litigation pending in this state, nor has the Texas practitioner had a written rule of procedure which he or she could use to give even the color of authority to the necessary officers in foreign jurisdictions for their use in invoking the local process required to compel the attendance of witnesses at depositions for use in the State of Texas. The proposed rule of procedure, similar to Rule 28, Federal Rules of Civil Procedure, will allow the Texas practitioner to accomplish both goals.

The proposed rule differs in one major respect from Rule 28, supra. Proposed Rule 188 specifically identifies and allows the Texas practitioner and the Texas courts to avail themselves of the Hague Evidence Convention, 23 U.S.T. 2555 (28 U.S.C.A. §1781 (Supp. 1981)). The Evidence Convention provides a much simplified procedure by which evidence from residents of a foreign country may be obtained. The proposed rule has established a procedure by which the Texas practitioner may a obtain a letter of request as authorized under the Convention to be sent by the judicial authority of the United States, as provided in the Convention, to the competent authority of another party country to request their assistance to a litigant in obtaining evidence for use in a judicial proceeding. Although ratified by a large number of countries, the convention has not been adopted by all of those countries. Additionally the United States has enacted other treaties and conventions with reference to the taking of evidence in foreign countries. Therefore, the proposed rule has allowed for the use of any other means that may be provided by existing or future treaties or conventions of the United States to aid the Texas practitioner.

Finally, included in the proposed rule is a provision whereby evidence obtained as a result of the use of the proposed rule need not be excluded by the court for the reason that it is not received or transcribed under conditions utilized within the State of Texas for taking depositions. This provision has been added as the result of the practice in civil law

countries where the usual procedure is that all evidence is taken before a judge and the judge asks all questions of the witness. A verbatim transcript is generally not taken; however, the judge may dictate a summary of the testimony. It is not unusual for a witness to give unsworn testimony and many civil law nations consider the taking of testimony in the inspection of documents to be public acts, the performance of which is limited to the courts. The proposed rule has provided discretion for the Texas trial court to admit evidence taken under those procedures even though they may not otherwise meet the requirements of Texas law. Without such a provision, crucial evidence located in foreign countries might not be obtainable by litigants at all. The proposed rule does not require the trial court to admit such evidence but merely gives the trial court the discretion to do so.

[Prepared by Dorsaneo]

Rule 233. Number of Peremptory Challenges

~~[Each party to a civil suit shall be entitled to six peremptory challenges in a case tried in the district court, and to three in the county court.]~~

Except as provided below, each party to a civil action is entitled to six peremptory challenges in a case tried in the district court, and to three in the county court.

Alignment of the Parties. In multiple party cases, it shall be the duty of the trial judge to decide whether any of the litigants aligned on the same side of the docket are antagonistic with respect to any issue to be submitted to the jury, before the exercise of peremptory challenges.

Definition of Side. The term "side" as used in this rule is not synonymous with "party," "litigant," or "person." Rather, "side" means one or more litigants who have common interests on the matters with which the jury is concerned.

Motion to Equalize. In multiple party cases, upon motion of any litigant made prior to the exercise of peremptory challenges, it shall be the duty of the trial judge to equalize the number of peremptory challenges so that no litigant or side is given unfair advantage as a result of the alignment of the litigants and the award of peremptory challenges to each litigant or side. In determining how the challenges should be allocated the court shall consider any matter brought to the attention of the trial judge concerning the ends of justice and the elimination of an unfair advantage.

COMMENT: This rule should have been amended years ago and before the legislature intruded into rule making in 1971 when it enacted article 2151a. That article provides:

COMMENT TO Rule 233 (Continued):

"Article 2151a. Peremptory challenges; equalization of number

"After proper alignment of parties, it shall be the duty of the court to equalize the number of peremptory challenges provided under Rule 233, Texas Rules of Civil Procedure, Annotated, in accordance with the ends of justice so that no party is given an unequal advantage because of the number of peremptory challenges allowed that party."

We are seeing an increasing number of appellate decisions which confront the problem of disparity of challenges among aligned and non-aligned parties. In addition to many court of appeals decisions, there are:

Lorusso v. Members Mut. Ins. Co.,
603 S.W.2d 818 (Tex. 1980)

Patterson Dental Company v. Dunn,
592 S.W.2d 914 (Tex. 1979)

Perkins v. Freeman,
518 S.W.2d 532 (Tex. 1974)

Tamburello v. Welch,
392 S.W.2d 114 (Tex. 1965)

Recommended by the Committee on Administration of Justice.

RULE 245. ASSIGNMENT OF CASES FOR TRIAL

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 ten [~~10~~] days to the parties, or by agreement of the parties. Noncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time. [~~With respect to a party who had no notice of setting of a contested case for trial, the provisions of Rule 329b governing motions for new trial and finality of judgments shall operate from the time of receipt of notice of rendition of the judgment, provided that the original motion for new trial shall in any event be filed within 90 days from the rendition of judgment.~~]

Change by amendment effective , 1983: The provision for extension of periods provided by Rule 329b has been deleted and a similar provision made in proposed new Rule 329c.

Comment: Insofar as this rule affects the periods provided in Rule 329b, it seems appropriate to include this provision in proposed new Rule 329c.

[By Guittard]

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 [~~or order overruling motion for new trial~~] is signed. [~~or the motion for new trial is overruled by operation of law.~~] No request for findings of fact and conclusions of law shall be invalid because it is filed prior to the date the final judgment has been signed; however, when a request for findings of fact and conclusions of law is filed prior to the entry of a judgment, such request shall be filed and retained by the court receiving the request, and shall be acted upon by the court only after the final judgment has been signed, and in accordance with Rule 297. Notice of the filing of the request shall be served on the opposite party as provided in Rule 21a. [~~or 21b~~].

COMMENT: This amendment was suggested by Mr. Edward M. Lavin of San Antonio. He advises that case law holds that requests for findings filed prior to entry of judgment are premature and a nullity. Williams v. Royal American Chinchilla, 560 S.W.2d 479 (Tex. Civ. App.--Beaumont 1977, writ ref'd n.r.e.). He cites an instance when he tried a case in Dallas, approved as to form a judgment adverse to him on September 1, 1981, opposing counsel presented the judgment to the Court after he returned to San Antonio, the judge signed the judgment September 14, 1981, and counsel obtained a copy on September 23, 1982 showing the date it was signed. This was nine days after the judgment was signed and the request for findings must be made within ten days after the judgment is signed. Mr. Lavin continues:

"Presently, there are only two options available to counsel desiring to preserve his right to seek such findings of fact and conclusions of law, in cases of this nature. He must either rely on timely notification by opposing counsel, a risky situation at best, or else he is faced with the prospect of calling the trial judge or Court on a daily basis until the judgment has been signed. Neither option is very satisfactory. Of course, one could always file a Motion for New Trial, but if this was not previously contemplated it would constitute a needless procedural expense."

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 [~~or order overruling the motion for new trial~~] is signed. [~~or the motion is overruled by operation of law.~~] 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.

COMMENT: Under present Rule 297, if a motion for new trial is filed (Rule 324) and overruled by operation of law, the conclusions of fact and law are not due in the trial court [Judgment plus 75 days (Rule 329b(c) plus 30 days (Rule 297) = 105 days] until after the record is due on appeal [Judgment plus 100 days (Rule 386)]. The proposed amendment is intended to fit Rules 296-299 back into the time period of preparation of the appellate record. Judge Pope points out that this would also have the effect of allowing the trial judge to work on such findings while considering the motion for new trial.

[Prepared by Beverly Tarpley]

CORRECTIVE RULES

LIST OF GROUP IV RULES

CORRECTIVE RULES

GROUP IV RULES (Cont'd)

Rule 21a. Notice

Every notice required by these rules, other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy of the notice or of the document to be served, as the case may be, to the party to be served, or his duly authorized agent, or his attorney of record, either in person or by registered mail to his last known address, or it may be given in such other manner as the court in its discretion may direct. Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depositiory under the care and custody of the United States Postal Service. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period. It may be served by a party to the suit or his attorney of record, or by the proper sheriff, or constable, or by any other person competent to testify. A written statement by an attorney of record, or the return of the officer, or the affidavit of any other person showing service of a notice shall be prima facie evidence of the fact of service. Nothing herein shall preclude any party from offering proof that the notice or document was not received, or, if service was by mail, that it was not received within three days from the date of deposit in a post office or official depository under the care and custody of the United States Postal Service, and upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just. The provisions hereof relating to the method of service of notice are cumulative of all other methods of service prescribed by these rules. [~~Wherever~~] When these Rules provide for notice or service by registered mail, such notice or service may also be had by certified mail.

[~~Rule 21b. Notice by Certified Mail~~

~~Wherever these Rules provide for notice or service by registered mail, such notice or service may also be had by certified mail~~].

Repealed.

COMMENT: A number of rules enacted prior to the enactment of Rule 21b, effective September 1, 1957 refer to Rule 21a but do not refer to Rule 21b. It is easier to make 21a and 21b into a single rule than it is to amend the several scattered rules that make reference only to 21a. See for example, Rules 169 in last sentence of first paragraph (now amended by new rule presently under consideration); 306d, 308-A, 663a, 700a.

[Prepared by Pope]

Rule 72. Filing Pleadings: Copy Delivered to Adverse Party or Parties

Whenever any party files, or asks leave to file any pleading, plea, or motion of any character which is not by law or by these rules required to be served upon the adverse party, he shall at the same time either deliver or mail to all parties or their attorneys [~~the adverse party or his attorney~~] of record a copy of such pleading, plea or motion. The attorney or authorized representative of such attorney, shall certify to the court on the filed pleading in writing over his personal signature, that he has complied with the provisions of this rule. If there is more than one adverse party and the adverse parties are represented by different attorneys, one copy of such pleading shall be delivered or mailed to each attorney representing the adverse parties, but a firm of attorneys associated in the case shall count as one. Not more than four copies of any pleading, plea, or motion shall be required to be furnished to adverse parties, and if there be more than four adverse parties, four copies of such pleading shall be deposited with the clerk of court, and the party filing them, or asking leave to file them, shall inform all adverse parties or their attorneys of record that such copies have been deposited with the clerk. The copies

shall be delivered by the clerk to the first four applicants entitled thereto, and in such case no copies shall be required to be mailed or delivered to the adverse parties or their attorneys by the attorney thus filing the pleading. After a copy of a pleading is furnished to an attorney, he cannot require another copy of the same pleading to be furnished to him.

COMMENT: Mr. Wendell S. Loomis, Attorney in Houston, Texas, submits this proposal with this comment: "Some attorneys and courts interpret Rules 72 and 73 as requiring copies of pleadings, motions, and other documents formally filed in a cause to be furnished to all counsel in a case regardless of their position. Other courts interpret Rules 72 and 73 as requiring only copies to be furnished 'adverse parties or their attorneys'.

"It frequently arises that there are several parties plaintiff or several parties defendant. In a recent experience before a court (which prompts the writing of this letter) one of three defendants proceeded with Interrogatories and Request for Admissions against the single plaintiff and not receiving any answer moved to deem the request admitted and to strike plaintiff's pleadings as to that defendant and for judgment and obtained a Judgment and Order of Severance thereby placing that defendant in a distinct advantageous position as to the other two defendants in the resolution of the lawsuit, even though, as to the lawsuit, none of the defendants were adverse to any other defendant. Upon protest, the court pointed out that Rules 72 and 73 only require that the pleading "be served upon the adverse party, . . . or his attorney of record."

Rule 116. Service of Citation by Publication

The citation, when issued, shall be served by the sheriff or any constable of any county of the State of Texas or by the clerk of the court in which the case is pending, by having the same published once each week for four (4) consecutive weeks, the first publication to be at least twenty-eight (28) days before the return day of the citation. In all suits which do not involve the title to land or the partition of real estate, such publication shall be made in the county where the suit is pending, if there be a newspaper published in said county, but if not, then in an adjoining county where a newspaper is published. In all suits which involve the title to land or partition of real estate, such publication shall be made in the county where the land, or a portion thereof, is situated, if there be a newspaper in such county, but if not, then in an adjoining county to the county where the land or a part thereof is situated, where a newspaper is published.

COMMENT: Rule 116 was not amended when Rule 103 was changed effective January 1, 1981. It was therefore inconsistent with Rule 103 which reads:

"All process may be served by the sheriff or any constable of any county in which the party to be served is found, or, if by mail, either of the county in which the case is pending or the county in which the party to be served is found; provided that no officer who is a party to or interested in the outcome of a suit shall serve any process therein. Service by registered or certified mail and citation by publication may be made by the clerk of the court in which the case is pending."

[Prepared by Pope]

[~~Rule 128. Officers May Demand Payment~~

~~Officers may demand payment of all costs due in each and every case pending in their respective courts, up to the adjournment of each term of said court.~~]

Repealed.

COMMENT: The rule is obsolete. We do not have terms of court and the rule is not used. It does not appear ever to have been cited.

Rule 129. How Costs Collected

If any party responsible for costs fails or refuses to pay the same within ten days after demand for payment, the clerk or justice of the peace may make certified copy of the bill of costs then due, and place the same in the hands of the sheriff or constable for collection. All taxes imposed on law proceedings shall be included in the bill of costs. Such certified bill of costs shall have the force and effect of an execution. The removal of a case by appeal shall not prevent the issuance of an execution for costs. [~~at the end of the term.~~]

COMMENT: This present rule is probably harmless. It serves no substantial purpose, and the Committee may want to repeal it entirely.

[Rule 132.— Fees of Only Two Witnesses

In no cause shall there be allowed the fees of more than two witnesses to any one fact.]

Repealed.

COMMENT: The rule is obsolete.

[Rule 134. On Exception to Pleading

If an exception to a pleading is sustained, all the costs of such exception and of the pleading adjudged to be insufficient, shall be taxed against the party filing such insufficient pleadings. If such exception be overruled, all costs of such exception shall be taxed against the party taking the exception.]

Repealed.

COMMENT: The rule is obsolete. No cases have ever arisen under it.

[Rule 135.— Of Several Suits

Where any plaintiff shall bring in the same court several suits against the same defendant for causes of action which should have been joined, he shall recover the costs of one action only, and the costs of the other action shall be adjudged against him, unless sufficient reasons appear to the court for instituting several actions.]

Repealed.

Comment: The rule is obsolete. No cases have ever arisen under it.

Rule 145. Affidavit of Inability

A party who is required to give security for costs may file with the clerk or justice of the peace an affidavit that he is too poor to pay the costs of court and is unable to give security therefor; and the clerk or justice shall issue process and perform all other services required of him, in the same manner as if the security had been given. Any party to the suit, or the clerk or justice, shall have the right to contest such affidavit. Such contest may be tried before the trial of the cause, at such time as the court may fix, [~~at the term of court at which the affidavit is filed,~~] after notice thereof has been given to the opposite party or his attorney of record. In the event a contest is filed, the burden shall be on the affiant to prove his alleged inability in open court by evidence other than by the affidavit above referred to.

COMMENT: Even if in a Constitutional County court with terms, the limitation by the term of court makes little sense.

Rule 147. Intervenor or Defendant

The foregoing rules as to security and rule for costs shall apply [~~also to an intervenor and to a defendant~~] to any party who seeks a judgment against [~~the plaintiff or~~] any other party [~~or any other party upon a cross-action or counterclaim~~].

COMMENT: Textual changes.

Rule 151. Death of Plaintiff

If the plaintiff dies, the heirs, or the administrator or executor of such decedent may appear and upon suggestion of such death being entered of record in open court, may be made plaintiff, and the suit shall proceed in his or their name. If no such appearance and suggestion be made at the first term of [~~the~~] court after the death of the plaintiff, the clerk upon the application of defendant, his agent or attorney, shall issue a scire facias for the heirs or the administrator or executor of such decedent, requiring him to appear and prosecute such suit. After service of such scire facias, should such heir or administrator or executor fail to enter appearance within the time provided, the defendant may have the suit [~~discontinued~~] dismissed.

COMMENT: Textual changes.

Rule 153. [~~Where~~] When Executor, etc., Dies

[~~Where~~] When an executor or administrator shall be a party to any suit, whether as plaintiff or as defendant, and shall die or cease to be such executor or administrator, the suit may be continued by or against the person succeeding him in the administration, or by or against the heirs, upon like proceedings being had as provided in the two preceding rules, or the suit may be [~~discontinued~~] dismissed, as provided in Rule 151.

COMMENT: Textual changes.

Rule 161. [~~Where~~] When Some Defendants Not Served

[~~Where~~] When some of the several defendants in a suit are served with process in due time and others are not so served, the plaintiff may either [~~discontinue~~] dismiss as to those not so served and proceed against those [~~that~~] who are, or he may take new process against those not served. No defendant against whom any suit may be so [~~discontinued~~] dismissed shall be thereby exonerated from any liability under which he was, but may at any time be proceeded against as if no such suit had been brought and no such [~~discontinuance~~] dismissal entered.

COMMENT: Textual changes.

Rule 162. [~~Discontinuance~~] Dismissal in Vacation

The plaintiff may enter a [~~discontinuance~~] dismissal on the docket in vacation, in any suit wherein the defendant has not answered, on the payment of all costs that have accrued thereon.

COMMENT: Textual changes.

Rule 163. [~~Discontinuance~~] Dismissal as to Defendants Served, etc.

When it will not prejudice the other defendants, the court may permit the plaintiff to [~~discontinue~~] dismiss his suit as to one or more of several defendants who were served with process, or who have answered, but no such [~~discontinuance~~] dismissal shall in any case, be allowed as to a principal obligor, except in the cases provided for in Art. 2088 of the Revised Civil Statutes of Texas.

COMMENT: Textual changes.

Rule 164. Non-Suit

Upon the trial of any case at any time before plaintiff has rested his case, i.e., has introduced all of his evidence other than rebuttal evidence, the plaintiff may take a non-suit, but he shall not thereby prejudice the right of an adverse party to be heard on his claim for affirmative relief. In the event the party taking the non-suit has been ordered to pay either attorney fees or other costs, or both, as sanctions for failing to comply with orders pertaining to discovery and has failed to pay such fees or costs, or both, the court may, in its discretion, deny the taking of the non-suit.

COMMENT: Recommended by Damon Ball. The basis for the change is that one under an order to disclose or otherwise, or one who is already subject to contempt, may avoid the sanctions by non-suit.

Rule ~~[166-A]~~ 166a. Summary Judgment

(a) Unchanged.

(b) Unchanged.

(c) Motion and Proceedings Thereon. The motion for summary judgment shall state the specific grounds therefor. Except on leave of court, with notice to opposing counsel, the motion and any supporitng affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response. No oral testimony shall be received at the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, admissions, ~~[and]~~ affidavits, and properly certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response. Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal. A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

(d) Unchanged.

(e) Unchanged.

(f) Unchanged.

(g) Unchanged.

COMMENT: A number of cases have held that certified records of court proceedings, and the like, though filed, may not be considered as summary judgment evidence unless they are otherwise within or attached to an affidavit conforming to Rule 166a(e). See State v. Easley, 404 S.W.2d 296, 297 (Tex. 1966); Perkins v. Crittenden, 462 S.W.2d 565, 567-68 (Tex. 1971); Gardner v. Martin, 345 S.W.2d 274, 275 (Tex. 1961). See also, Citizens State Bank v. Shapiro, 575 S.W.2d 375 (Tex. Civ. App.--1979, writ ref'd., n.r.e.).

The Committee on Administration of Justice approved the change.

Rule 219. Jury Trial Day

The court shall designate [~~any day during the term~~] the days for taking up the jury docket and the trial of jury cases. Such order may be revoked or changed in the court's discretion.

COMMENT: Textual change.

Rule [~~237 a.~~] 237a. Cases Remanded from Federal Court

When any cause is removed to the Federal Court and is afterwards remanded to the state court, the plaintiff shall file a certified copy of the order of remand with the clerk of the state court and shall forthwith give written notice of such filing to the attorneys of record for all adverse parties. All such adverse parties shall have fifteen days from the receipt of such notice within which to file an answer.

Comment: Housekeeping. Even so, we are not entirely consistent in numbering rules.

Rule 241. Assessing Damages on Liquidated Demands

[~~Where~~] When a judgment by default is rendered against the defendant, or all of several defendants, if the claim is liquidated and proved by an instrument in writing, the damages shall be assessed by the court, or under its direction, and final judgment [~~final~~] shall be rendered therefor, unless the defendant shall demand and be entitled to a trial by jury.

COMMENT: Textual changes.

Rule 247. Tried When Set

Every suit shall be tried when it is called, unless continued or postponed to a future day [~~of the term~~] or placed at the end of the docket to be called again for trial in its regular order. No cause which has been set upon the trial docket of the court shall be taken from the trial docket for the date set except by agreement of the parties or for good cause upon motion and notice to the opposing party.

COMMENT: Textual change.

Rule 248. Jury Cases

[~~Where juries have~~] When a jury has been demanded, questions of law, motions, exceptions to pleadings, etc., shall, as far as practicable, be heard and determined by the court before the day designated for the trial, and jurors shall be summoned to appear on the day [~~of the term~~] so designated.

COMMENT: Textual changes.

Rule 270. Additional Testimony

At any time the court may permit additional evidence to be offered [~~where~~] when it clearly appears to be necessary to the due administration of justice; provided that in a jury case no evidence on a controversial matter shall be received after the verdict of the jury.

COMMENT: Textual changes.

Rule 289. Discharge of Jury

The jury to whom a case has been submitted may be discharged by the court [~~in instances as follows:~~]

[~~(a) When~~] when they cannot agree and both parties consent to their discharge, or when they have been kept together for such time as to render it altogether improbable that they can agree, or when any calamity or accident may, in the opinion of the court, require it, or when by sickness or other cause their number is reduced below the number constituting the jury in such court.

[~~(b) The jury shall be discharged by the final adjournment of the court before they have agreed upon a verdict~~].

[~~(c) Where a jury has been discharged without having rendered a verdict, the cause may be again tried at the same or another term.~~] The cause shall again be placed on the jury docket and may again be set for trial in conformity with these rules or as the court may direct.

COMMENT: (b) appears to be a hold-over from terms of courts but this is not a serious defect. (c) again refers to terms of court and is obsolete in most courts.

Rule 302. On [~~Counter Claim~~] Counterclaim

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

COMMENT: Corrective.

Rule 303. On [~~Counter Claim~~] Counterclaim for Costs

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

COMMENT: Corrective. The rule was taken from article 2216 in 1941. Does it make any sense? Should it be repealed?

Rule 306d. [~~Notice of Final Judgment or Other Appealable Order~~]
Filing and Service of Final Judgment or Other Appealable Order

Immediately upon the signing of any final judgment or other appealable order, the judge shall deliver it to the clerk for entry in the minutes and for filing, and on the day it is filed the clerk of the court shall [~~mail a posteard notice thereof to~~] serve, as provided in Rule 21a, on each party to the suit [~~as provided in Rule 21a~~] a copy thereof showing the clerk's file mark. Failure to comply with the provisions of this rule shall not affect the finality of the judgment or order.

COMMENT: Recommended by Luke Soules. His letter states:

"The attached suggestions in connection with Rule 306d may bear consideration in response to the many criticisms raised in the Advisory Committee regarding the dating of appellate periods from the time a judgment or order is signed, rather than at some point where the signing becomes public. The suggested changes to Rule 306d would require filing of a judgment, prompt notice of the clerk to the parties, and perhaps accommodate the dating of appellate steps from filing.

"This suggestion responds primarily to the situation where a judge dates and signs an order but does not get it to the clerk in time for the appellate steps to be reasonably pursued by the lawyer. Of course, there are laborious and, to some extent, risky means to review the judge's action, but these changes might eliminate any need for such review."

I had earlier drafted a rule to require notice by ordinary mail. This was done in response to the request of William T. Curry and others and also to get Rules 457, 486, and 515 uniform about notice. The draft by Luke Soules requires registered mail under Rule 21a. If we require registered mail for this rule, we will also probably need to revise the others mentioned above. This was my draft of Rule 306d. Rules 457, 486, and 515 are on following pages.

[Prepared by Pope]

Rule 306d. Notice of Final Judgment or Other Appealable Order

[~~Immediately upon the signing of any~~] When the final judgment or other appealable order is signed, the clerk of the court shall [~~mail a postcard notice thereof to each party to the suit as provided in Rule 21a~~] immediately give notice to the parties or their attorneys of record by first-class mail advising that the judgment or order was signed. Failure to comply with the provisions of this rule shall not affect the finality of the judgment or order.

[Prepared by Pope]

Rule 486. Notice of Granting

~~[When a writ of error is granted, and it is made to appear by affidavit that the respondent has no attorney of record and that his residence is unknown, the clerk shall cause notice of its granting of the writ to be published once each week for four consecutive weeks in some newspaper published in the county in which the case was tried. Where respondent has an attorney of record or the residence of respondent is known the clerk shall send said notice by mail to said attorney of record or respondent. Where publication of the notice is required the petitioner shall deposit with the clerk an amount sufficient to cover the cost thereof.]~~

When the Supreme Court grants, refuses, or dismisses an application for writ of error, habeas corpus, mandamus or other original proceeding, or motion for rehearing, the clerk of the court shall notify the parties or their attorneys of record by sending them a letter by first-class mail.

COMMENT: The present rule is obsolete. Notice to parties by publication at this late stage of the court proceedings, especially since it has not been previously required in the appellate steps, appears strange. In examining this rule, I then looked for the rule that requires notice to attorneys on "refusing" or "dismissing" an application. I have not found it so I have added it here. The proposed amendment is more in keeping with efficient practice.

See also Rules 306d, 457, and 515. Every existing notice rule differs. This is an effort to make them conform to a similar wording.

[Prepared by Pope]

Section 3. Rehearing

Rule 515. Motion for Rehearing

(a) A motion for rehearing may be filed with the clerk of the court within fifteen days after the date of rendition of the judgment or decision of the court or the order refusing or dismissing an application for writ of error. [~~, whether such date be in the same or a succeeding term of such court.~~] In exceptional cases, if the ends of justice require, the court may shorten the time within which the motion may be filed or even deny the right to file it altogether.

(b) The points relied upon for the rehearing shall be distinctly specified in the motion. The motion shall [~~give~~] state the name and [~~residence of the counsel of the opposing party if known, and if not known, the name and residence as shown in the record~~] address of the attorneys of record for the parties, and if there is no attorney of record, the name and address of the party. The party filing such motion shall deliver or mail to each [~~opposing~~] party, or his attorney of record, a true copy of such motion, and shall note on the motion so filed with the clerk that such copies have been so furnished. Upon his failure to do so, he shall accompany his motion with [~~or~~] and furnish to the clerk [~~on his request~~] a sufficient number of [~~duplicates or~~] copies [~~thereof~~] of the motion for the clerk to [~~use in complying with the provisions of Rule 516~~] mail to the attorneys of record or the parties. Failure to supply such copies on request of the clerk may result in dismissal of the motion.

(c) Notice of the Motion. Upon the filing of the motion, the clerk shall notify the attorneys of record or other parties by mail, and if copies of the motion have not been

furnished to the attorneys of record or the parties, the clerk shall mail the motion for rehearing to them.

(d) The parties shall have five days after notice in which to file an answer to the motion. Upon the filing of an answer or the expiration of the five-day period, the motion shall be deemed submitted to the court and ready for disposition. The court may limit the time in which a motion for rehearing or an answer may be filed, and may act upon any motion at any time after it is filed. The court for good cause may deny leave to file a motion for rehearing. The court will not entertain a second motion for rehearing.

COMMENT: We got into this small group of rehearing rules to coordinate several other rules about the clerk's notice by mail or postcard. We have made other revisions for these reasons:

In (a) the reference to terms of court for the Supreme Court is obsolete.

In (b) the language is made to conform to many other rules concerning "attorneys of record or parties." More significantly, the rule requires the clerk to send the motion only to "opposing" parties. Who, in some cases, can tell who are the "opposing" parties? The rule is changed so all counsel get the motion.

(c) is an incorporation of present Rule 516. Rule 516 should be repealed since it is now (c) of this rule.

(d) is a condensed and rewritten version of the present Rule 517.

The last sentence accords with the practice of the court.

On the notice matter, compare Rules 306d, 457, and 486, all of which require the clerk to give notice by letter and not by postcard.

Rule 516. Notice on Motion. Repealed.

Rule 517. Hearing on Motion. Repealed.

[Prepared by Pope]

Rule 320. Motion and Action of Court Thereon

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

COMMENT: This makes the rule consistent with Rule 329b(d).

Rule 327. For Misconduct

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

COMMENT: This codifies existing law that there must be affidavits before the trial judge need have a hearing.

Rule [~~376-a~~] 376a. Form of Transcript

The transcript shall be prepared in [~~such~~] the form as may be directed by the Supreme Court. [~~Such~~] That Court will enter an order or orders in such respect for the guidance of trial clerks.

COMMENT: Corrective.

Rule 414. Briefs

The briefs of the parties shall meet these requirements:

(a) Signature and Service. The brief of each party shall be signed by at least one of the attorneys for the party, shall give the State Bar of Texas identification number, the [~~post office~~] mailing address and telephone number of each attorney whose name is signed thereto, and shall state that a copy of the brief has been delivered or mailed to each group of opposite parties or their counsel [~~there of~~]. A party not represented by an attorney shall sign his brief, and give his address and telephone number. The statement of service on opposite parties by one who is not a licensed attorney shall be verified.

(b) Number of Copies. Each party shall file six copies of his brief in the Court of [~~Civil~~] Appeals in which the case is pending. Any Court of Appeals may by rule authorize the filing therein of [~~a less number~~] fewer or more copies of briefs.

(c) Briefs Written, Typewritten or Printed. The brief of either party may be written, typewritten, or printed. If written, it shall not exceed fifteen pages of manuscript. If typewritten, it must be with double space between the lines, and at least one copy shall be an original written on heavy white paper in clear type.

(d) Appellant's Filing Date. Appellant shall file his brief within thirty days after the filing of the transcript and statement of facts, if any, except that in accelerated appeals appellant shall file his brief within the time prescribed by Rule 385. When the appellant has failed to file his brief in the time prescribed, the appellate court may dismiss the appeal for want of prosecution, unless reasonable explanation is shown for such failure and that appellee has not suffered material injury thereby. The court, may, however, decline to dismiss the appeal, whereupon it shall give such direction to the cause as it may deem proper.

(e) Appellee's Filing Dates. Appellee shall file his brief within twenty-five days after the filing of appellant's brief. When appellant has failed to file his brief as provided in ~~[the foregoing rules]~~ this rule, the appellee may, prior to the call of the case, file his brief, which the court may in its discretion regard as a correct presentation of the case, and upon which it may, in its discretion, affirm the judgment of the court below without examining the record.

(f) Modifications of Filing Time. Upon written motion showing a reasonable explanation of the need for more time, the Court of ~~[Civil]~~ Appeals may grant either or both parties further time for filing their respective briefs, and may extend the time for submission of the case. The court may also shorten the time for filing briefs and the submission of the cause in case of emergency, when in its opinion the needs of justice require it.

(g) Amendment or Supplementation. Briefs may be amended or supplemented at any time when justice requires upon such reasonable terms as the court may prescribe, and if the court shall strike or refuse to consider any part of a brief, the court shall on reasonable terms allow the same to be amended or supplemented.

COMMENT: The rule is rewritten to consolidate into a single rule several other rules. It more clearly identifies and groups subjects under headings. It also follows the format of present Rule 418.

(a). The section comes from the first sentence of present Rule 414, but is amended to make it consistent with Rule 57 that requires the attorney to show his State Bar identification number.

(b). This incorporates parts of the second, third and fourth sentences from present Rule 414. It separates the requirements about numbers of briefs from the requirements about filing dates. It includes a minor textual correction.

(c). Present Rule 417 unchanged.

(d). The first sentence is from the second sentence of present Rule 414. The second and third sentences are present Rule 415 unchanged.

(e). The first sentence is taken from the third sentence of present Rule 414. The second sentence is present Rule 416, with a minor textual change occasioned by the consolidation of several prior rules into the one rule.

(f). Minor textual changes are made in the fifth and sixth sentences of present Rule 414.

(g). Present Rule 431 unchanged.

Rule 415. Repealed _____.

Rule 416. Repealed _____.

Rule 417. Repealed _____.

Rule 431. Repealed _____.

[Prepared by Pope]

Rule 457. Notice of Judgment, Etc.

[~~Upon the rendering of judgment in the Court of Civil Appeals, as well as upon the making of an order granting or overruling a motion for rehearing,~~] When the Court of Appeals renders judgment or grants or overrules a motion for rehearing, the clerk shall immediately give notice to the parties or their attorneys of record of the disposition made of the cause or of the motion, as the case may be, unless such notice is waived. [~~The notice to the successful party or his attorney may be given by postal card, but notice to the unsuccessful party or his attorney~~] The notice shall be given by [~~letter sent under~~] first-class mail [~~postage~~] and be so marked as to be returnable to the clerk in case of nondelivery. Notice of the disposition of any other motion[~~, or of any other~~] or matter which requires notice, may, except as otherwise provided in these rules, be given by postal card.

COMMENT: See related Rules 306d, 486, and 515. Clerks often confuse who won and who lost an appeal. The same kind of notice should go to all parties.

[Prepared by Pope]

Rule 489. Filed Papers to State Addresses

Each filed paper shall recite the names and [~~postoffice~~] mailing addresses of opposing counsel, and in signing filed papers [~~attorneys~~] counsel shall give their own State Bar of Texas identification numbers, [~~postoffice addresses~~] mailing addresses and telephone numbers.

COMMENT: Not earthshaking, but conforms to Rule 57.

Rule 492. Printing, Typing, Number of Copies

Applications, motions, answers, briefs, arguments, and all documents originally filed in the Supreme Court may be printed or typewritten. Typewritten copies must be with double space between the lines and on heavy white paper in clear type. Twelve legible copies of each of such instruments shall be delivered to the Clerk of the Supreme Court. The Clerk shall file all copies. A copy of each [~~such~~] instrument shall be delivered or mailed to the adverse party or his attorney by the party filing it.

COMMENT: As the rule is written one party must hand deliver all documents to the other party.

Rule 496. Brief

The application for writ of error in the form required by Rule 469 shall be the brief for the petitioner. The respondent or other party who files a brief in the Supreme Court shall comply with the provisions of Rule 469(b), (c), (e), (f), (g), and (h). The respondent or party other than petitioner should file an original brief in the Supreme Court but may rely upon the brief filed in the Court of Appeals provided there is compliance with Rule 480a. Briefs shall be confined to the points raised in the motion for rehearing and preserved in the application for writ of error.

The brief shall be signed by at least one of the attorneys for the party, shall give the State Bar of Texas identification number, the mailing address and telephone number of each attorney whose name is signed thereto, and shall state that a copy of the brief has been delivered or mailed to each group of opposite parties or their counsel. A party not represented by an attorney shall sign the brief and give his address and telephone number. The statement of service on opposite parties by one who is not a licensed attorney shall be verified.

The clerk may receive amicus curiae briefs or argument, provided it is shown that copies have been furnished to all attorneys of record in the case.

COMMENT: The rule is rewritten. The revisions require service of briefs and compliance with Rule 480a concerning the number of briefs required for filing. Often only three briefs reach the Supreme Court. It also harmonizes Rules 414 and 469 concerning service of briefs on opposite parties.

Rule 498. Argument

In the argument of cases in the Supreme Court, each side may be allowed thirty minutes in the argument at the bar, with fifteen minutes more in conclusion by the petitioner. In cases [~~of very great importance,~~] involving difficult questions, the time allotted [~~herein~~] may be extended by the court, provided application [~~therefor~~] is made before argument begins. The court may, in its discretion, shorten the time for argument. It may also align the parties for purposes of presenting oral argument.

Not more than two counsel on each side will be heard, except on leave of the court.

Counsel for an amicus curiae shall not be permitted to argue except that he may share time allotted to one of the counsel who consents and on leave of the court obtained prior to time for argument.

COMMENT: This rule was re-examined because former Rule 426 was re-examined after the Chief Justices of the Courts of Appeals, following their meeting at the Judicial Conference in Corpus Christi in 1981, adopted a resolution asking the court to give consideration to a reduction of argument time in the Courts of Appeals. See Comment under Rule 423(d).

Rule 499. Correspondence

Correspondence or communications relative to any matter before the court must be conducted with the clerk and shall not be addressed to or conducted with any of the justices ~~[or to any judge of the Commission of Appeals]~~ or members of the court's staff.

COMMENT: The present rule does not cover telephone or personal communications. It does not include briefing attorneys, central staff, administrative assistants.

Rule 499a. Direct Appeals

~~[In obedience to an act of the Regular Session of the Forty Eighth Legislature approved February 16, 1943, and entitled "An Act authorizing appeals in certain cases direct from trial courts to the Supreme Court, authorizing the Supreme Court to prescribe rules of procedure for such appeals, and declaring an emergency," which act was passed by authority of an amendment known as Section 3-b of Article 5 of the Constitution, the following procedure is promulgated]~~

In compliance with article 1738a, the following rules of procedure for direct appeals to the Supreme Court are promulgated.

(a) Unchanged

(b) Unchanged

(c) Unchanged

(d) Unchanged

COMMENT: When present Rule 499a was adopted in June 1943, it referred to the Legislative Act because that had just been passed and did not then have a statute number.

Rule 504. No Affirmance, Reversal or Dismissal for Want of Form or Substance

The Supreme Court will not affirm or reverse a judgment or dismiss a writ of error for defects or irregularities in appellate procedure, either of form or substance, without allowing a reasonable time to correct or amend such defects or irregularities. [~~provided the court may make no enlargement of time prohibited by Rule 5 nor any enlargment of the time for filing transcript or statement of facts.~~]

COMMENT: The present rule conflicts with Rule 21c.

Rule 741. Requisites of Complaint

The complaint shall describe the lands, tenements or premises, the possession of which is claimed, with certainty sufficient to identify the same, and it shall also state the facts which entitle the complainant to the possession and authorize the action under Articles 3973, 3974 and 3975, [~~of the~~] Revised Civil Statutes. [~~of Texas of 1925~~]

COMMENT: Corrective.

Rule 746. Only Issue

In case of forcible entry or of forcible detainer under [~~Title 64, Revised Civil Statutes of Texas, 1925~~] Articles 3973-3994, Revised Civil Statutes, the only issue shall be as to the right to actual possession; and the merits of the title shall not be inquired into.

COMMENT: Corrective.

Rule 806. Claim for Improvements

When the defendant or person in possession has claimed an allowance for improvements in accordance with Articles 7393-7401, [~~of the~~] Revised Civil Statutes, [~~of Texas, 1925,~~] the claim for use and occupation and damages mentioned in the preceding rule shall be considered and acted on in connection with such claim by the defendant or person in possession.

COMMENT: Corrective.

Rule 807. Judgment [~~Where~~] When Claim for Improvements is Made

[~~Where~~] When a claim for improvements is successfully made under [~~Arts.~~] Articles 7393 [~~to~~] -7401, [~~of the~~] Revised Civil Statutes, [~~of Texas, 1925,~~] the judgment shall recite the estimated value of the premises without the improvements, and shall also include the conditions, stipulations and directions contained in Articles 7397 [~~7398 and~~] -7399, [~~of the~~] Revised Civil Statutes [~~of Texas, 1925~~], so far as applicable to the case before the court.

COMMENT: Corrective.

Rule 808. [~~Former Laws~~] These Rules Shall Not Govern, When

Nothing in [~~Title 124 of the Revised Civil Statutes of Texas, 1925,~~] Articles 7364-7401A, Revised Civil Statutes, shall be so construed as to alter, impair or take away the rights of parties, as arising under the laws in force before the introduction of the common law, but the same shall be decided by the principles of the law under which the same accrued, or by which the same were regulated or in any manner affected.

COMMENT: Corrective.

Rule 810. Requisites of Pleadings

The petition in actions authorized by Article 1975, [~~of the 1925~~] Revised Civil Statutes, shall state the real names of the plaintiff and defendant, and shall describe the property involved with sufficient certainty to identify the same, the interest which the plaintiff claims, and such proceedings shall be had in such action as may be necessary to fully settle and determine the question of right or title in and to said property between the parties to said suit, and to decree the title or right of the party entitled thereto; and the court may issue the appropriate order to carry such decree, judgment or order into effect; and whenever such petition has been duly filed and citation thereon has been duly served by publication as required by Rules 114-116, the plaintiff may, at any time prior to entering the decree by leave of court first had and obtained, file amended and supplemental pleadings that do not subject additional property to said suit without the necessity of reciting the defendants so cited as aforesaid.

COMMENT: Corrective.

Rule 811. Service by Publication in Actions Under Article 1975

In actions authorized by Article 1975, [~~of the 1925~~] Revised Civil Statutes, [~~of the State of Texas,~~] service on the defendant or defendants may be made by publication as is provided by Rules 114-116 or by service of notice of the character and in the manner provided by Rule 108.

COMMENT: Corrective.

Rule 820. [~~Workmen's~~] Workers' Compensation Law

All portions of the [~~Workmen's~~] Workers' Compensation Law, [~~Title 130 of the~~] Articles 8306-8309-1, Revised Civil Statutes, [~~of Texas, 1925,~~] and amendments thereto, which relate to matters of practice and procedure are hereby adopted and retained in force and effect as rules of court.

COMMENT: Corrective.