SUPREME COURT ADVISORY COMMITTEE

JUNE 26 - 27, 1987

REFERENCE MATERIALS

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SPECIAL SUBCOMMITTEE ON TRAP RULES 47, 48 and 49

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June 10, 1987

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

Dear Steve:

Thank you very much for agreeing by telephone to chair the Special Subcommittee of the Supreme Court Advisory Committee to review TRAP Rules 47, 48, and 49, for codification of the supersedeas law of Texas.

I appoint to your Committee: William V. Dorsaneo III (an attorney active in the appeal for Texaco), Harry M. Reasoner (an attorney active in the appeal for Texaco), Elaine Carlson, Pat Beard, and Tom Ragland.

The supersedeas issue is completely moot in the Pennzoil-Texaco litigation with the pendency of the Texaco bankruptcy. However, since the two sides have so deeply studied the problem when it was one of the forefront issues, I felt it important to have one member of each team in your assistance, with a majority not involved in that case or its former supersedeas issues.

The Texas Senate unanimously voted a resolution to study the supersedeas practice in Texas in the next biennium and to make a report at the next Legislative Session. SB 1414 (copy attached) got so far in this session as to pass the Senate Jurisprudence Committee although it did not have sufficient support to get to the Senate floor. Aside from the fact that this would be another instance of legislative invasion of the Supreme Court rule-making power, SB 1414 was riddled with defects and deficiencies readily apparent from reading it. The SCAC must act to produce a good work product in order to forestall something like this in the 1989 Legislative Session.

Marie Yeates, an attorney with Vinson & Elkins, has done an in-depth memorandum on the Texas law (copy attached) and has also drafted a proposed rule (copy attached).

I am sending copies of this letter and the attached materials to each of your Subcommittee members by Federal Express today and ask that you make a written report on a timely basis so as to have the report in my hands no later than Thursday, June 18. That's right -- in less than a week. We will be preparing the meeting materials for distribution to the Committee as a whole on Friday, June 19, so that they can be mailed that day and be in the hands of the Committee members a few days prior to the June 26 meeting in event the members should choose to make some advanced preparation for the meeting.

I apologize for the short fuse on this matter, but somehow the timing just worked out that way. I am sure that your members will be willing to meet by telephone as often as necessary next week at convenient times.

Very truly yours,

Luther H. Soules III

LHSIII:gc
LS587/029
Enclosures

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April 7, 1987

Luke Soules, Esq.
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Re: Texas Supreme Court Advisory Committee

Dear Luke:

This letter is written in response to your letter dated February 23, 1987, requesting a review of Rule 47, Texas Rules of Appellate Procedure, in connection with the Supreme Court Advisory Committee's consideration of that rule. After reviewing the proposed amendment to Rule 47, which has been approved by the State Bar Committee on Administration of Justice, my observations are as follows:

1. Paragraph (k) Recognizes Existing Texas Law. The principal (indeed, the only) proposed amendment to Rule 47 is the addition to that rule of new paragraph (k) expressly authorizing the trial court to stay enforcement of a judgment and order security arrangements in lieu of a supersedeas bond. As you and I have discussed, Texas courts have previously recognized the trial court's authority to suspend enforcement of a judgment even though Rule 47, like its predecessor, Rule 364, Texas Rules of Civil Procedure, does not expressly authorize such action by the trial court. Thus, for example, in McCormick Operating v. Gibson Drilling, 717 S.W.2d 420, 427 (Tex. App.--Tyler 1986, no writ), the Court of Appeals stated:

> A court may render a judgment that is final and appealable fixing the rights and liabilities of the parties, but defer its enforcement until final judgment is an ancillary or related proceeding. Rose v. Baker, 143 Tex. 202, 183 S.W.2d 438 (1944).

717 S.W.2d at 427. See, e.g., Hargrove v. Ins. Investment Corp., 142 Tex. 111, 176 S.W.2d 744 (1944) (one-half of money judgment ordered placed in registry of court pending appeal in related case); Jamison v. City of Pearland, 520

S.W.2d 445 (Tex. Civ. App.--Houston [1st Dist.] 1975, no writ) (enforcement of city's judgment for taxes, etc., suspended pending appeal in related case). Other Texas decisions deal with suspension of judgment enforcement outside of the context of some related or companion case. In Fairbanks, Morse & Co. v. Carsey, 109 S.W.2d 985 (Tex. Civ. App.--Dallas 1937, writ dism'd w.o.j.), the court entered a money judgment for commissions not yet accrued and stayed execution on the judgment until the date of accrual of the amounts due. The court's opinion includes the following language:

> That the court had the right to stay execution and abate the interest on the amounts not due cannot be seriously questioned. "Under the general supervisory powers over their process, all courts of common law have the power temporarily to stay execution on judgments by them rendered whenever it is necessary to accomplish the ends of justice." 23 C.J. p. 521. In the instant case, we think it was necessary for the accomplishment of the ends of justice, that the court establish the amounts and render judgment for the commissions not yet matured, and stay execution until their maturities, this to avoid a multiplicity of suits.

109 S.W.2d at 990. See Weaver v. Bogle, 325 S.W.2d 457 (Tex. Civ. App.--Waco 1959, no writ) (court entered money judgment on July 3, 1958, and by court's own motion ordered execution of the judgment stayed until November 24, 1958).

Similarly, in Harris v. Harris, 174 S.W.2d 996 (Tex. Civ. App.--Fort Worth 1943, no writ), a money judgment of $65.00 was awarded against the father-in-law as part of a divorce and property settlement judgment. The judgment ordered the amount to be paid by the father-in-law in monthly installments. An argument was made that the judgment was not final because the total judgment amount of $65.00 was not enforceable at once, payments being due under the judgment in monthly installments. Rejecting that argument, the appellate court stated: "under proper conditions, a court may enter a judgment and stay execution for a given time. . . ." 174 S.W.2d at 1000. The appellate court also noted that the trial court's action was "at least an adjustment of the equities between the parties. . . ." Id.

The parties may also agree to include in a judgment a stay of execution as in Karnes v. Barton, 272 S.W.2d 317

(Tex. Civ. App.--Austin 1925, no writ), in which the parties agreed to, and the judgment therefore recited, a 100-day stay of execution.

Thus, Texas trial courts have previously stayed execution of judgments under a variety of circumstances. The Texas courts arguably are already empowered to exercise the flexibility as recognized in the cases cited above. See also Section 65.013, TEX. CIV. PRAC. & REM. CODE (injunction to stay execution of judgments). Arguably, the present Rule 47 may contemplate such trial court authority pursuant to the prefatory language in paragraph (a) "Unless otherwise provided by law or these rules. . . ." Indeed, Justice Powell's opinion in Pennzoil Co. v. Texaco, Inc., slip op. No. 85-1798 (U.S. Sup. Ct. April 6, 1987) (footnote 15), recognized this prefatory language as suggesting that the Texas trial court has authority to suspend the supersedeas bond requirement, if that court determines that such a requirement would violate the federal Constitution. Accordingly, express recognition of the trial court's authority as in proposed paragraph (k) would certainly be consistent with the prior Texas case authorities cited above.

As you know, the majority of the United States Supreme Court did not address the constitutionality of the Texas bond rules in the Pennzoil decision. However, Justice Stevens' concurring opinion, joined in by Justice Marshall, recognizes that, even if present Rule 47 were construed to provide no flexibility to the trial judge, it would not contravene the federal Constitution. Thus, Justice Stevens wrote:

> I agree that it might be wise policy for Texas to grant an exception from the strict application of its rules when an appellant can satisfy these three factors. But the refusal to do so is certainly not arbitrary in the constitutional sense. A provision for such exceptions would require the State to establish rules and to hold individualized hearings whenever relevant allegations are made. Texas surely has a rational basis for adopting a consistent rule refusing to stay the execution of money judgments pending appeal, unless a sufficient bond or security is posted.

Justice Brennan likewise agreed that the Texas bond requirement is not unconstitutional. Nevertheless, the

proposed amendment to Rule 47 may preclude any future constitutional challenge to the Texas bond rule.

2. Appellate Review of Security Requirements. Rule 49, Texas Rules of Appellate Procedure, presently provides for appellate review of supersedeas bonds in civil cases. Rule 49(b) states that the appellate court may review for excessiveness a bond "fixed by the trial court." The proposed rules change should perhaps include a companion amendment to Rule 49 expressly to allow for appellate review of trial court action under proposed paragraph (k) to Rule 47. Additionally, language might be inserted in proposed paragraph (k) in Rule 47 stating that, notwithstanding paragraphs (a) and (b) [money judgment bond approved by the clerk], the trial court may "fix" a supersedeas bond on a money judgment in less than the amount of that judgment. The trial court's authority to "fix" such a bond could then be reviewed by the appellate court for excessiveness under present Rule 49(b).

3. Continuing Jurisdiction of the Trial Court to Establish the Supersedeas Bond. A judgment can be executed upon only after the expiration of thirty days following the date on which the new trial motion is overruled, either expressly or by operation of law. Rule 627, TEX. R. CIV. P. That is also the date on which the trial court's plenary jurisdiction over the cause expires--thirty days after the date of overruling the motion for new trial. Rule 329b(e), TEX. R. CIV. P. See Transamerican Leasing Co. v. Three Bears, Inc., 567 S.W.2d 799, 800 (Tex. 1978) ("[u]nder the express provision of [former Rule 329b], the trial court retains jurisdiction over the cause and, thus, plenary power over its judgment until thirty days after the original or amended motion for new trial is overruled." 567 S.W.2d at 800. See Burroughs v. Leslie, 620 S.W.2d 643, 644 (Tex. Civ. App.--Dallas 1981, writ ref'd n.r.e.) ("[u]nder rule 329b . . . the trial court retained jurisdiction over the cause and had plenary power over its judgment until thirty days after expiration of the time for overruling the motion for new trial. . . .").

In the usual case, the trial court should be requested to make the supersedeas bond determination before expiration of the period of its plenary jurisdiction. However, where no such determination is made during that time period, does the trial court have continuing jurisdiction to decide the supersedeas bond question? The trial court clearly has continuing jurisdiction to enforce its judgments, after expiration of its plenary power, so long as its actions do

not modify the judgment or otherwise interfere with the jurisdiction of the Court of Appeals. See Arndt v. Farris, 633 S.W.2d 497 (Tex. 1982); Smith v. Smith, slip op. 01-85-0989-CV (Tex. App.--Houston [1st Dist.] Sept. 25, 1986, no writ); Crawford v. Kelly Field National Bank, slip op. No. 04-85-00529- CV (Tex. App.--San Antonio, Jan. 29, 1987).

As a corollary to the trial court's continuing jurisdiction over enforcement of its judgments, that court must also have continuing jurisdiction to deal with the supersedeas bond issues. As a matter of policy and practice, the Court of Appeals would probably prefer to have the trial court pass on the supersedeas question in the first instance. Furthermore, it is questionable whether the Court of Appeals can hear evidence as would be necessary in a determination of what security arrangements are required. Thus, that continuing jurisdiction should probably rest in the trial court.

There are few cases dealing with the issue of the trial court's continuing jurisdiction over the supersedeas bond issue. In Southwestern States General Corp. v. McKenzie, 658 S.W.2d 850, 852 (Tex. App.--Dallas 1983, writ ref'd n.r.e.), the appellant filed a motion within the period of the trial court's plenary jurisdiction asking to substitute negotiable instruments in lieu of any supersedeas bond pursuant to Rule 14(c), Texas Rules of Civil Procedure. The trial court entered its order with respect to that motion after the expiration of the trial court's plenary jurisdiction, i.e., over 30 days after the overruling of appellant's new trial motion.

On appeal, the appellee argued that the trial court lacked jurisdiction to rule on the supersedeas bond issue. The Court of Appeals disagreed. First the Court noted that the motion with respect to the supersedeas bond was filed in the trial court within the period of the trial court's jurisdiction, and thus, the trial court was required to rule upon it. However, the Court went on to say the following:

> The fact that this court had acquired jurisdiction of the appeal did not diminish the trial court's continuing jurisdiction to fix the supersedeas bond. [Citations omitted.] Indeed, this court recently indicated that, at least in the Rule 14(c) case such as this, an applicant must properly first seek leave of the trial court. [Citation omitted.]

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658 S.W.2d at 852.

In Cashion v. Cashion, 239 S.W.2d 742 (Tex. Civ. App.--Waco 1951, no writ), the Court addressed the supersedeas bond issue with respect to a non-money judgment. Former Rule 364(e), Texas Rules of Civil Procedure, (now Rule 47(e), Texas Rules of Appellate Procedure) provided for the setting of the supersedeas bond in such cases by the trial court. In that case the appellant sought an injunction from the Court of Appeals to restrain execution of the judgment where no supersedeas bond had been filed. The Court stated as follows:

> If appellants desire to suspend the judgment pending appeal they should proceed under Rule 364, sec., (e), Texas Rules of Civil Procedure, and not by way of injunction. The right to suspend a judgment by filing supersedeas bond in the trial court exists though appeal bond and transcript have already been filed in the court of appeals and such filing does not diminish the power and duty of the trial court to fix the amount of the supersedeas bond in cases of this character if and when requested to do so. The appellants concede that no request in this respect has ever been made of the court below.

A rules amendment providing for continuing jurisdiction of the trial court to deal with the supersedeas bond issue would be in order. It would also make sense to specify that Rule 621a, Texas Rules of Civil Procedure (post-judgment discovery), is available in connection with the supersedeas bond determination under proposed paragraph (k) of Rule 47. Clearly the trial court will require information concerning the judgment debtor's financial picture in order to exercise its discretion in making the security determination.

These are my observations concerning the practical workings of the proposed new Rule 47. Obviously, these comments draw heavily upon our experiences in the Pennzoil litigation and the collective wisdom of the attorneys in that litigation, especially W. James Kronzer.

Please let me know if I can be of further assistance.

Sincerely,

Marie R. Yeates

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MEMORANDUM

June 9, 1987

To: Judge Kronzer
Luke Soules

From: Marie R. Yeates

Re: Proposed Revisions to Supersedeas Rules -- Texas Supreme Court Advisory Committee

Attached are the tentative proposed revisions of the Supersedeas Rule. They should be considered tentative only until reviewed by Judge Kronzer.

Proposed new Rule 47 would provide the trial court with discretion to determine the amount and type of security for any type of judgment, including a money judgment. It would also permit the trial court to make alternative security arrangements in lieu of posting security. Attached to the proposed Rule 47 are comments concerning the outlined changes.

Also attached, as requested by Luke, is a proposed re-write of Rule 49 providing for appellate review of the trial court's exercise of discretion. Comments are also attached to that proposed Rule.

Finally, as an alternative, we also attach a new paragraph (k) to be added to the present Rule 47 in order to attempt to engraft onto that rule, the authority provided federal courts by Rule 62b, Federal Civil Procedure, to stay the execution of a judgment. The Committee may be more likely to adopt a new paragraph (k), rather than attempting to rewrite the whole rule. However, Luke indicated that he was interested in an attempted rewrite of the whole rule.

In conjunction with your consideration of paragraph (k), you might note that the federal rules do not state the factors to be considered (e.g., irreparable harm, etc.) in the rule itself.

cc: Harry M. Reasoner

PROPOSED RULE 47
TEXAS RULES OF APPELLATE PROCEDURE

Stay of Judgment Pending Appeal

(a) Suspension of Execution. Unless otherwise provided by law or these rules, the appellant may suspend execution of the judgment by posting security (such as a surety bond with good and sufficient sureties or a deposit under Rule 48 payable to the appellee) in an amount and type determined by the trial court, to secure payment of the judgment, 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 appeals shall be against him, he shall pay all such damages and costs as said court may award against him. The amount and type of security necessary to suspend execution of judgment as provided in all succeeding paragraphs of this rule shall be established within the discretion of the trial court, considering what security is required to secure the plaintiff in judgment against any loss or damage occasioned by the delay on appeal, as well as the interests of justice and the relative equities of the parties. If the security posted is a surety bond or Rule 48 deposit and is sufficient to secure the costs and is filed or made within the time prescribed by Rule 40, it constitutes sufficient compliance with Rule 46.

(b) Money Judgment. When the judgment awards recovery of a sum of money, the amount and type of security shall be determined by the trial court. The clerk may approve a good and sufficient surety bond or deposit pursuant to Rule 48 without the exercise of the discretion of the trial court if the appellant files a bond or deposit in at least the amount of the judgment, interest, and costs.

(c) Land or Property. When the judgment is for the recovery of land or other property, the posting of security

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 during the appeal, and the security shall be in the amount and type determined by the trial court.

(d) Foreclosure on Real Estate. When the judgment is for the recovery of or foreclosure upon real estate, the appellant may suspend the judgment insofar as it decrees the recovery of or foreclosure against said specific real estate by posting security in the amount and type to be determined by the trial court, not less than the rents and hire of said real estate; but if the amount of the security is less than the amount of the money judgment, with interest and costs, then the trial court may within its discretion suspend execution on the money judgment with or without the posting of additional security.

(e) Foreclosure on Personal Property. When the judgment is for the recovery of or foreclosure upon specific personal property, the appellant may suspend the judgment insofar as it decrees the recovery of or foreclosure against said specific personal property by posting security in an amount and type to be determined by the trial court, not less than the value of said property on the date of rendition of judgment; but if the amount of the security is less than the amount of the money judgment with interest and costs, then the trial court within its discretion may suspend execution on the money judgment with or without the posting of additional security.

(f) Other Judgment. When the judgment is for other than money or property or foreclosure, the security shall be in such amount and type to be determined by the trial court as will secure the plaintiff in judgment in any loss or damage occasioned by the delay on appeal considering the interests of justice and the relative equities of the

parties, but the trial court may decline to permit the judgment to be suspended on filing by the plaintiff of security to be determined by the trial court in such an amount as will secure the defendant in judgment in any loss or damage occasioned by any relief granted if it is determined on final disposition that such relief was improper, considering the interests of justice and the relative equities of the parties.

(g) Child Custody. When the judgment is one involving the care or custody of a child, the appeal, with or without security, 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 rendering the judgment. However, the appellate court, upon a proper showing, may permit the judgment to be superseded in that respect also.

(h) For State or Subdivision. When 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 security shall be allowed and its amount and type determined within the discretion of the trial court, and the liability of the appellant shall be for the amount of the security if the appeal is not prosecuted with effect. Under equitable circumstances and for good cause shown by affidavit or otherwise, the court rendering judgment on the security may allow recovery for less than its full amount.

(i) Stay of Judgment upon Alternative Security Arrangements. The trial court may, in the exercise of its discretion, stay the judgment pending appeal by alternative security arrangements in lieu of posting security. Such alternative security arrangements should be sufficient to secure the plaintiff in judgment against any loss or damage occasioned by the delay on appeal and to preserve the

effectiveness of the judgment or order being appealed, but the trial court may consider the interests of justice and the relative equities of the parties in determining the adequacy of the alternative security arrangement. The trial court may vacate, limit or modify this stay for good cause during the pendency of the appeal.

(j) Effect of Stay of Judgment. The filing and approval by the clerk or the posting of security in the amount and type determined by the trial court or the provision for alternative security arrangements in compliance with this Rule,

> (1) shall suspend execution on the judgment, or so much thereof as has been suspended by the trial court, and if execution has issued, the clerk shall forthwith issue a writ of supersedeas; and
>
> (2) shall suspend any judgment liens established or that could otherwise be established pursuant to Texas Property Code Sec. 52.010, et seq.

Where the judgment is suspended only in part, and judgment liens attach with respect to those portions of a judgment not suspended, or, where suspension of the judgment has been denied, the trial court shall have discretion to direct that specified property of appellant, but not other property, shall be subject to judgment liens.

(k) Certificate of Deposit. If the appellant makes a deposit in lieu of a bond, posts other security, or makes alternative security arrangements, the clerk's certificate that the deposit has been made, the security posted or the alternative security arrangement made as required by the trial court shall be sufficient evidence thereof.

(l) Continuing Trial Court Jurisdiction. The trial court shall have continuing jurisdiction during the pendency of an appeal from a judgment, even after the expiration of its plenary power, to determine the amount and the type of security and, upon any changed circumstances, to modify the

amount or the type of security required to continue the suspension of judgment. If the security is determined or altered by the trial court after the attachment of jurisdiction of the court of appeals, the appellant shall notify the court of appeals of the security determination by the trial court. The trial court's exercise of discretion under this rule is subject to review under Rule 49, Texas Rules of Appellate Procedure.

COMMENTS TO PROPOSED RULE 47
TEXAS RULES OF APPELLATE PROCEDURE

Comments on Paragraph (a).

Comment 1: As used in this Rule, "trial court" means the court in which the judgment was rendered. This is consistent with TEX. CIV. PRAC. & REM. CODE § 65.023 providing for mandatory venue for any separate action to stay a suit for execution on a judgment in the court in which the suit is pending or the judgment was rendered.

Comment 2: The prefatory language of the prior rule, "unless otherwise provided by law or these rules . . ." remains in the proposed new rule and is intended to reflect that the trial court has other authority to suspend enforcement of a judgment, see TEX. CIV. PRAC. & REM. CODE § 65.013, and that the trial court has the authority to suspend execution of a judgment without posting security upon alternative security arrangements pursuant to paragraph (i) of this proposed Rule.

Comment 3: The term "security," as used in the proposed rule, is intended to include a surety bond, deposit under Rule 48, TEX. R. APP. P., or any form of property which the trial court may determine to be good and sufficient security under this Rule.

Comment 4: This paragraph (a) of the proposed rule continues the prior law that the appellant generally may supersede the judgment as a matter of right; the right to obtain suspension of execution on a judgment pending appeal is, as a general rule, not dependent upon the discretion of the trial court. Schrader v. Garcia, 512 S.W.2d 830 (Tex. Civ. App.--Corpus Christi 1974, no writ) ("Defendant [has] the right to suspend the execution of [money] judgment by giving a good and sufficient bond. . . ."); Brown v. Faulk, 231 S.W.2d 743 (Tex. Civ. App.--San Antonio 1950, mand.

overr.) (defendant had the right to supersede the judgment on a note to foreclose a chattel mortgage); R.B. Spencer & Co. v. Texas Pacific Coal & Oil Co., 84 S.W.2d 853 (Tex. Civ. App.--Ft. Worth 1935), writ dism'd, 91 S.W.2d 411 (Tex. Civ. App.--Ft. Worth 1936, writ dism'd) (appellant entitled to supersedeas in a foreclosure on real estate judgment).

The appellant is not, however, entitled to suspend enforcement of certain types of judgments as a matter of right, as set out in paragraph (f) and (g) of this Rule. This is merely a continuation of the prior law. Pena v. Zardenetta, 714 S.W.2d 72 (Tex. App.--San Antonio 1986, no writ) (relators were entitled to supersedeas only if the trial court judgment was for money, property, or foreclosure).

Comment 5: Proposed paragraph (a) contains a substantive change in the current law by providing the trial judge with discretion to determine the amount and type of security necessary to suspend execution and enforcement of all types of judgment. By allowing the trial court such discretion in setting the type of security required to suspend execution, this paragraph recognizes that a form of security approved by the court can provide protection to the appellee pending appeal equivalent to that afforded by a supersedeas bond or a Rule 48 deposit. In those situations where the appellant is able to post a form of security that would provide protection to the appellee equivalent to that provided by a supersedeas bond or Rule 48 deposit, the trial court, in its discretion, should be free to suspend execution or enforcement of the judgment upon appellant's posting of such security.

Comment 6: As stated in the proposed paragraph (a), the amount and type of security should be such as will secure the plaintiff in judgment against any loss or damage occasioned by the delay on appeal. However, the proposed

rule would change the prior rule by allowing the trial court also to consider the interests of justice and the relative equities of the parties in determining the amount and type of security required. The considerations applied by the federal courts under Rule 62, Fed. R. Civ. P., and Rule 8(a), Fed. R. App. P., may provide assistance in articulating how the trial court might weigh the interests of justice and the relative equities of the parties. To determine whether to suspend a judgment upon less than full security, the federal courts consider factors such as

> (1) whether the [appellant] has made a showing of likelihood of success on the merits;
>
> (2) whether the [appellant] has made a showing of irreparable harm if the [judgment] is not [suspended];
>
> (3) whether the granting of the [suspension of the judgment] would substantially harm the [appellee]; and
>
> (4) whether the granting of the [suspension of the judgment] would serve the public interest.

Rue v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981). See United States v. Baylor University Medical Center, 711 F.2d 38 (5th Cir. 1983); O'Bryan v. Estelle, 691 F.2d 706 (5th Cir. 1982); United States v. State of Texas, 523 F. Supp. 703 (E.D. Tex. 1981). See, e.g., Poplar Grove Planting and Refining Co. v. Bache Halsey Stuart, Inc., 600 F.2d 1189 (5th Cir. 1979) (requiring appellant to demonstrate objectively that "full" bond should not be required because of the appellant's present financial ability to respond to a money judgment and appellant's financially secure plan for maintaining that same degree of solvency during the period of an appeal and because posting full bond would impose undue financial burden on the appellant). The standard of proof for "likelihood of success on the merits" must be less than what is required to grant a motion for judgment n.o.v. or motion for a new trial, but more than mere proof of a non-frivolous appeal. Where the balance of

the remaining factors weighs heavily in favor of the appellant, the federal courts have reduced the standard of proof by requiring only proof of a substantial case on the merits of the appeal. See Ruiz, 650 F.2d at 565.

Comments on paragraph (b):

Comment 1: This paragraph provides that the amount and type of security required to be posted by the appellant in order to suspend execution of a judgment shall be set at the discretion of the trial court. Under current Texas law, in the case of a money judgment, the supersedeas bond must be at least equal to the amount of the judgment, interest, and costs. Mudd v. Mudd, 665 S.W.2d 128 (Tex. App.--San Antonio 1983, mand. overr.); Fortune v. McElhenney, 645 S.W.2d 934 (Tex. App.--Austin 1983, no writ); Kennesaw Life & Accident Ins. Co. v. Streetman, 644 S.W.2d 915 (Tex. App.--Austin 1983, writ ref'd n.r.e.); Haney Electric Co. v. Hurst, 608 S.W.2d 355 (Tex. Civ. App.--Dallas 1980, no writ); Cooper v. Bowser, 583 S.W.2d 805 (Tex. Civ. App.--San Antonio 1979, no writ); Schrad[illegible] Garcia, 512 S.W.2d 830 (Tex. Civ. App.--Corpus Christi 1974, no writ).

Proposed paragraph (b) constitutes a change in current law by providing that the appellant need not post security in the full amount of the judgment, if the trial court finds, in its discretion, that a lesser amount is sufficient. The trial court is afforded discretion as to both the type and amount of security to be posted. The trial court should apply the general standard, stated in paragraph (a), considering both the need to protect the judgment creditor against damages due to delay on appeal and the interests of justice and the relative equities of the parties.

Comment 2: This Rule does not intend to change current law regarding an appellant's automatic right to suspension

of the judgment by posting a supersedeas bond or Rule 48 deposit in the full amount of the judgment, interest, and costs. As under the prior law, such a bond or deposit, in at least the amount of the judgment, interests and costs, may be approved by the clerk without the exercise of discretion by the trial court.

Comments on paragraphs (d) and (e):

Comment 1: The proposed change to paragraph (d) would vest the trial court with discretion to suspend execution on the money judgment with or without the posting of additional security where the amount of security to suspend the foreclosure is less than the amount of the money judgment, with interest and costs. Under the prior rule, the full amount of the money judgment was required to be posted, to suspend execution on the money judgment. However, under the proposed rule, the trial court has discretion in setting the amount of security necessary to suspend the judgment. If the security set by the trial court is less than the full amount of the money judgment, execution on the money judgment may be suspended.

Comments on paragraph (f):

Changes to this proposed paragraph (f) reflect the notion embodied in the new proposed rule that the type and amount of security should be determined by the trial court based on both the intention to secure the plaintiff in judgment against any loss or damage occasioned by delay on appeal, as well as the interests of justice and the relative equities of the parties.

Comments on paragraph (h):

Comment 1: The second to last sentence in paragraph (h) of the prior Rule 47 states that "the discretion of the

trial court in fixing the amount shall be subject to review." That sentence has been deleted in light of the new Rule 49 subjecting all trial court determinations under Rule 47 to review by the appellate court. Additionally, the liability of the appellant for the "face" amount has been changed in the new paragraph (h) to provide for liability of the appellant for the amount of the security. This change reflects that the type of security approved by the trial court is not limited to a Rule 48 deposit or supersedeas bond.

Comments on paragraph (i):

Comment 1: This paragraph authorizes the trial court to stay enforcement of a judgment upon alternative security arrangements in lieu of posting security. For example, the trial court might order a standstill arrangement pursuant to which assets of the judgment creditor would not be transferred or encumbered outside of the ordinary course of busine[illegible] pro quo for suspension of the judgment pending appeal.

Texas courts have previously recognized the trial court's authority to suspend enforcement of a judgment.

> That the court had the right to stay execution and abate the interest on the amounts not due cannot be seriously questioned. "Under the general supervisory powers over their process, all courts of common law have the power temporarily to stay execution on judgments by them rendered whenever it is necessary to accomplish the ends of justice." 23 C.J. p. 521. In the instant case, we think it was necessary for the accomplishment of the ends of justice, that the court establish the amounts and render judgment for the commissions not yet matured, and stay execution until their maturities, this to avoid a multiplicity of suits.

Fairbanks, Morse & Co. v. Carsey, 109 S.W.2d 985, 990 (Tex. Civ. App.--Dallas 1937, writ dism'd w.o.j.). Recognition of such trial court authority is consistent with prior case law. See, e.g., McCormick Operating v. Gibson Drilling, 717 S.W.2d 425, 427 (Tex. App.--Tyler 1986, no writ) (a court

may render a judgment that is final and appealable fixing the rights and liabilities of the parties, but defer its enforcement until final judgment in an ancillary or related proceeding); Hargrove v. Insurance Investment Corp., 142 Tex. 111, 176 S.W.2d 744 (1944) (one-half of money judgment ordered placed in registry of court pending appeal in related case); Jamison v. City of Pearland, 520 S.W.2d 445 (Tex. Civ. App.--Houston [1st Dist.] 1975, no writ) (enforcement of city's judgment for taxes, etc., suspended pending appeal in related case); Fairbanks, Morse & Co. v. Carsey, 109 S.W.2d 985 (Tex. Civ. App.--Dallas 1973, writ dism'd w.o.j.) (court entered money judgment for commissions not yet accrued and stayed execution on the judgment until the date of accrual of the amounts due); Weaver v. Bogle, 325 S.W.2d 457 (Tex. Civ. App.--Waco 1959, no writ) (court entered money judgment on July 3, 1958, and by court's own motion ordered execution of the judgment stayed until November 24, 19[illegible].

Comments on paragraph (j):

Comment 1: Once the appellant posts the required security or provides for the alternative security arrangement determined by the trial court, the proposed paragraph (j) provides that the effect is to suspend the judgment by precluding any enforcement of the judgment.

Comment 2: This proposed paragraph changes current law by providing that the posting of security or making alternative security arrangements as provided by this rule will also suspend the effectiveness of judgment liens.

Comment 3: The proposed paragraph (j) also changes the law by permitting the trial court to designate that only specific property of the appellant may be subjected to judgment liens within the discretion of the trial court.

Comments on paragraph (k):

Comment 1: Paragraph (k) merely facilitates the procedural mechanics involved in those situations where a trial court approves other security arrangements in lieu of a supersedeas bond or Rule 48 deposit. The clerk's certificate that the security arrangements ordered by the trial court have been made is sufficient evidence thereof.

Comments on paragraph (l):

Comment 1: Paragraph (l) recognizes continuing jurisdiction in the trial court to make the determinations contemplated by the prior paragraphs of the proposed rule. The judgment becomes final for purposes of execution at the same date that the plenary jurisdiction of the trial court expires. See TEX. R. CIV. P. 627 and 329b(d) and (e). Thus, the language of the present Rule 47(j) may be read to imply that the security may be posted upon trial court approval even after execution has issued, i.e., after expiration of the trial court's plenary power. See Southwestern States General Corp. v. McKenzie, 658 S.W.2d 850 (Tex. App.--Dallas 1983, writ dism'd) (recognizing the trial court's continuing jurisdiction to fix the supersedeas bond after expiration of the trial court's plenary jurisdiction, at least where the motion upon which the trial court ruled was filed within the period of the trial court's plenary jurisdiction).

In the usual case, the appellant should request the trial court to make the security determination before expiration of the period of that court's plenary jurisdiction. However, where no such determination is made during that time period, or where a determination was made but the circumstances under which it was made have changed and good cause exists to modify the security, the trial court should have continuing jurisdiction to determine or modify the

amount or type of security required to suspend or to continue the suspension of judgment.

As a matter of policy and practice, the trial court should pass upon the security questions in the first instance subject to review by the court of appeals under Rule 49, TEX. R. APP. P. The court of appeals may lack jurisdiction to take evidence that may be necessary in a determination of what security arrangements are required. See McGee v. Ponthieu, 634 S.W.2d 780 (Tex. App.--Amarillo 1982, no writ). Paragraph (1) therefore recognizes that the trial court exercises continuing jurisdiction to permit the parties to conduct necessary discovery in order to muster the evidence before the trial court and to permit that court to make the initial security determination, as well as reconsidering its prior security determination upon any "changed circumstances."

PROPOSED RULE 49
TEXAS RULES OF APPELLATE PROCEDURE

Appellate Review of Security in Civil Cases

(a) Appellate Review of Stay of Judgment Pending Appeal. The exercise of discretion by the trial court pursuant to Rule 47 or the approval of a bond or deposit by the clerk as provided in Rule 47(b), is subject to review by the appellate court in which the appeal is pending, or prior to the time that the appellate court jurisdiction attaches, by a writ of mandamus in the court of appeals.

The court of appeals reviewing the trial court's exercise of discretion may require a change in the amount or type of security determined by the trial court either because the security is excessive or insufficient. The court of appeals may also remand to the trial court for findings of fact or the taking of evidence.

(b) Alterations in Security. If upon its review, the appellate court requires additional security for suspension of the judgment, execution of the judgment shall be suspended for twenty days after the order of the court of appeals 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 insufficient to secure the costs. The additional security shall not release the security previously posted or alternative security arrangements made.

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 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.

COMMENTS TO PROPOSED RULE 49
TEXAS RULES OF APPELLATE PROCEDURE

Paragraph (a). Comment 1: Proposed Rule 49 provides the appellate court with the power to review the trial court's exercise of discretion regarding the amount and type of security necessary to suspend execution of judgments. This proposed rule makes clear that appellate review for insufficiency or excessiveness of security extends to all types of judgments.

Comment 2: This paragraph recognizes that the appellate court may review the trial court's exercise of discretion before the appellate court's jurisdiction attaches by seeking writ of mandamus.

Comment 3: The court of appeals reviews the trial court's determination as to amount and type of security for insufficiency or excessiveness.

Comment 4: The review by the appellate court is limited to whether the trial court abused its discretion at the time the trial court set the security. In situations where changed circumstances may justify a modification of the security arrangement, the party seeking modification should first apply to the trial court for such modification pursuant to Rule 47.

COMMENTS TO PROPOSED NEW PARAGRAPH (k)
TO BE ADDED TO RULE 47

Paragraph (k): Comment 1: This paragraph is a proposed addition to the present Rule 47 that seeks to provide the trial court with authority to suspend execution of all or part of a judgment in the exercise of that court's discretion. This proposed additional paragraph seeks to give the Texas trial court discretion like that exercised by the federal courts under Rule 62, Fed. R. Civ. P., and Rule 8(a), Fed. R. App. P.

Comment 2: This proposed paragraph goes only to "enforcement" of the judgment by execution; it does not purport to affect judgment liens as established by the Texas Property Code.

Comment 3: This proposal differs from the earlier proposed new paragraph (k) previously rejected by the Advisory Committee in that the trial court would determine whether to stay the judgment (and would have continuing jurisdiction to do so pending appeal) subject to review by the court of appeals. Trial court determination and fact finding is more appropriate than fact finding in the appellate court. The new proposed paragraph (k) expressly provides for review in the court of appeals. Review of any decision by the court of appeals could be had pursuant to a mandamus proceeding in the Supreme Court.

Paragraph (k). Comment 4: Proposed additional paragraph (k) is substantially different from the proposed paragraph (k) previously rejected by the Supreme Court Advisory Committee with respect to what findings will support a stay of the judgment. Under the earlier proposal, the findings necessary to support a stay of enforcement required that the appeal not be frivolous or taken for purposes of delay. However, in many, if not the majority of cases, that standard is easily satisfied. The new proposed

paragraph (k) would require a stronger standard of proof of a substantial case on the merits of the appeal. If the factors are to be stated in the rule itself as mandatory criteria, then the lesser standard of "substantial" care on the merits may be preferable to the federal rule criterion of "likelihood of success" on the merits of the appeal. Even the federal cases recognize that the lesser "substantial case" standard might be applied when the other criteria weigh heavily in favor of the stay of the judgment. Ruiz v. Estelle, 650 F.2d 555 (5th Cir. 1981). Thus, the possible standards in increasing degree of difficulty for the appellant would be (1) the appeal is not frivolous, (2) the appellant has a substantial case on appeal or (3) the appellant has a likelihood of success on appeal.

The previously rejected paragraph (k) also did not require the appellant to make a showing that he would suffer irreparable harm if a stay were not granted or the judgment not suspended. The underlying theory of Rule 47 is the need to protect the judgment creditor who has obtained a judgment. That purpose may not be adequately served unless the appellant is required to show that he would sustain irreparable harm absent a stay.

In the proposed new paragraph (k), the other findings stated to be necessary before judgment may be suspended are those applied by the federal courts pursuant to Rule 62, Fed. R. Civ. P., and Rule 8, Fed. R. App. P. The federal courts require that the appellant make a showing that he will suffer irreparable harm if the judgment is not suspended and that the granting of the suspension of the judgment will not substantially harm the appellee. See Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981); U.S. v. Baylor University Medical Center, 711 F.2d 38 (5th Cir. 1983); O'Bryan v. Estelle, 691 F.2d 703 (5th Cir. 1983); U.S. v. State of Texas, 523 F. Supp. 703 (E.D. Tex. 1981);

Poplar Grove Planting and Refining Co. v. Bache Halsey Stuart, Inc., 600 F.2d 1189, 1191 (5th Cir. 1979).

PROPOSED NEW PARAGRAPH (k)
TO BE ADDED TO RULE 47

Paragraph (k). In lieu of a supersedeas bond, a Rule 48 deposit, or any portion of either thereof, the trial court may order a stay of all or any portion of any proceedings to enforce the judgment or order appealed from pending an appeal, upon a showing by the appellant and finding by the trial court that the appellant has a substantial case on the merits of the appeal; irreparable harm will be sustained by the appellant if the judgment is not suspended; granting the suspension would not substantially harm the appellee; and granting the suspension would serve the interests of justice.

The trial court's order granting any stay of enforcement shall provide for posting security or alternative security arrangements taking into account what security is required to secure the plaintiff in judgment against any loss or damage occasioned by the delay on appeal, as well as the interests of justice and the relative equities of the parties.

The trial court will have continuing jurisdiction to vacate, limit, or modify the stay for good cause or changed conditions during the pendency of the appeal. A motion to vacate, limit, or modify the stay shall be filed and determined in the trial court. The exercise of discretion by the trial court is subject to review by the appellate court in which the appeal is pending, or prior to the time that the appellate court jurisdiction attaches, by a writ of mandamus in the court of appeals.

TEXAS LEGISLATIVE SERVICE SB 1414
4/9/87
Filed by Parker of Orange

9 -20--290 A BILL TO BE ENTITLED

AN ACT

relating to a unified system of security for judgments pending appeal, to provide a procedure to supersede judgment liens, to provide a limit on the amount of security required, to provide flexibility in the type and amount of security required, to provide for interlocutory appellate review, to provide for implementing rules, and to declare an emergency.

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

SECTION 1. This Act may be cited as the Security for Judgment Act.

SECTION 2. The Legislature of the State of Texas finds that:

(1) Texas' statutes and rules currently provide no method by which judgment liens may be superseded pending exhaustion of all appeals;

(2) Art. I., Sec. 13 of the Texas Constitution provides a right of access to the appellate courts to present a meaningful appeal by due course of law; and

(3) The current security for judgment procedure may not afford judicial discretion as to the amount and type of security available to supersede a money judgment; and

(4) The constitutionality of the Texas security for judgment procedure provided for in Tex. R. App. P. 47, 48 & 49 and Section 52.009, Property Code et. seq. has been questioned as

a denial of the due process and equal protection guarantees of the Fourteenth Amendment to the United States Constitution; and

(5) The world-wide surety bonding capacity is only approximately $1.2 billion; and

(6) The current security for judgment procedures are in conflict, are ambiguous and are not under the administration of a single branch of government; and

(7) The provisions of this Act will accomplish much-needed clarification and afford equity, while preserving the right of persons to obtain appropriate relief through the appellate processes in the court system; and

(8) The 70th Legislature, having determined that there needs to be a substantive right of litigants to give security for judgment pending appeal in order to protect the rights of access by judgment debtors to the appellate courts of the State of Texas and the United States Supreme Court to present a meaningful appeal by due course of law enacts this legislation to accomplish this purpose.

SECTION 3. Section 52.001, Property Code is amended to read as follows:

Sec. 52.001 Establishment of Lien

A first or subsequent abstract of judgment, when it is recorded and indexed in accordance with this chapter, constitutes a lien on the real property of the defendant located in the county in which the abstract is recorded and indexed, including real property acquired after such recording and indexing; provided, however that no abstract of the judgment shall issue

and no lien shall be established or perfected if the person against whom the judgment is rendered supersedes the judgment as provided for herein.

SECTION 4. Section 52.002, Property Code is amended by adding Subsection (d) to read as follows:

(d) The Applicant shall give written notice to the judgment debtor of intent to request abstract of judgment by certified mail at least ten days prior to making the application. Service of Notice in accordance with Sec. 51.002(c) shall be sufficient.

SECTION 5. Section 52.004, Property Code is amended by adding Subsection (b)(4) to read as follows:

(4) The number of the page in the record in which an affidavit of security for judgment is recorded.

SECTION 6. Section 52.004, Property Code is amended by adding Subsection (d) to read as follows:

(d) Upon receipt of an affidavit of security for judgment as provided for in Sec. 52.009 herein, the clerk shall immediately record in the county judgment records such properly authenticated affidavit of security for judgment that is presented for recording. The clerk shall note in the record the date and hour an affidavit of security for judgment is received.

SECTION 7. Chapter 52, Property Code is amended by adding Section 52.008 to read as follows:

Sec. 52.008 Security for Judgment

(a) A judgment debtor may provide security for the judgment and thus suspend both the execution of the judgment and the establishment of judgment liens during the pendency of an appeal

to the Courts of Appeal, the Texas Supreme Court or the United States Supreme Court. The Texas Supreme Court shall promulgate specific rules to govern security for judgments pending appeal in accordance with this mandate provided that:

(1) The rules shall create a unified system for the suspension of execution of the judgment and suspension of the establishment or validity of judgment liens.

(2) The rules shall give the District Court discretion regarding the amount of security and type of security, beyond that currently provided in Tex. R. App. P. 47 & 49.

(3) The rules shall provide for interlocutory appellate review of the trial court's determination of the amount and type of security required.

(4) No judgment debtor shall be required to provide security for judgment in a value in excess of $1 billion to suspend execution of the judgment and to suspend establishment or validity of judgment liens.

(b) Pending final promulgation of the rules as mandated in (a) above, a person against whom a judgment has been rendered may provide security for the judgment and thus suspend both the execution of the judgment and the establishment of judgment liens during the pendency of an appeal to the Court of Appeals, the Texas Supreme Court or the United States Supreme Court by any of the following methods:

(1) The judgment debtor may follow the current

procedure provided in Tex. R. App. P. 47, 48 & 49 to determine the amount and type of security; or

(2) The judgment debtor may apply by motion to the judge of the court which rendered the judgment for a determination of the amount and type of security for judgment. The filing of the motion shall act as an immediate stay of enforcement of the judgment and establishment of judgment liens pending final determination of the motion. Any judgment lien filed prior to the determination of the motion shall be void and of no force and effect. The district judge shall promptly hold an evidentiary hearing, if requested by either party, and shall set security in an amount and type which the court deems adequate to protect the status quo pending appeal; provided, however that security for judgment may not be required in a sum in excess of the value of One Billion Dollars.

(c) Pending final promulgation of the rules mandated in (a) above, the court of appeals shall entertain an interlocutory appeal for insufficiency or excessiveness of security for judgment from the determination by the district court of the amount and type of security for judgment. During the pendency of the interlocutory appeal, enforcement of the judgment and establishment of judgment liens shall be stayed pending final determination of the interlocutory appeal. Any judgment lien filed prior to the final determination of the appeal shall be void and of no force and effect. The district court shall enter

such further orders as the court deems appropriate to protect the status quo pending final determination of the interlocutory appeal.

SECTION 8. Chapter 52, Texas Property Code is amended by adding Section 52.009 to read as follows:

Sec. 52.009 Affidavit of Security for Judgment

(a) If security for judgment has been deposited with the clerk of the court in the type and amount as provided for herein, on application of a person against whom a judgment has been rendered or on application of that person's agent, attorney or assignee, the judge or the clerk of the court which entered the judgment shall prepare and deliver to the applicant an affidavit of security for judgment.

(b) The affidavit of security for judgment must show:

(1) The information required in Sec. 52.003(1)-(5).

(2) The date the appeal was perfected.

(3) The date security for judgment was filed in accordance with the district court's determination.

SECTION 9. The provisions of this Act are intended to create a substantive right of litigants to give security for judgment pending appeal in order to protect the right of access by judgment debtors to the appellate courts of the State of Texas and the United States Supreme Court to present a meaningful appeal by due course of law in accordance with Art. I, Sec. 13 of the Texas Constitution. Therefore, in accordance with the provisions of Tex. Gov't Code Ann. Sec. 22.004(a), the Supreme

Court of Texas may not abridge, enlarge or modify the substantive rights created herein by promulgation of rules in conflict herewith.

SECTION 10. This Act applies to any judgment entered after its effective date and any judgment entered prior to its effective date which is pending on appeal in a Court of Appeals, the Texas Supreme Court or the United States Supreme Court on the effective date of this Act.

SECTION 11. The importance of this legislation and the crowded condition of the calendars in both houses creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

file

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February 23, 1987

Ms. Marie Yates
Vinson & Elkins
First City Tower
Houston, Texas 77002

Dear Marie:

Enclosed is the text of the proposed change to TRAP 47 which was unanimously supported by the State Bar Committee on Administrative of Justice but nonetheless rejected by the Supreme Court Advisory Committee. I would appreciate very much, in view of all the research that you have done on the subject of supersedeas, your reviewing Rule 47 in its entirety, identifying the many inconsistencies and inadequacies of it, and proposing a revised Rule for me to submit to the Supreme Court Advisory Committee.

I know that this request is a substantial imposition on you, but I simply can't resist at least attempting to call upon your bright intellect and your understanding of supersedeas problems to give us some help in solving the difficulties that are inherent in this poorly worded Rule.

Very truly yours,

Luther H. Soules III

LHSIII:gc
LS287/038
Enclosure

00000039

Texas Rules of Appellate Procedure

Rule 47. Supersedeas Bond or Deposit in Civil Cases

(a) No Change

(b) No Change

(c) No Change

(d) No Change

(e) No Change

(f) No Change

(g) No Change

(h) No Change

(i) No Change

(j) No Change

[(k) In lieu of a supersedeas bond or any portion thereof, the court from which or to which an appeal is taken may order a stay of all or any portion of any proceedings to enforce the judgment or order appealed from pending an appeal upon further finding that the appeal is not frivolous, not taken for purposes of delay, and that the interest of justice will be served by such stay. Any order granting, limiting, or modifying a stay must provide sufficient conditions for the continuing security of a party with a judgment and to preserve the status quo and the effectiveness of the judgment or order appealed from.

A court may vacate, limit, or modify the stay for good cause during the pendency of the appeal. A motion to vacate, limit, or modify the stay shall be filed and determined in the court that last rendered any order concerning the stay subject to review by any higher court.

Advisory Committee Comment: This is a proposal for a new rule to provide a secure alternative to requiring supersedeas bonds in the full amount of a judgment. The Supreme Court Advisory Committee voted 8-4 to reject the proposal. The State Bar Committee on Administration of Justice voted unanimously in favor of the proposal.

TRAP & T
Agenda - Dec

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March 9, 1987

Mr. Luther H. Soules, III
Soules, Cliffe & Reed
800 Milam Building
East Travis at Soledad
San Antonio, Texas

Dear Luke:

Pursuant to our telephone conference of this date, enclosed please find the decision of McCormick Operating Company v. Gibson Drilling Company, 717 S.W.2d 425 (Tex. App.--Tyler 1986).

Sincerely,

Marie R. Yeates

Marie R. Yeates

00000041

shall be susceptible of more than one ... conflicting interpretations, then the ... interpretation which is more nearly in accordance with the general purposes ... objectives of this Declaration shall ...

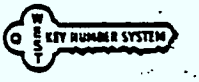
... developer's stated purpose for adopting these declarations is "to adopt a uniform plan for the orderly development of the property." It is apparent from the declaration that the developer intended to accomplish this goal by granting the Committee broad authority over many matters affecting the property. For example, no improvement can be placed on the property without the Committee's prior approval; it is within the Committee's sole discretion to specify a limited number of acceptable exterior materials; it is within the Committee's discretion to specify minimum setback, minimum height restrictions, maximum coverage ratio, the location, height, and extent of fences, walls, or other screening devices, and the orientation of the structure with respect to access and major roadway frontage; it is within the Committee's sole discretion to reject any plans and specifications as incompatible with the quality or overall character and aesthetics of the community; the committee is expressly granted the authority in its discretion to grant variances from specific requirements of particular covenants; the keeping of livestock and birds is permitted only with the Committee's approval; the Committee determines exclusively and finally which activities constitute noxious or offensive activities not to be permitted within the subdivision, etc. The interpretation given Article II, Section 1 by the trial court is consistent with the developer's intent to grant the committee with broad discretion. We overrule Imperial's points one through three.

... argues in its fourth and fifth points of error that CCA's use of its property as a detention center is incompatible with the property's enumerated permissible uses; therefore, it was necessary for CCA to obtain a variance. We have determined, however, that the Committee's having approved CCA's use is conclusive on the compatibility issue. Therefore, a variance was not required. Moreover, we find the Committee's written approval complies with the Declaration's variance requirements. We overrule Imperial's fourth and fifth points of error.

Summary judgment affirmed.

SEARS, Justice, concurring.

I concur in the results; however, I do not find the Declaration of Protective Covenants ambiguous.



McCORMICK OPERATING COMPANY, Appellant,

v.

GIBSON DRILLING COMPANY, Appellee.

No. 12-85-0148-CV.

Court of Appeals of Texas, Tyler.

Aug. 28, 1986.

Rehearing Denied Oct. 23, 1986.

Individual injured while overseeing drilling operations brought action against driller, and driller filed cross claim against owner for indemnification. The Fourth District Court, Rusk County, Donald R. Ross, J., entered summary judgment in favor of owner on cross claim, and driller appealed. The Court of Appeals, Bill Bass, J., held that summary judgment directing driller to defend injured party's suit against owner and pay any judgment obtained was not final for appeal purposes, even though trial court expressly sought to impart finality by severing cross claim for indemnity from underlying suit for personal injuries, where summary judgment nevertheless left open issue of amount of damages, if any, due owner and conditioned indemnification recovery on outcome of underlying personal injuries suit and upon extent of driller's insurance coverage.

Appeal dismissed.

1. Appeal and Error ⇐68

An interlocutory decree or order does not conclude a controversy for appeal purposes, but reserves some question for future determination.

2. Appeal and Error ⇐80(1)

A purported judgment expressly referring to an undecided issue is plainly interlocutory in nature and is not appealable.

3. Appeal and Error ⇐80(4)

A judgment is not final for appeal purposes if damages awarded are contingent, conditional or contingent upon outcome of another trial.

4. Appeal and Error ⇐80(4)

Summary judgment in favor of owner on its cross claim against driller for indemnification, directing driller to defend injured party's suit against owner and pay any judgment obtained, was not final for appeal purposes, even though trial court expressly sought to impart finality by severing cross claim for indemnity from underlying suit for personal injuries, where summary judgment nevertheless left open issue of amount of damages, if any, due owner and conditioned indemnification recovery on outcome of underlying personal injuries suit and also upon extent of driller's insurance coverage.

5. Appeal and Error ⇐76(1), 80

A court may render judgment final and appealable fixing rights and liabilities of parties, but defer its enforcement until final judgment in an ancillary or related proceeding; however, judgment may suspend enforcement of an award of definite sum pending outcome of other proceeding necessary to proper disposition of judgment, and must not leave

indefinite, entirely unfixed, and

Robertson, Longview, for appellant.

Charles H. Clark, Tyler, for appellee.

BILL BASS, Justice.

This is an appeal by McCormick Operating Company, defendant/indemnitor, from a summary judgment entered in favor of Gibson Drilling Company, plaintiff/indemnitee. McCormick contends that the court erred in rendering summary judgment because the summary judgment evidence demonstrates the existence of a genuine issue of material fact. We conclude that the summary judgment is interlocutory in nature and we are therefore without jurisdiction to consider the appeal.

Gibson contracted with McCormick to drill an oil well for McCormick. McCormick also hired George Roberts Consultants, Inc. to oversee the drilling operations. Clyde Stracener, a drilling consultant for the George Roberts firm, alleged that he was injured while on the Gibson rig supervising the drilling operations and he sued Gibson. Gibson then brought a cross-action against McCormick under the terms of the drilling agreement for "complete indemnification and/or contribution" and for reimbursement of all costs incurred in defending against Stracener's claim.

The trial court rendered summary judgment in favor of Gibson against McCormick ordering McCormick to defend Stracener's suit against Gibson and to pay "any judgment obtained herein by plaintiff, Clyde Stracener, to the extent of its insurance coverage as shown by Exhibit 'B' to the motion for summary judgment filed herein by Gibson Drilling Company." Exhibit "B" contains photocopies of several insurance policies. The court further ordered the severance of Gibson's cross-action against McCormick from Stracener's suit against Gibson "in order for this judgment to become a final judgment."

[1-3] Although there are exceptions, the general rule is that a final, and appealable, judgment must determine the entire controversy, disposing of all the parties and issues in the case. *Wagner v. Wannasch*, 156 Tex. 334, 295 S.W.2d 890 (1956). Finality requires a determination of all the rights and liabilities of the parties which have been placed in issue. *North East Independent School Dist. v. Aldridge*, 400 S.W.2d 893 (Tex.1966). The judgment must conclude the dispute so that no further questions will arise requiring judicial determination. *Jordan v. Burbach*, 330 S.W.2d 249 (Tex. Civ. App.—El Paso 1959, writ ref'd n.r.e.). An interlocutory decree or order does not conclude the controversy, but reserves some question for future determination. A purported judgment expressly referring to an undecided issue is plainly interlocutory. *Dimerling v. Grodhaus*, 152 Tex. 548, 261 S.W.2d 561 (1953). A judgment is not final if the damages awarded are unliquidated, conditional or contingent upon the outcome of another trial. *Evans v. Young County Lumber Company*, 368 S.W.2d 783 (Tex. Civ. App. —Fort Worth 1963, err. dism'd).

The trial court, in *Hunt Oil Company v. Moore*, 639 S.W.2d 459 (Tex.1982), decreed Hunt's lease terminated, vested title in Moore, and ordered that Hunt render an accounting to Moore for the oil and gas attributable to Moore's interest. Moore was awarded costs of suit, but the judgment did not mention his claim for prejudgment interest. The Supreme Court held the judgment was not appealable because "any award of damages based on the accounting necessarily had to occur at a subsequent time" and because the judgment did not address Moore's claim for prejudgment interest.

In *United States Automobile Association v. Eberly*, 399 S.W.2d 886 (Tex. Civ. App.—Corpus Christi 1966, no writ), plaintiff sought declaratory judgment that the plaintiffs were "insureds" and the vehicle with which they collided an "uninsured automobile" within the meaning of the insurance policy issued by the defendant liability insurer. Plaintiffs also sought dam-

...ages from the defendant carrier to the ex... ...tent of the limits of the insurance policy ...that it had issued. The trial court severed ...the cause from other claims against other ...defendants and granted plaintiffs' summary judgment "for all relief sought against said defendant ... except as to amount of damages." Since plaintiffs' petition expressly sought recovery of money damages and the issue was not concluded by the judgment, the court held the judgment was interlocutory and not appealable.[1]

[4] In severing the cross-action for indemnity from the underlying suit for personal injuries, the trial court expressly sought to impart finality to summary judgment. But although there has been a severance of the two causes, the judgment in the severed cause must still possess all the requisites of finality for an appeal to lie. In the instant case, the judgment orders McCormick to pay any judgment obtained by Stracener against Gibson "to the extent of its insurance coverage as shown by Exhibit 'B.'" The judgment leaves open the issue of the amount of damages, if any, due Gibson by McCormick, but conditions Gibson's recovery on the outcome of Stracener's suit and also upon the extent of McCormick's insurance coverage.

[5] A court may render a judgment that is final and appealable fixing the rights and liabilities of the parties, but defer its enforcement until final judgment in an ancillary or related proceeding. *Rose v. Baker*, 143 Tex. 202, 183 S.W.2d 438 (1944). This can be proper even though the scope of the recovery granted may be affected by the outcome in the related suit. *Hargrove v. Insurance Investment Corp.*, 142 Tex. 111, 176 S.W.2d 744 (1944). The judgments deemed final by the application of the previously mentioned rule have suspended the enforcement of an award of a *definite* sum pending the outcome of other allied proceedings necessary to the proper execution of the judgment.[2] On the other hand, in the case at bar, the amount, if any, of McCormick's liability remains *indefinite*, entirely unfixed, and contingent upon the outcome of the other case as well as the extent of McCormick's insurance coverage.

It has been recognized that "by various gradations, the interlocutory decree may be made to approximate the final determination, until the line of discrimination becomes so faint as not to be readily per-

1. *See also Palmer v. D.O.K.K. Benevolent and Insurance Ass'n*, 160 Tex. 513, 334 S.W.2d 149 (1960); *Campbell v. Campbell*, 550 S.W.2d 164 (Tex.Civ.App.—Austin 1977, no writ), reserving only the issue of the amount of child support; *Gonzales Motor Company v. Cain*, 476 S.W.2d 124 (Tex.Civ.App.—Corpus Christi 1972, no writ), determining liability for wrongful sequestration but leaving the amount of damages for later determination; *Moncrief v. Tate*, 561 S.W.2d 941 (Tex.Civ.App.—Fort Worth 1978, no writ), in which the decree held interlocutory order reinstatement of county employees with back pay, with the back pay due each employee to be mitigated by his actual earnings after discharge but left unresolved the amount of earnings to be applied in mitigation; *Gonzales v. Paiz*, 397 S.W.2d 101 (Tex.Civ.App.—San Antonio 1965, no writ), involving an order, held interlocutory, awarding title and possession in a trespass to try title case, but which did not dispose of plaintiff's plea for the rental value of the premises.

2. In *Hargrove*, the court gave judgment for a definite sum but ordered one-half of the amount placed in the registry of the court pending the outcome of an appeal in an associated case. The judgment further provided that the defendant be given credit against the one-half kept in the court's registry for any amounts it might be required to pay upon the judgment in the other case. Similarly, in *Jamison v. City of Pearland*, 520 S.W.2d 445 (Tex.Civ.App.—Houston [1st Dist.] 1975, no writ), the city was awarded judgment for taxes, penalty, interest, costs, and attorney's fees but the enforcement of the judgment was suspended until the decision of the appeal in a related tax case. In the event a lower assessment was found proper in the companion case, the city was ordered to refund the taxes, penalty and interest referable to the improper assessment. In *Graham v. Coolidge*, 70 S.W. 231 (Tex.Civ.App.1902), the judgment determined the amount and status of the parties' claims, foreclosed a lien and directed the sale of the property but reserved the authority to postpone the sale and modify its terms and conditions. The judgment in *Graham Ref. Co. v. Graham Oil Syn.*, 262 S.W. 142 (Tex.Civ.App.—Fort Worth 1924, no writ), was held to be final although it provided that the amount awarded to the plaintiff be paid into the registry of the court to await the determination of a suit pending in the United States District Court.

...ceived." *Leyba v. McNamara*, 243 S.W. 1074, 1076 (Tex. Comm'n App. 1922).

Given the entirely contingent and uncertain character of the recovery decreed, we are of the opinion that the summary judgment herein is interlocutory and that we are therefore without jurisdiction to entertain the appeal. The appeal should be dismissed without prejudice to the rights of the parties to perfect their appeal from any final appealable judgment subsequently entered in this cause.

The appeal is dismissed.

Forrest N. TROUTMAN, Appellant,

v.

INTERSTATE PROMOTIONAL PRINTING CO., Appellee.

No. 04-85-00180-CV.

Court of Appeals of Texas, San Antonio.

Aug. 29, 1986.

Rehearing Denied Oct. 3, 1986.

Appeal was taken from judgment of the 45th District Court, Bexar County, Carol R. Haberman, J., which granted recovery for unpaid balance on promissory note and awarded prejudgment interest. The Court of Appeals, Cadena, C.J., held that: (1) oral modification of written contract to extend time for payment, and to eliminate discount provision as consideration for extension, was enforceable, but (2) calculation of prejudgment interest was erroneous.

Affirmed as reformed.

1. Frauds, Statute of ⇐131(2)

There is exception to rule that written contract within the statute of frauds may not be orally modified which pertains to agreement to extend time of performance of contract if oral modification is made before expiration of written contract. V.T.C.A., Bus. & C. § 26.01(b)(6).

2. Frauds, Statute of ⇐131(2)

Oral modification of contract governed by statute of frauds which extended time for payment, and accompanying agreement to eliminate discount provision in written contract as consideration for the extension of time, was enforceable. V.T.C.A., Bus. & C. § 26.01(b)(6).

3. Deposits in Court ⇐10

Trial court did not abuse its discretion in allowing plaintiff to withdraw lien release, deposited in court by defendant when it accepted disbursement of plaintiff's deposit, where the plaintiff gave a letter of credit to secure the amount of money in dispute plus accrued interest when it withdrew the release. V.T.C.A., Civil Practices & Remedies Code § 7.002(a).

Malcolm Robinson, Austin, for appellant.

E.M. Schulze, Jr., Woodlands, for appellee.

Before CADENA, C.J., and BUTTS and DIAL, JJ.

OPINION

CADENA, Chief Justice.

Plaintiff, Forrest N. Troutman, appeals from a judgment awarding defendant, Interstate Promotional Printing Company, recovery on its counterclaim of $50,000.00, representing the unpaid balance on a promissory note given in payment for a conveyance of land by defendant and others to plaintiff's predecessors in title, plus prejudgment interest in the amount of $18,138.50 and attorney's fee. The judgment also provided for post-judgment interest at the rate of 9% per year. The note was secured by a deed of trust on certain land in Brazos County.

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Dear Broadus and Gilbert:

I know how chagrined you must be over the recalcitrance of the Legislature to honor the rule-making power of the Supreme Court. However, we will nonetheless be able to handle that in a completely effective way at the June 26th meeting.

I have not, as yet, received the written report from your subcommittee, although it was due on May 29, 1987, and, accordingly, have undertaken to prepare a proposed rule for consideration at the meeting. I would like to have your subcommittee's written report in my hands on this proposal as of June 18, 1987, i.e., next Thursday. I plan to prepare the complete meeting agenda on Friday, June 19, 1987, and to have your report distributed to all Committee members at that time. Accordingly, we cannot further delay.

I also enclose a copy of Art. 5 §31, wherein the Texas Constitution gives the Court rule-making power and of Government Code §22.004, which likewise gives the Supreme Court rule-making power and mandates that:

> "At the time the supreme court files a rule, the court shall file with the secretary of state a list of each article or section of general law or each part of an article or section of general law that in the court's judgment is repealed." (emphasis supplied)

This latter provision sustains that part of my proposal which repeals the offendingly intrusive portion of the tort reform act, i.e. Chapter 9, "Frivolous Pleadings and Claims." I understand the heavy burdens you labored under during the session, but I hope that you can, within the week, give me your subcommittee's written report, by conducting subcommittee meetings telephonically. I sent copies to all of them.

Thank you for your support and cooperation.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as
cc: Justice James P. Wallace
All Subcommittee Members

Texas Rules of Civil Procedure

Rule 13. ~~Penalty for Fictitious Suits or Pleading~~. [Effect of Signing of Pleadings, Motions and Other Papers; Sanctions]

[The signature of any attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is not groundless and brought in bad faith or groundless and brought for the purpose of harrassment.] Any attorney [or party] who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading ~~presenting a state of case~~ which he knows to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt[.] ~~; and the court, of its own motion, or at the instance of any party, will direct an inquiry to ascertain the fact.~~ [If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose sanctions available under Rule 215 upon the person who signed it, a represented party, or both.

Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction's order. "Groundless" for purposes of this rule means no basis in law or fact. The court may not

impose sanctions for violation of this rule if, before the 90th day after the court makes a determination of such violation, the offending party withdraws or amends the pleading, motion, or other paper, or offending portion thereof to the satisfaction of the court. A general denial does not constitute a violation of this rule. The amount requested for damages does not constitute a violation of this rule.]

[Chapter 9, Subtitle A, Title 2, Civil Practice and Remedies Code "Frivolous Pleadings and Claims" otherwise to be effective , is repealed pursuant to Tex. Const. Art. 5 §31, and Tex. Gov. Code §22.004(c).]

§ 30. Judges of courts of county-wide jurisdiction; criminal district attorneys

Notes of Decisions

1. In general

The provision in Vernon's Ann.Civ.St. art. 1970–339A fixing the full term of four years of judges of County Courts at Law to run from the General Election of 1968 was unconstitutional, being in violation of this section and Art. 16, § 65. Op.Atty.Gen.1970, No. M–566.

§ 31. Court administration and rule-making authority

Sec. 31. (a) The Supreme Court is responsible for the efficient administration of the judicial branch and shall promulgate rules of administration not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts.

(b) The Supreme Court shall promulgate rules of civil procedure for all courts not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts.

(c) The legislature may delegate to the Supreme Court or Court of Criminal Appeals the power to promulgate such other rules as may be prescribed by law or this Constitution, subject to such limitations and procedures as may be provided by law.

Adopted Nov. 5, 1985.

Amendment adopted in 1985 was proposed by Acts 1985, 69th Leg., S.J.R. No. 14, § 8.

ARTICLE VI

SUFFRAGE

Sec.
2a. Voting for Presidential and Vice Presidential electors and statewide offices; qualified persons except for residence requirements.

§ 1. Classes of persons not allowed to vote

Cross References

Ineligibility to be candidate for public office, see V.T.C.A. Election Code, § 141.001.

Law Review Commentaries

Expansion of equal protection clause as challenge to state laws disenfranchising felons. 5 St. Mary's L.J. 227 (1973).

Literacy tests and the Fifteenth Amendment. Alfred Avins, 12 South Texas L.J. 24 (1970).

United States Supreme Court

Felons as voters, see Richardson v. Ramirez, 1974, 94 S.Ct. 2655, 418 U.S. 24, 41 L.Ed.2d 551.

Voting or registration by persons detained waiting trial, see O'Brien v. Skinner, 1974, 94 S.Ct. 740, 41 U.S. 524, 38 L.Ed.2d 702.

Notes of Decisions

½. Validity

Neither provision of this section, barring a person convicted of a felony from voting, nor similar provision of V.A.T.S. Election Code, art. 5.01, subd. 4 are unconstitutional on their face. Hayes v. Williams (D.C.1972) 341 F.Supp. 182.

1. Right to vote in general

In determining the eligibility of voters, constitutional voting qualifications control over statutes and ordinances. Richter v. Martin (Civ. App.1960) 337 S.W.2d 134, reversed on other grounds 161 T. 323, 342 S.W.2d 1.

Legislative acts tending to abridge the citizen's franchise will be confined to their narrowest limits by liberal interpretation favoring the citizen's right to vote. Mitchell v. Jones (Civ. App.1963) 361 S.W.2d 224.

A qualified citizen is not to be denied the exercise of his suffrage except where the legislature has acted within constitutional authority and has expressly or by clear implication indicated an intention that a ballot of a qualified voter shall be void if certain prohibited conditions are shown to exist. Id.

Main design of all election laws should be to secure fair expression of popular will in speediest and most convenient manner, and failure to comply with provisions not essential to attain that object should not void the election, in absence of language clearly showing that such was

Acts 1943, 48th Leg., p. 354, ch. 232, § 1.
Acts 1967, 60th Leg., p. 1932, ch. 723, § 76.
Acts 1981, 67th Leg., p. 773, ch. 291, §§ 19, 20.

Vernon's Ann.Civ.St. arts. 1733 to 1735a, 1737.

§ 22.003. Procedure of the Court

(a) The supreme court from time to time shall promulgate suitable rules, forms, and regulations for carrying into effect the provisions of this chapter relating to the jurisdiction and practice of the supreme court.

(b) The supreme court may make and enforce all necessary rules of practice and procedure, not inconsistent with the law, for the government of the supreme court and all other courts of the state to expedite the dispatch of business in those courts.

Historical Note

Prior Law:
Rev.Civ.St.1879, arts. 1011, 1014.
Acts 1892, p. 19.
Rev.Civ.St.1895, arts. 944, 947.
G.L. vol. 10, p. 383.
Rev.Civ.St.1911, §§ 1523, 1524.
Vernon's Ann.Civ.St. arts. 1730, 1731.

Administrative Code References

Public Utility Commission, practice and procedure, rules of evidence, see 16 TAC § 21.122.

§ 22.004. Rules of Civil Procedure

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

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

(c) So that the supreme court has full rulemaking power in civil actions, a rule adopted by the supreme court repeals all conflicting laws

and parts of laws governing practice and procedure in civil actions, but substantive law is not repealed. At the time the supreme court files a rule, the court shall file with the secretary of state a list of each article or section of general law or each part of an article or section of general law that in the court's judgment is repealed. The list has the same weight and effect as a decision of the court.

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

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

Historical Note

Prior Law:
Acts 1939, 46th Leg., p. 201.
Vernon's Ann.Civ.St. art. 1731a.

§ 22.005. Disqualification of Justices

(a) The chief justice shall certify to the governor the following facts when they occur:

(1) at least five members of the supreme court are disqualified to hear and determine a case in the court; or

(2) the justices of the court are equally divided in opinion because of the absence or disqualification of one of its members.

(b) The governor immediately shall commission the requisite number of persons who possess the qualifications prescribed for justices of the supreme court to try and determine the case.

Historical Note

Prior Law:
Acts May 12, 1846.
P.D. 1575.
G.L. vol. 2, p. 1561.
Rev.Civ.St.1911, arts. 1516, 1517.
Acts 1981, 67th Leg., p. 772, ch. 291, § 16.
Vernon's Ann.Civ.St. art. 1717.

§ 22.006. Adjournment

(a) The supreme court may adjourn from day to day or for the periods that it deems necessary to the ends of justice and the determination of the business before the court.

(b) A suit, process, or matter returned to or pending in the supreme court may not be discontinued because a quorum of the court is not present at the commencement or on any other day of the term. If a

pate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and the independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 3C delineates the "disqualifications" of a judge:

A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including, but not limited to, instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

The Supreme Court has the authority to make and establish rules of the court under Art. V, Section 25 of the Texas Constitution:

Section 25. The Supreme Court shall have power to make and establish rules of procedure not inconsistent with the laws of the State for the government of said court and the other courts of the State to expedite the dispatch of business therein.

The Supreme Court thus has the power not only to make rules to regulate the ordinary proceedings of a trial, but also to establish rules *"for the government of . . . the other courts. . . ."*

The Court held in *Smirl v. Globe Laboratories, Inc.*, 144 Tex. 41, 188 S.W.2d 676, 678 (1945) that its rules are designed to obtain a fair, just, equitable, and impartial adjudication of the rights of litigants.

In *Church v. Chrites*, 370 S.W.2d 419, 421 (Tex. Civ. App. — San Antonio 1963, writ ref'd n.r.e.), a Court of Civil Appeals ruled that:

When the Supreme Court makes rules it is the exercise of a legislative power under direct grant by the Constitution, and such rules when promulgated and established have the effect of statutes. [Citing TEX. CONST., art. V, §25; TEX. REV. CIV. STAT. ANN. arts. 1730, 1731; *Brown* v. *Linkenhoger*, 153 S.W.2d 352 (Tex. Civ. App. — El Paso 1941, writ ref'd w.o.m.).].

The Supreme Court thereafter held in *Few v. Charter Oak Fire Insurance Co.*, 463 S.W.2d 424, 425 (Tex. 1971), that Art. V, Section 25 of the Texas Constitution vests in the Supreme Court the power to establish rules of procedure not inconsistent with the laws of the state. *See also Missouri, K. & T.Ry. Co.* v. *Beasley*, 106 Tex. 160, 155 S.W.183, 187 (1913).

Articles 1730, 1731, and 1731a further supplement the power granted the Supreme Court by the Texas Constitution. Art. 1730 states as follows:

The Supreme Court shall from time to time make and promulgate suitable rules, forms and regulations for carrying into effect the articles in this title relating to the jurisdiction and practice of said Court.

Art. 1731 states as follows:

The Court may make and enforce all necessary rules of practice and procedure, not inconsistent with the law, for the government of said Court and all other courts of the State, so as to expedite the dispatch of business in said courts.

Art. 1731a describes the powers of the Supreme Court's civil judicial proceedings which are in the relevant part as follows:

Sec. 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 Sept. 1, 1941. Provided, however, that no substantive law or part thereof is hereby repealed.

Sec. 2. The Supreme Court is hereby invested with the full rule-making power in the practice and procedure in civil actions.

The recent case of *Shapley* v. *Texas Department of Human Resources*, 581 S.W.2d 250, 253 (Tex. Civ. App. — El Paso 1979, no writ), held that:

Prior to the effective date of the Code of Judicial Conduct on September 1, 1974, the grounds enumerated by the Constitution were held to be both inclusive and exclusive and mere bias and prejudice were not disabling factors. *Chilicote Land Co.* v. *Houston Citizens Bank and Trust Co.*, 525 S.W.2d 941 (Tex. Civ. App. — El Paso 1975, no writ). Now under the Code, the subject of a disqualification has been broadened and the direction has been made that a judge should disqualify himself in a proceeding in which his partiality might reasonably be questioned. The direction is set out in Canon 3,

death and other civil actions based on tortious conduct.

ARTICLE 2. TRIAL; JUDGMENT

SECTION 2.01. Subtitle A, Title 2, Civil Practice and Remedies Code, is amended by adding Chapter 9 to read as follows:

CHAPTER 9. FRIVOLOUS PLEADINGS AND CLAIMS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 9.001. DEFINITIONS. In this chapter:

(1) "Claimant" means a party, including a plaintiff, counterclaimant, cross-claimant, third-party plaintiff, or intervenor, seeking recovery of damages. In an action in which a party seeks recovery of damages for injury to another person, damage to the property of another person, death of another person, or other harm to another person, "claimant" includes both that other person and the party seeking recovery of damages.

(2) "Defendant" means a party, including a counterdefendant, cross-defendant, or third-party defendant, from whom a claimant seeks relief.

(3) "Groundless" means no basis in law and in fact.

(4) "Pleading" includes a motion.

Sec. 9.002. APPLICABILITY. (a) This chapter applies to an action in which a claimant seeks:

(1) damages for personal injury, property damage, or death, regardless of the legal theories or statutes on the basis of which recovery is sought, including an action based on intentional conduct, negligence, strict tort liability, products liability (whether strict or otherwise), or breach of warranty; or

(2) damages other than for personal injury, property

damage, or death resulting from any tortious conduct, regardless of the legal theories or statutes on the basis of which recovery is sought, including libel, slander, or tortious interference with a contract or other business relation.

(b) This chapter applies to any party who is a claimant or defendant, including but not limited to:

(1) a county;

(2) a municipality;

(3) a public school district;

(4) a public junior college district;

(5) a hospital district;

(6) a hospital authority;

(7) any other political subdivision of the state; and

(8) the State of Texas.

(c) In an action to which this chapter applies, the provisions of this chapter prevail over all other law to the extent of any conflict.

Sec. 9.003. TEXAS RULES OF CIVIL PROCEDURE. This chapter does not alter the Texas Rules of Civil Procedure or the Texas Rules of Appellate Procedure.

Sec. 9.004. APPLICABILITY. This chapter does not apply to the Deceptive Trade Practice-Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code) or to Chapter 21, Insurance Code.

[Sections 9.005-9.010 reserved for expansion]

SUBCHAPTER B. SIGNING OF PLEADINGS

Sec. 9.011. SIGNING OF PLEADINGS. The signing of a pleading

as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry, the pleading is not:

(1) groundless and brought in bad faith; or

(2) groundless and brought for the purpose of harassment.

Sec. 9.012. VIOLATION; SANCTION. (a) At the trial of the action or at any hearing inquiring into the facts and law of the action, after reasonable notice to the parties, the court may on its own motion, or shall on the motion of any party to the action, determine if a pleading has been signed in violation of any one of the standards prescribed by Section 9.011.

(b) In making its determination of whether a pleading has been signed in violation of any one of the standards prescribed by Section 9.011, the court shall take into account:

(1) the multiplicity of parties;

(2) the complexity of the claims and defenses;

(3) the length of time available to the party to investigate and conduct discovery; and

(4) affidavits, depositions, and any other relevant matter.

(c) If the court determines that a pleading has been signed in violation of any one of the standards prescribed by Section 9.011, the court shall, not earlier than 90 days after the date of the determination, at the trial or hearing or at a separate hearing following reasonable notice to the offending party, impose an

appropriate sanction on the signatory, a represented party, or both.

(d) The court may not order an offending party to pay the incurred expenses of a party who stands in opposition to the offending pleading if, before the 90th day after the court makes a determination under Subsection (a), the offending party withdraws the pleading or amends the pleading to the satisfaction of the court or moves for dismissal of the pleading or the offending portion of the pleading.

(e) The sanction may include one or more of the following:

(1) the striking of a pleading or the offending portion thereof;

(2) the dismissal of a party; or

(3) an order to pay to a party who stands in opposition to the offending pleading the amount of the reasonable expenses incurred because of the filing of the pleading, including costs, reasonable attorney's fees, witness fees, fees of experts, and deposition expenses.

(f) The court may not order an offending party to pay the incurred expenses of a party who stands in opposition to the offending pleading if the court has, with respect to the same subject matter, imposed sanctions on the party who stands in opposition to the offending pleading under the Texas Rules of Civil Procedure.

Sec. 9.013. REPORT TO GRIEVANCE COMMITTEE. (a) If the court imposes a sanction against an offending party under Section 9.012, the offending party is represented by an attorney who signed

the pleading in violation of any one of the standards under Section 9.011, and the court finds that the attorney has consistently engaged in activity that results in sanctions under Section 9.012, the court shall report its finding to an appropriate grievance committee as provided by the State Bar Act (Article 320a-1, Vernon's Texas Civil Statutes) or by a similar law in the jurisdiction in which the attorney resides.

(b) The report must contain:

(1) the name of the attorney who represented the offending party;

(2) the finding by the court that the pleading was signed in violation of any one of the standards under Section 9.011;

(3) a description of the sanctions imposed against the signatory and the offending party; and

(4) the finding that the attorney has consistently engaged in activity that results in sanctions under Section 9.012.

Sec. 9.014. PLEADINGS NOT FRIVOLOUS. (a) A general denial does not constitute a violation of any of the standards prescribed by Section 9.011.

(b) The amount requested for damages in a pleading does not constitute a violation of any of the standards prescribed by Section 9.011.

SECTION 2.02. The heading of Chapter 33, Civil Practice and Remedies Code, is amended to read as follows:

CHAPTER 33. COMPARATIVE RESPONSIBILITY [NEGLIGENCE]

SECTION 2.03. The heading of Subchapter A, Chapter 33, Civil

COAJ Proposal
5-87

Rule 13. ~~Penalty for Fictitious Suits~~ or ~~Pleadings~~
[Effect of Signing of Pleadings, Motions and Other Papers; Sanctions]

[The signature of any attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law and that it is not interposed for any improper purpose, such as to harass, or to cause unnecessary delay or needless increase in the cost of litigation.] Any attorney [or party] who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such purpose, or make statements in pleading presenting a state of case which he knows to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be guilty of a contempt; and the court, of its own motion, or at the instance of any party, will direct an inquiry to ascertain the fact. [If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses

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W. W. TORREY

TELEPHONE
(512) 224-9144

February 9, 1987

Ms. Diana E. Marshall
Baker & Botts
One Shell Plaza
Houston, Texas 77002

RE: Proposed Change to Rule 13

Dear Ms. Marshall:

Enclosed is a letter from John H. Cochran regarding an amendment to Rule 13 of the Rules of Civil Procedure. This letter has been on our docket for some time, and I anticipate being able to dispose of it at our June meeting.

Please draft, in proper form for Committee consideration, an appropriate Rule for submission to the Committee at our June meeting. Please forward your draft to me no later than March 9, 1987.

Thank you for your attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
enclosure
cc: Justice James P. Wallace

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W. W. TORREY

September 25, 1986

Honorable Linda B. Thomas
Judge, 256th District Court
Old Red Courthouse, Second Floor
Dallas, Texas 75202

Dear Judge Thomas:

Enclosed is a letter from John H. Cochran regarding an amendment to Rule 13. Please draft, in proper form for Committee consideration, an appropriate Rule change for submission to the Committee and circulate it among your Standing Subcommittee members to secure their comments.

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

Very truly yours,

Luther H. Soules III

LUTHER H. SOULES III

LHSIII/tat
encl/as

THE SUPREME COURT OF TEXAS

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

September 8, 1986

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

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

Re: Rule 13 (Penalty for Fictitious Suits or Pleading
and
Rule 215 (Abuse of Discovery; Sanctions)

Dear Luke and Mike:

I am enclosing a letter from John H. Cochran of Dallas, regarding the above rules.

May I suggest that these matters be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. John H. Cochran
P. O. Box 141104
Dallas, Tx 75214

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COCHRAN PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
5838 LIVE OAK
DALLAS, TEXAS 75214
(214) 828-4444

MAILING ADDRESS
POST OFFICE BOX 141104
DALLAS, TEXAS 75214

TELEX: 203941 ACTD-UR

August 27, 1986

JUN 1

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

Attention: Rules of Civil Procedure Revision Committee

Gentlemen:

The next time the Supreme Court gets ready to rewrite the Rules of Civil Procedure, I think that Rule 13 should be amended to include frivolous lawsuits and motions and that the sanctions of Rule 215 A should be applicable.

Yours truly,

John H. Cochran

3995A/mp

MEMBERSHIP

STANDING SUBCOMMITTEES

TEXAS SUPREME COURT ADVISORY COMMITTEE

STANDING SUBCOMMITTEE ON RULES 1-14

Chairperson: Diana E. Marshall

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Dallas, Texas 75201
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uniform local rules

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February 24, 1987

Ms. Diana E. Marshall
Baker & Botts
One Shell Plaza
Houston, Texas 77002

RE: Local Rules
Rule 3, Texas Rules of Civil Procedure

Dear Ms. Marshall:

At our November meeting, Frank Branson moved that an attempt be made to create a uniform set of local rules. I have included the pertinent part of our meeting transcript for your information and use.

Please submit this issue to your subcommittee and have a report prepared for our June meeting, submitting a draft of same to me no later than May 29, 1987, for inclusion in the agenda.

Very truly yours,

LUTHER H. SOULES III
Chairman

LHSIII/tat
enclosure

Rule 3 - Local Rules

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W. W. TORREY

February 26, 1987

Ms. Diana E. Marshall
Baker & Botts
One Shell Plaza
Houston, Texas 77002

RE: Orders of the District Courts
of Bexar County, Texas

Dear Ms. Marshall:

Please review, along with your subcommittee, the enclosed Orders of the District Courts of Bexar County, Texas, to determine whether they could be included in a uniform set of local rules.

I have enclosed a copy of my letter to Sam Sparks regarding these same Orders, requesting him to look at them from a different perspective.

Please send me a draft of your report no later than May 29, 1987, so that I may include it in our agenda for consideration.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as
cc: Mr. Sam Sparks

JOINT ORDER OF THE DISTRICT COURTS OF THE JUDICIAL DISTRICTS OF BEXAR COUNTY, TEXAS, PURSUANT TO TEX. R. CIV. P. 165a AND 166 CONCERNING DISMISSAL FOR WANT OF PROSECUTION OR ALTERNATIVE PRETRIAL PROCEDURE FOR CIVIL CASES FILED PRIOR TO JANUARY 1, 1983

1. At joint conference of the District Judges of the several Judicial District Courts of Bexar County, Texas, Honorable David J. Garcia, District Clerk, at the request of the District Judges, reported that of the civil cases filed with the District Clerk of Bexar County, Texas at any time prior to January 1, 1983, there are currently 10,340 civil cases and an additional number of ad valorem tax cases all remaining pending and unresolved in these District Courts, as follows:

Year Filed	Number of Cases Pending
Prior to 1975	478
1975	167
1976	410
1977	442
1978	416
1979	1,067
1980	2,268
1981	2,399
1982	2,693

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said report having been made pursuant to assessing need and establishing a plan for disposition of all pending pre-1983 civil

cases. District Clerk Garcia further reported that all District Courts are current on civil cases filed during and since 1983 since civil cases have been posted into computers and accordingly subject to more readily available information for judicial management. The Courts have determined jointly that the pre-1983 cases are proper cases for review as to dismissal for want of prosecution pursuant to Tex. R. Civ. P. 165a, and that any cases not dismissed for want of prosecution are proper cases either (a) where service is complete for immediate pretrial pursuant to Tex. R. Civ. P. 166 and disposition by trial or, (b) where service is incomplete, for immediate service pursuant to Tex. R. Civ. P. 106 or substitute service of process pursuant to Tex. R. Civ. P. 103a, 109, 109a, or 116, followed by prompt pretrial and trial.

It is, accordingly, ORDERED jointly by the 37th, 45th, 57th, 73rd, 131st, 150th, 166th, 224th, 225th, 226th, 285th, and 288th Judicial District Courts of Bexar County, Texas, as follows:

1. APPOINTMENT OF JUDGES PRESIDING: Honorable Solomon J. Casseb, Jr., 57th Judicial District Judge, Retired, and Honorable Eugene C. Williams, 131st Judicial District Judge, Retired, or their successors (the "Assigned Judges Presiding"), are assigned to sit in designated Judicial District Courtroom of Bexar County, Texas, (the "Courtroom") for the purposes of conducting hearings for dismissals for want of prosecution, ordering service or substitute service of process, entering pretrial orders, and conducting trials on the merits to conclusion, of all pre-1983 civil cases pending in all Judicial District Courts of Bexar County, Texas, with a goal towards disposition of same prior to May 31, 1986. The Assigned Judges Presiding shall for all purposes of this Order sit simultaneously and preside in all of these Judicial District Courts of Bexar County, Texas.

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2. SCHEDULE TO CALL CASES: Beginning with the oldest cases first, and proceeding from those to the most recent cases, during the forthcoming ten month period ending July 31, 1986, all pending cases in all Judicial District Courts of Bexar County, Texas, filed prior to January 1, 1983, will be set in the Courtroom by any one or more of the Assigned Judges Presiding for hearing on the issue of dismissal for want of prosecution ("Dismissal Hearing") to be called fifteen (15) cases or more per hour every hour on the hour at 9:00 a.m., 10:00 a.m., 11:00 a.m., 2:00 p.m., 3:00 p.m., and 4:00 p.m., on every business day exclusive of legal holidays, and shall thereupon be dismissed for want of prosecution unless it is determined in the discretion of one of the Assigned Judges Presiding that there is good cause for cases, as individually considered, to be maintained on the docket of the Court pursuant to prompt pretrial and trial. All proceedings for dismissals for want of prosecution shall be conducted in accordance with Tex. R. Civ. P. 165a.

3. ABSENCE OF SERVICE OF CITATION: In event that one of the Assigned Judges Presiding should determine on showing by a party that a case should be maintained on the docket because it is reasonably possible for the plaintiff to perfect service of process, that Assigned Judge Presiding shall forthwith order that service of process be accomplished within a period not to exceed sixty (60) days and, where appropriate, shall enter an order permitting substitute service by any available means; if service is not perfected within the prescribed period, any Assigned Judge Presiding may, upon motion and for extreme good cause shown, extend the period for service, otherwise the case shall be dismissed for want of prosecution; if service is

perfected, immediately upon service of process the case shall become subject to the default judgment procedure set forth in paragraph 4 if no answer is filed or to the pretrial procedure set forth in paragraph 5 hereinbelow if answer is filed. When any citation is sought by publication the proceeding shall be governed by the provisions of Tex. R. Civ. P. 109 and an affidavit pursuant to that rule shall be filed at or prior to the Dismissal Hearing, by the party seeking to retain the case on the docket, his agent, or attorney, setting forth in detail the facts of diligence exercised in attempting to ascertain the residence or whereabouts of all necessary defendants or to obtain service of non-resident notice, sufficient to authorize the Court to approve the issuance by the Clerk of citation for service by publication, and sufficient further to negative the reasonableness of any other form of substitute service of citation pursuant to Tex. R. Civ. P. 106, 108, 108a. Absent sufficient showing at the Dismissal Hearing to reasonably assure that Rule 106 service can be promptly made or to support substitute service or service by publication or otherwise, cases in which defendants are not served shall be dismissed for want of prosecution. Parties pursuing substitute service are directed to timely comply with the provisions of 4.B. set forth below.

4. DEFAULT JUDGMENTS:

A. Wherever shown by a party to be proper pursuant to Tex. R. Civ. P. 239 and 241 the Assigned Judge Presiding shall render and sign proper forms of default judgments presented at the Dismissal Hearing; where Tex. R. Civ. P. 243 is applicable, proof of damages shall be made at the Dismissal Hearing whereupon the

Assigned Judge Presiding shall render and sign proper forms of judgments presented at the Dismissal Hearing; absent the presentment of a proper form of judgment and absent such proof where necessary the case shall be dismissed for want of prosecution at the Dismissal Hearing.

B. In addition to the provisions set forth above in 4.A., wherever any defendant has been cited by publication the plaintiff must secure, by order of an Assigned Judge Presiding, the appointment of an attorney ad litem pursuant to the provisions of Tex. R. Civ. P. 244 prior to the Dismissal Hearing and have the attorney ad litem present at the Dismissal Hearing to comply fully with Tex. R. Civ. P. 244, otherwise the case shall be dismissed for want of prosecution at the Dismissal Hearing; in this connection, all costs of court for reasonable attorneys fees allowed by the court to the attorney ad litem shall be taxed against and promptly paid by plaintiff and an attorney ad litem shall be issued a writ of execution therefor against any plaintiff who does not promptly make such payment.

5. PRETRIAL ORDER: When service of process has been completed in a case and answers are filed, and it is determined in the discretion of any of the Assigned Judges Presiding that said case should be maintained on the docket, the Presiding District Judge shall thereupon enter an order pursuant to Tex. R. Civ. P. 166 scheduling all pretrial matters and further setting the case for trial upon the merits within four months whether by trial to the Court or trial by jury. All proceedings in connection with the pretrial procedure shall be conducted pursuant to Tex. R. Civ. P. 166 and the Court shall, immediately following the Dismissal

Hearing, if the Court there concludes that the case should be maintained for trial, render and sign an order as follows:

(a) All time periods hereinaftar set forth commence on the date, i.e., the date of the Dismissal Hearing or the date of service of citation and answer by defendants as certified by the District Clerk whichever is later.

(b) All dilatory pleas and all motions and exceptions relating to the case will be filed on or prior to the expiration of seven (7) days and immediately set by the party for hearing on or prior to the expiration of fourteen (14) days, otherwise the same shall be deemed waived.

(c) Plaintiff's Amended Original Petition, if any, shall be filed on or prior to the expiration of 21 days, Defendant's Amended Original Answer, if any, shall be filed on or prior to the expiration of 28 days. No amendment of pleadings will thereafter be permitted.

(d) If a jury trial is desired, a jury fee if not already paid will be paid on or prior to the expiration of 28 days otherwise, jury trial shall be deemed waived, and all requested special issues will be submitted by all parties, on or prior to the expiration of 28 days otherwise, the right to request special issues shall be deemed waived; in event the parties do not desire a jury trial, all issues that the parties will try will be succinctly stated and filed with the Court on or prior to the expiration of 28 days and any issues

not submitted will be deemed waived. Any supplemental pleadings of the parties, together with a statement by every party identifying the name, location, and telephone number of every person having knowledge of relevant facts, including experts, and identifying by name, address, telephone number, subject matter, and substance of opinion every witness who will or may be called at trial in whole or in part to express an opinion on any matter shall also be filed on or prior to the expiration of 28 days. Pleadings may not thereafter be supplemented and persons and expert witnesses not so identified may not testify at any trial.

(e) If a jury fee is paid, and special issues are requested, all requests for instructions and definitions shall be submitted on or prior to the expiration of 35 days, otherwise such requests shall be deemed waived.

(f) All discovery will be completed on or prior to the expiration of 70 days: In this connection, pursuant to the provisions of Tex. R. Civ. P. 215(3), the Assigned Judge Presiding shall order in all cases the harshest permissible sanctions against parties and attorneys in circumstances where discovery abuses occur which tend to delay trials or interfere with timely preparation for trials; default judgments against defendants and dismissals against plaintiffs are to be considered in all such cases and granted wherever supported by the circumstances.

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(g) Trial on the merits shall commence on or prior to the expiration of 84 days.

(h) The time periods set forth in the order may be modified or extended by any Assigned Presiding District Judge only to prevent manifest injustice.

(i) Tex. R. Civ. P. 5 shall govern any deadlines falling on legal holidays.

(j) Failure to comply with any deadline will, in addition to the waivers hereinabove set forth, also be, in the discretion of any Assigned Judge Presiding, ground for immediate dismissal of the case for want of prosecution upon notice to the parties.

6. ORDERS AND JUDGMENTS IN COURTS WHERE FILED: All orders and judgments in the cases shall be rendered, signed, and entered in the Court where the case is filed but may be rendered and signed by an Assigned Presiding Judge in the Courtroom and thereafter delivered to the Clerk of the Court where filed for entry in that Court's minutes.

7. NOTICE OF JUDGMENT: Notice of Judgment shall be given by the Clerk where required pursuant to Tex. R. Civ. P. 165a(1), 239a, and 306a(3).

SIGNED and POSTED IN OPEN COURT effective October 1, 1985.

JOHN CORNYN, DISTRICT JUDGE
37TH Judicial District Court

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CAROL R. HABERMAN, DISTRICT JUDGE
45TH Judicial District Court

JOHN YATES, DISTRICT JUDGE
57TH Judicial District Court

JAMES C. ONION, DISTRICT JUDGE
73RD Judicial District Court

ROSE SPECTOR, DISTRICT JUDGE
131ST Judicial District Court

FRED BIERY, DISTRICT JUDGE
150TH Judicial District Court

PETER MICHAEL CURRY, DISTRICT JUDGE
166TH Judicial District Court

CAROLYN SPEARS, DISTRICT JUDGE
224TH Judicial District Court

ALFONSO CHAPA, DISTRICT JUDGE
225TH Judicial District Court

DAVID PEEPLES, DISTRICT JUDGE
285TH Judicial District Court

RAUL RIVERA, DISTRICT JUDGE
288TH Judicial District Court

ORDER OF THE DISTRICT COURTS OF BEXAR COUNTY, TEXAS
FOR
DISMISSAL FOR WANT OF PROSECUTION OF AD VALOREM
TAX CASES FILED PRIOR TO JANUARY 1, 1980

Political subdivisions having ad valorem taxing authority over property situated in Bexar County, Texas, filed certain suits to collect delinquent taxes prior to January 1, 1980, of which approximately 5,000 remain pending as inactive cases and should be dismissed for Want of Prosecution for the following reasons:

1. Most of the cases were filed by either the City of San Antonio or the County of Bexar and all of the cases so filed pertaining to ad valorem taxes remaining delinquent and unpaid as of January 1, 1980, have been refiled and superseded in lawsuits reinitiated by separate filings on or after January 1, 1980, and no rights to collection of the subject taxes are diminished by dismissing these cases.

2. All other pending ad valorem tax cases filed prior to January 1, 1980, and not since refiled, have been inactive for over five (5) years with no indication from the pertinent taxing authorities of intent to pursue same. In any event, no rights to collection of the subject taxes are diminished by dismissing these cases because any such cases having merit and deserving pursuit can be refiled without payment of filing fees and without substantial risk of expiration of lengthy limitations periods generally applicable to such suits.

3. These numerous pending cases are unnecessarily burdensome to the District Courts and District Clerks and costly to the County to retain in that: (a) the papers must be kept retrievable as active files, (b) the pending dockets of the Courts appear statistically distorted, (c) the disposition of pending cases by the Courts appears statistically distorted, (d) the cost of maintaining these inactive pending cases has no offsetting benefit and should be avoided, and (e) microfilming these files upon dismissal and subsequent destruction of the paper files will free physical space critically needed by the District Clerk for storage of active litigation files.

It is accordingly ORDERED that:

The District Clerk shall give notice by publication on four separate occasions of dismissal for want of prosecution of all ad valorem tax suits filed prior to January 1, 1980, and shall further give written notice directly to all political subdivisions having ad valorem taxing authority over property of any kind situated in Bexar County, Texas, delivered or mailed to the highest official of each such political subdivision with instructions that such notice be forwarded to current attorneys for such subdivision.

Thirty (30) days after the last notice is given as above provided, all cases not individually set for immediate trial with notice of such setting given to the District Clerk by certified mail, return receipt requested, will be dismissed for want of prosecution by blanket order dismissing all pending ad valorem tax cases filed prior to January 1, 1980, excepting only those so set for trial with such notice to the District Clerk given by individual cause number.

At any time following the expiration of thirty (30) days after the dismissal, and compliance by the District Clerk with all necessary legal prerequisites,

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the contents of the files of the cases may be micro-filmed and the paper files and contents may be destroyed.

SIGNED December 9, 1985.

Raul Rivera

RAUL RIVERA, Administrative Judge
District Courts of Bexar County,
Texas

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SCAC
Agenda
Prep for 3a

MICHAEL D. SCHATTMAN
DISTRICT JUDGE
348TH JUDICIAL DISTRICT OF TEXAS
TARRANT COUNTY COURT HOUSE
FORT WORTH, TEXAS 76196-0281
PHONE (817) 877-2715

April 29, 1987

Hon. John Hill, Chief Justice
Hon. Robert M. Campbell, Justice
Hon. Franklin S. Spears, Justice
Hon. C. L. Ray, Justice
Hon. James P. Wallace, Justice
Hon. Ted J. Robertson, Justice
Hon. William W. Kilgarlin, Justice
Hon. Raul A. Gonzalez, Justice
Hon. Oscar H. Mauzy, Justice

Re: Amendments to Rules
of Civil Procedure
Adopted March 10, 1987

Dear Judges:

Since the newly adopted rules are the work of the entire court this letter is addressed to all of you in a collegial capacity.

Frankly, I am appalled. While many of the changes are just housekeeping, there are a number of major changes. At no time during the past two years that I am aware of, were any of these changes run by the State Bar's Committee on the Administration of Justice. The first that I and other members of that body knew of these proposals was about March 1st of this year. Copies were distributed and we were asked to look them over for comment by June, anticipating a June SCAC meeting and a January 1988 effective date. However, the proposals were adopted and promulgated on March 10th.

What is appalling is that this is a waste of the considerable talent (this writer excluded) on that committee, and it is a deviation from the practice of having rules proposals reviewed by both the COAJ and the SCAC. I understand that several years ago the COAJ had become fairly inactive, but under Professor Pat Hazel's chairmanship it has reorganized and has actively worked on the proposals presented to it.

While the SCAC has a membership of impressive quality, another level of discussion would not hurt. Let me give you an example. These new rules make a substantial change in the method of filing discovery. Whether this was done simply to ape the federal practice or to satisfy the yearnings of District Clerk Ray Hardy to reduce his workload and storage space, I do not know. Many of you were trial judges, but you may be far enough removed from it to have forgotten the benefit to the trial judge of being able to review the discovery on file to prepare him/herself for the trial. You can learn more from that than the pleadings. This change deprives us of that. It can also facilitate telephone conferences for a complete file to be available to the judge. Further, we have heard many adverse comments about the federal practice. That it actually makes the file grow unnecessarily as each side begins to attach copies of discovery documents as exhibits to motions and responses. You also have some attorneys who engage in sharp practices and this is an invitation to do that -- arguing about whether or when an instrument was received. How are we now to "deem" admissions without motion? The Court cannot know when a document was sent or received unless it holds a hearing. Finally, if the object is to save storage space and costs, that object can be better obtained by a rule authorizing the stripping of all files in cases which are settled except for the final pleadings and the dismissal order.

Whether any of these considerations are persuasive is not the point. The point is that the opportunity to raise and discuss them was lost.

Another example has to do with what is <u>not</u> in the new rules. As you know, there has been some discussion of having two rules on "the rule" -- Rule 267, T.R. Civ. P., and Rule 613, T.R. Ev. The COAJ has discusses this, but it has also discussed the advisability of stating whether "the rule" can be invoked in depositions, limitations on its invocation to experts, and has been formulating language to do this. A less hurried approach to these new changes would have allowed both the SCAC and yourselves to consider whether this should be done as part of the 1988 changes.

I would note parenthetically that the reference to administrative judicial "districts" in Rule 3a, as amended, should probably be "regions."

I hope that you will consider these remarks in the spirit that they are presented and will take steps to ensure the use of the abilities

of the lawyers on the State Bar's Committee on the Administration of Justice, and for that matter, the Committee on the Administration of the Rules of Evidence, in the amendatory process.

Respectfully yours,

Michael D. Schattman

MDS/lw

xc: Luther H. Soules III
Patrick Hazel

Agenda

Texas Rules of Civil Procedure

Rule 3a. Rules by Other Courts

Each administrative judicial ~~district~~ [region], each district court, 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 before their promulgation be furnished to the Supreme Court of Texas for approval.

Texas Rules of Civil Procedure

Rule 14b. Return or Other Disposition of Exhibits

~~In all hearings, proceedings or trials in which exhibits have been filed with or left in the possession of the clerk, such clerk or any party to the proceeding may, after the judgment has become final and times for appeal, writ of error, bill of review under Rule 329 when applicable, and certiorari have expired without the same having been perfected, or after mandate which is finally decisive of such matter has been issued, move such court, on written notice to all parties, for the return of any or all of such exhibits to the party or parties originally introducing or offering the same, or may move for their destruction or such other disposition as the court may direct.~~ The clerk of the court in which the exhibits are filed shall retain and dispose of the same as directed by the Supreme Court.

SUPREME COURT ORDER RELATING TO

RETENTION AND DISPOSITION OF EXHIBITS

In compliance with the provisions of Rule 14b, the Supreme Court hereby directs that exhibits offered or admitted into evidence shall be retained and disposed of by the clerk of the court in which the exhibits are filed upon the following basis.

This order shall apply only to: (1) those cases in which judgment has been rendered on service of process by publication and in which no motion for new trial was filed within two years after judgment was signed; and, (2) all other cases in which judgment has been signed for one year and in which no appeal was perfected or in which a perfected appeal was dismissed or concluded by a final judgment as to all parties and the issuance of the appellate court's mandate such that the case is no longer pending on appeal or in the trial court.

After first giving all attorneys of record thirty days written notice that they have an opportunity to claim and withdraw the trial exhibits, the clerk, unless otherwise directed by the court, may dispose of the exhibits. If any such exhibit is desired by more than one attorney, the clerk shall make the necessary copies and prorate the cost among all the attorneys desiring the exhibit.

If the exhibit is not a document or otherwise capable of reproduction, the party who offered the exhibit shall be entitled to claim same; provided, however, that the party claiming the exhibit shall provide a photograph of said exhibit to any other party upon request and payment of the reasonable cost thereof by the other party.

STANDING SUBCOMMITTEE ON RULES 15-166a

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Subcommittee Report
6-87
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May 28, 1987

BY FEDERAL EXPRESS
Airbill No. 2332320981

Mr. Luther H. Soules, III
Soules, Reed and Butts
800 Milan Building
San Antonio, Texas 78205

Re: Texas Supreme Court Advisory Committee - Proposed Revisions to Rules of Civil Procedure

Dear Luke:

For the June agenda, I am enclosing proposals for Rules 8, 21, 22, 22(a), 45(e), 71, 142, 57, 85, 101, 106, 127, 157, 165(a), and 170. Please note that the recommendation regarding Rule 57 is really a recommendation that relates to Federal Rule 11 and its substantive content. I have included this as our subcommittee report, but I anticipate that your special subcommittee on Rule 11 will take care of this particular item.

Yours truly,

GRAMBLING & MOUNCE

BY: Sam Sparks/sk

Sam Sparks

SS:sk

Subcommittee Report
6-87

RULE 8. LEADING COUNSEL DEFINED

The attorney [first employed] who places his signature on the initial pleadings for any party shall be considered leading counsel in the case[, and, if present,] and shall have control in the management of the cause unless a change is made by the party [himself, to be entered of record.] or attorney by formal pleadings filed with the clerk.

Subcommittee Report
6-87

RULE 21. MOTIONS

An application to the court for an order, whether in the form of a motion, plea or other form of request, unless presented during a hearing or trial, shall be made in writing, shall state the grounds therefor, shall set forth the relief or order sought, and shall be filed and noted on the docket.

An application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, shall be served upon the adverse party not less than [three] five days (excluding Saturdays, Sundays and legal holidays) before the time specified for the hearing, unless otherwise provided by these rules or shortened by the court.

Subcommittee Report
6-87

RULE 22. COMMENCED BY PETITION

A civil suit in the district or county court shall be commenced by petition filed in the office of the clerk. Filing shall occur upon receipt by the clerk of a pleading or instrument delivered in hard-copy original, by hand or mail, or by electronic transfer when the receipt is accompanied by full payment of statutory filing fees, unless the filing is requested pursuant to Rule 145 of these rules.

Subcommittee Report
6-87

RULE 22(a). ORIGINAL PLEADINGS

Where filed manually by hard-copy original, the clerk may retain the hard copy as the original pleading or instrument, or may transform the copy to a records library medium approved by the Supreme Court. If the hard-copy original is transformed to a records library medium, the hard-copy original may be returned to the filing party, who shall be responsible to retain the instrument until the case reaches final disposition. The instrument as stored by the clerk shall be recognized as the original instrument for all court proceedings. Where filed by electronic means, the electronically transmitted instrument shall be the original instrument for all court proceedings.

Subcommittee Report
6-87

RULE 45(e).

The signature of a party, the party's attorney, or authorized agent shall be affixed to all instruments filed with the district or county clerk as official court records. Signature may be handwritten or, if filed electronically, by personal identification number (PIN) code, specifically identifying the party or attorney filing. Handwritten or PIN code shall be recognized as original signatures for all rules regarding signatures.

Subcommittee Report
6-87

RULE 71. MISNOMER OF PLEADINGS

When a party has mistakenly designated any plea or pleading, the court, if justice so requires, shall treat the plea or pleading as if it had been properly designated. Pleadings shall be docketed as originally filed and shall remain identified as named, unless the court orders redesignation. Upon court order filed with the clerk, the clerk shall modify the docket and all other clerk records to reflect redesignation.

Subcommittee Report
6-87

RULE 142 [SECURITY FOR COST] FEES FOR SERVICES RENDERED

The clerk [may] shall require from the plaintiff [security for costs] fees for services rendered before issuing any process[, but shall file the petition and enter the same on the docket.] unless filing is requested pursuant to Rule 145 of these rules. No attorney or other officer of the court shall be surety in any cause pending in the court, except under special leave of court.

Subcommittee Report
6-87

RULE 57. SIGNING OF PLEADINGS

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, with his State Bar of Texas identification number, address and telephone number. A party not represented by an attorney shall sign his pleadings, state his address and telephone number. The signature of an attorney or party constitutes a certificate that he has read the pleading, motion or other paper; that, to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of any existing law, and that it is not interposed for any improper purpose, such as to harrass or to cause unnecessary delay or needless increase in the cost of litigation.

Subcommittee Report
6-87

RULE 85. ORIGINAL ANSWER AND AMENDMENTS

The original answer may consist of motions to transfer venue, pleas to the jurisdiction, in abatement or any other dilatory pleas; of special exceptions, of general denial, and any defense by way of avoidance or estoppel, and it may present cross-action, which to that extent will place defendant in the attitude of a plaintiff. Matters in avoidance and estoppel may be stated together, or in several special pleas, each presenting a distinct defense, and numbered so as to admit of separate issues to be formed on them. Before one hundred and twenty days after the disposition of any motions to transfer, pleas to the jurisdiction, pleas in abatement or other dilatory pleas, or of determination of special exceptions, the defendant shall file an amended answer and shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments on which the adverse party relies. If the defendant is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as true and material and shall deny only the remainder.

Subcommittee Report
6-87

RULE 101. REQUISITES

The citation shall be styled, "The State of Texas," and shall be directed to the defendant and shall command [him] the defendant [to appear by filing] to file a written answer to the plaintiff's petition at or before 10:00 a.m. [of the Monday next after] before the expiration of twenty days after the date of service of the citation and petition upon the defendant [thereof, stating the place of holding the court]. The citation [It] shall state the location of the court, the date of the filing of the petition, its file number and the style of the case, and the date and issuance of the citation[,]. It shall be signed and sealed by the clerk, and shall be accompanied by a copy of plaintiff's petition. The citation shall further direct that if it is not served within ninety days after the date of issuance, it shall be returned unserved.

The citation shall include a simple statement to the defendant to inform the defendant that he has been sued, he may employ an attorney, and that, if a written answer is not filed with the appropriate court within twenty days after service of citation and petition, a default judgment may be taken against the defendant.

Subcommittee Report
6-87

RULE 106

COMMENT: There is no need to modify rules 106 and 103 unless there is a specific statutory enactment requiring such a revision. I do not know whether any statutory enactment has been accomplished.

Subcommittee Report
6-87

RULE 127. PARTIES LIABLE FOR OTHER COSTS

Each party to a suit shall be liable for all costs incurred by him and shall be responsible for the accurate recordation of all costs incurred by him during the course of a lawsuit. Each party to a lawsuit shall be responsible for the presentation to the court at the time the judgment is submitted a true and accurate bill of costs. If the costs cannot be collected from the party against whom they have been adjudged, execution may issue against any party in such suit for the amount of costs incurred by such party, but no more.

Subcommittee Report
6-87

RULE 157. MARRIAGE NOT TO ABATE SUIT

A suit by or against a feme sole shall not abate by her marriage, but upon suggestion of said marriage being entered on the record, the husband may make himself a party plaintiff, or if she be a defendant, the clerk shall upon suggestion or upon a petition issue a scire facias to the husband; and the case, after the service and return thereof, shall thereupon proceed to judgment.

COMMENT: This rule has been recommended to be repealed by Judge Kilgarlen and others.

Subcommittee Report
6-87

RULE 165(a). DISMISSAL FOR WANT OF PROSECUTION

1. DISMISSAL. A case may be dismissed for want of prosecution on the failure of any party seeking affirmative relief or his attorney to appear for any hearing or trial of which the party or attorney had notice[, or on the failure of the party or his attorney to request a hearing or take other action specified by the court within fifteen days after the mailing of notice of the court's intention to dismiss the case for want of prosecution.] Any case pending on the docket for thirty-six months shall be placed on a dismissal docket. Notice of the court's intention to dismiss and the date and place of the docket hearing shall be sent by the clerk to each attorney of record, and to each party not represented by an attorney whose address is shown on the docket or in the papers on file by posting same in the United States postal service. At the docket hearing, the court shall dismiss for want of prosecution any case unless verified pleadings are filed and the court determines there is good cause for the case to be maintained on the docket. If the court determines to maintain the case on the docket, it shall enter a pretrial order specifying the reasons why the case was not dismissed, assigning a trial date for the case within six months from the docket date, and setting deadlines for the making of new parties, all discovery, filing of all pleadings, and the filing

RULE 165(a). DISMISSAL FOR WANT OF PROSECUTION

(continued)

of responses or supplemental responses to discovery. The case may be continued thereafter only for valid and compelling reasons as established in verified pleadings and specifically determined by court order but, thereafter, the court must try the case within ninety days of the entry of an order of continuance or the case shall be dismissed. Notice of the signing of the order of dismissal shall be given as provided in Rule 306(a). Failure to mail notices as required by this rule shall not affect any of the periods mentioned in Rule 306(a), except as provided in that rule.

Subcommittee Report
6-87

RULE 170. PRETRIAL MOTIONS

In pretrial motions that do not require the presentation of evidence at the hearing, except those filed pursuant to Rules 18(a), 86, 106, 120(a), 165(A), 165(a), 166-A, and 207(3), the following procedures shall apply:

a. Form. All motions shall be in writing and may be accompanied by a proposed order granting the relief sought as a separate attached instrument to the motion.

b. Submission. Each motion shall state a date of submission, which shall be at least fifteen (15) days from the date of the filing unless shortened or extended by order of court. The motion may be submitted to the court on the submission date or later.

c. Response. Responses to any motion may be in writing and shall be filed before the date of submission or on a date set by the court. (Failure to file a response shall be considered a representation of no opposition.) The court may require written responses to any motion.

d. Oral argument. The motion or response shall include a request for oral argument or hearing if a party deems it necessary. The court shall (may) grant the request for oral argument or hearing and may order oral argument or hearing on its own motion. Oral argument

Subcommittee Report
6-87

RULE 170. PRETRIAL MOTIONS

(continued)

may be made by telephone conference with all parties in the court. Any party may request a telephone conference argument in a motion or response, but the Court shall determine the mode of hearing absent an agreement of the parties. Any party requesting a record of a telephone conference or hearing must advise the court (in writing) by the date preceding the telephone conference.

e. Disposition. The court shall enter its order on any motion after the submission date or the hearing and the clerk shall mail a copy of said order to every party.

Subcommittee Report
6-87

RULE 21. MOTIONS

An application to the court for an order, whether in the form of a motion, plea or other form of request, unless presented during a hearing or trial, shall be made in writing, shall state the grounds therefor, shall set forth the relief or order sought, and shall be filed and noted on the docket.

An application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, shall be served upon the adverse party not less than [three] five days (excluding Saturdays, Sundays and legal holidays) before the time specified for the hearing, unless otherwise provided by these rules or shortened by the court.

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March 29, 1987

Mr. Sam Sparks
Grambling and Mounce
P.O. Drawer 1977
El Paso, Texas 79950

RE: Proposed Change to Rule 21, TRCP

Dear Sam:

Enclosed is a proposed change to Texas Rule of Civil Procedure 21 submitted by William A. Brandt.

Please draft, in proper form for Committee consideration, an appropriate Rule for submission to the Committee and submit your report no later than May 29, 1987, so that I may include same in our June agenda.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
enclosure
cc: Justice James P. Wallace
William A. Brandt

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March 26, 1987

Mr. Luther H. Soules, III.
Soules, Reed & Butts
800 Milam Building
East Travis & Soledad
San Antonio, Texas 78205

Re: Proposed change to Rule 21 of the Texas Rules of Civil Procedure

Dear Luke:

I have been troubled by Rule 21 of the Texas Rules of Civil Procedure and would propose a slight change in the rule. I believe the change would make it a more liveable rule. I submit the proposed change for your consideration and the consideration of the rule making committee and would appreciate your assistance in this matter.

The problem with Rule 21. Motions is with the last sentence of the rule which states,

> "An application to the Court for an order and notice of any hearing thereon, not presented during a hearing or trial, shall be served upon the adverse party not less than three (3) days (emphasis added) before the time specified for the hearing, unless otherwise provided by these rules or shorten by the Court."

My problem with the rule as now stated is that the three (3) days includes both Saturday and Sunday. Theoretically, not withstanding Martinez v. General Motors Corporation, 686 S.W.2d 349 (Tex. App. 4 Dist. 1985), your opponent could hand deliver a motion to your office before 9:00 o'clock on Friday morning and have a hearing on that motion Monday morning at 9:00 o'clock. Recently, I had a situation arise in a complex case. I was scheduled for deposition Friday in Houston on another case and on Thursday afternoon my office was delivered a Motion to Dismiss in the complex case set for Monday morning at 9:00 o'clock.

Fortunately, my deposition cancelled on Thursday and I was able to prepare a response on Friday which enabled me to defeat the Motion to Dismiss. This week, I am leaving town Friday for a medical malpractice seminar which runs on Saturday and Sunday. I am faced with the possibility of having opposing counsel file a Motion for Protective Order on some of my discovery before my Motion to Compel is heard a week from Friday. Conceivably, I could have a hearing on Monday without having effective notice or being able to do anything about filing a response when I am out of the city.

Because of this dilemma, I propose the following change to the last sentence of Rule 21,

> "... shall be served upon the adverse party not less than three business days before the time specified for the hearing, unless otherwise provided by these rules or shorten by the Court."

My proposed change would insert "business" between "three" and "days" in the rule.

An alternative, to the insertion of "business" into the rule would be to use similar wording out of Federal Rule 6 Time (a) Computation. This change would add another sentence to Texas Rules of Civil Procedure Rule 21 where the last sentence would read:

> "When the period of time prescribed or allowed is three days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation."

It seems to me to be unfair to allow someone to take advantage of a weekend when secretaries are off, court houses are closed, and people have other committments by virtue of a three day rule. Should you have any questions regarding my proposed changes or comments, please do not hesitate to contact me.

I trust everything is going well for you and look forward to seeing you sometime.

Very truly yours,

STOLHANDSKE, STOLHANDSKE & CONLEY

BY: William A. Brant
WILLIAM A. BRANT

WAB/dr

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June 8, 1987

Mr. Sam Sparks
Grambling and Mounce
P.O. Drawer 1977
El Paso, Texas 79950-1977

RE: Proposed Changes to Rules 21a and 72
Texas Rules of Civil Procedure

Dear Sam:

Enclosed is a letter from Don L. Baker suggesting changes to Rules 21a and 72.

In the interest of time, I have drafted up proposed rules and am enclosing them, along with a copy of Federal Rule 5, to which Mr. Baker references.

Please look these over and, if you are unable to get a written report to me, be prepared to give an oral report at our June meeting.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as

Sam,
I do not believe
this is advised.

The ambiguity can be resolved by specific amendments to Rules 4(d)(7) and 4(e), but the Committee is of the view that there is no reason why Rule 4(c) should not generally authorize service of process in all cases by anyone authorized to make service in the courts of general jurisdiction of the state in which the district court is held or in which service is made. The marshal continues to be the obvious, always effective officer for service of process.

EDITORIAL NOTES

Effective Date of 1983 Amendment. Amendment by Pub.L. 97–462 effective 45 days after Jan. 12, 1983, see section 4 of Pub.L. 97–462, set out as an Effective Date of 1983 Amendment note under section 2071 of this title.

Rule 5. Service and Filing of Pleadings and Other Papers

(a) **Service: When Required.** Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) **Same: How Made.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

(c) **Same: Numerous Defendants.** In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) **Filing.** All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.

(e) **Filing With the Court Defined.** The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivisions (a) and (b). Compare 2 Minn. Stat. (1927) §§ 9240, 9241, 9242; N.Y.C.P.A. (1937) §§ 163, 164 and N.Y.R.C.P. (1937) Rules 20, 21; 2 Wash.Rev.Stat. Ann. (Remington, 1932) §§ 244–249.

Note to Subdivision (d). Compare the present practice under former Equity Rule 12 (Issue of Subpoena—Time for Answer).

1963 AMENDMENT

The words "affected thereby," stricken out by the amendment, introduced a problem of interpretation. See 1 Barron & Holtzoff, Federal Practice & Procedure 760–61 (Wright ed. 1960). The amendment eliminates this difficulty and promotes full exchange of information among the parties by requiring service of papers on all the parties to the action, except as otherwise provided in the rules. See also subdivision (c) of Rule 5. So, for example, a third-party defendant is required to serve his answer to the third-party complaint not only upon the defendant but also upon the plaintiff. See amended Form 22–A and the Advisory Committee's Note thereto.

As to the method of serving papers upon a party whose address is unknown, see Rule 5(b).

THE SUPREME COURT OF TEXAS

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

June 4, 1987

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

Professor J. Patrick Hazel, Chairman
Administration of Justice Committee
University of Texas School of Law
727 E. 26th Street
Austin, Tx 78705

Re: Tex. R. Civ. P. 21a and 72

Dear Luke and Pat:

I am enclosing a letter from Mr. Don L. Baker, suggesting a change to Tex. R. Civ. P. 21a and 72.

Will you please place these matters on your Agenda for the next meeting so that they might be given consideration in due course.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. Don L. Baker
Law Offices of Baker & Price
812 San Antonio, Suite 400
Austin, Tx 78701-2223

Law Offices of Walker & Price A PROFESSIONAL CORPORATION 812 SAN ANTONIO SUITE 400 AUSTIN, TEXAS 78701-2223 512-476-6003

May 19, 1987

Honorable James P. Wallace
Justice, Supreme Court of Texas
Supreme Court Building
Austin, TX 78711

Re: Texas Rules of Civil Procedure 21a and 72

Dear Justice Wallace:

There appears to be a hiatus in the application of these two Rules relating to service of pleadings and notices. It's been my observation that for several years, the actual practice has varied significantly from place to place, from lawyer to lawyer, from case to case, and from the actual language of the Rules. Most of the time, it has not been a practical problem, but there have been some recent rulings in local trial courts which have brought the problem into focus.

The specific language of Rule 72 deals with pleadings, pleas and motions, but does not specifically address, deal with or define a "notice". Rule 72 authorizes service by mail, but does not specify whether the mail is to be first class or not, certified or not, registered or not.

Rule 21a specifically deals with "notice", the subject matter of the Rule being defined in the first phrase as "Every notice required by these Rules, . . .". Rule 21a does not appear to control pleadings, motions and pleas. Rule 21a provides for mail to be either by certified or registered mail, thus by implication precluding the first class mail. The Rule, however, does allow service in any other manner as the trial court may direct in its discretion, which presumably would clearly include first class mail.

For many years, it has been a widespread custom to send copies of pleadings to other parties and counsel in a case by first class mail. This is because first class mail is much less expensive, much less troublesome to the sender, much less troublesome to the receiver, and normally makes for better actual notice than the restricted delivery mail. However, it now appears that it is being argued locally that if a notice of setting for hearing on a

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motion or pleading is included in the same document, then it is required to be sent by certified mail. Strangely enough, since Rule 21a does not apply to pleadings and there does not appear to be any other rule which expressly requires sending of a notice of a setting, it appears logically arguable that Rule 21a doesn't apply to anything. If there is a rule which says that a party must give notice to all other parties of each setting for hearing on a motion, I have not found that rule. Of course, we have done that for years, as have other attorneys.

In order to make the rules fit together logically, it would be my suggestion that appropriate language be used to amend these rules to provide that it is the responsibility of the moving party or the party filing any document with the court to send a copy to all other parties or their attorney of record. I suggest that the requirement also be expressly made that notice of any hearing or setting obtained or requested by any party similarly be sent.

Further, I suggest that the standard method of sending be by first class mail without the requirement of certified or registered mail unless the court shall order otherwise in a given case. The reasons for suggesting that first class mail is a better method include:

1. Actual receipt and actual knowledge of the contents are much more likely with first class mail than with certified mail because first class mail is delivered whether anyone chooses to sign for it or not. Actual knowledge is more likely by first class mail because there are many people who still believe the untrue folk wisdom that if you don't sign for the certified mail, then you are not on notice of and not bound by the contents of it. This means there are lots of folks who simply fail or refuse to sign for certified or registered mail.

2. Notice and knowledge will be received more quickly because there is no need to make a separate subsequent trip to the post office to obtain mail and sign for it since first class mail will be left at the address intended. It is increasingly the case that both spouses are employed outside the home and where notice is sent to a residential address, it is a large burden on people to take off work during the hours of the day when the post office is open and go to the post office to claim and sign for receiptable mail.

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3. Where mail is going to law offices, the same may occasionally be true and even if not directly applicable, it is less trouble in the recipient's office to receive mail without the necessity of filling out extra forms and signing receipts to get the mail.

4. Expense to the sender is lessened because first class mail can normally be sent for 22 cents, whereas it will cost several times that much to send it by certified or registered mail. When a law office is sending hundreds of pieces of mail of this nature, this amounts to a significant expense.

5. The additional time required for receiving employees to sign for mail is an unnecessary expense item to the recipient and, therefore, an authorization of first class mail reduces expenses on both ends of the equation.

Service by first class mail has been the norm for many years in the federal procedure under Rule 5, Federal Rules of Civil Procedure. It would appear that it has not presented any significant problem and has worked well in the federal system. It does not make good sense to me for anyone to suggest that the lawyers of Texas are somehow less honest or that the courts of Texas are somehow less capable than those in the federal system. I would not expect to see any greater incidence of dishonesty by a sender in claiming it was sent when it was not or by a receiver in claiming that it was not received when it was.

Perhaps there are other considerations which I have not addressed. Perhaps there is more to this than I realize. In any event, I felt it appropriate to bring this to the attention of the court and of the Rules Committee in the hope that it might be appropriately addressed. Thank you for your consideration of these suggestions.

Very truly yours,

DON L. BAKER

DLB/lg

Texas Rules of Civil Procedure

Rule 21a. Notice

Every notice required by these rules [or pleading subsequent to the original complaint], 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~~ [first-class] 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 depository 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. ~~When these rules provide for notice or service by registered mail, such notice or service may also be had by certified mail.~~

Subcommittee Report
6-87

RULE 22. COMMENCED BY PETITION

A civil suit in the district or county court shall be commenced by petition filed in the office of the clerk. Filing shall occur upon receipt by the clerk of a pleading or instrument delivered in hard-copy original, by hand or mail, or by electronic transfer when the receipt is accompanied by full payment of statutory filing fees, unless the filing is requested pursuant to Rule 145 of these rules.

Subcommittee Report
6-87

RULE 22(a). ORIGINAL PLEADINGS

Where filed manually by hard-copy original, the clerk may retain the hard copy as the original pleading or instrument, or may transform the copy to a records library medium approved by the Supreme Court. If the hard-copy original is transformed to a records library medium, the hard-copy original may be returned to the filing party, who shall be responsible to retain the instrument until the case reaches final disposition. The instrument as stored by the clerk shall be recognized as the original instrument for all court proceedings. Where filed by electronic means, the electronically transmitted instrument shall be the original instrument for all court proceedings.

Subcommittee Report
6-87

RULE 45(e).

The signature of a party, the party's attorney, or authorized agent shall be affixed to all instruments filed with the district or county clerk as official court records. Signature may be handwritten or, if filed electronically, by personal identification number (PIN) code, specifically identifying the party or attorney filing. Handwritten or PIN code shall be recognized as original signatures for all rules regarding signatures.

Subcommittee Report
6-87

RULE 71. MISNOMER OF PLEADINGS

When a party has mistakenly designated any plea or pleading, the court, if justice so requires, shall treat the plea or pleading as if it had been properly designated. Pleadings shall be docketed as originally filed and shall remain identified as named, unless the court orders redesignation. Upon court order filed with the clerk, the clerk shall modify the docket and all other clerk records to reflect redesignation.

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January 12, 1987

Mr. Sam Sparks
Grambling and Mounce
P.O. Drawer 1977
El Paso, Texas 79950

Dear Sam:

Enclosed is a memorandum from from Eve Lieber of Ray Hardy's office regarding a Proposed Rule 22a, Proposed Rule 45e and an addition to existing Rule 71. Justice Wallace has requested that our Committee, as well as the COAJ, take a look at it.

Please draft, in proper form for Committee consideration, an appropriate Rule for submission to the Committee at our June meeting.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
enclosure

THE SUPREME COURT OF TEXAS

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

December 1, 1986

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

Professor J. Patrick Hazel, Chm.
Administration of Justice Committee
University of Texas School of Law
727 E. 26th Street
Austin, TX 78705

Dear Luke and Pat:

I am enclosing letters from Mr. Ray Hardy, District Clerk of Harris County, regarding:

1. Consideration of adopting several State Rules to delineate the following areas: Clarification of Lead Counsel and Attorney of Record; Attorney responsibility for the preparation and submission of a Bill of Costs; and, Removal of the Filing of All Depositions and Exhibits;

2. Request for Attorney General Opinion on Facsimile Signature. (Memo to Ray Hardy from Eve Lieber).

3. Texas Rules and Tex. Rev. Stat. art. 3927 Definition of filing to include electronic filing; Requisite payment of statutory filing fees; Errors and omissions in pleadings/instruments filed; Missing signatures and misnamed documents (Memo to Ray Hardy from Eve Lieber, with cover letter to Frank G. Jones).

Please bring these matters to the attention of your respective committees.

Sincerely,

James P. Wallace
Justice

JPW:fw
cc: Mr. Ray Hardy, District Clerk
Harris County Courthouse
1307 San Jacinto
Houston, Texas 77002

Proposed Rule 22a

RAY HARDY
DISTRICT CLERK
HOUSTON, TEXAS 77002

August 9, 1984

Mr. Frank G. Jones
Member, Administration of Justice Committee
Fulbright & Jaworski
Bank of the Southwest Building
Houston, Texas 77002

Dear Mr. Jones:

Enclosed is a memo submitted to me by Eve Lieber concerning problems related to the filing of pleadings and instruments without requisite statutory filing fees paid at the time of delivery. Since modification of Rule 22, Tex. R. Civ. P. is involved, the memo also includes proposals for the changes necessary to provide for electronic filing allowed under Tex. Rev. Stat. art. 29f (Vernons Supp. 1984).

Proposed Rule 22a needs further modification; however, it should serve to show the need for an explanation of the effect of a records system which allows the clerk to capture pleadings and/or instruments using a medium different from the hard copy original (traditionally filed and maintained as official court records). There should also be some explanation regarding the custody of the pleading or instrument if filed in hard copy, and a means by which the same can be entered of record if required.

Also enclosed is a memorandum from my office concerning the use of facsimile signatures, specifically facsimile stamp signatures on judgments. This is included to provide insight into the issues surrounding the use of any form of facsimile signature, and possible statutory limitations.

The third document is a study on a paperless court project conducted in New Jersey that you may find interesting. I will continue to keep you informed as my office gathers more information on electronic filing systems in the courts.

Sincerely Yours,

Ray Hardy, District Clerk
Harris County, Texas

RAY HARDY
DISTRICT CLERK
HOUSTON, TEXAS 77002

June 14, 1984

MEMO

TO: Ray Hardy, District Clerk

FROM: Eve Liebe[illegible], Research Analyst

SUBJECT: Texas Rules and Tex. Rev. Stat. art. 3927
Definition of filing to include electronic filing
Requisite payment of statutory filing fees
Errors and omissions in pleadings/instruments filed
Missing signatures and misnamed documents

Two issues were submitted by this Office to the County Attorney for an Attorney General's Opinion in May, 1984:

(1) Whether the District Clerk of Harris County, upon receipt of a file from a transferring court shall assign and docket the case before the filing fee is paid?

(2) How should a case from a transferring court be dismissed if the filing fee is not paid?

Having reviewed the request for an Attorney General's Opinion for interpretation of the conflict between Rule 89, Tex. Rev. Civ. P. and Tex. Stat. Art. 3927 (Vernon's 1984), the following issues remain unanswered:

(3) Whether, upon receipt of a pleading for initial filing with the district clerk, without filing fee or with insufficient filing fee tendered, the clerk must file and docket the case in accordance with Tex. R. Civ. P. 22 and 42, in contradiction to Tex. Rev. Stat. art. 3927 (Vernons 1984)?

(4) Whether the district clerk must file and docket a pleading or instrument which is incomplete (e.g. missing exhibit, missing affidavit, no signature or photocopy of original signature)?

The first question is directly related to the issues addressed to the Attorney General, except that the issue regarding Rule 89 deals with pleadings transferred after initial filing. The statute of limitations in such instances does not apply. Where the pleading is tendered for the first time, as in issue (3) above, the statute of limitations is running. The conflict lies in an interpretation of Rules 22, 142, Tex. R. Civ. P., and Tex. Rev. Stat. art. 3927 (Vernons 1984). Rule 22 provides:

> A civil suit in the district or county court shall be commenced by a petition filed in the office of the clerk.
> Source: Art. 1971 (repealed, Acts 1939, 46th Leg. p. 201, §1)

Rule 142, amended by order of March 31, 1941, provides:

> The clerk may require from the plaintiff security for costs before issuing any process, but shall file the petition and enter the same on the docket. No attorney or other officer of the court shall be surety in any cause pending in the court, except under special leave of court. (emphasis added)
> Source: Art. 2067 (repealed, Acts 1939, 46th Leg., p. 201 §1).

However, Tex. Rev. Stat. art. 3927, created in 1965, changed the concept "security for costs" to constitute fees for services rendered in processing, due and payable at the time of filing. The 1965 Act thereby overruled Attorney General Opinion S-42 (1956), which interpreted art. 3927, Acts 1941, with minor changes thereafter. Article 3927 provides:

> the clerks of the district courts shall receive the following fees for their services: (1) the fees in this subsection shall be due and payable, and shall be paid at the time the suit or action is filed.

The Texas Rules of Court fail to require payment of statutory filing fees at the time of initial filing, which payment is required under art. 3927. Where there is such conflict between state rule and statute, under Const. Art. 5§ 25, the rule must yield. See Also FEW v. CHARTER OAK FILE INS., 463 S.W. 2d 424 (1971).

FILING DEFINED

In addition to the inclusion of requisite payment of statutory filing fees, a clear definition of filing is needed which will address electronic filing of pleadings and other instruments. Rule 22 provides:

> A civil suit in the district or county court shall be commenced by a petition filed in the office of the clerk.

Proposed Rule 22 would provide:

> A civil suit in the district or county court shall be commenced by petition filed in the office of the clerk. Filing shall occur upon

receipt by the clerk of a pleading or instrument delivered by hand or by mail in hard copy original, or by electronic transfer, upon full payment of statutory filing fees.

Proposed Rule 22a would further provide:

> Where filed manually by hard copy original, the clerk may retain the hard copy as the original pleading or instrument, or may transform the document to a records library medium approved by the Supreme Court. The hard copy filed may be returned to the party filing, who shall be responsible to retain the instrument until the case reaches final disposition. The instrument as stored by the clerk shall be recognized as the original instrument for all court proceedings.
>
> Where filed by electronic means, the electronically transmitted instrument shall be the original instrument for all court proceedings.

OMISSIONS AND IMPROPER IDENTIFICATION OF PLEADINGS AND INSTRUMENTS FILED

The second issue addressed refers to omissions in instruments filed. There is no statutory guideline or state rule defining the district clerk's responsibility to insure the correctness of pleadings. With regard to signed pleadings or instruments filed, Rules 45(d), 57, 78 and 83 Tex. R. Civ. P. require indorsement by the attorney or party filing. Rule 45(d) Tex. R. Civ. P., requires:

> Pleadings in the district and county courts shall... be in writing, signed by the party or his attorney, and be filed with the clerk.

Rule 57 Tex R. Civ. P. provides:

> Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, with his State Bar of Texas identification number, address, and telephone number. A party not represented by an attorney shall sign his pleadings; state his address and telephone number.

Similarly, Rules 78 and 83 Tex. R. Civ. P. require indorsement of pleadings and answers. There is no direction as to whether the district clerk must accept or reject a pleading or other instrument unsigned at the time of filing. This is particularly important where such instrument directs the clerk to issue service of process. In addition, the rules are silent as to whether a photocopy of an original signature shall constitute an original signature for purposes of filing, and whether the clerk shall accept or reject such photocopied signature if the instrument is one which does <u>not</u> direct the clerk to issue service of process.

It is recommended that the following proposed Rule 45(e) be adopted in order to define signature where a pleading or instrument is electronically filed.

The signature of a party, his attorney, or authorized agent shall be affixed to all instruments filed with the district or county clerk as official court records. Signature may be handwritten, or if filed electronically, by personal identification number (PIN) code specifically identifying the party or attorney filing. Handwritten or P.I.N. code shall be recognized as original signature for all rules regarding signatures.

Finally, there is no direction regarding whether the clerk is to docket pleadings misnamed, such as a second amended original petition filed where no first amended original petition has been filed. Rule 71 Tex. R. Civ. P. provides:

> When a party has mistakenly designated any plea or pleading, the court, if justice so requires, shall treat the plea or pleading as if it had been properly designated.

It is recommended that an addition to this rule provide:

> Pleadings shall be docketed as originally filed, and shall remain identified as named unless the court allows redesignation. Upon order granted and filed with the clerk, the clerk shall modify the docket and other clerk records to reflect such change.

cc: Mr. Hank Husky, Chief Deputy District Clerk
Mrs. Dorothy Phillips, Manager, Support Systems
Ms. Ella Tyler, Assistant County Attorney
Mr. Frank G. Jones, Fulbright & Jaworski
Member, State Bar Administration of Justice Committee
Mr. Charles Hampton, Staff Counsel, Supreme Court of Texas

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May 5, 1987

Mr. Sam Sparks
Grambling and Mounce
P.O. Drawer 1977
El Paso, Texas 79950-1977

RE: Rule 166a

Dear Sam:

Enclosed is a copy of a current report and a "news and comments" article from the BNA Civil Trial Manual that I felt might be of interest to the Committee. I have included the current report in our June agenda.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as

TRIAL PRACTICE SERIES

BNA CIVIL TRIAL MANUAL

Vol. 2 No. 9 June 4, 1986

CURRENT REPORTS

HEARING ON SUMMARY JUDGMENT MAY EVOLVE INTO BENCH TRIAL

Parties impliedly may consent to a partial bench trial on a motion for summary judgment, the Seventh Circuit holds. Defendant obtained a Rule 43(e) hearing on a summary judgment motion. Implied consent was found in plaintiff's failure to object and presentation of evidence. (Page 200)

U.S. WON'T HEAR BHOPAL CASES; FORUM NON CONVENIENS APPLIED

India, not the United States, is the appropriate forum for resolving thousands of toxic chemical accident claims arising out of the 1984 Bhopal disaster. But dismissal is conditioned on Union Carbide's agreement to satisfy any judgment rendered by an Indian court and, if applicable, upheld by an Indian appellate court provided the Indian judgment comports with minimal due process requirements. (Page 195)

DON'T FORGET THE EXPERT, NY COURT TELLS AMNESIACS

Amnesiac plaintiffs often obtain a special instruction lowering their burden of proof. But the New York Court of Appeals holds that before an alleged amnesiac gets the instruction, expert testimony must establish the fact of amnesia and its connection with the accident. (Page 199)

FORENSIC CROSS-EXAMINATION FEATURED AT ABA INSTITUTE

The capabilities, and the limits, of magnetic tape analysis were tested during a mock cross-examination held as part of the ABA's Fifth Institute on Litigation in Aviation. The exercise pitted three experienced aviation litigators against a savvy FBI audio tape analyst. (Page 211)

LAWYER SUED TO KEEP TEST QUIET WINS $5.2 M FOR ABUSE OF PROCESS

An attorney member of the California Building Standards Commission and counsel to the California Pipe Trades Council sent test results of plastic pipes manufactured by Shell Oil Co. to the state housing agency revealing the pipes' carcinogenic makeup. Shell unsuccessfully sued the attorney to bar disclosure, and is now ordered by a California jury to pay the lawyer $5.2 million for abuse of process. (Page 204)

MOTHER OF CHILD SHOT BY POLICE SETTLES WITH CITY FOR $350,000

A police officer, responding to a missing persons call, believed a child's toy gun was real and, seeing only the silhouette of a person pointing a gun, shot and killed the child. Now, the municipality has settled with the five-year-old's mother for $350,000. (Page 207)

TAMPON MANUFACTURER WINS TOXIC SHOCK CASE

A Michigan jury has cleared Johnson & Johnson of liability for the death of a woman who used both Johnson & Johnson and Rely tampons. The defense argued that the woman's death stemmed from gall bladder infections and a heart ailment and that, if there was toxic shock, it was caused by Rely tampons. (Page 207)

JUDGES TURN MORE FREQUENTLY TO STIFF MONETARY SANCTIONS

A trilogy of recent federal cases highlight the increasing willingness of courts to impose five and six-digit sanctions on attorneys and their clients. The cases involved sanctions ranging from $42,000 to $1.4 million. (Page 209)

The defense, represented by Robert Kerrigan and David Gontar, argued Zerengue was negligent in leaving the hotel at 3 a.m. without finding someone — a guard or her acquaintance Alan — to get her a taxi. The defense presented a security supervisor who said he was on duty that night but did not see Zerengue. The hotel also claimed that signs on the door warned that one could not reenter, but Zerengue testified that she saw no such sign facing the inside. The hotel had locked five of the Claiborne Street doors, leaving two as emergency exits, a special procedure for Mardi Gras to keep outsiders from entering the hotel.

The plaintiff argued the procedure was inadequate to protect hotel guests since there was no guard in the lobby and therefore nothing to prevent an outsider from entering when a guest exited.

Zerengue also brought a strict liability claim, asserting the door was defective as an emergency exit since it had no alarm or signs informing guests not to use it to exit. There had been one rape at the hotel at a time when it was an apartment house, and the plaintiff presented statistics of other crimes, including auto thefts and pickpocketing, to show that the hotel was in a high crime area.

The jury found $300,000 in damages, apportioning the award 80 percent, or $240,000, for the negligence claims and 20 percent, or $60,000, for the strict liability claim. The $240,000 award will be reduced by 30 percent for Zerengue's contributory negligence. The defense moved for remittitur, a new trial, and judgment notwithstanding the verdict.

(Zerengue v. Delta Towers, USDC EDLa, 3/21/86)

NEWS AND COMMENTS

COURT TOLD TIME TO CHANGE SUMMARY JUDGMENT STANDARD

"This case comes down to the question of what kind of [evidentiary] support is sufficient to win summary judgment," reckoned Leland S. Van Koten in urging the Supreme Court to reverse *Catrett v. Johns-Manville Sales Corp.*, 756 F2d 181, 1 BNA CivTr Man 134 (CADC 1985), cert. granted sub nom *Celotex Corp. v. Catrett*, 106 SCt 342 (1985). Van Koten, in his April 1 argument, warned that to affirm the D.C. Circuit's decision would have a "chilling effect on the willingness of district courts to grant summary judgment."

The D.C. Circuit held that the asbestos manufacturer's summary judgment papers were "patently defective on their face" because the manufacturer, instead of offering its own evidence, merely pointed to plaintiff's alleged failure to produce evidence of product identification. The panel, over a dissent by Judge Robert H. Bork, ruled that under these circumstances the plaintiff need not come forward with evidence to oppose the manufacturer's motion. The Fifth Circuit has rejected this approach and endorsed Judge Bork's dissent, *Fontenot v. Upjohn Co.*, CA5, 2 BNA CivTrMan 6, 1/17/86, Rubin, J., and the Seventh Circuit has suggested that it agrees with Bork and the Fifth Circuit, *American Nurses' Ass'n v. Illinois*, CA7, 2 BNA CivTrMan 71, 2/18/86, Posner, J.

Van Koten urged the Court to "harmonize" the summary judgment rules with the burden of proof at trial, noting that this would have the "salutary effect" of permitting district courts to better control their dockets and whittle down the issues. The D.C. Circuit's decision, according to Van Koten, allows a nonmovant to bar summary judgment without making *any* evidentiary showing.

In plaintiff's brief before the Court, counsel Paul March Smith pointed out that the 1963 Amendments to Rule 56 resolved the issue of whether a nonmoving party, in responding to the evidentiary showing of a moving party, could rely simply on allegations made in the pleading. The amendment, wrote March, made it clear that a party must meet the opponent's evidence with some evidence of his own. "But it never even occurred to anyone at the time that a nonmoving party might be required to make an evidentiary showing where the moving party had not done so."

But Smith told the justices during argument that while the manufacturer's exclusive reliance on the record might have been appropriate if the record were "devoid of evidence," the record here adequately apprised the manufacturer of plaintiff's case.

0-87179-486-1/86/$0+.50

Asked by Justice White whether plaintiff nevertheless was defending a rule allowing nonmoving parties to hold their evidence until trial, Smith hedged, but added that the plaintiff should at least have some time to "show something."

Plaintiff's Showing

The justices asked a battery of questions about the substance of plaintiff's discovery responses. Justice White asked Smith to identify the interrogatory responses going to product identification. Justice O'Connor observed that these responses gave only a witness's name and address. Smith replied that other materials, submitted in opposition to the manufacturer's summary judgment motion or in supplemental discovery responses, showed the witness's knowledge. Smith suggested that the manufacturer could have deposed the witness or contradicted the witness's allegations. All the information was given, argued Smith, "albeit not in interrogatory form."

The manufacturer, Smith contended, had two options: attack the sufficiency of plaintiff's case or marshal its own affirmative evidence. "You need more than the attorney's assertion" to win summary judgment, argued Smith.

In his brief, Smith attacked the manufacturer's "lack of access argument." "[W]here the defendant lacks access to direct evidence to refute a plaintiff's claim, he can use discovery to force the plaintiff to reveal the facts and evidence on which he plans to rely at trial. This information, in turn, can provide the basis for a proper motion for summary judgment. In some cases, the defendant can simply rely on the plaintiff's responses and argue that the plaintiff's proposed trial evidence is insufficient to prove the case as a matter of law. In other cases, he may choose to depose the plaintiff's witnesses to test their actual knowledge of the relevant facts. Or he may be able to respond to the plaintiff's prospective case with affidavits or documents of his own that undermine the purported significance of the plaintiff's evidence."

The D.C. Circuit, however, wrote that "[s]ince Celotex offered no evidence, we need not and do not speculate as to what showing would have been adequate to meet Celotex's burden."

Amici Argue Cost and Delay

The Motor Vehicle Manufacturers Association, a trade organization whose member companies build over 99 percent of all motor vehicles produced in the United States, and the Product Liability Advisory Council, a nonprofit industry corporation, told the court, as *amici curiae*, that "[t]o deny a defendant summary judgment under these circumstances is to unfairly expose it to needless expense and consequent settlement extortion. Even groundless suits cost money to defend and therefore have a nuisance value if they cannot be disposed of by a speedy and inexpensive pretrial motion. The costs are not, of course, borne solely by the individual defendant. Ultimately, they are borne by insurers or by consumers to whom the increased costs are passed on."

In 1983, noted *amici*, over $33 billion was spent on legal services, an increase in real terms of 58.6 percent in one decade. Legal fees, lost management time, delay and uncertainty, lost opportunities, and destroyed business relationships all are part of the escalating price of civil justice.

Amici also contended that the "potential of the federal rules to expedite judicial business will never be achieved . . . if appellate courts deprive district courts of discretion to terminate meritless litigation." A 1977 study of Rule 56 showed that only 1.5 percent of the federal caseload was resolved through summary judgment. This shows "a restraint that approaches paralysis," and the D.C. Circuit's opinion, contended *amici*, " can only serve to deter effective use of this vital tool."

DEFINITION OF STRICT LIABILITY PROVES ELUSIVE, CONFEREES TOLD

CHICAGO — (By a BNA Staff Correspondent) — The courts have been "struggling" for the last 10 years to distinguish between strict liability and negligence in design defect and warning cases, Sheila L. Birnbaum of the New York University Law School told lawyers March 21 at the two-day 1986 National Conference of Products Liability Law, sponsored by the National Practice Institute.

The NYU professor, who also is of counsel to the New York law firm of Skadden, Arps, Slate, Meagher & Flom, surveyed recent product liability decisions for the group.

In a negligence claim, the plaintiff must prove that the defendant knew or should have known of the defect, while under strict liability, most courts will presume knowl-

0-87179-486-1/86/$0+.50

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June 8, 1987

Mr. Sam Sparks
Grambling and Mounce
P.O. Drawer 1977
El Paso, Texas 79950-1977

RE: Proposed Changes to Rules 21a and 72
Texas Rules of Civil Procedure

Dear Sam:

Enclosed is a letter from Don L. Baker suggesting changes to Rules 21a and 72.

In the interest of time, I have drafted up proposed rules and am enclosing them, along with a copy of Federal Rule 5, to which Mr. Baker references.

Please look these over and, if you are unable to get a written report to me, be prepared to give an oral report at our June meeting.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as

Sam,
I do not believe
this is advised.

The ambiguity can be resolved by specific amendments to Rules 4(d)(7) and 4(e), but the Committee is of the view that there is no reason why Rule 4(c) should not generally authorize service of process in all cases by anyone authorized to make service in the courts of general jurisdiction of the state in which the district court is held or in which service is made. The marshal continues to be the obvious, always effective officer for service of process.

EDITORIAL NOTES

Effective Date of 1983 Amendment. Amendment by Pub.L. 97–462 effective 45 days after Jan. 12, 1983, see section 4 of Pub.L. 97–462, set out as an Effective Date of 1983 Amendment note under section 2071 of this title.

Rule 5. Service and Filing of Pleadings and Other Papers

(a) **Service: When Required.** Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) **Same: How Made.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

(c) **Same: Numerous Defendants.** In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) **Filing.** All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.

(e) **Filing With the Court Defined.** The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivisions (a) and (b). Compare 2 Minn. Stat. (1927) §§ 9240, 9241, 9242; N.Y.C.P.A. (1937) §§ 163, 164 and N.Y.R.C.P. (1937) Rules 20, 21; 2 Wash.Rev.Stat. Ann. (Remington, 1932) §§ 244–249.

Note to Subdivision (d). Compare the present practice under former Equity Rule 12 (Issue of Subpoena—Time for Answer).

1963 AMENDMENT

The words "affected thereby," stricken out by the amendment, introduced a problem of interpretation. See 1 Barron & Holtzoff, Federal Practice & Procedure 760–61 (Wright ed. 1960). The amendment eliminates this difficulty and promotes full exchange of information among the parties by requiring service of papers on all the parties to the action, except as otherwise provided in the rules. See also subdivision (c) of Rule 5. So, for example, a third-party defendant is required to serve his answer to the third-party complaint not only upon the defendant but also upon the plaintiff. See amended Form 22-A and the Advisory Committee's Note thereto.

As to the method of serving papers upon a party whose address is unknown, see Rule 5(b).

THE SUPREME COURT OF TEXAS

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

June 4, 1987

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

Professor J. Patrick Hazel, Chairman
Administration of Justice Committee
University of Texas School of Law
727 E. 26th Street
Austin, Tx 78705

Re: Tex. R. Civ. P. 21a and 72

Dear Luke and Pat:

I am enclosing a letter from Mr. Don L. Baker, suggesting a change to Tex. R. Civ. P. 21a and 72.

Will you please place these matters on your Agenda for the next meeting so that they might be given consideration in due course.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. Don L. Baker
Law Offices of Baker & Price
812 San Antonio, Suite 400
Austin, Tx 78701-2223

00000133

Law Offices of Baker & Price A PROFESSIONAL CORPORATION 812 SAN ANTONIO SUITE 400 AUSTIN, TEXAS 78701-2223 512-476-6003

May 19, 1987

Honorable James P. Wallace
Justice, Supreme Court of Texas
Supreme Court Building
Austin, TX 78711

Re: Texas Rules of Civil Procedure 21a and 72

Dear Justice Wallace:

There appears to be a hiatus in the application of these two Rules relating to service of pleadings and notices. It's been my observation that for several years, the actual practice has varied significantly from place to place, from lawyer to lawyer, from case to case, and from the actual language of the Rules. Most of the time, it has not been a practical problem, but there have been some recent rulings in local trial courts which have brought the problem into focus.

The specific language of Rule 72 deals with pleadings, pleas and motions, but does not specifically address, deal with or define a "notice". Rule 72 authorizes service by mail, but does not specify whether the mail is to be first class or not, certified or not, registered or not.

Rule 21a specifically deals with "notice", the subject matter of the Rule being defined in the first phrase as "Every notice required by these Rules, . . .". Rule 21a does not appear to control pleadings, motions and pleas. Rule 21a provides for mail to be either by certified or registered mail, thus by implication precluding the first class mail. The Rule, however, does allow service in any other manner as the trial court may direct in its discretion, which presumably would clearly include first class mail.

For many years, it has been a widespread custom to send copies of pleadings to other parties and counsel in a case by first class mail. This is because first class mail is much less expensive, much less troublesome to the sender, much less troublesome to the receiver, and normally makes for better actual notice than the restricted delivery mail. However, it now appears that it is being argued locally that if a notice of setting for hearing on a

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motion or pleading is included in the same document, then it is required to be sent by certified mail. Strangely enough, since Rule 21a does not apply to pleadings and there does not appear to be any other rule which expressly requires sending of a notice of a setting, it appears logically arguable that Rule 21a doesn't apply to anything. If there is a rule which says that a party must give notice to all other parties of each setting for hearing on a motion, I have not found that rule. Of course, we have done that for years, as have other attorneys.

In order to make the rules fit together logically, it would be my suggestion that appropriate language be used to amend these rules to provide that it is the responsibility of the moving party or the party filing any document with the court to send a copy to all other parties or their attorney of record. I suggest that the requirement also be expressly made that notice of any hearing or setting obtained or requested by any party similarly be sent.

Further, I suggest that the standard method of sending be by first class mail without the requirement of certified or registered mail unless the court shall order otherwise in a given case. The reasons for suggesting that first class mail is a better method include:

1. Actual receipt and actual knowledge of the contents are much more likely with first class mail than with certified mail because first class mail is delivered whether anyone chooses to sign for it or not. Actual knowledge is more likely by first class mail because there are many people who still believe the untrue folk wisdom that if you don't sign for the certified mail, then you are not on notice of and not bound by the contents of it. This means there are lots of folks who simply fail or refuse to sign for certified or registered mail.

2. Notice and knowledge will be received more quickly because there is no need to make a separate subsequent trip to the post office to obtain mail and sign for it since first class mail will be left at the address intended. It is increasingly the case that both spouses are employed outside the home and where notice is sent to a residential address, it is a large burden on people to take off work during the hours of the day when the post office is open and go to the post office to claim and sign for receiptable mail.

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3. Where mail is going to law offices, the same may occasionally be true and even if not directly applicable, it is less trouble in the recipient's office to receive mail without the necessity of filling out extra forms and signing receipts to get the mail.

4. Expense to the sender is lessened because first class mail can normally be sent for 22 cents, whereas it will cost several times that much to send it by certified or registered mail. When a law office is sending hundreds of pieces of mail of this nature, this amounts to a significant expense.

5. The additional time required for receiving employees to sign for mail is an unnecessary expense item to the recipient and, therefore, an authorization of first class mail reduces expenses on both ends of the equation.

Service by first class mail has been the norm for many years in the federal procedure under Rule 5, Federal Rules of Civil Procedure. It would appear that it has not presented any significant problem and has worked well in the federal system. It does not make good sense to me for anyone to suggest that the lawyers of Texas are somehow less honest or that the courts of Texas are somehow less capable than those in the federal system. I would not expect to see any greater incidence of dishonesty by a sender in claiming it was sent when it was not or by a receiver in claiming that it was not received when it was.

Perhaps there are other considerations which I have not addressed. Perhaps there is more to this than I realize. In any event, I felt it appropriate to bring this to the attention of the court and of the Rules Committee in the hope that it might be appropriately addressed. Thank you for your consideration of these suggestions.

Very truly yours,

DON L. BAKER

DLB/lg

Texas Rules of Civil Procedure

Rule 72. Filing Pleadings; Copy Delivered to All Parties or Attorneys

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 [by first-class mail] to the adverse party or their attorney(s) 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 [by first-class mail] 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.

Subcommittee Report
6-87

RULE 57. SIGNING OF PLEADINGS

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, with his State Bar of Texas identification number, address and telephone number. A party not represented by an attorney shall sign his pleadings, state his address and telephone number. The signature of an attorney or party constitutes a certificate that he has read the pleading, motion or other paper; that, to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of any existing law, and that it is not interposed for any improper purpose, such as to harrass or to cause unnecessary delay or needless increase in the cost of litigation.

Subcommittee Report
6-87

RULE 85. ORIGINAL ANSWER AND AMENDMENTS

The original answer may consist of motions to transfer venue, pleas to the jurisdiction, in abatement or any other dilatory pleas; of special exceptions, of general denial, and any defense by way of avoidance or estoppel, and it may present cross-action, which to that extent will place defendant in the attitude of a plaintiff. Matters in avoidance and estoppel may be stated together, or in several special pleas, each presenting a distinct defense, and numbered so as to admit of separate issues to be formed on them. Before one hundred and twenty days after the disposition of any motions to transfer, pleas to the jurisdiction, pleas in abatement or other dilatory pleas, or of determination of special exceptions, the defendant shall file an amended answer and shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments on which the adverse party relies. If the defendant is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as true and material and shall deny only the remainder.

57

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W. W. TORREY

February 6, 1987

Mr. Sam Sparks
Grambling and Mounce
P.O. Drawer 1977
El Paso, Texas 79950

Dear Sam:

Enclosed is a letter from Alwin E. Pape, Jr., regarding proposed changes to Rules 57, 83, 84, and 85.

Please draft, in proper form for Committee consideration, an appropriate Rule for submission to the Committee at our June meeting.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
enclosure

Twin
SCAC Suit

THE SUPREME COURT OF TEXAS

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

February 5, 1987

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

Professor J. Patrick Hazel, Chairman
Administration of Justice Committee
University of Texas School of Law
727 E. 26th Street
Austin, TX 78705

Re: Tex. R. Civ. P. 57.

Dear Luke and Pat:

I am enclosing a suggested amendment to the above rule received from Alwin E. Pape, Jr., of Seguin.

May I suggest that this matter be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr.Alwin E. Pape, Jr.
Moore And Pape
Attorneys at Law
P. O. Box 590
Seguin, Tx 78156-0590

/12.14

MOORE AND PAPE
ATTORNEYS AT LAW
434 N. TRAVIS STREET
P. O. BOX 590
SEGUIN, TEXAS 78156-0590

FRED J. MOORE
ALWIN E. PAPE, JR.
CHRISTOPHER H. MOORE

AREA CODE 512
379-4962

February 3, 1987

James Wallace, Justice
Supreme Court Building
P. O. Box 12248
Austin, Texas 78711

I have been aware of the Court's amendments to the Rules of Civil Procedure attempting to speed up disposition of cases. Your efforts have been mainly in the summary judgment and discovery areas. I would suggest that the Court is attacking the problem from the wrong direction. I propose that amendments to the Rules of Civil Procedure be made in two (2) areas.

First, Rule 57, Signing of Pleadings, should be amended along the lines of Federal Rule 11, which provides in part:

> "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

Federal Rule 11 is longer, with provisions for penalties and striking of pleadings. In my opinion, this rule change is long overdue, and might lessen the "games" which are played by attorneys.

The second area which needs to be addressed is the answer aspect of the Texas Rules of Civil Procedure (Rules 83, 84 and 85). At some time after a defendant has answered (120 days for example), the defendant should be required to file an amended answer along the lines of Federal Rule 8(b), which provides in part:

> "A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments on which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment,

he shall specify so much of it as is true and material and shall deny only the remainder..."

I know that the Texas Bar is not ready for the adoption of the Federal Rules. Every Texas lawyer will, due to clients or attorney's delays, need the benefit of a general denial as now used. However, by requiring a federal style amended answer at some specified time after an appearance, the attorney's will be required to narrow the issues without playing games with discovery. And, as an added long term benefit, plaintiff's lawyers will begin to prepare better petitions, so as to narrow the issues when the required federal style answer is filed, which would then speed up the disposition of cases in general.

Please note that by providing an extended time period for the filing of a federal style amended answer, the attorneys would still have time to settle their cases without the need of filing the detailed federal style answer, thereby saving some expense to the clients.

These changes will not have an immediate effect on the dockets of the various courts in the state, but a change should be noticed in 12 to 18 months after they become effective.

Respectfully,

Alwin E. Pape, Jr.

AEPJ/dcl
cc: File

Subcommittee Report
6-87

RULE 101. REQUISITES

The citation shall be styled, "The State of Texas," and shall be directed to the defendant and shall command [him] the defendant [to appear by filing] to file a written answer to the plaintiff's petition at or before 10:00 a.m. [of the Monday next after] before the expiration of twenty days after the date of service of the citation and petition upon the defendant [thereof, stating the place of holding the court]. The citation [It] shall state the location of the court, the date of the filing of the petition, its file number and the style of the case, and the date and issuance of the citation[,]. It shall be signed and sealed by the clerk, and shall be accompanied by a copy of plaintiff's petition. The citation shall further direct that if it is not served within ninety days after the date of issuance, it shall be returned unserved.

The citation shall include a simple statement to the defendant to inform the defendant that he has been sued, he may employ an attorney, and that, if a written answer is not filed with the appropriate court within twenty days after service of citation and petition, a default judgment may be taken against the defendant.

COAJ
101 & 107

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May 26, 1987

Mr. Sam Sparks
Grambling and Mounce
P.O. Drawer 1977
El Paso, Texas 79950-1977

RE: COAJ Proposals
TRCP 101, 107, 157

Dear Sam:

The Committee on Administration of Justice met on May 16, 1987. I have enclosed drafts of the proposed new rules/rule amendments that they approved that fall within your subcommittee, and will be including same in our June agenda.

These drafts are included for your information only, and no further drafting is required unless you feel it is necessary.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as

COAJ Proposal
5-87

Rule 101. Requisites

The citation shall be styled "The State of Texas" and shall be directed to the defendant and shall command him to appear by filing a written answer to the plaintiff's petition ~~at or~~ before ~~10 o'clock a.m. on the Monday next after~~ the expriation of ~~20~~ [30] days after the date of service thereof, stating the place of holding the court. It shall state the date of the filing of the petition, its file number and the style of the case, and the date of issuance of the citation, be signed and sealed by the clerk, and shall be accompanied by a copy of plaintiff's petition. The citation shall further direct that if it is not served within 90 days after the date of its issuance, it shall be returned unserved. The party filing any pleading upon which citation is to be had shall furnish the clerk with a sufficient number of copies thereof for use in serving the parties to be served, and when the copies are so furnished the clerk shall make no charge therefor.

Rule as noted.
Recommend - one negative vote.
5-16-87

COAJ Proposal
5-87

Rule 107. Return of Citation

The return of the officer or authorized person executing the citation shall be endorsed on or attached to the same; it shall state when the citation was served and the manner of service and be signed by the officer officially or by the authorized person. When the citation was served by registered or certified mail as authorized by Rule 106, the return by the officer or authorized person must also contain the return receipt with the addressee's signature. When the officer or authorized person has not served the citation, the return shall show the diligence used by the officer or authorized person to execute the same and the cause of failure to execute it, and where the defendant is to be found, if he can ascertain.

When citation is executed by an alternative method as authorized by Rule 106, proof of service shall be made in the manner ordered by the court.

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

Rule as noted.
Recommended unanimously.
5-16-87

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W. W. TORREY

February 9, 1987

Mr. Sam Sparks
Grambling and Mounce
P.O. Drawer 1977
El Paso, Texas 79950

Dear Sam:

Enclosed is a letter from Greg Gossett regarding an amendment to Rule 101. As you know, this letter has been on our docket for some time.

Please draft, in proper form for Committee consideration, an appropriate Rule for submission to the Committee at our June meeting. Please forward your draft to me no later than March 9, 1987.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
enclosure
cc: Justice James P. Wallace

THE SUPREME COURT OF TEXAS

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

September 18, 1985

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Cliffe
1235 Milam Building
San Antonio, TX 78205

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
70th Fl., Allied Bank Plaza
Houston, TX 77002

Re: Rule 101

Dear Luke and Mike:

I am enclosing a letter in regard to the above rule.

May I suggest that this matter be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure

LOGAN, LEAR, GOSSETT, HARRISON, REESE & WILSON
ATTORNEYS AT LAW
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RALPH LOGAN (1913-1983)
TOM LEAR
GREG GOSSETT
GEORGE W. HARRISON
MORRIS M. REESE, JR.
CLYDE WILSON
JONATHAN R. DAVIS

TELEPHONE (915) 653-3291

September 12, 1985

Jim will do this?
Jon

Honorable John Hill, Chief Justice
Texas Supreme Court
Supreme Court Building
Austin, Texas 78711

Re: Proposal of Amendment to the Texas Rules of Court

Dear Chief Justice Hill:

I would like to propose a change in the requisites for citation as set out in Rule 101 of the Texas Rules of Civil Procedure. Presently our citation has required the defendant "to appear by filing a written answer to plaintiff's petition at or before ten o'clock A.M. of the Monday next after the expiration of 20 days after the date of service thereof."

My objection to this anachronism is two-fold. First, the computation of the answer day can sometimes be confusing, particularly if the twentieth day falls on Monday or the Monday is a holiday. Secondly, often intelligent clients assume that they must appear in court at ten o'clock on the answer day and are confused by this terminology. Why not provide that an answer must be filed within a definite time, such as 20 days as required in federal court?

In this age of fair notice and consumer protection I would also suggest that citation might contain some simple statement to the recipient, such as: You have been sued. You have a right to retain an attorney. If you do not file a written answer with the appropriate court within the appropriate time, a default judgment may be taken against you.

Your consideration to the above will be greatly appreciated.

With warmest regards, I remain

Very truly yours,

LOGAN, LEAR, GOSSETT, HARRISON, REESE & WILSON

Greg Gossett

GG:lt

00000151

Subcommittee Report
6-87

RULE 170. PRETRIAL MOTIONS

In pretrial motions that do not require the presentation of evidence at the hearing, except those filed pursuant to Rules 18(a), 86, 106, 120(a), 165(A), 165(a), 166-A, and 207(3), the following procedures shall apply:

a. Form. All motions shall be in writing and may be accompanied by a proposed order granting the relief sought as a separate attached instrument to the motion.

b. Submission. Each motion shall state a date of submission, which shall be at least fifteen (15) days from the date of the filing unless shortened or extended by order of court. The motion may be submitted to the court on the submission date or later.

c. Response. Responses to any motion may be in writing and shall be filed before the date of submission or on a date set by the court. (Failure to file a response shall be considered a representation of no opposition.) The court may require written responses to any motion.

d. Oral argument. The motion or response shall include a request for oral argument or hearing if a party deems it necessary. The court shall (may) grant the request for oral argument or hearing and may order oral argument or hearing on its own motion. Oral argument

RULE 170. PRETRIAL MOTIONS

(continued)

may be made by telephone conference with all parties in the court. Any party may request a telephone conference argument in a motion or response, but the Court shall determine the mode of hearing absent an agreement of the parties. Any party requesting a record of a telephone conference or hearing must advise the court (in writing) by the date preceding the telephone conference.

e. Disposition. The court shall enter its order on any motion after the submission date or the hearing and the clerk shall mail a copy of said order to every party.

Proposed New Rule : Book #5

Rule 170. - Pre-Trial Motions

In all pre-trial motions except those filed pursuant to Rules 18a, 86, 120a, 165A, and 207(3), the following procedures shall apply: 166

a. Form. All motions shall be in writing and ~~shall~~ may be accompanied by a proposed order granting the relief sought as a separate attached instrument to the motion.

b. Submission. Each motion shall state a date of submission which shall be at least fifteen (15) days from the date of filing, except on leave of court. The motion ~~shall~~ may be submitted to the court on the submission date or later.

3 days from service

c. Response. Responses to any motion ~~shall~~ may be in writing and shall be filed before the date of submission or on a date set by the court. (Failure to file a response shall be considered a representation of no opposition).

d. Oral argument. The motion or response shall include a request for oral argument or hearing if a party deems it necessary. The court shall (may) grant the request for oral argument or hearing and may order oral argument or hearing on its own motion.

Oral argument may be made by telephone conference with all parties and the court. Any party may request a telephone conference argument in a motion or response but the court shall determine the mode of hearing absent an agreement of the parties. Any party requesting a record of a telephone conference or hearing must advise the court (in writing) by the day preceding the telephone conference.

e. Disposition. The court shall enter its order on any motion after the submission date or the hearing and the clerk shall mail a copy of said order to every party.

[F. Emergency exception.-
G. Written Submissions - when no hearing required as deemed by Judge]

Dropped

Tabled

Subcommittee Report
6-87

RULE 106

COMMENT: There is no need to modify rules 106 and 103 unless there is a specific statutory enactment requiring such a revision. I do not know whether any statutory enactment has been accomplished.

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March 10, 1987

Mr. Sam Sparks
Grambling and Mounce
P.O. Drawer 1977
El Paso, Texas 79950

Dear Sam:

Enclosed is a letter from Rick Keeney regarding the licensing of private process servers. Please monitor the progress of this bill and, if it is passed, insure that our Rule 106 or some other Rule can accomodate it.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
enclosure
cc: Justice James P. Wallace
Rick L. Keeney

Professional
Civil Process of Texas, Inc.
1440 NORTH LOOP — SUITE 127
HOUSTON, TEXAS 77009
(713) 227-5858 • (713) 227-3381

SAC
2106
S. Exc

March 6, 1987

SOULES & REED
800 Milam Building
San Antonio, Texas 78205
Attention: Luke Soules

Dear Luke:

I first want to apologize for the lost bill which was previously sent to you about a week ago.

Please find enclosed a duplicate of the bill, and as soon as you get time, please look at it. I would greatly appreciate it.

I am acting as co-chairman of the Legislature Committee of the Texas Professional Process Servers Association. We have been trying since 1979 to get this bill passed, which would allow private process servers to serve all types of process in the state of Texas.

We are needing your support in any way that can help us get this needed bill passed through the legislation process. We have received numerous support from different associations, judges, and attorneys throughout the years and feel that this is the year that this much needed bill will become law.

If there is anything that I can do, or our association, in any way as far as reimbursement for any expenditures or expenses which you might incur in helping to get this bill passed we will gladly reimburse you.

Our bill will be heard on March 17th in the County Affairs Committee in the Jurisprudence Committee. If you feel that this bill is worth passing, and would like in any way to come to this hearing, we would be happy to see you there, and would be assured that your presence and your support would be greatly appreciated and helpful in getting this through. If there is anything further, or any questions regarding the bill, please feel free to call myself or Harry VanSkike, who is the president of our association. Thank you in advance for your time.

Sincerely,

Rick Keeney

Rick L. Keeney
Co-Chairman

00000157

By HB 513 S. B. No. 250

Sponsor Larry Shaw Washington

A BILL TO BE ENTITLED

AN ACT

relating to regulation of private process servers; providing penalties.

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

SECTION 1. DEFINITIONS. In this Act:

(1) "Board" means the Texas Board of Private Investigators and Private Security Agencies.

(2) "Person" means an individual, corporation, or association.

SECTION 2. PRIVATE PROCESS SERVERS. (a) Each person who acts as a private process server must be licensed under this Act. A licensed process server may serve civil process issued by the courts of this state in the manner provided by law for sheriffs and constables and in compliance with the applicable Texas Rules of Civil Procedure. Each return of executed process served by a licensee must include the license number of the licensee.

(b) Any function of a process server licensed under this Act may be performed by the licensee's registered agent on compliance with the registration requirements of this Act.

(c) A license or registration issued under this Act is valid throughout this state but is not transferrable.

SECTION 3. LICENSE APPLICATION; ELIGIBILITY. (a) To be licensed under this Act, a person must:

(1) not have been convicted of a felony or a misdemeanor

involving moral turpitude;

(2) be at least 18 years of age;

(3) have resided in this state for at least one year preceding the date of application;

(4) submit to the board, on a form prescribed by the board, a sworn application accompanied by proof of security having been deposited with the board as required by this Act; and

(5) submit to the board the application and license fees required under this Act.

(b) If the applicant is a corporation, the requirement prescribed by Subsection (a)(1) of this section must be satisfied by each officer, and the requirement prescribed by Subsections (a)(2) and (3) of this section must be satisfied by at least one officer. The corporation's application must be accompanied by a certified copy of the certificate of incorporation and a certificate of good standing indicating compliance with the corporation laws of this state.

(c) If the applicant is an association, the requirement prescribed by Subsection (a)(1) of this section must be satisfied by each owner or partner, and the requirement prescribed by Subsections (a)(2) and (3) of this section must be satisfied by at least one owner or partner. The association's application must be accompanied by a statement indicating the name of each owner and partner and a copy of any partnership agreement or other operating agreement.

(d) Each application must include a statement indicating compliance with Subsections (a)(1), (2), and (3) of this section.

(e) A law enforcement officer or elected official of this state may not be a co-owner of, or stockholder in, a business association or corporation licensed under this Act. Such an individual is not eligible for a license under this Act.

SECTION 4. SECURITY DEPOSIT. (a) An applicant for a license must deposit security with the board in one of the following forms:

(1) $10,000 in cash;

(2) $10,000 in securities approved by the board; or

(3) a $10,000 bond payable to the State of Texas executed by a corporation authorized to do business in this state, provided that the aggregate liability of the surety on the bond may not exceed $10,000.

(b) The security deposit shall be conditioned on the lawful performance of the functions of a process server and payment of any fines or penalties levied against the licensee for failure to comply with this Act.

(c) The security deposit shall be retained during the period beginning on the date the deposit is received and ending two years after the date of termination of the license. After the two-year period has elapsed, the board shall refund the security deposit on demonstration to the satisfaction of the board that an action is not pending against the former licensee for fines or penalties in connection with the performance of the licensee's functions as a process server or for misfeasance or nonfeasance in the performance of the licensee's functions as a process server.

(d) An action against a licensee for fines, penalties, or

civil damages may not be commenced later than two years after the date of the act, event, or transaction on which the action is based.

SECTION 5. ISSUANCE OF LICENSE. Not later than the 15th day after the date the application is received, the board shall issue a process server license to an applicant who complies with Section 3 of this Act.

SECTION 6. AGENT REGISTRATION. (a) A licensee must register with the board each agent appointed by the licensee to perform any of the licensee's functions as a process server. To be eligible for registration, an agent must be at least 18 years of age and must not have been convicted of a felony or a misdemeanor involving moral turpitude.

(b) The licensee must register an agent not later than the 15th day after the date of appointment on a form prescribed by the board. The registration must be accompanied by a registration fee and a bond or other security in the amount of $500 conditioned in the same manner as a licensee's security.

(c) If the appointment of a registered agent is terminated, the licensee shall notify the board of that fact not later than the 15th day after the date of termination on a form prescribed by the board.

SECTION 7. TERM OF LICENSE AND REGISTRATION; RENEWAL. (a) A license issued under this Act and an agent's registration under this Act are valid for one year from the date of issuance.

(b) A licensee may renew the license and an agent's registration by submitting a renewal application to the board at

least 30 days before the expiration date, on a form prescribed by the board, accompanied by a renewal fee in the amount set by this Act.

SECTION 8. RECORDS. (a) A licensee shall maintain, at the licensee's principal place of business, records of the licensee's activities as a process server. The records must include the date and hour of receipt of all process to be served; the name of the individual to whom the process is assigned for service; the date, hour, and manner of each attempt at service; the date, hour, and circumstances of each accomplished service; the date and hour of each return of service and the court to which it is made; and the name of the indiviqual accomplishing the service.

(b) The board may require other records to be maintained by a licensee.

(c) The board may examine a licensee's records during normal business hours to determine whether the licensee is in compliance with this Act.

(d) On termination of a license, the licensee shall deliver to the board any records relating to the service of civil process. Any unserved process in the licensee's custody or control shall be returned to the party who initiated the service of process.

SECTION 9. DENIAL, REVOCATION, OR SUSPENSION OF LICENSE OR REGISTRATION. (a) The board may deny a license if the applicant does not meet the licensing requirements. If the board denies a license, the board shall notify the applicant in writing of the reasons for the denial not later than the 15th business day after the date on which the board denies the license. The board shall

notify the applicant by certified mail, return receipt requested. On denial of a license, the board shall refund to the applicant the original license fee and security deposit. The application fee is nonrefundable.

(b) The board shall revoke or suspend a process server license or an agent registration, as appropriate, if the board determines that:

(1) the licensee or agent has violated this Act;

(2) the licensee or agent has failed to maintain the security required by this Act;

(3) the licensee has failed to maintain the records required by this Act;

(4) the licensee has refused to permit an examination by the board of the records required to be maintained by this Act;

(5) the licensee or agent has made a false or fraudulent return of service; or

(6) any owner, operator, officer, or manager of the licensee is not of good moral character or has been convicted of a felony or a misdemeanor involving moral turpitude.

(c) Proceedings before the board for the denial, revocation, or suspension of a license or registration and appeals from those proceedings are governed by the Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes).

SECTION 10. FEES. (a) The fee for an original process server license is $250. The fee for an original registration as a registered agent of a licensee is $75. The application fee for a license or registration is $15.

(b) The board shall set renewal fees for licenses and registrations issued under this Act in amounts that are reasonable and necessary to cover the costs of administering this Act when combined with other revenue received by the board under this Act.

(c) Fees received by the board under this Act shall be deposited in the state treasury to the credit of the general revenue fund.

(d) Fees charged and collected by a licensee for service of process may be charged as costs in a judicial proceeding.

(e) In addition to any other fee allowed by law, a fee of $2 is imposed for service of process by a licensed process server. This fee shall be deposited in the general fund of the county in which the case is pending.

SECTION 11. NOT PEACE OFFICER; OFFICER OF COURT. (a) A licensed process server or a registered agent is not considered a peace officer because of this Act.

(b) A licensee or agent shall be treated as an officer of the court and is entitled to the protection of the law afforded to a sheriff or constable while performing duties under this Act.

SECTION 12. PENALTIES. (a) A person commits an offense if the person knowingly or intentionally violates this Act. An offense under this subsection is a Class A misdemeanor.

(b) A person commits an offense if the person knowingly or intentionally falsifies a return of civil process. An offense under this subsection is a felony of the third degree.

SECTION 13. EFFECTIVE DATE. This Act takes effect September 1, 1987. A person is not required to be licensed or registered

under this Act until January 1, 1988.

SECTION 14. EMERGENCY. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

Subcommittee Report
6-87

RULE 127. PARTIES LIABLE FOR OTHER COSTS

Each party to a suit shall be liable for all costs incurred by him and shall be responsible for the accurate recordation of all costs incurred by him during the course of a lawsuit. Each party to a lawsuit shall be responsible for the presentation to the court at the time the judgment is submitted a true and accurate bill of costs. If the costs cannot be collected from the party against whom they have been adjudged, execution may issue against any party in such suit for the amount of costs incurred by such party, but no more.

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January 12, 1987

Mr. Sam Sparks
Grambling and Mounce
P.O. Drawer 1977
El Paso, Texas 79950-1977

Dear Sam:

Enclosed is a letter from Ray Hardy to Justice Wallace dated September 15, 1983. Justice Wallace has requested that our Committee, as well as the COAJ, take a look at it. While I believe that we have taken care of most, if not all, of the matters contained in the letter, please review those portions dealing with Rules 127 and 131. Then, if necessary, please draft in proper form for Committee consideration appropriate rules for submission to the Committee at our June meeting.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
enclosure

127

RAY HARDY
DISTRICT CLERK
HOUSTON, TEXAS 77002

September 15, 1983

Supreme Court Justice James P. Wallace
Supreme Court Building
P. O. Box 12248
Austin, Texas 78711

Dear Justice Wallace:

I am writing to you again regarding the consideration of adopting several State Rules to delineate the following areas:

(1) Clarification of Lead Counsel and Attorney of Record

There appears to be some inconsistancy with respect to which attorney is attorney of record and lead counsel, and which are recorded only as attorneys of record. According to State Rules 8 and 10, lead counsel is the first attorney employed (does this mean just employed, or the attorney whose signature appears on the first instrument filed by a party to a suit?), and remains such until he designates another attorney in his stead. Does State Rule 65, substitution of amended instrument for the original, act to substitute the lead counsel automatically? Or simply to remove the superceded instrument? If lead counsel remains such until a separate designation is made, of record, by the counsel substituting "out", then is it necessary to provide notice under State Rule 165a of dismissal for want of prosecution to all attorneys of record, or only to lead counsel? If the intent of the rule is to insure notification be made to the party, then notification to lead counsel should suffice; if, however, the notice is intended to protect every attorney connected to the suit (multiple attorneys representing one party, potentially), then the Rule would be left as written.

Below is Rule 1.G. (1) and (4), of the Local Rules Of The United States District Court for the Southern District of Texas, amended May, 1983, effective July 1, 1983, which appears to adequately answer these questions:

1.G. Attorney in Charge.

(1) Designation and Responsibility. Unless otherwise ordered, in all actions filed in or removed to the Court, each party shall, on the occasion of his first appearance through counsel, designate as "attorney in charge" for such party an attorney who is a member of the Bar of this Court or is appearing under the terms of paragraph E of this rule. Thereafter, until such designation is changed by notice pursuant to Local Rule 1.G.(4), said attorney in charge shall be responsible for the action as to such party and shall attend or send a fully authorized representative to all hearings, conferences and the trial.

1.G.(4) Withdrawal of Counsel. Withdrawal of counsel in charge may be effected (a) upon motion showing good cause and under such conditions imposed by the presiding judge; or (b) upon presentation by such attorney in charge of a notice of substitution designating the name, address and telephone number of the substitute attorney, the signature of the attorney to be substituted, the approval of the client, and an averment that such substitution will not delay any setting currently in effect.

Regarding the problem of appropriate attorney notification, the same Rule, 1.G.(5), regarding Notices, specifies:

All communications from the Court with respect to an action will be sent to the attorney in charge who shall be reponsible for notifying his associate or co-counsel of all matters affecting the action.

(2) Attorney responsibility for the preparation and submission of a Bill of Costs:

Originally legislation was proposed to place the responsibility on each party to maintain a record and cause to have included in the judgment their recoverable costs. This legislation was not adopted. We recommend consideration of a State Rule which would require that each attorney be responsible for the inclusion of the recoverable cost in the Judgment submitted to the court. This might be attached to either State Rule 127 or State Rule 131, or be a separate rule, such as:

Rule: Parties Responsible for Accounting of Own Costs.

Each party to a suit shall be responsible for the accurate recordation of all costs incurred by him during the course of a law suit, and such shall be presented to the court at the time the Judgment is submitted.

(3) Removal of the Filing of All Depositions and Exhibits:

It is recommended that in an effort to save the counties from increasing space requirements to provide library facilities for case files, that a limit be set on the depositions, interrogatories, answers to interrogatories, requests for production or inspection and other discovery material so that only those instruments to be used in the course of the trial are filed. Again, the United States District Court for the Southern District of Texas has adopted this rule:

Rule 10. Filing Requirements.

F. Documents Not to be Filed. Pursuant to Rule 5(d), Fed. R. Civ. P., depositions, interrogatories, answers to interrogatories, requests for production or inspection, responses to those requests and other discovery material shall not be filed with the Clerk. When any such document is needed in connection with a

pretrial procedure, those portions which are relevant shall be submitted to the Court as an exhibit to a motion or answer thereto. Any of this material needed at trial or hearing shall be introduced in open court as provided by the Federal Rules. (Added May, 1983).

and

Rule 12. Disposition of Exhibits.

A. Exhibits offered or admitted into evidence which are of unmanageable size (such as charts, diagrams, and posters) will be withdrawn immediately upon completion of the trial and reduced reproductions substituted therefor. Model exhibits (such as machine parts) will be withdrawn upon completion of trial unless otherwise ordered by the Judge.

B. Exhibits offered or admitted into evidence will be removed by the offering party within 30 days after final disposition of the cause by the Court without notice if no appeal is taken. When an appeal is taken, exhibits returned by the Court of Appeals will be removed by the offering party within 10 days after telephonic notice by the Clerk. Exhibits not so removed will be disposed of by the Clerk in any convenient manner and any expenses incurred taxed against the offering party without notice.

C. Exhibits which are determined by the Judge to be of a sensitive nature so as to make it improper for them to be withdrawn shall be retained in the custody of the Clerk pending disposition on order of the Judge.

Yours very truly,

Ray Hardy, District Clerk
Harris County, Texas

RH/ba

Rule 127

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March 9, 1987

Senator Gene Green
P.O. Box 12068
Austin, Texas 78711

Dear Senator Green:

I received a copy of your Senate Bill 414 relating to the recordation submission and recovery of taxable and other court costs incurred in civil suits. I have recently corresponded with District Clerk Ray Hardy on the subject, since he submitted them not only apparently to you but also to the Supreme Court Advisory Committee. Most of Mr. Hardy's concerns expressed sometime back in his September 15, 1983, letter to the Supreme Court have been addressed and resolved by the Supreme Court Advisory Committee. As you know, that was the case with the filing of discovery materials, and I sent you copies of those new rules last week.

The subject of SB 414 is now before the Supreme Court Advisory Committee for further study, and, seems to me, to be a proper subject for court rule making, as it apparently was perceived to be by Ray Hardy in 1983, since it is actually a matter of court procedure.

I respectfully request, as Chairman of the Supreme Court Advisory Committee, that you give us an opportunity to address the few remaining concerns consistent with our earlier actions in assigning them to subcommittees and permit our rule-making process to take its customary course. That is not to say that these suggestions will be adopted or recommended for adoption by

the Supreme Court; however, you do have my full assurance that the matter will be completely addressed and thoroughly discussed pursuant to disposition however that may be.

Thank you for your many considerations.

Very truly yours,

LUTHER H. SOULES III
Chairman
Supreme Court Advisory Committee

LHSIII/tat
cc: Justice James P. Wallace
Ms. Barbara Spezig
Mr. Ray Hardy

THE SUPREME COURT OF TEXAS
P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

March 3, 1987

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

Re: S.B. 414

Dear Luke:

I'm enclosing herewith a copy of Senate Bill 414 filed by Senator Gene Green of Houston.

This is one of the subjects covered by the information from Ray Hardy I sent to you several weeks ago.

As I recall, this subject was mentioned in passing at one of our Advisory Committee meetings and it certainly didn't attract a crowd when it was mentioned.

This has been an objective of Ray Hardy, the District Clerk in Harris County, for sometime now and he is obviously trying to get the Legislature to mess with procedural matters.

It might be helpful for you to write Ray Hardy and Senator Green, explaining to them again how we are better equipped to handle procedural matters than the Legislature. I understand Ray Hardy has announced he will not run for election again so maybe this will be the last session in which we have to worry about such end-runs.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure

A BILL TO BE ENTITLED

AN ACT

relating to the recordation, submission, and recovery of taxable and other court costs incurred in civil suits.

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

SECTION 1. PARTIES RESPONSIBLE FOR ACCOUNTING OF OWN COSTS. (a) Each party to a suit shall be responsible for accurately recording all costs and fees incurred during the course of a lawsuit, and such record shall be presented to the court at the time the judgment is submitted to the court for entry, if the judgment is to provide for the adjudication of such costs. If the judgment provides that costs are to be borne by the party by whom such costs were incurred, it shall not be necessary for any of the parties to present a record of court costs to the court in connection with the entry of a judgment.

(b) A judge of any court may include in any order or judgment all costs, including the following:

(1) fees of the clerk and service fees due the county;

(2) fees of the court reporter for the original of stenographic transcripts necessarily obtained for use in the suit;

(3) compensation for experts, masters, interpreters, and guardians ad litem appointed pursuant to these rules and state statutes;

(4) such other costs and fees as may be permitted by these rules and state statutes.

SECTION 2. EMERGENCY. The importance of this legislation

and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

Subcommittee Report
6-87

RULE 157. MARRIAGE NOT TO ABATE SUIT

A suit by or against a feme sole shall not abate by her marriage, but upon suggestion of said marriage being entered on the record, the husband may make himself a party plaintiff, or if she be a defendant, the clerk shall upon suggestion or upon a petition issue a scire facias to the husband; and the case, after the service and return thereof, shall thereupon proceed to judgment.

COMMENT: This rule has been recommended to be repealed by Judge Kilgarlen and others.

COAJ 157

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May 26, 1987

Mr. Sam Sparks
Grambling and Mounce
P.O. Drawer 1977
El Paso, Texas 79950-1977

RE: COAJ Proposals
TRCP 101, 107, 157

Dear Sam:

The Committee on Administration of Justice met on May 16, 1987. I have enclosed drafts of the proposed new rules/rule amendments that they approved that fall within your subcommittee, and will be including same in our June agenda.

These drafts are included for your information only, and no further drafting is required unless you feel it is necessary.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as

COAJ Proposal
5-87

Rule 157. Marriage Not to Abate Suit

A suit by or against a feme sole shall not abate by her marriage, but upon suggestion of such marriage being entered on the record, the husband may make himself a party plaintiff, or if she be a defendant, the clerk shall upon suggestion or upon a petition issue a scire facias to the husband, and the case, after the service and return thereof, shall thereupon proceed to judgment.

Repeal. Recommended unanimously.

5-16-87

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March 5, 1987

Mr. Sam Sparks
Grambling and Mounce
P.O. Drawer 1977
El Paso, Texas 79950

Dear Sam:

Enclosed is a memorandum from Justice Kilgarlin regarding repeal of Rule 157. Please draft, in proper form for Committee consideration, a report for submission to the Committee at our June meeting. Please forward your draft to me no later than May 29, 1987.

I have included a list of pertinent cases, as well as the cases themselves, for your committee's consideration in drafting their report. You will note that the Supreme Court Journal case that has been included, while not specifically addressing Rule 157, sheds light on the attitude of the court with regard to equal rights.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
enclosure
cc: Justice James P. Wallace w/memo
Justice William W. Kilgarlin w/memo
Judge Cochran w/memo
Judge Phillips w/memo
Pat Hazel w/memo

00000179

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
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February 26, 1987

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

Professor J. Patrick Hazel, Chairman
Administration of Justice Committee
University of Texas School of Law
727 E. 26th Street
Austin, TX 78705

Re: Tex. R. Civ. P. 157.

Dear Luke and Pat:

I am enclosing a copy of a memo from Judge Kilgarlin in regard to the above rule.

May I suggest that this matter be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Honorable W. W. Kilgarlin
The Supreme Court of Texas
P. O. Box 12248, Cap. Sta.
Austin, Tx 78711

MEMORANDUM

TO: The Judges February 23, 1987

FROM: Kilgarlin, J.

RE: Tex. R. Civ. P. Amendments

Judge Ann Cochran of Houston believes Rule 157 is (1) unconstitutional; (2) violates community property managership set forth in the Family Code; and, moreover, (3) is insulting and degrading.

I agree. Let's repeal the whole rule.

Achterberg v. Burton-Lingo Co., 25 S.W.2d 1008 (Tex. Civ. App. - El Paso 1930, no writ).

3. Abatement and revival 34 "Burden of joining husband defendant married after institution of suit rested on plaintiff (Rev. St. 1925, art. 2084) In suit against feme sole for goods, wares, and merchandise, burden of joining husband, where defendant married after institution of suit, was on plaintiff under Rev. St. 1925, art. 2084."

Dixie Motor Coach Corporation v. Shivers, 131 S.W.2d 677 (Tex. Civ. App. - Fort Worth 1939, writ dism'd judgmt cor.).

3. Death 69 "Where plaintiff and her deceased husband had lived in a state of separation before his death, in plaintiff's action for alleged wrongful death of husband, excluding defendant's offer of unanswered letters written to plaintiff by a man during the state of separation and who apparently encouraged the separation and whom plaintiff had married shortly after deceased's death was error, especially where testimony tended to show a mutual running correspondence between plaintiff and such man. Rev. St. 1925, arts. 1983, 2084."

4. Death 104(4) "In action for death of plaintiff's husband where plaintiff and such husband had been living in a state of separation at time of his death, charging, with respect to what matters could be considered by jury in arriving at pecuniary benefits plaintiff had reasonable expectation of receiving from her deceased husband, that jury should not consider the fact of plaintiff's second marriage for purpose of either increasing or diminishing her damages, if any, was error, especially where plaintiff's second husband had apparently urged continuance of separation. Rev. St. 1925, arts. 1983, 2084."

Edmondson v. Williams, 295 S.W. 295 (Tex. Civ. App. - El Paso 1927, no writ).

5. Abatement and revival 34 "Marriage of feme sole plaintiff after filing suit does not abate suit (Rev. St. 1925, art 2084). Under Rev. St. 1925, art. 2084, action by feme sole is not abated by plaintiff's marriage subsequent to filing of suit."

Hill v. Moore, 268 S.W.2d 488 (Tex. Civ. App. - Austin 1954, no writ).

1. Abatement and Revival 34 "The burden is upon a plaintiff to bring in the husband of a feme sole who has married after the institution of a suit against her and before judgment, and a knowing failure to do so prevents the rendition of an effective judgment. Rules of Civil Procedure, rule 157; Rev.St. 1925, art. 2084."

2. Husband and Wife 222 "In action against a feme sole for damages arising out of automobile collision, where feme sole testified that she had married since the accident and disclosed her new name, new husband was a necessary party and rendition of judgment in absence of new husband was improper. Rules of Civil Procedure, rule 157; Rev.St. 1925, art. 2084."

In the Interest of Unnamed Baby McLean, a Child, 30 Tex. Sup. Ct. J. 206 (February 11, 1987).

Keeton v. King, 248 S.W.2d 500 (Tex. Civ. App. - Amarillo 1952, no writ).

8. Husband and Wife 238(3) "Where divorced mother was unmarried at time action was brought by divorced father for change of custody of their child, and such mother married the night before the trial, and in testifying used her first married name, and nobody apprised court of the marriage, and second husband knew about agreement between parents for change of custody and told them it was their affair and none of his, and second husband knew that such mother had signed waiver of service and had consented to such change, and second husband attended hearing when change of custody was made, and neither he nor his wife sought new trial or appealed from order changing custody or made any complaint about the change of custody until they sought to set aside judgment by petition for bill of review, judgment changing custody was not void, as contended, by reason that such mother was a married woman at time of trial and her husband was not made a party defendant. Rules of Civil Procedure, rule 157."

Miller v. Sullivan, 33 S.W. 695 (Tex. Civ. App. 1896, no writ).

7. "Where defendant feme sole marries pending the suit, it is error to proceed with the trial without having made her husband a party, the fact of marriage having been made known to the court."

Powell v. Dyer, 227 S.W. 731 (Tex. Civ. App. - San Antonio 1921, no writ).

1. Abatement and revival 34 "Where feme sole sued, but marries before judgment, husband must be impleaded. Where a feme sole is sued, but marries while the suit is pending and before judgment rendered, Rev. St. art. 1983, provides the husband shall be impleaded as a defendant, when the suit shall proceed to the end against husband and wife jointly, which must be done before an effective judgment can be rendered, a requirement not affected by Acts of 1913, c. 32, enlarging the rights of married women; the burden to see that the requirement is met being on plaintiff.

Reed v. Cavitt, 30 S.W. 575 (Tex. Civ. App. 1895, no writ).

1. "If a feme sole defendant marries during the pendency of suit, and before judgment, the marriage should be suggested on the record, and the husband made a party, as provided by Sayles; Civ. St. art. 1253."

Rhoades v. Fredwell, 192 S.W.2d 295 (Tex. Civ. App. - Austin 1946, writ ref'd n.r.e.).

2. Husband and wife 221, 230 "Where wife is alone sued, she must plead her coverture, and then it becomes duty of plaintiff to make husband a party to the suit. Vernon's Ann.Civ. St. arts. 1985, 2084."

3. Husband and wife 221 "In father's suit against mother for change of custody of their two minor children whom court had awarded to mother when she obtained divorce, where mother filed plea of coverture, she was entitled to have her present husband, the stepfather of the minor children, made a party. Vernon's Ann.Civ.St. arts. 1985, 2084."

7. Husband and wife 221 "Where a suit has been filed against a married woman, upon suggestion of that fact being entered of record, the court shall issue a scire facias to the husband and the case after service and return thereof should thereupon proceed to judgment. Vernon's Ann.Civ.St. art 2084."

Robinson Sons, Inc. v. Ellis, 412 S.W.2d 728 (Tex. Civ. App. - Amarillo 1967, no writ).

31. Husband and wife 221 "Rule permitting husband to make himself party plaintiff to suit begun by wife prior to marriage pertains to party plaintiff and has application

where marital status changes before completion of trial and not after return of verdict. Rules of Civil Procedure, rule 157."

San Antonio St. Ry. Co. v. Caillonette, 79 Tex. 341, 15 S.W. 390 (1891).

5. "In an action to recover damages for the negligent killing of a child, brought by a widow who afterwards marries, if defendant wishes to make the husband a party plaintiff under Rev. St. Tex. art. 1252, he must do so before the trial."

Taylor v. Hustead & Tucker, 243 S.W. 766 (Tex. Civ. App. - Amarillo 1922, no writ).

1. Husband and wife 230 "Defense of coverture waived by failure to plead it. A wife when sued waives her defense of coverture by not properly pleading it."

2. Husband and wife 230 "Judgment against married woman not void when rendered against her as a single woman on her failure to appear and plead coverture. Where there is nothing in a pleading to show that a defendant in an action is a married woman, if she is duly cited to appear and makes default, a judgment rendered against her as a single woman is not void."

3. Judgment 402(1) "Refusal to enjoin enforcement of judgment against plaintiff as a single woman when she was married held proper; she not having pleaded coverture. In a suit by a married woman against a person who obtained judgment against her in an action at law, to enjoin enforcing the judgment on the ground that plaintiff was a married woman when judgment was obtained, where plaintiff failed to answer in the action at law, and also failed to move for new trial and to appeal, refusal of an injunction was proper."

4. Judgment 447(1), 460(3) "In proceeding by married woman to set aside judgment by default on ground of coverture, she must negative want of diligence, and show a meritorious defense. In proceeding by married woman against one who had obtained a judgment in an action at law against her to set the judgment aside on the ground of coverture, she must negative want of diligence in defending the action at law, and must show that she has a meritorious defense to the action; the mere fact of coverture not being sufficient."

Woodmen of World Life Ins. Soc. v. Smauley, 153 S.W.2d 608 (Tex. Civ. App. - Eastland 1941, no writ).

12. Husband and wife 221 "When a feme sole institutes a suit and subsequently marries before the case is tried, the suit will not abate under statute, but husband is a "necessary party plaintiff", in absence of allegations and proof that husband declined to join wife in the action. Vernon's Ann.Civ. St. arts. 1983, 2084."

13. Husband and wife 221 "Where beneficiary instituted action on double indemnity benefit certificate when she was a feme sole, but subsequently married before case was tried, beneficiary's husband was a "necessary party plaintiff", in absence of allegations and proof that he declined to join her in the suit as provided by statute, and it was not sufficient to merely make him a party plaintiff pro forma and not dispose of him in the judgment. Vernon's Ann.Civ.St. arts. 1983, 2084."

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W. W. TORREY

February 27, 1987

Honorable James P. Wallace
Justice, Supreme Court of Texas
P. O. Box 12248
Capitol Station
Austin, Texas 78767

Dear Justice Wallace:

I just received and reviewed the draft of the "Dallas Local Rules." I guess, in a word, they can only be described as "incredible" in my judgment. Forty-four pages of verbiage which in many instances is redundant to the Texas Rules of Civil Procedure, and in many other instances conflicts with those Rules.

Also, these draft Rules are repetitious and redundant of themselves. To me, these Rules present a "worst-possible-case-scenario." Lawyers relying upon the Texas Rules of Civil Procedure may be entrapped by varying Local Rules such as these. Local Rules should address matters that are not addressed in the Rules of Civil Procedure.

For example, where Local Rules establish deadlines more stringent than the state-wide practices under the Rules of Civil Procedure, state-wide practitioners relying on the state-wide Texas Rules of Civil Procedure may be subjected to traps in 254 counties setting different date deadlines. That, to me, is untenable. Rule 166 is a tool readily available to adjust deadlines in specific cases with notice to counsel. General deadlines at variance with the Rules of Civil Procedure were among the most vocally opposed and unnecessary portions of the early Task Force considerations.

Others of these Rules seem to me to be wholly unnecessary as well. For example, Rule 703(c) at page 39 seems to me to just be excess baggage. And proposed Local Rule 703(d) is a repetition of Tex. R. Civ. P 266(f). Other examples are replete.

This "draft" in my judgment represents a tremendous amount of work-product effort, but misdirected effort. It best

exemplifies, in my judgment, the need to submit to the Supreme Court Advisory Committee an array of Local Rules proposals so that the Supreme Court Advisory Committee may advise the Supreme Court on a proposed set of "Model Local Rules" not to be departed from except for substantial need. That will also concur with the mandate of the Task Force and of the February 4, 1987, Order Approving Rules of Judicial Administration, i.e. to attempt to have uniform Local Rules not divergent from the Texas Rules of Civil Procedure.

Another difficulty with the Dallas draft is the effort to promulgate a "Federal Rule 11" which you may notice on page 14 at proposed Local Rule 131(c). That proposal is preemptive of an intense effort on the part of the Advisory Committee to address the subject problem on a state-wide basis. First, is there really a problem? Second, if so, how pervasive and how should it best be fixed state-wide? The Supreme Court Advisory Committee has a Special Subcommittee to Study Federal Rule 11, with Gilbert T. Adams, Jr. as its Chairman, addressing these matters for a full report at the scheduled June meeting.

The Supreme Court Advisory Committee also has a permanent Standing Subcommittee on Local Rules under the leadership of Subcommittee Chairman Diana E. Marshall to which I have been referring Local Rules matters. I wanted to inform you of this fact so that the Court might consider utilizing the advices of the Supreme Court Advisory Committee in its effort to solve the nagging Local Rules difficulties. During a portion of the two year interim between Rules effective dates, we could nonetheless develop Model Local Rules and begin their implementation without promulgation of any amendments to the Rules of Civil Procedure between January 1, 1988, and January 1, 1990.

Very truly yours,

Luther H. Soules III

LHSIII:gc
LS287/044

cc: Diana E. Marshall w/enclosures
Local Rules Standing Subcommittee Chairman

Gilbert T. Adams, Jr. w/enclosures
Special Committee to Study Federal Rule 11

William V. Dorsaneo w/o enclosures

165a

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W. W. TORREY

February 23, 1987

Mr. Sam Sparks
Gambling & Mounce
P. O. Drawer 1977
El Paso, Texas 79950-1977

Dear Sam:

Please review the enclosed Orders of the District Courts of Bexar County, Texas, and prepare a draft Rule setting forth the particular requisites for a trial court order for dismissal for want of prosecution. This scheme has worked well in Bexar County because, by posting this order in advance of calling the dismissal docket, the parties and attorneys of record are all on notice as to what will take place at the dismissal docket, and made aware of what is necessary to be prepared.

This approach to dismissal dockets gets the cases moved, as trial courts must to meet current time standards, with maximum procedural fairness to those litigants whose cases have aged on the dockets.

Very truly yours,

Luther H. Soules III

LHSIII:gc
LS287/031
Enclosures

00000189

JOINT ORDER OF THE DISTRICT COURTS OF THE JUDICIAL DISTRICTS OF BEXAR COUNTY, TEXAS, PURSUANT TO TEX. R. CIV. P. 165a AND 166 CONCERNING DISMISSAL FOR WANT OF PROSECUTION OR ALTERNATIVE PRETRIAL PROCEDURE FOR CIVIL CASES FILED PRIOR TO JANUARY 1, 1983

At joint conference of the District Judges of the several Judicial District Courts of Bexar County, Texas, Honorable David J. Garcia, District Clerk, at the request of the District Judges, reported that of the civil cases filed with the District Clerk of Bexar County, Texas at any time prior to January 1, 1983, there are currently 10,340 civil cases and an additional number of ad valorem tax cases all remaining pending and unresolved in these District Courts, as follows:

Year Filed	Number of Cases Pending
Prior to 1975	478
1975	167
1976	410
1977	442
1978	416
1979	1,067
1980	2,268
1981	2,399
1982	2,693

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said report having been made pursuant to assessing need and establishing a plan for disposition of all pending pre-1983 civil

cases. District Clerk Garcia further reported that all District Courts are current on civil cases filed during and since 1983 since civil cases have been posted into computers and accordingly subject to more readily available information for judicial management. The Courts have determined jointly that the pre-1983 cases are proper cases for review as to dismissal for want of prosecution pursuant to Tex. R. Civ. P. 165a, and that any cases not dismissed for want of prosecution are proper cases either (a) where service is complete for immediate pretrial pursuant to Tex. R. Civ. P. 166 and disposition by trial or, (b) where service is incomplete, for immediate service pursuant to Tex. R. Civ. P. 106 or substitute service of process pursuant to Tex. R. Civ. P. 103a, 109, 109a, or 116, followed by prompt pretrial and trial.

It is, accordingly, ORDERED jointly by the 37th, 45th, 57th, 73rd, 131st, 150th, 166th, 224th, 225th, 226th, 285th, and 288th Judicial District Courts of Bexar County, Texas, as follows:

1. APPOINTMENT OF JUDGES PRESIDING: Honorable Solomon J. Casseb, Jr., 57th Judicial District Judge, Retired, and Honorable Eugene C. Williams, 131st Judicial District Judge, Retired, or their successors (the "Assigned Judges Presiding"), are assigned to sit in designated Judicial District Courtroom of Bexar County, Texas, (the "Courtroom") for the purposes of conducting hearings for dismissals for want of prosecution, ordering service or substitute service of process, entering pretrial orders, and conducting trials on the merits to conclusion, of all pre-1983 civil cases pending in all Judicial District Courts of Bexar County, Texas, with a goal towards disposition of same prior to May 31, 1986. The Assigned Judges Presiding shall for all purposes of this Order sit simultaneously and preside in all of these Judicial District Courts of Bexar County, Texas.

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2. SCHEDULE TO CALL CASES: Beginning with the oldest cases first, and proceeding from those to the most recent cases, during the forthcoming ten month period ending July 31, 1986, all pending cases in all Judicial District Courts of Bexar County, Texas, filed prior to January 1, 1983, will be set in the Courtroom by any one or more of the Assigned Judges Presiding for hearing on the issue of dismissal for want of prosecution ("Dismissal Hearing") to be called fifteen (15) cases or more per hour every hour on the hour at 9:00 a.m., 10:00 a.m., 11:00 a.m., 2:00 p.m., 3:00 p.m., and 4:00 p.m., on every business day exclusive of legal holidays, and shall thereupon be dismissed for want of prosecution unless it is determined in the discretion of one of the Assigned Judges Presiding that there is good cause for cases, as individually considered, to be maintained on the docket of the Court pursuant to prompt pretrial and trial. All proceedings for dismissals for want of prosecution shall be conducted in accordance with Tex. R. Civ. P. 165a.

3. ABSENCE OF SERVICE OF CITATION: In event that one of the Assigned Judges Presiding should determine on showing by a party that a case should be maintained on the docket because it is reasonably possible for the plaintiff to perfect service of process, that Assigned Judge Presiding shall forthwith order that service of process be accomplished within a period not to exceed sixty (60) days and, where appropriate, shall enter an order permitting substitute service by any available means; if service is not perfected within the prescribed period, any Assigned Judge Presiding may, upon motion and for extreme good cause shown, extend the period for service, otherwise the case shall be dismissed for want of prosecution; if service is

perfected, immediately upon service of process the case shall become subject to the default judgment procedure set forth in paragraph 4 if no answer is filed or to the pretrial procedure set forth in paragraph 5 hereinbelow if answer is filed. When any citation is sought by publication the proceeding shall be governed by the provisions of Tex. R. Civ. P. 109 and an affidavit pursuant to that rule shall be filed at or prior to the Dismissal Hearing, by the party seeking to retain the case on the docket, his agent, or attorney, setting forth in detail the facts of diligence exercised in attempting to ascertain the residence or whereabouts of all necessary defendants or to obtain service of non-resident notice, sufficient to authorize the Court to approve the issuance by the Clerk of citation for service by publication, and sufficient further to negative the reasonableness of any other form of substitute service of citation pursuant to Tex. R. Civ. P. 106, 108, 108a. Absent sufficient showing at the Dismissal Hearing to reasonably assure that Rule 106 service can be promptly made or to support substitute service or service by publication or otherwise, cases in which defendants are not served shall be dismissed for want of prosecution. Parties pursuing substitute service are directed to timely comply with the provisions of 4.B. set forth below.

4. DEFAULT JUDGMENTS:

A. Wherever shown by a party to be proper pursuant to Tex. R. Civ. P. 239 and 241 the Assigned Judge Presiding shall render and sign proper forms of default judgments presented at the Dismissal Hearing; where Tex. R. Civ. P. 243 is applicable, proof of damages shall be made at the Dismissal Hearing whereupon the

Assigned Judge Presiding shall render and sign proper forms of judgments presented at the Dismissal Hearing; absent the presentment of a proper form of judgment and absent such proof where necessary the case shall be dismissed for want of prosecution at the Dismissal Hearing.

B. In addition to the provisions set forth above in 4.A., wherever any defendant has been cited by publication the plaintiff must secure, by order of an Assigned Judge Presiding, the appointment of an attorney ad litem pursuant to the provisions of Tex. R. Civ. P. 244 prior to the Dismissal Hearing and have the attorney ad litem present at the Dismissal Hearing to comply fully with Tex. R. Civ. P. 244, otherwise the case shall be dismissed for want of prosecution at the Dismissal Hearing; in this connection, all costs of court for reasonable attorneys fees allowed by the court to the attorney ad litem shall be taxed against and promptly paid by plaintiff and an attorney ad litem shall be issued a writ of execution therefor against any plaintiff who does not promptly make such payment.

5. PRETRIAL ORDER: When service of process has been completed in a case and answers are filed, and it is determined in the discretion of any of the Assigned Judges Presiding that said case should be maintained on the docket, the Presiding District Judge shall thereupon enter an order pursuant to Tex. R. Civ. P. 166 scheduling all pretrial matters and further setting the case for trial upon the merits within four months whether by trial to the Court or trial by jury. All proceedings in connection with the pretrial procedure shall be conducted pursuant to Tex. R. Civ. P. 166 and the Court shall, immediately following the Dismissal

Hearing, if the Court there concludes that the case should be maintained for trial, render and sign an order as follows:

(a) All time periods hereinaftar set forth commence on the date, i.e., the date of the Dismissal Hearing or the date of service of citation and answer by defendants as certified by the District Clerk whichever is later.

(b) All dilatory pleas and all motions and exceptions relating to the case will be filed on or prior to the expiration of seven (7) days and immediately set by the party for hearing on or prior to the expiration of fourteen (14) days, otherwise the same shall be deemed waived.

(c) Plaintiff's Amended Original Petition, if any, shall be filed on or prior to the expiration of 21 days, Defendant's Amended Original Answer, if any, shall be filed on or prior to the expiration of 28 days. No amendment of pleadings will thereafter be permitted.

(d) If a jury trial is desired, a jury fee if not already paid will be paid on or prior to the expiration of 28 days otherwise, jury trial shall be deemed waived, and all requested special issues will be submitted by all parties, on or prior to the expiration of 28 days otherwise, the right to request special issues shall be deemed waived; in event the parties do not desire a jury trial, all issues that the parties will try will be succinctly stated and filed with the Court on or prior to the expiration of 28 days and any issues

not submitted will be deemed waived. Any supplemental pleadings of the parties, together with a statement by every party identifying the name, location, and telephone number of every person having knowledge of relevant facts, including experts, and identifying by name, address, telephone number, subject matter, and substance of opinion every witness who will or may be called at trial in whole or in part to express an opinion on any matter shall also be filed on or prior to the expiration of 28 days. Pleadings may not thereafter be supplemented and persons and expert witnesses not so identified may not testify at any trial.

(e) If a jury fee is paid, and special issues are requested, all requests for instructions and definitions shall be submitted on or prior to the expiration of 35 days, otherwise such requests shall be deemed waived.

(f) All discovery will be completed on or prior to the expiration of 70 days: In this connection, pursuant to the provisions of Tex. R. Civ. P. 215(3), the Assigned Judge Presiding shall order in all cases the harshest permissible sanctions against parties and attorneys in circumstances where discovery abuses occur which tend to delay trials or interfere with timely preparation for trials; default judgments against defendants and dismissals against plaintiffs are to be considered in all such cases and granted wherever supported by the circumstances.

(g) Trial on the merits shall commence on or prior to the expiration of 84 days.

(h) The time periods set forth in the order may be modified or extended by any Assigned Presiding District Judge only to prevent manifest injustice.

(i) Tex. R. Civ. P. 5 shall govern any deadlines falling on legal holidays.

(j) Failure to comply with any deadline will, in addition to the waivers hereinabove set forth, also be, in the discretion of any Assigned Judge Presiding, ground for immediate dismissal of the case for want of prosecution upon notice to the parties.

6. ORDERS AND JUDGMENTS IN COURTS WHERE FILED: All orders and judgments in the cases shall be rendered, signed, and entered in the Court where the case is filed but may be rendered and signed by an Assigned Presiding Judge in the Courtroom and thereafter delivered to the Clerk of the Court where filed for entry in that Court's minutes.

7. NOTICE OF JUDGMENT: Notice of Judgment shall be given by the Clerk where required pursuant to Tex. R. Civ. P. 165a(1), 239a, and 306a(3).

SIGNED and POSTED IN OPEN COURT effective October 1, 1985.

JOHN CORNYN, DISTRICT JUDGE
37TH Judicial District Court

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CAROL R. HABERMAN, DISTRICT JUDGE
45TH Judicial District Court

JOHN YATES, DISTRICT JUDGE
57TH Judicial District Court

JAMES C. ONION, DISTRICT JUDGE
73RD Judicial District Court

ROSE SPECTOR, DISTRICT JUDGE
131ST Judicial District Court

FRED BIERY, DISTRICT JUDGE
150TH Judicial District Court

PETER MICHAEL CURRY, DISTRICT JUDGE
166TH Judicial District Court

CAROLYN SPEARS, DISTRICT JUDGE
224TH Judicial District Court

ALFONSO CHAPA, DISTRICT JUDGE
225TH Judicial District Court

DAVID PEEPLES, DISTRICT JUDGE
285TH Judicial District Court

RAUL RIVERA, DISTRICT JUDGE
288TH Judicial District Court

00000198

VOL 5401 PAGE 710

ORDER OF THE DISTRICT COURTS OF BEXAR COUNTY, TEXAS
FOR
DISMISSAL FOR WANT OF PROSECUTION OF AD VALOREM
TAX CASES FILED PRIOR TO JANUARY 1, 1980

Political subdivisions having ad valorem taxing authority over property situated in Bexar County, Texas, filed certain suits to collect delinquent taxes prior to January 1, 1980, of which approximately 5,000 remain pending as inactive cases and should be dismissed for Want of Prosecution for the following reasons:

1. Most of the cases were filed by either the City of San Antonio or the County of Bexar and all of the cases so filed pertaining to ad valorem taxes remaining delinquent and unpaid as of January 1, 1980, have been refiled and superseded in lawsuits reinitiated by separate filings on or after January 1, 1980, and no rights to collection of the subject taxes are diminished by dismissing these cases.

2. All other pending ad valorem tax cases filed prior to January 1, 1980, and not since refiled, have been inactive for over five (5) years with no indication from the pertinent taxing authorities of intent to pursue same. In any event, no rights to collection of the subject taxes are diminished by dismissing these cases because any such cases having merit and deserving pursuit can be refiled without payment of filing fees and without substantial risk of expiration of lengthy limitations periods generally applicable to such suits.

3. These numerous pending cases are unnecessarily burdensome to the District Courts and District Clerks and costly to the County to retain in that: (a) the papers must be kept retrievable as active files, (b) the pending dockets of the Courts appear statistically distorted, (c) the disposition of pending cases by the Courts appears statistically distorted, (d) the cost of maintaining these inactive pending cases has no offsetting benefit and should be avoided, and (e) microfilming these files upon dismissal and subsequent destruction of the paper files will free physical space critically needed by the District Clerk for storage of active litigation files.

It is accordingly ORDERED that:

The District Clerk shall give notice by publication on four separate occasions of dismissal for want of prosecution of all ad valorem tax suits filed prior to January 1, 1980, and shall further give written notice directly to all political subdivisions having ad valorem taxing authority over property of any kind situated in Bexar County, Texas, delivered or mailed to the highest official of each such political subdivision with instructions that such notice be forwarded to current attorneys for such subdivision.

Thirty (30) days after the last notice is given as above provided, all cases not individually set for immediate trial with notice of such setting given to the District Clerk by certified mail, return receipt requested, will be dismissed for want of prosecution by blanket order dismissing all pending ad valorem tax cases filed prior to January 1, 1980, excepting only those so set for trial with such notice to the District Clerk given by individual cause number.

At any time following the expiration of thirty (30) days after the dismissal, and compliance by the District Clerk with all necessary legal prerequisites,

the contents of the files of the cases may be micro-filmed and the paper files and contents may be destroyed.

SIGNED December 9, 1985.

Raul Rivera

RAUL RIVERA, Administrative Judge
District Courts of Bexar County,
Texas

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Subcommittee Report
6-87

RULE 165(a). DISMISSAL FOR WANT OF PROSECUTION

1. DISMISSAL. A case may be dismissed for want of prosecution on the failure of any party seeking affirmative relief or his attorney to appear for any hearing or trial of which the party or attorney had notice[, or on the failure of the party or his attorney to request a hearing or take other action specified by the court within fifteen days after the mailing of notice of the court's intention to dismiss the case for want of prosecution.] Any case pending on the docket for thirty-six months shall be placed on a dismissal docket. Notice of the court's intention to dismiss and the date and place of the docket hearing shall be sent by the clerk to each attorney of record, and to each party not represented by an attorney whose address is shown on the docket or in the papers on file by posting same in the United States postal service. At the docket hearing, the court shall dismiss for want of prosecution any case unless verified pleadings are filed and the court determines there is good cause for the case to be maintained on the docket. If the court determines to maintain the case on the docket, it shall enter a pretrial order specifying the reasons why the case was not dismissed, assigning a trial date for the case within six months from the docket date, and setting deadlines for the making of new parties, all discovery, filing of all pleadings, and the filing

RULE 165(a). DISMISSAL FOR WANT OF PROSECUTION

(continued)

of responses or supplemental responses to discovery. The case may be continued thereafter only for valid and compelling reasons as established in verified pleadings and specifically determined by court order but, thereafter, the court must try the case within ninety days of the entry of an order of continuance or the case shall be dismissed. Notice of the signing of the order of dismissal shall be given as provided in Rule 306(a). Failure to mail notices as required by this rule shall not affect any of the periods mentioned in Rule 306(a), except as provided in that rule.

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SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

February 9, 1987

Mr. Sam Sparks
Grambling and Mounce
P.O. Drawer 1977
El Paso, Texas 79950

RE: Proposed Rule Change
Rule 165a and 330

Dear Sam:

As you know, the enclosed letter from Tom Alexander has been carried over from our last meeting and is now on our June agenda.

Please draft, in proper form for Committee consideration, an appropriate Rule 165a for submission to the Committee at our June meeting. Please forward your draft to me no later than March 9, 1987. I have forwarded that part of the request dealing with Rule 330 to Harry Tindall.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
enclosure
cc: Justice James P. Wallace

00000203

THE SUPREME COURT OF TEXAS

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

Tunia
To SCAC Secy
Xc transmittal to Tom Alexander

June 24, 1986

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

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

Re: Proposed Rule Change
TEX. R. CIV. P. 165a and 330,

Dear Luke and Mike:

I am enclosing a letter and suggested rule changes from Mr. Tom Alexander of Houston, regarding the above rules.

May I suggest that this matter be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. Tom Alexander
Alexander & Fogel
Five Post Oak Park, 24th Fl.
Houston, Texas 77027

00000204

ALEXANDER & FOGEL
Lawyers
Five Post Oak Park
24th Floor
Houston, Texas 77027
713/439-0000

June 18, 1986

Honorable James P. Wallace
Justice, Supreme Court of Texas
Supreme Court Building
Box 12248, Capitol Station
Austin, Texas 78711

Dear Justice Wallace:

In an effort to promote speedy trials and eliminate cumbersome dismissal for want of prosecution, I am enclosing suggested rule changes for your consideration. I have sent a copy to each member of the Court.

With high regard I remain,

Yours truly,

~~ALEXANDER & FOGEL~~

Tom Alexander

Tom Alexander

TA:ca
Enclosure: 1

TX SpCt/Rule Change:30

TO: CHIEF JUSTICE JOHN L. HILL, JR. and THE SPEEDY TRIAL COMMITTEE:

SUGGESTED RULE CHANGES TO PROMOTE SPEEDY TRIALS AND ELIMINATE CUMBERSOME DISMISSAL FOR WANT OF PROSECUTION PROCEDURES.

NEED: RULE 165a, (D.W.O.P.) is not producing speedy trials. Instead it is producing unnecessary paper work, court appearances and judicial determinations without necessarily pushing the cases toward trial. Additionally, it is a potential snare for the party who, missing one or more of its requirements is exposed to dismissal without trial, usually after limitations have run, and exposing the lawyer to potential liability arising from dismissal of cases whose true merit may have been less than initially perceived. The unfortunate client and lawyer are then without remedy except from each other. This was not the initial intent of either.

REMEDY: Revoke Rule 165a and ammended Rule 330 and eliminate dismissal for want of prosecution except as follows.

1) Require each Court to set for trial, on that Court's next docket, each case which has been on file 2 years or in which the last new party joined has been in the case more than 1 year, which ever comes first.

2) Once set, no such case may be continued except under the strict application of Rules 251-254. With the additional requirements that:

a) Such continuance shall be granted only upon the Affidavit of the party or parties seeking the continuance;

b) If granted, the case is set, at the time the continuance is granted, for a date certain within 90 days (or at the next docket of the court if Rule 330 is applicable).

c) No continuance may be granted without a trial setting or a date certain set out in the Order of Continuance which must be approved by the parties and their lead counsel signifying their awareness of the foregoing requirements and their willingness to abide these rules and the new setting.

d) If continuance should be granted a second time for absense of counsel under Rule 253, it must be preferentially set for the next sitting time available 10 days after that counsel finishes the trial in which he is then engaged.

e) On any motion for continuance after the first for each side of the case, all parties and

lead counsel must appear in open court for the mandatory resetting and certify their availability and readiness for the date certain set by the Court, as a condition for the granting of a second continuance.

f) If not otherwise disposed of, one year after the first setting under.

1) the case shall be preferentially set, subject only to other cases with a statutory preference, and shall be tried or dismissed on that setting without continuance except pursuant to Rule 254 until a date certain 10 days after adjournment of the Legislative when the case shall be tried as set out in (d.) above.

g) The mandatory provisions of this Section shall apply to all cases filed after January 1, 1986; however each Trial Court is urged, in its discretion to apply these provisions to eliminate backlog as soon as possible in the effective administration of justice realizing that justice delayed is sometimes justice denied. When application of these provisions have reduced the backlog to the 3 year maximum, each Court is urged to reduce the maximum period further so as to produce justice in speedy disposition of disputes.

RATIONALE: These changes will eliminate the hazards and vagaries of the present lack of uniformity among the various Courts in applying Rule 165a and virtually eliminate the possibility of the loss of a client's rights without participation. This is a clear, self-enforcing procedure which insures knowledge and acknowledgment of rights and a day certain in Court. It will also help insure speedy trials and put an effective ceiling on delay at a maximum of 3 years without working hardship upon the rights of litigants.

If it works well, and I am convinced that it will, consideration can be given to shortening the time periods, reducing the ceiling of delay and produce even more speed in disposition of cases, still assuring the parties of their day in Court.

Respectfully submitted toward the Administration of justice,

TOM ALEXANDER
State Bar No. 01000000

STANDING SUBCOMMITTEE ON RULES 166b-215

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May 26, 1987

Mr. Luther H. Soules III
Soules, Cliffe and Reed
800 Milam Bldg.
East Travis at Soledad
San Antonio, TX 78205

Dear Luke,

Enclosed please find the report of the Standing Subcommittee on Rules 166b-215 together with proposed draft revisions of Tex. R. Civ. P. 166b, 167 and 168.

Best regards,

Bill

William V. Dorsaneo III

WVD:vm

Enc.

cc: Gilbert T. Adams
Pat Beard
Kenneth D. Fuller
Paul Gold
Steve McConnico
Russell McMains
Harold Nix
Harry M. Reasoner
Broadus Spivey
Harry L. Tindall
Hon. James P. Wallace

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REPORT OF STANDING COMMITTEE ON RULES 166b-215

The Standing Committee on Rules 166b-215 makes the following report and recommendations to the Supreme Court Advisory Committee.

1. A proposal by John Howie to amend Rules 167 and 168 to permit discovery, without leave of court, before the defendant's answer day, was reviewed by the committee. After a divided vote, the committee determined that the full committee should consider the matter. Accordingly, draft amendments to Tex. R. Civ. P. 167 and 168 modeled upon language presently contained in Fed. R. Civ. P. 33(a) and Fed. R. Civ. P. 34(a) are submitted to the full committee for its consideration.

2. A proposal by Clyde Jackson to amend paragraph 6 of Tex. R. Civ. P. 168 such that it expressly provides that "objections are waived" if "written objections to specific interrogatories or portions thereof" are not made "[w]ithin thirty (30) days after interrogatories are served" was reviewed by the committee. After a discussion which recognized and considered the opinion of the Texas Supreme Court in Gutierrez v. Dallas Independent School District, 30 S. Ct. J. 431 (Tex. 1987) (holding that it is incumbent upon the party to object to improper interrogatory but providing for relief from waiver of objection if good cause is shown) and the Fort Worth Court of Appeals opinion in

Independent Insulating Glass/Southwest Inc. v. Street, 722 S.W.2d 798 (Tex. App. -- Fort Worth 1987) (extending holding of Peeples case and also holding that objections to interrogatories are waived, if not made in a timely fashion unless good cause is shown, the committee determined that Tex. R. Civ. P. 168 should be amended to provide that objections are waived unless an extension of time has been obtained from the trial court or good cause is shown for the failure to object within thirty days. The draft amendment to Tex. R. Civ. P. 168 includes a revised paragraph 6 that includes the suggested amendatory language.

3. A companion proposal by Clyde Jackson to modify paragraph 6 of Tex. R. Civ. P. 168 to provide that objections to interrogatories are overruled by "operation of law" if not ruled upon "within seventy-five days after interrogatories are served" was rejected unanimously.

4. The committee also spent considerable time discussing paragraphs 3 and 4 of Tex. R. Civ. P. 166b in light of Weisel Enterprises, Inc. v. Curry, 718 S.W.2d 56 (Tex. 1986) and Peeples v. Fourth Court of Appeals, 701 S.W.2d 635 (Tex. 1985). The committee determined that an attempt should be made to redraft the procedural rule to deal with these decisions and intermediate appellate court opinions that have construed them. See

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e.g. Independent Insulating Glass/Southwest Inc. v. Street, 722 S.W.2d 798 (Tex. App. -- Fort Worth 1987). The committee also determined that the overall problem cannot be resolved in a satisfactory manner, unless paragraph 3 of Rule 166b is revised to include workable definitions for the particular types of trial preparation materials exempted from discovery. Hence, a revised version of Tex. R. Civ. P. 166b has been drafted for the consideration of the full committee.

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

1. No change.

2. No change.

3. Exemptions. The following matters are not discoverable:

a. [Privileged Information.] ~~any~~ [Any] matter protected from disclosure by privilege [is not discoverable].

b. ~~the work product of an attorney~~ [Work Product. The mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party as well as any notes, memoranda, briefs, communications and other writings prepared by an attorney or an attorney's agents or representatives in anticipation of litigation or in preparation for trial, are not discoverable.]

c. [Experts.] ~~the~~ [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 [are not discoverable] if the expert will not be called as a witness, except that the identity, mental impressions and opinions of an expert who will not be called to testify and any documents or tangible things containing such impressions and opinions are discoverable if the expert's work product forms a basis either in whole or in part of the opinions of an expert who will be called

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as a witness.

d. [Witness Statements.] ~~the~~ [The] written statements of potential witnesses and parties [are not discoverable if the statement was made subsequent to the occurrence or transaction upon which the suit is based and in connection with the prosecution, investigation, or defense of the particular suit or in connection with the particular circumstances out of which it arose], except that persons, whether parties or not, shall be entitled to obtain, upon request, copies of statements they have previously made concerning the action or its subject matter and which are in the possession, custody, or control of any party. [The term "written statements" includes (i) a written statement signed or otherwise adopted or approved by the person making it, and (ii) 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.]

e. [Party Communications.] ~~with~~ [With] the exception of ~~photographs~~ discoverable communications prepared ~~or used~~ by or for experts, and other discoverable ~~documents~~ [communications], communications between agents or representatives or the employees of a party to the action or communications between a party and that party's agents, representatives or employees [are not discoverable] ~~where~~ [when] made subsequent to the occurrence or transaction upon which the suit is based and in anticipation of the prosecution or defense of the claims made in the pending

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litigation. [For the purpose of this paragraph, a photograph is not a communication.]

[delete proviso and substitute the following:]

[Upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means, a party may obtain discovery of the materials otherwise exempted from discovery by subparagraphs b, c, d, and e of this paragraph 3. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Nothing in this paragraph 3 . . .[no change]

4. [Presentation of Objections. In responding to an appropriate discovery request directly addressed to the matter, a party who seeks to exclude any matter from discovery must specifically plead the particular privilege, immunity or exclusion from discovery relied upon and produce evidence supporting such claim in the form of affidavits or live testimony presented at a hearing requested by either the requesting or objecting party. When a party's objection concerns the discoverability of documents and is based on a specific privilege or exemption, such as attorney-client or attorney work product, the party's objection may be supported by an affidavit or live testimony but, if the trial court determines that an IN CAMERA

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inspection of some or all of the documents is necessary, the objecting party must segregate and produce the documents. The court's order concerning the need for an inspection shall specify a reasonable time, place and manner for making the inspection. When a party seeks to exclude documents from discovery and the basis for objection is lack of relevancy, burdensomeness or harassment, rather than a specific privilege or exemption, it is not necessary for the court to conduct an inspection of the individual documents before ruling on the objection.]

[5.] Protective Orders. . . .

[6.] Duty to Supplement. . . .

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COMMENT: Paragraph 3 has been revised by the addition of definitions or descriptive information designed to set forth the nature of particular exemptions that are not defined in the present rule. The "work product" definition was taken from the opinions of the courts of appeals in Evans v. State Farm Mutual Automobile Ins. Co., 685 S.W.2d 765, 767 (Tex. App. -- Houston [1st Dist.] 1985, writ ref'd n.r.e.) and Bearden v. Boone, 693 S.W.2d 25 (Tex. App. -- Amarillo 1985) which themselves represent a typical approach to the work product doctrine. The addition of more detailed information concerning the "witness statements" that qualify as exempt from discovery is based upon the Texas Supreme Court's opinion in Allen v. Humphreys, 559 S.W.2d 798 (Tex. 1977). It is meant to indicate that only witness statements taken or made in anticipation of the litigation in which the exemption is asserted are nondiscoverable. The definition of the term "written statements" was borrowed from paragraph 2(g) of Rule 166b. In addition, the "substantial need"/;"undue hardship" provision has been redrafted such that it applies to all trial preparation materials that are not protected by a true privilege except "opinion" work product which remains sacrosanct.

Paragraph 4 has been added in an attempt to deal with the decisions of the Texas Supreme Court in Weisel Enterprises, Inc. v. Curry, 718 S.W.2d 56 (Tex. 1986) and Peeples v. Fourth Court of Appeals, 701 S.W.2d 635 (Tex. 1985). Old paragraphs 4 and 5 have been renumbered.

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

1. No change.

2. Time. ~~No REQUEST may be served on a party until that party has filed a pleading or time therefor has elapsed.~~ [The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the citation and petition upon that party.] ~~Thereafter the REQUEST~~ [T]he request] shall be then 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 service of the request.~~ [The] party upon whom the request is served shall serve a written response and objections, if any, within 30 days after the service of the request, except that a defendant may serve a written response and objections, if any, within 45 days after service of the citation and petition upon that defendant.] The time for making a RESPONSE may be shortened or lengthened by the court upon a showing of good cause.

3. No change.

4. No change.

5. No change.

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COMMENT: Paragraph 2 has been revised to permit discovery, without leave of court, before the defendant's answer day, but in that event the defendant is given 45 days to respond.

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Rule 168. Interrogatories to Parties

~~At any time after a party has made appearance in the cause, or time therefor has elapsed, any other~~ [Any] party may serve upon ~~such~~ [any other] party written interrogatories to be answered by the party served, or, if the party served is a public or private corporation or a partnership or association, or governmental agency, by an officer or agent who shall furnish such information as available to the party. [Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after the service of the citation and petition upon that party.]

1. No change.

2. No change.

3. No change.

4. Time to Answer. The party upon whom the interrogatories have been served shall serve 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, except that a defendant may serve answers within 45 days after service of the citation and petition upon that defendant]. ~~unless the~~ [The] court, on motion and notice for good cause shown, [may] enlarges or shortens the time [for serving answers or objections.]

5. Number of Interrogatories. The number of questions including subsections in a set of interrogatories shall be

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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 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. On or prior to the date on which answers are to be served, a party may serve written objections to specific interrogatories or portions thereof. [Objections served after the date on which answers are to be served are waived unless an extension of time has been obtained from the trial court in accordance with paragraph 4 of this Rule or good cause is shown for the failure to object within such period.] Answers only to those interrogatories or portions thereof, to which

Subcommittee Report
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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.

7. No change.

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COMMENT: The introductory paragraph and paragraphs 4 and 6 have been revised to permit discovery, without leave of court, before the defendant's answer day, but in that event the defendant is given 45 days to respond. Paragraph 6 has also been revised to make it clear that when a party fails to make a timely objection to an interrogatory, the objection is waived unless an extension of time has been obtained from the trial court or good cause is shown for the failure to object on time. This amendment is based upon Gutierrez v. Dallas Independent School District, ___ S.W.2d ___ (Tex. 1987) (30 S.Ct.J. 431) and Independent Insulating Glass/Southwest Inc. v. Street, 722 S.W.2d 798 (Tex. App. -- Fort Worth 1987).

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Subcommittee Report
6-87

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1. No change.

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Subcommittee Report
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Subcommittee Report
6-87

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167

LAW OFFICES

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TELEPHONE
(512) 224-9144

October 29, 1986

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

RE: Proposed Changes to Rules 167 and 168
John Howie

Dear Tony:

Enclosed is a request from John Howie regarding Rules 167 and 168 that was originally sent to the COAJ. I have included same in our package for discussion during our November meeting.

Very truly yours,

LUTHER H. SOULES III
Chairman

LHSIII/tat
enclosures

Rules 167 and 165
Item 5j.

LAW OFFICES OF

WINDLE TURLEY, P. C.

ATTORNEYS

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August 6, 1986

Professor Pat Hazel
University of Texas
School of Law
727 East 26th Street
Austin, Texas 78705

RE: State Bar of Texas Administration of Justice Committee

Dear Pat:

I would like to propose the following changes to the Texas Rules of Civil Procedure:

1. Rule 167 - Rule 167 should be amended to provide, as in the Federal Rules, that the request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. [Refer to FRCP 34(b)]

2. Rule 168 - Rule 168(1) should be amended to provide that interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. [Refer to FRCP 33(a)]

These proposed changes would permit the plaintiff to serve discovery with the original petition. This would allow us to move our cases along at a faster pace and would contribute to the efforts to reduce the backlog in our courts.

Please present these proposed changes to the committee or advise me of the procedure that I need to follow to insure that these changes are presented to the committee. By copy of this letter, I have provided copies of the recommendations to certain members of your committee.

Thank you for your consideration.

With kind regards,

LAW OFFICES OF WINDLE TURLEY, P.C.

John Howie

JH/dh

cc: Justice Cynthia Hollingsworth
John Collins
Richard Clarkson
Jan W. Fox
Frank Herrera, Jr.
Guy Hopkins
Russell McMains
William O. Whitehurst, Jr.
Doak Bishop
Charles R. "Bob" Dunn
John R. Feather

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April 23, 1987

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

RE: Rule 168

Dear Bill:

I have enclosed a copy of a letter from Clyde J. Jackson III regarding amendment to Rule 168. As you will see in reading his letter, his proposal is contrary to the spirit of the history of the rules in that it does not leave the parties to work out their disputes so as to completely dispose of any need for a court order.

There is no need to prepare a proposed rule at this time. However, please have your committee make a report and submit same to me no later than May 29, 1987, so that I may include it in our June agenda.

Very truly yours,

LUTHER H. SOULES III
Chairman

LHSIII/tat
enclosure

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April 2, 1987

Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Reed
800 Milam Building
East Travis at Soledad
San Antonio, Tx 78205

Re: Texas Rules of Civil Procedure

Dear Mr. Soules:

Thank you for providing me with current information concerning the status of the proposed change from legal-size pleadings to letter-size pleadings. Hopefully this is a rule change which would benefit every practitioner in Texas Courts.

There is another proposed rule which might solve a separate problem facing Texas lawyers, an example of which occurred recently in Court during the regular Monday morning hearing docket. Of the numerous hearings, approximately one-half of the time was spent on discovery disputes. In each of those cases, the discovery had been outstanding for many, many months, and there was an argument among the lawyers about the timeliness of the objections to the discovery. Unfortunately, this typifies the usual discovery hearing scenario.

The problem is this: The philosophy of Texas civil procedure strongly favors discovery, yet the actual practice techniques place the advantage with the party resisting discovery. All that the resisting party need do is object; the proponent, by contrast, must draft the discovery, he usually reminds the recipient when it is overdue, then he must prepare a motion, schedule a hearing, file the motion, and then finally attend the hearing. In other words, the burdens of filing the motion and securing the hearing are on the proponent. Then, as a practical matter, the Court usually expects the proponent to prove that he is entitled to the discovery, rather than requiring the resisting party to prove a discovery exception as the case law has

decided. See e.g. Coral Construction Company v. Presdiding Judge of 48th Judicial District Court of Tarrant County, 715 S.W.2d. 206, (Tex.App.--Ft. Worth, 1986).

The solution to this problem is simple. By using the approach taken in the area of motions for new trial, which places the burden upon the party attempting to alter the procedural flow, the discovery rules could easily be supplemented to place a requirement upon the recipient of discovery to object within a specified time, say 30 days, and then to secure a hearing thereon within another specified time, for instance 30 or 45 days thereafter. The failure to secure a favorable ruling within that time period could operate to overrule all objections to the discovery. Two companion provisions could assure speedy discovery: a) that all of the unobjectionable discovery must still be answered within 30 days, as already provided under the current rules; and b) that the proponent's right to obtain an earlier hearing after the objections are filed would be unaffected.

Below is some sample language which could be used by your committee as a starting point for analyzing this proposal.

Rule 168

6. Objections. Within thirty (30) days after interrogatories are served, a party must serve its written objections to specific interrogatories or portions thereof, or any such objections are waived. 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.

> In the event that a written order is not signed by the court sustaining any such objections within seventy-five days after interrogatories are served, it shall be considered overruled by operation of law on expiration of that period.

As you can see, the proposed language is based precisely on Rule 168(6), with the principal change being the addition of the last sentence, which is taken from Rule 329b(c) which governs the procedure for new trials. A similar rule could also be applied to Requests for Production. The burden of action is thereby placed on the resisting party, which under present law is supposed to have the burden of persuasion.

With a built-in decision structure like this, I sincerely believe that the quantity of dilatory objections will greatly diminish, and that discovery will be smoother, quicker, and more efficient.

Thank you for your consideration of this.

Very truly yours,

SCHECHTER & EISENMAN

Clyde J. Jackson, III

CJJ/eo

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

1. No change.

2. No change.

3. Exemptions. The following matters are not discoverable:

a. [Privileged Information.] ~~any~~ [Any] matter protected from disclosure by privilege [is not discoverable].

b. ~~the work product of an attorney~~ [Work Product. The mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party as well as any notes, memoranda, briefs, communications and other writings prepared by an attorney or an attorney's agents or representatives in anticipation of litigation or in preparation for trial, are not discoverable.]

c. [Experts.] ~~the~~ [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 [are not discoverable] if the expert will not be called as a witness, except that the identity, mental impressions and opinions of an expert who will not be called to testify and any documents or tangible things containing such impressions and opinions are discoverable if the expert's work product forms a basis either in whole or in part of the opinions of an expert who will be called

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as a witness.

d. [Witness Statements.] ~~the~~ [The] written statements of potential witnesses and parties [are not discoverable if the statement was made subsequent to the occurrence or transaction upon which the suit is based and in connection with the prosecution, investigation, or defense of the particular suit or in connection with the particular circumstances out of which it arose], except that persons, whether parties or not, shall be entitled to obtain, upon request, copies of statements they have previously made concerning the action or its subject matter and which are in the possession, custody, or control of any party. [The term "written statements" includes (i) a written statement signed or otherwise adopted or approved by the person making it, and (ii) 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.]

e. [Party Communications.] ~~with~~ [With] the exception of ~~photographs~~ discoverable communications prepared ~~or used~~ by or for experts, and other discoverable ~~documents~~ [communications], communications between agents or representatives or the employees of a party to the action or communications between a party and that party's agents, representatives or employees [are not discoverable] ~~where~~ [when] made subsequent to the occurrence or transaction upon which the suit is based and in anticipation of the prosecution or defense of the claims made in the pending

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litigation. [For the purpose of this paragraph, a photograph is not a communication.]

[delete proviso and substitute the following:]

[Upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means, a party may obtain discovery of the materials otherwise exempted from discovery by subparagraphs b, c, d, and e of this paragraph 3. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Nothing in this paragraph 3 . . .[no change]

4. [Presentation of Objections. In responding to an appropriate discovery request directly addressed to the matter, a party who seeks to exclude any matter from discovery must specifically plead the particular privilege, immunity or exclusion from discovery relied upon and produce evidence supporting such claim in the form of affidavits or live testimony presented at a hearing requested by either the requesting or objecting party. When a party's objection concerns the discoverability of documents and is based on a specific privilege or exemption, such as attorney-client or attorney work product, the party's objection may be supported by an affidavit or live testimony but, if the trial court determines that an IN CAMERA

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inspection of some or all of the documents is necessary, the objecting party must segregate and produce the documents. The court's order concerning the need for an inspection shall specify a reasonable time, place and manner for making the inspection. When a party seeks to exclude documents from discovery and the basis for objection is lack of relevancy, burdensomeness or harassment, rather than a specific privilege or exemption, it is not necessary for the court to conduct an inspection of the individual documents before ruling on the objection.]

[5.] Protective Orders. . . .

[6.] Duty to Supplement. . . .

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COMMENT: Paragraph 3 has been revised by the addition of definitions or descriptive information designed to set forth the nature of particular exemptions that are not defined in the present rule. The "work product" definition was taken from the opinions of the courts of appeals in Evans v. State Farm Mutual Automobile Ins. Co., 685 S.W.2d 765, 767 (Tex. App. -- Houston [1st Dist.] 1985, writ ref'd n.r.e.) and Bearden v. Boone, 693 S.W.2d 25 (Tex. App. -- Amarillo 1985) which themselves represent a typical approach to the work product doctrine. The addition of more detailed information concerning the "witness statements" that qualify as exempt from discovery is based upon the Texas Supreme Court's opinion in Allen v. Humphreys, 559 S.W.2d 798 (Tex. 1977). It is meant to indicate that only witness statements taken or made in anticipation of the litigation in which the exemption is asserted are nondiscoverable. The definition of the term "written statements" was borrowed from paragraph 2(g) of Rule 166b. In addition, the "substantial need"/;"undue hardship" provision has been redrafted such that it applies to all trial preparation materials that are not protected by a true privilege except "opinion" work product which remains sacrosanct.

Paragraph 4 has been added in an attempt to deal with the decisions of the Texas Supreme Court in Weisel Enterprises, Inc. v. Curry, 718 S.W.2d 56 (Tex. 1986) and Peeples v. Fourth Court of Appeals, 701 S.W.2d 635 (Tex. 1985). Old paragraphs 4 and 5 have been renumbered.

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January 12, 1987

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Dear Bill:

Enclosed is a letter from David E. Chamberlain regarding a 166(b)4. Justice Wallace has requested that our Committee, as well as the COAJ, take a look at it.

Please draft, in proper form for Committee consideration, an appropriate Rule for submission to the Committee at our June meeting.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
enclosure

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
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January 8, 1987

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

Professor J. Patrick Hazel, Chairman
Administration of Justice Committee
University of Texas School of Law
727 E. 26th Street
Austin, TX 78705

Re: Weasel Enterprises, Inc., d/b/a Builders Choice v. Honorable Peter Michael Curry, Judge, Cause No. C05730; and Peeples v. Fourth Circuit Court of Appeals, 701 S.W.2d 635 (Tex. 1985).

Dear Luke and Pat:

The attached letter from David E. Chamberlain is being sent for consideration by your respective committees.

Sincerely,

James P. Wallace
Justice

JPW:fw
cc: Evelyn Avent, Secretary to C.O.A.J.
7303 Wood Hollow Drive, #208
Austin, Texas 78731

00000243

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202 WEST SEVENTEENTH
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DAVID E. CHAMBERLAIN

512/474-9124

December 3, 1986

Honorable John L. Hill
Chief Justice
Texas Supreme Court
Supreme Court Building
P. O. Box 12248-Capitol Station
Austin, Texas 78711

Re: Weasel Enterprises, Inc., d/b/a Builders Choice v. Honorable Peter Michael Curry, Judge, Cause No. C-5730; and Peeples v. Fourth Circuit Court of Appeals, 701 S.W.2d 635 (Tex. 1985)

Dear Judge Hill:

As a practicing lawyer, I am extremely concerned about the Court's holding in the above cases.

The Court has now placed an extraordinary burden upon the trial judge to wade through documents to which a claim of privilege, immunity, or exclusion has been interposed during the discovery process.

Further, it appears that the Court has also required that there be a hearing on each and every other objection, such as relevancy or harassment.

Practically speaking, I receive document requests occasionally which state the following:

> "Please produce each and every document or other tangible thing that you intend to show the jury."

Obviously, such a broad discovery request is clearly objectionable. That would require me to produce such irrelevant items as my shirt, coat, tie, and even face, if I intended to show those individual items or let the jury see them during the trial of a cause. To require a lawyer to file a motion, segregate these items, and request a hearing is not only ludicrous, but extremely burdensome to the trial judge. It also causes an unnecessary expense to the parties, as well as the taxpayer who foots the bill on these hearings.

It seems to me that the burden has been reversed unnecessarily. The deponent should make the objection. The proponent of the discovery should then decide if he believes that his discovery request is good in the face of an objection properly interposed. If it is, the proponent of discovery should file a motion for incamera inspection with the court and request a hearing. The deponent then responds, segregates the items, and appears for the hearing.

This was the old practice prior to the Peeples case. It resulted in very few discovery hearings and very few incamera inspections. The new procedure is reasonably calculated to encourage these type of hearings.

Obviously, this is the situation that faced the trial judge in the Weasel case. A trial judge does not have time to wade through boxes and boxes of materials for which protection is sought. That should be in all things minimized. The purpose of our discovery rules should be reasonably calculated to reduce discovery disputes, not encourage them.

If you cannot reverse yourselves on the Weasel case, I strongly suggest that you turn this over to the Texas Supreme Court Rules Advisory Committee for consideration. The practicing bar and their clients would prefer a well drafted rule that is fair to both the proponent and the deponent of discovery.

Thank you very much for your consideration of these matters.

With best personal regards, I am

Very truly yours,

David E. Chamberlain

DEC/bes

cc: Hon. Sears McGee
Hon. Robert M. Campbell
Hon. Franklin S. Spears
Hon. C. L. Ray
Hon. James P. Wallace
Hon. Ted Robertson
Hon. William Kilgarlin
Hon. Raul A. Gonzalez

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May 19, 1987

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, TX 75275

RE: Amendments to Rule 166b

Dear Bill:

I have enclosed comments sent to me by Harlow Sprouse regarding our amendments to Rule 166b for your information and use. I will also be including his letter in our June agenda.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as

Bill, Thanks for a great visit in Dallas.

Luke

00000246

Xc Dousaneo ✓

SCAC Agenda

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May 14, 1987

Mr. Luther H. Soules III
SOULES & REED
800 Milam Building
San Antonio, TX 78205

Dear Luke:

In connection with our telephone conversation yesterday, I thought I might set out in this letter some of the criticisms I have about the comment following the recent amendments to Rule 166b:

(1) "The amendments add express language to make it clear that photographs are discoverable." The only express language referring to photographs comes in what is now paragraph 166b(3)(e), the so-called "communications" discovery exemption. The new language expressly excepts photographs from that exemption. This, of course, is simply a codification of the Court's previous ruling which was in a case dealing only with the communications exemption. Photographs have always been discoverable unless they are privileged or otherwise exempted from discovery. These amendments merely provide that they are not exempt under the communications exemption. If a lawyer were to take a photograph in connection with the pending litigation, I cannot imagine that that photograph would not be exempt from discovery under Rule 166b(3)(b), the work product privilege. If a non-testifying expert fitting within the exemption of subparagraph (c) had taken photographs, I see nothing in the Rules before the amendments, nor in the amendments themselves, that would exclude those photographs from the exemption set out in Rule 166b(3)(c). The amendments therefore do not "make it clear that photographs are discoverable," they simply make it clear that photographs do not fit within the communications exemption.

(2) "They also make it clear that all persons having knowledge of relevant facts are the proper subjects of discovery who may not be hidden beneath the cloak of the term 'consulting experts,' or shielded by any other privilege." There is absolutely no new

language in these amendments supporting that statement. The only language shown in the amendments that deals with persons having knowledge or relevant facts is in the last paragraph of paragraph (3) which has been in our Rules at least since 1984. This sentence of the comment would suggest that an expert fitting within the exemption of subparagraph (c), or an attorney for the parties whose work product would be privileged under new paragraph (b), would be "proper subjects of discovery" if they have "knowledge of relevant facts." This, of course, flies in the face of 166b(2)(e), which provides that "the facts known, mental impressions and opinions of experts. . .may be obtained only" if the expert may be called as a witness or is an expert whose work product forms a basis for the opinions of an expert who is to be called as a witness. This sentence of the comment likewise flies in the face of prior case law. In any event, though, the changes in the Rule by the new amendments contain no provision which could support this sentence.

(3) "The amendments incorporate the anticipation of litigation standard for determining when. . .photographs. . .are discoverable." As mentioned previously, the only mention of photographs in the new amendments excludes them from the communications exemption to discovery now contained in paragraph (e). The "anticipation of litigation standard" has absolutely nothing to do with whether photographs are discoverable, since that standard applies only to whether the communications exemption exists, and the communications exemption expressly does not include photographs.

(4) "Further, the amendments include the federal rule allowing a party who shows substantial need and undue hardship to obtain witness statements. . .and investigative results. . .." The "federal rule" allows discovery of work product upon a showing of substantial need and hardship (except for mental impressions, conclusions, opinions or legal theories of the attorney). Nothing in the amendments to the Texas rule suggest that the Texas work product privilege is now subjected to a "substantial need and undue hardship" qualification. The amendments only so qualify the "communications" exemption (which federal procedure does not recognize aside from the "work product" exemption of Hickman v. Taylor, 329 U.S. 495 [1947]). This is confused further by the fact that the federal qualified work product exemption does not require the work product to be that of an attorney or under his direction, while the Texas work product rule clearly does. It is therefore nothing less than confusing for the comment to state that these amendments "include the federal rule."

It is also confusing to include the term "investigative results" in this sentence, since the new amendments appear to have deleted the portion of the communication exemption dealing with communications in connection with investigations, and to have limited such communications exemptions to those made in anticipation of prosecution or defense.

(5) "A manner is provided for making a record for discovery

hearings." It may be that this is the meaning and purpose of the addition of the sentence in paragraph (4), Protective Orders, that motions or responses made under this Rule "may have exhibits attached including affidavits, discovery pleadings, or any other documents," but the Rule certainly does not say that is the meaning or purpose for that provision. Case law does seem to indicate that affidavits can sufficiently support a court's ruling on discovery questions, including protective orders. I am not sure that it follows that by affidavit you "make a record for discovery hearings." Does this mean that a court reporter's transcript of the hearing (whether evidence is introduced or not) would no longer "make a record" for such hearings? The sentence is, to say the least, unclear.

I suppose it is questionable whether your committee has any influence with regard to comments that have already been included in the Court's orders. If there is anything you can do, to clarify or delete these comments, I believe it would make these amendments considerably less confusing to the Bench and Bar.

I want to thank you and your committee for your continued efforts in the administration of justice.

Cordially,

Harlow Sprouse

HS:ls

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

Professor Pat Hazel
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May 29, 1987

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Dear Bill:

I just had occasion to look at TRCP 88. It looks to me like this needs some re-working. It would appear that, literally, the rule limits discovery to "issues relevant to a determination of proper venue," for discovery all undertaken prior to hearing the motion to transfer. It seems to me that such a limitation is awkward and little more than another vehicle for lawyers' squabbling. Cf. Petromark Minerals, Inc. v. Buttes Resources Co., 633 S.W.2d 657, 659 (Tex. App. - Houston [14th Dist.] 1982, writ ref'd n.r.e.); Newman Oil Company v. Alkek, 585 S.W.2d 340 (Tex. Civ. App. - Dallas 1979, no writ); Texas Land & Development Co. v. Myers, 239 S.W. 303, 304 (Tex. Civ. App. - San Antonio 1922, writ dsm'd).

Please consider preparing a revised rule that will make it clear that discovery can proceed prior to the hearing on motion to transfer on any matters within the scope of Rule 166b and that no waiver of the motion to transfer occurs by pursuing or permitting discovery.

Very truly yours,

Luther H. Soules III

LHSIII:gc
LS587/016

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June 4, 1987

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Dear Bill:

Enclosed are proposed rules changes for TRCP 88, 166a, 206, 207, and 208, which, if adopted by the Supreme Court, would eliminate the necessity for filing depositions as well as the requirement that depositions be filed before they can be used in any sort of proceedings.

Please circulate this to your Subcommittee Members and prepare a report on these proposed rules for the June 26 meeting. I will include them in the agenda and, assuming I get your report before the agenda is prepared, I will also include your report and any alterations that you may make in these suggestions. In other words, if your report turns out to be oral only, since this is coming to you on such short notice, these proposed rules will nonetheless be in the agenda for perusal by the Committee as a whole during your oral report. However, if we get a written report from you with refinements of these rules, I will utilize your written report and refinements rather than these.

Thank you for your considerations.

Very truly yours,

Luke

Luther H. Soules III

LHSIII:gc
LS587/021
Enclosures

Texas Rules of Civil Procedure

Rule 88. Discovery and Venue

~~Reasonable discovery is permitted on any issues relevant to a determination of proper venue.~~ [Discovery shall not be abated or otherwise affected by pendency of a motion to transfer venue.] Issuing process for witnesses and taking depositions shall not constitute a waiver of a motion to transfer venue, but depositions taken in such case may be read in evidence in any subsequent suit between the same parties concerning the same subject matter in like manner as if taken in such subsequent suit. Depositions [transcripts], responses to requests for admission, answers to interrogatories and other discovery products ~~on file~~ containing information relevant to a determination of proper venue may be considered by the court in making the venue determination when they are attached to, or incorporated by reference in, an affidavit of a party, a witness or an attorney who has knowledge of such discovery.

Texas Rules of Civil Procedure

Rule 166a. Summary Judgment

(a) No Change

(b) No Change

(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 supporting 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 [(i) the deposition transcripts, interrogatory answers, and other discovery responses set forth in the motion or response, and (ii)] the pleadings, ~~depositions, answers to interrogatories,~~ admissions, affidavits, stipulations of the parties, and authenticated or 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 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) No Change

(e) No Change

(f) No Change

(g) No Change

Texas Rules of Civil Procedure

Rule 206. Certification and ~~Filing~~ by Officer; Exhibits; Copies; Notice of ~~Filing~~ [Delivery]

~~1.---Certification-and-Filing-by-Officer.--The-officer-shall certify-on-the-deposition-transcript-that-the-witness-was-duly sworn-by-him-and-that-it-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 transcript-in-the-certification.---The-clerk-of-the-court-where such--deposition--transcript--is--filed--shall--tax--as--costs--the charges-for-preparing-the-original-deposition-transcript.---Unless otherwise-ordered-by-the-court,-he-shall-then-securely-seal-the deposition-transcript-in-an-envelope-endorsed-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--transcript-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-transcript-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 transcript.--Any-party-may-move-for-an-order-that-the-original-be annexed--to--and-returned-with-the--deposition-transcript--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 transcript to any party or to the deponent.~~

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

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

[1. Certification. The officer shall attach as part of the deposition transcript a certificate duly sworn by such officer which shall state the following:

(i) that the witness was duly sworn by the officer;

(ii) that the transcript is a true record of the testimony given by the witness;

(iii) the amount of charges for the officer's preparation of the completed deposition transcript and any copies of exhibits;

(iv) that the deposition transcript was submitted on a specified date to the witness or to the attorney of record for a party who was the witness for examination, signature and return to the officer by a specified date;

(v) that changes, if any made by the witness, in the transcript and otherwise are attached thereto or incorporated therein;

(vi) that the witness returned or did not return the transcript;

(vii) that the original deposition transcript, or a copy thereof in event the original was not returned to the officer, together with copies of all exhibits, was delivered or mailed in a post paid properly addressed wrapper, certified with return receipt requested, to the attorney or party who asked the first question

appearing in the transcript for safekeeping and use at trial;

(viii) that a copy of the certificate was served on all parties pursuant to Tex. R. Civ. P. 21a.

The officer shall file with the court in which the cause is pending a copy of said certificate, and the clerk of the court where such certification is filed shall tax as costs the charges for preparing the original deposition transcript and making and attaching copies of all exhibits to the original deposition.

2. Delivery. Unless otherwise requested or agreed to by the parties on the record in the deposition transcript, the officer, after certification, shall securely seal the original deposition transcript, or a copy thereof in the event the original is not returned to the officer, and copies of all exhibits in a wrapper endorsed with the title of the action and marked "Deposition of (here insert name of witness)," and shall thereafter deliver, or mail in a postpaid, properly addressed wrapper, certified with return receipt requested, such deposition transcript and copies of all exhibits to the attorney or party who asked the first question appearing in the transcript, and shall give notice of delivery to all parties.

3. Exhibits. Original 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 transcript and may be inspected and copied by any party, except that the person producing the materials may (a) offer copies to be marked for identification and annexed to the deposition transcript and to serve thereafter as originals if he affords to all parties fair opportunity at the deposition to verify the copies by comparison with the originals, or (b) offer the originals to be marked for identification, in which event the materials may then be used in the same manner as if annexed to the deposition transcript. In the event that original exhibits rather than copies are marked for identification, the deposition officer shall make copies of all original exhibits to be annexed to the original deposition transcript for delivery, and shall

thereafter return the originals of the exhibits to the witness or party producing them, and such witness or party shall thereafter maintain and preserve the original exhibits and shall produce any such original exhibits for hearing or trial upon seven (7) days notice from any party. Copies annexed to the original deposition transcript may be used for all purposes.

4. Nothing in this Rule shall preclude the parties from agreeing to any procedure at variance with the provisions of this Rule or Rule 205; provided, however, that any such agreement between the parties shall be set forth on the record in the text of the deposition transcript, set forth in a separate exhibit to the transcript and signed by all parties or approved by prior written order of the court.

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

6. Notice of Delivery. The deposition officer shall give notice to all parties of delivery of the deposition transcript and copies of exhibits. It shall be sufficient notice of delivery for the officer to serve on each party a copy of the officer's certification described in paragraph 1 herein pursuant to Tex. R. Civ. P. 21a.]

Texas Rules of Civil Procedure

Rule 207. Use of Deposition Transcripts in Court Proceedings

1. Use of Deposition Transcripts in Same Proceeding.

a. Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition taken in the same proceeding, insofar as admissible under the rules of evidence, may be used by any person for any purpose against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof. Further, the rules of evidence shall be applied to each question and answer as though the witness were then present and testifying. Depositions shall include the original transcripts or any certified copies thereof. Unavailability of deponent is not a requirement for admissibility.

b. Included Within Meaning of "Same Proceeding." Substitution of parties pursuant to these rules does not affect the right to use depositions previously taken; and, when a suit has been brought in a court of the United States or of this or any other state 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 in each suit may be used in the other suit(s) as if originally taken therefor.

c. Parties Joined After Deposition Taken. If one becomes a party after the deposition is taken and has an interest similar to that of any party described in (a) or (b) above, the deposition is admissible against him only if he has had a reasonable opportunity, after becoming a party, to redepose deponent, and has failed to exercise that opportunity.

2. Use of Deposition Transcripts Taken in Different Proceeding. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition taken in a different proceeding may be used subject to the provisions and requirements

of the rules of evidence. Further, the rules of evidence shall be applied to each question and answer as though the witness were then present and testifying.

3. Motion to Suppress. When a deposition transcript ~~shall have been filed in the court~~ [has been delivered by the deposition officer pursuant to Rule 206] and notice [of delivery] given at least one entire day before the day on which the case is called for trial, errors and irregularities in the notice [of delivery], and errors in the manner in which the testimony is transcribed or the deposition transcript is prepared, signed, certified, sealed, endorsed, ~~transmitted, filed~~ [delivered,] or otherwise dealt with by the deposition officer under Rules 205 and 206 are waived, unless a motion to suppress the deposition transcript or some part thereof is made and notice of the written objections made in the motion is given to every other party before the trial commences.

Texas Rules of Civil Procedure

Rule 208. Depositions Upon Written Questions

1. No Change

2. Notice by Publication. In all civil suits where it shall be shown to the court, by affidavit, that 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 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 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~~ [notice] in the court where 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.

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 the notice ~~and questions~~ among the papers of the suit at least twenty days before such depositions are to be taken.

(3) No Change

(4) No Change

(5) Officer to take Responses and Prepare Record. 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 to administer an oath to the witness in the manner provided in paragraph 2 of Rule 204, to take the testimony of the witness in response to the questions in the manner provided in paragraph 3 of Rule 204 and to prepare, certify and ~~file or mail~~ [deliver] the deposition, in the manner provided by Rules 205 and 206, attaching thereto the copy of the notice and questions received by him.

The ~~person filing~~ [officer delivering] the deposition shall give prompt notice of its ~~filing~~ [delivery] to all parties. [It shall be sufficient notice of delivery for the officer to forward to each party a copy of the officer's certification described in paragraph 1 of Rule 206.]

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

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June 12, 1987

Professor William V. Dorsaneo III
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RE: New Rule 175A

Dear Bill:

Enclosed is a draft of a new Rule 175A, Offers of Judgment, similar to Federal Rule 68 except that it is made mutual. I also enclose a recent publication discussing a case on Rule 68 and a recent article from the Antitrust Law Journal on same and a copy of the Marek Decision discussed in the ABA Section Report on Rule 68.

I would appreciate very much if you would make a report on this new Rule pursuant to adopting some Offer of Judgment procedure by the Supreme Court of Texas at the SCAC June 26 meeting.

By copy of this letter, I have circulated these same materials to all of your Subcommittee members so that you may conduct a telephonic meeting.

Very truly yours,

Luke

Luther H. Soules III

LHSIII:gc
LS587/040
Enclosures

cc: Justices James P. Wallace
All Subcommittee Members

00000263

FROM PAMELA M. GIBLIN

NEW RULE 175A

OFFER OF JUDGMENT

At any time more than 10 days before the trial begins, a party may serve upon the adverse party an offer of judgment, including costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs and attorneys' fees incurred after the making of the offer. Attorneys' fees will not be awarded unless the court in its discretion determines that the losing party did not act reasonably in refusing the offer. In making that decision, the court may consider among other factors the differential between the offer and the judgment and the importance of the issues involved. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, either party may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

after trial that they had entered into a private, unilateral agreement to apportion $10,000 of the settlement to wife's claim for personal injuries and the remaining $35,000 to husband's consortium claim. Thus, under plaintiffs' setoff method the non-settling defendant would pay a $47,000 judgment, while under defendant's setoff method, its liability would be $15,800.

The non-settling defendant emphasized the settlement's failure to apportion the proceeds and plaintiffs' failure to advise the court and other parties that the settlement had been apportioned until after the jury returned its verdict. Also, counsel for the settling defendant testified that he had refused to execute a post-verdict settlement agreement apportioning the $45,000, and would not have settled at all if plaintiffs had insisted on an apportionment.

The trial court rejected plaintiffs' unilateral apportionment, and the Florida Supreme Court affirms. The court holds that "a private unilateral agreement among several plaintiffs to apportion funds paid by one joint tort-feasor is not binding upon the non-settling joint tort-feasors and the courts in determining the claim of the non-settling joint-tortfeasors. Rather, an agreement to apportion the proceeds of a settlement agreement must be found on the face of the settlement agreement and agreed to by all of the parties involved in the settlement."

The supreme court condemns plaintiffs' tactics. "Private unilateral agreements by plaintiffs to divvy up the proceeds of a general settlement are contrary to all concepts of fairness. Private unilateral agreements to apportion settlement proceeds would often result in a windfall recovery." Here, for example, plaintiffs' allocation of $35,000 to husband's consortium claim "result[s] in more than a $30,000 windfall for [husband], a recovery about 900% greater than the damages the jury determined he should receive."

The court further observes that rights of settling and non-settling joint tortfeasors are adversely affected if plaintiffs are permitted to unilaterally apportion the proceeds of a settlement containing a general release.

For example, the settling defendant here is exposed to a contribution claim by the non-settling defendant as a result of a unilateral apportionment that is "totally contrary" to the jury's findings on damages, notes the court. And the non-settling defendant would be adversely affected if the private unilateral agreement resulted in increased liability.

"The only proper method of ensuring against duplicate recoveries in an undifferentiated lump sum settlement situation is to set-off the total settlement funds against the total jury award," the court says. "If necessary, the settlement can then be allocated proportionally against the jury verdict for each cause of action tried, thus preserving the distinct nature of the separate claims." **(Dionese v. City of West Palm Beach, Fla. Sup.Ct., No. 68689, Adkins, J., 1/22/87)**

TIMELINESS OF RULE 68 OFFERS—

Continuance extends time for determining timeliness of offers of judgment under Fed.R.Civ.P. 68; offers of judgment not expressly joint are tested independently against each party's ultimate liability.

Commercial property owners sued the city and its contractor over an easement dispute. On Nov. 30, 1984, the contractor and the city offered settlements of $7,500 and $2,500, respectively. The offers were not expressly joint, as plaintiffs seemed free to accept or reject each offer independently. Plaintiffs rejected both.

Trial was set for Dec. 10, 1984, but the parties agreed to continue the trial to Dec. 12; the trial court concluded, however, that defendants' settlement offers were untimely, reasoning that a last-minute continuance should not extend the period for IRCP 68 offers. Plaintiffs ultimately recovered $6,989 plus costs of $874. The contractor was held liable, either individually or jointly, for the entire amount.

Contractor appealed, arguing that the offers were timely, and that in cases involving multiple defendants, Idaho's Rule 68 should be read to compare collective offers—not independent offers—with plaintiffs' total recovery. The Idaho Court of Appeals agrees that the offers were timely but decides that where settlement offers are not expressly joint, Rule 68 must be read to test the offer from each party independently.

Under IRCP 68, identical to the federal rule, an offer must be made more than 10 days "before the trial begins." *Greenwood v. Stevenson*, 88 FRD 225 (DRI 1980), which examined the question of when trial "begins" for purposes of Rule 68, held that the "settlement-encouraging purpose of the rule would best be served by selecting the last possible point in time for cutting off Rule 68 offers."

Thus, the instant court decides, trial "begins" under *Greenwood* "when the judge

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calls the proceedings to order and actually commences to hear the case, and *not* when the jury was selected previous to that time."

Here, the initial trial date was continued at the same time plaintiffs' timeliness motion was decided. However, trial did not begin until 12 days after the offer was made. Applying its rule literally, and, in accord with *Greenwood*, the court holds that the Nov. 30 offers were timely.

Next, the court turns to the issue of whether, in cases involving multiple defendants, Rule 68 should be read to compare independent offers with a particular party's ultimate liability, or collective offers with the total recovery. In rejecting the contractor's suggestion that offers should be combined for purposes of Rule 68, the court explains that ordinarily, a defendant should not be permitted to point to the offers of others for protection from prospective cost recovery.

"Therefore, we believe Rule 68 should be read to test the offer and recovery from each party independently. Only if its own offer exceeded its individual liability can the particular defendant be said to have made a fair offer. We believe this interpretation will forward the rule's policy of encouraging fair and reasonable settlement offers by each party."

But the court warns that the result would be different had the defendants "expressly made a joint, unapportioned offer of settlement, which could only be accepted or rejected in total" by plaintiffs. In that case, "the collective offers may properly be compared to the total recovery," it says, citing *Johnston v. Penrod Drilling Co.* (CA5, 11/5/86, 2 *BNA CivTrMan* 511).

(Gilbert v. City of Caldwell, Idaho Ct.App., No. 15990, Waltes, C.J., 1/29/87)

Jury Deliberations & Verdict

INCONSISTENT VERDICTS—

Where alleged inconsistencies in jury's verdict are "hardly plain," trial court has no independent duty to resolve inconsistencies absent objection; doctrine of waiver thus applies to party's failure to object to alleged inconsistencies before jury is discharged.

At defendant's request, the trial court submitted special interrogatories to the jury, which returned a verdict against defendant for $75,000 in compensatory damages and $75,000 in punitive damages. Defendant did not object to the jury's answers.

On appeal, defendant argued that entry of judgment was improper under Fed.R. Civ.P. 49 because the jury's answers were inconsistent with each other and that at least one answer was inconsistent with the general verdict. For example, defendant argued that the award of punitive damages for conspiracy to interfere with a contract was inconsistent with the jury's failure to award compensatory damages on that claim.

The U.S. Court of Appeals for the Seventh Circuit affirms, holding that a party waives objections to alleged inconsistencies by failing to raise them before the jury is discharged, where the conflict is "hardly plain."

The last sentence of Rule 49(b) states: "When the answers [to the special interrogatories] are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial."

The court notes that it has not had an opportunity to decide whether, in the context of the last sentence of Rule 49(b), the failure to object to alleged inconsistencies in the special interrogatories is a waiver.

Several circuits hold that a party can waive its objections to alleged inconsistencies by failing to raise them before the jury is discharged. *Diamond Shamrock Corp. v. Zinke & Trumbo, Ltd.*, 791 F2d 1416 (CA10 1986); *Skillin v. Kimball*, 643 F2d 19 (CA1 1981); *Stancill v. McKenzie Tank Lines, Inc.*, 497 F2d 529 (CA5 1974). The Second Circuit has indicated that although "a party's failure to object carries some weight in our analysis on appeal," the trial judge has an independent responsibility to resolve inconsistencies even where no objection is made. *Schasfsma v. Morin Vermont Corp.*, 802 F2d 629 (1986).

And the Sixth Circuit, in *Waggoner v. Mosti*, 792 F2d 595 (1986), stated that a district court had no authority to enter judgment where answers to interrogatories were inconsistent with one another and at least one answer was also inconsistent with the general verdict. But the court notes that *Waggoner* did not discuss the requirement of an objection.

In this case, the court observes that "at some future date we might encounter a case where the inconsistency in the special interrogatories is so obvious that it would be proper to hold that the trial judge had an

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AMERICAN BAR ASSOCIATION
SECTION OF ANTITRUST LAW

REPORT OF CIVIL PRACTICE AND PROCEDURE COMMITTEE ON PROPOSALS RESPECTING RULE 68, FEDERAL RULES OF CIVIL PROCEDURE*

I. INTRODUCTION

The Civil Practice and Procedure Committee has been asked to conduct research and to prepare a recommendation for the Section of Antitrust Law concerning proposals respecting Rule 68, Federal Rules of Civil Procedure. The specific proposal which prompted this study is one by the Section of Tort and Insurance Practice to amend Rule 68 in several significant ways. This proposal is attached.

II. RECOMMENDATIONS

The Civil Practice and Procedure Committee recommends that Rule 68 not be amended at this time. In making this recommendation, the Committee has concluded that the decision in *Marek v. Chesny*, 105 S. Ct. 3012 (1985) should not seriously impede antitrust policies and that it furthers the purpose of Rule 68, which is to encourage settlements. The committee believes, however, that the TIPS proposal does have both desirable and undesirable features which deserve comment.

III. RULE 68

Rule 68 is entitled "Offer of Judgment." It provides that, at any time more than ten days before the trial, a defendant may make an offer to allow judgment to be taken against him together with accrued costs. If the offer is not accepted within ten days it is deemed withdrawn and if the plaintiff finally obtains a judgment less favorable than the offer the plaintiff "must pay the costs incurred after the making of the offer." Traditionally, the term "costs" in Rule 68 has been interpreted as meaning "taxable costs" as defined in 28 U.S.C. § 1920. Most authorities have

* The Council of the Section of Antitrust Law approved this report on January 26, 1987.

determined that "costs" in Rule 68 refers not only to plaintiff's but also defendant's post-offer costs. *See Crossman v. Marcoccio*, 806 F.2d 329 (1st Cir. 1986), slip opinion, p. 4. Since the parties' taxable costs under this interpretation are usually relatively limited in amount, the incentive to employ Rule 68 has not been great.

IV. *MAREK V. CHESNY*—THE MAJORITY OPINION

Marek v. Chesny was a civil rights case in which the plaintiff sued police officers for killing his son when answering a call. Prior to trial the defendants made a Rule 68 offer of $100,000, which included accrued costs and attorneys' fees. The offer was not accepted and plaintiff recovered only $60,000 in damages. It was stipulated that plaintiff's pre-offer accrued costs, including attorneys' fees, amounted to $32,000. The district court rejected plaintiff's effort to recover $139,692 in attorneys' fees and trial expenses which were incurred after the offer of judgment. The Seventh Circuit reversed the district court, but the Supreme Court reversed the Seventh Circuit. The Supreme Court held that plaintiff could not recover his post-offer attorney's fees because (1) the civil rights statute applicable to the case, 42 U.S.C. § 1988, provided that the court in its discretion could award the "prevailing party" attorney's fees " 'as part of the costs,' " 105 S. Ct. at 3017, and (2) plaintiff's attorney's fees were therefore "costs" within the meaning of Rule 68.

More broadly, the Court stated that:

> [A]ll costs properly awardable in an action are to be considered within the scope of Rule 68 "costs." Thus, absent Congressional expressions to the contrary, where the underlying statute defines "costs" to include attorney's fees, we are satisfied such fees are to be included as costs for purposes of Rule 68.

105 S. Ct. at 3017.

V. JUSTICE BRENNAN'S DISSENT AND THE ISSUE OF PLAINTIFF'S LIABILITY FOR DEFENDANT'S FEES

Concern has been raised over the suggestion in Justice Brennan's dissenting opinion in *Marek* that the decision will result in plaintiff's having to pay defendant's post-offer attorney's fees. The majority opinion in *Marek* did not address this issue.

Section 4 of the Clayton Act, 14 U.S.C. § 15, provides that a successful antitrust plaintiff shall recover treble damages "and the cost of suit, including a reasonable attorney's fee." 42 U.S.C. § 1988 provides that in a civil rights action "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." This provision

has been interpreted as permitting the allowance of attorney's fees to a prevailing defendant only where "the trial court determines that the plaintiff's action was 'frivolous, unreasonable, or without foundation.' " *Crossman*, slip opinion, p. 7, citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978).

The majority in *Marek* referred to Section 4 of the Clayton Act as one of a number of statutes that include "attorney's fees as part of awardable 'costs.' " 105 S. Ct. at 3017. Justice Brennan's dissent also listed numerous statutes providing for attorney's fees as part of costs, including Section 4 of the Clayton Act. He concluded that, in a case such as *Marek*, the majority ruling would logically result in the plaintiff having to pay the defendant's post-offer attorney's fees. 105 S. Ct. at 3023–24.

One reported case has since addressed that issue. *Crossman v. Marcoccio*, 108 F.R.D. 433 (D.R.I. 1985), *aff'd in part, rev'd in part*, 806 F.2d 329 (1st Cir. 1986). The district court held that a civil rights plaintiff was liable for defendant's attorney's fees incurred after the rejected offer of judgment. On December 9, 1986, however, the First Circuit reversed this ruling.

The First Circuit emphasized that the Supreme Court had limited the scope of Rule 68 costs in such cases to those "properly awardable" under the relevant statute. It decided that the defendants' attorneys' fees were not properly awardable under 42 U.S.C. § 1988 because the statute awards costs only to a "prevailing party" and limits recovery of attorney's fees by defendants to cases in which plaintiff's claims are found to be frivolous, unreasonable or without foundation.

The First Circuit held that the proper reading of the majority opinion in *Marek* required that fees not be shifted, in order "to prevent Marek's chilling effect on the initiation of civil rights actions from attaining glacial magnitude." Slip opinion, p. 6. It further stated that, "because courts may not properly award attorney's fees to unsuccessful civil rights defendants under section 1988, we hold that Rule 68 can never require prevailing civil rights plaintiffs to pay defendants' post-offer attorney's fees." Slip opinion, p. 7.

VI. PROPOSALS TO CHANGE THE SITUATION AFTER *MAREK*

As the opinion and dissent in *Marek* note, there have been numerous studies and proposals made over many years with respect to Rule 68. Apparently the Litigation Section is not currently pursuing any proposed amendment to Rule 68 but has decided to support bills pending in Congress which would overrule *Marek*. The Section of Tort and Insur-

ance Practice has asked the Section of Antitrust Law to support its most recent proposal, which is attached. The TIPS proposal overrules *Marek*, makes Rule 68 usable by plaintiffs *and* defendants, and provides for a penalty or sanction of three to seven times taxable costs for failing to beat an offer of judgment. Attorneys' fees are taken out of the definition of "costs."

We have reviewed the TIPS proposal and have considered *Marek* and other aspects of existing law and have concluded that *Marek* should not be overturned and that Rule 68 should be kept.

VII. BASES FOR RECOMMENDATIONS

A. No Rule 68 Change Recommended

(1) We do not think it is likely that there will be full fee shifting under Section 4 of the Clayton Act. While the reasoning of the district court in *Crossman* might be read to support such fee shifting, the First Circuit's reversal squarely rejects any such reasoning. In any event, we think it is premature to base a change in Rule 68 on such a concern at this time.

In contrast to Section 1988, under which a defendant can recover attorney's fees in limited circumstances, there is no basis in the antitrust laws to presume a defendant is ever entitled to attorneys' fees and the definition of costs to include fees in Section 4 of the Clayton Act applies only to the costs of a successful plaintiff. An antitrust defendant's attorney's fees would never be "properly awardable" costs under Section 4.

These conclusions are consistent with the legislative history of Section 4 of the Clayton Act, the Advisory Committee's Notes to Rule 68, and case law discussing the issue of attorneys' fee awards to defendants in antitrust cases. None of these sources supports any expectation that attorneys' fees of defendants might be imposed upon plaintiffs in an antitrust case as a result of Rule 68 or *Marek v. Chesny*.

Several courts have considered the issue of attorneys' fee awards to prevailing defendants in antitrust cases; none has awarded fees to a defendant on the basis of any express or implied right to recover simply because the defendant has prevailed. *Byram Concretanks, Inc. v. Warren Concrete Products Co.*, 374 F.2d 649, 651 (3d Cir. 1967), holds that "attorneys' fees may not be awarded to defendants in private antitrust litigation," even if the litigation is vexatious or oppressive. *See also Juneau Square v. First Wisconsin National Bank of Milwaukee*, 435 F. Supp. 1307,

1327 (E.D. Wis. 1977); *Gillam v. A. Shyman, Inc.*, 205 F. Supp. 534, 535–36 (D. Alaska 1962).[1]

(2) Rule 68 has been part of the federal rules for 50 years. It was part of the rules of various state courts for years before that. The basic concept of shifting some of the financial risks and rewards of litigation as an incentive to settlement has been a proper part of the scheme of federal civil procedure and should be retained.

(3) *Marek* will have the effect of barring post-offer attorney's fees to a successful plaintiff who recovers an amount less than the amount of the offer of judgment. This result is reasonable if one considers that awards of attorney's fees to plaintiffs under the antitrust laws are an exception to the general rule against an award of fees.

B. COMMENTS ON TIPS PROPOSAL

1. Desirable Features

(a) In the context of the TIPS proposal two other changes make a great deal of sense. They are:

Plaintiffs should be permitted to make offers of judgment.

The time period changes seem reasonable in view of questions about the fairness of short limits.

(b) The TIPS proposal contains a significant and laudable change in Rule 68 that is noted offhandedly in the commentary. This change reverses the holding in *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981), that a defendant must lose, but not as badly as to exceed the offer, in order to take advantage of Rule 68. The proposal would, sensibly, apply Rule 68 as well when an offeror wins outright.

2. Undesirable Features

(a) We think the flexible approach of Rule 68 as established in *Marek* is more sensible than the arbitrary multiplier of costs reflected in the TIPS proposal. The *Marek* method reflects much better the actual hardships imposed by an unreasonable rejection of a settlement offer, and the arbitrary three to seven multiplier in the TIPS proposal causes some peculiar results depending on how and why costs were incurred in case

[1] Despite these authorities, there is a possibility that attorney's fees might be available to a defendant under the inherent powers of a federal district court to impose sanctions for the filing of frivolous or vexatious litigation. In Dreiling v. Peugeot Motors of America, Inc., 768 F.2d 1159 (10th Cir. 1985), the court awarded fees and costs to the defendant as sanctions under 28 U.S.C. § 1927 without reference to any antitrust policy considerations. The specific findings as to vexatiousness and bad faith were quite strong. *See also* Alyeska Pipeline Serv. Co. v. The Wilderness Soc'y, 421 U.S. 240, 258–59 (1975).

preparation. In addition, the TIPS proposal sets no standards for application of the multiplier.

(b) The TIPS proposal does not spell out reasons for exempting certain cases from the operation of Rule 68. As long as defendants are not allowed to recover attorney's fees, we think, but of course are not sure, that the sanctions of Rule 68 are not so substantial as to reduce access to the courts.

Submitted this 16th day of January 1987.

James L. Magee
Daniel I. Booker

APPENDIX

AMERICAN BAR ASSOCIATION

SECTION OF TORT AND INSURANCE PRACTICE

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, That the American Bar Association recommends that Rule 68 of the Federal Rules of Civil Procedure be amended as follows:

OFFERS OF SETTLEMENT

a. Service. At any time more than 60 days after service of the summons and complaint upon a party but not less than 60 days before trial, any party may serve upon any adverse party or parties (but shall not file with the court) a written offer, denominated as an offer under this Rule, to settle a claim for the money, property or other relief specified in the offer, and to enter into a stipulation dismissing the claim or allowing judgment to be entered according to the terms of the offer.

b. Time For Acceptance. The offer shall remain open for 45 days unless sooner withdrawn by a writing served on the offeree before the offer is accepted by the offeree. An offer that is neither withdrawn nor accepted within 45 days shall be deemed rejected.

c. Subsequent Offers; Admissibility. The fact that an offer is made but not accepted does not preclude a subsequent offer. Evidence of an offer is not admissible for any purpose except in proceedings to enforce a settlement, execute upon a judgment or determine sanctions or costs under these Rules.

d. Exemptions. At any time before judgment is entered, upon its own motion or upon motion of any party, the courts upon express findings may exempt from this Rule any case or count that presents novel and important questions of law or

fact or that presents issues substantially affecting non-parties. If a case or count is exempted from this Rule, all past and pending offers made by any party under the Rule shall be void and of no effect.

e. Sanctions for Rejections. (1) If an offer is rejected and the judgment finally entered (exclusive of post-offer costs, expenses, and attorneys' fees) appears not more favorable to the offeree than the rejected offer, the offeror may file the offer with the court (together with a bill of costs incurred after the making of the offer) in support of a motion for sanctions pursuant to this Rule.

(2) If the court finds that the judgment finally entered is not more favorable to the offeree than the rejected offer, the offeree shall not recover any costs taxable under 28 U.S.C. Section 1920 incurred after the date the offer was made, and the court shall order the offeree or his attorney or both to pay the offeror a sum certain of money no less than three times the costs taxable under 28 U.S.C. Section 1920 (excluding attorneys' fees and expert witnesses' fees), and no greater than seven times such costs, incurred by the offeror after the date the offer was made, unless the court upon express findings concludes that the imposition of such sanction would be manifestly unjust.

f. Bifurcated Proceedings. When the liability of one party to another has been determined by verdict, order, or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of settlement that shall have the same effect as an offer made before trial if it is served not less than 60 days before the actual commencement of further proceedings. If an offer is served less than 60 days before the anticipated commencement of further proceedings, the court may upon motion order a continuance to allow a timely response before the commencement of further proceedings.

REPORT

The express purpose of Rule 68 when adopted in 1938 was to promote settlements. Since then there have been minor amendments, but the Rule is seldom used by parties; and thus has not achieved its original goal of encouraging resolution of cases. Although much has been written on why Rule 68 is not effective, in the last analysis, it "lacks teeth" in its sanction provisions since the "costs incurred after the making of an offer" are usually insignificant compared to the dollar amount at issue. Moreover, the Rule is available only to defendants and not plaintiffs.

The urge to amend the Rule has recently been given greater impetus by the decision in Marek v. Chesny, 105 S.Ct. 3012 (1985), which awarded attorneys' fees as "costs."

Many commentators have discussed the philosophical and practical issues involved in providing the Rule some bite and in maintaining judicial discretion for its implementation. It is felt the presently proposed amendment balances these two competing goals by incorporating the established law relating to taxable costs as a base and by also giving a court discretion to exempt the application of the Rule "upon express findings," and further discretion as to the multiplier to be used (between 3 and 7 times taxable costs).

(a) Service. This section expands the applicability of the Rule to allow an initial offer to be made by any party, whether making or defending against the claim under which the offer is made. In cases with multiple parties or multiple claims, the revised Rule comtemplates that an offer may be made as to any of the claims or parties in any combination. However, no defending party may be served with an offer until at least 60 days after service of the summons and complaint on that party. The triggering act is necessarily service of the pleadings not the filing of the complaint, since the latter may precede the former by as much as 120 days under the Rules. The 60 day period is specifically intended to afford the defendant an opportunity to come to grips with the matter so that it may make an informed response to the offer of judgment. The proposed Rule would also require a defending party intending to serve an offer upon a complaining party to wait at least 60 days after the adverse party's complaint or claim is served upon it before serving an offer on the complaining party. Since defendants under some circumstances have up to 60 days after service of a complaint in which to file an answer or other responsive pleading, this would prevent a defendant's offer being submitted before its answer so that the complainant would be forced to respond before being able to evaluate the legal and factual position taken by the defending party in its responsive pleading. The revision specifically requires the offer to be in writing, and denominated as an offer under this Rule, to prevent collateral litigation over whether a rejected offer of settlement should bring into play the sanctions contemplated by the Rule. Further, the revision does not restrict the offeror to an offer to allow judgment to be taken against it, but provides that the offer may be one to dismiss the claim or allow any other form of judgment to be entered according to the terms of the offer. Since the parties of their own accord have no power to either dismiss the claim or enter judgment, the rule specifically provides that regardless of the form of final disposition of the claim, the parties' agreement formed by acceptance of the offer shall consist of a stipulation, subject to the enforcement power of the court.

(b) Time For Acceptance. The 45 day period in which the offeree may make a response before the offer is withdrawn or automatically deemed rejected is intended to represent an interweaving of the needs of defendants, particularly where insurance companies are involved, and of plaintiffs in multiparty situations such as mass torts or class actions, to undertake a review of the matter and make a response, with the parallel need of all parties to have time upon rejection of an offer to prepare the case for trial. Regardless of other time factors, all parties should have at least 15 days in which to undertake trial preparation after an offer expires or has been rejected.

(c) Subsequent Offers; Admissibility. The first sentence of this section tracks the existing language of the Rule. The second sentence parallels the existing language but specifies additional proceedings in which the making of an offer may be admissible in evidence. Under the language of the existing Rule, a court could be hamstrung in efforts to enforce a settlement or execute upon a judgment entered pursuant to this Rule. The revised Rule does not specify that such evidence is admissible; it simply enlarges the exception provided to the general rule that evidence of an offer is not admissible, requiring the court to make the final determination of admissibility of particular evidence in a particular proceeding.

(d) Exemptions. The language of this section is new. This section allows the court upon express findings to exempt certain individual cases from the operation of this Rule. It is contemplated that the discretion granted the court by this section will be exercised sparingly, with each case or count examined individually to determine if it presents novel and important questions of law or fact or presents issues substantially affecting non-parties. This section is not intended to act as a blanket exemption of any category of action, such as class actions or derivative actions, from the operation of the Rule.

(e) Sanctions for Rejection. The reference to "judgment finally obtained by the offeree" in the former Rule is changed to "judgment finally entered" to make clear that the Rule continues to apply if the offeree has been denied any relief, specifically overturning Delta Airlines, Inc., v. August, 450 U.S. 346 (1981). This section parallels the language of the existing Rule but provides that the amount of the sanction shall be in a range three to seven times that contemplated by the present Rule. The trigger criterion remains the same, with sanctions to be imposed automatically in the event the offeree obtains a less favorable result. The revised Rule provides, however, that the court does not impose sanctions on its own motion, but only upon motion of an offeror for sanctions pursuant to this Rule. This obviates the necessity of the court's making a determination of whether the relief taken was

more or less favorable than the offer where the question is a close one; it is contemplated that where the litigation costs for this collateral issue (in cases where other than a money judgment was sought) would exceed the available sanction, an offeror may choose not to pursue a motion. The court is required to make specific findings of fact upon such a motion if made, and if it finds that sanctions are triggered, the court's discretion in imposition of the sanction is limited to the range of three to seven times taxable costs, specifically excluding attorneys' and expert witnesses' fees from the term "costs." This specifically overturns Marek v. Chesny, 105 S.Ct. 3012 (1985), while preserving each party's entitlement to attorneys' fees if provision for award of fees is made by any statute. The intent of the enhanced sanctions over that in the existing Rule is to provide a greater incentive than that provided by the existing Rule to both make and accept offers of settlement under the Rule, while preserving the relative certainty and ease of determination achieved by using a multiple of taxable costs as the measure of the sanction. In exercising its discretion within the range of allowable sanctions, the court may consider any facts or circumstances that would either mitigate or aggravate the amount of appropriate sanction in a particular case, and no attempt is made in the revised Rule to limit the areas into which the court may inquire in making this determination.

(f) Bifurcated Proceedings. This section tracks the existing language of the Rule, changing the time limits for offer and acceptance in a bifurcated proceeding to those which generally apply under the revised Rule. The revision adds language specifically acknowledging that the court has discretion to grant a continuance to allow a timely response if a late offer is served, but it is contemplated that this discretion will be sparingly exercised and only in circumstances where the time interval between entry of the verdict, order, or judgment of liability and anticipated commencement of further proceedings is so short as not to allow the normal sequence of 45 days in which to contemplate the offer, followed by at least 15 days to prepare for trial as generally contemplated by the Rule. Again, the court may consider all relevant facts and circumstances in determining whether to allow a late offer to be made and to require a response, although under no circumstances should the deadline for a response be less than 15 days before commencement of further proceedings.

Where a claim or count is concluded by settlement outside the framework of this Rule, even after rejection of a prior offer under the Rule and regardless of the stage of proceedings, it is clear that no sanctions under this Rule should apply. The avowed purpose of the Rule is to promote settlement; and the parties having reached an agreement to conclude the action as

to any count or claim may be presumed to have taken in to account all of the vested or inchoate rights and obligations concerning the subject matter which they would surrender by entering a settlement. The parties may well, however, negotiate a settlement factoring in the amount of sanctions to be received if the cause were to proceed to final judgment.

Respectfully submitted,

T. Richard Kennedy
Chairperson
Section of Tort and Insurance Practice

0374I

August, 1936

General Information Form

To Be Appended to Reports with Recommendations

No. _____
(Leave Blank)

Submitting Entity: Section of Tort and Insurance Practice

Submitted By: T. Richard Kennedy
Chairperson, Section of Tort and Insurance Practice

1. Summary of Recommendation(s).

The proposed revised rule changes the time periods, provides that any party may file an offer, allows the court to exempt certain cases or counts, and increase the sanction for rejection to a range between three and seven times the taxable cost exclusive of attorneys' and expert witnesses' fees.

2. Approval by Submitting Entity.

This recommendation was approved by the Section of Tort and Insurance Practice at its Council meeting in May, 1986.

3. Background.

The Association does not currently have a position on this matter. At the February, 1986 Midyear meeting, the Sections of Tort and Insurance Practice and Litigation co-sponsored a recommendation to oppose the amendment to Federal Rule of Civil Procedure 68 as currently proposed by the Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure. The House deferred action, requesting the Sections develop an alternative proposal to overcome the objections which caused the opposition.

4. Need for Action at This Meeting.

The Committee on Rules and Procedure of the Judicial Conference of the United States has been considering this proposed amendment for several months, and the statement of a position by the Association at this time would be extremely helpful to them in their continuing deliberations.

5. Status of Legislation.

There are currently bills pending in both the House and Senate which would determine whether attorneys' fees would be included in the sanctions for rejection of a settlement offer. Two bills under consideration in the House address whether Marek v. Chesny should be specifically incorporated into Rule 68 or overturned, and a similar issue is pending in the Senate as part of a proposed amendment to the Danforth product liability bill.

6. Financial Information.

No funds will be required.

7. Conflict of Interest.

None.

8. Referrals.

Copies of this report with recommendations will be circulated to all Sections and Divisions prior to the 1986 Annual Meeting.

9. Contact Person. (Prior to meeting)

William E. Rapp
211 South Broad Street
Philadelphia, Pennsylvania 19107
215/875-4089

10. Contact Person. (Who will present the report to the House)

Donald M. Haskell
Suite 1800
11 South LaSalle Street
Chicago, Illinois 60603
312/781-9393

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immigration policy. But even if entry quotas may be set by reference to nationality, national origin (let alone race) cannot control every decision in any way related to immigration. For example, that the Executive might properly admit into this country many Cubans but relatively few Haitians does not imply that, when dealing with aliens in detention, it can feed Cubans but not feed Haitians.

In general, national-origin classifications have a stronger claim to constitutionality when they are employed in connection with decisions that lie at the heart of immigration policy. Cf. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116, 96 S.Ct. 1895, 1911, 48 L.Ed.2d 495 (1976) ("due process requires that [an agency's] decision to impose [a] deprivation of an important liberty ... be justified by reasons which are properly the concern of that agency"). When central immigration concerns are not at stake, however, the Executive must recognize the individuality of the alien, just as it must recognize the individuality of all other persons within our borders. If in this case the Government acted out of a belief that Haitians (or Negroes for that matter) are more likely than others to commit crimes or be disruptive of the community into which they are paroled, its detention policy certainly would not pass constitutional muster.

III

The narrow question presented by this case is whether, in deciding which aliens will be paroled into the United States pending the determination of their admissibility, the Government may discriminate on the basis of race and national origin even in the absence of any reasons closely related to immigration concerns. To my mind, the Constitution clearly provides that it may not. I would therefore reverse the judgment of the Court of Appeals and remand for a determination of the scope of petitioners' equal protection rights.

The Court instead disposes of this case through reliance on a statutory and regulatory analysis that finds no support in either the statute or the regulations. I therefore dissent.

Jeffrey MAREK, Thomas Wadycki and Lawrence Rhode, Petitioners

v.

Alfred W. CHESNY, Individually and as Administrator of the Estate of Steven Chesney, Deceased.

No. 83–1437.

Argued Dec. 5, 1984.

Decided June 27, 1985.

Plaintiff brought motion for additur to judgment and for award of attorney fees in his civil rights action based on the allegedly unlawful fatal shooting of his son, and defendants moved for judgment n.o.v. and award of attorney fees. The United States District Court for the Northern District of Illinois, Milton I. Shadur, J., 547 F.Supp. 542, declined to award plaintiff costs, including attorney fees, incurred after an offer of judgment. On appeal, the Court of Appeals for the Seventh Circuit, 720 F.2d 474, reversed in part, and certiorari was granted. The Supreme Court, Chief Justice Burger, held that police officer defendants were not liable for attorney fees incurred by plaintiff after officers' pretrial offer of settlement, where plaintiff recovered judgment less than offer.

Reversed.

Justices Powell and Rehnquist filed concurring opinions.

Justice Brennan filed a dissenting opinion in which Justices Marshall and Blackmun joined.

1. **Federal Civil Procedure** ⇐2725

Rule [Fed.Rules Civ.Proc.Rule 68, 28 U.S.C.A.] shifting to plaintiff all "costs" incurred subsequent to offer of judgment not exceeded by ultimate recovery at trial does not require that defendant's offer itemize respective amounts being tendered for settlement of underlying substantive claim and for costs.

2. **Federal Civil Procedure** ⇐2725

Postoffer costs merely offset part of expense of continuing litigation to trial, and should not be included in calculus of rule [Fed.Rules Civ.Proc.Rule 68, 28 U.S.C.A.] shifting to plaintiff all "costs" incurred subsequent to offer of judgment not exceeded by ultimate recovery at trial.

3. **Federal Civil Procedure** ⇐2725

Where underlying statute defines "costs" to include attorney fees, such fees are to be included as costs for purposes of rule [Fed.Rules Civ.Proc.Rule 68, 28 U.S.C.A.] shifting to plaintiff all "costs" incurred subsequent to offer of judgment not exceeded by ultimate recovery at trial.

4. **Federal Civil Procedure** ⇐2725

Term "costs" in rule [Fed.Rules Civ. Proc.Rule 68, 28 U.S.C.A.] shifting to plaintiff all costs incurred subsequent to offer of judgment not exceeded by ultimate recovery at trial includes attorney fees awardable under 42 U.S.C.A. § 1988.

See publication Words and Phrases for other judicial constructions and definitions.

5. **Federal Civil Procedure** ⇐2725

Police officer defendants in action under 42 U.S.C.A. § 1983 were not liable for attorney fees incurred by plaintiff after officers' pretrial offer of settlement, where plaintiff recovered judgment less than offer. Fed.Rules Civ.Proc.Rule 68, 28 U.S.C.A.; 42 U.S.C.A. § 1988.

Syllabus *

Petitioner police officers, in answering a call on a domestic disturbance, shot and killed respondent's adult son. Respondent, in his own behalf and as administrator of his son's estate, filed suit against petitioners in Federal District Court under 42 U.S.C. § 1983 and state tort law. Prior to trial, petitioners made a timely offer of settlement of $100,000, expressly including accrued costs and attorney's fees, but respondent did not accept the offer. The case went to trial and respondent was awarded $5,000 on the state-law claim, $52,000 for the § 1983 violation, and $3,000 in punitive damages. Respondent then filed a request for attorney's fees under 42 U.S.C. § 1988, which provides that a prevailing party in a § 1983 action may be awarded attorney's fees "as part of the costs." The claimed attorney's fees included fees for work performed subsequent to the settlement offer. The District Court declined to award these latter fees pursuant to Federal Rule of Civil Procedure 68, which provides that if a timely pretrial offer of settlement is not accepted and "the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." The Court of Appeals reversed.

Held: Petitioners are not liable for the attorney's fees incurred by respondent after petitioners' offer of settlement. Pp. 3015–3018.

(a) Petitioners' offer was valid under Rule 68. The Rule does not require that a defendant's offer itemize the respective amounts being tendered for settlement of the underlying substantive claim and for costs. The drafters' concern was not so much with the particular components of offers, but with the *judgments* to be allowed against defendants. Whether or not the offer recites that costs are included or specifies an amount for costs, the offer has

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed.2d 499.

allowed judgment to be entered against the defendant both for damages caused by the challenged conduct and for costs. This construction of Rule 68 furthers its objective of encouraging settlements. Pp. 3015–3016.

(b) In view of the Rule 68 drafters' awareness of the various federal statutes, which, as an exception to the "American Rule," authorize an award of attorney's fees to prevailing parties as part of the costs in particular cases, the most reasonable inference is that the term "costs" in the Rule was intended to refer to all costs properly awardable under the relevant substantive statute. Thus, where the underlying statute defines "costs" to include attorney's fees, such fees are to be included as costs for purposes of Rule 68. Here, where § 1988 expressly includes attorney's fees as "costs" available to a prevailing plaintiff in a § 1983 suit, such fees are subject to the cost-shifting provision of Rule 68. Rather than "cutting against the grain" of § 1988, applying Rule 68 in the context of a § 1983 action is consistent with § 1988's policies and objectives of encouraging plaintiffs to bring meritorious civil rights suits; Rule 68 simply encourages settlements. Pp. 3016–3018.

720 F.2d 474 (CA7 1983), reversed.

Donald G. Peterson, Chicago, Ill., for petitioners.

Jerrold J. Ganzfried, Washington, D.C., for the United States as amicus curiae, by special order of the Court.

Victor J. Stone, Champaign, Ill., for respondent.

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to decide whether attorney's fees incurred by a plaintiff subsequent to an offer of settlement under Federal Rule of Civil Procedure 68 must be paid by the defendant under 42 U.S.C. § 1988, when the plaintiff recovers a judgment less than the offer.

I

Petitioners, three police officers, in answering a call on a domestic disturbance, shot and killed respondent's adult son. Respondent, in his own behalf and as administrator of his son's estate, filed suit against the officers in the United States District Court under 42 U.S.C. § 1983 and state tort law.

Prior to trial, petitioners made a timely offer of settlement "for a sum, including costs now accrued and attorney's fees, of ONE HUNDRED THOUSAND ($100,000) DOLLARS." Respondent did not accept the offer. The case went to trial and respondent was awarded $5,000 on the state-law "wrongful death" claim, $52,000 for the § 1983 violation, and $3,000 in punitive damages.

Respondent filed a request for $171,692.47 in costs, including attorney's fees. This amount included costs incurred after the settlement offer. Petitioners opposed the claim for post-offer costs, relying on Federal Rule of Civil Procedure 68, which shifts to the plaintiff all "costs" incurred subsequent to an offer of judgment not exceeded by the ultimate recovery at trial. Petitioners argued that attorney's fees are part of the "costs" covered by Rule 68. The District Court agreed with petitioners and declined to award respondent "costs, including attorney's fees, incurred after the offer of judgment." 547 F.Supp. 542, 547 (ND Ill.1982). The parties subsequently agreed that $32,000 fairly represented the allowable costs, including attorney's fees, accrued prior to petitioner's offer of settlement.[1] Respondent appealed the denial of post-offer costs.

The Court of Appeals reversed. 720 F.2d 474 (CA7 1983). The court rejected what it

1. The District Court refused to shift to respondent any costs accrued by petitioners. Petitioners do not contest that ruling.

termed the "rather mechanical linking up of Rule 68 and section 1988." *Id.*, at 478. It stated that the District Court's reading of Rule 68 and § 1988, while "in a sense logical," would put civil rights plaintiffs and counsel in a "predicament" that "cuts against the grain of section 1988." *Id.*, at 478, 479. Plaintiffs' attorneys, the court reasoned, would be forced to "think very hard" before rejecting even an inadequate offer, and would be deterred from bringing good faith actions because of the prospect of losing the right to attorney's fees if a settlement offer more favorable than the ultimate recovery were rejected. *Id.*, at 478–479. The court concluded that "[t]he legislators who enacted section 1988 would not have wanted its effectiveness blunted because of a little known rule of court." *Id.*, at 479.

We granted certiorari, 466 U.S. ——, 104 S.Ct. 2149, 80 L.Ed.2d 536. We reverse.

II

Rule 68 provides that if a timely pretrial offer of settlement is not accepted and "the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay *the costs incurred after the making of the offer.*" Fed.Rule Civ. Proc. 68 (emphasis added). The plain purpose of Rule 68 is to encourage settlement and avoid litigation. Advisory Committee Note on Rules of Civil Procedure, Report of Proposed Amendments, 5 F.R.D. 433, 483 n. 1 (1946); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352, 101 S.Ct. 1146, 1150, 67 L.Ed.2d 287 (1981). The Rule prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success upon trial on the merits. This case requires us to decide whether the offer in this case was a proper one under Rule 68, and whether the term "costs" as used in Rule 68 includes attorney's fees awardable under 42 U.S.C. § 1988.

A

The first question we address is whether petitioners' offer was valid under Rule 68. Respondent contends that the offer was invalid because it lumped petitioners' proposal for damages with their proposal for costs. Respondent argues that Rule 68 requires that an offer must separately recite the amount that the defendant is offering in settlement of the substantive claim and the amount he is offering to cover accrued costs. Only if the offer is bifurcated, he contends, so that it is clear how much the defendant is offering for the substantive claim, can a plaintiff possibly assess whether it would be wise to accept the offer. He apparently bases this argument on the language of the Rule providing that the defendant "may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, *with costs then accrued.*" (emphasis added).

[1] The Court of Appeals rejected respondent's claim, holding that "an offer of the money or property or to the specified effect is, by force of the rule itself, 'with'—that is, plus 'costs then accrued,' whatever the amount of those costs is." 720 F.2d, at 476. We, too, reject respondent's argument. We do not read Rule 68 to require that a defendant's offer itemize the respective amounts being tendered for settlement of the underlying substantive claim and for costs.

The critical feature of this portion of the Rule is that the offer be one that *allows judgment to be taken against the defendant for both the damages caused by the challenged conduct and the costs then accrued.* In other words, the drafters' concern was not so much with the particular components of offers, but with the *judgments* to be allowed against defendants. If an offer recites that costs are included or specifies an amount for costs, and the plaintiff accepts the offer, the judgment will necessarily include costs; if the offer does not state that costs are included and an amount for costs is not specified, the court will be obliged by the

terms of the Rule to include in its judgment an additional amount which in its discretion, see *Delta Air Lines, Inc. v. August*, *supra* 450 U.S., at 362, 365, 101 S.Ct., at 1153, 1156 (POWELL, J., concurring), it determines to be sufficient to cover the costs. In either case, however, the offer has *allowed* judgment to be entered against the defendant both for damages caused by the challenged conduct and for costs. Accordingly, it is immaterial whether the offer recites that costs are included, whether it specifies the amount the defendant is allowing for costs, or for that matter, whether it refers to costs at all. As long as the offer does not implicitly or explicitly provide that the judgment *not* include costs, a timely offer will be valid.

This construction of the Rule best furthers the objective of the Rule, which is to encourage settlements. If defendants are not allowed to make lump sum offers that would, if accepted, represent their total liability, they would understandably be reluctant to make settlement offers. As the Court of Appeals observed, "many a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might fix on motion of the plaintiff." 720 F.2d, at 477.

Contrary to respondent's suggestion, reading the Rule in this way does not frustrate plaintiffs' efforts to determine whether defendants' offers are adequate. At the time an offer is made, the plaintiff knows the amount in damages caused by the challenged conduct. The plaintiff also knows, or can ascertain, the costs then accrued. A reasonable determination whether to accept the offer can be made by simply adding these two figures and comparing the sum to the amount offered. Respondent is troubled that a plaintiff will not know whether the offer on the substantive claim would be exceeded at trial, but this is so whenever an offer of settlement is made. In any event, requiring itemization of damages separate from costs would not in any way help plaintiffs know in advance whether the judgment at trial will exceed a defendant's offer.

[2] Curiously, respondent also maintains that petitioner's settlement offer did not exceed the judgment obtained by respondent. In this regard, respondent notes that the $100,000 offer is not as great as the sum of the $60,000 in damages, $32,000 in pre-offer costs, and $139,692.47 in claimed post-offer costs. This argument assumes, however, that post-offer costs should be included in the comparison. The Court of Appeals correctly recognized that post-offer costs merely offset part of the expense of continuing the litigation to trial, and should not be included in the calculus. *Id.*, at 476.

B

The second question we address is whether the term "costs" in Rule 68 includes attorney's fees awardable under 42 U.S.C. § 1988. By the time the Federal Rules of Civil Procedure were adopted in 1938, federal statutes had authorized and defined awards of costs to prevailing parties for more than 85 years. See Act of Feb. 26, 1853, 10 Stat. 161; see generally *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). Unlike in England, such "costs" generally had not included attorney's fees; under the "American Rule," each party had been required to bear its own attorney's fees. The "American Rule" as applied in federal courts, however, had become subject to certain exceptions by the late 1930's. Some of these exceptions had evolved as a product of the "inherent power in the courts to allow attorney's fees in particular situations." *Alyeska*, *supra*, at 259, 95 S.Ct., at 1622. But most of the exceptions were found in federal statutes that directed courts to award attorney's fees as part of costs in particular cases. 421 U.S., at 260–262, 95 S.Ct., at 1623.

Section 407 of the Communications Act of 1934, for example, provided in relevant part that, "[i]f the petitioner shall finally

prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit." 47 U.S.C. § 407. There was identical language in Section 3(p) of the Railway Labor Act, 45 U.S.C. § 153(p) (1934 ed.). Section 40 of the Copyright Act of 1909, 17 U.S.C. § 40 (1934 ed.), allowed a court to "award to the prevailing party a reasonable attorney's fee as part of the costs." And other statutes contained similar provisions that included attorney's fees as part of awardable "costs." See, *e.g.*, the Clayton Act, 15 U.S.C. § 15 (1934 ed.); the Securities Act of 1933, 15 U.S.C. § 77k(e) (1934 ed.); the Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e), 78r(a) (1934 ed.).

The authors of Federal Rule of Civil Procedure 68 were fully aware of these exceptions to the American Rule. The Advisory Committee's Note to Rule 54(d) contains an extensive list of the federal statutes which allowed for costs in particular cases; of the 25 "statutes as to costs" set forth in the final paragraph of the Note, no fewer than 11 allowed for attorney's fees as part of costs. Against this background of varying definitions of "costs," the drafters of Rule 68 did not define the term; nor is there any explanation whatever as to its intended meaning in the history of the Rule.

[3] In this setting, given the importance of "costs" to the Rule, it is very unlikely that this omission was mere oversight; on the contrary, the most reasonable inference is that the term "costs" in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority. In other words, all costs properly awardable in an action are to be considered within the scope of Rule 68 "costs." Thus, absent Congressional expressions to the contrary, where the underlying statute defines "costs" to include attorney's fees, we are satisfied such fees are to be included as costs for purposes of Rule 68. See, *e.g.*, *Fulps v. City of Springfield, Tenn.*, 715 F.2d 1088, 1091–1095 (CA6 1983); *Waters v. Heublein, Inc.*, 485 F.Supp. 110, 113–117 (ND Cal.1979); *Scheriff v. Beck*, 452 F.Supp. 1254, 1259–1260 (D Colo.1978). See also *Delta Air Lines Inc. v. August*, 450 U.S., at 362–363, 101 S.Ct., at 1155–1156 (1981) (POWELL, J., concurring).

[4] Here, respondents sued under 42 U.S.C. § 1983. Pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, a prevailing party in a § 1983 action may be awarded attorney's fees "as part of the costs." Since Congress expressly included attorney's fees as "costs" available to a plaintiff in a § 1983 suit, such fees are subject to the cost-shifting provision of Rule 68. This "plain meaning" interpretation of the interplay between Rule 68 and § 1988 is the only construction that gives meaning to each word in both Rule 68 and § 1988.[2]

Unlike the Court of Appeals, we do not believe that this "plain meaning" construction of the statute and the Rule will frustrate Congress' objective in § 1988 of ensuring that civil rights plaintiffs obtain "effective access to the judicial process." *Hensley v. Eckerhart*, 461 U.S. 424, 429, 103 S.Ct. 1933, 1937, 76 L.Ed.2d 40 (1983), quoting H.R.Rep. No. 94–1558, p. 1 (1976). Merely subjecting civil rights plaintiffs to the settlement provision of Rule 68 does not curtail their access to the courts, or significantly deter them from bringing suit. Application of Rule 68 will serve as a disincentive for the plaintiff's attorney to continue litigation after the defendant makes a settlement offer. There is no evidence,

2. Respondents suggest that *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980), requires a different result. *Roadway Express*, however, is not relevant to our decision today. In *Roadway*, attorney's fees were sought as part of costs under 28 U.S.C. § 1927, which allows the imposition of costs as a penalty on attorneys for vexatiously multiplying litigation. We held in *Roadway Express* that § 1927 came with its own statutory definition of costs, and that this definition did not include attorney's fees. The critical distinction here is that Rule 68 does not come with a definition of costs; rather, it incorporates the definition of costs that otherwise applies to the case.

however, that Congress, in considering § 1988, had any thought that civil rights claims were to be on any different footing from other civil claims insofar as settlement is concerned. Indeed, Congress made clear its concern that civil rights plaintiffs not be penalized for "helping to lessen docket congestion" by settling their cases out of court. See H.R.Rep. No. 94–1588, p. 7 (1976).

Moreover, Rule 68's policy of encouraging settlements is neutral, favoring neither plaintiffs nor defendants; it expresses a clear policy of favoring settlement of all lawsuits. Civil rights plaintiffs—along with other plaintiffs—who reject an offer more favorable than what is thereafter recovered at trial will not recover attorney's fees for services performed after the offer is rejected. But, since the Rule is neutral, many civil rights plaintiffs will benefit from the offers of settlement encouraged by Rule 68. Some plaintiffs will receive compensation in settlement where, on trial, they might not have recovered, or would have recovered less than what was offered. And, even for those who would prevail at trial, settlement will provide them with compensation at an earlier date without the burdens, stress, and time of litigation. In short, settlements rather than litigation will serve the interests of plaintiffs as well as defendants.

To be sure, application of Rule 68 will require plaintiffs to "think very hard" about whether continued litigation is worthwhile; that is precisely what Rule 68 contemplates. This effect of Rule 68, however, is in no sense inconsistent with the congressional policies underlying § 1983 and § 1988. Section 1988 authorizes courts to award only "reasonable" attorney's fees to prevailing parties. In *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), we held that "the most critical factor" in determining a reasonable fee "is the degree of success obtained." Id., at 436, 103 S.Ct., at 1941. We specifically noted that prevailing at trial "may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved." *Ibid.* In a case where a rejected settlement offer exceeds the ultimate recovery, the plaintiff—although technically the prevailing party—has not received any monetary benefits from the post-offer services of his attorney. This case presents a good example: the $139,692 in post-offer legal services resulted in a recovery $8,000 less than petitioner's settlement offer. Given Congress' focus on the success achieved, we are not persuaded that shifting the post-offer costs to respondent in these circumstances would in any sense thwart its intent under § 1988.

Rather than "cutting against the grain" of § 1988, as the Court of Appeals held, we are convinced that applying Rule 68 in the context of a § 1983 action is consistent with the policies and objectives of § 1988. Section 1988 encourages plaintiffs to bring meritorious civil rights suits; Rule 68 simply encourages settlements. There is nothing incompatible in these two objectives.

III

[5] Congress, of course, was well aware of Rule 68 when it enacted § 1988, and included attorney's fees as part of recoverable costs. The plain language of Rule 68 and § 1988 subjects such fees to the cost-shifting provision of Rule 68. Nothing revealed in our review of the policies underlying § 1988 constitutes "the necessary clear expression of congressional intent" required "to exempt ... [the] statute from the operation of" Rule 68. *Califano v. Yamasaki*, 442 U.S. 682, 700, 99 S.Ct. 2545, 2557, 61 L.Ed.2d 176 (1979). We hold that petitioners are not liable for costs of $139,692 incurred by respondent after petitioners' offer of judgment.

The judgment of the Court of Appeals is *Reversed.*

Justice POWELL, concurring.

In *Delta Airlines, Inc. v. August*, 450 U.S. 346, 101 S.Ct. 1146, 67 L.Ed.2d 287 (1981), the offer under Rule 68 stated that it was "in the amount of $450, which shall

include attorney's fees, together with costs accrued to date." *Id.*, at 365, 101 S.Ct., at 1156. In a brief concurring opinion, I expressed the view that this offer did not comport with the Rule's requirements. It seemed to me that an offer of judgment should consist of two identified components: (i) the substantive relief proposed, and (ii) costs, including a reasonable attorney's fee. The amount of the fee ultimately should be within the discretion of the court if the offer is accepted. In questioning the form of the offer in *Delta*, I was influenced in part by the fact that it was a Title VII case. I concluded that the "'costs' component of a Rule 68 offer of judgment in a Title VII case must include reasonable attorney's fees accrued to the date of the offer." *Id.*, at 363, 101 S.Ct., at 1155. My view, however, as to the specificity of the "substantive relief" component of the offer did not depend solely on the fact that *Delta* was a Title VII case.

No other Justice joined my *Delta* concurrence. The Court's decision was upon a different ground. Although I think it the better practice for the offer of judgment expressly to identify the components, it is important to have a Court for a clear interpretation of Rule 68. I noted in *Delta* that "parties to litigation and the public as a whole have an interest—often an overriding one—in settlement rather than exhaustion of protracted court proceedings." *Ibid.* The purpose of Rule 68 is to "facilitat[e] the early resolution of marginal suits in which the defendant perceives the claim to be without merit, and the plaintiff recognizes its speculative nature." *Ibid.* See also *ibid.*, n. 1. We have now agreed as to what specifically is required by Rule 68.

Accordingly, I join the opinion of the Court.

Justice REHNQUIST, concurring.

In *Delta Airlines v. August*, 450 U.S. 346, 101 S.Ct. 1146, 67 L.Ed.2d 287 (1981), I expressed in dissent the view that the term "costs" in Rule 68 did not include attorney's fees. Further examination of the question has convinced me that this view was wrong, and I therefore join the opinion of THE CHIEF JUSTICE. Cf. *McGrath v. Kristensen*, 340 U.S. 162, 176, 71 S.Ct. 224, 232, 95 L.Ed. 173 (1950) (Jackson, J. concurring).

Justice BRENNAN, with whom Justice MARSHALL and Justice BLACKMUN join, dissenting.

The question presented by this case is whether the term "costs" as it is used in Rule 68 of the Federal Rules of Civil Procedure [1] and elsewhere throughout the Rules refers simply to those taxable costs defined in 28 U.S.C. § 1920 and traditionally understood as "costs"—courts fees, printing expenses, and the like [2]—or instead includes

1. Rule 68 provides:

"At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability."

2. Section 1920 provides:

"A judge or clerk of any court of the United States may tax as costs the following:

"(1) Fees of the clerk and marshall;

"(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

attorney's fees when an underlying fees-award statute happens to refer to fees "as part of" the awardable costs. Relying on what it recurrently emphasizes is the "plain language" of one such statute, 42 U.S.C. § 1988,[3] the Court today holds that a prevailing civil-rights litigant entitled to fees under that statute is *per se* barred by Rule 68 from recovering any fees for work performed after rejecting a settlement offer where he ultimately recovers less than the proffered amount in settlement.

I dissent. The Court's reasoning is wholly inconsistent with the history and structure of the Federal Rules, and its application to the over 100 attorney's fees statutes enacted by Congress will produce absurd variations in Rule 68's operation based on nothing more than picayune differences in statutory phraseology. Neither Congress nor the drafters of the Rules could possibly have intended such inexplicable variations in settlement incentives. Moreover, the Court's interpretation will "seriously undermine the purposes behind the attorney's fees provisions" of the civil-rights laws, *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 378, 101 S.Ct. 1146, 1163, 67 L.Ed.2d 287 (1981) (REHNQUIST, J., dissenting)—provisions imposed by Congress pursuant to § 5 of the Fourteenth Amendment.[4] Today's decision therefore violates the most basic limitations on our rulemaking authority as set forth in the Rules Enabling Act, 28 U.S.C. § 2072, and as summarized in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). Finally, both Congress and the Judicial Conference of the United States have been engaged for years in considering possible amendments to Rule 68 that would bring attorney's fees within the operation of the Rule. That process strongly suggests that Rule 68 has not previously been viewed as governing fee awards, and it illustrates the wisdom of deferring to other avenues of amending Rule 68 rather than ourselves engaging in "standardless judicial lawmaking." *Delta Air Lines, Inc. v. August, supra* 450 U.S., at 378, 101 S.Ct., at 1163 (REHNQUIST, J., dissenting).

I

The Court's "plain language" analysis, *ante*, at 3018, goes as follows: Section 1988 provides that a "prevailing party" may recover "a reasonable attorney's fee as part of the costs." Rule 68 in turn provides that, where an offeree obtains a judgment for less than the amount of a previous settlement offer, "the offeree must pay the costs incurred after the making of the offer." Because "attorney's fees" are "costs," the Court concludes, the "plain meaning" of Rule 68 *per se* prohibits a prevailing civil-rights plaintiff from recovering fees incurred after he rejected the proposed out-of-court settlement. *Ante*, at 3017.

The Court's "plain language" approach is, as Judge Posner's opinion for the court below noted, "in a sense logical." 720 F.2d 474, 478 (CA7 1983). However, while the starting point in interpreting statutes and rules is always the plain words themselves,

"(3) Fees and disbursements for printing and witnesses;

"(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

"(5) Docket fees under section 1923 of this title;

"(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

"A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

3. Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, as amended, 42 U.S.C. § 1988 (emphasis added). That section provides in relevant part that "[i]n any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

4. See S.Rep. No. 94-1011, pp. 5-6 (1976), U.S. Code Cong. & Admin.News 1976, pp. 5908, 5912; H.R.Rep. No. 94-1558, pp. 7, n. 14, 8-9 (1976).

"[t]he particular inquiry is not what is the abstract force of the words or what they may comprehend, but in what sense were they intended to be understood or what understanding they convey when used in the particular act." [5] We previously have been confronted with "superficially appealing argument[s]" strikingly similar to those adopted by the Court today, and we have found that they "cannot survive careful consideration." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 758, 100 S.Ct. 2455, 2460, 65 L.Ed.2d 488 (1980). So here.

In *Roadway Express*, the petitioner argued that under 28 U.S.C. § 1927 (1976 ed.) (which at that time allowed for the imposition of "excess costs" on an attorney who "unreasonably and vexatiously" delayed court proceedings),[6] "costs" should be interpreted to include attorney's fees when the underlying fees-award statute provided for fees "as part of the costs." We rejected that argument, concluding that "costs" as it was used in § 1927 had a well-settled meaning limited to the traditional taxable items of costs set forth in 28 U.S.C. § 1920. 447 U.S., at 759–761, 100 S.Ct., at 2460–2462. We found that Congress has consistently "sought to standardize the treatment of costs in federal courts, to 'make them uniform—make the law explicit and definite,' " and that the petitioner's interpretation "could result in virtually random application of § 1927 on the basis of other laws that do not address the problem of controlling abuses of judicial processes." *Id.*, at 761–762, 100 S.Ct., at 2461–2462. Specifically, allowing the definition of "costs" to vary depending on the phraseology of the underlying fees-award statute

> "would create a two-tier system of attorney sanctions.... Under Roadway's view of § 1927, lawyers in cases brought under those statutes [authorizing fees *as part of* the costs] would face stiffer penalties for prolonging litigation than would other attorneys. There is no persuasive justification for subjecting lawyers in different areas of practice to differing sanctions for dilatory conduct. A court's processes may be as abused in a commercial case as in a civil rights action. Without an express indication of congressional intent, we must hesitate to reach the imaginative outcome urged by Roadway, particularly when a more plausible construction flows from [viewing 'costs' uniformly as limited to those items set forth in § 1920]." *Id.*, at 762–763, 100 S.Ct., at 2462.

The Court today restricts its discussion of *Roadway* to a single footnote, urging that that case "is not relevant to our decision" because "section 1927 came with its own statutory definition of costs" whereas "Rule 68 does not come with a definition of costs." *Ante*, at 3017, n. 2. But this purported "distinction" merely begs the question. As in *Roadway*, the question we face is whether a cost-shifting provision

5. 2A C. Sands, Sutherland on Statutory Construction § 46.07, p. 110 (4th ed. 1984). See also *United States v. Campos-Serrano*, 404 U.S. 293, 298, 92 S.Ct. 471, 474, 30 L.Ed.2d 457 (1971) ("If an absolutely literal reading of a statutory provision is irreconcilably at war with the clear congressional purpose, a less literal construction must be considered"); *Lynch v. Overholser*, 369 U.S. 705, 710, 82 S.Ct. 1063, 1067, 8 L.Ed.2d 211 (1962) ("The decisions of this Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute, ... for 'literalness may strangle meaning' "); *United States v. Brown*, 333 U.S. 18, 25–26, 68 S.Ct. 376, 379–380, 92 L.Ed. 442 (1948) ("The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose. It does not require magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language"). Cf. *Harrison v. Northern Trust Co.*, 317 U.S. 476, 479, 63 S.Ct. 361, 362, 87 L.Ed. 407 (1943) ("words are inexact tools at best"):

6. That section provided that any attorney "who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs." The section was amended after *Roadway Express* to require the payment of "excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." Pub.L. 96–349, § 3, 94 Stat. 1156, 28 U.S.C. § 1927.

"come[s] with a definition of costs"—that set forth in § 1920 in an effort "to standardize the treatment of costs in federal courts," *Roadway Express, Inc. v. Piper, supra,* at 761, 100 S.Ct., at 2461—or instead may vary wildly in meaning depending on the phraseology of the underlying fees-award statute.[7] The parties' arguments in this case and in *Roadway* are virtually interchangeable, and our analysis is not much advanced simply by the conclusory statement that the cases are different.

For a number of reasons, "costs" as that term is used in the Federal Rules should be interpreted uniformly in accordance with the definition of costs set forth in § 1920:

First. The limited history of the costs provisions in the Federal Rules suggests that the drafters intended "costs" to mean only taxable costs traditionally allowed under the common law or pursuant to the statutory predecessor of § 1920.[8] Nowhere was it suggested that the meaning of taxable "costs" might vary from case to case depending on the language of the substantive statute involved—a practice that would have cut against the drafters' intent to create uniform procedures applicable to "*every* action" in federal court. Fed.Rule Civ.Proc. 1.[9]

Second. The Rules provide that "costs" may automatically be taxed by the clerk of the court on one day's notice, Fed.Rule Civ.Proc. 54(d)—strongly suggesting that "costs" were intended to refer only to those routine, readily determinable charges that could appropriately be left to a clerk, and as to which a single day's notice of settlement would be appropriate. Attorney's fees, which are awardable only by the

7. Taken to its logical limit, the Court's argument that the Federal Rules come with no "definition of costs" would mean that courts in applying the Rules' costs provisions could altogether ignore § 1920 in defining taxable costs. Surely the Court cannot mean to endorse such a result. The proper question, it seems to me, is instead whether § 1920 sets forth the *only* "definition" of costs for purposes of applying the Rules or whether courts may pick and choose from among other statutes in adding items to the enumeration set forth in § 1920.

8. Rule 68 modifies the general cost-shifting provisions set forth in Rule 54(d). See *Delta Air Lines, Inc. v. August,* 450 U.S. 346, 351–356, 101 S.Ct. 1146, 1149–1152, 67 L.Ed.2d 287 (1981); n. 13, *infra.* The Advisory Committee's Notes to Rule 54(d) emphasized that the terms of the statutory predecessor of § 1920 were "unaffected by this rule"—suggesting that the drafters did not intend to alter the uniform definition of costs set forth in that statute. 28 U.S.C.App., p. 621. Moreover, the drafters cited to an article as authority on "the present rule" which emphasized "the fundamental, essential, and common law doctrines and distinctions as to *costs* and *fees.* The distinction between costs and fees should be carefully borne in mind ...." Payne, Costs in Common Law Actions in the Federal Courts, 21 Va.L.Rev. 397, 398 (1935) (emphasis in original), cited at 28 U.S.C.App., p. 621. The article continued that the statutory predecessor of § 1920 "was designed to reduce the expense of proceedings in the federal courts *and to secure uniform rules* throughout the United States. The intention of Congress to establish the provisions of the Act of 1853 as the *exclusive* law of costs in the United States courts seems clear under the declarations and interdictions of that act. It would seem that the object ... was to substitute ... its own provisions *and secure uniform rules.*" *Id.,* at 404 (emphasis added).

9. "There is probably no provision in the Federal Rules that is more important than this mandate." 4 C. Wright & A. Miller, Federal Practice and Procedure § 1029, p. 127 (1969) (Wright & Miller). See also 2 J. Moore, Federal Practice ¶ 1.13[1], p. 285 (1985) (Moore).

The Court's major argument is that, when Rule 68 was drafted in 1938, there already was a disparity in the phraseology of fees-award statutes such that many provisions authorized the award of fees "as" costs, and that it is therefore "very unlikely" that the drafters intended a uniform definition of costs. *Ante,* at 3016–3017. As set forth above, however, the limited history strongly indicates that the drafters intended to secure uniform rules on costs and that the uniform definition contained in the statutory predecessor of § 1920 would be "unaffected" by the Rules. See *supra,* at ——, and n. 8. Moreover, application of the Court's interpretation to statutes in effect in 1938 would have led to inexplicable variations in settlement incentives, see n. 32, *infra*—variations for which the Court has no plausible explanation. In the absence of *any* indication that the drafters or Congress intended a "schizophrenic" application of the Rules, *Delta Air Lines, Inc. v. August, supra,* at 353, 101 S.Ct., at 1150, "the most reasonable inference," *ante,* at 3016, contrary to the Court's pronouncement, is that Rule 68 was intended to conform to § 1920 and to the general policy of uniformity in applying the Rules.

court and which frequently entail lengthy disputes and hearings,[10] obviously do not fall within that category.

Third. When particular provisions of the Federal Rules are *intended* to encompass attorney's fees, they do so *explicitly.* Eleven different provisions of the Rules authorize a court to award attorney's fees as "expenses" in particular circumstances, demonstrating that the drafters knew the difference, and intended a difference, between "costs," "expenses," and "attorney's fees." [11]

Fourth. With the exception of one recent Court of Appeals opinion and two recent District Court opinions, the Court can point to no authority suggesting that courts or attorneys have ever viewed the cost-shifting provisions of Rule 68 as including attorney's fees.[12] Yet Rule 68 has been in effect for 47 years, and potentially could have been applied to numerous fee statutes during this time. "The fact that the defense bar did not develop a practice of seeking" to shift or reduce fees under Rule 68 "is persuasive evidence that trial lawyers have interpreted the Rule in accordance with" the definition of costs in § 1920. *Delta Air Lines, Inc. v. August,* 450 U.S., at 360, 101 S.Ct., at 1154.

Fifth. We previously have held that words and phrases in the Federal Rules must be given a consistent usage and be read *in pari materia,* reasoning that to do otherwise would "attribute a schizophrenic intent to the drafters." *Id.,* at 353, 101 S.Ct., at 1150. Applying the Court's "plain language" approach consistently throughout the Rules, however, would produce absurd results that would turn statutes like § 1988 on their heads and plainly violate the restraints imposed on judicial rulemaking by the Rules Enabling Act. See generally *infra,* at ———. For example, Rule 54(d) provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." [13] Similarly, the *plain* language of Rule 68 provides that a plaintiff covered by the Rule "must pay the costs incurred after the making of the offer"—language requiring the plaintiff to bear both his post-offer costs and the defendant's post-offer costs.[14] If "costs" as used in these provisions were

10. See generally 2 M. Derfner & A. Wolf, Court Awarded Attorney Fees, chs. 23–24 (1984); 3 *id.,* chs. 25–27.

11. See Fed.Rules Civ.Proc. 11 (signing of pleadings, motions, or other papers in violation of the Rule), 16(f) (noncompliance with rules respecting pretrial conferences), 26(g) (certification of discovery requests, responses, or objections made in violation of Rule), 30(g)(1) (failure of party giving notice of a deposition to attend), 30(g)(2) (failure of party giving notice of a deposition to serve subpoena on witness), 37(a)(4) (conduct necessitating motion to compel discovery), 37(b) (failure to obey discovery orders), 37(c) (expenses on failure to admit), 37(d) (failure of party to attend at own deposition, serve answers to interrogatories, or respond to request for inspection), 37(g) (failure to participate in good faith in framing of a discovery plan), 56(g) (summary-judgment affidavits made in bad faith).

12. *Ante,* at 3016, citing *Fulps v. City of Springfield,* 715 F.2d 1088, 1091–1095 (CA6 1983); *Waters v. Heublein, Inc.,* 485 F.Supp. 110, 113–117 (ND Cal.1979); *Sheriff v. Beck,* 452 F.Supp. 1254, 1259–1260 (Colo.1978). For cases to the contrary, see, *e.g., Dowdell v. City of Apopka,* 698 F.2d 1181, 1188–1189, and n. 2 (CA 11 1983); *White v. New Hampshire Department of Employment Security,* 629 F.2d 697, 702–703 (CA1 1980), rev'd on other grounds, 455 U.S. 445, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982); *Piguead v. McLaren,* 699 F.2d 401, 403 (CA7 1983); *Association for Retarded Citizens v. Olson,* 561 F.Supp. 495, 498 (ND 1982), modified, 713 F.2d 1384 (CA8 1983); *Greenwood v. Stevenson,* 88 F.R.D. 225, 231–232 (RI 1980).

13. Rule 54(d) provides in full:

"Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court."

14. This is precisely how Rule 68 has been applied with respect to ordinary items of taxable costs. See generally 12 Wright & Miller §§ 3001, 3005; 7 Moore ¶ 68.06.

interpreted to include attorney's fees by virtue of the wording of § 1988, losing civil-rights plaintiffs would be required by the "plain language" of Rule 54(d) to pay the defendant's attorney's fees, and prevailing plaintiffs falling within Rule 68 would be required to bear the defendant's post-offer attorney's fees.

Had it addressed this troubling consequence of its "plain language" approach, perhaps the Court would have acknowledged that such a reading would conflict directly with § 1988, which allows an award of attorney's fees to a prevailing defendant *only* where "the suit was vexatious, frivolous, or brought to harass or embarass the defendant," [15] and that the substantive standard set forth in § 1988 therefore overrides the otherwise "plain meaning" of Rules 54(d) and 68. But that is precisely the point, and the Court cannot have it both ways. Unless we are to engage in "schizophrenic" construction, *Delta Air Lines, Inc. v. August*, 450 U.S., at 360, 101 S.Ct., at 1154, the word "costs" as it is used in the Federal Rules either does or does not allow the inclusion of attorney's fees. If the word "costs" does subsume attorney's fees, this "would alter fundamentally the nature of" civil-rights attorney's fee legislation. *Roadway Express, Inc. v. Piper*, 447 U.S., at 762, 100 S.Ct., at 2462. To avoid this extreme result while still interpreting Rule 68 to include fees in *some* circumstances, however, the Court would have to "select on an ad hoc basis those features of § 1988 ... that should be read into" Rule 68—a process of construction that would constitute nothing short of "standardless judicial lawmaking." *Ibid.*[16]

Sixth. As with all of the Federal Rules, the drafters intended Rule 68 to have a uniform, consistent application in *all* proceedings in federal court. See *supra*, at ——, and n. 9. In accordance with this intent, Rule 68 should be interpreted to provide uniform, consistent incentives "to encourage the settlement of litigation." *Delta Air Lines, Inc. v. August, supra*, 450 U.S., at 352, 101 S.Ct., at 1150. Yet today's decision will lead to dramatically different settlement incentives depending on minor variations in the phraseology of the underlying fees-award statutes—distinctions that would appear to be nothing short of irrational and for which the Court has no plausible explanation.

Congress has enacted well over 100 attorney's fees statutes, many of which would appear to be affected by today's decision. As the Appendix to this dissent illustrates, Congress has employed a variety of slightly different wordings in these statutes. It sometimes has referred to the awarding of "attorney's fees *as part of* the costs," to "costs *including* attorney's fees," and to "attorney's fees and *other* litigation costs." Under the "plain language" approach of today's decision, Rule 68 will operate to *include* the potential loss of otherwise-recoverable attorney's fees as an incentive to settlement in litigation under these statutes. But Congress frequently has referred in other statutes. But Congress frequently has referred in

15. *Hensley v. Eckerhart*, 461 U.S. 424, 429, n. 2, 103 S.Ct. 1933, 1937, n. 2, 76 L.Ed.2d 40 (1983). See also *Hughes v. Rowe*, 449 U.S. 5, 14–16, 101 S.Ct. 173, 178–179, 66 L.Ed.2d 163 (1980) (*per curiam*); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978); H.R.Rep. No. 94–1558, at 7.

16. It also might be argued that a defendant may not recover post-offer attorney's fees under the "plain language" of Rule 68 because he is not the "prevailing party" within the meaning of § 1988. We have made clear, however, that a party may "prevail" under § 1988 on some elements of the litigation but not on others. See, *e.g., Hensley v. Eckerhart, supra*, 461 U.S., at 434–437, 103 S.Ct., at 1939–1942. Thus while the plaintiff would prevail for purposes of preoffer fees, the defendant could be viewed as the prevailing party for purposes of the postoffer fees. Shifting fees to the defendant in such circumstances would plainly violate § 1988 for the reasons set forth above in text, and the substantive standards of § 1988 must therefore override the otherwise "plain language" approach taken by the Court.

other statutes to the awarding of "costs *and* a reasonable attorney's fee," of "costs *together* with a reasonable attorney's fee," or simply of "attorney's fees" without reference to costs. Under the Court's "plain language" analysis, Rule 68 obviously will *not* include the potential loss of otherwise-recoverable attorney's fees as a settlement incentive in litigation under these statutes because they do not refer to fees "as" costs.[17]

The result is to sanction a senseless patchwork of fee-shifting that flies in the face of the fundamental purpose of the Federal Rules—the provision of uniform and consistent procedure in federal courts. Such a construction will "introduce into [Rule 68] distinctions unrelated to its goal ... and [will] result in virtually random application of the Rule." *Roadway Express, Inc. v. Piper, supra*, 447 U.S., at 761–762, 100 S.Ct., at 2461–2462. For example, two consumer safety statutes, the Motor Vehicle Information and Cost Savings Act[18] and the Consumer Product Safety Act,[19] were enacted in the same congressional session and are similar in purpose and structure—they both authorize the promulgation of safety standards, provide for private rights of action for violations of their requirements, and authorize awards of attorney's fees. The Motor Vehicle Act, however, authorizes the award of fees *and* costs,[20] while the Consumer Product Safety Act authorizes costs *including* fees.[21] Under today's decision a successful plaintiff will, where the requirements of Rule 68 are otherwise met, be barred from recovering otherwise-reasonable attorney's fees for a defective toaster (under the Consumer Product Safety Act) but not for a defective bumper (under the Motor Vehicle Act). Yet nothing in the history of either Act, or in the history of Rule 68, supports such a bizarre differentiation.

The untenable character of such distinctions is further illustrated by reference to the various civil-rights laws. For example, suits involving alleged discrimination in housing are frequently brought under both the Fair Housing Act of 1968[22] and 42 U.S.C. § 1982,[23] and suits involving alleged gender discrimination are often brought under both the Equal Pay Act of 1963[24] and Title VII of the Civil Rights Act of 1964.[25] Yet because of the variations in wording of the attorney's fee provisions of these statutes, today's decision will require that fees be *excluded* from Rule 68 for purposes of the Fair Housing Act[26] but *included* for purposes of § 1982,[27] and that fees be *excluded* for purposes of the

17. Congress also has enacted statutes providing for the award of "costs and expenses, including attorney's fees." See *infra*, at ———. It is unclear how the "plain language" of these provisions interacts with Rule 68. If "including attorney's fees" is read as referring at least in part to "costs," fees awards under these statutes are subject to Rule 68. If "including attorney's fees" is more naturally read as modifying only the preceding word, "expenses," fees awards under these statutes are not governed by Rule 68.

18. 86 Stat. 947, as amended, 15 U.S.C. § 1901 *et seq.*

19. 86 Stat. 1207, as amended, 15 U.S.C. § 2051 *et seq.*

20. 86 Stat. 955, 15 U.S.C. § 1918(a) ("costs and a reasonable attorney's fee shall be awarded").

21. 86 Stat. 1226, as amended, 15 U.S.C. §§ 2072(a), 2073 ("costs of suit, including reasonable attorney's fees").

22. 82 Stat. 81, 42 U.S.C. § 3601 *et seq.*

23. That section provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." See generally *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968).

24. 77 Stat. 56, 29 U.S.C. § 206(d).

25. 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*

26. 82 Stat. 88, 42 U.S.C. § 3612(c) ("court costs *and* reasonable attorney fees") (emphasis added).

27. Attorney's fee awards in actions under § 1982 are governed by the terms of § 1988. See n. 3, *supra*.

Equal Pay Act [28] but *included* for purposes of Title VII.[29] It will be difficult enough to apply Rule 68 to the numerous cases seeking relief under both "fees as costs" and "fees and costs" statutes.[30] More importantly, there is absolutely no reason to believe that either Congress or the drafters of the Rules were more eager to induce settlement of § 1982 fair-housing litigation than Fair Housing Act litigation, [31] or that they intended sterner settlement incentives in Title VII gender-discrimination cases than in Equal Pay Act gender-discrimination cases.[32]

Moreover, many statutes contain several fees-award provisions governing actions arising under different subsections, and the phraseology of these provisions sometimes differs slightly from section to section. It is simply preposterous to think that Congress or the drafters of the Rules intended to sanction differing applications of Rule 68 depending on which particular subsection of, *inter alia*, the Privacy Act of 1974, [33] the Home Owners' Loan Act of 1933, [34] the Outer Continental Shelf Lands Act Amendments of 1978, [35] or the Interstate Commerce Act [36] the plaintiff happened to invoke.

In sum, there is nothing in the history and structure of the Rules or in the history of any of the underlying attorney's fee

28. Attorney's fee awards in actions under the Equal Pay Act are governed by the fee provisions of the Fair Labor Standards Act, 52 Stat. 1069, as amended, 29 U.S.C. § 216(b) ("a reasonable attorney's fee ... and costs of the action") (emphasis added).

29. 78 Stat. 259, 42 U.S.C. § 2000e–5(k) ("a reasonable attorney's fee as part of the costs") (emphasis added).

30. As we noted in *Hensley v. Eckerhart*, 461 U.S., at 435, 103 S.Ct., at 1940, many civil-rights cases "involve a common core of facts or will be based on related legal theories" that make it difficult to apportion an attorney's fee request among various claims. "Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Ibid.* The Court offers no guidance on how lower courts are to go about applying the *Hensley* standard in cases where Rule 68 requires conflicting results on closely related claims.

31. In fact, the Senate Report to § 1988 specifically addressed the interplay between the Fair Housing Act and § 1982 and emphasized Congress' intent to abolish the "anomalous gaps" between the two statutes and to make them "consistent" with respect to attorney's fee awards. S.Rep. No. 94–1011, at 4.

32. With respect to fees-award statutes enacted prior to 1938—which the Court relies on as evidence of the drafters' and Congress' intent to sanction a chameleonic definition of "costs," *ante*, at ——— the same inexplicable scheme would result. For example, the Fair Labor Standards Act of 1938 (FLSA), 52 Stat. 1060, 29 U.S.C. § 201 *et seq.*, and the Railway Labor Act of 1926, 44 Stat. 577, 45 U.S.C. § 151 *et seq.*, are both designed to regulate the hours and wages of covered employees. Both provide for private causes of action and for the recovery of reasonable attorney's fees. But the FLSA provides for fees *and* costs, 52 Stat. 1069, 29 U.S.C. § 216(b), whereas the Railway Labor Act provides for fees *as part of* the costs, 44 Stat. 578, 45 U.S.C. § 153. The Court can point to nothing suggesting that Congress intended for similarly situated employees to be subject to different attorney's fee standards under these statutes.

33. Compare Privacy Act of 1974, 88 Stat. 1896, as amended, 5 U.S.C. §§ 552a(g)(2)(B), 552a(g)(3)(B) ("reasonable attorney fees and other litigation costs") with *id.*, 88 Stat. 1897, as amended, 5 U.S.C. § 552a(g)(4) ("costs of the action together with reasonable attorney fees").

34. Compare Home Owners' Loan Act of 1933, 48 Stat. 132, as amended, 12 U.S.C. § 1464(q)(3) ("cost of suit, including a reasonable attorney's fee") with *id.*, 48 Stat. 132, as amended, 12 U.S.C. § 1464(d)(8)(A) ("reasonable expenses and attorneys' fees").

35. Compare Outer Continental Shelf Lands Act Amendments of 1978, 92 Stat. 657, 43 U.S.C. § 1349(a)(5) ("costs of litigation, including reasonable attorney and expert witness fees") with *id.*, 92 Stat. 657, 684, 43 U.S.C. §§ 1349(b)(2) ("damages ... including reasonable attorney and expert witness fees"), 1818(c)(1)(C) ("court costs ... and attorneys' fees").

36. Compare Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. § 11705(d)(3) ("attorney's fee ... as a part of the costs") with Pub.L. 95–473, 92 Stat. 1454, as amended, 49 U.S.C. § 11708(c) ("reasonable attorney's fee ... in addition to costs").

statutes to justify such incomprehensible distinctions based simply on fine linguistic variations among the underlying fees-award statutes—particularly where, as in *Roadway Express*, the cost provision can be read as embodying a *uniform* definition derived from § 1920. As partners with Congress, we have a responsibility not to carry "plain language" constructions to the point of producing "untenable distinctions and unreasonable results." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71, 102 S.Ct. 1534, 1538, 71 L.Ed.2d 748 (1982). See also n. 5, *supra*. As Justice REHNQUIST, joined by The Chief JUSTICE and Justice Stewart, cogently reasoned in *Delta Air Lines, Inc. v. August*, 450 U.S., at 378, 101 S.Ct., at 1163 (dissenting opinion), interpreting Rule 68 to allow a "two-tier system of cost-shifting" would attribute "wooden[ ] and perverse[ ]" motives to Congress and to the drafters of the Rules; "[n]o persuasive justification exists for subjecting these plaintiffs to differing penalties for failure to accept a Rule 68 offer and no persuasive justification can be offered as to how such a reading of Rule 68 would in any way further the intent of the Rule which is to encourage settlement" on a uniform basis.[37]

II

A

Although the Court's opinion fails to discuss any of the problems reviewed above, it does devote some space to arguing that its interpretation of Rule 68 "is in no sense inconsistent with the Congressional policies underlying § 1983 and § 1988." *Ante*, at 3018. The Court goes so far as to assert that its interpretation fits in smoothly with § 1988 as interpreted by *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). *Ante*, at 3018.

The Court is wrong. Congress has instructed that attorney's fee entitlement under § 1988 be governed by a *reasonableness* standard.[38] Until today the Court always has recognized that this standard precludes reliance on any mechanical "bright-line" rules automatically denying a portion of fees, acknowledging that such "mathematical approach[es]" provide "little aid in determining what is a reasonable fee in light of all the relevant factors." 461 U.S., at 435–436, n. 11, 103 S.Ct., at 1040–1041, n. 11. Although the starting point is always "the number of hours *reasonably* expended on the litigation," this "does not end the inquiry": a number of considerations set forth in the legislative history of § 1988 "may lead the district court to adjust the fee upward or downward." *Id.*, at 433–434, 103 S.Ct., at 1939 (emphasis added).[39] We also have emphasized that the district court "necessarily has discretion in making this equitable judgment" because of its "superior understanding of the litigation." *Id.*, at 437, 103 S.Ct., at 1941. Section 1988's reasonableness standard is, in sum, "acutely sensitive to the merits of an action and to antidiscrimination policy." *Roadway Express, Inc. v. Piper*, 447 U.S., at 762, 100 S.Ct., at 2462.

Rule 68, on the other hand, is not "sensitive" at all to the merits of an action and to

37. The majority in *Delta Air Lines* did not reach the issue of Rule 68's application to attorney's fees. The Chief JUSTICE (implicitly) and Justice REHNQUIST (explicitly) have today repudiated their views in *Delta Air Lines*. See *ante*, at 3017; *ante*, at —— (REHNQUIST, J., concurring).

38. S.Rep. No. 94–1011, at 6; H.R.Rep. No. 94–1558, at 8–9.

39. Among the factors that Congress intended courts to consider are "(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in other cases." *Hensley v. Eckerhart*, 461 U.S., at 430, n. 3, 103 S.Ct., at 1937, n. 3. See also H.R.Rep. No. 94–1558, at 8.

antidiscrimination policy. It is a mechanical *per se* provision automatically shifting "costs" incurred after an offer is rejected, and it deprives a district court of *all* discretion with respect to the matter by using "the strongest verb of its type known to the English language—'must.'" *Delta Air Lines, Inc. v. August*, 450 U.S., at 369, 101 S.Ct., at 1158. The potential for conflict between § 1988 and Rule 68 could not be more apparent.[40]

Of course, a civil-rights plaintiff who *unreasonably* fails to accept a settlement offer, and who thereafter recovers less than the proffered amount in settlement, is barred under § 1988 itself from recovering fees for unproductive work performed in the wake of the rejection. This is because "the extent of a plaintiff's success is *a* crucial factor in determining the proper amount of an award of attorney's fees," 461 U.S., at 440, 103 S.Ct., at 1943 (emphasis added); hours that are "excessive, redundant, or otherwise unnecessary" must be excluded from that calculus, *id.*, at 434, 103 S.Ct., at 1939. To this extent, the results might sometimes be the same under either § 1988's reasonableness inquiry or the Court's wooden application of Rule 68. Had the Court allowed the Seventh Circuit's remand in the instant case to stand, for example, the District Court after conducting the appropriate inquiry might well have determined that much or even all of the respondent's postoffer fees were unreasonably incurred and therefore not properly awardable.

But the results under § 1988 and Rule 68 will *not* always be congruent, because § 1988 mandates the careful consideration of a broad range of other factors and accords appropriate leeway to the district court's informed discretion. Contrary to the Court's protestations, it is not at all clear that "[t]his case presents a good example" of the smooth interplay of § 1988 and Rule 68, *ante*, at 9, because there has never been an evidentiary consideration of the reasonableness or unreasonableness of the respondent's fee request. It *is* clear, however, that under the Court's interpretation of Rule 68 a plaintiff who ultimately recovers only slightly less than the proffered amount in settlement will *per se* be barred from recovering trial fees even if he otherwise "has obtained excellent results" in litigation that will have far-reaching benefit to the public interest. *Hensley v. Eckerhart*, *supra*, at 435, 103 S.Ct., at 1940. Today's decision necessarily will require the disallowance of some fees that otherwise would have passed muster under § 1988's reasonableness standard,[41] and there is *nothing* in § 1988's legislative history even vaguely suggesting that Congress intended such a result.[42]

The Court argues, however, that its interpretation of Rule 68 "is neutral, favoring neither plaintiffs nor defendants." *Ante*, at 3018. This contention is also plainly wrong. As the Judicial Conference

40. It might be argued that Rule 68's offer-of-judgment provisions merely serve to define one aspect of "reasonableness" within the meaning of *Hensley v. Eckerhart*, *supra*. This argument is foreclosed by Congress' rejection of *per se* "mathematical approach[es]" that would "end the inquiry" without allowing consideration of "all the relevant factors." 461 U.S., at 433, 435–436, n. 11, 103 S.Ct., at 1939, 1940–1941, n. 11. See *supra*, at ——.

41. Indeed, the "plain language" of § 1988 authorizes the inclusion as "costs" only of those attorney's fees that have been determined to be "reasonable," see n. 3, *supra*, so the cost-shifting provisions of Rule 68 necessarily will come into play only with respect to reasonable attorney's fees.

42. Given that Congress enumerated factors to consider in applying the reasonableness standard, see nn. 4, 39, *supra*, and given that the *per se* provisions of Rule 68 were nowhere mentioned in the legislative history, there is no basis to believe that Congress intended to modify the reasonableness standard in the context of settlement offers. Moreover, as we previously have noted, Congress' use of the word "costs" in § 1988 had one purpose and one purpose only: to permit an award of attorney's fees against a State notwithstanding the Eleventh Amendment. See *Hutto v. Finney*, 437 U.S. 678, 693–695, 98 S.Ct. 2565, 2574–2576, 57 L.Ed.2d 522 (1978); S.Rep. No. 94–1011, at 5; H.R.Rep. No. 94–1558, at 7.

Advisory Committee on the Federal Rules of Civil Procedure has noted twice in recent years, Rule 68 "is a 'one-way street,' available only to those defending against claims and not to claimants." [43] Interpreting Rule 68 in its current version to include attorney's fees will lead to a number of skewed settlement incentives that squarely conflict with Congress' intent. To discuss but one example, Rule 68 allows an offer to be made any time after the complaint is filed and gives the plaintiff only 10 days to accept or reject. The Court's decision inevitably will encourage defendants who know they have violated the law to make "low-ball" offers immediately after suit is filed and before plaintiffs have been able to obtain the information they are entitled to by way of discovery to assess the strength of their claims and the reasonableness of the offers. The result will put severe pressure on plaintiffs to settle on the basis of inadequate information in order to avoid the risk of bearing all of their fees even if reasonable discovery might reveal that the defendants were subject to far greater liability. Indeed, because Rule 68 offers may be made recurrently without limitation, defendants will be well advised to make ever-slightly larger offers throughout the discovery process and before plaintiffs have conducted all reasonably necessary discovery.

This sort of so-called "incentive" is fundamentally incompatible with Congress' goals. Congress intended for "private citizens . . . to be able to assert their civil rights" and for "those who violate the Nation's fundamental laws" not to be able "to proceed with impunity." [44] Accordingly, civil rights plaintiffs " 'appear before the court cloaked in a mantle of public interest' "; to promote the "*vigorous* enforcement of modern civil rights legislation," Congress has directed that such "private attorneys general" shall not "be deterred from bringing good faith actions to vindicate the fundamental rights here involved." [45] Yet requiring plaintiffs to make wholly uninformed decisions on settlement offers, at the risk of *automatically* losing all of their post-offer fees no matter what the circumstances and notwithstanding the "excellent" [46] results they might achieve after the full picture emerges, will work just such a deterrent effect.[47]

Other difficulties will follow from the Court's decision. For example, if a plaintiff recovers less money than was offered before trial but obtains potentially far-reaching injunctive or declaratory relief, it is altogether unclear how the Court intends judges to go about quantifying the "value" of the plaintiff's success.[48] And the

43. Advisory Committee's Note to Proposed Amendment to Rule 68, 98 F.R.D. 339, 363 (1983); Advisory Committee's Note to Proposed Amendment to Rule 68, 102 F.R.D. 407, 434 (1984).

44. S.Rep. No. 94–1011, at 2, U.S.Code Cong. & Admin.News 1976, p. 5910.

45. H.R.Rep. No. 94–1558, at 6; S.Rep. No. 94–1011, at 4–5, U.S.Code Cong. & Admin.News 1976, p. 5912 (emphasis added). See generally *Northcross v. Memphis Board of Education*, 412 U.S. 427, 428, 93 S.Ct. 2201, 2202, 37 L.Ed.2d 48 (1973) *(per curiam)*; *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401–402, 88 S.Ct. 964, 965–966, 19 L.Ed.2d 1263 (1968) *(per curiam)*.

46. *Hensley v. Eckerhart*, 461 U.S., at 435, 103 S.Ct., at 1939.

47. The Judicial Conference Advisory Committee on the Federal Rules has emphasized the unfairness of forcing a party to make such a decision before "enough discovery has been had to appraise the strengths and weaknesses of a claim or defense," and thus has proposed extension of Rule 68 to attorney's fees only in connection with measures to ensure that the offeree has all "information to which it would be entitled by way of discovery under the rules to appraise the fairness of the offer." Advisory Committee's Note to Proposed Amendment to Rule 68, 102 F.R.D., at 434–435. See generally *infra*, at ——.

48. For example, a plaintiff who is unable to prove actual damages at trial and recovers only nominal damages of $1, but who nevertheless demonstrates the unconstitutionality of the challenged practice and obtains an injunction, is surely a "prevailing party" within the meaning of § 1988. If the plaintiff had earlier rejected an offer of $500 to "get rid" of the controversy, the damages portion of his suit will fall within Rule 68 as interpreted by today's decision. Yet

Court's decision raises additional problems concerning representation and conflicts of interest in the context of civil-rights class actions.[49] These are difficult policy questions, and I do not mean to suggest that stronger settlement incentives would necessarily conflict with the effective enforcement of the civil-rights laws. But contrary to the Court's 4-paragraph discussion, the policy considerations do not all point in one direction, and the question of whether and to what extent attorney's fees should be included within Rule 68 has provoked sharp debate in Congress, on the Advisory Committee on the Federal Rules, and among commentators.[50] The Court has offered up

we previously have emphasized that "a plaintiff who failed to recover damages but obtained injunctive relief, or vice versa, may recover a fee award based on all hours reasonably expended if the relief obtained justified that expenditure of attorney time." *Hensley v. Eckerhart, supra,* 461 U.S., at 435–436, n. 11, 103 S.Ct., at 1940, n. 11. See also *id.,* at 445, n. 5, 103 S.Ct., at 1938, n. 5 (BRENNAN, J., concurring in part and dissenting in part) ("Civil rights remedies often benefit a large number of persons, many of them not involved in the litigation, making it difficult both to evaluate what a particular lawsuit is really worth to those who stand to gain from it and to spread the costs of obtaining relief among them.... [The] problem is compounded by the fac[t] that monetary damages are often not an important part of the recovery sought under the statutes enumerated in § 1988"). Although courts must therefore evaluate the "value" of nonpecuniary relief before deciding whether the "judgment" was "more favorable than the offer" within the meaning of Rule 68, the uncertainty in making such assessments surely will add pressures on a plaintiff to settle his suit even if by doing so he abandons an opportunity to obtain potentially far-reaching nonmonetary relief—a discouraging incentive entirely at odds with Congress' intent. See S.Rep. No. 94–1011, at 5–6; H.R. Rep. No. 94–1558, at 8–9.

Of course, the difficulties in assessing the "value" of nonpecuniary relief are inherent in Rule 68's operation whether or not the Rule applies to attorney's fees. But when the Rule was interpreted simply as affecting at most several hundred or several thousand dollars of traditionally taxable costs, these inherent problems were of little practical significance. Now that Rule 68 applies in some situations to the vital question of attorney's fees, these problems will assume major significance.

49. Like the question of injunctive relief, see n. 48, *supra,* these problems are inherent in Rule 68 but were inconsequential so long as the operation of the Rule was limited to taxable costs as defined in 28 U.S.C. § 1920. Now that the Rule has been extended to many attorney's fee provisions, these difficulties can be expected to create substantial problems in administering class actions. "[S]uits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs." *General Telephone Co. v. Falcon,* 457 U.S. 147, 157, 102 S.Ct. 2364, 2370, 72 L.Ed.2d 740 (1982). Rule 68 makes no distinctions between individual and class actions. Yet as the Advisory Committee recently has cautioned, in the class-action context "[an] offeree's rejection would burden a named representative-offeree with the risk of exposure to heavy liability [for costs and expenses] that could not be recouped from unnamed class members.... [This] could lead to a conflict of interest between the named representatives and other members of the class." Advisory Committee's Note to Proposed Amendment to Rule 68, 102 F.R.D., at 436.

Moreover, Rule 23(e) requires the court's approval before a class action is compromised; the Rule protects class members "from unjust or unfair settlements affecting their rights by representatives who lose interest or are able to secure satisfaction of their individual claims by compromise." *Moreland v. Rucker Pharmacal Co.,* 63 F.R.D. 611, 615 (WD La.1974). Yet Rule 68 does not mesh with such careful supervision. Its "plain language" requires simply that upon the plaintiff's acceptance "the clerk *shall* enter judgment."

In addition, Rule 68 sets a nondiscretionary 10-day limit on the plaintiff's power of acceptance—a virtually impossible amount of time in many cases to consider the likely merits of complex claims of relief, give notice to class members, and secure the court's approval.

50. In addition to the sources cited in nn. 57, 59, and 61, *infra,* see, *e.g.,* Branham, Offer of Judgment and Rule 68: A Response to the Chief Justice, 18 John Marshall L.Rev. 341 (1985); Fiss, Comment, Against Settlements, 93 Yale L.J. 1073 (1984); Shavell, Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs, 11 J.Legal Studies 55 (1982); Simon, Rule 68 at the Crossroads: The Relationship Between Offer of Judgment and Statutory Attorney's Fees, 53 U.Cinn.L.Rev. 889 (1984); Notes, The Impact of Proposed Rule 68 on Civil Rights Litigation, 84 Colum.L.Rev. 719 (1984); Note, Rule 68: A "New" Tool for Litigation, 1978 Duke L.J. 889; Offer of Judgment and Statutorily Authorized Attorney's Fees: A Reconciliation of the Scope and Purpose of Rule 68, 16 Ga.L.Rev. 482 (1982); The 'Offer of Judgment' Rule in Em-

some interesting arguments based on an economic analysis of settlement incentives and aggregate results. *Ante*, at 3018. But I believe Judge Posner had the better of this argument in concluding that the incentives created by interpreting Rule 68 in its current form to include attorney's fees would "cu[t] against the grain of section 1988," and that in any event a modification of Rule 68 to encompass fees is for Congress, not the courts. 720 F.2d, at 479.

B

Indeed, the judgment of the Court of Appeals below turned on its determination that an interpretation of Rule 68 to include attorney's fees is beyond the pale of the judiciary's rulemaking authority. *Ibid.* Congress has delegated its authority to this Court "to prescribe by general rules ... the practice and procedure of the district courts and courts of appeals of the United States in civil actions." 28 U.S.C. § 2072.[51] This grant is limited, however, by the condition that "[s]uch rules shall not abridge, enlarge or modify any substantive right." *Ibid.* The right to attorney's fees is "substantive" under any reasonable definition of that term. Section 1988 was enacted pursuant to § 5 of the Fourteenth Amendment, and the House and Senate Reports recurrently emphasized that "fee awards are an integral part of the *remedies* necessary to obtain ... compliance" with the civil-rights laws and to redress violations.[52] Statutory attorney's fees remedies such as that set forth in § 1988 "are far more like new causes of action tied to specific rights than like background procedural rules governing any and all litigation." *Hensley v. Eckerhart*, 461 U.S., at 443, n. 2, 103 S.Ct., at 1937, n. 2 (BRENNAN, J., concurring in part and dissenting in part). See also 720 F.2d, at 479 (§ 1988 "does not make the litigation process more accurate and efficient for both parties; even more clearly than the statute of limitations [at issue in *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 69 S.Ct. 1233, 93 L.Ed. 1520 (1949)], it is designed instead to achieve a substantive objective—compliance with the civil rights laws").[53]

As construed by the Court today, Rule 68 surely will operate to "abridge" and to "modify" this statutory right to reasonable attorney's fees. "The test must be whether a rule really regulates *procedure*,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them," or instead operates to abridge a substantive right "in the guise of regulating procedure." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10, 14, 61 S.Ct. 422, 424, 426, 85 L.Ed. 479 (1941) (emphasis added); see also *Hanna v. Plumer*, 380 U.S. 460, 464–465, 85 S.Ct. 1136, 1140, 14 L.Ed.2d 8 (1965). Unlike those provisions of the Federal Rules

ployment Discrimination Actions: A Fundamental Incompatibility, 10 Golden Gate L.Rev. 963 (1980); Notes, The Proposed Amendment to Federal Rule of Civil Procedure 68: Toughening the Sanctions, 70 Iowa L.Rev. 237 (1984).

51. Section 2072 provides in relevant part:

"The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

52. S.Rep. No. 94–1011, at 5 (emphasis added), U.S.Code Cong. & Admin.News 1976, p. 5913. See also *id.*, at 2–4; H.R.Rep. No. 94–1558, at 1; *Maine v. Thiboutot*, 448 U.S. 1, 11, 100 S.Ct. 2502, 2508, 65 L.Ed.2d 555 (1980).

53. "The most helpful way ... of defining a substantive rule—or more particularly a substantive right, which is what the Act refers to—is as a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process." Ely, The Irrepressible Myth of Erie, 87 Harv.L.Rev. 693, 725 (1974).

that explicitly authorize an award of attorney's fees, Rule 68 is not addressed to bad-faith or unreasonable litigation conduct. The courts always have had inherent authority to assess fees against parties who act "in bad faith, vexatiously, wantonly, or for oppressive reasons," *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S., at 258–259, 95 S.Ct., at 1622, and the assessment of fees against parties whose *unreasonable* conduct has violated the rules of litigation falls comfortably into the courts' authority to administer "remedy and redress for disregard or infraction" of those rules, *Sibbach v. Wilson & Co.*, *supra*, 312 U.S., at 14, 61 S.Ct., at 426.

Rule 68, on the other hand, contains no reasonableness component. See *supra*, at ——. As interpreted by the Court, it will operate to divest a prevailing plaintiff of fees to which he otherwise might be entitled under the reasonableness standard simply because he guessed wrong, or because he did not have all information reasonably necessary to evaluate the offer, or because of unforeseen changes in the law or evidence after the offer. The Court's interpretation of Rule 68 therefore clearly collides with the congressionally prescribed substantive standards of § 1988, and the Rules Enabling Act requires that the Court's interpretation give way.

If it had addressed this central issue, perhaps the Court would have reasoned that Rule 68 as interpreted to include attorney's fees is merely a procedural device designed to further the important policy of encouraging efficient and prompt resolution of disputes. With all respect, such refashioning of settlement incentives is squarely foreclosed by the Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, which held that it is "inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation." 421 U.S., at 247, 95 S.Ct., at 1616. Beyond a handful of "limited circumstances" that do not encompass today's decision,[54] "it is apparent that the circumstances under which attorney's fees are to be awarded *and the range of discretion of the courts in making these awards* are matters for Congress to determine," *id.*, at 257, 262, 95 S.Ct., at 1621, 1624 (emphasis added), and that "courts are not free to fashion drastic new rules with respect to the allowance" or disallowance of attorney's fees, *id.*, at 269, 95 S.Ct., at 1627. By permitting a mechanical *per se* rule to supplant the congressionally prescribed reasonableness standard of § 1988, and by divesting courts of the discretion Congress intended them to exercise, the Court has assumed a forbidden "roving authority" to "make major inroads on a policy matter that Congress has reserved for itself." *Id.*, at 260, 269, 95 S.Ct., at 1627. It matters not whether such "roving authority" is exercised on a case-by-case basis or, as here, in interpreting a Federal Rule promulgated pursuant to Congress' delegation of rulemaking authority: in either event, the result is to "abridge" and to "modify" the substance of § 1988 "in the guise of regulating procedure." *Sibbach v. Wilson & Co.*, 312 U.S., at 10, 61 S.Ct., at 424.[55]

III

For several years now both the Judicial Conference and Congress have been en-

54. Those exceptions include recovery of attorney's fees from a common fund, and recovery of attorney's fees where the opposing party has acted in bad faith or in willful disobedience of a court order. See, *e.g.*, *Summit Valley Industries, Inc. v. Carpenters*, 456 U.S. 717, 721, 102 S.Ct. 2112, 2114, 72 L.Ed.2d 511 (1982); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 257–259, 95 S.Ct. 1612, 1621–1623, 44 L.Ed.2d 141 (1975).

55. "It would be untenable to assert that Congress, although determined to prevent the courts through judicial interpretation from 'mak[ing] major inroads on a policy matter that Congress has reserved for itself,' would approve of the identical result if achieved through judicial rulemaking." Note, The Conflict Between Rule 68 and the Civil Rights Attorneys' Fee Statute: Reinterpreting the Rules Enabling Act, 98 Harv. L.Rev. 828, 844 (1985), quoting *Alyeska Pipeline Service Co. v. Wilderness Society*, *supra*, 421 U.S., at 269, 95 S.Ct., at 1627.

gaged in an extensive reexamination of Rule 68 and have considered numerous proposals to amend the Rule to include attorney's fees. The Advisory Committee on the Federal Rules initially proposed an amendment to Rule 68 in August 1983 that would have applied equally to plaintiffs and defendants and that would have left application of the Rule's fee provisions in the courts' informed discretion.[56] The proposal received extensive criticism[57] and subsequently was replaced with a revised version in September 1984. The attorney's fee provisions of that proposal would apply only if a court determined that "an offer was rejected unreasonably," and the proposal sets forth detailed factors for assessing the reasonableness of the rejection.[58] Public hear-

56. The proposed Rule provided:

"At any time more than 30 days before the trial begins, any party may serve upon an adverse party an offer, denominated as an offer under this rule, to settle a claim for the money or property or to the effect specified in his offer and to enter into a stipulation dismissing the claim or to allow judgment to be entered accordingly. The offer shall remain open for 30 days unless a court authorizes earlier withdrawal. An offer not accepted in writing within 30 days shall be deemed withdrawn. Evidence of an offer is not admissible except in a proceeding to enforce a settlement or to determine costs and expenses.

"If the judgment finally entered is not more favorable to the offeree than an unaccepted offer that remained open 30 days, the offeree must pay the costs and expenses, including reasonable attorneys' fees, incurred by the offeror after the making of the offer, and interest from the date of the offer on any amount of money that a claimant offered to accept to the extent such interest is not otherwise included in the judgment. The amount of the expenses and interest may be reduced to the extent expressly found by the court, with a statement of reasons, to be excessive or unjustified under all of the circumstances. In determining whether a final judgment is more or less favorable to the offeree than the offer, the costs and expenses of the parties shall be excluded from consideration. Costs, expenses, and interest shall not be awarded to an offeror found by the court to have made an offer in bad faith.

"The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, any party may make an offer of settlement under this rule, which shall be effective for such period of time, not more than 30 days, as is authorized by the court. This rule shall not apply to class or derivative actions under Rules 23, 23.1, and 23.2." Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendment to the Federal Rules of Civil Procedure (Aug. 1983), reprinted in 98 F.R.D. 337, 361–363 (1983).

57. See generally Proposed Amendments to the Federal Rules of Civil Procedure: Hearings before the Advisory Committee on Civil Rules of the Judicial Conference of the United States (Washington, D.C., Jan. 18, 1984); Proposed Amendments to the Federal Rules of Civil Procedure: Hearings before the Advisory Committee of Federal Rules of Civil Procedure of the United States Judicial Conference (Los Angeles, Cal., Feb. 3, 1984).

58. The revised proposed Rule 68 provides:

"At any time more than 60 days after the service of the summons and complaint on a party but not less than 90 days (or 75 days if it is a counteroffer) before trial, either party may serve upon the other party but shall not file with the court a written offer, denominated as a[n] offer under this rule, to settle a claim for the money, property, or relief specified in the offer and to enter into a stipulation dismissing the claim or to allow judgment to be entered accordingly. The offer shall remain open for 60 days unless sooner withdrawn by a writing served on the offeree prior to acceptance by the offeree. An offer that remains open may be accepted or rejected in writing by the offeree. An offer that is neither withdrawn nor accepted within 60 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude a subsequent offer. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine sanctions under this rule.

"If, upon a motion by the offeror within 10 days after the entry of judgment, the court determines that an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of the litigation, it may impose an appropriate sanction upon the offeree. In making this determination the court shall consider all of the relevant circumstances at the time of the rejection, including (1) the then apparent merit or lack of merit in the claim that was the subject of the offer, (2) the closeness of the questions of fact and law at issue, (3) whether the offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer, (4) whether the suit was in the nature of a "test case," presenting questions of far-reaching im-

ings on this proposed amendment were held only several months ago.[59]

In the meantime, numerous revisions of § 1988 have been proposed in Congress in recent years. A 1981 proposal would have imposed a rule similar to that adopted by the Court today,[60] but it drew sharp opposition during legislative hearings [61] and never was voted out of Subcommittee. Subsequent proposals to the same effect have had a similar fate.[62] In 1984, legislation was introduced that would have adopted the same rule but subject to the qualification that the failure to accept a settlement offer "was not reasonable at the time such failure occurred." [63] Hearings were held on this legislation,[64] but it too never was voted out of Subcommittee.

This activity is relevant in two respects. First, it rather strongly suggests that neither the Advisory Committee nor Congress have viewed Rule 68 as currently governing attorney's fees, else the proposals to amend Rule 68 to include attorney's fees would largely be unnecessary. Second, the Committee and Congress have given close consideration to a broad range of troubling issues that would be raised by application of Rule 68 to attorney's fees, such as (1) whether to import a reasonableness standard into Rule 68, (2) whether and to what extent district courts should have discretion in applying the Rule, (3) the need to

portance affecting non-parties, (5) the relief that might reasonably have been expected if the claimant should prevail, and (6) the amount of the additional delay, cost, and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged.

"In determining the amount of any sanction to be imposed under this rule the court also shall take into account (1) the extent of the delay, (2) the amount of the parties' costs and expenses, including any reasonable attorney's fees incurred by the offeror as a result of the offeree's rejection, (3) the interest that could have been earned at prevailing rates on the amount that a claimant offered to accept to the extent that the interest is not otherwise included in the judgment, and (4) the burden of the sanction on the offeree.

"This rule shall not apply to class or derivative actions under Rules 23, 23.1, and 23.2." Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Sept. 1984), reprinted in 102 F.R.D. 407, 432–433 (1985).

59. See generally Proposed Amendments to the Federal Rules of Civil Procedure: Hearings before the Standing Committee of the Advisory Committee on Civil and Criminal Rules of the Judicial Conference of the United States (Washington, D.C., Feb. 1, 1985); Proposed Amendments to the Federal Rules of Civil Procedure: Hearings before the Standing Committee and the Advisory Committees on Civil and Criminal Rules of Practice and Procedure of the Judicial Conference of the United States (San Francisco, Cal., Feb. 21, 1985).

60. During Subcommittee hearings, Senator Hatch submitted a proposed amendment to S. 585, 97th Cong., 1st Sess. (1981), § 2(c) of which would have provided: "No fee shall be awarded under [§ 1988] as compensation for that part of litigation subsequent to a declined offer of settlement when such offer was as substantially favorable to the prevailing party as the relief ultimately awarded by the court." Attorney's Fees Awards: Hearings on S. 585 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 2nd Sess. 13 (1982).

61. See *id.*, at 17–18, 29–31, 51, 65–66, 72. See also Municipal Liability Under 42 U.S.C. § 1983: Hearings on S. 585 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 1st Sess. (1981).

62. See, *e.g.*, S. 141, 98th Cong., 1st Sess. (1983); H.R. 721, 99th Cong., 1st Sess. (1985).

63. S. 2802, § 8(2), 98th Cong., 2d Sess. (1984):

"No award of attorney's fees and related expenses subject to the provisions of this Act may be made—

. . . . . .

"(2) for services performed subsequent to the time a written offer of settlement is made to a party, if the offer is not accepted and a court or administrative officer finds that—

"(A) the relief finally obtained by the party is not more favorable to the party than the offer of settlement, and

"(B) the failure of the party to accept the offer of settlement was not reasonable at the time such failure occurred."

64. See Legal Fees Equity Act: Hearings on S. 2802 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 98th Cong., 2d Sess. (1984).

revise Rule 68 so as to ensure that offerees have had sufficient time and discovery to evaluate the strength of their cases and the reasonableness of settlement offers, (4) application of the Rule to suits for non-pecuniary relief, (5) application of the Rule to class-action litigation, (6) conflicts of interest between attorneys and clients that the Rule might create, and (7) the precise nature and scope of the sanction. Many of the proposals discussed above have been carefully crafted to address these problems. See nn. 56, 58, and 63, *supra*.

Congress and the Judicial Conference are far more institutionally competent than the Court to resolve this matter. Because the issue before us at the very least is ambiguous, and because the "plain language" approach leads to so many inexplicable inconsistencies in the operation of the Rules and the substantive fees-award statutes, the Court should have stayed its hand and allowed these other avenues for amending Rule 68 to be pursued. Under these circumstances, the Court's decision to the contrary constitutes poor judicial administration as well as poor law, and it renders even more imperative the need for Congress and the Judicial Conference to resolve this problem with dispatch.

APPENDIX TO OPINION OF BRENNAN, J., DISSENTING

Congress has enacted well over 100 fee-shifting statutes, which typically fall into three broad categories:

(A) *Statutes that refer to attorney's fees "as part of the costs."* Variations include "attorney's fees to be taxed and collected as part of the costs," "costs including attorney's fees," and "attorney's fees and other litigation costs." Under the Court's "plain language" approach, these various formulations all "defin[e] 'costs' to include attorney's fees." *Ante*, at 3017. Thus where an action otherwise is governed by Rule 68, attorney's fees that are potentially awardable under these statutes "are to be included as costs for purposes of Rule 68." *Ibid.*

(B) *Statutes that do not refer to attorney's fees as part of the costs.* Many other fee statutes do not describe fees "as" costs, but instead as an item separate from costs. Typical formulations include "costs and a reasonable attorney's fee," "costs together with a reasonable attorney's fee," and "costs, expenses, and a reasonable attorney's fee." Some statutes simply authorize awards of fees without any reference to costs. Under the Court's "plain language" approach, none of these formulations "defin[e] 'costs' to include attorney's fees." *Ante*, at 3017. Thus where an action otherwise is governed by Rule 68, attorney's fees that are potentially awardable under these statutes are *not* subject to Rule 68 and instead are to be evaluated solely under the reasonableness standard as summarized in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).

(C) *Statutes that may or may not refer to attorney's fees as part of the costs.* A number of statutes authorize the award of "costs and expenses, including attorney's fees." It is altogether uncertain how such statutes should be categorized under the Court's "plain language" approach to Rule 68. On the one hand, if the phrase "including attorney's fees" is read as modifying the word "costs" at least in part, attorney's fees that are potentially awardable under these statutes arguably are subject to Rule 68. On the other hand, if "including attorney's fees" is read as modifying only the word "expenses" (which seems to be the more plausible "plain meaning"), fees under these statutes are *not* subject to Rule 68 and instead are governed solely by the reasonableness standard as summarized in *Hensley v. Eckerhart*, *supra*.

The following is a summary of the statutes enacted by Congress authorizing courts to award attorney's fees, broken down into the three categories discussed above.[65] The Court has not explained why

65. This list does not purport to be a complete enumeration of all statutes authorizing court-

APPENDIX—Continued

it is that either Congress or the drafters of the Federal Rules might have intended to create such disparate settlement incentives based on minor variations in the phraseology of attorney's fee statutes.

A. *Attorney's Fees Referred to as "Costs"*

1. Freedom of Information Act, 88 Stat. 1562, as amended, 5 U.S.C. § 552(a)(4)(E)(F), 5 U.S.C.A. § 552(a)(4)(F) (1985 Supp.).
2. Privacy Act of 1974, 88 Stat. 1901, as amended, 5 U.S.C. §§ 552a(g)(2)(B), 552a(g)(4)(B).
3. Government in the Sunshine Act, 90 Stat. 1245, 5 U.S.C. § 552b(i).
4. Commodity Exchange Act, as added by § 14 of the Commodity Futures Trading Commission Act, 88 Stat. 1394, 7 U.S.C. § 18(d)–(e).
5. Packers and Stockyard Act of 1921, 42 Stat. 166, as amended, 7 U.S.C. § 210(f).
6. Perishable Agricultural Commodities Act of 1930, 46 Stat. 534, as amended, 7 U.S.C. § 499g(b).
7. Agricultural Fair Practices Act of 1967, 82 Stat. 95, 7 U.S.C. §§ 2305(a) and (c).
8. Home Owners' Loan Act of 1933, 48 Stat. 132, as amended, 12 U.S.C. § 1464(q)(3).
9. Bank Holding Company Act Amendments of 1970, 84 Stat. 1767, 12 U.S.C. § 1975.
10. Clayton Antitrust Act, 38 Stat. 731, as amended, 15 U.S.C. §§ 15(a), 15(b).
11. Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1394, 1396, as amended, 15 U.S.C. §§ 15c(a)(2), 26.
12. Unfair Competition Act of 1916, 39 Stat. 798, 15 U.S.C. § 72.
13. Securities Act of 1933, 48 Stat. 82, as amended, 15 U.S.C. § 77k(e).
14. Trust Indenture Act of 1939, as added by § 315b of the Securities and Exchange Commission Act, 53 Stat. 1171, 1176, 15 U.S.C. §§ 77ooo(e), 77www(a).
15. Securities Exchange Act of 1934, 48 Stat. 890, 898, as amended, 15 U.S.C. §§ 78i(e), 78r(a).
16. Jewelers Hall-Mark Act, 34 Stat. 262, as amended, 15 U.S.C. § 298(b)–(d).
17. Consumer Product Safety Act, 86 Stat. 1218, 1226, as amended, 15 U.S.C. §§ 2060(c), (f), 2072(a), 2073.
18. Hobby Protection Act, 87 Stat. 686, 15 U.S.C. § 2102.
19. Export Trading Company Act of 1982, 96 Stat. 1243, 15 U.S.C. §§ 4016(b)(1), (4).
20. National Cooperative Research Act of 1984, 98 Stat. 1817, 15 U.S.C.A. § 4304(a)–(b) (Supp.1985).
21. National Historic Preservation Act Amendments of 1980, 94 Stat. 3002, as added, 16 U.S.C. § 470w–4.
22. Endangered Species Act of 1973, 87 Stat. 897, as amended, 16 U.S.C. § 1540(g)(4).
23. Public Utility Regulatory Policies Act of 1978, 92 Stat. 3129, 16 U.S.C. § 2632(a)–(b).
24. Copyright Act of 1976, 90 Stat. 2586, 17 U.S.C. § 505.
25. Semiconductor Chip Protection Act of 1984, 98 Stat. 3353, 17 U.S.C.A. § 911(f) (Supp.1985).
26. Racketeer Influenced and Corrupt Organizations Act, 84 Stat. 944, 18 U.S.C. § 1964(c).
27. Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 223, as amended, 18 U.S.C. § 2520.
28. Jury System Improvement Act of 1978, as amended, 28 U.S.C.A. § 1875(d)(2) (Supp.1985).
29. Rehabilitation Act of 1973, 92 Stat. 2982, 29 U.S.C.A. § 794a(b) (Supp. 1985).
30. Surface Mining Control and Reclamation Act of 1977, 91 Stat. 503, 30 U.S.C. § 1270(d).
31. Deep Seabed Hard Mineral Resources Act, 94 Stat. 573, 30 U.S.C. § 1427(c).

awarded attorney's fees. Moreover, I do not suggest that all of these statutes necessarily are governed by Rule 68's offer-of-judgment provisions.

APPENDIX—Continued

32. Federal Oil and Gas Royalty Management Act of 1982, 96 Stat. 2458, 30 U.S.C. § 1734(a)(4).
33. Federal Water Pollution Control Act, as added by § 505 of Title V, 86 Stat. 888, 33 U.S.C. § 1365(d).
34. Marine Protection, Research, and Sanctuaries Act of 1972, 86 Stat. 1057, 33 U.S.C. § 1415(g)(4).
35. Deepwater Ports Act of 1974, 88 Stat. 2141, 33 U.S.C. § 1515(d).
36. Act to Prevent Pollution from Ships, 94 Stat. 2302, 33 U.S.C. § 1910(d).
37. Safe Drinking Water Act, 88 Stat. 1690–1691, as amended, 42 U.S.C. §§ 300j–8(d), 300j–9(2)(B)(i)(ii).
38. Voting Rights Act of 1965, 79 Stat. 445, as amended, 42 U.S.C. § 1973*l*(e).
39. The Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, 42 U.S.C. § 1988.
40. Civil Rights of Institutionalized Persons Act, 94 Stat. 350–351, 42 U.S.C. §§ 1997a(b), 1997c(d).
41. Title II of the Civil Rights Act of 1964, 78 Stat. 244, 42 U.S.C. § 2000a–3(b).
42. Title III of the Civil Rights Act of 1964, 78 Stat. 246, 42 U.S.C. § 2000b–1.
43. Title VII of the Civil Rights Act of 1964, 78 Stat. 261, 42 U.S.C. § 2000e–5(k).
44. Privacy Protection Act of 1980, 94 Stat. 1880, 42 U.S.C. § 2000aa–6(f).
45. Noise Control Act of 1972, 86 Stat. 1244, 42 U.S.C. § 4911(d).
46. Comprehensive Older Americans Act Amendments of 1978, 92 Stat. 1555, 42 U.S.C. § 6104(e)(1).
47. Energy Policy and Conservation Act, 89 Stat. 930, 42 U.S.C. § 6305(d).
48. Resource Conservation and Recovery Act of 1976, as added, 90 Stat. 2826, 42 U.S.C. § 6972(e).
49. Clean Air Act, 84 Stat. 1686, 1706–1707, 42 U.S.C. §§ 7413(b), 7604(d), 7607(f).
50. Clean Air Act Amendments of 1977, 91 Stat. 784, 42 U.S.C. § 7622(e)(2).
51. Powerplant and Industrial Fuel Use Act of 1978, 92 Stat. 3335, 42 U.S.C. § 8435(d).
52. Ocean Thermal Energy Conversion Act of 1980, 94 Stat. 990, 42 U.S.C. § 9124(d).
53. Outer Continental Shelf Lands Act Amendments of 1978, 92 Stat. 657, 43 U.S.C. § 1349(a)(5).
54. Railway Labor Act of 1926, 44 Stat. 578, as amended, 45 U.S.C. § 153(p).
55. Shipping Act of 1916, 39 Stat. 737, as amended, 46 U.S.C. § 829.
56. Merchant Marine Act of 1936, 49 Stat. 2015, as amended, 46 U.S.C. § 1227.
57. Shipping Act of 1984, 98 Stat. 3132, 46 U.S.C.A. § 1710(h)(2) (Supp.1985).
58. Communications Act of 1934, 48 Stat. 1072, 1095, 47 U.S.C. §§ 206, 407.
59. Cable Communications Policy Act of 1984, 98 Stat. 2779, 47 U.S.C.A. §§ 553(c)(2), 605(d)(3)(B) (Supp.1985).
60. Natural Gas Pipeline Safety Act, 90 Stat. 2076, 49 U.S.C.A. § 1686(e) (Supp. 1985).
61. Hazardous Liquid Pipeline Safety Act of 1979, 93 Stat. 1015, 49 U.S.C. § 2014(e).
62. Interstate Commerce Act, 24 Stat. 382, as amended, 49 U.S.C. § 11705(d)(3).
63. Codification of Interstate Commerce Act and related Laws, 92 Stat. 1337, 49 U.S.C. § 11710(b).
64. Foreign Intelligence Surveillance Act of 1978, 92 Stat. 1796, 50 U.S.C. § 1810(c).

B. *Attorney's Fees Not Referred to as "Costs"*

1. Privacy Act of 1974, 88 Stat. 1897, as amended, 5 U.S.C. § 552a(g)(4).
2. Plant Variety Act, 84 Stat. 1556, 7 U.S.C. § 2565.
3. Bankruptcy Act of 1978, 92 Stat. 2559, 2570, 2572, 2590, as amended, 11 U.S.C. §§ 303(i), 362(h), 363(n), 523(d).

APPENDIX—Continued

4. Home Owners' Loan Act of 1933, 48 Stat. 132, as amended, 12 U.S.C. § 1464(d)(8)(A).
5. National Housing Act, 48 Stat. 1260, as amended, 12 U.S.C. § 1730(m)(3).
6. Federal Credit Union Act, 84 Stat. 1010, as amended, 12 U.S.C. § 1786(p).
7. Federal Deposit Insurance Act, 64 Stat. 879, as amended, 12 U.S.C. § 1818(n).
8. Real Estate Settlement Procedures Act of 1974, 88 Stat. 1728, as amended, 12 U.S.C. § 2607(d)(2)(b).
9. Right to Financial Privacy Act of 1978, 92 Stat. 3708, 3789, 12 U.S.C. §§ 3417(a)(4), 3418.
10. Securities Exchange Act of 1934, 48 Stat. 899, as amended, 15 U.S.C. § 78u(h)(8).
11. Trademark Act, 60 Stat. 439, as amended, 15 U.S.C. § 1117.
12. National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 724, 15 U.S.C. § 1400(b).
13. Truth-in-Lending Act, 82 Stat. 157, as amended, 15 U.S.C. § 1640(a).
14. Consumer Leasing Act, 90 Stat. 259, 15 U.S.C. § 1667b(a).
15. Consumer Credit Protection Act, as added by § 601 of the Fair Credit Reporting Act, 84 Stat. 1134, 15 U.S.C. §§ 1681n(3), 1681o(2).
16. Consumer Credit Protection Act, as added by § 503 of the Equal Credit Opportunity Act, 88 Stat. 1524, 15 U.S.C. § 1691e(d).
17. Consumer Credit Protection Act, as added by § 814 of the Fair Debt Collection Practices Act, 91 Stat. 881, 15 U.S.C. § 1692k(a).
18. Electronic Fund Transfer Act, 92 Stat. 3737, 15 U.S.C. §§ 1693m(a), (f).
19. Interstate Land Sales Full Disclosure Act, 82 Stat. 595, as amended, 15 U.S.C. § 1709(c).
20. Motor Vehicle Information and Cost Savings Act, 86 Stat. 955, 963, as amended, 15 U.S.C. §§ 1918(a), 1989(a)(2).
21. Toxic Substances Control Act, 90 Stat. 2039, 2041–2042, 15 U.S.C. §§ 2618(d), 2619(c)(2), 2020(b)(4)(C).
22. Petroleum Marketing Practices Act, 92 Stat. 331, 15 U.S.C. § 2805(d)(1), (3).
23. Condominium and Cooperative Abuse Relief Act of 1980, 94 Stat. 1677, 1679, 15 U.S.C. §§ 3608(d), 3611(d).
24. Alaska National Interest Lands Conservation Act, 94 Stat. 2426, 16 U.S.C. § 3117(a).
25. Navajo and Hopi Indian Relocation Amendments Act of 1980, 94 Stat. 934, 25 U.S.C. § 640d–27(b).
26. Tax Reform Act of 1976, 90 Stat. 1660, 26 U.S.C. § 6110(i)(2).
27. Codification of Title 28, Judiciary and Judicial Procedure, 62 Stat. 869, as amended, 28 U.S.C. § 1927.
28. Equal Access to Justice Act, 94 Stat. 2327, 28 U.S.C. § 2412(b).
29. Norris-La Guardia Act, 47 Stat. 71, 29 U.S.C. § 107.
30. Fair Labor Standards Act of 1938, 52 Stat. 1069, as amended, 29 U.S.C. § 216(b).
31. Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 524, 29 U.S.C. § 431(c).
32. Age Discrimination in Employment Act of 1967, 81 Stat. 604, as amended, 29 U.S.C. § 626(b).
33. Employee Retirement Income Security Act of 1974, 88 Stat. 891, as amended, 29 U.S.C. § 1132(g).
34. Multiple Mineral Development Act, 68 Stat. 710, 30 U.S.C. § 526(e).
35. State and Local Fiscal Assistance Act of 1972, 86 Stat. 919, as amended, 31 U.S.C. § 6721(c).
36. Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1438, as amended, 33 U.S.C. § 928(a).
37. Patent Infringement Act, 66 Stat. 813, 35 U.S.C. § 285.
38. Servicemen's Group Life Insurance Act, 72 Stat. 1165, 38 U.S.C. § 784(g).
39. Social Security Act, 49 Stat. 624, as amended, 42 U.S.C. § 406(b).

APPENDIX—Continued

40. Atomic Energy Act of 1954, 68 Stat. 946, 42 U.S.C. § 2184.
41. Legal Services Corporation Act, as added, 88 Stat. 381, as amended, 42 U.S.C. § 2996e(f).
42. Fair Housing Act of 1968, 82 Stat. 88, 42 U.S.C. § 3612(c).
43. Mobile Home Construction and Safety Standards Act, 88 Stat. 706, as amended, 42 U.S.C. § 5412(b).
44. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 94 Stat. 2792, 42 U.S.C. § 9612(c)(3).
45. Outer Continental Shelf Lands Act Amendments of 1978, 92 Stat. 658, 682, 43 U.S.C. §§ 1349(b)(2), 1818(c)(1)(C).
46. Alaska National Interest Lands Conservation Act, 94 Stat. 2430, 43 U.S.C. § 1631(c).
47. Act of Mar. 2, 1897, 29 Stat. 619, 48 U.S.C. § 1506.
48. Codification of Interstate Commerce Act and related Laws, 92 Stat. 1454, as amended, 49 U.S.C. § 11708(c).
49. Household Goods Transportation Act of 1980, 94 Stat. 2016, as amended, 49 U.S.C. § 11711(d)–(e).

C. *"Costs and Expenses, Including Attorney's Fees"*

1. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 88 Stat. 2189, 15 U.S.C. § 2310(d)(2).
2. Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1263, 29 U.S.C. § 1451(e).
3. Federal Mine Safety and Health Act of 1977, 91 Stat. 1303, 92 Stat. 183, 30 U.S.C. §§ 815(c)(3), 938(c).
4. Surface Mining Control and Reclamation Act of 1977, 91 Stat. 511, 520, 30 U.S.C. §§ 1275(e), 1293(c).
5. Uniform Relocation Assistance and Real Property Acquisition Policies Act, 84 Stat. 1906, 42 U.S.C. §§ 4654(a) and (c).
6. Nuclear Regulatory Commission Appropriations Authorization of 1978, 92 Stat. 2953, 42 U.S.C. § 5851(e)(2).
7. Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 122, as amended, 45 U.S.C. § 854(g).

UNITED STATES, Petitioner

v.

Louise SHEARER, Individually, and as Administratrix For the Estate of Vernon Shearer, Deceased.

No. 84–194.

Argued Feb. 25, 1985.

Decided June 27, 1985.

Mother of army private, who was killed by fellow serviceman while off duty, brought action against the United States under Federal Tort Claims Act, claiming that the Army's alleged negligence caused son's death. The United States District Court for the Eastern District of Pennsylvania, John B. Hannum, J., rendered summary judgment for the Government. The Court of Appeals for the Tenth Circuit, 723 F.2d 1102, reversed and remanded. Certiorari was granted. The Supreme Court, Chief Justice Burger, held that the *Feres* doctrine barred recovery notwithstanding that the incident occurred off base and off duty or that the mother characterized her claim as a challenge to a "straightforward personnel decision" because whatever name it was called the matter involved a decision of command.

Reversed.

Justice Brennan filed opinion concurring in part and concurring in the judgment, in which Justice Blackmun and Justice Stevens joined.

Justice Marshall filed on opinion concurring in the judgment.

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June 16, 1987

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

RE: Revision of TRCP 204

Dear Bill:

Enclosed is a letter from Judge Michael Schattman concerning a proposed change to Rule 204. Please be prepared to give an oral report regarding this proposal at our June meeting. I am including same on our agenda.

Very truly yours,

LUTHER H. SOULES ~~III~~

LHSIII/tat
encl/as

We are planning to have
you as house guests
Friday 6/26.

00000309

Want to come in Thursday?

MICHAEL D. SCHATTMAN
DISTRICT JUDGE
348TH JUDICIAL DISTRICT OF TEXAS
TARRANT COUNTY COURT HOUSE
FORT WORTH, TEXAS 76196-0281
PHONE (817) 877-2715

May 13, 1987

Luther H. Soules, III
Soules, Reid & Butts
800 Milam Building
San Antonio, Texas 78205

Dear Luke:

Thanks for your reply to my letter of April 29th. I particularly liked the last sentence. I will save it to impress the voters, if need be, and my mother will believe it.

As you could readily tell my letter expressed a level of frustration because the current COAJ has been working hard to do what it is supposed to do and wants to be involved in the rules process. The current leadership and membership understands the seriousness of its function and I hope that will continue to be the case. I agree that there is no reason for the Court or the SCAC to wait for the Bar's committee to get its act together. That should never be a problem again. With rules changes now going into effect only in January of even-numbered years there should be sufficient time for there to be a useful exchange between the two bodies.

Since I will be at my son's high school graduation instead of the May 16th COAJ meeting, I am calling Pat to see if some kind of draft can be provided for a rule covering the invocation of "the rule" in depositions (267 T.R.C.P. and 613 T.R.E.). Failing that, I am enclosing a copy of some language which we discussed, but got hung up in what to do about expert witnesses. The relevant portion of the supporting memo is also enclosed.

As to my "stripper" rule, some suggested language is enclosed. I am confident that it can use reworking.

332
304

You need not have stated that your comments were sent with "respect," but I do appreciate it. If you feel the need to take me down a peg or two, just do it. My children are all smarter than I am and they emphasize with every passing day that I have a lot to be humble about.

Best wishes,

Michael D. Schattman

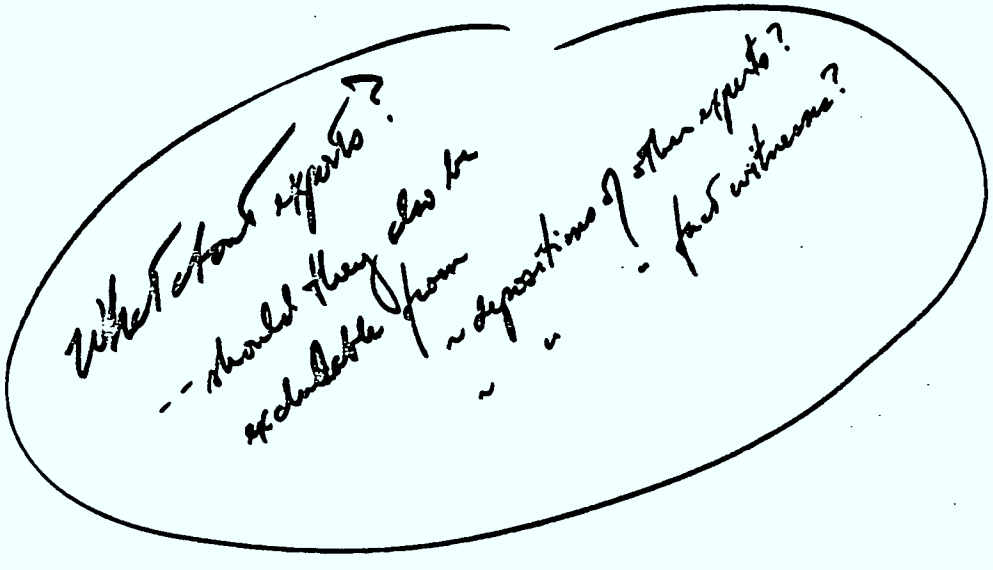
MDS/lw

xc

encl.

RULE 204. Examination, Cross-Examination and Objections

5. At the request of any party, all persons shall be excluded from the examination room during a depositon except the parties, their attorneys, the deposition officers, and the deponent and his counsel, if any. A corporate party to the suit may be represented by an officer or other representative of such corporation. Parties may not be excluded from a deposition except by leave of court upon a showing of good cause.



this, the word shall is substituted for the word may in line 3 of Rule 204.

Despite the undeniable utility of the sequestration of witnesses in the courtroom, there is no provision in the Texas Rules of Civil Procedure, the statutes, or decision law authorizing the invocation of the rule at pre-trial depositions. The rule is often recognized at depositions as a matter of custom; however, there is no authority upon which one can rely if opposition to sequestration is made. Lovett and Branton, Texas Depositions, Vol. 1A, p. T-10 1986). "The most ordinary reaction for violation of this "custom" is to refuse to proceed with the deposition until the offending persons leave the deposition room." Id. Likewise, either party may request a protective order authorizing the presence or exclusion of an observer from the deposition. Both choices have the undesirable element of delay and unnecessary involvement of the court in pretrial discovery.

A suggested amendment to Rule 204 authorizes sequestration of nontestifying witnesses. Under this proposal, sequestration is mandatory if requested without the necessity of judicial intervention. The proposal places the burden on the party opposing sequestration to show cause for the presence of an observer at another witness' deposition. Support for this position is found in Dardashti v. Singer, 407 So. 2d 1098 (Fla. Dist. Ct. App. 1982). In Dardashti the court found that the same justification for sequestering witnesses at trial existed for sequestering deposition witnesses. Accordingly, the court gave the burden of proof to the opponent to show cause for the observer's presence at deposition, just as the Florida courts do at trial. Equally important, the Florida court based its rationale on the Florida Rule of Evidence 615, which is identical to Texas Rule of Evidence 613. As mentioned above, under Rule 613, exclusion is the rule, not the exception.

Colorado practitioners have urged the Colorado rulemakers to adopt proposals authorizing sequestration of witnesses at deposition. See Kostolansky, "Sequestration of Deponents in Civil Litigation," 15 The Colorado Lawyer 1028 (June 1986); Kall, "Sequestration - A Few Observations and a Modest Proposal," 8 The Colorado Lawyer 1970 (October 1979). One Colorado commentator proposed that Colorado adopt F.R.E. 615 (which was adopted verbatim as T.R.E. 613) and amend its discovery rules to order depositions conducted in accordance with that rule. Kall, "Sequestration - A Few Observations and a Modest Proposal", 8 The Colorado Lawyer at 1976. Currently, Rule 26(c) of the Colorado Rules of Civil Procedure mirrors Rule 26(c) of the Federal Rules of Civil Procedure. Under both versions, a party may seek a protective order restricting the presence of various persons at discovery. As the Colorado commentators suggest, this process requires judicial supervision of depositions; an unnecessary waste of limited resources. Id. The proposal suggested herein

(and in Colorado) is self supporting and requires judicial intervention in limited circumstances to prevent abuse.

Finally, one Federal court has construed F.R.E. 615 to authorize the sequestration of certain deposition witnesses as a matter of right. In Williams v. Electronic Control Systems, Inc., 68 F.R.D. 703 (E.D. Tenn. 1975), the court stated in dictum that under F.R.E. 615, a party may exclude any witness from attending another witness' deposition upon demand, excepting three catagories of witnesses (presumably parties, their attorneys, and as explicitly stated therein certain expert witnesses).

WCD:lc

STANDING SUBCOMMITTEE ON RULES 216-314

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subcommittee report
6-87

Texas Tech University

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

May 18, 1987

Mr. Luther H. Soules III, Chairman
800 Milam Building
East Travis at Soledad
San Antonio, TX 78205

Re: SCAC - Report of Subcommittee on Tex.R.Civ.P. 216-314

Dear Luke:

Our subcommittee has met, considered all the proposals submitted to us, with the following results:

1. Recommend Tex.R.Civ.P. 20a (new). This would incorporate the concern of Hardy's clerk, proposed Rule 305a and require the repeal of Tex.R.Civ.P. 305.

2. Recommend amendment of Tex.R.Civ.P. 216.

3. Recommend amendment of Tex.R.Civ.P. 239a.

4. Do not recommend the amendment of Tex.R.Civ.P. 247 and 250 nor adoption of 247a.

5. Recommend the SCAC reconsider the repeal of Tex.R.Civ.P. 264 on January 1, 1988. While forcible entry and detainer cases are governed by their own rules and small claims court cases by the Government Code, what appellate process will be available for other types of justice court cases after that date?

6. Recommend amendment of Tex.R.Civ.P. 267.

7. Recommend amendment of Tex.R.Civ.P. 273, 274, 275, 276, and 278. These are housekeeping amendments only and should be made effective January 1, 1988 to avoid unnecessary confusion.

Drafts of the necessary documents to implement these recommendations are attached.

Sincerely,

J. Hadley Edgar
Professor of Law

JHE/nt
cc: All subcommittee members

Subcommittee report
6-87

Rule 20a.(new). Preparation and Signing of Judgments and Orders

All judgments and orders shall be promptly prepared by the prevailing party and submitted to the trial court for signature and to all other counsel of record. If the non-prevailing party opposes the instrument proferred to the court, such party shall, within seven (7) days following receipt thereof, request the court to set such matter for hearing as soon as practicable. The court shall read and sign the original of all such documents.

Subcommittee Report
6-87

Rule 216. Fee

No jury trial shall be had in any civil suit, unless application be made therefor and unless a fee of ~~five~~ ten dollars if in the district court, and ~~three~~ five dollars if in the county court, be deposited by the applicant with the clerk to the use of the county on or before 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 ten days in advance. The clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet.

Subcommittee report
6-8.1

Rule 239a. Notice of Default Judgment

At or immediately prior to the time an interlocutory or final default judgment is rendered, the party taking the same or his attorney shall certify to the clerk in writing the last known mailing address of the party against whom the judgment is taken, which certificate shall be filed among the papers in the cause. Immediately upon the signing of the judgment, the clerk shall mail ~~a post card notice thereof~~ written notice thereof by certified mail, return receipt requested, to the party against whom the judgment was rendered at the address shown in the certificate, and note the fact of such mailing on the docket. The notice shall state the number and style of the case, the court in which the case is pending, the names of the parties in whose favor and against whom the judgment was rendered, and the date of the signing of the judgment. The returned receipt will become a part of the court's file. Cost of the certified mailing will be paid by the party obtaining the judgment and will be taxed as a cost of court. Failure to comply with the provisions of this rule shall not affect the finality of the judgment.

Subcommittee report
6-87

Rule 267. Witnesses Placed Under Rule

(a) At the request of either party, in a civil case, the witnesses on both sides ~~may~~ shall be sworn and removed out of the court room to some place where they can not hear the testimony as delivered by any other witness in the cause. This is termed placing witnesses under the rule. ~~Neither party to the suit shall be placed under the rule. Where a corporation is a party to the suit, the court may exempt from the rule an officer or other representative of such corporation to aid counsel in the presentation of the case.~~ (b) This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his case. (c) If any party be absent the court in its discretion may exempt from the rule a representative of such party. (d) Witnesses, when placed under the rule, shall be instructed by the court that they are not to converse with each other or with any other person about the case other than the attorneys in the case, except by permission of the court, and that they are not to read any report of or comment upon the testimony in the case while under the rule. (e) Any witness or other person violating such instructions may be punished for contempt of court.

Subcommittee report
6-87

Rule 273. Jury Submissions

Either party may present to the court and request written ~~instructions;~~ questions, ~~charges~~, definitions, and instructions to be given to the jury; and the court may give them or a part thereof, or may refuse to give them, as may be proper. Such requests shall be prepared and presented to the court and submitted to opposing counsel for examination and objection within a reasonable time after the charge is given to the parties or their attorneys for examination. A request by either party for any ~~instructions;~~ questions, ~~charges~~, definitions or instructions shall be made separate and apart from such party's objections to the court's charge.

Change by amendment effective January 1, 1988.

Subcommittee report
6-87

Rule 274. Objections and Requests

A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection. Any complaint as to a question, ~~charge~~, definition or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections. When the complaining party's objection, or requested question, ~~charge~~, definition, or instruction is, in the opinion of the appellate court, obscured or concealed by voluminous unfounded objections, minute differentiations or numerous unnecessary requests, such objection or request shall be untenable. No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only.

Change by amendment effective January 1, 1988.

Subcommittee report
6-87

Rule 275. Charge Read Before Argument

Before the argument is begun, the trial court shall read the charge to the jury in the precise words in which it was written, including all questions, ~~charges~~, definitions, and instructions which the court may give.

Change by amendment effective January 1, 1988.

subcommittee report
6-87

Rule 276. Refusal or Modification

When an instruction, question or definition is requested and [there has been compliance with] the provisions of the law, ~~have been complied with and~~ the trial court, upon refusing ~~judge refuses~~ the same, ~~he~~ shall endorse thereon "Refused," and sign the same officially. Upon modifying ~~If the trial judge modifies~~ the same , the trial court ~~he~~ shall endorse thereon "Modified as follows: (stating ~~in what~~ the particular modification ~~he has modified the same~~) and given, and exception allowed" and sign the same officially. Such refused or modified instruction, question, or definition ~~or explanatory instruction~~, when so endorsed shall constitute a bill of exceptions, and it shall be conclusively presumed that the party asking the same presented it at the proper time, excepted to its refusal or modification, and that all the requirements of law have been observed, and such procedure shall entitle the party requesting the same to have the action of the trial court ~~judge~~ thereon reviewed without preparing a formal bill of exceptions.

Change by amendment effective January 1, 1988.

Subcommittee report
6-87

Rule 278. Submission of Questions, Definitions, and Instructions

The court shall submit the questions, instructions and definitions in the form provided by Rule 277, which are raised by the written pleadings and the evidence. Except in trespass to try title, statutory partition proceedings, and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to any submission of any question raised only by a general denial and not raised by affirmative written pleading by that party. Nothing herein shall change the burden of proof from what it would have been under a general denial. A judgment shall not be reversed because of the failure to submit other and various phases or different shades of the same question ~~issue~~. Failure to submit an question ~~issue~~ shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the question is one relied upon by the opposing party. Failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment.

Change by amendment effective January 1, 1988.

Subcommittee report
6-87

Rule 20a.(new). Preparation and Signing of Judgments and Orders

All judgments and orders shall be promptly prepared by the prevailing party and submitted to the trial court for signature and to all other counsel of record. If the non-prevailing party opposes the instrument proferred to the court, such party shall, within seven (7) days following receipt thereof, request the court to set such matter for hearing as soon as practicable. The court shall read and sign the original of all such documents.

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January 12, 1987

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

RE: Supreme Court Advisory Committee

Dear Hadley:

Enclosed is a Request for Attorney General Opinion on Facsimile Signature from Eve Lieber of Ray Hardy's office. Justice Wallace has requested that our Committee, as well as the COAJ, take a look at it.

Please draft, in proper form for Committee consideration, an appropriate Rule for submission to the Committee at our June meeting.

I have also included your letter of January 9, 1987, regarding Rule 277, on our June agenda.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
enclosure

300 series - Prof. Edgar

RAY HARDY
DISTRICT CLERK
HOUSTON, TEXAS 77002

July 25, 1984

TO: Ray Hardy
Hank Husky

FROM: Eve Lieb

SUBJECT: Request for Attorney General Opinion on Facsimile Signature

It has come to the attention of this office that Judges of the District and County Criminal Courts have directed Deputy District Clerks to affix facsimile stamp signatures to certain instruments where judicial signature is required by law. The issue we would like to have addressed by Attorney General opinion is: Whether a judge or group of judges of district or county courts can order or otherwise direct a district clerk or his deputies of the same county to affix by facsimile signature stamp that judge's signature to judgments where such are required by statute to be signed by the judge.

Judgment is defined under Art. 42.01, Sec. 1 of the Texas Code of Criminal Procedure as:

> A judgment is the written declaration of the court signed by the trial judge and entered of record showing the conviction or acquittal of the defendant.

Although under Art. 42.01, Sec. 2 the Judge may order the Clerk of the Court, Prosecuting Attorney, or the Attorney or Attorneys representing any defendant to prepare the judgment, or the Court may prepare the same, as amended in 1981 the statute requires that the Judge sign the judgment.

There has been no case law developed since the 1981 Amendment to Art. 42.01, Sec. 1, which sets forth whether the Judge may order the clerk to affix judicial signature to the judgment. However, clearly where one other than the judge prepares the judgment, the statute requires that the judge sign it representing his approval. The Supreme Court touched on this issue of preparation and approval of the judgment Burrell v Cornelius, 570 S.W.2d 382 (Tex. 1978), in which Justice Pope stated:

> It is the trial judge's ultimate responsibility to read every judgment and order, however long, and however many, and to correct every judgment and order.

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A second equally important issue is raised under the separation of powers doctrine set forth in Art. 2, Sec. 1 of the Texas Constitution, which prohibits any person or persons from one of the branches of government from exercising any power belonging to either of the other branches. The law is replete with cases in which the Texas Courts have held that where the legislature prescribes statutes, the courts must enforce them and may not modify, repeal, rewrite, or amend them. See generally: Martinez v State, 134 Cr.R. 180, 114 S.W.2d 874 (1938); Franklin v Pietzch, 334 S.W.2d 214, ref. n.r.e. (Tex. Civ. App. - Dall, 1960); A.M. Servicing Corp. of Dallas v State, 380 S.W.2d 747 (Tex. Civ. App. - Dallas, 1964); Skrabanek v Ritter, 412 S.W.2d 337, ref. n.r.e. (Tex. Civ. App. - Austin, 1967).

In particular the Court of Appeals held that the lower courts may not by judicial construction dispense with specific statutory requirements. See Southwestern Settlement & Development Company v Randolph 240 S.W. 655 (Tex. Civ. App., 1922) in which the Court of Appeals overruled a lower court ruling which had declared that a writ of execution which did not bear a court seal as required by statute constituted a conveyance and transfer of legal title.

Of particular similarity to our issue of who may affix a judge's signature is a statute adopted to assist the Governor of Texas in statutory duties which require his signature on certain instruments. By enactment of Art. 2.24 (a), created in 1983, the legislature adopted a law which provides:

> The Governor may appoint an authenticating officer in accordance with section (b) of the article and delegate to that officer the power to sign for the governor or to use the governor's facsimile signature for signing any document that does not have legal effect under the code unless it is signed by the governor.

Art. 2.24 (b) sets forth the particular circumstance by which such facsimile signature may be applied.

Contrary to what some officials believe to be a central issue, Texas case law clearly allows a judge to sign a legal instrument either by original hand signature or by facsimile stamp. Estes v State, 484 S.W.2d 711 (Tex. Crim. App. 1972); Parson v State, 429 S.W.2d 476, appeal after remand, 449 S.W.2d 78 (Tex. Crim. App. 1968). The issue raised impliedly in these and other cases is whether there is evidence contradicting the assumption that where signed by facsimile stamp, the signature was affixed by the officer statutorily required to do so. The implication is that where there is evidence to the contrary, the signature may be held to be invalid. The gravity of facsimile signature affixed by other than the official or his statutorily authorized agent is exemplified by case law which has held that an instrument with forged signature affixed may be held valid and binding unless there is evidence to the contrary. See Stout v Oliviera, 153 S.W.2d 590, error ref'd (Tex Civ. App. 1941).

In summary, it appears that unless another person may be authorized by statute to affix facsimile or substitute signature for an official, the officer whose signature must be affixed to specific instruments must so affix his signature whether by original handwriting or by facsimile stamp. Without a statute allowing this exception, it is our contention that a judge cannot order or authorize the clerk to sign for him where he is specifically required to do so by statute.

Subcommittee Report
6-87

Rule 216. Fee

No jury trial shall be had in any civil suit, unless application be made therefor and unless a fee of ~~five~~ ten dollars if in the district court, and ~~three~~ five dollars if in the county court, be deposited by the applicant with the clerk to the use of the county on or before 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 ten days in advance. The clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet.

Texas Rules of Civil Procedure (Murphree)

Rule 216. Request and Fee for Jury Trial

1. Request. No jury trial shall be had in any civil suit, unless a written request for a jury trial is filed with the clerk of the court a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than thirty days in advance.

2. Jury Fee. A fee of five dollars if in the district court and ~~three~~ [five] dollars if in the county court must be deposited with the clerk of the court within the time for making a written request for a jury trial. The clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet.

Amend Rule 216 as follows:

No jury trial shall be had in any civil suit, unless application be made therefor and unless a fee of five dollars (~~if in the district court, and three dollars if in the county court~~) be deposited by the applicant with the clerk to the use of the county on or before 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 ten days in advance. The clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet.

Amend Rule 544 as follows:

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

Amend Rule 739 by adding a new section that reads:

The citation must contain, in bold or conspicuous print, the information that the defendant may request a trial by jury, that such request must be made three days in advance of the date named in the citation, along with the costs for trial by jury.

Amend Rule 744 as follows:

Either party shall have the right of trial by jury by making the demand to the justice three days in advance of the date (~~on or before the day~~) for which the case is set for trial, and paying the jury fee of five (~~three~~) dollars. When a jury is demanded they shall be summoned as in other cases in justice court.

THE SUPREME COURT OF TEXAS

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

February 3, 1987

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

Professor J. Patrick Hazel, Chairman
Administration of Justice Committee
University of Texas School of Law
727 E. 26th Street
Austin, TX 78705

Re: Rules 216, 544, 739 and 744

Dear Luke and Pat:

I am enclosing suggested amendments to the above rules received from Judge Faye Murphree, Chairman of the Justices of the Peace Legislative Committee in Springtown.

May I suggest that these matters be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Honorable Faye Murphree
Chairman
J. P. Legislative Committee
P. O. Box 967
Springtown, TX 76082

Justices of the Peace and Constables Association of Texas

JUDGE JAMES W. DINKINS
PRESIDENT
Montgomery County Courthouse
Conroe, Texas 77301

February 9, 1987

Honorable James Wallace
Associate Justice
The Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Re: Amendments to Texas Rules of Court, Numbers 544, 739, 742 (relating to Justice of the Peace Courts) and 216 (relating to County and District Courts)

Dear Sir:

Thank you for your help concerning the above referenced amendments. The promptness with which you and your staff work took me by surprise and is very impressive.

These amendments were unanimously approved by the Board of our state association, upon recommendation from our legislative committee.

The impetus in seeking these amendments is the scheduling problems created for our dockets when the defendant comes in the day the case is set for trial and requests a jury. Invariably, the result is a postponement of anywhere from two to six weeks to enable the judge to have a jury summoned and find another open date on his docket. The old days of the constable going out on the streets and summarily bringing people in to serve as a juror is basically passed; when it is used at all, it is for one or two people to complete a panel, not for the entire panel.

We also believe this is inherently inequitable for the plaintiff who has been patiently (or sometimes not so patiently) waiting for his case to come to trial. This inequity is particularly true in forcible detainer cases where the defendant continues to occupy the premises of the landlord during the pendency of the suit. Although the landlord is entitled to a judgment for the past due rent that is accruing, he is unable to recover the rent in the majority of cases.

The increase in the jury fee is secondary to the primary purpose of the proposed amendments; however, if the rules are to be amended, we would like to have the increase as well. As you will note, we have also requested an amendment to Rule 216, County and District Courts. Since county courts have concurrent jurisdiction with justice of the peace courtts, we believed the amendment to Rule 216 was necessary if the other rules are amended.

Again, thank you for your help. We sincerely hope the Supreme Court will be able to assist us in the more efficient management of our courts.

Yours very truly,

W. Faye Murphree, Chairman
J.P. Legislative Committee

cc: Judge James Dinkins, President
J.P. Constables Assoc. of Texas

Subcommittee report
6-87

Rule 239a. Notice of Default Judgment

At or immediately prior to the time an interlocutory or final default judgment is rendered, the party taking the same or his attorney shall certify to the clerk in writing the last known mailing address of the party against whom the judgment is taken, which certificate shall be filed among the papers in the cause. Immediately upon the signing of the judgment, the clerk shall mail ~~a post card notice thereof~~ written notice thereof by certified mail, return receipt requested, to the party against whom the judgment was rendered at the address shown in the certificate, and note the fact of such mailing on the docket. The notice shall state the number and style of the case, the court in which the case is pending, the names of the parties in whose favor and against whom the judgment was rendered, and the date of the signing of the judgment. The returned receipt will become a part of the court's file. Cost of the certified mailing will be paid by the party obtaining the judgment and will be taxed as a cost of court. Failure to comply with the provisions of this rule shall not affect the finality of the judgment.

Rule 239a

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TELEPHONE
(512) 224-9144

February 24, 1987

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

RE: Supreme Court Advisory Committee

Dear Hadley:

Enclosed is a letter from Senator Ray Farabee regarding a proposed revision of Rule 239a.

Your study of same, with a view towards a report at our June 26-27, 1987 meeting, is appreciated. Please submit to me a copy of the report you intend to use no later than May 29, 1987, for inclusion in our agenda.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
enclosure
cc: Justice James P. Wallace

Time to study for draft & report

THE SUPREME COURT OF TEXAS

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

February 18, 1987

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

Professor J. Patrick Hazel, Chairman
Administration of Justice Committee
University of Texas School of Law
727 E. 26th Street
Austin, TX 78705

Re: Rule 239(a)

Dear Luke and Pat:

Enclosed is a copy of a letter from Senator Ray Farabee requesting a review of Rule 239(a).

May I suggest that this matter be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Honorable Ray Farabee
Texas Senate
P. O. Box 12068
Austin, Tx 78711

RAY FARABEE
District 30
P. O. Box 12068
Austin, Texas 78711
(512) 463-0130

P.O. Drawer S & P
Wichita Falls, Texas 76307
(817) 322-0746

The Senate of The State of Texas

COMMITTEES:

Chairman:
STATE AFFAIRS
Member:
FINANCE
CRIMINAL JUSTICE
LEGISLATIVE BUDGET BOARD
SUNSET COMMISSION

February 11, 1987

The Honorable James P. Wallace
Justice
Supreme Court of Texas
Supreme Court Building

Dear Justice Wallace:

I respectfully request Supreme Court review of Rule 239(a) of the Texas Rules of Civil Procedure. This rule requires the district clerk to mail a post card notice to the party against whom an interlocutory or final default judgment is rendered.

The specific requirement that a "post card" be used by district clerks when notifying a party appears archaic. Modern word processing technology, which could be efficiently used by district clerks, may be prohibited because of the restrictive language of this rule.

Simply deleting "a post card" from this rule would still require mailed notice while giving district clerks more latitude in how such mailed notice is provided.

Thank you for your consideration of this request.

Sincerely,

Ray Farabee

RF/dw

cc: Mrs. Pat Brown, President
District Clerks Association of Texas

Mr. Dorsey Trapp
District Clerk
Wichita County

00000340

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TELEPHONE
(512) 224-9144

February 6, 1987

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

RE: Supreme Court Advisory Committee

Dear Hadley:

Enclosed is a letter from Justice Franklin Spears regarding a proposed revision of Rule 239a.

Your study of same, with a view towards a report at our June 26-27, 1987 meeting, is appreciated.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
enclosure

THE SUPREME COURT OF TEXAS
P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

February 5, 1987

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

Professor Pat Hazel
University of Texas
School of Law
727 E. 26th
Austin, Texas 78705

Hon. Luther H. Soules III
Supreme Court Advisory Committee
Soules & Cliffe
800 Milam Building
San Antonio, Texas 78205

Gentlemen:

It seems to me that the appellate courts are filled with an unnecessary number of cases in which a defendant claims that he did not receive notice of a default judgment and claims that plaintiff knew his real address.

It occurs to me that your committee might consider amending Rule 239a to require that notice of default judgment be sent by certified mail or some form of notice more effective than a postcard.

I suggest that there would be fewer defaults and fewer attacks on defaults if a better method were devised to prove notice of default had been given.

Attached is a memorandum from Todd Clement, one of my briefing attorneys, with the information he obtained from the post office about types of mail.

I urge your consideration of such a proposal. It would eliminate the swearing match between the plaintiff who said notice was sent and the defendant who said he never received it.

Sincerely,

Franklin Spears
Justice

Enclosure

MEMORANDUM

TO: Judge Spears

FROM: Todd

DATE: November 13, 1986

RE: Default Notice Rules Change

Last Monday in conference you suggested a default notice rule change. Judge Wallace suggested that you write a letter concerning your suggestions. I have a few moments so I thought I would look at the rules and see which ones you would need to change.

First, Tex. R. Civ. P. 239a provides that:

> At or immediately prior to the time an interlocutory or final defult judgment is rendered, the party taking the same or his attorney shall certify to the clerk in writing the last known mailing address of the party against whom the judgment is taken, which certificate shall be filed among the papers in the cause. Immediately upon the signing of the judgment, the clerk shall mail a post card notice thereof to the party against whom the judgment was rendered at the address shown in the certificate, and note the fact of such mailing on the docket. The notice shall state the number and style of the case, the court in which the case is pending, the names of the parties in whose favor and against whom the judgment was rendered, and the date of the signing of the judgment. Failure to comply with the provisions of this rule shall not affect the finality of the judgment.

The underlined portions of the rule would be the portion which would be affected by your suggested change. You noted the recurring problem of the district clerk swearing that she sent the post card notice while the defendant swearing that the notice was never received. You even mentioned that this practice is ripe for corruption by the clerks. You observed that this Court has a number of cases each term in which this problem arises.

You suggested that the rule be changed to provide for notice by certified mail. I called the post office to find out the various specialized mailing features and what their cost would be.

1. Certified Mail: Cost -- first class postage + $.75. Advantages: a party at the address given must sign for the letter. A record of the signer with date of delivery is kept in the post office files and would be available to either party to the suit. Several features may be added to certified mail at an extra cost such as:

2. Return Receipt Requested: Cost -- $.70 for a total of $1.45. Advantages: the district or county clerk would then have a record of the notice in her files.

3. Change of Address Service: Cost -- $.20 and must be used with return receipt requested for a total of $1.65. This service would include a new address with the return receipt.

4. Restricted Delivery: Cost -- $1.25 plus return receipt fee for a total of $2.70. This service would deliver the notice only to the defendant.

If you need any more information, I would be glad to help.

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June 10, 1987

Professor J. Hadley Edgar
Texas Tech University
School of Law
Lubbock, Texas 79409

RE: Amendment to Rule 239a

Dear Hadley:

Enclosed is a letter from Charles Matthews regarding an amendment to Rule 239a. Please submit a report to me regarding his proposal by June 19, 1987, so that it can be included in our agenda.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as

xc all Subc Members

EXXON COMPANY, U.S.A.
POST OFFICE BOX 2180 • HOUSTON, TEXAS 77252-2180

CHARLES W. MATTHEWS
ASSOCIATE GENERAL ATTORNEY

Texas

June 3, 1987

Honorable Luther H. Soules, III
Supreme Court Advisory Committee
800 Milam Building
San Antonio, Texas 78205

Dear Luke:

At the last meeting of the Committee on Administration of Justice, a discussion of Rule 239a focused on the sufficiency of a post card for notice of a default judgment. The background material that we had before us discussed this rule in terms of cost of postage and verification of receipt. The committee felt that the post card was sufficient and that there was little justification for requiring notification at an increased postage rate.

Following the meeting, I received a call from Dorsey Trapp, the District Clerk in Wichita Falls. He expressed concern that Rule 239a prevented him from realizing efficiencies afforded by his computer. He reported that in his office, it is more efficient, and less costly, to mail a computer generated first-class letter than a hand generated post card. Therefore, Mr. Trapp is urging that the words "post card" be eliminated from the rule, thereby allowing the flexibility to mail either a letter or a post card. A copy of this suggested rule change is attached.

It is too late for the Administration of Justice Committee to re-consider this rule, but I thought you might want this background if and when this Rule is considered by the Supreme Court Advisory Committee.

Yours truly,

Charles W. Matthews

CWM:ch

c: Judge John Cornyn, III
Professor J. Patrick Hazel

Rule 239a. Notice of Default Judgment

At or immediately prior to the time an interlocutory or final default judgment is rendered, the party taking the same or his attorney shall certify to the clerk in writing the last known mailing address of the party against whom the judgment is taken, which certificate shall be filed among the papers in the cause. Immediately upon the signing of the judgment, the clerk shall mail a ~~post/card~~ notice thereof to the party against whom the judgment was rendered at the address shown in the certificate, and note the fact of such mailing on the docket. The notice shall state the number and style of the case, the court in which the case is pending, the names of the parties in whose favor and against whom the judgment was rendered, and the date of the signing of the judgment. Failure to comply with the provisions of this rule shall not affect the finality of the judgment.

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June 16, 1987

Professor J. Hadley Edgar
Texas Tech University
School of Law
Lubbock, Texas 79409

RE: Revision of TRCP 239a

Dear Hadley:

Enclosed is a letter from Ralph W. Kinsey concerning a proposed change to Rule 239a. Please be prepared to give an oral report regarding this proposal at our June meeting. I am including same on our agenda.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as

THE SUPREME COURT OF TEXAS

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

June 15, 1987

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

Professor J. Patrick Hazel, Chairman
Administration of Justice Committee
University of Texas School of Law
727 E. 26th Street
Austin, TX 78705

Re: Rule 239a, Notice of Default Judgment and Court Cost Deposit

Dear Luke and Pat:

Enclosed is a copy of a letter from Mr. Ralph W. Kinsey pertaining to the above rules.

May I suggest that these matters be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. Ralph W. Kinsey
P. O. Box 459
Lamesa, Tx 79331

RALPH W. KINSEY
ATTORNEY AND COUNSELLOR AT LAW
P.O. BOX 459
LAMESA, TEXAS 79331
PHONE: 806-872-3603

May 8, 1987

To the Honorable Justices of the Supereme Court of TEXAS
Capitol Station
P.O. Box 12248
Austin, Texas 79711

Dear Sirs:

I am submitting for your consideration two items that may improve two parts of court procedure.

It would be helpful if the clerk in compliance with the provisions of Rule 239a of the Rules of Civil Procedure at the time of notification to the Defendant(or attorney) would send a copy of the notice to the Plaintiff(or attorney) and file a copy of the notice in the file of the case.

The second suggestion is that the court cost deposit required for placing a case on the jury docket be increased to cover a larger cost of an average jury trial. Cases are frequently placed on the jury docket to delay trial of the case and thereby adds to the jury docket needlessly.

Yours very truly,

Ralph W. Kinsey

247

THE SUPREME COURT OF TEXAS

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

January 11, 1985

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Cliffe
1235 Milam Building
San Antonio, TX 78205

Re: Rules 3a, 8, 10, 10a, 10b, 27a, 27b, 27c, 165a, 166f, 247, 247a, 250, 305a.

Dear Luke:

I am enclosing herewith copies of amendments to the Rules of Civil Procedure as recommended by the Committee on Local Rules of the Council of Administrative Judges. I am also enclosing a copy of that Committee's report to Judge Pope which sets out the reasons for the proposed changes.

If you would like a copy to go to each member of the Advisory Committee at this time, please call Flo in my office (512/475-4615) and we will take care of it.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosures

00000352

To: Jack Pope, Chief Justice, Supreme Court of Texas

Re: Report of Committee on Local Rules

Little vacuum exists is case processing; necessity, inventiveness and the skill of the martinette will rush in to plug gaps in any system of rules, wherever adopted.

Your committee was furnished copies of all Local Rules filed by District and County Courts with the Supreme court by April 1, 1984. Our work was divided, with Judges Ovard and Thurmond reviewing Criminal case processing and Judges McKim and Stovall civil case processing. Our approach was to group Local Rules by function, so each could be compared for likenesses and differences. Most Local rules addressed these functions:

1. Division of work load in overlapping districts.
2. Schedules for sitting in multi-county districts.
3. Procedures for setting cases: Jury, non-jury, ancillary and dilatory, preferential.
4. Announcements, assignments, pass by agreements, and continuances.
5. Pre-trial methods and procedures.
6. Dismissal for Want of Prosecution.
7. Notices - lead counsel.
8. Withdrawal/Substitution of Counsel.
9. Attorney vacations.
10. Engaged counsel conflicts.
11. Courtroom decorum - housekeeping.
12. Exhortatory suggestions about good-faith settlement efforts.

The Committee found three broad groups of Local Rules and offer the following comments:

Group One: General Administrative Rules

Most courts have general administrative rules, particularly those who serve more than one county, setting out terms of court in each county, types of setting calendars and information about who to call for settings, what kind of notice is to be given others in the case and general housekeeping provisions, subject to change, depending on circumstances.

Comment: The Committee notes that terms of court are governed by statute, usually when the court was created or in a reconstituting statute, making most, if not all, continuous term courts. This language is probably not needed in a Local Rule. Calendars setting out the "who, when, what and where" are useful and must be flexible, to fit court needs, such as illness, vacations and the unexpected long case or docket collapse. Our recommendation: place this information in a "broadside", post it in all courthouses in the District and instruct the clerk to send a copy to all out-of-district attorneys and pro se who file papers, when the first appearance is made. The local Bar can be copied when the schedule is first made and notified of any changes. We note that many multi-county Judicial

Districts serve overlapping counties and the division of work load is governed by statute or agreement of the affected Judges. All the above could be covered by a "Court Information Bulletin", spelling out the manner of getting a setting on motions, pre-trial and trial matters.

Recommendation: Adopt as a statewide Rule the following:

LOCAL RULES: NOTICE TO COUNSEL AND PUBLIC

Local Schedules and Assignments of Court shall be mailed by each District or County Clerk upon receipt of the first pleading or instrument filed by an attorney or pro se party not residing within the county. The clerk shall not be required to provide more than one copy of the rules during a given year to each attorney or litigant who resides outside of the county in which the case is filed. It shall be the attorney and litigant's responsibility to keep informed of amendments to local rules, which shall be provided by the clerk on request for out of county residents. Local Rules and Amendments thereto shall be printed and available in the clerks office at no cost, and shall be posted in the Courthouse at all times.

Group Two: State Rules of Procedure

Many of Local Rules address functions which could best be served by a statewide uniform rule. These are suggested, as examples.

36th, 156th

Rule 247. Tried When Set

Every suit shall be tried when it is called, unless continued or postponed to a future day, unless continued under the provisions of Rule 247a, 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 for the date set except by agreement of the parties or for good cause upon motion and notice to the opposing party.

CA:RULE15(69th)

Rule 247a (new). Trial Continuances

Motions for continuance or agreements to pass cases set for trial shall be made in writing, and shall be filed not less than 10 days before trial date or 10 days before the Monday of the week set for trial, if no specific trial date has been set. Provided however, that agreed motions for continuance may be announced at first docket call in courts utilizing docket-call court setting methods. Emergencies requiring delay of trial arising within 10 days of trial or of the Monday preceding the week of trial shall be submitted to the court in writing at the earliest practicable time. Agreements to pass shall set forth specific legal, procedural or other grounds which require that trial be delayed. The court shall have full discretion in granting or denying delay in the trial of a case. Upon motion or agreement granted, the court shall reset the date for trial.

CA:RULE16(69th)

Rule 250 (new). . Cases Set for Trial; Announcement of Ready

Cases set for trial on the merits shall be considered ready for trial, and there shall be no need for counsel to declare ready the week, month, or term prior to trial date after initial announcement of ready has occurred. Cases not tried as scheduled due to court delay shall be considered ready for trial at all times unless informed otherwise by motion, and such cases shall be carried over to the succeeding term for trial assignment until trial occurs or the case is otherwise disposed. In all instances it shall be the attorney's or pro se party's responsibility to know the status of a case set for trial.

CA:RULE14(69th)

Subcommittee report
6-87

Rule 267. Witnesses Placed Under Rule

(a) At the request of either party, in a civil case, the witnesses on both sides ~~may~~ shall be sworn and removed out of the court room to some place where they can not hear the testimony as delivered by any other witness in the cause. This is termed placing witnesses under the rule. ~~Neither party to the suit shall be placed under the rule. Where a corporation is a party to the suit, the court may exempt from the rule an officer or other representative of such corporation to aid counsel in the presentation of the case.~~ (b) This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his case. (c) If any party be absent the court in its discretion may exempt from the rule a representative of such party. (d) Witnesses, when placed under the rule, shall be instructed by the court that they are not to converse with each other or with any other person about the case other than the attorneys in the case, except by permission of the court, and that they are not to read any report of or comment upon the testimony in the case while under the rule. (e) Any witness or other person violating such instructions may be punished for contempt of court.

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W. W. TORREY

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(512) 224-9144

March 6, 1987

Professor J. Hadley Edgar
Texas Tech University School of Law
Lubbock, Texas 79409

RE: Rule 267

Dear Hadley:

Enclosed is a copy of a revision to Rule 267 as suggested by the COAJ at their meeting on November 22, 1986. It is different from the Rule that we submitted to the Supreme Court, and I have enclosed a copy of our version for your convenience in studying same. Please submit to me a copy of the report you intend to make concerning the COAJ's suggestion no later than May 29, 1987, for inclusion in our agenda.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
enclosure
cc: Professor Pat Hazel

EXHIBIT "B"

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

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

I. Exact wording of existing Rule:

Rule 267. Witnesses Placed Under Rule

At the request of either party, in a civil case, the witnesses on both sides may be sworn and removed out of the court room to some place where they can not hear the testimony as delivered by any other witness in the cause. This is termed placing witnesses under the rule. Neither party to the suit shall be placed under the rule. Where a corporation is a party to the suit, the court may exempt from the rule an officer or other representative of such corporation to aid counsel in the presentation of the case. If any party be absent the court in its discretion may exempt from the rule a representative of such party. Witnesses, when placed under the rule, shall be instructed by the court that they are not to converse with each other or with any other person about the case other than the attorneys in the case, except by permission of the court, and that they are not to read any report of or comment upon the testimony in the case while under the rule. Any person violating such instructions may be punished for contempt of court.

Source: C.C.P. Arts. 644, 647.

II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parenthesis; underline proposed new wording; see example attached).

Rule 267. Witnesses Placed Under Rule

(a) At the request of either party, in a civil case, the witnesses on both sides may shall be sworn and removed out of the court room to some place where they can not hear the testimony as delivered by any other witness in the cause. This is termed placing witnesses under the rule. ~~Neither party to the suit shall be placed under the rule. Where a corporation is a party to the suit, the court may exempt from the rule an officer or other representative of such corporation to aid counsel in the presentation of the case.~~ (b) This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his case. (c) If any party be absent the court in its discretion may exempt from the rule a representative of such party. (d) Witnesses, when placed under the rule, shall be instructed by the court that they are not to converse with each other or with any other person about the case other than the attorneys in the case, except by permission of the court, and that they are not to read any report of or comment upon the testimony in the case while under the rule. (e) Any witness or other person violating such instructions may be punished for contempt of court.

etc.

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

This rule (R.267,Tex.R.Civ.P.) and Rule 613,Tex.R.Ev., are duplicitous and sometimes contradictory. The proposed change would make the Procedural rule easier to read and more in keeping with the thrust of the Evidence rule which would be repealed.

Respectfully submitted,

00000360

Date _____ 197__ Name

Texas Rules of Civil Procedure

Rule 267. Witnesses Placed Under Rule

At the request of either party, in a civil case, the witnesses on both sides may be sworn and removed out of the courtroom to some place where they can not hear the testimony as delivered by any other witness in the cause. This is termed placing witnesses under the rule. Neither party to the suit shall be placed under the rule. Where a corporation is a party to the suit, the court may exempt from the rule an officer or other representative of such corporation to aid counsel in the presentation of such party. Witnesses, when placed under Rule 613 of the Rules of Evidence, shall be instructed by the court that they are not to converse with each other or with any other person about the case other than the attorneys in the case, except by permission of the court, and that they are not to read any report of or comment upon the testimony in the case while under the rule. Any person violating such instructions may be punished for contempt of court.

Texas Tech University

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

May 6, 1987

Professor J. Patrick Hazel, Chair
Committee on Administration of Justice
University of Texas School of Law
727 E. 26th Street
Austin, TX 78705

Re: Need to amend Rule 267, Tex.R.Civ.Proc.

Dear Pat:

Rule 267, Tex.R.Civ.P., was amended, effective January 1, 1988, to include language expressly referring to Rule 613 of the Texas Rules of Evidence. The latter, however, was amended, effective January 1, 1988, and renumbered as Rule 614. Also, the "Texas Rules of Evidence" were renamed the "Texas Rules of Civil Evidence."

Accordingly, the enclosed suggested amendment to Rule 267, Tex.R.Civ.P., is offered to conform it to the amendments to the Texas Rules of Evidence.

Sincerely,

Jeremy C. Wicker
Professor of Law

JCW/nt
Enclosure

cc: Justice James P. Wallace

Mr. Luther H. Soules III ✓

(existing rule marked through with dashes; proposed new wording underlined)

Rule 267. Witnesses Placed Under Rule

At the request of either party, in a civil case, the witnesses on both sides may be sworn and removed out of the courtroom to some place where they cannot hear the testimony as delivered by any other witness in the cause. This is termed placing witnesses under the rule. Neither party to the suit shall be placed under the rule. Where a corporation is a party to the suit, the court may exempt from the rule an officer or other representative of such party. Witnesses, when placed under Rule ~~613~~ 614 of the Texas Rule of Civil Evidence, shall be instructed by the court that they are not to converse with each other or with any other person about the case other than the attorneys in the case, except by permission of the court, and that they are not to read any report of or comment upon the testimony in the case while under the rule. Any person violating such instructions may be punished for contempt of court.

Subcommittee report
6-87

Rule 273. Jury Submissions

Either party may present to the court and request written ~~instructions;~~ questions, ~~charges~~, definitions, and instructions to be given to the jury; and the court may give them or a part thereof, or may refuse to give them, as may be proper. Such requests shall be prepared and presented to the court and submitted to opposing counsel for examination and objection within a reasonable time after the charge is given to the parties or their attorneys for examination. A request by either party for any ~~instructions;~~ questions, ~~charges~~, definitions or instructions shall be made separate and apart from such party's objections to the court's charge.

Change by amendment effective January 1, 1988.

Subcommittee report
6-87

Rule 274. Objections and Requests

A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection. Any complaint as to a question, charge, definition or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections. When the complaining party's objection, or requested question, charge, definition, or instruction is, in the opinion of the appellate court, obscured or concealed by voluminous unfounded objections, minute differentiations or numerous unnecessary requests, such objection or request shall be untenable. No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only.

Change by amendment effective January 1, 1988.

Subcommittee report
6-87

Rule 275. Charge Read Before Argument

Before the argument is begun, the trial court shall read the charge to the jury in the precise words in which it was written, including all questions, charges, definitions, and instructions which the court may give.

Change by amendment effective January 1, 1988.

subcommittee report
6-87

Rule 276. Refusal or Modification

When an instruction, question or definition is requested and [there has been compliance with] the provisions of the law, ~~have been complied with and~~ the trial court, upon refusing ~~judge refuses~~ the same, ~~he~~ shall endorse thereon "Refused," and sign the same officially. Upon modifying ~~If the trial judge modifies~~ the same, the trial court ~~he~~ shall endorse thereon "Modified as follows: (stating ~~in what~~ the particular modification ~~he has modified the same~~) and given, and exception allowed" and sign the same officially. Such refused or modified instruction, question, or definition ~~or explanatory instruction~~, when so endorsed shall constitute a bill of exceptions, and it shall be conclusively presumed that the party asking the same presented it at the proper time, excepted to its refusal or modification, and that all the requirements of law have been observed, and such procedure shall entitle the party requesting the same to have the action of the trial court ~~judge~~ thereon reviewed without preparing a formal bill of exceptions.

Change by amendment effective January 1, 1988.

Subcommittee report
6-87

Rule 278. Submission of Questions, Definitions, and Instructions

The court shall submit the questions, instructions and definitions in the form provided by Rule 277, which are raised by the written pleadings and the evidence. Except in trespass to try title, statutory partition proceedings, and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to any submission of any question raised only by a general denial and not raised by affirmative written pleading by that party. Nothing herein shall change the burden of proof from what it would have been under a general denial. A judgment shall not be reversed because of the failure to submit other and various phases or different shades of the same question ~~issue~~. Failure to submit an question ~~issue~~ shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the question is one relied upon by the opposing party. Failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment.

Change by amendment effective January 1, 1988.

THE SUPREME COURT OF TEXAS

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

January 9, 1987

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

Professor J. Patrick Hazel, Chairman
Administration of Justice Committee
University of Texas School of Law
727 E. 26th Street
Austin, TX 78705

Re: Rule 277

Dear Luke and Pat:

Enclosed is a copy of a letter from Professor J. Hadley Edgar re: Rule 277, as proposed by the Advisory Committee.

I would appreciate your comments concerning his recommendation of further consideration by the committee of the rule.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Evelyn Avent, Secretary to C.O.A.J.
7303 Wood Hollow Drive, #208
Austin, Texas 78731

Texas Tech University

School of Law

December 17, 1986

Honorable James P. Wallace
Justice, Supreme Court of Texas
P.O. Box 12248, Capital Station
Austin, Texas 78711

Re: Rule 277, T.R.C.P.

Dear Judge Wallace:

The more I think about the first paragraph of proposed Rule 277, the more concerned I become. As you recall, the Advisory Committee has recommended that it read as follows:

> "In all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions. The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict."

Does this mean that there may be instances in which it is not feasible to submit upon broad-form questions? If so, then what other type of submission is permissible? The rule doesn't answer this question because we have eliminated all references to other forms of submission (check-list, broad form with limiting instructions, separate and distinct, et al). How will DTPA "laundry list" and worker's compensation cases be submitted? The only type of submission specifically recognized is a "broad-form." This leads me to my second concern.

Just what do we mean by a "broad-form" question? How broad is "broad?" While the Comment will refer to Lamos v. Montez, this will be of assistance only in negligence cases. When we go outside the negligence area, I fear that the wording will be perplexing at best and hopelessly confusing at worst. We have given no guidance whatsoever under the proposed rule to the judge and lawyers trying, for example, a complicated commercial case.

Our original purpose was to simplify the court's charge. In doing so, however, I'm afraid we may have created far more problems than we have solved.

My suggestion to the Court is this--since these rules are not to become effective for some time, why not send this Rule back to the Advisory Committee for study with a deadline for action?

There is one final, though unrelated, matter and I have to put another hat on to raise it. As Chairman of the Pattern Jury Charge Committee, I know that we are almost ready to send a revised Volume One (automobile cases) to the printer. Of course, this will not be done until after the Court approves a final form for Rule 277. However, we are most anxious to get this into the hands of the bench and bar as soon as possible and I'm wondering if the Court would consider making the court's charge rules effective on, say, September 1, 1987, and the balance effective on January 1, 1988?

If I've not made myself clear or if there are any questions, please do not hesitate to contact me by letter or telephone. Thank you for your consideration of the matters.

I wish you, Mrs. Wallace, and your family a happy holiday season.

Sincerely,

J. Hadley Edgar
Professor of Law

JHE/nt

STANDING SUBCOMMITTEE ON RULES 315-331

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Houston, Texas 77002
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JANICE E. PARDUE

BOARD CERTIFIED - TEXAS BOARD OF LEGAL SPECIALIZATION

• FAMILY LAW
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June 5, 1987

Luther H. Soules, III
Soules, Reed & Butts
800 Milam Building
San Antonio, Texas 78205

RE: SUPREME COURT ADVISORY COMMITTEE ON RULES

Dear Luke:

Enclosed are proposed Rules that we discussed by telephone today. Basically, the changes are:

1. Combining Rules 99 - 101 into a single rule regarding citations.

2. Amending Rule 107 to delete the time requirement for return of citations before rendering default judgment.

3. Amending Rule 320 to incorporate portions of Rule 328.

4. Amending Rule 85, TRAP, to incorporate portions of Rule 328.

Sincerely,

Harry L. Tindall

Harry L. Tindall

/jm
Enc.

cc: J. Hadley Edgar
William Dorsaneo
All Subcommittee Members

Subcommittee Report
6-87

RULE 99: ISSUANCE & FORM

(a) Issuance. Upon the filing of the petition, the Clerk shall forthwith issue a citation and deliver the citation to plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the citation and a copy of the petition. Upon request of plaintiff, separate or additional citations shall issue against any defendants.

(b) Form. The citation shall be signed by the Clerk, be under seal of the Court, contain the name of the Court, the date of the filing of the petition, date of issuance of citation, file number, and the names of the parties, and be directed to the defendant, shall state the name and address of plaintiff's attorney, if any, otherwise the plaintiff's address and the time within which these rules require the defendant to appear and defend and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the petition. The citation shall direct the defendant to file a written answer to the plaintiff's petition on or before 10:00 A.M. on the Monday next after the expiration of twenty days after the date and service thereof.

[alternate: within twenty (thirty) days after service of the citation and petition. Suggestion of Committee on Administration of Jusice.]

ADVISORY COMMITTEE COMMENT:

The above amendment combines Rules 99, 100, and 101 into a single rule. Language is largely patterned after Rule 4, Federal Rules of Civil Procedure.

RULE 100. Repealed. Combined in Rule 99

RULE 101. Repealed. Combined in Rule 99.

Subcommittee Report
6-87

RULE 107. Return of Citation

The return of the officer or authorized person executing the citation shall be endorsed on or attached to the same; it shall state when the citation was served and the manner of service and be signed by the officer officially or by the authorized person. The return of citation by an authorized person shall be verified. When the citation was served by registered or certified mail as authorized by Rule 106, the return by the officer or authorized person must also contain the return receipt with the addressee's signature. When the officer or authorized person has not served the citation, the return shall show the diligence used by the officer or authorized person to execute the same and the cause of failure to execute it, and where the defendant is to be found, if he can ascertain.

Where citation is executed by an alternative method as authorized by Rule 106, proof of service shall be made in the manner ordered by the court.

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

ADVISORY COMMITTEE COMMENT: This deletes the requirement that return of citation be on file for 10 days before default judgment may be rendered. Suggestion from Committee on Administration of Justice.

Subcommittee Report
6-87

RULE 320. MOTION AND ACTION OF COURT THEREON.

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

ADVISORY COMMITTEE COMMENT: The new language is taken from Rule 328.

Rule 328. Repealed. Portions of rule now found in Rule 320, TRCP, and Rule 85(2), TRAP.

Subcommittee Report
6-87

TEXAS RULES OF APPELLATE PROCEDURE

RULE 85. Remittitur in Civil Cases

(a) Cross Point on Remittitur. Whenever the trial court shall direct a remittitur in any action, and the same is made, and the party for whose benefit it is made shall appeal in said action, then the party remitting shall not be barred from contending in the appellate court that said remittitur should not have been required either in whole or in part, and if the appellate court sustains such contention it shall render such judgment as the trial court should have rendered without respect to said remittitur.

Succeeding subsections relettered.

ADVISORY COMMITTEE COMMENT: New subsection (a) is taken from Rule 328, TRCP.

Subcommittee Report
6-87

RULE 320. MOTION AND ACTION OF COURT THEREON.

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

ADVISORY COMMITTEE COMMENT: The new language is taken from Rule 328.

Rule 328. Repealed. Portions of rule now found in Rule 320, TRCP, and Rule 85(2), TRAP.

Subcommittee Report
6-87

TEXAS RULES OF APPELLATE PROCEDURE

RULE 85. Remittitur in Civil Cases

(a) Cross Point on Remittitur. Whenever the trial court shall direct a remittitur in any action, and the same is made, and the party for whose benefit it is made shall appeal in said action, then the party remitting shall not be barred from contending in the appellate court that said remittitur should not have been required either in whole or in part, and if the appellate court sustains such contention it shall render such judgment as the trial court should have rendered without respect to said remittitur.

Succeeding subsections relettered.

ADVISORY COMMITTEE COMMENT: New subsection (a) is taken from Rule 328, TRCP.

Rule 315 - B18

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HUGH L. SCOTT, JR.
DAVID K. SERGI
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

February 24, 1987

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

RE: Special Subcommittee on Rules 315-328

Dear Harry:

At our November meeting, there was so much discussion regarding a possible combination of Rule 315 with 328, that I requested you look into either that possibility, or the possibility of moving Rule 315 adjacent to Rule 328 so that the concept of remittitur would be in one section of the Rules.

I have enclosed a copy of that portion of the November transcript that deals with this issue. Please draft a report to be submitted at our June meeting, and send me a copy no later than May 29, 1987, so that it can be included in our agenda.

Very truly yours,

LUTHER H. SOULES III
Chairman

LHSIII/tat
enclosure

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W. W. TORREY

February 9, 1987

Mr. Harry L. Tindall
Tindall & Foster
2801 Texas Commerce Tower
Houston, Texas 77002-3094

RE: Proposed Change to
Rules 165a and 330

Dear Harry:

As you know, the enclosed letter from Tom Alexander has been carried over from our last meeting and is now on our June agenda.

Please draft, in proper form for Committee consideration, an appropriate Rule 330 for submission to the Committee at our June meeting. Please forward your draft to me no later than March 9, 1987. I have forwarded that part of the request dealing with Rule 165a to Sam Sparks of El Paso.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
enclosure
cc: Justice James P. Wallace

THE SUPREME COURT OF TEXAS

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

Tina
To SCAC Seal
Xc transmittal to Tom Alexander

June 24, 1986

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

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

Re: Proposed Rule Change
TEX. R. CIV. P. 165a and 330,

Dear Luke and Mike:

I am enclosing a letter and suggested rule changes from Mr. Tom Alexander of Houston, regarding the above rules.

May I suggest that this matter be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. Tom Alexander
Alexander & Fogel
Five Post Oak Park, 24th Fl.
Houston, Texas 77027

00000382

ALEXANDER & FOGEL
Lawyers
Five Post Oak Park
24th Floor
Houston, Texas 77027
713/439-0000

June 18, 1986

Honorable James P. Wallace
Justice, Supreme Court of Texas
Supreme Court Building
Box 12248, Capitol Station
Austin, Texas 78711

Dear Justice Wallace:

In an effort to promote speedy trials and eliminate cumbersome dismissal for want of prosecution, I am enclosing suggested rule changes for your consideration. I have sent a copy to each member of the Court.

With high regard I remain,

Yours truly,

~~ALEXANDER & FOGEL~~

Tom Alexander

Tom Alexander

TA:ca
Enclosure: 1

TX SpCt/Rule Change:30

Rule 330

TO: CHIEF JUSTICE JOHN L. HILL, JR. and THE SPEEDY TRIAL COMMITTEE:

SUGGESTED RULE CHANGES TO PROMOTE SPEEDY TRIALS AND ELIMINATE CUMBERSOME DISMISSAL FOR WANT OF PROSECUTION PROCEDURES.

NEED: RULE 165a, (D.W.O.P.) is not producing speedy trials. Instead it is producing unnecessary paper work, court appearances and judicial determinations without necessarily pushing the cases toward trial. Additionally, it is a potential snare for the party who, missing one or more of its requirements is exposed to dismissal without trial, usually after limitations have run, and exposing the lawyer to potential liability arising from dismissal of cases whose true merit may have been less than initially perceived. The unfortunate client and lawyer are then without remedy except from each other. This was not the initial intent of either.

REMEDY: Revoke Rule 165a and ammended Rule 330 and eliminate dismissal for want of prosecution except as follows.

1) Require each Court to set for trial, on that Court's next docket, each case which has been on file 2 years or in which the last new party joined has been in the case more than 1 year, which ever comes first.

2) Once set, no such case may be continued except under the strict application of Rules 251-254. With the additional requirements that:

a) Such continuance shall be granted only upon the Affidavit of the party or parties seeking the continuance;

b) If granted, the case is set, at the time the continuance is granted, for a date certain within 90 days (or at the next docket of the court if Rule 330 is applicable).

c) No continuance may be granted without a trial setting or a date certain set out in the Order of Continuance which must be approved by the parties and their lead counsel signifying their awareness of the foregoing requirements and their willingness to abide these rules and the new setting.

d) If continuance should be granted a second time for absense of counsel under Rule 253, it must be preferentially set for the next sitting time available 10 days after that counsel finishes the trial in which he is then engaged.

e) On any motion for continuance after the first for each side of the case, all parties and

lead counsel must appear in open court for the mandatory resetting and certify their availability and readiness for the date certain set by the Court, as a condition for the granting of a second continuance.

f) If not otherwise disposed of, one year after the first setting under.

1) the case shall be preferentially set, subject only to other cases with a statutory preference, and shall be tried or dismissed on that setting without continuance except pursuant to Rule 254 until a date certain 10 days after adjournment of the Legislative when the case shall be tried as set out in (d.) above.

g) The mandatory provisions of this Section shall apply to all cases filed after January 1, 1986; however each Trial Court is urged, in its discretion to apply these provisions to eliminate backlog as soon as possible in the effective administration of justice realizing that justice delayed is sometimes justice denied. When application of these provisions have reduced the backlog to the 3 year maximum, each Court is urged to reduce the maximum period further so as to produce justice in speedy disposition of disputes.

RATIONALE: These changes will eliminate the hazards and vagaries of the present lack of uniformity among the various Courts in applying Rule 165a and virtually eliminate the possibility of the loss of a client's rights without participation. This is a clear, self-enforcing procedure which insures knowledge and acknowledgment of rights and a day certain in Court. It will also help insure speedy trials and put an effective ceiling on delay at a maximum of 3 years without working hardship upon the rights of litigants.

If it works well, and I am convinced that it will, consideration can be given to shortening the time periods, reducing the ceiling of delay and produce even more speed in disposition of cases, still assuring the parties of their day in Court.

Respectfully submitted toward the Administration of justice,

TOM ALEXANDER
State Bar No. 01000000

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LUTHER H. SOULES III
W. W. TORREY

6-10-86
xc Harry Tindall

Harry -
We have looked and researched this - I think all you need is to report our history.
Jude

June 8, 1987

Mr. Royce Coleman
Citizens National Bank Building
Interstate 35E at Fort Worth Drive
Post Office Drawer M
Denton, Texas 76202-1717

RE: Proposed Change to Rule 103
Texas Rules of Civil Procedure

Dear Mr. Coleman:

Justice Wallace has forwarded your letter of May 21, 1987, for a response.

The Supreme Court Advisory Committee has addressed several requests regarding Rule 103 similar to yours, and I have enclosed a copy of the Rule that we proposed and that the Supreme Court of Texas adopted for promulgation on January 1, 1988.

I trust that the enclosed Rule, once in use, will allow you some respite from the Denton County Sheriff's office. Thank you for your suggestion.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as
cc: Justice James P. Wallace

Rule 103. Who May Serve

Citation and other notices may be served by (1) any sheriff or constable or other person authorized by law or, (2) by any person authorized by written order of the court who is not less than eighteen years of age. No person who is a party to or interested in the outcome of a suit shall serve any process. Service by registered or certified mail and citation by publication shall, if requested, be made by the clerk of the court in which the case is pending. The order authorizing a person to serve process may be made without written motion and no fee shall be imposed for issuance of such order.

Change by amendment effective January 1, 1988.

Comment. The amendment makes clear that the courts are permitted to authorize persons other than Sheriffs or Constables to serve Citation. Further, Sheriffs or Constables are not restricted to service in their county. The last sentence is added to avoid the necessity of motions and fees.

THE SUPREME COURT OF TEXAS

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

June 4, 1987

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

Professor J. Patrick Hazel, Chairman
Administration of Justice Committee
University of Texas School of Law
727 E. 26th Street
Austin, Tx 78705

Re: Tex. R. Civ. P. 103.

Dear Luke and Pat:

I am enclosing a letter from Mr. Royce Coleman, suggesting a change to Tex. R. Civ. P. 103.

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

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. Royce Coleman
Attorney and Counselor at Law
P. O. Drawer M
Denton, Tx 76202-1717

Royce Coleman
ATTORNEY AND COUNSELOR AT LAW
CITIZENS NATIONAL BANK BUILDING
INTERSTATE 35E AT FORT WORTH DRIVE
DENTON, TEXAS

AREA CODE 817
TELEPHONE 566-3949

MAILING ADDRESS:
POST OFFICE DRAWER M
DENTON, TEXAS 76202-1717

May 21, 1987

Honorable James P. Wallace
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Re: Proposed Change to Texas Rules of Court

Dear Justice Wallace:

It has been called to my attention that you are Chairman of the Rules Committee in terms of the Texas Rules of Court and in that respect, I write suggesting a long needed change.

I suggest that Rule 103 be changed to provide as follows:

" All process may be served by any person competent to testify or 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 of 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."

This change would allow the present procedure or for service to be served by any private individual.

This change is desparately needed as it is almost hopeless to get the sheriff's department in many counties to serve papers. For instance, I just sued the City of Denton and it took the sheriff department here 2½ weeks to drive down to City Hall to serve the citation. Furthermore, when we make a telephone call to the sheriff's department, no one knows where the citation is, who is going to serve it, or when it might be served. They take the position they are doing a real favor, and they are; however, they charge $35.00 which I think is adequate compensation. Also, in terms of compensation, I

just filed a divorce action with a restraining order and the sheriff's fee for serving those papers was $120.00 which I think is absolutely outrageous. The client in question is below poverty level. Just to give you an example of what we are up against, I enclose photocopy of a letter I forwarded to the Denton County Sheriff's Department on April 3, 1987. I would appreciate your reading the letter as you will see just how rough things can get on account of our not being able to employ someone who will go out and do the job that needs to be done.

My suggestion is not new at all as under Section 21.016 of the Texas Property Code, any person competent to testify may serve the notice in eminent domain proceedings. Also, I might add that it is absolutely no comfort at all for us to be able to forward process by certified mail as under the Rule, the delivery is restricted to "addressee only" and it is even more difficult for the postman to get the person in question to sign the "green card".

Also, the sheriff's fees around the state of Texas are not uniform. For instance, if you want to file a lawsuit with service in 2 or 3 different counties, like Dallas and Tarrant which are adjacent to Denton County, we have to make a number of phone calls just to find out who the citation is to be mailed to along with the proper sheriff's fee. I don't know whether or not you are aware, but in Dallas County the sheriff will not serve suit papers and we then have to determine which constable out of at least a half dozen may do the job. If any person competent to testify could serve the suit papers, the suit papers could be served directly by a person from Denton County sent into the adjacent county to perfect the service. Also, I have a case where I am trying to serve a man in Austin and I have now spent in excess of 6 months attempting service on this individual who apparently can only be found when he goes out to the airport and to date, I cannot get a deputy sheriff or constable to do so.

Wise County is one of the worst places in the state of Texas, which is adjacent to Denton County, to get suit papers served. In fact, within a month or so ago, I was absolutely begging someone to go out and serve the papers and I was telling the administrator of the civil process department that the defendant just did not get home until after 5:00 p.m. and her response was "Well, the boys just don't like to go out after 5:00."

Practicing law is hard enough when things go well, but there is absolutely no reason why Rule 103 should not be changed as I have suggested, which would make a difficult job a lot easier. I do not

know your procedure in terms of rule changes, but if you desire testimony such as is done in the Legislature, I assure you I could talk 2 weeks at least on the problems I have had in getting suit papers served in the North Texas area and I can give you at least a hundred reasons why you should change the rules to specifically allow any person competent to testify to serve the suit papers. If you desire my presence, further explanation, further reasons or just anything, I will be happy to address this matter in more detail. Also, if after you consider this letter, my statements and allegations, you do not feel the change warranted, I would like to know your feelings as to why the change should not be made as I feel I could address that position.

Sincerely,

Royce Coleman

RC/km
Enclosure

Royce Coleman
ATTORNEY AND COUNSELOR AT LAW
CITIZENS NATIONAL BANK BUILDING
INTERSTATE 35E AT FORT WORTH DRIVE
DENTON, TEXAS

AREA CODE 817
TELEPHONE 566-3949

MAILING ADDRESS:
POST OFFICE DRAWER M
DENTON, TEXAS 76202-1717

April 3, 1987

Chief Deputy of Civil Process
Denton County Sheriff's Office
127 Woodrow Lane
Denton, Texas 76205

Re: Cause No. 13338-B
First National Bank of Sanger
vs. James C. & Mira Tuggle

Dear Sir:

I represent First National Bank of Sanger, Texas and on or about February 17, 1987 I filed on behalf of the bank an action against James C. Tuggle and Mira Tuggle, husband and wife. Mrs. Tuggle just called me and advised that approximately 3 weeks ago she was served with the citation. That she related to your office that her husband left early and got in late and that it would be difficult for your office to catch him to serve the suit papers. She advises that the process server told her that in that case Mr. Tuggle could go by the Sheriff's office and be served there. That in fact, Mr. Tuggle has now been by your office in excess of 3 times but that every time he goes down there, no one knows anything about this matter.

I have now told her that I would write you in hopes of someone finding about this matter so that Mr. Tuggle can come by the Sheriff's office and you serve him. Mrs. Tuggle has told me that he will be by your office during business hours sometime after next Wednesday. I would deeply appreciate your having the citation and serving it on Mr. Tuggle when he comes in.

I am sending a copy of this letter to Mrs. Tuggle advising her that she does not need to appear in court until after Mr. Tuggle is served and that she will not be prejudiced by her failing to appear this Monday which is answer day for her. She tells me that she is going to use Hardy Burke and that after her husband is served, both

of them will have Mr. Burke answer the lawsuit.

Sincerely,

Royce Coleman

RC/km
cc: Mr. and Mrs. James Tuggle
P. O. Box 1010
Sanger, Texas 76266

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June 16, 1987

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

RE: New TRCP 332

Dear Harry:

Enclosed is a letter from Judge Michael Schattman concerning a proposed new Rule 332. Please be prepared to give an oral report regarding this proposal at our June meeting. I am including same on our agenda.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as

MICHAEL D. SCHATTMAN
DISTRICT JUDGE
348TH JUDICIAL DISTRICT OF TEXAS
TARRANT COUNTY COURT HOUSE
FORT WORTH, TEXAS 76196-0281
PHONE (817) 877-2715

May 13, 1987

Luther H. Soules, III
Soules, Reid & Butts
800 Milam Building
San Antonio, Texas 78205

Dear Luke:

Thanks for your reply to my letter of April 29th. I particularly liked the last sentence. I will save it to impress the voters, if need be, and my mother will believe it.

As you could readily tell my letter expressed a level of frustration because the current COAJ has been working hard to do what it is supposed to do and wants to be involved in the rules process. The current leadership and membership understands the seriousness of its function and I hope that will continue to be the case. I agree that there is no reason for the Court or the SCAC to wait for the Bar's committee to get its act together. That should never be a problem again. With rules changes now going into effect only in January of even-numbered years there should be sufficient time for there to be a useful exchange between the two bodies.

Since I will be at my son's high school graduation instead of the May 16th COAJ meeting, I am calling Pat to see if some kind of draft can be provided for a rule covering the invocation of "the rule" in depositions (267 T.R.C.P. and 613 T.R.E.). Failing that, I am enclosing a copy of some language which we discussed, but got hung up in what to do about expert witnesses. The relevant portion of the supporting memo is also enclosed.

As to my "stripper" rule, some suggested language is enclosed. I am confident that it can use reworking.

332
304

You need not have stated that your comments were sent with "respect," but I do appreciate it. If you feel the need to take me down a peg or two, just do it. My children are all smarter than I am and they emphasize with every passing day that I have a lot to be humble about.

Best wishes,

Michael D. Schattman

MDS/lw

xc

encl.

The Rule Concerning the Application of the Dynamic

Principles of Gypsy Rose Lee

New 332

Rule _____. Disposition of Papers from Closed Files

1. Three years after the end of the month in which
   (a) an order of dismissal was signed disposing of an entire cause;
   (b) a judgment, which was not appealled, became final; or
   (c) a mandate, entirely affirming or reversing and rendering a judgment, was received,

   the district clerk, the county clerk, or the justice of the peace having custody of such records may remove from the file and discard all papers and exhibits in any cause, including orders of the trial and appellate courts, except the final pleadings of any party, the judgment or order of dismissal, and the mandate of any appellate court of this State or of the United States.
2. This rule does not apply to records kept in mircofiche format by the clerk pursuant to law.
3. No person is civilly liable for the destruction of any record, document, or exhibit under this rule.

Nothing magic about three years -- but you have to start somewhere.

filed

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(512) 224-9144

February 23, 1987

Mr. Russell McMains
Chairman, Standing Subcommittee on
Texas Rules of Appellate Procedure
Edwards, McMains & Constant
P. O. Drawer 480
Corpus Christi, Texas 78403

Dear Rusty:

The attached Rules 80 and 90 were tabled at the last SCAC meeting. However, the Court wants a resolution on how to approach the non-addressed unresolved Court of Appeals issues. One disposition that I have heard is to simply treat all such issues as overruled by the Court of Appeals. That would result in a situation where even when the Court of Appeals has ruled that there was "no evidence" because all the evidence was incompetent, and had not addressed the insufficiency points, the Court of Appeals would nonetheless be deemed to have "overruled" the insufficiency points by failing to write on them. That does not seem to me to be a desirable result. I know that you felt strongly that these attached proposed changes to Rules 80 and 90 were inappropriate. Please have your Committee reach a recommendation on how, other than "status quo," the Rules can address this problem and give guidance to the bench and the bar. I would appreciate your having a final work product of your Committee to me by the end of May for agenda consideration at the June 26 meeting.

Very truly yours,

Luther H. Soules III

LHSIII:gc
LS287/037
Enclosures

00000399

Texas Rules of Appellate Procedure

Rule 80. Judgment of Court of Appeals

(a) Time. When a case has been submitted, the court of appeals shall render its judgment promptly.

(b) Types of Judgment. The court of appeals may: (1) affirm the judgment of the court below, (2) modify the judgment of the court below by correcting or reforming it, (3) reverse the judgment of the court below and dismiss the case or render the judgment or decree that the court below should have rendered, or (4) reverse the judgment of the court below and remand the case for further proceedings.

(c) Final Judgment. The final judgment of a court of appeals shall contain a ruling on every point of error before the court.

~~(c)~~ (d) Other Orders. In addition, the court of appeals may make any other appropriate order, as the law and the nature of the case may require.

~~(d)~~ (e) Presumptions in Criminal Cases. The court of appeals shall presume that the venue was proved in the court below; that the jury was properly impaneled and sworn; that the defendant was arraigned; that he pleaded to the indictment or other charging instrument; that the court's charge was certified by the judge and filed by the clerk before it was read to the jury, unless such matters were made an issue in the court below, or it otherwise affirmatively appears to the contrary from the record.

Advisory Committee Comment: The Supreme Court Advisory Committee voted unanimously to table the proposal. The State Bar Committee on Administration of Justice voted unanimously in favor of the proposal.

00000400

STANDING SUBCOMMITTEE ON TRAP RULES

Chairperson: Russell McMains

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3000 First City Tower
Houston, Texas 77002-6760
(713) 651-2222

Texas Rules of Appellate Procedure

Rule 90. Opinions, Publication and Citation

(a) Decision and Opinion. The court of appeals shall ~~decide every substantial issue raised and necessary to disposition of the appeal and hand down a written opinion which shall be as brief as practicable.~~ hand down a written opinion which shall be as brief as practicable but which shall address every issue raised and necessary to final disposition of the appeal. Where the issues are clearly settled, the court shall write a brief memorandum opinion which should not be published.

(b) No Change

(c) No Change

(d) No Change

(e) No Change

(f) No Change

(g) No Change

(h) No Change

(i) No Change

Advisory Committee Comment: The Supreme Court Advisory Committee voted 5-2 to reject the proposal. The State Bar Committee on Administration of Justice voted unanimously in favor of the proposal.

00000401

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(512) 224-9144

October 24, 1986

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

RE: Appellate Rules 80(a) and 90(a)

Dear Bill:

The enclosed is a recommendation from COAJ. Please circulate within your subcommittee and draft Please draft, in proper form for Committee consideration, appropriate Rule changes for submission to the Committee and circulate it among your Standing Subcommittee members to secure their comments.

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

Very truly yours,

Luther

LUTHER H. SOULES III
Chairman

LHSIII/tat
encl/as

Texas
11/7 Agenda
Refer to SubC

Delete "Decision and" from caption

90(a)

Amend Rule 90(a) Texas Rules of Appellate Procedure as follows:

The court of appeals shall ~~decide~~ every ~~substantial~~ issue raised but which shall address and necessary to final disposition of the appeal ~~and~~ hand down a written opinion which shall be as brief as practicable. Where the issues are clearly settled, the court shall write a brief memorandum opinion which should not be published.

future would be desirability of the appeal (DC)

In Cons. Cases

unanimously approved

Comment: This charge is suggested by the Supreme Court. The purpose is to require the court of appeals to address all pertinent issues rather than decide the case on one or more dispositive issues and disregard the other pertinent issues. This quite often results in a reversal and remand by the Supreme Court causing unnecessary delay in disposition of the cause along with an unnecessary second consideration of the cause by the court of appeals.

Amend 90(a)

c. Final Judgment: a

~~The~~ final judgment of ~~the~~ a Court of ~~Civil Appeals~~ contain a ruling on ~~shall pass~~ every Point of Error before the Court.

move ~~Clause~~ "(c)" to "(d)"

move ~~Clause~~ "(d)" to "(e)"

unanimously approved by COA's 10-11-80

Texas Tech University

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

May 6, 1987

Professor J. Patrick Hazel, Chair
Committee on Administration of Justice
University of Texas School of Law
727 E. 26th Street
Austin, TX 78705

Re: Need to amend Appellate Rule 85(b)

Dear Pat:

In Larson v. Cactus utility Co., _____ S.W.2d _____, 30 T. S. Ct. J. 331 (April 1, 1987), the Court clarified Pope v. Moore, 711 S.W.2d 622 (Tex. 1986) and overruled in part Flanigan v. Carswell, 159 Tex. 598, 324 S.W.2d 835 (1959). These cases all deal with remittitur. Larson made it clear that the test for remittitur is the same for the trial court and the court of appeals: factual sufficiency. Regarding review of the trial court's ruling on remittitur, Flanigan had used language in its opinion which suggested an abuse of discretion standard of review. Larson expressly rejects this standard, but fails to cite, much less discuss, Appellate Rule 85(b), which incorporates an abuse of discretion standard of review, contrary to the Larson and Pope holdings.

Accordingly, the enclosed suggested amendment to Appellate Rule 85(b) is offered.

Sincerely,

Jeremy C. Wicker
Professor of Law

JCW/nt
Enclosure

cc: Justice James P. Wallace

Mr. Luther H. Soules III

00000404

(existing rule marked through with dashes; proposed new wording underlined)

Rule 85. Remittitur in Civil Cases

* * *

(b) Suggestion of Remittitur by Court of Appeals. In civil cases appealed to the court of appeals, if such court is of the opinion that the trial court ~~abused its discretion~~ erred in refusing to suggest a remittitur and that said cause should be reversed for that reason only, then said appellate court shall indicate to such party, or his attorney, within what time he may file a remittitur of such excess. If such remittitur is so filed, then the court shall reform and affirm such judgment in accordance therewith; if not filed as indicated then the judgment shall be reversed.

* * *

App Rule 74

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February 24, 1987

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Dear Bill and Rusty:

I have enclosed a copy of a letter from Bill to Justice Wallace, with enclosures, regarding Appellate Rules of Procedure 84 and 140. I have included same on our June agenda, and will appreciate input from both of you at that time.

Very truly yours,

LUTHER H. SOULES III
Chairman

LHSIII/tat
enclosure

February 5, 1987

Agenda - Dorsaneo Request

Russell H. McMains
McMains & Constant
P.O. Box 2846
Corpus Christi, TX 78403

Luther H. Soules III
Soules, Cliffe and Reed
800 Milam Building
East Travis at Soledad
San Antonio, TX 78205

Re: Texas Rules of Appellate Procedure

Gentlemen,

During the course of the last year, I have noted a number of problems with the above referenced procedural rules. I have attempted to deal with two of them as follows:

1. Tex. R. App. P. 84. This new rule was drafted to be applicable to the courts of appeals and to the Texas Supreme Court. Unfortunately, it is located in the part of the rulebook that applies only to the courts of appeals. Hence, either it needs to be moved to the General Rules or redrafted and cloned for inclusion in both the court of appeals section and the Supreme Court's section. I have opted for the latter approach. Hence, I am enclosing a proposed revision of Tex. R. App. P. 84 and a revised version of Tex. R. App. P. 182.

2. Tex. R. App. P. 140. This rule was modified to reflect legislative changes eliminating direct appeals to the Texas Supreme Court when a trial court has granted or denied an injunction on the grounds of the validity or invalidity of an administrative order. Unfortunately, paragraph (c) of the current rule still refers to "administrative orders." I also redrafted paragraphs (a) and (d).

Please let me know what you think.

Sincerely,

Bill

William V. Dorsaneo III

enc.

cc: Hon. James P. Wallace

00000407

SCHOOL OF LAW
SOUTHERN METHODIST UNIVERSITY / DALLAS, TEXAS 75275-0116 / 214 • 692-3249

Rule 84. Damages for Delay in Civil Cases. In civil cases where the court [of appeals] shall determine that an [appellant has taken an] appeal ~~or writ of error has been taken~~ for delay and without sufficient cause, then the ~~appellate~~ court may, as part of its judgment, award each prevailing appellee ~~or respondent~~ an amount not to exceed ten percent of the amount of damages awarded to such appellee ~~or respondent~~ as damages against such appellant ~~or petitioner~~. If there is no amount awarded to the prevailing appellee ~~or respondent~~ as money damages, then the ~~appellate~~ court may award, as part of its judgment, each prevailing appellee ~~or respondent~~ an amount not to exceed ten times the total taxable costs as damages against such appellant ~~or petitioner~~.

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

Rule 182. (a) Judgment on Affirmance or Rendition. Whenever the Supreme Court shall affirm the judgment or decree of the trial court or the court of appeals, or proceeds to modify the judgment and to render such judgment or decree against the appellant in the court of appeals as should have been rendered by the trial court or the court of appeals, it shall render judgment against the appellant and the sureties upon his supersedeas bond, if any, for the performance of said judgment or decree, and shall make such disposition of the costs as the court shall deem proper, rendering judgment against the appellant or petitioner and the sureties on his appeal or supersedeas bond, if any, for such costs as are taxed against him.

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

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

Section Ten. Direct Appeals.

Rule 140. Direct Appeals. In compliance with section 22.001(c) of the Government Code, the following rules of procedure for direct appeals to the Supreme Court are promulgated.

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:

(a) In view of section 3 of Article 5 of the Constitution which confines the appellate jurisdiction of the Supreme Court to questions of law only, this court under the present and later amendment, above cited, and such present and any future legislation under it, has and will take appellate jurisdiction over questions of law only, and in view of sections 3, 6, 8 and 16 of such Article 5, will not take such jurisdiction from any court other than a district or county court.

(b) An appeal to the Supreme Court directly from such a trial court may present only the constitutionality or unconstitutionality of a statute of this State when the

same shall have arisen by reason of the order of a trial court granting or denying an interlocutory or permanent injunction.

(b) [When a trial court has granted or denied an interlocutory or permanent injunction and its decision is based on the grounds of the constitutionality or unconstitutionality of any statute of this State, the Supreme Court shall have jurisdiction of a direct appeal of the trial court's order when the appeal contests that court's holding regarding the constitutionality or unconstitutionality of the statute.]

(c) Such appeal shall be in lieu of an appeal to the court of appeals and shall be upon such question or questions of law only[.] and a [A] statement of facts shall not be brought up except to such [the] extent as may be [it is] necessary to show that the appellant has an interest in the subject matter of the appeal and to show the proof concerning the promulgation of any administrative order that may be involved in the appeal. If the case involves the determination of [the Supreme Court would be required to determine] any contested issue of fact, even though the contested evidence should be adduced as to constitutionality or unconstitutionality of a statute, or as to the validity or invalidity of an administrative order, neither the statute or statutes, above mentioned, nor these rules, apply, and such an [in order to rule on the

constitutionality of the statute in question as ruled on by the trial court, the] appeal will be dismissed.

(d) ~~Except where they are inconsistent with this rule, the rules now or hereafter prescribed in instances of appeal to the court of appeals shall, insofar as they are applicable, apply to appeals to the Supreme Court pursuant to such amendment to the Constitution and the legislation thereunder.~~

(d) [The rules governing appeals to the courts of appeals apply to direct appeals to the Supreme Court except when inconsistent with Section 22.001 of the Government Code and with this rule.]

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April 23, 1985

Mr. Tom B. Ramey, Jr.
P. O. Box 8012
Tyler, Texas 75711

RE: Adoption of F.R.A.P. 10
and F.R.A.P.11 in Texas

Dear Tom:

I have followed with interest the efforts to curb litigation costs and delay. Today I am responding to your invitation to submit suggestions that may aid in solving these problems.

The adoption of rules similar to F.R.A.P.10 and F.R.A.P.11 (copies enclosed) would save countless hours and dollars in those very common situations where court reporters fail to transcribe the statement of facts for timely filing in an appeal.

The federal system recognizes that courts-not lawyers-control court reporters. Clients there no longer pay for lawyer time expended in interviewing court reporters, preparing affidavits and filing motions for extension.

I have been forced to file as many as five motions for extension in one state case. I have had appellate courts invite writs of mandamus. The client could not understand the reason for the expense nor the delay, much less the uncertainty of an extension.

I am taking the liberty of sharing these thoughts not only with you as President of the State Bar of Texas, but as well with some members of the Committee on Proposed Uniform Rules of Appellate Procedure.

They are proposals that would seem appropriate for civil rules to be promulgated by the Supreme Court regardless of what the legislature may do with the criminal rules.

Cordially,

Frank

F. W. Baker

FWB:bv
6FWBaak

cc: Hon. Clarence A. Guittard
Hon. Sam Houston Clinton
Hon. James Wallace
Hon. Shirley Butts
Mr. Hubert Green
Mr. Luke Soules
Mr. Ed Coultas

which appellant was convicted; the date and terms of sentence.

Concise statement of the question or questions involved on the appeal, with a showing that such question or questions are not frivolous. Counsel shall set forth sufficient facts to give the essential background and the manner in which the question or questions arose in the trial court.

Certificate by counsel, or by appellant if acting pro se, that the appeal is not taken for delay.

Factual showing setting forth the following factors as to appellant with particularity:

nature and circumstances of offense charged,

weight of evidence,

family ties,

employment,

financial resources,

character and mental condition,

length of residence in the community,

record of conviction,

record of appearances or flight,

danger to any other person or the community,

such other matters as may be deemed pertinent.

A copy of the district court's order denying bail, containing the written reasons for denial, shall be appended to the application. If the movant questions the factual basis of the order, a transcript of the proceedings had on the motion for bail made in the district court shall be lodged with this Court. If the movant is unable to obtain a transcript of these proceedings, he shall state in an affidavit the reasons why he has not obtained a transcript.

If the transcript is not lodged with the motion, the movant shall also attach to this motion a certificate of the court reporter verifying that the transcript has been ordered and that satisfactory financial arrangements have been made to pay for it, together with the estimated date of completion of the transcript.

The government shall file a written response to all motions for bail pending appeal within 7 days after service thereof.

Also, upon receipt of the application for bail, the Clerk shall request that the Clerk of the District Court obtain from the probation officer a copy of the presentence report, if one is available, and it shall be attached to the application for bail. The report shall not, however, be disclosed to the applicant. See Rule 32(c)(3) Fed.R.Crim.Proc.

THE RECORD ON APPEAL

FRAP 10.

(a) Composition of the Record on Appeal. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript Is Ordered.

(1) Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary, subject to local rules of the courts of appeals. The order shall be in writing and within the same period a copy shall be filed with the clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order shall so state. If no such parts of the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.

(2) If the appellant intends to urge an appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) Unless the entire transcript is to be included the appellant shall, within the 10 days time provided in (b)(1) of this Rule 10, file a statement of the issues he intends to present on the appeal and shall serve on the appellee a copy of the order or certificate and of the statement. If the appellee deems a transcript of other parts of the proceedings to be necessary, he shall, within 10 days

court of appeals such parts of the original record as any party shall designate.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979.)

Loc. R. 11

11.1. Duties of Court Reporters—Extensions of Time. The court reporter shall, in all cases in which transcripts are ordered, furnish the following information, on a form to be prescribed by the Clerk of the Court:

acknowledge receipt of the order for the transcript,

the date of receipt of the order for the transcript,

whether adequate financial arrangements under CJA or otherwise, have been made,

the number of trial or hearing days involved in the transcript, and an estimate of the number of pages,

the estimated date on which the transcript is to be completed,

a certificate that he or she expects to file the trial transcript with the District Court Clerk within the time estimated.

A request by a court reporter for enlargement of the time for filing the transcript beyond the 30 day period fixed by FRAP 11(b) shall be filed with the Clerk and shall specify in detail (a) the amount of work that has been accomplished on the transcript, (b) a list of all outstanding transcripts due to this and other courts, including the due dates of filing, and (c) verification that the request has been brought to the attention of, and approved by, the district judge who tried the case.

[I.O.P.—The monitoring of all outstanding transcripts, and the problems of delay in filing, will be done by the Clerk. Counsel will be kept informed when extensions of time are allowed on requests made by the court reporters.

On October 11, 1982 the Fifth Circuit Judicial Council adopted a resolution requiring each district court in the Fifth Circuit to develop a court reporter management plan that will provide for the day-to-day management and supervision of an efficient court reporting service within the district court. The plan is to provide for the supervision of court reporters in their relations with litigants as specified in the Court Reporter Act, including fees charged for transcripts, adherence to transcript format prescriptions and delivery schedules. The plan must also provide that supervision be exercised by a judge of the court, the clerk of court, or some other person designated by the Court.]

11.2. Duty of the Clerk. It is the responsibility of the Clerk of the District Court to determine when the record on appeal is complete for purposes of the appeal. Unless the record on appeal can be transmitted to this Court within 15 days from the filing of the notice of appeal or 15 days after the filing of the transcript of trial proceedings if one has been ordered, whichever is later, the Clerk of the District Court shall advise the Clerk of this Court of the reasons for delay and request an enlarged date for the filing thereof.

DOCKETING THE APPEAL; FILING OF THE RECORD

FRAP 12.

(a) Docketing the Appeal. Upon receipt of the copy of the notice of appeal and of the docket entries, transmitted by the clerk of the district court pursuant to Rule 3(d), the clerk of the court of appeals shall thereupon enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant, his name, identified as appellant, shall be added to the title.

(b) Filing the Record, Partial Record, or Certificate. Upon receipt of the record transmitted pursuant to Rule 11(b), or the partial record transmitted pursuant to Rule 11(e), (f), or (g), or the clerk's certificate under Rule 11(c), the clerk of the court of appeals shall file it and shall immediately give notice to all parties of the date on which it was filed.

(c) [Dismissal for Failure of Appellant to Cause Timely Transmission or to Docket Appeal.] [Abrogated]

(As amended Apr. 1, 1979, eff. Aug. 1, 1979.)

REVIEW OF DECISIONS OF THE TAX COURT

FRAP 13.

(a) How Obtained; Time for Filing Notice of Appeal. Review of a decision of the United

of such defect by the exercise of reasonable diligence?

Answer: "We do" or "We do not"

Answer: We do

The evidence revealed that when the Bains moved into the house they noticed a bulge under one window, a crack in the kitchen wall, and a sticking door. Within six or seven months after occupying the house, they noticed a foundation crack near the patio. Karen Bain testified that during the spring or summer of 1977 she was told there might be a slab problem with the house.

The Bains presented some evidence to the contrary. They consulted with a foundation expert in April, 1978, who informed them that there was not a substantial foundation defect. Also, they argue the flaws in the house could have been indicative of problems other than a foundation defect, such as ordinary subsidence problems common to the Houston area, or the effects of age, dampness and weathering on a 20-year-old house.

On appeal, the Bains asserted that the jury finding that they were on constructive notice of the foundation defect was against the great weight and preponderance of the evidence. The court of appeals reversed the trial court's judgment and remanded the cause, holding the flaws and evidence of defects in the house "do not point unerringly to a substantial foundation defect." This is not the correct standard of review for a challenge to the sufficiency of the evidence.

When reviewing a jury verdict to determine the factual sufficiency of the evidence, the court of appeals must consider and weigh all the evidence, and should set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Dyson v. Olin Corp.*, 692 S. W. 2d 456, 457 (Tex. 1985); *In Re King's Estate*, 150 Tex. 662, 664-65, 244 S. W. 2d 660, 661 (1951).

The court of appeals imposed a different standard—that the evidence supporting the jury's finding must point "unerringly" to the conclusion found by the jury. The court also held the evidence was "much too slight and indefinite" to support the jury verdict. The jury's task is to decide a fact issue based on the preponderance of the evidence. We hold that the court of appeals has decided this case under an inappropriate standard of law. There is some evidence to support the jury verdict. Therefore, we reverse the judgment of the court of appeals and remand the cause to that court to consider the insufficiency points of error under the proper test.

OPINION DELIVERED: February 12, 1986.

EX PARTE HECTOR SANCHEZ

No. C-4829

Original Habeas Corpus Proceeding.

Writ of habeas corpus granted December 30, 1985 and the cause submitted on January 15, 1986.

Relator is remanded to the custody of the Sheriff of Nueces County, Texas. (Opinion by Justice Kilgarlin.)

For Relator: Thomas G. White, Corpus Christi, Texas.

For Respondent: Larry Ludka and Tom Greenwell, Corpus Christi, Texas.

Hector Sanchez, official court reporter for the 103rd Judicial Distirct Court of Cameron County, was held in contempt by the Court of Appeals for the Thirteenth Supreme Judicial District for failing to file, as ordered, a statement of facts in a cause on appeal in that court. His punishment was a $500 fine and thirty days in jail, and he was further ordered confined until he purged himself of contempt by completing and filing the statement of facts.

Sanchez has sought a writ of habeas corpus from this court, asserting four reasons why his restraint is unlawful. Pending disposition of this case, we released Sanchez from the Nueces County jail upon his posting a proper bond as ordered by this court. Now, having concluded that the order of the court of appeals holding Sanchez in contempt was proper, we deny the writ of habeas corpus and order Sanchez remanded to the custody of the Nueces County Sheriff.

The underlying cause in the court of appeals is *Lee Ross Puckett v. Grizzard Sales, Inc.* The record on appeal was due October 11, 1985. Sanchez received a request for the statement of facts on October 3, 1985, and signed an affidavit in support of Puckett's motion to extend the time for filing the record on appeal. Sanchez's affidavit stated "[t]he Statement of Facts can be prepared by December 11, 1985." In that affidavit, Sanchez estimated that the statement of facts would be 350 pages in length. The court of appeals, in an order dated November 14, 1985, extended the time for filing the record but specifically ordered Sanchez to prepare and file the statement of facts by December 11, 1985. A copy of the order was received by Sanchez on November 19, 1985.

Sanchez was already under order to prepare and file a statement of facts in a criminal case on appeal in the same court. In that case, *Domingo Gonzalez, Jr. v. The State of Texas*, a statement of facts had been requested from Sanchez on October 10, 1984. The court of appeals ordered Sanchez to complete and file the statement of

facts in Gonzalez by August 30, 1985. That statement of facts was not timely filed, and, after two hearings on contempt, Sanchez was incarcerated in the Nueces County jail on November 26, 1985.[1]

Sanchez did not file a statement of facts in *Puckett* by December 11, 1985. Accordingly, on December 12, 1985, the court of appeals ordered Sanchez to appear on December 23, 1985 and show cause why he should not be held in contempt for failing to file the statement of facts in *Puckett* by the date ordered. Sanchez, still in the Nueces County jail as a result of the contempt holding in *Gonzalez*, was promptly served with that show cause order.

The attorney for Sanchez in this habeas corpus proceeding was also his attorney in the last *Gonzalez* contempt hearing, November 7, 1985.[2] On December 4, 1985, the attorney, Thomas G. White, who serves without compensation by appointment from the court of appeals, met with Sanchez in the Nueces County jail. White discussed Sanchez's needs for securing his court reporting equipment, notes, and other matters necessary for the preparation of the statement of facts in *Puckett*.

White concedes in argument before this court that Sanchez did not attempt to obtain his notes and equipment until December 15, 1985, because he was under the mistaken belief that he would be released from the Nueces County jail on the basis of two for one credit. Sanchez's testimony admits much the same, except he places the date as December 13, 1985. Upon realizing his mistake, Sanchez testified that he requested the equipment be delivered to him. However, he received notes from another case, rather than notes from *Puckett*.

In any event, from about December 15, 1985 until the hearing on contempt on December 23, 1985, Sanchez still had not completed the statement of facts in *Puckett*. Moreover, in addition to *Puckett*, Sanchez owed statements of fact in at least six criminal appeals and two civil appeals in the Corpus Christi court. The records of that court reflect that it became necessary on December 31, 1985 for the court, on its own motion, to extend the filing of the statements of facts in those other eight cases and in *Puckett* until further order. By December 31, 1985, Sanchez had completed and filed the statement of facts in *Gonzalez*.

Sanchez's four grounds for habeas corpus relief are: (1) he was not granted a ten-day delay of the contempt hearing as requested in a motion for continuance; (2) because he was in jail as a result of the *Gonzalez* contempt, and without equipment and cooperation from the Nueces County Sheriff's Office, there was impossibility of compliance with the November 14, 1985 order; (3) if he were sentenced for contempt in each of the additional cases in which he owed statements of facts, his punishment could exceed six months, entitling him to a jury trial, and thus it was error to overrule his motion to consolidate all causes in which statements of facts were due; and (4) civil contempt (the coercive aspect of the order) and criminal contempt (the thirty days confinement and $500 fine punishment aspect) cannot be combined in the same order of contempt.

The last two contentions do not require much discussion. It is true that the United States Supreme Court has said that where a court may impose a sentence in excess of six months, a contemner may not be denied a right of trial by jury. *Bloom v. Illinois*, 391 U.S. 194, 198-202 (1967). It is also true that even when offenses are separate and the sentence for each contempt is less than six months, the contemner is nevertheless entitled to a trial by jury if the offenses are aggregated to run consecutively, so as to result in punishment exceeding six months. *Ex Parte McNemee*, 605 S. W. 2d 353, 356 (Tex. Civ. App.—El Paso 1980, habeas granted).

However, Sanchez asks us to assume that he will fail to timely file the statements of facts in the eight additional cases; that this will result in a show cause order from the court of appeals; that this will next result in a holding of contempt; that this will further result in punishment for each separate offense; and, that such combined punishment will exceed a total of six months confinement. We cannot possibly make all of these assumptions, nor could the court of appeals in passing upon Sanchez's motion for consolidation of all of the various causes. There was no error in the court of appeals overruling the motion to consolidate causes.

As to combining criminal contempt and civil contempt (punishment and coercion) into one order, Sanchez cites no cases. Moreover, Sanchez offers no policy argument as to why the two types of contempt should not be combined in the same order and we can think of no reason why the orders should be separate. Separate orders would only tend to confuse jailers. A judgment combining punishment and coercion was found not to be in violation of a predecessor contempt statute. *Ex parte Klugs-*

[1]For an explanation of facts and proceedings in that cause, *see* In Re Hector Sanchez, 698 S. W. 2d 462 (Tex. App.—Corpus Christi 1985).

[2]Sanchez remained out of jail on bond in *Gonzalez*, from November 7, 1985 until November 26, 1985 while seeking habeas corpus relief from the Court of Criminal Appeals, which was denied.

berg, 126 Tex. 225, 229, 87 S. W. 2d 465, 468 (1935). The enactment of Tex. Rev. Civ. Stat. Ann. art. 1911a[3] does not change the permissiveness of incorporating the two forms of contempt into one order.

In respect to Sanchez's continuance argument, all parties agree that attorney White was informally advised four days prior to the December 23 contempt hearing that he would again represent Sanchez. However, the order appointing White to represent Sanchez was not signed until the date of the hearing. Arguing that a continuance should have been granted, Sanchez cites Tex. Code Crim. Proc. art. 26.04(b), which states: "The appointed counsel is entitled to ten days to prepare for trial, but may waive the time by written notice, signed by the counsel and the accused."

We recognize that contempt proceedings are quasi-criminal in nature. *Ex Parte Cardwell*, 416 S. W. 2d 382, 384 (Tex. 1967). Further, we acknowledge that proceedings in contempt cases should conform as nearly as practicable to those in criminal cases. *Ex Parte Scott*, 133 Tex. 1, 10, 123 S. W. 2d 306, 311 (1939). It is because of our eagerness to guarantee that Sanchez's rights of due process be protected and that he not be deprived of his liberty except by due course of law that we do not consider as waiver of this point that the motion for continuance was orally made and was unsworn. It is set out in the statement of facts of the contempt hearing.

It is now settled law in this state that if a contemner requests, he is entitled to be represented by counsel in a contempt proceeding. *Ex Parte Hiester*, 572 S. W. 2d 300, 302 (1978). However, it is a unique situation that would allow the appointment of counsel for a court reporter, whom we would ordinarily assume to have sufficient funds to retain an attorney. Nevertheless, upon Sanchez's request, the Corpus Christi Court of Appeals appointed counsel, and that counsel was entitled to a reasonable time to prepare his defense of Sanchez. We concede, as did the United States Supreme Court in *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964), that the right to counsel can be rendered an empty formality if counsel is denied a justifiable request for delay. But, as the Supreme Court said in that case, "[t]he answer [to whether the case should be delayed] must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Id.*

The sole reason given by White to the court of appeals in support of his motion for continuance was so that he could secure witnesses who would testify in support of the impossibility of compliance defense. He identified those witnesses as jail personnel and the person who furnished the wrong notes and diskettes to Sanchez.

Under the rule announced in *Ungar v Sarafite*, and in consideration of the circumstances of this case, we conclude attorney White had adequate time to prepare for the contempt hearing. The hearing on contempt in *Gonzalez* was already completed when White counseled Sanchez in the Nueces County jail on December 4, 1985 about completing the *Puckett* statement of facts. White admits that he was informally told on December 19, 1985 that he would again be Sanchez's counsel. He came to court armed with a written motion for consolidation. Jail personnel who could testify as to any restrictions placed upon Sanchez's use of his equipment and preparation of the statement of facts were readily available for subpoena in the same courthouse complex in which the contempt hearing was held. Sanchez's testimony as to receiving the wrong notes and diskettes was not disputed. The other relevant facts of the impossibility defense were likewise not disputed, only the legal conclusions to drawn therefrom.

We hold that the time requirements of the Code of Criminal Procedure are not hard and fast rules to be adopted in contempt cases insofar as motions for continuance are concerned. Rather, due process requires only that the judge consider the reasons given for delay in context with the circumstances of the particular case. Sanchez's rights to due process were protected. The ingenuity of attorney White and the able defense he rendered is apparent from the record. Minimally, White had four days to prepare a defense. Based on the grounds asserted in his motion for continuance, that was adequate. The motion for continuance was properly denied.

Finally, we turn to the impossibility of compliance argument. Sanchez testified that the sheriff's office would only allow him to work in preparation of the *Puckett* record from 7 o'clock a.m. until 3 o'clock p.m. (but not during two meal breaks and two roll call breaks). He also testified as to his having received the wrong notes on *Puckett*. He further testified that he needed to compare his notes with certain records of the District Clerk of Cameron County. None of this was disputed. What is in dispute is whether Sanchez voluntarily put himself in a position where it would be impossible for him to comply with the court order.

In this regard, it will be noted that Sanchez knew on November 19, 1985 that he

[3]Now Tex. Gov't Code Ann. § 21.001.

was under order to have the statement of facts prepared and filed by December 11, 1985. Sanchez admitted that the preparation of the *Puckett* statement of facts would consume no more than thirty hours. While it is true that the court had ordered Sanchez to simultaneously prepare the *Puckett* statement of facts and the *Gonzalez* statement of facts, the testimony reveals that Sanchez undertook to do much of the legal preparation and leg work for the *Gonzalez* habeas corpus petition, rather than prepare the *Puckett* statement of facts.

Certainly until his incarceration on November 26, 1985, Sanchez was free to work on the *Puckett* statement of facts. All parties concede that after his incarceration, the sheriff's office, at least as early as December 4, 1985, made it possible for Sanchez to work on the *Puckett* statement of facts. That he elected not to do so until about December 15, 1985 was a decision that Sanchez voluntarily made. Thus, his impossibility of compliance defense must fall. As we said in *Ex Parte Helms*, 152 Tex. 480, 482, 259 S. W. 2d 184, 186 (1953), it is only involuntary inability to perform a judgment or comply with a court's order that is a good defense in a contempt proceeding.

The requested habeas corpus relief by Hector Sanchez is denied. He is ordered remanded to the custody of the sheriff of Nueces County to comply with the order of contempt of the court of appeals.

WILLIAM W. KILGARLIN
Justice

OPINION DELIVERED: February 12, 1986.

RAILROAD COMMISSION OF TEXAS vs. COMMON CARRIER MOTOR FREIGHT ASSOCIATION, INC. ET AL.

No. C-4883

From Tarrant County, Third District.

Opinion of CA, 699 S. W. 2d 291.

Under the provisions of Rule 483, T.R.C.P., the application for writ of error is granted and without hearing oral argument the judgment of the court of appeals is reversed and the cause is dismissed and the order of the Railroad Commission is final. (Per Curiam Opinion.)

For Petitioner: Jim Mattox, Attorney General, Stephen J. Davis, Assistant Attorney General, Austin, Texas.

For Respondents: Brooks and Brooks, Barry Brooks, Dallas, Texas. Robinson, Felts, Starnes, Angenend and Mashburn, John R. Whisenhunt, Phillip Robinson and Mert Starnes, Austin, Texas. Jerry Prestridge, Austin, Texas.

PER CURIAM

This case involves an appeal by the Common Carrier Motor Freight Association, Inc. and its members from an order of the Texas Railroad Commission relating to line-haul rates and minimum charges. The question before us is whether the Association's appeal from the Commission's final order was timely filed in the District Court of Travis County. We hold that it was not and, without hearing oral argument, reverse the judgment of the court of appeals and dismiss the cause. Tex. R. Civ. P. 483.

The Railroad Commission issued its final order regarding the requested rate increase on September 20, 1982. The Commission's order stated that "an imminent peril to the public welfare requires that this order have immediate effect" and that the "order shall be final and appealable on the date issued." Section 19(b) of the Administrative Procedure and Texas Register Act (TEX. REV. CIV. STAT. ANN. art 6252-13a) requires that proceedings for review of an agency order be instituted by filing a petition within 30 days after the decision complained of is final and appealable. Under the Commission's final order, then, the Association was required to file its appeal to the District Court of Travis County by October 20, 1982. The appeal was not filed until November 24, 1982, some 35 days after the required time.

The Association contends that the time for filing its appeal was tolled by its motion for rehearing to the Commission's final order, which was not overruled until November 1, 1982. Generally, a motion for rehearing to the appropriate agency is a prerequisite to a judicial appeal. A.P.T.R.A. § 13(a)(e). However, § 16(c) of the Act specifically provides that if an agency finds the existence of an imminent peril to the public health, safety, or welfare and notes that finding on its final order, a motion for rehearing is not required. The Association acknowledges § 16(c) but contends that this provision merely relieves them of the *necessity* of filing a motion for rehearing, it does not *prevent* them from doing so if they so choose.

Clearly, the purpose of the "imminent peril" clause is to shorten the time frame for the appellate process to preserve the public health, safety, or welfare. Were we to allow a prospective appellant to unilaterally lengthen that process, the "imminent peril" clause would be rendered virtually meaningless. We therefore hold that when a regulatory agency designates a final order as constituting an imminent peril to the public, a party wishing to contest that order must file an appeal to the district

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May 26, 1987

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RE: COAJ Proposals
TRAP 54(a)

Dear Rusty:

The Committee on Administration of Justice met on May 16, 1987. I have enclosed a draft of a proposed rule amendment that they approved that falls within your subcommittee, and will be including same in our June agenda.

This draft is included for your information only, and no further drafting is required unless you feel it is necessary.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as

COAJ Proposal
5-87

Texas Rules of Appellate Procedure

Rule 54. Time to File Record

(a) In Civil Cases -- Ordinary Timetable. 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 [twenty] days after the judgment is signed. If a writ of error has been perfected to the court of appeals 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, 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 facts, except as permitted by this rule.

(b) (no change)

(c) (no change)

Rule as noted.
Recommended unanimously.
5-16-87.

00000123

STANDING SUBCOMMITTEE ON RULES 523-591

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Subcommittee report
6-87

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MELINDA WINN
JAMES T. MAHONEY
MARGARET ANN KICKLER
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*BOARD CERTIFIED - COMMERCIAL REAL ESTATE LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

MAILING ADDRESS:
POST OFFICE BOX 2482
HOUSTON, TEXAS 77252

TELECOPIER (713) 960-1741

March 9, 1987

FILE NO.:

Honorable Luther H. Soules, III, Esq.
Chairman, Supreme Court Advisory Committee
SOULES & REED
800 Milam Building
East Travis At Soledad
San Antonio, Texas 78205

Dear Luke:

This is a report of the Standing Subcommittee on Rules 523-591 which responds to your referral of certain matters to our subcommittee for study per your letters dated February 9, 1987.

This report is an informal one due to the fact of our not having a subcommittee meeting at which a quarum was present. The material was distributed to our membership and we received a letter from John O'Quinn which was supportive of the recommendations of Judge Faye Murphree with respect to the proposed amendments to Rules 216, 544, 739 and 744.

Also, at our meeting last Saturday, Mr. Sam Sparks of San Angelo and I were present and discussed these matters. The two of us also agreed with Judge Murphree's recommendations.

Therefore, we informally add our recommendations to Judge Murphree's proposals subject to any views of the members of this subcommittee to the contrary and, of course, pending full deliberation by the committee.

With respect to Judge David Cave's observations concerning to Rule 591, which are contained in his letter to the Supreme Court of Texas dated January 29, 1987, unless we are overlooking something, it appears that the Rule in question is not Rule 591, but instead should be Rule 592. Rule 592 is outside the purview of our subcommittee and should be referred to the appropriate subcommittee for study and recommendation. Accordingly, we believe it would not be appropriate for our subcommittee to express any views, informal or otherwise, with respect to Judge Cave's observations.

Please let me know if you have any comments with respect to this report.

With best regards, I remain

Your sincerely,

Anthony J. Sadberry /bm

Anthony J. Sadberry

00000425

Subcommittee Report
6-87

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cc: Subcommittee Members

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

:010
Soules

Subcommittee Report
6-87

Tina

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May 28, 1987

FILE NO.:

Federal Express

Luther H. Soules, III, Esq.
SOULES, REED & BUTTS
800 Milam Building
East Travis at Soledad
San Antonio, Texas 78205

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

Dear Luke:

This letter acknowledges receipt of your letter dated May 14, 1987 accompanied by a copy of your letter dated May 13, 1987 in connection with proposed new Rule 574A.

I have circulated copies of this material to the members of this subcommittee and have also contacted their respective offices by telephone. I have received a letter from John O'Quinn in support of the proposal, and I have received no negative responses from members of the subcommittee. In order that it may be docketed on the agenda of the full committee, I am passing on this preliminary report of the subcommittee saying that no opposition to the proposed new rule has been expressed.

Professor Edgar's subcommittee has also addressed this matter concerning the repeal of Rule 264, and, based on my conversation with him, I believe you should receive (or have already received) his letter on the matter. However, he does not oppose this method of solving the problem and as well suggests the possibility of reinstating Rule 264, together with other possible solutions.

I look forward to seeking you soon.

Yours sincerely,

SULLIVAN, KING & SABOM, P.C.

By: _____
Anthony J. Sadberry

00000427

Subcommittee Report
6-87

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

Mr. John M. O'Quinn
O'Quinn, Hagans & Wettman
3200 Texas Commerce Tower
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Waco, Texas 76703

COAJ Proposal
5-87

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 [not less than three days in advance of the date set for trial of the cause,] make a demand for a jury, and also deposit a jury fee of three dollars, which shall be noted on the docket; and the case shall be set down as a jury case.

Revise as noted.
Recommended unanimously.
5-16-87

Texas Rules of Civil Procedure (Murphree)

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~~ [five] dollars, which shall be noted on the docket; and the case shall be set down as a jury case.

Justices of the Peace and Constables Association of Texas

JUDGE JAMES W. DINKINS
PRESIDENT
Montgomery County Courthouse
Conroe, Texas 77301

February 9, 1987

Honorable James Wallace
Associate Justice
The Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Re: Amendments to Texas Rules of Court, Numbers 544, 739, 742 (relating to Justice of the Peace Courts) and 216 (relating to County and District Courts)

Dear Sir:

Thank you for your help concerning the above referenced amendments. The promptness with which you and your staff work took me by surprise and is very impressive.

These amendments were unanimously approved by the Board of our state association, upon recommendation from our legislative committee.

The impetus in seeking these amendments is the scheduling problems created for our dockets when the defendant comes in the day the case is set for trial and requests a jury. Invariably, the result is a postponement of anywhere from two to six weeks to enable the judge to have a jury summoned and find another open date on his docket. The old days of the constable going out on the streets and summarily bringing people in to serve as a juror is basically passed; when it is used at all, it is for one or two people to complete a panel, not for the entire panel.

We also believe this is inherently inequitable for the plaintiff who has been patiently (or sometimes not so patiently) waiting for his case to come to trial. This inequity is particularly true in forcible detainer cases where the defendant continues to occupy the premises of the landlord during the pendency of the suit. Although the landlord is entitled to a judgment for the past due rent that is accruing, he is unable to recover the rent in the majority of cases.

The increase in the jury fee is secondary to the primary purpose of the proposed amendments; however, if the rules are to be amended, we would like to have the increase as well. As you will note, we have also requested an amendment to Rule 216, County and District Courts. Since county courts have concurrent jurisdiction with justice of the peace courtts, we believed the amendment to Rule 216 was necessary if the other rules are amended.

00000431

Again, thank you for your help. We sincerely hope the Supreme Court will be able to assist us in the more efficient management of our courts.

Yours very truly,

W. Faye Murphree, Chairman
J.P. Legislative Committee

cc: Judge James Dinkins, President
J.P. Constables Assoc. of Texas

COAJ Proposal
5-87

[Rule 574a. New Matter May Be Pleaded

Either party may plead any new matter in the county or district court which was not presented in the court below, but no new ground of recovery shall be set up by the plaintiff, nor shall any set-off or counterclaim be set up by the defendant which was not pleaded in the court below. The pleading thereof shall be in writing and filed in the cause before the parties have announced ready for trial.]

New rule.
Recommended unanimously.
5-16-87

COAJ Proposal
5-87

[Rule 574b. Trial de Novo

The cause shall be tried de novo in the county or district court; and judgment shall be rendered.]

New rule.
Recommended unanimously.
5-16-87

File

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May 13, 1987

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

RE: Proposed New Justice Rule

Dear Tony:

Justice Mike McCormick of the Court of Criminal Appeals called me today and pointed up a problem that was created by the repeal of Rule 264. There is no longer in the rules a statement that appeals from the justice court to county court be de novo. There is a provision for that in certiorari proceedings under Rule 591, but even that refers to circumstances similar to "cases appealed from justice courts."

He and I believe that we need to provide for how cases should be appealed unless otherwise provided by law; e.g., where statutes have created municipal courts of record, and perhaps even justice courts of record, where the appeal is on the record.

Accordingly, I recommend that we consider a rule that could be located right after Rule 574 or elsewhere in the 571-574 series as follows:

New Rule 574A

[Unless otherwise provided by law or by these rules, the cause shall be tried and judgment shall be rendered de novo in the county court.]

If your committee finds no other place in the rules where this problem is addressed, I recommend that this rule be forwarded to the Supreme Court of Texas with recommendation from the Supreme Court Advisory Committee that it be adopted.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
cc: Justice Mike McCormick
Justice James P. Wallace

STANDING SUBCOMMITTEE ON RULES 592-734

Chairperson: Steve McConnico

Scott, Douglass & Keeton
12th Floor, First City Bank Bldg.
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(512) 476-6337

Members: Charles Morris
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Chief Justice Jack Pope
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Houston, Texas 77002-6760
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Vester T. Hughes, Jr.
Hughes & Luce
1000 Mercantile Dallas Building
Dallas, Texas 75201
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Subcommittee Report
6-87

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Jesse P. Luton, Jr.
Carroll Martin
Elizabeth N. Miller
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Wallace H. Scott, Jr.
John G. Soule
Frank P. Youngblood

Douglas Jackson Dashiell
Lois E. Fielding
Christopher Fuller
James P. Pennington
Ann Marie Waters

Ray N. Donley
R. Scott Fraley
John Pierce Griffin
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Jenny L. Watford

*Board Certified-Civil Trial Law
**Board Certified-Personal Injury Trial Law
Texas Board of Legal Specialization

Page Keeton
Guy T. Buell
Dick C. Calkins
of Counsel

June 2, 1987

FEDERAL EXPRESS

Mr. Luke Soules
Soules, Reed & Butts
800 Milam Building
East Travis at Soledad
San Antonio, Texas 78205

In Re: Rules 592-734 Subcommittee of the Texas Supreme Court Advisory Committee

Dear Luke:

Enclosed please find the report of the standing Subcommittee on Rules 592-734 together with a proposed draft revision of Tex.R.Civ.P. 1592 and a proposed draft of new Rule 667a.

Very truly yours,

Steve McConnico

sm/kr
Enclosure
cc: Mr. Pat Beard
Prof. Elaine Carlson
Mr. Vester Hughes
Mr. Charles Morris
Mr. John O'Quinn
Mr. Harry Reasoner
Justice Jack Pope
Justice Jim Wallace

Subcommittee Report
6-87

REPORT OF SUBCOMMITTEE ON RULES 592-734

The Subcommittee on Rules 592-734 makes the following report to the Supreme Court Advisory Committee.

1. Judge David Cave, District Judge of the 110th Judicial District Court of Spur, Texas, requests that Rule 592 be amended to provide that a deposit for all costs incurred in connection with carrying out the writ of attachment shall be immediately made to the file clerk by the party seeking the writ of attachment. This proposal was reviewed by the subcommittee. The initial reaction of most of the members of the subcommittee was to favor Judge Cave's proposal. But, subcommittee member Pat Beard raised some questions about the proposed change which I belive are meritorious. As Pat Beard points out, the sheriffs have the right to and probably will ask to be bonded prior to certifying the estimated attachment costs. Unless the sheriff is bonded, the sheriff may refuse to act. Prior to certifying the costs, the sheriff will probably follow the more conservative course and request a large bond. The sheriff will also make a large estimate for attachment costs. Allowing the sheriffs to make estimates as to the attachment costs is probably necessary under Judge Cave's proposal. The sheriff is responsible for carrying out the attachments, and he will know how to estimate the costs incurred in carrying out the writ of attachment. Consequently, the attached proposed rule provides that the estimated cost may be certified by an officer authorized to execute the writ.

There is also a question whether this rule amendment is necessary. Present Rule 592 provides in part:

> The court shall find in its Order the amount of bond required of defendant to replevy, which unless the defendant chooses to exercise his option, as provided in Rule 599, shall be the amount of plaintiff's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court.

Such costs of court should include the estimated attachment costs. The problem remains in making such estimate.

2. Representative Valigura has proposed House Bill 1235. The purpose of such bill is to change Rule 677 to make a defaulting garnishee liable only for the funds held by the garnishee and payable to the debtor rather than for the full amount of the judgment against the debtor as the rule now provides. This proposal was also reviewed by the subcommittee. The subcommittee did not see an easy solution to this problem.

Subcommittee Report
6-87

Following our subcommittee telephone conference, the Committee on Administration of Justice met on May 16, 1987 and approved new proposed Rule 667a in an attempt to solve this problem. I understand the Committee on Administration of Justice's proposal was recommended unanimously. Such proposal is attached to this report. The members on the Subcommittee on Rules 592-734 have not seen this recommendation. This recommendation was proposed by the COAJ after the subcommittee talked. Consequently, I cannot share the subcommittee's comments with the Supreme Court Advisory Committee on Proposed Rule 667a. With this report, the subcommittee members are seeing the COAJ proposal for the first time. I am reuesting that each subcommittee member review this COAJ proposal and share their comments with the Supreme Court Advisory Committee at the June meeting.

A writ of garnishment also directs the garnishee to disclose what property the garnishee possesses that belongs to the defendant. The COAJ proposed rule does not solve the problem of what the default judgment garnishor should obtain when the garnishee possesses property of the defendant. For example, a bank may have valuable property in a safety deposit box leased by the defendant.

Subcommittee Report
6-87

RULE 592
APPLICATION FOR WRIT OF ATTACHMENT AND ORDER

First paragraph - no change.

Second paragraph - no change until the proposed below addition before the last sentence.

> . . . and the estimated cost of court. The order may expressly find the estimated cost of court. The order may direct the issuance of several writs at the same time, or in succession, to be sent to different counties.

RULE 592a

No writ of attachment shall issue until the party applying therefor has deposited the estimated costs as found by the court or as certified by an officer authorized to execute the writ in the absence of an express court finding with the clerk and is filed with the officer authorized to issue such writ a bond payable to the defendant in the amount fixed by the court's order with sufficient surety or sureties as provdied by statute to be approved by such officer, . . . (the remaining rule will not be changed).

Subcommittee Report
6-87

RULE 667a
MODIFICATION IN JUDGMENT BY DEFAULT

During the period of the trial court's plenary power, on motion of the garnishee and hearing thereon, the judgment by default shall be modified to the amount of any indebtedness owed by the garnishee to the defendant, if less than default judgment, plus all interest on the amount of that indebtedness, plus all costs that have accrued in the garnishment proceedings, plus attorneys' fees of the garnishor incurred in connection with the modification.

Subcommittee Report
6-87

RULE 592
APPLICATION FOR WRIT OF ATTACHMENT AND ORDER

First paragraph - no change.

Second paragraph - no change until the proposed below addition before the last sentence.

. . . and the estimated cost of court. The order may expressly find the estimated cost of court. The order may direct the issuance of several writs at the same time, or in succession, to be sent to different counties.

RULE 592a

No writ of attachment shall issue until the party applying therefor has deposited the estimated costs as found by the court or as certified by an officer authorized to execute the writ in the absence of an express court finding with the clerk and is filed with the officer authorized to issue such writ a bond payable to the defendant in the amount fixed by the court's order with sufficient surety or sureties as provdied by statute to be approved by such officer, . . . (the remaining rule will not be changed).

Rule 592

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March 24, 1987

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

RE: Proposed Change to Rules 592-598

Dear Steve:

Enclosed is a copy of a letter from Judge David Cave regarding an amendment to existing Rules 592-598. You will note that even though he cites Rule 591, the amendment that he proposes falls within Rules 592-598.

Please discuss this with your subcommittee and submit a report to me no later than May 29, 1987, so that I can include it in the agenda for our June meeting.

Thank you for your attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES
Chairman

LHSIII/tat
encl/as
cc: Justice James P. Wallace

THE SUPREME COURT OF TEXAS

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

February 2, 1987

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

Professor J. Patrick Hazel, Chairman
Administration of Justice Committee
University of Texas School of Law
727 E. 26th Street
Austin, TX 78705

Re: Rule 591

Dear Luke and Pat:

I am enclosing a letter from Judge David Cave, District Judge of trhe 110th Judicial District of Spur, Texas, regarding the above rule.

May I suggest that this matter be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Honorable David Cave
District Judge
110th Judicial District of Texas
P. O. Box 456
Spur, Texas 79370

OFFICE OF THE DISTRICT JUDGE
110TH JUDICIAL DISTRICT OF TEXAS
BRISCOE, DICKENS, FLOYD AND MOTLEY COUNTIES
110 EAST HARRIS STREET
SPUR, TEXAS 79370

DAVID CAVE
DISTRICT JUDGE

(806) 271-3309
P. O. BOX 456

January 29, 1987

The Supreme Court of Texas
Rules of Civil Procedures Committee
Supreme Court Building
Austin, Texas

Re: Rule 591, Texas Rules of Court

Gentlemen:

I want to advise of a problem with the implementation of Attachment pursuant to Rule 591 and recommend a solution thereto.

The problem has reached a considerable dimension as of late with the downturn in the farm economy of West Texas and the oil economy. That is, when the Sheriff is ordered to Attach an item of property, or so much of the property of the Defendant as to equal a certain sum, who is going to pay for the attachment? The cost of attaching a vast amount of farm machinery is extensive. You are talking about at least $5,000.00 in many cases where the cost of hauling large items of farm machinery from a farm to some place for the Sheriff to keep same, and then the cost of construction of an enclosure to keep it safe in once it is in the possession of the Sheriff. And about Cattle? Does the sheriff have the duty to hire help to get a large number of cows off of a ranch and feed them in lots which the Sheriff is to rent? We have had one lawyer in particular urge this theory on the Court.

Certainly we know that the County government cannot be responsible for financing such large sums of money, and the Rules need to provide that all costs incurred in connection with carrying out the Writ of Attachment shall be immediately ~~born~~ by the party seeking the writ.

Your consideration of the problem is appreciated.

Yours most respectfully,

deposit for

DAVID CAVE

made to the clerk

DCC:s
DC1:r591

Subcommittee Report
6-87

RULE 667a
MODIFICATION IN JUDGMENT BY DEFAULT

During the period of the trial court's plenary power, on motion of the garnishee and hearing thereon, the judgment by default shall be modified to the amount of any indebtedness owed by the garnishee to the defendant, if less than default judgment, plus all interest on the amount of that indebtedness, plus all costs that have accrued in the garnishment proceedings, plus attorneys' fees of the garnishor incurred in connection with the modification.

Rule 667

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March 24, 1987

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

RE: Proposed Change to Rule 667

Dear Steve:

Enclosed is a copy of H.B. 1235, a copy of a letter from Justice Wallace, and a copy of my letter to Representative Valigura. Please discuss this matter with your subcommittee and submit a report to me no later than May 29, 1987, so that I can include it in the agenda for our June meeting.

Thank you for your attention to the business of the Advisory Committee.

Very truly yours,

Luke

LUTHER H. SOULES
Chairman

LHSIII/tat
encl/as
cc: Justice James P. Wallace

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March 17, 1987

Representative Keith Valigura
300 W. Davis Street, Suite 506
Conroe, Texas 77301

Dear Representative Valigura:

Justice Wallace has sent to me the attached materials concerning H.B. 1235. I have put the matter on the Supreme Court Advisory Committee agenda for the June meeting, which is our next meeting. One problem I see with the bill, as it is written, and I say this without passing on the advisability of it, is that it requires the judgment creditor to take a default judgment for the lesser of the amount of the judgment against the defendant or the amount of the indebtedness owed by the bank to the defendant. If the garnishee bank has never answered, how would the garnishor judgment creditor know which of those two amounts was the "lesser"? I believe that the suggestion as written would place the judgment creditor garnishee in a situation where it would be impossible for him to take a default judgment because in the absence of an answer there would be insufficient information even to take a default.

In any event, the matter is in large measure "procedural" as well as one to limit bank exposure. The Supreme Court Advisory Committee will study the matter in its upcoming June, 1987, meeting, and I respectfully request that you defer action to a future legislative session to give us an opportunity to do that.

Very truly yours,

Luther H. Soules III

LHSIII:gc
LS287/065
Attachment

cc: Justice James P. Wallace

THE SUPREME COURT OF TEXAS

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

March 10, 1987

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

Professor J. Patrick Hazel, Chairman
Administration of Justice Committee
University of Texas School of Law
727 E. 26th Street
Austin, TX 78705

Re: Tex. R. Civ. P. 667.

Dear Luke and Pat:

I am enclosing a copy of H.B. 1235 filed by Representative Keith Valigura, which would change Rule 667 to make a defaulting garnishee liable only for the funds held by the garnishee and payable to the debtor rather than for the full amount of the judgment against the debtor as the rule now provides.

I talked to Representative Valigura and explained to him our gentlemen's agreement with the Legislature to let the Court take care of Rules of Procedure and the Legislature substantive law. He advised me that he had introduced this bill at the request of the Texas Banker's Association and that some of the Bankers were quite upset about the present rule. He advised me that the representative of the Texas Banker's Association explained to him that the Banks were finding it cheaper to allow a default judgment to be taken against them for the amount they owed the debtor than to file an answer. That was the only reasoning he had for his bill.

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

Sincerely,

James P. Wallace
Justice

00000450

Pour, 150

TEXAS LEGISLATIVE SERVICE HB 1235
3/4/87
Filed by Valigura

9 -13-21--317 A BILL TO BE ENTITLED

AN ACT

relating to judgment by default in a garnishment proceeding.

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

SECTION 1. Chapter 63, Civil Practice and Remedies Code, is amended by adding Section 63.006 to read as follows:

Sec. 63.006. JUDGMENT BY DEFAULT. Notwithstanding the Texas Rules of Civil Procedure, if a garnishee does not file an answer to a writ of garnishment at or before the time directed in the writ, the court may, at any time after judgment is rendered against the defendant, and on or after appearance day, render judgment by default, as in other civil cases, against the garnishee for the lesser of:

(1) the full amount of the judgment against the defendant with all interest and costs that have accrued in the main case; or

(2) the amount of any indebtedness owed by the garnishee to the defendant, with all interest and costs that have accrued in the garnishment proceeding.

SECTION 2. This Act takes effect September 1, 1987, and applies to a writ of garnishment issued on or after that date. A writ of garnishment issued before the effective date of this Act is governed by the law in effect at the time the writ was issued, and that law is continued in effect for this purpose.

SECTION 3. The importance of this legislation and the

crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

COAJ Proposal
5-87

[Rule 667a. Modification of Judgment by Default

During the period of the trial court's plenary power, upon motion of the garnishee and hearing thereon, the judgment by default shall be modified to the amount of any indebtedness owed by the garnishee to the defendant, if less than the default judgment, plus all interest on the amount of that indebtedness, plus all costs that have accrued in the garnishment proceedings, plus attorneys fees of the garnishor incurred in connection with the modification.]

New rule.
Recommended unanimously.
5-16-87

STANDING SUBCOMMITTEE ON RULES 737-813

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COAT Proposal
5-87

Rule 739. Citation

When the party aggrieved or his authorized agent shall file his written sworn complaint with such justice, the justice shall immediately issue citation directed to the defendant or defendants commanding him to appear before such justice at a time and place named in such citation, such time being not more than ten days nor less than six days from the date of service of citation.

[The citation must contain, in bold or conspicuous print, the information that the defendant may request a trial by jury, that such request must be made three days in advance of the date set for trial of the cause, and that the fee for trial by jury must be filed along with the request.]

Rules as noted.
Recommend unanimously.
5-16-87

Texas Rules of Civil Procedure (Murphree)

Rule 739. Citation

When the party aggrieved or his authorized agent shall file his written sworn complaint with such justice, the justice shall immediately issue citation directed to the defendant or defendants commanding him to appear before such justice at a time and place named in such citation, such time being not more ~~then~~ [than] ten days nor less than six days from the date of service of the citation.

[The citation shall inform the parties that, upon timely request and payment of a jury fee no later than five days after the defendant is served with citation, the case may be heard by a jury.]

COAJ Proposal
5-87

Rule 744. Demanding Jury

Either party shall have the right of trial by jury, by making [the] demand to the justice on or before the day for which [three days in advance of the date] the case is set for trial, and paying the jury fee of three dollars. When a jury is demanded they shall be summoned as in other cases in justice court.

Revise as noted.
Recommend unanimously.
5-16-87

Texas Rules of Civil Procedure (Murphree)

Rule 744. Demanding Jury

~~Either~~ [Any] party shall have the right of trial by jury~~,~~ by making ~~demand to the justice~~ [a written request to the court] on or before [five days from the date the defendant is served with citation,] ~~the day for which the case is set for trial~~, and [by] paying ~~the~~ [a] jury fee of ~~three~~ [five] dollars. ~~When a jury is demanded they~~ [Upon such request, a jury] shall be summoned as in other cases in justice court.

COAJ Proposal
5-87

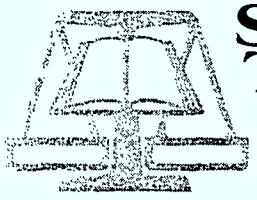
Rule 752. Damages

On the trial of the cause in the county court the appellant or appellee shall be permitted to plead, prove and recover his damages, if any, suffered for withholding or defending possession of the premises during the pendence of the appeal.

Damages may include but are not limited to loss of rentals during the pendency of the appeal and reasonable attorney fees in the justice and county courts[, provided as to attorney fees the requirements of Section 24.006 of the Texas Property Code have been met]. Only the party prevailing in the county court shall be entitled to recover damages against the adverse party. He shall also be entitled to recover court costs. He shall be entitled to recover against the sureties on the appeal bond in cases where the adverse party has executed such bond.

Rules as noted.
Recommend approval.
5-16-87

Subcommittee Report
6-87



South Texas College of Law

May 21, 1987

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

Re: Rules 787-815 Subcommittee Report

Dear Luke:

In response to your letter of May 14, 1987, I wish to report that the subcommittee on rules 737-813 is continuing to study and evaluate the proposal by Professor William Dorsaneo that the trespass to try title rules 783-804 be abolished.

We have concluded, however, that we need more time to study this proposal before we can make a recommendation to the full committee and therefore request that this matter be tabled until our fall meeting.

Very truly yours,

Elaine A. Carlson
Professor of Law

EAC:cs

cc: Charles Morris
John M. O'Quinn
Tom L. Ragland
Franklin Jones, Jr.
Gilbert I. Lowe
Anthony J. Sadberry

00000460

1303 San Jacinto Street, Houston, Texas 77002-7006 (713) 659-8040

Trespass Rules

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LUTHER H. SOULES III
W. W. TORREY

February 24, 1987

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

RE: Rules 783 through 804
Texas Rules of Civil Procedure

Dear Professor Carlson:

At our November meeting, Professor Dorsaneo moved for repeal of the "trespass to try title" Rules. I have attached the pertinent part of that meeting transcript to this letter for your reference.

Please have your subcommittee study this proposal and prepare a report for our June meeting, with a copy to me no later than May 29, 1987, so that I may include same in our agenda.

Very truly yours,

LUTHER H. SOULES III
Chairman

LHSIII/tat
enclosure

LHS - FYI

South Texas College of Law

March 6, 1987

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

Re: Proposed Changes to Rules 739 and 744

Dear Mr. Soules:

In response to your letter of February 9, 1987, enclosed is a draft of proposed amendments to Rules 739 and 744 following review by my subcommittee. I intend to submit these proposed changes at the June meeting of the full committee. Judge Murphree's proposals to these rules reflect a positive change and will hopefully lead to greater and more prudent docket control and less delay and abuse than the current rules might foster.

If you should require any additional information or wish to further discuss this matter, please feel free to contact me.

Sincerely,

Elaine A. Carlson
Professor of Law

EAC:cs

Enclosure

cc: Charles Morris
John M. O'Quinn
Tom L. Ragland
Franklin Jones, Jr.
Gilbert I. Lowe
Anthony J. Sadberry

Trial note

CC.C0162

1303 San Jacinto, Houston, Texas 77002-9990 (713) 659-8040 X 434

Amend Rule 739 by adding a new section that reads:

> The Citation shall inform the parties that, upon timely request and payment of a jury fee no later than five days after the defendant is served with citation, the case may be heard by a jury.

Amend Rule 744 as follows:

> Any party shall have the right of trial by jury by making a written request to the court on or before five days from the date the defendant is served with citation, and by paying a jury fee of five dollars. Upon such request, a jury shall be summoned as in other cases in justice court.

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W. W. TORREY

February 9, 1987

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

RE: Proposed Changes to Rules 739 and 744

Dear Professor Carlson:

Enclosed are requests from Judge Faye Murphree regarding Rules 739 and 744.

Please have your subcommittee study same and forward to me the draft that you intend to submit at our June, 1987, meeting by March 9, 1987, so that I may include it in our agenda.

Very truly yours,

LUTHER H. SOULES III
Chairman

LHSIII/tat
enclosures

Justices of the Peace and Constables Association of Texas

JUDGE JAMES W. DINKINS
PRESIDENT
Montgomery County Courthouse
Conroe, Texas 77301

February 9, 1987

Honorable James Wallace
Associate Justice
The Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Re: Amendments to Texas Rules of Court, Numbers 544, 739, 742 (relating to Justice of the Peace Courts) and 216 (relating to County and District Courts)

Dear Sir:

Thank you for your help concerning the above referenced amendments. The promptness with which you and your staff work took me by surprise and is very impressive.

These amendments were unanimously approved by the Board of our state association, upon recommendation from our legislative committee.

The impetus in seeking these amendments is the scheduling problems created for our dockets when the defendant comes in the day the case is set for trial and requests a jury. Invariably, the result is a postponement of anywhere from two to six weeks to enable the judge to have a jury summoned and find another open date on his docket. The old days of the constable going out on the streets and summarily bringing people in to serve as a juror is basically passed; when it is used at all, it is for one or two people to complete a panel, not for the entire panel.

We also believe this is inherently inequitable for the plaintiff who has been patiently (or sometimes not so patiently) waiting for his case to come to trial. This inequity is particularly true in forcible detainer cases where the defendant continues to occupy the premises of the landlord during the pendency of the suit. Although the landlord is entitled to a judgment for the past due rent that is accruing, he is unable to recover the rent in the majority of cases.

The increase in the jury fee is secondary to the primary purpose of the proposed amendments; however, if the rules are to be amended, we would like to have the increase as well. As you will note, we have also requested an amendment to Rule 216, County and District Courts. Since county courts have concurrent jurisdiction with justice of the peace courtts, we believed the amendment to Rule 216 was necessary if the other rules are amended.

Again, thank you for your help. We sincerely hope the Supreme Court will be able to assist us in the more efficient management of our courts.

Yours very truly,

W. Faye Murphree, Chairman
J.P. Legislative Committee

cc: Judge James Dinkins, President
J.P. Constables Assoc. of Texas

STANDING SUBCOMMITTEE ON RULES OF EVIDENCE

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Subcommittee report 6-87 Texas - Oglesby

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UNIVERSITY OF HOUSTON
LAW CENTER

May 27, 1987

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

Dear Luke:

Herewith is the report of the Rules of Evidence Subcommittee of the Supreme Court Advisory Committee. The report deals with the rule 172, Texas Rules of Civil Procedure, matter you raised, and the four evidence rule changes recommended by the State Bar Committee on Administration of Rules of Evidence.

Yours truly,

Newell H. Blakely, Chairman
Rules of Evidence Subcommittee

NHB/cs

cc: All Members
Supreme Court Advisory Committee

Subcommittee Report
6-87

MAY 27, 1987 REPORT OF EVIDENCE RULES SUBCOMMITTEE

OF THE SUPREME COURT ADVISORY COMMITTEE

PROBLEM #I

Rule 172, Texas Rules of Civil Procedure, provides for auditors in certain situations and mandates that the auditor's report is admissible in evidence. Despite the mandate, some trial judges are excluding such reports on the basis of one or more of the rules of evidence. The problem is how to make clear to trial courts that procedure rule 172 overrides all obstacles presented by the rules of evidence.

Solution IA. This solution is favored by Low, O'Quinn, Carlson, Ragland, Blakely. Low would add a reference to 172 in evidence rule 705.

> Rule 172 Audit.
> When an investigation of accounts or examination of vouchers appears necessary for the purpose of justice between the parties to any suit, the court shall appoint an auditor or auditors to state the accounts between the parties and to make report thereof to the court as soon as possible. The auditor shall verify his report by his affidavit stating that he has carefully examined the state of the account between the parties, and that his report contains a true statement thereof, so far as the same has come within his knowledge. Said report shall be admitted in evidence despite any evidence rule to the contrary, but may be contradicted by evidence from either party where exceptions to such report or of any item thereof have been filed before the trial. The court shall award reasonable compensation to such auditor to be taxed as costs of suit.

Solution IB. This solution is favored by Jones and Sadberry.

> Texas Rules of Civil Evidence.
> Rule 706. Audit.
> "Verified reports of auditors appointed pursuant to Texas Rule of Civil Procedure 172, whether in the form of summaries, opinions, or otherwise, shall be admitted in evidence when offered by any party whether or not the facts or data in the reports are otherwise admissible and whether or not the reports embrace the ultimate issues to be decided by the trier of fact. Where exceptions to the reports have been filed, a party may contradict the reports by evidence supporting the exceptions."

Subcommittee Report
6-87

Texas Rules of Civil Procedure
Rule 172. Audit.
When an investigation of accounts or examination of vouchers appears necessary for the purpose of justice between the parties to any suit, the court shall appoint an auditor or auditors to state the accounts between the parties and to make report thereof to the court as soon as possible. The auditor shall verify his report by his affidavit stating that he has carefully examined the state of the account between the parties, and that his report contains a true statement thereof, so far as the same has come within his knowledge. [~~Said report shall be admitted in evidence; by may be contradicted by evidence from either party where~~] Exceptions to such report or of any item thereof may be [~~have been~~] filed within 30 days of the filing of such report. [~~before the trial;~~] The Court shall award reasonable compensation to such auditor to be taxed as costs of suit.

Solution IC. Judge Pope favors having identical procedure and evidence rules. Perhaps as follows?

Texas Rules of Civil Procedure
Rule 172. Audit.
When an investigation of accounts or examination of vouchers appears necessary for the purpose of justice between the parties to any suit, the court shall appoint an auditor or auditors to state the accounts between the parties and to make report thereof to the court as soon as possible. The auditor shall verify his report by his affidavit stating that he has carefully examined the state of the account between the parties, and that his report contains a true statement thereof, so far as the same has come within his knowledge. Said report shall be admitted in evidence despite any evidence rule to the contrary, but may be contradicted by evidence from either party where exceptions to such report or of any item thereof have been filed before the trial. The court shall award reasonable compensation to such auditor to be taxed as costs of suit.

Texas Rules of Civil Evidence
Rule 706. Audit.
When an investigation of accounts or examination of vouchers appears necessary for the purpose of justice between the parties to any suit, the court shall appoint an auditor or auditors to state the accounts between the parties and to make report thereof to the court as soon as possible. The auditor shall verify his report by his affidavit stating that he has carefully examined the state of the account between the parties, and that his report contains a true statement

thereof, so far as the same has come within his knowledge. Said report shall be admitted in evidence **despite any evidence rule to the contrary**, but may be contradicted by evidence from either party where exceptions to such report or of any item thereof have been filed before the trial. The court shall award reasonable compensation to such auditor to be taxed as costs of suit.

PROBLEM # II

Should language from rule 52(b), Texas Rules of Appellate Procedure, be brought into the Texas Rules of Civil Evidence, to make clearer that the opponent of evidence need not, to preserve error, repeat objections in the presence of the jury, inasmuch as the trial court has already ruled adversely to opponent out of the presence of the jury?

Solution IIA. This solution was recommended by the State Bar Committee On Rules of Evidence. This solution was approved by Low, Carlson, Sadberry, Pope and Blakely, but rejected by Jones and Ragland.

Texas Rules of Civil Evidence
Rule 103. Rulings on Evidence.
(a) Effect of erroneous ruling. . .
(1) Objection. . .
(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections.

Comment by the State Bar Committee on Rules of Evidence. This proposed amendment is suggested to make Rule 103(a)(2) consistent with Tex. R. App. P. 52(b). It is not a change in the law, but rather collects relevant rules from different codes into the same body. The recommended changes . . . carried by a Committee vote of 10-9. The opposition did not dispute that the new language was fully consistent with the present law. Rather, the objection was to the inclusion in the Rules of Evidence of matters covered in procedural rules in the absence of any inconsistency between the two. Such additions were said to be objectionable because they unnecessarily add to the verbiage of the Rules of Evidence, and depart unnecessarily from the model of the Federal Rules of Evidence. It was also noted that if the addition set forth in item . . . above were to be made, it would be more properly placed at the end of Rule 103(a)(1) which is titled "Objection".

Subcommittee Report
6-87

Solution IIB. This solution picks up the suggestion from the Bar Committee comment that 103(a)(1) is the more appropriate location for the new language than is 103(a)(2).

Texas Rules of Civil Evidence.
Rule 103. Rulings on Evidence.
(a) Effect of erroneous ruling . . .
(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context [;] . When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections. Or,

PROBLEM # III

Should language from rule 52(b), Texas Rules of Appellate Procedure, be brought into the Texas Rules of Evidence, to make clearer an offering party's right to make the offer before the charge and out of the presence of the jury?

Solution IIIA. This solution was recommended by the State Bar Committee on Rules of Evidence. This solution was approved by Low, Carlson, Sadberry, Pope and Blakely, but was rejected by Jones and Ragland.

Texas Rules of Civil Evidence
Rule 103. Rulings on Evidence
(a) Effect of erroneous ruling. . . .
(b) Record of offer and ruling. The offering party shall as soon as practicable, but before the court's charge is read to the jury, be allowed to make, in the absence of the jury, its offer of proof. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may, or at the request of a party shall, direct the making of an offer in question and answer form.

Comment by State Bar Committee on Rules of Evidence. The purpose of this amendment is to make 103(b) consistent with Tex. R. App. P. 52(b). The recommended changes . . . carried by a Committee vote 10-9. The opposition did not dispute that the new language was fully consistent with the present law. Rather, the objection was to the inclusion in the Rules of Evidence of matters covered in procedural rules in the absence of any inconsistency between the two. Such additions were said to be objectionable because they unnecessarily add to the verbiage of the Rules of Evidence, and depart unnecessarily from the model of the Federal Rules of Evidence.

Subcommittee Report
6-87

PROBLEM # IV

The last sentence of rule 407, Texas Rules of Civil Evidence, has the effect of admitting subsequent remedial measures in products liability cases. Should that last sentence be struck so as to leave the matter open? See, State Bar Committee Comment.

Solution IVA. This solution was approved by the State Bar Committee on Rules of Evidence. The solution was approved by Carlson, Sadberry, Pope and Blakely, but rejected by Low, Jones and Ragland.

> Rule 407. SUBSEQUENT REMEDIAL MEASURES; NOTIFICATION OF DEFECT
>
> (a) SUBSEQUENT REMEDIAL MEASURES. When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control or feasibility of precautionary measures, if controverted, or impeachment. [~~Nothing in this rule shall preclude admissibility in products liability cases based on strict liability.~~]

Comment by State Bar Committee on Rules of Evidence. The recommendation carried by a Committee vote of 12-5. It was argued that the inclusion of the last sentence is inequitable and arbitrary in drawing a distinction in the treatment of this class of evidence on the basis of whether the action is tried on the basis of strict liability rather than negligence. It was also urged that this language discourages manufacturers from making desirable changes in product design for fear of the use of such changes to their overwhelming disadvantage in subsequent litigation. A final argument was that striking the last sentence would conform rule 407(a) to the language of the Federal Rules, leaving to the courts the task of deciding in the context of specific cases when, if ever, a distinction in the treatment of this class of evidence is appropriate in products liability cases.

PROBLEM # V

Should rule 705, Texas Rules of Civil Evidence, be amended to give the opponent of expert opinion an opportunity to screen, out of the presence of the jury, the basis of the expert opinion with respect to sufficiency and with respect to whether the danger of improper use of the facts or data underlying the opinion will outweigh their value as a basis for the opinion?

Subcommittee Report
6-87

Solution VA. This solution was approved by the State Bar Committee on Rules of Evidence. This solution was approved by Low, Carlson, Sadberry, Pope and Blakely, but rejected by Jones and Ragland.

Rule 705. DISCLOSURE OF FACTS OR DATE UNDERLYING EXPERT OPINION

(a) DISCLOSURE OF FACTS OR DATA. The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data, subject to subparagraphs (b) through (d)

(b) VOIR DIRE. Prior to the expert giving his opinion or disclosing the underlying facts or data, a party against whom the opinion is offered shall, upon request, be permitted to conduct a voir dire examination directed to the underlying facts or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury.

(c) ADMISSIBILITY OF OPINION. If the court determines that the expert does not have a sufficient basis for his opinion, the opinion is inadmissible unless the party offering the testimony first establishes sufficient underlying facts or data.

(d) BALANCING TEST; LIMITING INSTRUCTIONS. When the underlying facts or data would be inadmissible in evidence for any purpose other than to explain or support the expert's opinion or inference, the court shall exclude the underlying facts or data if the danger that they will be used for an improper purpose outweighs their value as explanation or support for the expert's opinion. If the facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

Comment: This rule does not preclude a party from conducting a voir dire examination into the qualifications of an expert.

Comment by State Bar Committee on Rules of Evidence. The recommendation was adopted unanimously by the Committee. It would conform Rule 705 completely to Criminal Rule 705. As originally proposed only the balancing test found in subsection 705(d) of the Criminal Rules would have been added. This proposal was justified on the grounds that it was needed to prevent "back door" introduction of otherwise inadmissible and prejudicial evidence relied upon by the expert witness pursuant to Rule 703. An example which was offered was that in a products

liability case the expert might examine other claims, lawsuits or complaints in reaching an opinion. This data might be inadmissible under Rules 402 and 403 because of remoteness, dissimilarity, or other defects in its probative value. Yet, under the rule as it now stands, a judge might admit the evidence because of the claim that other experts in the relevant area of expertise rely upon such data.

It was acknowledged that Rules 105(a) and 403 probably provide the trial judge with sufficient authority to prevent such possible misuse of data employed by an expert witness in reaching an opinion. Nevertheless, there was thought to be substantial danger that trial judges might not consider the applicability of Rules 105 and 403, and think themselves bound by the language of Rules 703 and 705. This recommendation was not intended or thought to change the law.

The Committee in its consideration of this proposal reached the conclusion that subsections (b) and (c) of Criminal Rule 705 were also valuable protections against the misuse of expert testimony. Despite recognition that these protections were originally designed to take account of the relatively limited discovery permitted in criminal cases, the Committee believed the entire language of Criminal Rule 705 worthy of inclusion.

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April 17, 1987

Professor Newell Blakely
University of Houston Law Center
4800 Calhoun Road
Houston, Texas 77004

RE: Recommendations of the State Bar Committee
Rules of Evidence

Dear Newell:

Enclosed is a copy of a letter from Mike Sharlot, a copy of the Agenda of the Committee on Administration of Rules of Evidence, and a copy of its Proposed Recommendations.

Justice Wallace has requested that we consider these recommendations. Accordingly, I am requesting that your subcommittee prepare a report to be submitted to me no later than May 29, 1987, so that it may be included in our June, 1987, agenda.

Thank you for your attention to this matter.

Very truly yours,

LUTHER H. SOULES III
Chairman

LHSIII/tat
enclosure

Newell, I perceive little enthusiasm for this -

Fwd,
To stdg Subs
& Agenda

THE SUPREME COURT OF TEXAS
P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

April 15, 1987

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

Dear Luke:

I am enclosing a copy of Mike Sharlot's letter of April 7, 1987, along with the recommendations of the State Bar Committee on Rules of Evidence resulting from the April 3 meeting. I attended the meeting but had to leave at noon when they finished their agenda. The items recommended were not on the published agenda and were considered after I left. I was somewhat surprised to get this report.

Please include this in your calendar of pending matters.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure

SCHOOL OF LAW
THE UNIVERSITY OF TEXAS AT AUSTIN

727 East 26th Street · Austin, Texas 78705 · (512) 471-5151

April 7, 1987

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

Dear Justice Hill:

The State Bar of Texas Committee on the Administration of the Rules of Evidence, after deliberation at its April 3, 1987 meeting, recommends to the Supreme Court that the Rules of Evidence be amended as described in the enclosed list dated April 7, 1987.

Also enclosed is the agenda for the meeting of April 3. A comparison of the items listed there with those recommended will reveal that none of the agenda items were deemed appropriate for action by the Supreme Court. Indeed, all of the Committee's recommendations to this Court were based on proposals received too late for inclusion on the agenda. In this connection, I will urge the next chairman to announce a rule precluding formal action on any item that is not received in time for inclusion on the agenda and circulation to the Committee.

Sincerely,

M. Michael Sharlot

M. Michael Sharlot
Chair, Committee on the
Administration of the
Rules of Evidence

C: Hon. John F. Onion
Hon. James P. Wallace

Enclosures

MMS/jjp

AGENDA

COMMITTEE ON ADMINISTRATION OF RULES OF EVIDENCE

MEETING OF FRIDAY, APRIL 3, 1987, ROOM 104, LAW CENTER

The Committee on Administration of Rules of Evidence will meet from 10 A.M. to 5 P.M. in Room 104, Texas Law Center, Friday, April 3, 1987. The room will be available for Saturday morning if our work requires the meeting to be continued. The following items are offered in the order in which they were received. A number of other suggestions were submitted, but the questions that they raise appear to have been resolved to the satisfaction of the writer through direct communication by the Chair.

1. Judge Gist recommends that Criminal Rule 614(d) be amended so as to require the production of witness statements before trial or before the witness testifies.

2. Mr. Reynolds suggests consideration of possible amendment of Rule 408 to address the admissibility of "Mary Carter" agreements in light of Scurlock Oil Co. v. Smithwick, 30 Tex.Sup.Ct.J. 74 (1986). I have written Mr. Reynolds asking him to consider preparing and distributing language for a proposed amendment.

3. Justice Hall requests consideration of the application of Civil Rule 802 to summary judgment proceedings.

4. Ms. Fox recommends the removal of "or by considerations of undue delay" from Criminal Rule 403 as a grounds for the exclusion of otherwise relevant evidence.

5. Ms. Fox recommends the removal of "in the State's case in chief" from Criminal Rule 404(b) so as to require prior notice as to the offer for any purpose of evidence of prior acts of the defendant.

6. Ms. Fox recommends the addition to Criminal Rule 404(b) of language that would provide in detail the contents of the notice to be provided by the prosecution prior to the offer of evidence of "other acts" of the defendant.

7. Mr. Marshall recommends the amendment of Criminal Rule 410 to permit the use in perjury prosecutions of certain statements made during plea hearings (where the plea was later withdrawn) or during plea negotiations.

8. Mr. Marshall recommends the amendment of Criminal Rule 410 to permit the use of such statements in a subsequent prosecution for an offense other than the one at issue during the original plea hearing or negotiation. He offers the examples of prosecutions for bribery or retaliation.

9. Mr. Marshall recommends the amendment of Criminal Rule 613 to give the court discretion to permit the victim and the victim's relatives to remain in the courtroom during testimony although they would otherwise be subject to exclusion as witnesses. In this connection it is suggested that consideration be given to extending this proposal to include persons who have interviewed child victims of sexual or other assault and whose presence may be justified as providing reassurance to the child even if they may also be called as witnesses.

10. Other matters, if any.

Attachments: 1987-1 through 9.

April 7, 1987

THE 1986-87 STATE BAR COMMITTEE ON THE ADMINISTRATION OF RULES OF EVIDENCE RECOMMENDS TO THE SUPREME COURT OF TEXAS THE FOLLOWING CHANGES IN THE RULES OF EVIDENCE

In the following materials, new language is indicated by being underscored, section and subsection headings to be highlighted when printed are shown in capitals, and language to be deleted is bracketed.

1. Rule 103(a) * * *

(2) OFFER OF PROOF. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections.

EXPLANATION: This proposed amendment is suggested to make Rule 103(a)(2) consistent with Tex. R. App. P. 52(b). It is not a change in the law, but rather collects relevant rules from different codes into the same body.

2. Rule 103(b)

RECORD OF OFFER AND RULING. The offering party shall as soon as practicable, but before the court's charge is read to the jury, be allowed to make, in the absence of the jury, its offer of proof. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may, or at request of a party shall, direct the making of an offer in question and answer form.

EXPLANATION: The purpose of this amendment is to make 103(b) consistent with Tex. R. App. P. 52(b).

The recommended changes ## 1 and 2 carried by a Committee vote of 10-9. The opposition did not dispute that the new language was fully consistent with the present law. Rather, the objection was to the inclusion in the Rules of Evidence of matters covered in procedural rules in the absence of any inconsistency between the two. Such additions were said to be objectionable because they unnecessarily add to the verbiage of the Rules of Evidence, and depart unnecessarily from the model of the Federal Rules of Evidence. It was also noted that if the addition set forth in item # 1, above, was to be made, it would be more properly placed at the end of Rule 103(a)(1) which is titled "Objection".

3. Rule 407. SUBSEQUENT REMEDIAL MEASURES; NOTIFICATION OF DEFECT

(a) SUBSEQUENT REMEDIAL MEASURES. When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control or feasibility of precautionary measures, if controverted, or impeachment. [Nothing in this rule shall preclude admissibility in products liability cases based on strict liability.]

EXPLANATION: The recommendation carried by a Committe vote of 12-5. It was argued that the inclusion of the last sentence is inequitable and arbitrary in drawing a distinction in the treatment of this class of evidence on the basis of whether the action is tried on the basis of strict liability rather than negligence. It was also urged that this language discourages manufacturers from making desirable changes in product design for fear of the use of such changes to their overwhelming disadvantage in subsequent litigation A final argument was that striking the last sentence would conform rule 407(a) to the language of the Federal Rules, leaving to the courts the task of deciding in the context of specific cases when, if ever, a distinction in the treatment of this class of evidence is appropriate in products liability cases.

4. Rule 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

(a) DISCLOSURE OF FACTS OR DATA. The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or date, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data, subject to subparagraphs (b) through (d)

(b) VOIR DIRE. Prior to the expert giving his opinion or disclosing the underlying facts or data, a party against whom the opinion is offered shall, upon request, be permitted to conduct a voir dire examination directed to the underlying facts or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury.

(c) ADMISSIBILITY OF OPINION. If the court determines that the expert does not have a sufficient basis for his opinion, the opinion is inadmissible unless the party offering the testimony first establishes sufficient underlying facts or data.

(d) BALANCING TEST: LIMITING INSTRUCTIONS. When the underlying facts or data would be inadmissible in evidence for any purpose other than to explain or support the expert's opinion or inference, the court shall exclude the underlying facts or data if the danger that they will be used for an improper purpose outweighs their value as explanation or support for the expert's opinion. If the facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

Comment: This rule does not preclude a party from conducting a voir dire examination into the qualifications of an expert.

The recommendation was adopted unanimously by the Committee. It would conform Rule 705 completely to Criminal Rule 705. As originally proposed only the balancing test found in subsection 705(d) of the Criminal Rules would have been added. This proposal was justified on the grounds that it was needed to prevent "back door" introduction of otherwise inadmissible and prejudicial evidence relied upon by the expert witness pursuant to Rule 703. An example which was offered was that in a products liability case the expert might examine other claims, lawsuits or complaints in reaching an opnion. This data might be inadmissible under Rules 402 and 403 because of remoteness, dissimilarity, or other defects in its probative value. Yet, under the rule as it now stands, a judge might admit the evidence because of the claim that other experts in the relevant area of expertise rely upon such data.

It was acknowledged that Rules 105(a) and 403 probably provide the trial judge with sufficient authority to prevent such possible misuse of data employed by an expert witness in reaching an opinion. Nevertheless, there was thought to be a substantial danger that trial judges might not consider the applicability of Rules 105 and 403, and think themselves bound by the language of Rules 703 and 705. This recommendation was not intended or thought to change the law.

The Committee in its consideration of this proposal reached the conclusion that subsections (b) and (c) of Criminal Rule 705 were also valuable protections against the misuse of expert testimony. Despite recognition that these protections were originally designed to take account of the relatively limited discovery permitted in criminal cases, the Committe believed the entire language of Criminal Rule 705 was worthy of inclusion.

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JOHN M. O'QUINN, P.C.
BOARD CERTIFIED
PERSONAL INJURY TRIAL LAW

May 30, 1987

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

RE: Proposed Amendments to Rules 407 & 705

Dear Luke:

In a letter dated May 27, 1987, Chairman Blakely reported the Subcommittee's vote about several proposed rule changes.

My vote was not reflected in his report regarding Rules 407 & 705. This is not his fault, but mine. I have been out of town in trial and did not timely send my vote to him. Nonetheless, I would like to make my position known, particularly since the Subcommittee is sharply divided on these matters.

In my judgment, it would be wrong, and seriously wrong, to tinker with Rule 407. The present language of that rule represents a compromise between sharply competing points of view. The present rule was hammered out after much argument and discussion and represents a consensus position. The present rule represents a reasonable balance between those competing points of view, and it would, in my judgment, be wrong to change one portion of the rule and upset that balance.

Moreover, there are strong arguments in favor of admissibility of subsequent changes in product liability cases. Strict product liability law is not fault based. It focuses on the product's condition, rather than the seller's conduct. Thus, the traditional arguments for excluding subsequent remedial measures in negligence cases do not apply.

Hence, include me with those who voted to reject this rule change.

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June 10, 1987

Professor Newell Blakely
University of Houston Law Center
4800 Calhoun Road
Houston, Texas 77004

RE: Amendment to Rule 267

Dear Newell:

Enclosed is a housekeeping amendment to Rule 267, submitted by Professor Wicker.

Please submit a proposed Rule no later than June 18, 1987, so that I may include it in our June agenda.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as

Texas Tech University

School of Law
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May 6, 1987

Professor J. Patrick Hazel, Chair
Committee on Administration of Justice
University of Texas School of Law
727 E. 26th Street
Austin, TX 78705

Re: Need to amend Rule 267, Tex.R.Civ.Proc.

Dear Pat:

Rule 267, Tex.R.Civ.P., was amended, effective January 1, 1988, to include language expressly referring to Rule 613 of the Texas Rules of Evidence. The latter, however, was amended, effective January 1, 1988, and renumbered as Rule 614. Also, the "Texas Rules of Evidence" were renamed the "Texas Rules of Civil Evidence."

Accordingly, the enclosed suggested amendment to Rule 267, Tex.R.Civ.P., is offered to conform it to the amendments to the Texas Rules of Evidence.

Sincerely,

Jeremy C. Wicker
Professor of Law

JCW/nt
Enclosure

cc: Justice James P. Wallace

Mr. Luther H. Soules III

(existing rule marked through with dashes; proposed new wording underlined)

Rule 267. Witnesses Placed Under Rule

At the request of either party, in a civil case, the witnesses on both sides may be sworn and removed out of the courtroom to some place where they cannot hear the testimony as delivered by any other witness in the cause. This is termed placing witnesses under the rule. Neither party to the suit shall be placed under the rule. Where a corporation is a party to the suit, the court may exempt from the rule an officer or other representative of such party. Witnesses, when placed under Rule ~~613~~ 614 of the Texas Rule of Civil Evidence, shall be instructed by the court that they are not to converse with each other or with any other person about the case other than the attorneys in the case, except by permission of the court, and that they are not to read any report of or comment upon the testimony in the case while under the rule. Any person violating such instructions may be punished for contempt of court.