INDEX

00332	TRCP 237a
00333-00341	TRCP 278
00342-00343	TRCP 299
00344-00345	TRCP 299a
00346-00351	TRCP 305
00352-00355	TRCP 308a
00356-00392	TRCP 329b
00393-00395	TRCP 330
00396-00401	TRCP 749
00402-00406	Letter regarding House Bill 1637
00407-00409	TRCP 534

4543.001

0118 HJH
Copy LHS
6-27-89

STATE OF TEXAS
OFFICE OF THE GOVERNOR
AUSTIN, TEXAS 78711

WILLIAM P. CLEMENTS, JR.
GOVERNOR

June 22, 1989

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

Dear Mr. Soules:

Thank you for your recent letter urging my veto of S.B. 874.

You will be happy to know that I vetoed this particular piece of legislation.

Constituent input was vital to my decision and I appreciate your interest.

Sincerely,

William P. Clements, Jr.
Governor

WPC:DPF/smm/ls

LHS Copy

The Senate of The State of Texas Austin

BOB GLASGOW
STATE SENATOR
DISTRICT 22

Chairman
JURISPRUDENCE Committee
Vice-Chairman
FINANCE Committee
Member
ADMINISTRATION Committee
STATE AFFAIRS Committee
LEGISLATIVE BUDGET BOARD
TEXAS LEGISLATIVE COUNCIL

June 23, 1989

Mr. Luther Soules, III
10th Floor Republic of Texas Plaza
175 E. Houston Street
San Antonio, Texas 78205-2230

Dear Luke:

I enjoyed getting to visit with you again at the Committee hearing on S.B. 1013. I also appreciated your letter outlining your thoughts on the bill.

As we discussed during the hearing, it appears that part of the solution to this question regarding sanctions for frivolous lawsuits would be to have better lines of communication opened up between the Legislature and the Supreme Court.

Again, I appreciate you taking the time to come before the Committee to share your views.

Very truly yours,

Bob Glasgow

BG/ms

0001

P.O. Box 12068, Capitol Station
Austin, Texas 78711
512/463-0122

6410 Southwest Blvd., Ste. 109
Ft. Worth, Texas 76109
817/763-0259

505 N. Graham
Stephenville, Texas 76401
817/965-5069

P.O. BOX 2910
AUSTIN, TEXAS 78768-2910
512-463-0532

State of Texas
House of Representatives

200 NAVARRO
SAN ANTONIO, TEXAS 78205
512-225-3141

ORLANDO L. GARCIA
STATE REPRESENTATIVE
DISTRICT 115

June 20, 1989

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

Dear Mr. Soules:

As you know, the 71st Legislature has concluded its Regular Session. Previously you communicated your concern and interest regarding House Bill 2223 by Representative Culberson and Senate Bill 1013 by Senator Krier relating to frivolous lawsuits. Please be advised that the Legislature did not pass either of these bills.

Again, thank you for your communication and interest in our state government. Your participation in our government is an integral part of the democratic process. If I or my staff may be of assistance to you on any matter pending before the Legislature or any state agency, please call me.

Very truly yours,

ORLANDO L. GARCIA
State Representative

OLG/bac

COMMITTEES:
APPROPRIATIONS • CORRECTIONS, CHAIRMAN OF BUDGET & OVERSIGHT

The Senate of
The State of Texas

HUGH PARMER
District 12
Fort Worth

CHAIRMAN:
Intergovernmental Relations
MEMBER:
Administration
Health and Human Services
State Affairs

June 9, 1989

Mr. Luther H. Soules III
Republic of Texas Plaza
175 East Houston Street, 10th Floor
San Antonio, Texas 78205-2230

Dear Mr. Soules:

Thank you for your letter concerning SB1019 and HB2223 relating to frivolous lawsuits. As you probably know, neither of these bills were passed into law during the legislative session. Please be assured that I will continue to keep your concerns with this issue in mind in the future.

Once again, thank you for writing. Please feel free to call on me if I may ever be of any assistance to you in the future.

Sincerely,

Hugh Parmer

Hugh Parmer
Senator

HP/ck

Re Justice Hecht -

✓ 6-21-89

0001

P. O. Box 12068 Austin 78711 512/463-0112

1100 Texas Street Fort Worth 76102 817/332-2444

ALAN SCHOOLCRAFT
DISTRICT 121

State of Texas
House of Representatives
Austin

District Office:
2117 Pat Booker Rd.
Universal City, Texas 78148
(512) 658-0768

May 24, 1989

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

Dear Mr. Soules:

Thank you for your recent letter in opposition to Senate Bill 1013, relating to frivolous law suits, and the companion House Bill 2223. I am always glad to hear from interested citizens about current issues.

Senate Bill 1013 was left pending in the Senate Jurisprudence Committee. House Bill 2223 has passed out of committee in the House but has not yet been set on the House Calendar. At this late date in the session, it is highly unlikely that either of these bills can possibly complete the legislative process.

I appreciate you sharing your concerns with me and if I can be of any further assistance to you in state government matters, please don't hesitate to call on me.

Sincerely,

Alan Schoolcraft
State Representative

AS:cb

The State of Texas
House of Representatives
Austin, Texas

BETTY DENTON
1023 JEFFERSON
SUITE 203
WACO, TEXAS 76701
817/756-2650

COMMITTEES:
APPROPRIATIONS
FINANCIAL INSTITUTIONS
Chairman, Budget
& Oversight

June 6, 1989

Mr. Luther H. Soules III
Attorney at Law
10th Floor, Republic of Texas Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Dear Mr. Soules:

You had written me regarding S.B. 1019 and H.B. 2223; however, S.B. 1019 deals with schools, and I believe that you are referring to S.B. 1013. H.B. 2223 was sent to the Calendars Committee but was never scheduled for debate. S.B. 1013 was never reported from Committee.

Again, I appreciate your keeping me informed of legislation of interest to you. Many good bills were not passed this Session, since about 4,700 pieces of legislation were introduced and only about 835 were actually passed.

Sincerely,

Betty Denton

BD/dh

TRCP 3a. Rules by Other Courts

Each court of appeals, administrative judicial region, district court, county court, county court at law, and probate court, may make and amend ~~the~~ [local] rules governing practice before such courts, provided;

(1) No change.

[(2) No time period provided by these rules may be altered by local rules; and]

~~(2)~~ (3) any proposed [local] rule or amendment shall not become effective until it is submitted and approved by the Supreme Court of Texas; and

~~(3)~~ (4) any proposed [local] rule or amendment shall not become effective until at least thirty (30) days after its publication in a manner reasonably calculated to bring it to the attention of attorneys practicing before the court or courts for which it is made; and

~~(4)~~ (5) all [local] rules [or amendments] adopted and approved in accordance herewith are made available upon request to the members of the bar.

[(6) No local rule, order, or practice of any court, other than local rules and amendments which fully comply with all requirements of this Rule 3a shall ever be applied to determine the merits of any matter.

[COMMENT TO 1990 CHANGE: To make Texas Rules of Civil Procedure timetables mandatory and to preclude use of unpublished local rules or other "standing" orders or local practices from determining issues of substantive merit.]

TRCP 5. Enlargement

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (a) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or (b) upon motion permit the act to be done after the expiration of the specified period where good cause is shown for the failure to act. [The court] may not enlarge the period for taking any action under the rules relating to new trials except as stated in these rules. [If any document] is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail [on or] before the last day for filing same, the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and be deemed filed in time. [A] legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing.

[COMMENT TO 1990 CHANGE: To make the last date for mailing under Rule 5 coincide with the last date for filing.]

TRCP 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, [shall be served on all parties,] 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 [all other] ~~the/adverse/party~~ [parties], not less than three days before the time specified for the hearing unless otherwise provided by these rules or shortened by the court.

[COMMENT TO 1990 CHANGE: To require service of all described documents on all parties.]

TRCP 21a. Notice

Every notice required by these rules, [and every application to the Court for an order,] 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 [thereof] ϕf/ŧħɇ/ŋϕŧiɕɇ/ϕŗ/ϕf/ŧħɇ/ɖϕɕʋŋɇɲŧ/ŧϕ/ƀɇ/ʂɇŗʏɇɖ//ȧʂ ŧħɇ/ɕȧʂɇ/ŋȧʏ/ƀɇ/ to the party to be served, or ŋiʂ [the party's] duly authorized agent or ŋiʂ attorney of record, either in person or by [agent or by courier receipted delivery or by certified or] registered mail, to [the party's] ŋiʂ last known address, [or by telephonic document transfer to the party's current telecopier number,] 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 ϕŗ ŧȧkɇ /ʂϕɲɇ /ƀŗϕɕɇɖiɲgʂ within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon by mail [or by telephonic document transfer], three days shall be added to the prescribed period. It [Notice] may be served by a party to the suit, ϕŗ/ŋiʂ [an] attorney of record, ϕŗ/ƀʏ/ŧħɇ/ƀŗϕƀɇŗ [a] sheriff or constable, or by any other person competent to testify. [The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument.] A ŵŗiŧŧɇɲ

statement certificate by [a party or] an attorney of record, or the return of an officer, or the affidavit of any 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 rules provide for notice or service by mail, such notice may also be sent by certified mail

[COMMENT TO 1990 CHANGE: Delivery means and technologies have significantly changed since 1941 and this amendment brings approved service practices more current.]

TRCP 26. Clerk's Court Docket

Each clerk shall also keep a court docket in a ŵęłł/þǫųńđ þǫǫķ [permanent record] ĩń that ńę shall ęńţęŕ [include] the number of the case and the names of parties, the names of the attorneys, the nature of the action, the pleas, the motions, and the ruling of the court as made.

[COMMENT TO 1990 CHANGE: To conform to modern technologies for keeping of permanent records by clerks.]

TRAP 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 [or if any party has timely filed a request for findings of fact and conclusions of law in a nonjury case], 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 has authority to consider all timely filed transcripts and statements of facts, but shall have no authority to consider a late filed transcript or statement of facts, except as permitted by this rule.

(b) In Criminal Cases - Ordinary Timetable. The transcript and statement of facts shall be filed in the appellate court within sixty days after the day sentence is imposed or suspended in open court or the order appealed from has been signed, if a motion for new trial is not filed. If a timely motion for new trial is filed, the transcript and statement of facts shall be filed within one hundred [twenty] days after the day sentence is

imposed or suspended in open court or the order appealed from has been signed.

(c) No change.

[COMMENT TO 1990 CHANGE: To make the appellate timetable for non-jury cases conform more to that in jury cases. To conform paragraph (b) to the rule amendment adopted by the Court of Criminal Appeals.]

TRCP 67. Amendments to Conform to Issues Tried Without Objection

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. In such case such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made by leave of court upon motion of any party at any time up to the submission of the case to the Court or jury, but failure so to amend shall not affect the result of the trial of these issues; provided that written pleadings, before the time of submission, shall be necessary to the submission of ~~special issues~~ [questions], as is provided in Rules 277 and 279.

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

TRCP 72 Filing Pleadings: Copy Delivered to All Parties or Attorneys

[A] Whenever any party [who] 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 [all other parties] the adverse party he shall at the same time either deliver [by any method approved for service in Rule 21a to] or mail to the adverse party [all parties not required to be served] or their attorney(s) [attorneys] of record a copy of such pleading, plea, or motion. The [party or] attorney or authorized representative of such attorney [of record], shall certify to the court [compliance with this rule in writing over signature] on the filed pleading, [plea or motion]. In writing over his signature that he has complied with the provisions of this rule. If there is more than one adverse [other] party and the adverse parties are represented by different attorneys, one copy of such pleading shall be delivered or mailed to each attorney, representing the adverse parties but a firm of attorneys associated in the case shall count as one. Not more than four copies of any pleading, plea or motion shall be required to be furnished to the 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 advertise parties or their attorneys by the attorney thus filing the pleading. After [one] a copy of a pleading is furnished, to an attorney [a party] cannot require another copy of the same pleading to be furnished to him [without tendering reasonable charge for copying and delivering.]

[COMMENT TO 1990 CHANGE: To require service on all parties.]

TRCP 73. Failure to ~~Furnish~~ [Serve or Deliver] Copy of Pleadings ~~to/Adverse/Party~~

If any party fails to ~~furnish~~ [serve or deliver] the ~~adverse party~~ [other parties] ~~with~~ a copy of any pleading, [plea, or motion whenever required by these rules and] in accordance with ~~the/preceding/rule~~ [Rules 21a and 72 respectively], the court may in its discretion, ~~on/motion/~~ [on notice and hearing] order all or any part of such pleading stricken, direct that such party shall not be permitted to present grounds for relief or defense contained therein, require such party to pay to the ~~adverse/party~~ [other parties] the amount of reasonable costs and expenses [including attorneys fees] incurred as a result of the failure, ~~including/attorney/fees/~~ or make such other order with respect to the failure as may be just.

[COMMENT TO 1990 CHANGE: To provide sanctions for the failure to serve all parties.]

TRCP 87. Determination of Motion to Transfer

1. Consideration of Motion. (No change.)

2. Burden of Establishing Venue

(a) (No change.)

(b) Cause of Action. It shall not be necessary for a claimant to prove the merit[s] of a cause of action, but the existence of a cause of action, when pleaded properly, shall be taken as established as alleged by the pleadings[.]//þµt/ψ [W]hen the [defendant specifically denies the] ¢lαimαnt/$ venue allegations] αre /$pe¢ifiically /deniεd/ the plεαdεr [claimant] is required, by prima facie proof as provided in paragraph 3 of this rule, to support hi$ [such] pleading that the cause of action taken as established by the pleadings, or a part thereof of such cause of action, accrued in the county of suit./þy/prinma/fac¡e prof/as/proyided/in/paragraph/3/of/thi$/rule/ If a defendant seeks transfer to a county where the cause of action or a part thereof accrued, it shall be sufficient for the defendant to plead that if a cause of action exists, then the cause of action or part thereof accrued in the specific county to which transfer is sought, and such allegation shall not constitute an admission that a cause of action in fact exists. A But the defendant who seeks/to/transfer/a/case/to/a/county/where/the/cause/of/action/or/part/thereof/accrued shall be required to support his motion pleading, by prima facie proof as provided in paragraph 3 of this rule, that, if a cause of action exists, it or a part thereof accrued in the county to which transfer is sought.

(c) (No change.)

3. Proof

(a) Affidavit and Attachments. All venue facts, when properly pleaded, shall be taken as true unless specifically denied by the adverse party. When a venue fact is specifically denied, the party pleading the venue fact must make prima facie proof of that venue fact[; provided, however, that no party shall ever be required for venue purposes to support by prima facie proof the existence of a cause of action or part thereof, and at the hearing the pleadings of the parties shall be taken as conclusive on the issues of existence of a cause of action. Prima facie proof is made when the venue facts are properly pleaded and an affidavit, and any duly proved attachments to the affidavit, are filed fully and specifically setting forth the facts supporting such pleading. Affidavits shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.

(b) The Hearing. (No change.)

(c) (No change.)

4. No Jury. (No change.)

5. No Rehearing. (No change.)

6. (No change.)

[COMMENT TO 1990 CHANGE: To clarify that no proof of any kind is required of any party to establish any element of a cause of action or part thereof; proof is restricted to place, if any, and

the pleadings establish all other elements and may not be controverted for venue purposes as to the existence of a cause of action or part thereof.]

TRCP 106. Method of Service.

(a) (No change.)

(b) Upon motion supported by affidavit stating the location of the defendant's usual place of business or usual place ~~of~~ of abode or other place where the defendant can probably be found and stating specifically the facts showing that service has been attempting under either (a)(1) or (a)(2) at the location named in such affidavit but has not been successful, the court may authorize service

(1) (No change.)

(2) (No change.)

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

TRCP 107. Return of ~~Citation~~ [Service]

(No change.)

(No change.)

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

[COMMENT TO 1990 CHANGE: To state more directly that a default judgment can be obtained when the defendant has been served with process in a foreign country pursuant to the provisions of Rule 108 or 108a.]

Rule 166. Pre-Trial Procedure; Formulating Issues

In any action, the court may in its discretion direct the attorneys for the parties and the parties or their duly authorized agents to appear before it for a conference to consider:

(a) All dilatory pleas and all motions and exceptions relating to a suit pending;

(b) The simplification of the issues;

(c) The necessity or desirability of amendments to the pleadings;

(d) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(e) The limitation of the number of expert witnesses;

(f) The advisability of a preliminary reference of issues to a master or auditor for findings to be used as evidence when the trial is to be by jury.

[(g) The Settlement of the case. To aid such consideration, the court may encourage settlement.]

(g) (h) Such other matters as may aid in the disposition of the action. The court shall make an order which recites the action taken at the pre-trial conference, the amendments allowed to the pleadings, the time within which same may be filed, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered shall control the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a

pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or extend it to all actions.

[COMMENT TO 1990 CHANGE: To add a new paragraph (g) to express the ability of the trial courts at pretrial hearings to encourage settlement.]

TRCP 166a. Summary Judgment

(a) (No change)

(b) (No change)

(c) (No change)

(d) Appendix[ces], References and Other Use of Discovery Not Otherwise on File.

Discovery products not on file with the clerk may be used as for summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the specific discovery or specific references or other instruments, is served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least twenty-one (21) days before the hearing if such proofs are to be used to support the summary judgment; or (ii) at least seven (7) days before the hearing if such proofs are to be used to oppose the summary judgment.

~~(d)~~ **(e) Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including

the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted.

(e) (f) **Form of Affidavits; Further Testimony.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

(f) (g) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) (h) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith

or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

[COMMENT TO 1990 CHANGE: This amendment provides a mechanism for using previously non-filed discovery in summary judgment practice. Such proofs must all be filed in advance of the hearing in accordance with Rule 166a. Paragraphs (d) through (g) are renumbered (e) through (h).]

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

1. Forms of Discovery. (No change.)

2. Scope of Discovery. Except as provided in paragraph 3 of this rule, unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

a. In General. (No change.)

b. Documents and Tangible Things. (No change.)

c. Land. (No change.)

d. Potential Parties and Witnesses. (No change.)

e. Experts and Reports of Experts. Discovery of the facts known, mental impressions and opinions of experts, otherwise discoverable because the information is relevant to the subject matter in the pending action but which was acquired or developed in anticipation of litigation and the discovery of the identity of experts from whom the information may be learned may be obtained only as follows:

(1) In General. A party may obtain discovery of the identity and location (name, address and telephone number) of an expert who may be called as a witness, the subject matter on which the witness is expected to testify, the mental impressions and opinions held by the expert and the facts known to the expert (regardless of when the factual information was acquired) which relate to or form the basis of the mental impressions and opinions held by the expert. The disclosure

of the same information concerning an expert used for consultation and who is not expected to be called as a[n expert] witness at trial is required if the ¢x¢¢rt/s/work/¢r¢¢uct/f¢rms/a/¢as¢is/¢itn¢r/in/wn¢l¢/¢r in /¢art /¢f /tn¢ /¢¢in¢¢ns /¢f /an /¢x¢¢rt /wn¢ /is /t¢ /b¢ ¢all¢d /as /a /witn¢ss/ [consulting expert's opinion or impressions have been reviewed by a testifying expert.]

(2) Reports. A party may also obtain discovery of documents and tangible things including all tangible reports, physical models, compilations of data and other material prepared by an expert or for an expert in anticipation of the expert's trial and deposition testimony. The disclosure of material prepared by an expert used for consultation is required even if it was prepared in anticipation of litigation or for trial wn¢n/it/f¢rms/a/¢as¢is/¢itn¢r/in/wn¢l¢/¢r/in/¢art/¢f/tn¢ ¢¢in¢¢ns/¢f/an/¢x¢¢rt/wn¢/is/t¢/b¢/¢all¢d/as/a/witn¢ss/ [if the consulting expert's opinions or impressions have been reviewed by a testifying expert.]

(3) Determination of Status. (No change.)

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

f. Indemnity, Insuring and Settlement Agreements. (No change.)

g. Statements. (No change.)

h. Medical Records; Medical Authorization. (No change.)

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

a. Work Product. (No change.)

b. Experts. (No change.)

c. Witness Statements. The written statements of potential witnesses and parties, ~~If the statement was~~ [when] 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 anticipation of the prosecution or defense of the claims made ~~in~~ [a part of] the pending litigation, 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. [For purpose of this paragraph a photograph is not a statement.]

d. Party Communications. ~~With the exception of discoverable communications prepared by or for experts, and other discoverable c~~[C]ommunications between agents or representatives or the employees of a party to the action or communications between a party and that party's agents, representatives or employees, ~~when made subsequent to the occurrence or transaction upon which the~~

suit is based, and in connection with the prosecution, investigation or defense of the particular suit, or in anticipation of the prosecution or defense of the claims made in [a part of] the pending litigation. [This exemption does not include communications prepared by or for experts that are otherwise discoverable.] For the purpose of this paragraph, a photograph is not a communication.

e. Other Privileged Information. Any matter protected from disclosure by any other privilege.

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 exempt from discovery by subparagraphs c and d of this paragraph 3. Nothing in this paragraph 3 shall be construed to render non-discoverable the identity and location of any potential party, any person having knowledge or relevant facts, any expert who is expected to be called as a witness in the action, or of any consulting expert whose opinions or impressions have been reviewed by a testifying expert.

4. Presentation of Objections. [Either an objection or a motion for protective order made by a party to discovery shall preserve that objection without further support or action by the party unless the objection or motion is set for hearing and

determined by the court. Any party may at any reasonable time request a hearing on any objection or motion for protective order. The failure of a party to obtain a ruling prior to trial on any objection to discovery or motion for protective order does not waive such objection or motion.] In ~~responding~~ [objecting] to an appropriate discovery request within the scope of paragraph 2, ~~directly/addressed/to/the/matter/~~ a party ~~who/seeks~~ [seeking] to exclude any matter from discovery on the basis of an exemption or immunity from discovery, must specifically plead the particular exemption or immunity from discovery relied upon and [at or prior to any hearing shall] produce [any] evidence [necessary to] support~~ing~~ such claim [either] in the form of affidavits [served at least seven days before the hearing] or [by] ~~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/immunity/or/exemption//such/as/attorney-client/privilege 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/inspection~~ [in camera inspection and review by the Court] of some or all of the ~~documents~~ [requested discovery] is necessary, the objecting party must segregate and produce the ~~documents~~ [discovery to the court in a sealed wrapper or by answers made in camera to deposition questions, to be transcribed and sealed in event the objection is sustained]. ~~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 undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights, rather than a specific immunity or exemption, it is not necessary for the court to conduct ~~an inspection of the individual documents~~ [an inspection and review of the particular discovery] before ruling on the objection. [After the date on which answers are to be served, objections are waived unless an extension of time has been obtained by agreement or order of the court or good cause is shown for the failure to object within such period.

5. Protective Orders. (No change.)

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

a. A party is under a duty ~~s~~[r]easonably to supplement his response if he obtains information upon the basis of which:

(1) (No change.)

(2) (No change.)

b. (No change.)

c. (No change.)

[COMMENT TO 1990 CHANGE: To eliminate the contradiction between Rule 166b 2.e (1) and (2) and corresponding Rule 166b 3.e, Rule 166b 2.e (1) and (2) have been modified. As modified, Rule 166b 2.e (1) and (2) now make discoverable the impressions and opinions of a consulting expert if a testifying expert has reviewed those opinions and material, regardless of whether or not the opinions and material form a basis for the opinion of the testifying expert. The revisions keep the intent of Rule 166b 2.e (1) and (2) and Rule 166b 3.e consistent with regard to consulting experts. The amendments to Section 3 standardize language for the same meaning. The amendments to Section 4 expressly dispense with the necessity to do anything more than serve objections to preserve discovery complaints in order to avoid unnecessary time and expense to parties and time of the courts, particularly where no party ever requests a hearing on the objection. The failure of any party to do more than merely object fully shall never constitute a waiver of any objection.

The last sentence added to Section 4 was previously the second sentence of Rule 168(6) and was moved because it applies to all discovery objections.]

TRCP 167a. Physical and Mental Examination of Persons

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical ~~or mental~~ examination by a physician[, or a mental examination by a physician or psychologist] or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of Examining Physician[or Psychologist].

(1) If requested by the party against whom an order is made under this rule or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician [or psychologist] setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain

it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician [or psychologist] fails or refuses to make a report the court may exclude his testimony if offered at the trial.

(2) (No change.)

c. [No Comment.]

If no examination is sought either by agreement or under the provisions of this rule, the party whose mental or physical condition is in controversy shall not comment to the court or jury on his willingness to submit to an examination, on the right of any other party to request an examination or move for an order, or on the failure of such other party to do so.

d. Definitions.

For the purpose of this rule, a psychologist is a psychologist licensed by the State of Texas.]

[COMMENT TO 1990 CHANGE: To provide for court-ordered examination by certain psychologists.]

TRCP 168. Interrogatories to Parties

Any party may serve upon any other party written interrogatories to be answered by the party served, or, if the party served is a public or private corporation or a partnership or association, or governmental agency, by an officer or agent who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after the service of the citation and petition upon that party.

1. (No change.)

2. (No change.)

3. (No change.)

4. (No change.)

5. (No change.)

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 by agreement or order of the court or good cause is shown for the failure to object within such period.~~ 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.

[COMMENT TO 1990 CHANGE: The previous second sentence in Section 6, which read, "Objections served after the date on which answers are to be served are waived unless an extension of time has been obtained by agreement or order of the court or good cause is shown for the failure to object within such period," was and is applicable to all discovery objections and therefore has been moved to Rule 166b 4, last sentence.]

TRCP 169. Request for Admission

1. Request for Admission. At any time after [commencement of the action] ŧħę /ɗęƒęŋɗąŋŧ /ħąś /ɱąɗę /ąƿƿęąɾąŋċę /įŋ /ŧħę /ċąʉśę/ /ǿɾ ŧįɱę/ŧħęɾęƒǿɾ/ħąś/ęłąƿśęɗ, a party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 166b set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of the documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Whenever a party is represented by an attorney of record, service of a request for admissions shall be made on his attorney unless service on the party himself is ordered by the court. A true copy of a request for admission or of a written answer or objection, together with proof of the service thereof as provided in Rule 21a, shall be filed promptly in the clerk's office by the party making it.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted without necessity of a court order unless, within thirty (30) days after service of the request, or within such time as the court may allow, [or as otherwise agreed by the parties,] the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court

shortens the time, a defendant shall not be required to serve answers or objections before the expiration of ~~forty-five (45)~~ fifty (50) days after service of the citation and petition upon ~~him~~ that defendant. If objection is made, the reason therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons that the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or easily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission is requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of paragraph 3 of Rule 215, deny the matter or set forth reasons why he cannot admit or deny it.

2. Effect of Admission. (No change.)

[COMMENT TO 1990 CHANGE: The rule is amended to provide for an agreement of the parties for additional time for the recipient of the requests to file answers or objections. This change will allow the parties to agree to additional time within which to answer without the necessity of obtaining a court order.

The rule is also amended to permit service of a Request for Admission at any time after commencement of the action but extends responses to no less than 50 days after service of the citation and petition on the responsive parties.]

TRCP 183. Interpreters

The court may//ẅḧḗṅ/ṅḗḉḗṡṡȧṛẏ/ appoint [an] interpreters [of its own selection and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.]/ /ẅḧǿ /ṁȧẏ /ƀḗ /ṡṻṁṁǿṅḗḍ /ḭṅ /ṯḧḗ /ṡȧṁḗ /ṁȧṅṅḗṛ /ȧṡ /ẅḭṯḥ ṅḗṡṡḗṡṡ//ȧṅḍ/ṡḧȧḽḽ/ƀḗ/ṡṻƀĵḗḉṯ/ṯǿ/ṯḧḗ/ṡȧṁḗ/ṗḗṅȧḽṯḭḗṡ/ḟǿṛ/ḍḭṡǿƀḗḍḭḥ ḗṅḉḗ/

[COMMENT TO 1990 CHANGE: To adopt procedures for the appointment and compensation of interpreters. Source: Fed. R. Civ. P. 43(f).]

TRCP 184. Determination of Law of Other States

[Repealed.]

A court upon its own motion may or upon the motion of a party shall take judicial notice of the constitutions, public statutes, rules, regulations, ordinances, court decisions, and common law of every other state, territory, or jurisdiction of the United States. A party requesting that judicial notice be taken of such matter shall furnish the court sufficient information to enable it properly to comply with the request, and shall give all parties such notice, if any, as the court may deem necessary, to enable all parties fairly to prepare to meet the request. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. Judicial notice of such matters may be taken at any stage of the proceeding. The court's determination shall be subject to review as a ruling on a question of law.

[COMMENT TO 1990 CHANGE: Rule 184 has been repealed because it was added to Rule 202, Texas Rules of Civil Evidence, effective January 1, 1988.]

TRCP 184a. Determination of the Laws of Foreign Countries

[Repealed]

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

[COMMENT TO 1990 CHANGE: Rule 184 has been repealed because it was added to Rule 203, Texas Rules of Civil Evidence, effective January 1, 1988.]

TRCP 200. Depositions Upon Oral Examination

1. When Depositions May Be Taken. (No change.)

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

a. Reasonable notice must be served in writing by the party, or his attorney, proposing to take a deposition upon oral examination, to every other party or his attorney of record. The notice shall state the name of the deponent, the time and the place of the taking of his deposition and, if the production of documents or tangible things in accordance with Rule 201 is desired, a designation of the items to be produced by the deponent either by individual item or by category and which describes each item and category with reasonable particularity. [The notice shall also state the identity of other persons who will attend other than the witness, parties, spouses of parties, counsel, employees of counsel, and the officer taking the deposition. If any other party intends to have such other persons attend, that party must give reasonable notice of the identity of such other persons.]

b. (No change.)

[COMMENT TO 1990 CHANGE: Rule 200(2)(a) was amended to provide for persons who may attend deposition without notification and to provide for notice, to be given a reasonable number of days in advance of the deposition, of any party's intent to have any other persons attend.]

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

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

(1) (No change.)

(2) (No change.)

(3) (No change.)

(4) (No change.)

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

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

Rule 208. Depositions Upon Written Questions

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

A party proposing to take a deposition upon written questions shall serve them upon every other party or his attorney with a written notice ten days before the deposition is to be taken. The notice shall state the name and if known, the address of the deponent, the suit in which the deposition is to be used, the name or descriptive title and address of the officer before whom the deposition is to be taken, and, if the production of documents or tangible things in accordance with Rule 201 is desired, a designation of the items to be produced by the deponent either by individual item or by category and which describes each item and category with reasonable particularity. [The notice shall also state the identity of other persons who will attend other than the witness, parties, spouses of parties, counsel, employees of counsel, and the officer taking the deposition. If any other party intends to have such other persons attend, that party must give reasonable notice of the identity of such other persons.]

A party may in his notice name as the witness a public or private corporation or a partnership or association or

given a reasonable number of days in advance of the deposition, of any party's intent to have any other persons attend.]

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

2. Notice by Publication. (No change.)

3. Cross-Questions, Redirect Questions, Re-cross Questions and Formal Objections. (No change.)

4. Deposition Officer; Interpreter. (No change.)

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

[COMMENT TO 1990 CHANGE: Rule 208 was silent as to whether a deposition on written questions of a defendant could be taken prior to the appearance date. Rule 200 permits depositions upon oral examination of defendants prior to appearance date with permission of the court. As modified, Rule 208 conforms to Rule 200 and permits the deposition on written questions of a defendant prior to appearance date with permission of the court. Rule 208 was also amended to provide for persons who may attend deposition without notification and to provide for notice, to be

TRCP 215. Abuse of Discovery; Sanctions

1. (No change.)

2. (No change.)

3. Abuse in Discovery Process in Seeking, Making, or Resisting Discovery. [All motions to compel discovery and all motions for sanctions shall contain a certificate by the party filing same that efforts to resolve the discovery dispute without the necessity of court intervention have been attempted and failed.] If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may impose any sanction authorized by paragraphs (1), (2), (3), (4), (5), and (8) of paragraph 2b of this rule. Such order of sanction shall be subject to review on appeal from the final judgment.

4. (No change.)

5. (No change.)

6. (No change.)

[COMMENT TO 1990 CHANGE: To encourage the courtesy of a conference of attorneys prior to motion practice.]

TRCP 216. Request and Fee for Jury Trial

1/ [a.] (No change.)

2/ [b.] Jury Fee. [Unless otherwise provided by law, a] A fee of ten dollars if in the district court and 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.

[COMMENT TO 1990 CHANGE: Additional fees for jury trials may be required by other law. E.g., Texas Government Code § 51.604.]

TRCP 223. Jury List in Certain Counties

In counties governed as to juries by the laws providing for interchangeable juries, the names of the jurors shall be placed upon the general panel in the order in which they are [randomly selected] drawn from the wheel, and jurors shall be assigned for service from the top thereof, in the order in which they shall be needed, and jurors returned to the general panel after service in any of such courts shall be enrolled at the bottom of the list in the order of their respective return; provided, however, that the trial judge upon the demand of any party to any case reached for trial by jury or of the attorney for any such party, shall cause the names of all the members of such assigned jury panel in such case to be placed in a receptacle, shuffled, and drawn, and such names shall be transcribed in the order drawn on the jury list from which the jury is to be selected to try such case. There shall be only one shuffle and drawing by the trial judge in each case. [after such assignment to a particular court, the trial judge of such court, upon the demand prior to voir dire examination by any party or attorney in the case reached for trial in such court, shall cause the names of all members of such assigned jury panel in such case to be placed in a receptacle, shuffled, and drawn, and such names shall be transcribed in the order drawn on the jury list from which the jury is to be selected to try such case. There shall be only one shuffle and drawing by the trial judge in each case.]

[COMMENT TO 1990 CHANGE: To provide informity in jury shuffles.]

TRCP 239. Judgment by Default

Upon such call of the docket, or at any time after a defendant is required to answer, the plaintiff may in term time take judgment by default against such defendant if he has not previously filed an answer and provided that the citation with the officer's return thereon shall have been on file with the clerk for the length of time required by Rule 107. [No default judgment shall be rendered against a party in a removed action remanded from federal court if that party filed an answer in federal court during removal.]

[COMMENT TO 1990 CHANGE: To provide that any answer by a party, state or federal, will preclude a state court default judgment against that party.]

TRCP 245. Assignment of Cases for Trial

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

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

[COMMENT TO 1990 CHANGE: First paragraph, to harmonize a first time non-jury setting with the time for jury demand. Second paragraph, to eliminate impediments to continuing case preparation and discovery after a trial setting is requested in a pending case.]

TRCP 260. In Case of New Counties

[Repealed]

When a suit is pending in the district or county court of any county, out of the territory of which a new county has been or may be made, in whole or in part, if the defendants or any one of them, shall file a motion in the court where such suit is pending, to transfer the same to such new county, naming it, together with an affidavit stating that neither he nor any one of the defendants resided in said territorial limit at the time the suit was instituted, and further stating that at the date of the filing of such suit, said defendant was resident citizen within the territorial limits of the new county, the court shall grant a change of venue to such new county, unless the suit could be properly brought in the county in which the same is pending under some provision of law.

[COMMENT TO 1990 CHANGE: Repealed as no longer needed.]

TRCP 269. Argument

(a) After the evidence is concluded and the charge is read, the parties may argue the case to the jury. The party having the burden of proof on the whole case, or on all matters which are submitted by the charge~~, whether upon special issues or otherwise,~~ shall be entitled to open and conclude the argument; where there are several parties having separate claims or defenses, the court shall prescribe the order of argument between them.

(b) (No change.)

(c) (No change.)

(d) (No change.)

(e) (No change.)

(f) (No change.)

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

(h) (No change.)

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

TRCP 294. Polling the Jury

Either party shall have the right to have the jury polled. When a jury is polled, this is done by reading once to the jury collectively the general verdict, or the ¢µ¢¢i¿i/i¢¢µ¢¢ [questions] and answers thereto consecutively, and then calling the name of each juror separately and asking him if it is his verdict. If any juror answers in the negative when the verdict is returned signed only by the presiding juror as a unanimous verdict, or if any juror shown by his signature to agree to the verdict should answer in the negative, the jury shall be retired for further deliberation.

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

TRCP 296. Conclusions of Fact and Law

In any case tried in the district or county court without a jury, any party may request the court to state in writing its findings of fact and conclusions of law. Such request shall be entitled REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW and shall be filed with the clerk of the court who shall immediately call such request to the attention of the judge who tried the case.

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

Notice of Filing. Each request made pursuant to this rule shall be served on each party to the suit in accordance with Rule 21a. The party making the request shall also provide a copy of the request to the judge who tried the case by any method allowed in Rule 21a.]

[COMMENT TO 1990 CHANGE: To better prescribe the practice and times for findings of fact and conclusions of law. See also Rules 297 and 298.]

TRCP 297. Time to File Findings and Conclusion

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

[TRCP 297. Time to Make and File Findings of Facts and Conclusions of Law.

(a) When timely request is filed, the court shall make and file its findings of fact and conclusions of law within twenty (20) days after such request is filed. The court shall cause a copy of its findings and conclusions to be mailed to each party in the suit.

(b) If the court fails to make timely findings of fact and conclusions of law, the party making the request shall, within thirty (30) days after filing the original request, file with the clerk a NOTICE OF PAST DUE FINDINGS OF FACT AND CONCLUSIONS OF LAW which shall be immediately called to the attention of the Court by the clerk. Such notice shall state the date the original request was filed and the date the findings and conclusions were due.

(c) Upon filing the notice in (b) above, the time for the court to make findings of fact and conclusions of law is extended to forty (40) days from the date the original request was filed.

(d) The notice provided by this rule shall be served on each party to the suit in accordance with Rule 21a. A copy of the notice shall also be provided to the judge who tried the case by any method allowed in Rule 21a.

[COMMENT TO 1990 CHANGE: To better prescribe the practice and times for findings of fact and conclusions of law. See also Rules 296 and 298.]

TRCP 298. Additional or Amended Findings

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

[TRCP 298. Additional or Amended Findings of Fact and Conclusions of Law; Notice.

(a) After the court files original findings of fact and conclusions of law, any party may file with the clerk of the court a request for specified additional or amended findings or conclusions, or both. The request for these findings shall be made within ten (10) days after the filing of the original findings and conclusions by the court. Each request made pursuant to this rule shall be served on each party to the suit in accordance with Rule 21a. The party making the request shall also provide a copy to the judge who tried the case by any method allowed in Rule 21a.

(b) The court shall make and file any additional or amended findings and conclusions within ten (10) days after such request is filed, and cause a copy to be mailed to

each party to the suit. No findings or conclusions shall be deemed or presumed by any failure of the court to make any additional orders or conclusions.]

[COMMENT TO 1990 CHANGE: To better prescribe the practice and times for findings of fact and conclusions of law. See also Rules 296 and 298.]

TRCP/305///Draft

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

[TRCP 305. Proposed Judgment

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

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

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

[COMMENT TO 1990 CHANGE: To better prescribe the practice for proposed judgments and notice to other parties.]

TRCP 534. Citation

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

[COMMENT TO 1990 CHANGE: To conform to 1988 changes to other citation rules.]

TRCP 687. Requisites of Writ

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

(a) (No change.)

(b) (No change.)

(d) (No change.)

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

(f) (No change.)

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

TRCP 771. Objections to Report

Either party to the suit may file objections to any report of the commissioners in partition [within 30 days of the date the report is filed], and in such case a trial of the issues thereon shall be had as in other cases. If the report be found to be erroneous in any material respect, or unequal and unjust, the same shall be rejected, and other commissioners shall be appointed by the Court, and the same proceedings had as in the first instance.

[COMMENT TO 1990 CHANGE: To set a time within which objections to a commissioners report must be filed.]

TRCP 781. Proceedings as in Civil Cases

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

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

TRE 604. Interpreters

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

[COMMENT: See Rule 183, Texas Rules of Civil Procedure, regarding appointment and compensation of interpreters.]

TRE 614. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person or the spouse of such 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 cause. [This rule is not applicable to discovery proceedings.]

[COMMENT TO 1990 CHANGE: See Rules 200 and 208, Texas Rules of Civil Procedure, relating to depositions.]

TRE 703. Bases of Opinion Testimony

The facts or data in the particular case upon which an expert bases an ~~his~~ opinion or inference may be those perceived by or ~~made known to~~ reviewed by the expert ~~him~~ at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

[COMMENT TO 1990 CHANGE: This amendment conforms this rule of evidence to the rules of discovery in utilizing the term "reviewed by the expert." See also comment to Rule 166b.]

TRAP 1 Scope of Rules; [Local Rules of Courts of Appeals]

(a) [No change.]

(b) Local Rules. Each court of appeals 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 and to the Court of Criminal Appeals for approval. [When an appeal or original proceeding is docketed, the clerk shall mail a copy of the court's local rules to all counsel of record who requests it.]

[COMMENT TO 1990 CHANGE: To provide for distribution of local rules of court of appeals upon docketing of an appeal.]

TRAP 4. Signing, Filing and Service

(a) Signing. Each application, brief, motion or other paper filed shall be signed by at least one of the attorneys for the party/ [and] shall give the State Bar of Texas identification number, the mailing address and telephone number of each attorney whose name is signed thereto/ /and/shall/state/that/a/copy/of/the paper/has/been/delivered/or/mailed/to/each/group/of/opposing parties/or/their/counsel. A party who is not represented by an attorney shall sign his brief and give his address and telephone number. The statement of service on opposite parties by one who is not a licensed attorney shall be verified by affidavit.

Sup p 133.

(b) Filing. The filing of records, briefs and other papers in the appellate court as required by these rules shall be made by filing them with the clerk, except that any justice of the court may permit the papers to be filed with him, in which event he shall note thereon the filing date and time and forthwith transmit them to the office of the clerk. If a motion for rehearing, any matter relating to taking an appeal or writ of error from the trial court to any higher court, or application for writ of error or petition for discretionary review is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail one/day/or/more/before [on or before] the last day for filing same, the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and be deemed as filed in time; provided, however, that a certificate of mailing by the

United States Postal Service or a legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing.

(c) (No change.)

(d) (No change.)

(e) (No change.)

(f) (No change.)

(g) ~~Proof of~~ Service. Papers presented for filing shall [be served and shall] contain an acknowledgement of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names [and addresses] of the persons served, certified by the person who made the service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgement or proof of service but shall require such to be filed promptly thereafter.

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

TRAP 5. Computation of Time

(a) In General. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run ~~is not to~~ [shall not] be included. The last day of the period so computed ~~is to~~ [shall] be included, unless it is a Saturday, [a] Sunday or [a] legal holiday, as defined by Article 4591, Revised Civil Statutes, in which event the period ~~runs until~~ [extends to] the end of the next day which is ~~neither~~ [not] a Saturday, Sunday ~~nor~~ [or a] legal holiday. ~~When the last day of the period is the next day which is neither a Saturday, Sunday nor legal holiday, any paper filed by mail as provided in Rule 4 is mailed on time when it is mailed on the last day of the period.~~

(b) (No change.)

(c) Nunc Pro Tunc Order. In civil cases, when a corrected judgment has been signed after expiration of the court's plenary power pursuant to Rule 316 ~~or 317~~ of the Texas Rules of Civil Procedure, the periods mentioned in subparagraph (b)(1) of this rule shall run from the date of signing the corrected judgment with respect to any complaint that would not be applicable to the original judgment.

(d) (No change.)

(e) (No change.)

(f) (No change.)

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

TRAP 12. Work of Court Reporters

(a) (No change.)

(b) (No change.)

(c) To aid the judge in setting the priorities in (b) above, each court reporter shall report in writing to the judge on a monthly basis the amount and nature of the business pending in the court reporter's office. A copy of this report shall be filed with the Clerk of the Court of Appeals of each ~~Supreme Judicial~~ District in which the court sits.

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

TRAP 15a. Grounds for Disqualification and Recusal of Appellate Judges

(1) (No Change)

(2) Recusal

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

[COMMENT TO 1990 CHANGE: The present rule does not contain a provision dealing with an evenly divided court sitting en banc on a motion to recuse. The proposed amendment will determine that situation without the necessity of bringing in a visiting judge.]

TRAP 17 Issuance of Process by Appellate Court

(a) Any writ ~~of~~ [or] process issuing from any appellate court shall bear the teste of the chief justice or presiding judge under the seal of said court and be signed by the clerk, and, unless otherwise expressly provided by law or by these rules, shall be directed to the party or court to be served, may be served by the sheriff or any constable of any county of the State of Texas within which such person to be served may be found, and shall be returned to the court from which it issued according to the direction of the writ. Whenever such writ or process shall not be executed, the clerk is authorized to issue another like process or writ upon the application of the party who requested the former writ or process. Two or more writs may be issued simultaneously at the request of any party.

(b) (No change.)

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

TRAP 20. Amicus Briefs

The clerk of the appellate court may receive but not file amicus curiae briefs. An amicus curiae shall comply with the briefing rules for the parties,a nd shall show in the brief that copies have been furnished to all attorneys of record in the case. [In civil cases, an amicus curiae brief shall not exceed 50 pages in length, exclusive of pages containing the table of contents, index of authorities, points of error, and any addendum containing statutes, rules, regulations, etc. The court may, upon motion and order, permit a longer brief.]

[COMMENT TO 1990 CHANGE: To provide for a maximum length for amicus curiae briefs conformably with Rules 74(h) and 136(e).]

TRAP 41 Ordinary Appeal - When Perfected

(a) Appeals in Civil Cases.

(1) Time to Perfect Appeal. When security for costs on appeal is required, the bond or affidavit in lieu thereof shall be filed with the clerk within thirty days after the judgment is signed, or, within ninety days after the judgment is signed if a timely motion for new trial has been filed by any party [or if any party has timely filed a request for findings of fact and conclusions of law in a nonjury case]. If a deposit of cash is made in lieu of bond, the same shall be made within the same period.

(2) Extension of Time. (No change.)

(b) Appeals in Criminal Cases.

(1) Time to Perfect Appeal. (No change.)

(2) Extension of Time. (No change.)

(c) Prematurely Filed Documents. No appeal or bond or affidavit in lieu thereof, notice of appeal, or notice of limitation of appeal shall be held ineffective because prematurely filed. In civil cases, every such instrument shall be deemed to have been filed on the date of but subsequent to the ~~date~~ [time] of signing of the judgment or the ~~date~~ [time] of the overruling of motion for new trial, if such a motion is filed. In criminal cases, every such instrument shall be deemed to have been filed on the date of but subsequent to the imposition or suspension of sentence in open court or the signing of appealable order by the trial judge, provided that no notice of appeal shall be

effective if given before a finding of guilt is made or a verdict is received.

[COMMENT TO 1990 CHANGE: To make the appellate timetable for non-jury cases conform more to that in jury cases.]

TRAP 43 Orders Pending Interlocutory Appeal in Civil Cases.

(a) (No change.)

(b) Security. Except as provided in subdivision (a) the trial court may permit interlocutory order[s] to be suspended pending an appeal therefrom by filing security pursuant to Rule 47. Denial of such suspension may be reviewed for abuse of discretion on motion by the appellate court.

(c) Temporary Orders of Appellate Court. On perfection of an appeal from an interlocutory order, the appellate court may issues such temporary orders as it finds necessary to preserve the rights of the parties until disposition of the appeal and may require such security as it deems appropriate, but it shall not suspend the trial court's order if the appellant's rights would be adequately protected by supersedeas [or other orders pursuant to Rules 47 or 49.]

(d) (No change.)

(e) (No change.)

(f) (No change.)

(g) (No change.)

(h) (No change.)

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

TRAP 47. Suspension of Enforcement of Judgment Pending Appeal in Civil Cases

Text as amended by the Supreme Court effective January 1, 1988. See also text as adopted by the Court of Criminal Appeals, post.

(a) Suspension of Enforcement. Unless otherwise provided by law or these rules, a judgment debtor may suspend the execution of the judgment by filing a good and sufficient bond to be approved by the clerk, subject to review by the court on hearing, or making the deposit provided by Rule 48, payable to the judgment creditor in the amount provided below, conditioned that the judgment debtor 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 perform its judgment, sentence or decree and pay all such damages and costs as said court may award against him. If the bond or deposit is sufficient to secure the costs and is filed or made within the time prescribed by Rule ~~40~~ [41], it constitutes sufficient compliance with Rule 46. The trial court may make such orders as will adequately protect the judgment creditor against any loss or damages occasioned by the appeal.

(b) (No change.)

(c) (No change.)

(d) (No change.)

(e) (No change.)

(f) (No change.)

(g) Conservatorship or Custody. When the judgment is one involving the conservatorship or custody of a ~~child~~ [minor], the appeal, with or without security shall not have the effect of suspending the judgment as to the conservatorship or custody of the ~~child~~ [minor], 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) (No change.)

(i) (No change.)

(j) (No change.)

(k) (No change.)

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

TRAP 56. Receipt of the Record by Court of Appeals

(a) Duty of Clerk on Receiving Transcript. The clerks of the courts of appeals shall receive the transcripts delivered and sent to them, and receipt for same is required; but they shall not be required to take a transcript out of the post office or any express office, unless the postage or charges thereon be fully paid. Upon receipt of the transcript, it shall be the duty of the clerk to examine it in order to ascertain whether or not, in case of an appeal, a proper appeal bond, notice of appeal or affidavit in lieu thereof (when bond is required) have been given; and in case of a writ of error, whether or not the petition and bond or affidavit in lieu thereof (when bond is required) appear to have been filed. If it seems to ~~him~~ [the clerk] that the appeal or writ of error has not been duly perfected, ~~he~~ [the clerk] shall note on the transcript the day of its reception and refer the matter to the court. If upon such reference the court shall be of the opinion that the transcript shows that the appeal or writ of error has been duly perfected, ~~it~~ [it] shall order the transcript to be filed as of the date of its reception. If not, ~~it~~ [it] shall cause notice of the defect to issue to the attorneys of record of the appellant, to the end that they may take steps to amend the record, if it can be done; for which a reasonable time shall be allowed. If the transcript does not show the jurisdiction of the court, and if[,] after notice[,] it ~~be/not~~ [is not] amended, the appeal shall be dismissed.

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

(b) Duty of Clerk on Receiving Statement of Facts. Upon receipt of a statement of facts, the clerk shall ascertain if it is presented within the time allowed and also if it has been properly authenticated in accordance with these rules. If the clerk finds that the statement of facts is presented in time and has been certified by the official court reporter, the clerk shall file it forthwith; otherwise, the clerk shall endorse thereon the time of the receipt of such statement of facts, hold the same subject to the order of the court of appeals, and notify

the party (or ~~his~~ [the party's] attorney) tendering the statement of facts of the action and state the reasons therefor.

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

TRAP 57. Docketing the Appeal

(a) (No change.)

(b) Attorneys' Names. Before an attorney has filed his [or her] brief he [or she] may notify the clerk in writing of the fact that he [or she] represents a named party to the appeal, which fact shall be ~~by/the/clerk~~ noted [by the clerk] upon the docket, opposite the name of the party for whom ~~he~~ [the attorney] appears, and shall be regarded by the court as having whatever effect is given to the appearance of a party to a case without [a] brief [having been] filed. After briefs have been filed, the name of the attorney or attorneys sign~~ed~~/~~o~~[ing] the brief shall be entered by the clerk on the docket, opposite the name of the appropriate party if such names have not already been so entered. The clerk shall add the names of additional counsel [up]on request.

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

TRAP 59. Voluntary Dismissal

(a) Civil Cases.

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

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

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

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

TRAP 72. Motions to Dismiss for Want of Jurisdiction

Motions to dismiss for want of jurisdiction to decide the appeal and for such [other] defects as defeat the jurisdiction in the particular case and [which] cannot be waived shall also be made, filed and docketed within thirty days after the filing of the transcript in the court of appeals; provided, however, if made afterwards they may be entertained by the court upon such terms as the court may deem just and proper.

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

TRAP 74. Requisites of Briefs

Briefs shall be brief. Briefs shall be filed with the Clerk of the Court of Appeals. They shall be addressed to "The Court of Appeals" of the correct ~~Supreme/Judicial/D~~ [d]istrict. In civil cases the parties shall be designated as "Appellant" and "Appellee", and in criminal cases as "Appellant" and "State".

(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) (No change.)

(l) (No change.)

(m) (No change.)

(n) (No change.)

(o) (No change.)

(p) (No change.)

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

TRAP 79. Panel and En Banc Submission

(a) (No change.)

(b) (No change.)

(c) (No change.)

(d) (No change.)

(e) A hearing or rehearing en banc is not favored and should not be ordered ~~except~~ [unless consideration by the full court is necessary to secure or maintain uniformity of its decisions or] in extraordinary circumstances. A vote need not be taken to determine whether a cause shall be heard or reheard en banc unless a justice of the en banc court requests a vote. If a vote is requested and a majority of the membership of the en banc court vote to hear or rehear the case en banc, the case will be heard or reheard en banc; otherwise, it will be decided by a panel of the court.

[COMMENT TO 1990 CHANGE: To provide for en banc review by courts of appeals where necessary to secure or maintain uniformity of court decisions between or among panels of justices.]

TRAP 90. Opinions, Publication and Citation

(a) Decision and Opinion. The court of appeals shall 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) Signing of Opinions. A majority of the justices participating in the decision of the case shall determine whether the opinion shall be signed by a justice or issued per curiam. The names of the justices participating in the decision shall be noted on all written opinions or orders handed down by a panel.

~~(e)~~ [c)] Determination to Publish. A majority of the justices participating in the decision of a case shall determine, prior to the time it is issued, whether an opinion meets the criteria for publishing, and if it does not meet the criteria for publication, the opinion shall be distributed only to the persons specified in Rule 91, but a copy may be furnished to any interested person. On each opinion a notation shall be made to "publish" or "do not publish."

~~(c)~~ [(d)] Standards for Publication. An opinion by a court of appeals shall be published only if, in the judgment of a majority of the justices participating in the decision, it is one that (1) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal

issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority.

~~(d)~~ [(e)] Concurring and Dissenting Opinions. Any justice may file an opinion concurring in or dissenting from the decision of the court of appeals. A concurring or dissenting opinion may be published if, in the judgment of its author, it meets one of the criteria established in paragraph (c), but in such event the majority opinion shall be published as well.

(f) (No change.)

(g) (No change.)

(h) Order of the Supreme Court. Upon the grant[, denial,] or refusal of an application for writ of error, ~~w h e t h e r~~ an opinion previously unpublished shall forthwith be released for publication, if the Supreme Court so orders.

(i) (No change.)

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

TRAP 91. Copy of Opinion and Judgment to Attorneys, Etc.

On the date an opinion of an appellate court is handed down, it shall be the duty of the clerk of the appellate court to mail or deliver to the clerk of the trial court, to the trial judge who tried the case, and to one of the attorneys for the plaintiffs or the State and one of the attorneys for the defendants a copy of the opinion delivered by the appellate court and a copy of the judgment rendered by such appellate court as entered in the minutes. The copy received by the clerk of the trial court shall be ~~by/him~~ filed among the papers of the cause in such court. When there is more than one attorney on each side, the attorneys may designate in advance the one to whom the copies of the opinion and judgment shall be mailed. In criminal cases, copies shall also be provided to the State Prosecuting Attorney, P. O. Box 12405, Austin, Texas 78711 and to the Clerk of the Court of Criminal Appeals and any appellant representing himself.

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

TRAP 100. Motion and Second Motion for Rehearing

(a) (No change.)

(b) (No change.)

(c) (No change.)

(d) (No change.)

(e) (No change.)

(f) En Banc Reconsideration. A majority of the justices of the court en banc may order an en banc reconsideration of any decision of a panel within ~~fifteen days after~~ [the period of the court's plenary jurisdiction] with or without a motion for reconsideration en banc. A majority of the justices may call for an en banc review by (1) notifying the clerk in writing within said ~~fifteen day~~ period, or (2) by written order issued within said ~~fifteen day~~ period, either with or without en banc conference. In such event, the panel decision shall not become final, and the case shall be resubmitted to the court for an en banc review and disposition.

(g) (No change.)

[COMMENT TO 1990 CHANGE: To provide that en banc review may be conducted at any time within the period of plenary jurisdiction of a court of appeals.]

SECTION NINE. APPLICATION FOR WRIT OF ERROR AND BRIEF IN RESPONSE [IN THE SUPREME COURT]

TRAP 130. Filing of Application in Court of Appeals

(a) (No change.)

(b) [Number of Copies:] Time and Place of Filing. [Twelve copies of] T[t]he application shall be filed with the Clerk of the Court of Appeals within thirty days after the overruling of the last timely motion for rehearing filed by any party.

(c) (No change.)

(d) (No change.)

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

TRAP 133. Orders on Applications for Writ of Error

(a) (No change.)

(b) Conflict in Decisions. In cases of conflict ~~named in~~ [under] subsection (a)(2) of section 22.001 of the Government Code, the Supreme Court will grant the application for writ of error, unless it is in agreement with the decision of the court of appeals in the case in which the application is filed. In that event said Supreme Court will so state in its order, with such explanatory remarks as may be deemed appropriate. If the decision of the court of appeals is in conflict with an opinion of the Supreme Court, is contrary to the Constitution, the statutes or any rules promulgated by the Supreme Court, the Supreme Court may, upon granting writ of error and without hearing argument in the case, reverse, reform or modify the judgment of the court of appeals, making, at the same time, such further orders as may be appropriate.

(c) (No change.)

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

TRAP 134. When Application [Denied,] Dismissed or Refused

When the application shall have been filed for a period of ten days, if the court determines to [deny,] refuse[,] or dismiss the same, whether or not the respondent has filed a brief in response, the clerk of the court will retain the application, together with the record and accompanying papers, for fifteen days from the date of rendition of the judgment [denying,] refusing or dismissing the writ. At the end of that time, if no motion for rehearing has been filed, or upon the overruling or dismissal of a motion for rehearing, the Clerk of the Supreme Court shall transmit to the court of appeals a certified copy of the orders denying[, refusing] or dismissing the application and of the order overruling the motion for rehearing and shall return all filed papers to the Clerk of the Court of Appeals, except the application for writ of error, any brief in response and any other briefs filed in the Supreme Court.

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

TRAP 135. Notice of Granting, Etc.

When the Supreme Court grants, [denies,] refuses, or dismisses an application for writ of error or a motion for rehearing, the clerk of the court shall notify the parties or their attorneys of record by letter.

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

SECTION TEN. DIRECT APPEALS [TO THE SUPREME COURT]

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

TRAP 160. Form and Content of Motions for Extension of Time

All motions for extension of time for filing an application for writ of error shall be filed in, directed to, and acted upon by the Supreme Court. [Twelve copies of the motion for extension of time shall be filed in the Supreme Court.] A copy of the motion shall [also] be filed at the same time in the court of appeals and the Clerk of the Supreme Court shall notify the court of appeals of the action taken on the motion by the Supreme Court. Each such motion shall specify the following:

(a) the court of appeals and the date of its judgment, together with the number and style of the case;

(b) the date upon which the last timely motion for rehearing was overruled;

(c) the deadline for filing the application; and

(d) the facts relied upon to reasonably explain the need for an extension.

[COMMENT TO 1990 CHANGE: To provide that 12 copies of a motion for extension be filed.]

TRAP 172. Argument

(a) Time. In the argument of cases in the Supreme Court, each side may be allowed ~~thirty~~ [twenty-five] minutes in the argument at the bar, with ~~fifteen~~ [ten] minutes more in conclusion by petitioner. In cases involving difficult questions, the time allotted may be extended by the court, provided application is made before the day of argument. The court may, in its discretion, shorten the time for argument. It may also align the parties for purposes of presenting oral argument.

(b) (No change.)

(c) (No change.)

[COMMENT TO 1990 CHANGE: To reduce standard times for oral submissions.]

TRAP 182. Judgment on Affirmance or Rendition

Text as amended by the Supreme Court effective January 1, 1988. See also text as adopted by the Court of Criminal Appeals, post.

(a) (No change.)

(b) **Damages for Delay.** Whenever the Supreme Court shall determine that application for writ of error has been taken for delay and without sufficient cause, then the court may 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 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 or error that have not been otherwise properly preserved or presented for review.

[COMMENT TO 1990 CHANGE: To provide for sanctions whether or not the court renders a judgment.]

TRAP 190. Motion for Rehearing

(a) Time for Filing. (No change.)

(b) Contents and Service. (No change.)

(c) Notice of the Motion. (No change.)

(d) Answer and Decision. (No change.)

[(e) Extensions of Time. An extension of time may be granted for late filing in the Supreme Court of a motion for rehearing, if a motion reasonably explaining the need therefor is filed with the Supreme Court not later than fifteen days after the last date for filing the motion.]

[COMMENT TO 1990 CHANGE: To conform with Rule 54(c) providing for extensions of time in the courts of appeals.]

SECTION TWELVE. SUBMISSION AND ORAL ARGUMENT [IN THE SUPREME COURT]

SECTION THIRTEEN. DECISION, JUDGMENT AND MANDATE [IN THE SUPREME COURT]

SECTION FOURTEEN. MOTION FOR REHEARING [IN THE SUPREME COURT]

SECTION SEVENTEEN. SUBMISSIONS, ORAL ARGUMENTS, AND OPINIONS [IN THE COURT OF CRIMINAL APPEALS]

SECTION EIGHTEEN. REHEARINGS AND MANDATE [IN THE COURT OF CRIMINAL APPEALS]

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

APPENDIX FOR CRIMINAL CASES

TEXAS RULES OF APPELLATE PROCEDURE

Adopted by orders of the Supreme Court and the Court of Criminal Appeals April 10, 1986

Effective September 1, 1986

This appendix, adopted by order of the Court of Criminal Appeals on April 10, 1986, effective September 1, 1986, to apply to criminal cases and criminal law matters, preserves the substance of Rule 201 and Forms 3, 4, and 5 of the former Rules of Post Trial and Appellate Procedure in Criminal Cases which were repealed effective September 1, 1986, by another order of April 10, 1986.

Rule 1. The Record on Appeal

Pursuant to the provisions Rule 51(c) and 53(h), the Court of Criminal Appeals directs that a record consisting of transcript and statement of facts (formerly transcription of court reporter's notes) in case of an appeal or writ of error (Article 44.43, C.C.P.) from trial court to an appellate court shall be prepared in accordance with applicable Rules in the following formats, respectively:

(a) Transcript

(1) (No change.)

(2) (No change.)

(3) The front cover page shall be labeled in bold type "TRANSCRIPT" and it shall state the number and style of the criminal case, the court in which the case is pending, the name of the judge presiding and the names and mailing addresses of attorneys for the parties. The Clerk shall endorse thereon the day the transcript was transmitted to the court of appeals and shall sign his name officially thereto, and shall provide a space for the Clerk of the Court of Appeals to endorse his filing thereon, showing the date received, and to enter the docket number assigned to the cause. For those purposes the following form will be sufficient.

TRANSCRIPT

(Trial Court) No._____

In the _____ District (County) Court of _____ County, Texas, Honorable _____, Judge Presiding.

_____

_____, Appellant

vs.

The State of Texas

_____

_____

Appealed to the Court of Appeals for the _____ ~~Supreme/Judicial~~ District of Texas, at _____, Texas.

_____

_____

Appellate Attorney for Appellant:	Appellate Attorney for State:
(name)_____	(name)_____
(address)_____	(address)_____
_____	_____
_____	_____

_____

_____

Delivered to Court of Appeals for the _____ ~~Supreme/Judicial~~ District of Texas, at _____, Texas on the _____ day of _____, 19___.

(signature _____

(name of trial court clerk ____

(title _____

_____

_____

(Court of Appeals) Cause No. _____

Filed in the Court of Appeal for the _____ ~~Supreme/Judicial~~ District of Texas, at _____, Texas this _____ day of _____, 19____.

_____, Clerk

By_____, Deputy

VOLUME _____

(4) (No change.)

(5) (No change.)

(6) (No change.)

(7) (No change.)

(b) Statement of Facts. (No change.)

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

HELD OVER FROM MAY 26-27 Meeting LHS Info Copy

KOONS, RASOR, FULLER & McCURLEY
A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS
2311 CEDAR SPRINGS ROAD, SUITE 300
DALLAS, TEXAS 75201
214/871-2727

WILLIAM C. KOONS
BOARD CERTIFIED-FAMILY LAW
AND CIVIL TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION
REBA GRAHAM RASOR
BOARD CERTIFIED-FAMILY LAW
TEXAS BOARD OF LEGAL SPECIALIZATION
KENNETH D. FULLER
BOARD CERTIFIED-FAMILY LAW
TEXAS BOARD OF LEGAL SPECIALIZATION
MIKE McCURLEY
BOARD CERTIFIED-FAMILY LAW
TEXAS BOARD OF LEGAL SPECIALIZATION
ROBERT E. HOLMES JR.
BOARD CERTIFIED-FAMILY LAW
TEXAS BOARD OF LEGAL SPECIALIZATION
KEVIN R. FULLER
PHILIP D. HART, JR.

WILLIAM V. DORSANEO,
OF COUNSEL

+ LSH - Copies to Fuller as a "Special Project" and Agenda

February 11, 1988

Mr. Luther Soules, III
Soules, Reed & Butts
800 Milam Bldg.
San Antonio, TX 78205

Dear Luther:

I would like to personally thank you for your recent presentation on the 1988 rules changes to the family law section of the Dallas Bar Association. I have heard nothing but good comments.

I was recently contacted by Larry Praeger, a practicing attorney in Dallas regarding a possible amendment to the Family Code dealing with the expunction of records relating to a false allegation of child abuse. I took this matter to the Legislative Committee of the Family Law Section who took it under consideration. The Legislative Committee was of the opinion that it would be unwise to deal with the expunction or sealing of records only as it related to family law cases and more specifically with matters involving sexual abuse.

The sealing of records has been a hot topic in Dallas resulting in several court orders being questioned and the promulgation of some general admonissions against such action by our presiding judge. I am informed also that this subject is starting to rear its ugly head in several of the metropolitan areas.

The Legislative Committee of the Family Law Section was of the opinion that this was a matter which should be addressed by the Rules of Civil Procedure. I for one do not want to single out cases ivolving child abuse and take on the very emotionally involved group which has been involved in legislation in this area. Likewise, I feel that a rule of civil procedure could be drafted setting forth guidelines and procedures for the court to follow in the sealing of cases and the expunging of records in certain cases. There is a parallel procedure under the Criminal Law as pointed out by Mr. Praeger.

I enclose Larry Praeger's memorandum to me with the attached copy of Article 55.02 of the Code of Criminal Procedure.

I would personally request that consideration of a rule dealing with these matters be put on the agenda for the next meeting of the Supreme Court Advisory Committee having to do with rules changes.

Again thank you very much for your hard work and sacrifice and working on the rules changes, and more particularly for taking the time to fly into Dallas in the dead of night, speak to us, skip dinner and run madly back to the airport. Hopefully the next time we meet we can take more time to visit.

Respectfully,

Kenneth D. Fuller

KDF/jlj

Enclosure

cc: Lawrence Praeger
Jack Sampson
Harry Tindall

PERINI & CARLOCK
ONE TURTLE CREEK VILLAGE, SUITE 300
OAK LAWN AT BLACKBURN
DALLAS, TEXAS 75219
TELEPHONE 214 521-0390

VINCENT WALKER PERINI, P.C.*
DAVID CARLOCK, P.C.**
LARRY HANCE**
JUDY M. SPALDING
LAWRENCE J. PRAEGER

MEMORANDUM

January 22, 1988

* BOARD CERTIFIED-CRIMINAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION
** BOARD CERTIFIED-FAMILY LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

TO: Ken Fuller

FROM: Larry Praeger

RE: Expunction of records relating to a false allegation of child abuse

We have several cases pending on both the family and criminal sides of our law firm that have dealt with allegations of child abuse that have proven to be unfounded. Some of these cases have produced an arrest and a subsequent "No Bill" by the grand jury.

When a case is no-billed (and under certain other circumstances), a defendant is entitled to an expunction of records pursuant to Article 55, Texas Code of Criminal Procedure (a copy of the article is attached). The purpose of this law is obvious, it protects the innocent person from the opprobrium associated with evidence of criminal charges existing in public records.

These expunctions are granted routinely. After a brief hearing the Court orders that all records and files relating to the arrest be destroyed -- this includes court indices of cases filed.

I believe a person should have the same right to be free of records of a false allegation in a civil lawsuit that he/she does in criminal litigation.

An argument can be made that the Department of Human Services is an agency for the purpose of Article 55. However, in order to avoid lengthy litigation that would probably require an appellate court opinion, I think legislation should be enacted giving a person a right to expunge Department of Human Services records and court files in a suit affecting the parent child relationship under certain limited conditions.

Possible procedures:

1) Amend Article 55, Texas Code of Criminal Procedure to specifically include Department of Human Services investigations of child abuse.

2) In a suit affecting the parent-child relationship, authorize the clerk to obliterate all references to child abuse unless

the judge hearing the case makes an affirmative finding that the allegations are true.

3) Amend the Family Code to require that in all suits affecting the parent child relationship that contain an allegation of child abuse the files be automatically sealed unless the District Court directs otherwise.

4) Require the Department of Human Services to destroy its records unless:
   a) a criminal case is filed within a specified time; or
   b) the judge in the suit affecting the parent-child relationship makes an affirmative finding that the allegations are true.

5) Create a cause of action for an individual to sue the Department of Human Services for negligent disclosure of Department of Human Services information relating to any investigation.

These are just some ideas: The concept is to provide the same protection on the civil side of the docket that the expunction statute does on the criminal.

I will be happy to work with you on this in any way possible. I appreciate your interest and look forward to your comments.

changes in such procedure have been intentionally made. This Act shall be construed to be an independent Act of the Legislature, enacted under its caption, and the articles contained in this Act, as revised, rewritten, changed, combined, and codified, may not be construed as a continuation of former laws except as otherwise provided in this Act. The existing statutes of the Revised Civil Statutes of Texas, 1925, as amended, and of the Penal Code of Texas, 1925, as amended, which contain special or specific provisions of criminal procedure covering specific instances are not repealed by this Act.

(b) A person under recognizance or bond on the effective date of this Act continues under such recognizance or bond pending final disposition of any action pending against him.

[Acts 1965, 59th Leg., p. 317, ch. 722, § 1, eff. Jan. 1, 1966.]

Art. 54.03. Emergency Clause

The fact that the laws relating to criminal procedure in this State have not been completely revised and re-codified in more than a century past and the further fact that the administration of justice, in the field of criminal law, has undergone changes, through judicial construction and interpretation of constitutional provisions, which have been, in certain instances, modified or nullified, as the case may be, necessitates important changes requiring the revision or modernization of the laws relating to criminal procedure, and the further fact that it is desirous and desirable to strengthen, and to conform, various provisions in such laws to current interpretation and application, emphasizes the importance of this legislation and all of which, together with the crowded condition of the calendar in both Houses, create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days be suspended, and said Rule is hereby suspended, and that this Act shall take effect and be in force and effect from and after 12 o'clock Meridian on the 1st day of January, Anno Domini, 1966, and it is so enacted.

[Acts 1965, 59th Leg., p. 317, ch. 722, § 1, eff. Jan. 1, 1966.]

CHAPTER FIFTY-FIVE. EXPUNCTION OF CRIMINAL RECORDS

Article
55.01. Right to Expunction.
55.02. Procedure for Expunction.
55.03. Effect of Expunction.
55.04. Violation of Expunction Order.
55.05. Notice of Right to Expunction.

Acts 1979, 66th Leg., p. 1333, ch. 604, which by § 1 amended this Chapter 55, provided in § 3:

"Any law or portion of a law that conflicts with Chapter 55, Code of Criminal Procedure, 1965, as amended, is repealed to the extent of the conflict."

Art. 55.01. Right to Expunction

A person who has been arrested for commission of either a felony or misdemeanor is entitled to have all records and files relating to the arrest expunged if each of the following conditions exist:

(1) an indictment or information charging him with commission of a felony has not been presented against him for an offense arising out of the transaction for which he was arrested or, if an indictment or information charging him with commission of a felony was presented, it has been dismissed and the court finds that it was dismissed because the presentment had been made because of mistake, false information, or other similar reason indicating absence of probable cause at the time of the dismissal to believe the person committed the offense or because it was void;

(2) he has been released and the charge, if any, has not resulted in a final conviction and, is no longer pending and there was no court ordered supervision under Article 42.13, Code of Criminal Procedure, 1965, as amended, nor a conditional discharge under Section 4.12 of the Texas Controlled Substances Act (Article 4476-15, Vernon's Texas Civil Statutes); and

(3) he has not been convicted of a felony in the five years preceding the date of the arrest.

[Acts 1977, 65th Leg., p. 1880, ch. 747, § 1, eff. Aug. 29, 1977. Amended by Acts 1979, 66th Leg., p. 1333, ch. 604, § 1, eff. Aug. 27, 1979.]

Art. 55.02. Procedure for Expunction

Sec. 1. (a) A person who is entitled to expunction of records and files under this chapter may file an ex parte petition for expunction in a district court for the county in which he was arrested.

(b) The petitioner shall include in the petition a list of all law enforcement agencies, jails or other detention facilities, magistrates, courts, prosecuting attorneys, correctional facilities, central state depositories of criminal records, and other officials or agencies or other entities of this state or of any

political subdivision of this state and of all central federal depositories of criminal records that the petitioner has reason to believe have records or files that are subject to expunction.

Sec. 2. The court shall set a hearing on the matter no sooner than thirty days from the filing of the petition and shall give reasonable notice of the hearing to each official or agency or other entity named in the petition by certified mail, return receipt requested, and such entity may be represented by the attorney responsible for providing such agency with legal representation in other matters.

Sec. 3. (a) If the court finds that the petitioner is entitled to expunction of any records and files that are the subject of the petition, it shall enter an order directing expunction and directing any state agency that sent information concerning the arrest to a central federal depository to request such depository to return all records and files subject to the order of expunction. Any petitioner or agency protesting the expunction may appeal the court's decision in the same manner as in other civil cases. When the order of expunction is final, the clerk of the court shall send a certified copy of the order by certified mail, return receipt requested, to each official or agency or other entity of this state or of any political subdivision of this state named in the petition that there is reason to believe has any records or files that are subject to the order. The clerk shall also send a certified copy by certified mail, return receipt requested, of the order to any central federal depository of criminal records that there is reason to believe has any of the records, together with an explanation of the effect of the order and a request that the records in possession of the depository, including any information with respect to the proceeding under this article, be destroyed or returned to the court.

(b) All returned receipts received by the clerk from notices of the hearing and copies of the order shall be maintained in the file on the proceedings under this chapter.

Sec. 4. (a) If the state establishes that the petitioner is still subject to conviction for an offense arising out of the transaction for which he was arrested because the statute of limitations has not run and there is reasonable cause to believe that the state may proceed against him for the offense, the court may provide in its order that the law enforcement agency and the prosecuting attorney responsible for investigating the offense may retain any records and files that are necessary to the investigation.

(b) Unless the petitioner is again arrested for or charged with an offense arising out of the transaction for which he was arrested, the provisions of Articles 55.03 and 55.04 of this code apply to files and records retained under this section.

Sec. 5. (a) On receipt of the order, each official or agency or other entity named in the order shall:

(1) return all records and files that are subject to the expunction order to the court or, if removal is impracticable, obliterate all portions of the record or file that identify the petitioner and notify the court of its action; and

(2) delete from its public records all index references to the records and files that are subject to the expunction order.

(b) The court may give the petitioner all records and files returned to it pursuant to its order.

(c) If an order of expunction is issued under this article, the court records concerning expunction proceedings are not open for inspection by anyone except the petitioner unless the order permits retention of a record under Section 4 of this article and the petitioner is again arrested for or charged with an offense arising out of the transaction for which he was arrested. The clerk of the court issuing the order shall obliterate all public references to the proceeding and maintain the files or other records in an area not open to inspection.

[Acts 1977, 65th Leg., p. 1880, ch. 747, § 1, eff. Aug. 29, 1977. Amended by Acts 1979, 66th Leg., p. 1333, ch. 604, § 1, eff. Aug. 27, 1979.]

Art. 55.03. Effect of Expunction

After entry of an expunction order:

(1) the release, dissemination, or use of the expunged records and files for any purpose is prohibited;

(2) except as provided in Subdivision 3 of this article, the petitioner may deny the occurrence of the arrest and the existence of the expunction order; and

(3) the petitioner or any other person, when questioned under oath in a criminal proceeding about an arrest for which the records have been expunged, may state only that the matter in question has been expunged.

[Acts 1977, 65th Leg., p. 1880, ch. 747, § 1, eff. Aug. 29, 1977. Amended by Acts 1979, 66th Leg., p. 1333, ch. 604, § 1, eff. Aug. 27, 1979.]

Art. 55.04. Violation of Expunction Order

Sec. 1. A person who acquires knowledge of an arrest while an officer or employee of the state or of any agency or other entity of the state or any political subdivision of the state and who knows of an order expunging the records and files relating to that arrest commits an offense if he knowingly releases, disseminates, or otherwise uses the records or files.

Sec. 2. A person who knowingly fails to return or to obliterate identifying portions of a record or file ordered expunged under this chapter commits an offense.

Sec. 3. An offense under this article is a Class B misdemeanor.

[Acts 1977, 65th Leg., p. 1880, ch. 747, § 1, eff. Aug. 29, 1977. Amended by Acts 1979, 66th Leg., p. 1333, ch. 604, § 1, eff. Aug. 27, 1979.]

Art. 55.05. Notice of Right to Expunction

On release or discharge of an arrested person, the person responsible for the release or discharge shall give him a written explanation of his rights under this chapter and a copy of the provisions of this chapter.

[Acts 1977, 65th Leg., p. 1880, ch. 747, § 1, eff. Aug. 29, 1977. Amended by Acts 1979, 66th Leg., p. 1333, ch. 604, § 1, eff. Aug. 27, 1979.]

CHAPTER 56. RIGHTS OF CRIME VICTIMS

Article

Art. 56.01. Definitions

In this chapter:

(1) "Close relative of a deceased victim" means a person who was the spouse of a deceased victim at the time of the victim's death or who is a parent or adult brother, sister, or child of the deceased victim.

(2) "Guardian of a victim" means a person who is the legal guardian of the victim, whether or not the legal relationship between the guardian and victim exists because of the age of the victim or the physical or mental incompetency of the victim.

(3) "Victim" means a person who is the victim of sexual assault, kidnapping, or aggravated robbery or who has suffered bodily injury or death as a result of the criminal conduct of another.

[Acts 1985, 69th Leg., ch. 588, § 1, eff. Sept. 1, 1985.]

Art. 56.02. Crime Victims' Rights

(a) A victim, guardian of a victim, or close relative of a deceased victim is entitled to the following rights within the criminal justice system:

(1) the right to receive from law enforcement agencies adequate protection from harm and threats of harm arising from cooperation with prosecution efforts;

(2) the right to have the magistrate take the safety of the victim or his family into consideration as an element in fixing the amount of bail for the accused;

(3) the right, if requested, to be informed of relevant court proceedings and to be informed if those court proceedings have been canceled or rescheduled prior to the event;

(4) the right to be informed, when requested, by a peace officer concerning the procedures in criminal investigations and by the district attorney's office concerning the general procedures in the criminal justice system, including general procedures in guilty plea negotiations and arrangements;

(5) the right to provide pertinent information to a probation department conducting a presentencing investigation concerning the impact of the offense on the victim and his family by testimony, written statement, or any other manner prior to any sentencing of the offender;

(6) the right to receive information regarding compensation to victims of crime as provided by the Crime Victims Compensation Act (Article 8309–1, Vernon's Texas Civil Statutes), including information related to the costs that may be compensated under that Act and the amount of compensation, eligibility for compensation, and procedures for application for compensation under that Act, the payment of medical expenses under Section 1, Chapter 299, Acts of the 63rd Legislature, Regular Session, 1973 (Article 4447m, Vernon's Texas Civil Statutes), for a victim of a sexual assault, and when requested, to referral to available social service agencies that may offer additional assistance; and

(7) the right to be informed, upon request, of parole procedures, to participate in the parole process, to be notified, if requested, of parole proceedings concerning a defendant in the victim's case, to provide to the Board of Pardons and Paroles for

HJH Yc SCAC TRAP Subc Agenda 7/15

MEMORANDUM

To: Justice Nathan Hecht
Justice David Peeples
Luther H. Soules III

From: Sarah B. Duncan

Date: June 13, 1989

Re: Organization of the Texas Rules of Appellate Procedure

Some sentiment not to tamper w/ this now - Dorsaneo says this in workable shape: no real problem, at most have to tamper. Consensus is to leave this for now.

As currently organized, the Texas Rules of Appellate Procedure for the most part neatly collect in one section all rules relating to practice in the courts of appeals; there are, however, exceptions. The rules relating to practice in the supreme court are dispersed over four sections. Moreover, original proceedings practice rules, as well as those relating to certified questions and direct appeals in the supreme court, sit right in the middle of the rules governing the normal appellate process. Bill Dorsaneo, at the last SCAC meeting, said this was the result of the inevitable last minute rush to get the Texas Rules of Appellate Procedure written, passed, and published and agreed that a reorganization is in order. I suggest the following reorganization, at least for a starting point (changes are noted in brackets):

Section Five: Motions, Briefs, Argument, and Submission in the Courts of Appeals

- A. Motions in the Courts of Appeals
- B. Briefs and Argument in the Courts of Appeals
- C. Submission in the Courts of Appeals
- D. Judgments in the Courts of Appeals [now in Section 6]
- E. Opinions by the Courts of Appeals [now in Section 6]
- F. Rehearing in the Courts of Appeals [now in Section 6]

Section Six: Motions, Briefs, Argument, and Submission in the Supreme Court

- A. Motions in the Supreme Court [now in Section 11]
- B. Briefs and Argument in the Supreme Court [now in Sections 11 and 12]
- C. Submission in the Supreme Court [now in Section 12]
- D. Decision, Judgment, and Mandate in the Supreme Court [now in Section 13]
- E. Rehearing in the Supreme Court [now in Section 14]

Section Seven: Certified Questions to the Supreme Court in Civil Cases [now Section 7 and entitled simply "Certified Questions in Civil Cases"]

Section Eight: Direct Appeals to the Supreme Court [now Section 10]

Section Nine: Orginal Proceedings in Civil Cases [now Section 8 and entitled simply "Original Proceedings"]

Section Ten: Discretionary Review in Criminal Cases [now Section 15]

Section Eleven: Submission, Oral Argument, and Opinions in the Court of Criminal Appeals [now Sections 17 and 18]

A. Submission, Oral Argument, and Opinions [now Section 17]
B. Rehearings and Mandate [now Section 18]

Section Twelve: Direct Appeals and Extraordinary Matters in the Court of Criminal Appeals (including postconviction applications for writ of habeas corpus)[now Section 16]

If this organizational scheme is used, I think the only rules that will need to be moved are as follows: Rules 88 regarding "Execution on Failure to Pay Costs in Civil Cases" and 91 regarding "Copy of Opinion and Judgment to Attorneys, Etc." will need to be moved to Section Two ("General Provisions"), since there is no supreme court or court of criminal appeals counterparts; Rule 101 regarding "Reconsideration on Petition for Discretionary Review" will need to be moved to Section Ten.

LAW OFFICES

SOULES & WALLACE
ATTORNEYS-AT-LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
RICHARD M. BUTLER
W. CHARLES CAMPBELL
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
SARAH B. DUNCAN
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
RONALD J. JOHNSON
REBA BENNETT KENNEDY
PHIL STEVEN KOSUB
GARY W. MAYTON
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL *
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

TELEFAX
SAN ANTONIO
(512) 224-7073
AUSTIN
(512) 327-4105

June 21, 1989

Mr. Michael A. Hatchell
Ramey, Flock, Hutchins, Jeffus,
Crawford & Harper
P. O. Box 629
Tyler, Texas 75710-0629

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Organization of the Texas Rules of Appellate Procedure

Dear Rusty:

Enclosed please find a copy of a memorandum sent to me by Sarah B. Duncan regarding reorganizing the Texas Rules of Appellate Procedure. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan L. Hecht
Honorable Stanley Pemberton

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

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
* BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

LHS Copy
Orig to Lyh 6/26/86

7/3 HJH,
SCAC Agenda
TRAP Subc (3)

MEMO

TO: ALL JUDGES

FROM: SAM HOUSTON CLINTON, Rules Committee Chair

RE: Recommendations on SCAC proposed TRAP amendments

DATE: JUNE 23, 1989

The Rules Committee recommends that the Court adopt all proposed amendments to Texas Rules of Appellate Procedure attached to a June 12, 1989 memorandum to all members of the Supreme Court Advisory Committee from Luther H. Soules III, Chairman, but with the following modifications.

Rule 1: Add to the last sentence "who requests it," so that the sentence would read:

> When an appeal or original proceeding is docketed, the clerk shall mail a copy of the court's local rules to all counsel of record who requests it.

To provide prosecuting attorneys and criminal defense attorneys located and regularly practicing within the district a copy of local rules every time a cause is docketed in which one is counsel is redundant and, frankly, wasteful.

Rule 20. Begin the first bracketed sentence with "In civil cases," so the sentence would read:

> In civil cases, an amicus curiae brief shall not exceed 50 pages in length, exclusive of pages containing the table of contents, index of authorities, points of error and any addendum containing statutes, rules regulations, etc.

On the criminal side, we no longer impose a fifty page limitation on briefs.

Also, optionally, add to the comment "conformably with Rules 74(h) and 136(e)," so that comment would read:

> COMMENT TO 1990 CHANGE: To provide for a maximum length for amicus curiae briefs conformably with Rules 74(h) and 136(e).

After headings for sections twelve, thirteen and fourteen, insert:

> SECTION SEVENTEEN. SUBMISSIONS, ORAL ARGUMENTS AND OPINIONS [IN THE COURT OF CRIMINAL APPEALS]

SHC

cc: Chief Justice Thomas R. Phillips

Justice Nathan L. Hecht

Luther H. Soules III, Chairman

TRAP 4. Signing, Filing and Service

(a) Signing. Each application, brief, motion or other paper filed shall be signed by at least one of the attorneys for the party/ [and] shall give the State Bar of Texas identification number, the mailing address and telephone number of each attorney whose name is signed thereto/ /and/shall/state/that/a/copy/of/the paper /has /been /delivered /or /mailed /to /each /group /of /opposite parties/or/their/counsel. A party who is not represented by an attorney shall sign his brief and give his address and telephone number. The/statement/or/service/of/opposite/parties/by/one/who is/not/a/licensed/attorney/shall/be/verified/by/affidavit/

(b) Filing. The filing of records, briefs and other papers in the appellate court as required by these rules shall be made by filing them with the clerk, except that any justice of the court may permit the papers to be filed with him, in which event he shall note thereon the filing date and time and forthwith transmit them to the office of the clerk. If a motion for rehearing, any matter relating to taking an appeal or writ of error from the trial court to any higher court, or application for writ of error or petition for discretionary review is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail one /day /or /more /before [on or before] the last day for filing same, the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and be deemed as filed in time; provided, however, that a certificate of mailing by the

United States Postal Service or a legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing.

(c) (No change.)

(d) (No change.)

(e) (No change.)

(f) (No change.)

(g) ~~Proof~~ Service. Papers presented for filing shall [be served and shall] contain an acknowledgement of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names [and addresses] of the persons served, certified by the person who made the service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgement or proof of service but shall require such to be filed promptly thereafter.

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

HJH,
SCAC Ofcl
TRAP Sub C Chair (3)

MEMORANDUM

TO: LHS

FROM: SBD

DATE: June 27, 1989

RE: Proposed TRAP 4

Judge Austin McCloud of Eastland, Texas called today regarding the proposed changes to TRAP 4. He noted that, because of our deletion in paragraph (a), the last sentence of paragraph (a) regarding an acknowledgement of service by a pro se litigant no longer fits. It should be moved to paragraph (g).

A redline is attached.

S.B.D.

MEMORANDUM

TO: LHS

FROM: SBD

DATE: June 28, 1989

RE: Proposed changes to TRAP 4

Judge McCloud called again today and, after further thought, he suggests that the sentence in TRAP 4(a) requiring a pro se litigant to swear by affidavit to service on opposing counsel not simply be moved to (g), but rather deleted entirely.

Judge McCloud's reasoning is that, in criminal cases, the court gets literally hundreds of pro se motions, and the court knows it will eventually have to hear and decide those motions. Since they just really don't have time to keep sending it back for compliance with this somewhat technical TRAP requirement, they don't. They simply decide the motion. Since the rule generally isn't followed in criminal appeals, Judge McCloud asks why have it.

On the civil side, pro se appeals are less frequent; however, the supreme court ruled about ten years ago that pro se litigants should be treated just like attorneys. Yet, the rule requires a sworn-to acknowledgement of service from a pro se litigant, but not from an attorney. Judge McCloud's court, therefore, generally doesn't follow this rule in civil appeals either; the court simply notifies opposing counsel that a brief has been filed by the pro se litigant. And, as in criminal matters, the court really just wants to decide the case and move on, rather than running pleadings and briefs back and forth in an effort to obtain compliance with somewhat technical requirements.

I told Judge McCloud I would write you a memo about this and possibly it could be put on the agenda for the next meeting.

S.B.D.

c

LHS Copy
Orig to Lyn
6/26/89

7/3 HJH,
SCAC Agenda
TRAP Subc (3)

MEMO

TO: ALL JUDGES

FROM: SAM HOUSTON CLINTON, Rules Committee Chair

RE: Recommendations on SCAC proposed TRAP amendments

DATE: JUNE 23, 1989

The Rules Committee recommends that the Court adopt all proposed amendments to Texas Rules of Appellate Procedure attached to a June 12, 1989 memorandum to all members of the Supreme Court Advisory Committee from Luther H. Soules III, Chairman, but with the following modifications.

Rule 1: Add to the last sentence "who requests it," so that the sentence would read:

> When an appeal or original proceeding is docketed, the clerk shall mail a copy of the court's local rules to all counsel of record who requests it.

To provide prosecuting attorneys and criminal defense attorneys located and regularly practicing within the district a copy of local rules every time a cause is docketed in which one is counsel is redundant and, frankly, wasteful.

Rule 20. Begin the first bracketed sentence with "In civil cases," so the sentence would read:

> In civil cases, an amicus curiae brief shall not exceed 50 pages in length, exclusive of pages containing the table of contents, index of authorities, points of error and any addendum containing statutes, rules regulations, etc.

May 25, 1989

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

Dear Luke:

I find no provision in the appellate rules for substitution of parties except Rule 9. That rule does not cover the situation, quite common in these hard times, in which a new entity (like the FDIC or the FSLIC) succeeds to the interest of a party on appeal. Perhaps an amendment to Rule 9 should be considered at the May meeting of the Advisory Committee.

Texas Rule of Civil Procedure 749c requires a pauper appellant in a forcible detainer case involving non-payment of rent to deposit one rental period's rent into the court registry to perfect the appeal. This deposit is not in the nature of a supersedeas, which is provided for in Rule 749b. A pending case challenges the constitutionality of Rule 749c. *Walker v. Blue Water Garden Apartments*, C-7798. This may be another problem we want to discuss.

Finally, a local justice of the peace recently complained of inconsistencies in the requirements for service of citation under Rules 99-107 and 533-536 of the Texas Rules of Civil Procedure. He suggested that the latter rules were simply overlooked when changes in the former rules were made.

As always, the Court is grateful to you for your dedicated assistance in developing our Rules.

Sincerely,

Nathan L. Hecht
Justice

On the criminal side, we no longer impose a fifty page limitation on briefs.

Also, optionally, add to the comment "conformably with Rules 74(h) and 136(e)," so that comment would read:

COMMENT TO 1990 CHANGE: To provide for a maximum length for amicus curiae briefs conformably with Rules 74(h) and 136(e).

After headings for sections twelve, thirteen and fourteen, insert:

SECTION SEVENTEEN. SUBMISSIONS, ORAL ARGUMENTS AND OPINIONS [IN THE COURT OF CRIMINAL APPEALS]

SHC

cc: Chief Justice Thomas R. Phillips

Justice Nathan L. Hecht

Luther H. Soules III, Chairman

4543.001

orig HJH
copy LHS
✓ 7-11-89

South Texas College of Law

July 10, 1989

Mr. Luther Soules
175 E. Houston Street
Republic of Texas Plaza-10th Floor
San Antonio, TX 78205

RE: Special Report on Modifications to TRAP Rules 47 & 49- Concerning Security on Appeal

Dear Luke:

Enclosed is a "marked-up" version of Appellant Rules 47 & 49 to reflect;

1) Modification of the standard for security on appeal in conformity with Senate Bill 134, effective September 1, 1989, (attached is the Bill and its enrolled form) and,

2) Modification of Appellant Rule 49 (b) to clarify the Texas Supreme Court's authority to review security on appeal for excessiveness. This concern was raised in Justice Kilgarlin's letter to you of April 25, 1988. (attached) I noticed in going through the Supreme Court Advisory Committee materials from our May meeting, that the COAJ did not concur in recommending a rule change to Rule 49(b). (See attached)

I believe that this addresses all of the concerns raised on this subject. If I can be of any further assistance in this matter, please feel free to contact me. I will be present to report on this matter at our meeting this Saturday.

Sincerely,

Elaine A. Carlson
Professor of Law

1303 San Jacinto Street, Houston, Texas 77002-7006 (713) 659-8040

00139

Rule 47. Suspension of Enforcement of Judgment Pending Appeal in Civil Cases

(a) (No change.)

(b) Money Judgment. When the judgment awards recovery of a sum of money, the amount of the bond or deposit shall be at least the amount of the judgment, interest, and costs. The trial court may make an order deviating from this general rule if after notice to all parties and a hearing the trial court finds that ~~posting the amount of the bond or deposit will~~ [setting the security at an amount of the judgment, interest, and costs would] cause irreparable harm to the judgment debtor, and ~~not posting such bond or deposit will cause no substantial harm to the judgment creditor~~ [setting the security at the lesser amount would not substantially decrease the degree to which a judgment creditor's recovery under the judgment would be secured after the exhaustion of all appellate remedies]. In such a case, the trial court may stay enforcement of the judgment based upon an order which adequately protects the judgment creditor against ~~any~~ loss or damage occasioned by the appeal.

(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) (No change.)

HELD OVER FROM MAY 26-27 Meeting

Rule 47. Suspension of Enforcement of Judgment Pending Appeal in Civil Cases

Text as amended by the Supreme Court effective January 1, 1988. See also text as adopted by the Court of Criminal Appeals, post.

(a) Suspension of Enforcement. Unless otherwise provided by law or these rules, a judgment debtor may suspend the execution of the judgment by filing a good and sufficient bond to be approved by the clerk, subject to review by the court on hearing, or making the deposit provided by Rule 48, payable to the judgment creditor in the amount provided below, conditioned that the judgment debtor 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 perform its judgment, sentence or decree and pay all such damages and costs as said court may award against him. If the bond or deposit is sufficient to secure the costs and is filed or made within the time prescribed by Rule ~~40~~ [41], it constitutes sufficient compliance with Rule 46. The trial court may make such orders as will adequately protect the judgment creditor against any loss or damages occasioned by the appeal.

(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) (No change.)

AN ACT

relating to security for certain judgments pending appeal.

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

SECTION 1. Subtitle D, Title 2, Civil Practice and Remedies Code, is amended by adding Chapter 52 to read as follows:

CHAPTER 52. SECURITY FOR JUDGMENTS PENDING APPEAL

Sec. 52.001. DEFINITION. In this chapter, "security" means a bond or deposit posted, as provided by the Texas Rules of Appellate Procedure, by a judgment debtor to suspend execution of the judgment during appeal of the judgment.

Sec. 52.002. BOND OR DEPOSIT FOR MONEY JUDGMENT. A trial court rendering a judgment that awards recovery of a sum of money, other than a judgment rendered in a bond forfeiture proceeding, a personal injury or wrongful death action, a claim covered by liability insurance, or a workers' compensation claim, may set the security in an amount less than the amount of the judgment, interest, and costs if the trial court, after notice to all parties and a hearing, finds that:

(1) setting the security at an amount equal to the amount of the judgment, interest, and costs would cause irreparable harm to the judgment debtor; and

(2) setting the security at the lesser amount would not substantially decrease the degree to which a judgment creditor's recovery under the judgment would be secured after the exhaustion of all appellate remedies.

Sec. 52.003. REVIEW FOR SUFFICIENCY. In a manner similar to appellate review under Rule 49, Texas Rules of Appellate Procedure, of the sufficiency of the amount of security set by a trial court, an appellate court may review the sufficiency of the amount of security set by the trial court under Section 52.002.

Sec. 52.004. REVIEW FOR EXCESSIVENESS. (a) In a manner similar to appellate review under Rule 49, Texas Rules of Appellate Procedure, of the sufficiency of the amount of security set by a trial court, an appellate court may review for excessiveness the amount of security set by a trial court under:

(1) Section 52.002; or

(2) the Texas Rules of Appellate Procedure if security is not set under Section 52.002.

(b) If the appellate court finds that the amount of security is excessive, the appellate court may reduce the amount.

Sec. 52.005. CONFLICT WITH TEXAS RULES OF APPELLATE PROCEDURE. (a) To the extent that this chapter conflicts with the Texas Rules of Appellate Procedure, this chapter controls.

(b) Notwithstanding Section 22.004, Government Code, the supreme court may not adopt rules in conflict with this chapter.

(c) The Texas Rules of Appellate Procedure apply to any proceeding, cause of action, or claim to which Section 52.002 does not apply.

SECTION 2. Section 52.001, Property Code, is amended to read as follows:

Sec. 52.001. ESTABLISHMENT OF LIEN. Except as provided by

Section 52.0011, a [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.

SECTION 3. Subchapter A, Chapter 52, Property Code, is amended by adding Section 52.0011 to read as follows:

Sec. 52.0011. ESTABLISHMENT OF LIEN PENDING APPEAL OF JUDGMENT. (a) A first or subsequent abstract of a judgment rendered by a court against a defendant, when it is recorded and indexed under this chapter, does not constitute a lien on the real property of the defendant if:

(1) the defendant has posted security as provided by law or is excused by law from posting security; and

(2) the court finds that the creation of the lien would not substantially increase the degree to which a judgment creditor's recovery under the judgment would be secured when balanced against the costs to the defendant after the exhaustion of all appellate remedies. A certified copy of the finding of the court must be recorded in the real property records in each county in which the abstract of judgment or a certified copy of the judgment is filed in the abstract of judgment records.

(b) The court may withdraw its finding under Subsection (a)(2) at any time the court determines, from evidence presented to it, that the finding should be withdrawn. The lien exists on withdrawal of the finding and on the filing of a certified copy of

the withdrawal of the finding of the court in the real property records in each county in which the abstract of judgment or a certified copy of the judgment is filed in the abstract of judgment records.

SECTION 4. This Act takes effect September 1, 1989, and applies only to a judgment rendered on or after that date. A judgment rendered before the effective date of this Act is governed by the law in effect at the time the judgment was rendered, and that law is continued in effect for that purpose.

SECTION 5. 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.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 134 passed the Senate on April 17, 1989, by a viva-voce vote; and that the Senate concurred in House amendment on May 22, 1989, by a viva-voce vote.

Secretary of the Senate

I hereby certify that S.B. No. 134 passed the House, with amendment, on May 20, 1989, by a non-record vote.

Chief Clerk of the House

Approved:

Date

Governor

LEGISLATIVE BUDGET BOARD

Austin, Texas

FISCAL NOTE

April 20, 1989

TO: Honorable Senfronia Thompson, Chair
Committee on Judiciary
House of Representatives
Austin, Texas

In Re: Senate Bill No. 134, as engrossed
By: Parker

FROM: Jim Oliver, Director

In response to your request for a Fiscal Note on Senate Bill No. 134, as engrossed (relating to security for certain judgments pending appeal) this office has determined the following:

No fiscal implication to the State or units of local government is anticipated.

Criminal Justice Policy Impact Statement: No change in the sanctions applicable to adults convicted of felony crimes is anticipated.

Source: LBB Staff: JO, JWH, AL, GMH, BL

LEGISLATIVE BUDGET BOARD

Austin, Texas

FEB 23

FISCAL NOTE

January 24, 1989

TO: Honorable Bob Glasgow, Chairman
Committee on Jurisprudence
Senate Chamber
Austin, Texas

In Re: Senate Bill No. 134
By: Parker

FROM: Jim Oliver, Director

In response to your request for a Fiscal Note on Senate Bill No. 134 (relating to security for judgments pending appeal) this office has determined the following:

No fiscal implication to the State or units of local government is anticipated.

Source: LBB Staff: JO, JWH, AL, GMH, PA

71FSB134

00148

1-25-89

71/89

FILE

BILL ANALYSIS

By: Parker S.B. 134

BACKGROUND:

no background at this time

PURPOSE:

As proposed, S.B. 134 provide for security for judgements pending appeal.

RULEMAKING AUTHORITY:

It is the committee's opinion that this bill does not grant any addition rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS:

SECTION 1. Amends Subtitle D, Title 2, Civil Practice and Remedies Code, by ad ing Chapter 52, as follows:

CHAPTER 52 SECURITY FOR JUDGMENTS PENDING APPEAL

Sec. 52.001. Defines "security."

Sec. 52.002. Allows a trial court rendering a judgment that awards recove of money to set the security in an amount less than the amount of the ju ment, interest, and costs under certain conditions.

Sec. 52.003. Allows an appellate court to review the sufficiency of the amount of security set by the trial court under Section 52.002.

Sec. 52.004. (a) Allows an appellate court to review for excessiveness th amount of security set by a trial court under Section 52.002 or the Texas Rules of Appellate Procedure.

(b) Provides that the appellate court may reduce the amount if it finds i excessive.

Sec. 52.005. (a) Provides that this chapter controls if it conflicts wit the Texas Rules of Appellate Procedure.

(b) Prohibits the supreme court from adopting rules in conflict with this chapter.

SECTION 2. Amends Section 52.001, Property Code, to provide an exception, as pro vided by Section 52.0011, to a first or subsequent abstract of judgment.

SECTION 3. Amends Subchapter A, Chapter 52, Property Code, by adding Sectio 52.0011, as follows:

Sec. 52.0011. (a) Sets forth conditions under which a first or subsequent abstract of a judgment does not constitute a lien on the real property of the defendant.

(b) Allows the court to withdraw its findings under Subsection (a)(2) at any time. Provides that the lien exists upon withdrawal of the finding.

SECTION 4. Effective date: September 1, 1989.
Makes application of this Act prospective.

SECTION 5. Emergency clause.

with effect and shall pay all costs which have accrued in the trial court and the cost of the statement of facts and transcript. Each surety shall give his post office address. Appellant may make the bond payable to the clerk instead of the appellee, and same shall inure to the use and benefit of the appellee and the officers of the court, and shall have the same force and effect as if it were payable to the appellee.

(b) Deposit. In lieu of a bond, appellant may make a deposit with the clerk pursuant to Rule 48 in the amount of $1000, and in that event the clerk shall file among the papers his certificate showing that the deposit has been made and copy same in the transcript, and this shall have the force and effect of an appeal bond.

(c) Increase or Decrease in Amount. Upon the court's own motion or motion of any party or any interested officer of the court, the court may increase or decrease the amount of the bond or deposit required. The trial court's power to increase or decrease the amount shall continue for thirty days after the bond or certificate is filed, but no order increasing the amount shall affect perfecting of the appeal or the jurisdiction of the appellate court. If a motion to increase the amount is granted, the clerk and official reporter shall have no duty to prepare the record until the appellant complies with the order. If the appellant fails to comply with such order, the appeal shall be subject to dismissal or affirmance under Rule 60. No motion to increase or decrease the amount shall be filed in the appellate court until thirty days after the bond or certificate is filed. In determining the question of whether an appellant's bond or deposit should be increased to more than the minimum amount of $1000, the court shall credit the appellant with such sums as have been paid by appellant on the costs to the clerk of the trial court or to the court reporter.

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

(e) Payment of Court Reporters. Even if a bond is filed or deposit in lieu of bond is made, appellant shall either pay or make arrangements to pay the court reporter upon completion and delivery of the statement of facts.

(f) Amendment: New Appeal Bond or Deposit. On motion to dismiss an appeal or writ of error for a defect of substance or form in any bond or deposit given as security for costs, the appellate court may allow the filing of a new bond or the making of a new deposit in the trial court on such terms as the appellate court may prescribe. A certified copy of the new bond or certificate of deposit shall be filed in the appellate court.

Rule 47. Suspension of Enforcement of Judgment Pending Appeal in Civil Cases

Text as amended by the Supreme Court effective January 1, 1988. See also text as adopted by the Court of Criminal Appeals, post.

(a) Suspension of Enforcement. Unless otherwise provided by law or these rules, a judgment debtor may suspend the execution of the judgment by filing a good and sufficient bond to be approved by the clerk, subject to review by the court on hearing, or making the deposit provided by Rule 48, payable to the judgment creditor in the amount provided below, conditioned that the judgment debtor 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 perform its judgment, sentence or decree and pay all such damages and costs as said court may award against him. If the bond or deposit is sufficient to secure the costs and is filed or made within the time prescribed by Rule ~~46~~, it constitutes sufficient compliance with Rule 46. The trial court may make such orders as will adequately protect the judgment creditor against any loss or damage occasioned by the appeal.

(b) Money Judgment. When the judgment awards recovery of a sum of money, the amount of the bond or deposit shall be at least the amount of the judgment, interest, and costs. The trial court may make an order deviating from this general rule if after notice to all parties and a hearing the trial court finds that posting the amount of the bond or deposit will cause irreparable harm to the judgment debtor, and not posting such bond or deposit will cause no substantial harm to the judgment creditor. In such a case, the trial court may stay enforcement of the judgment based upon an order which adequately protects the judgment creditor against any loss or damage occasioned by the appeal.

(c) Land or Property. When the judgment is for the recovery of land or other property, then the bond, deposit, or orders which adequately protect the judgment creditor for any loss or damage occasioned by the appeal shall be further conditioned

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

TELEFAX

SAN ANTONIO
(512) 224-7073

AUSTIN
(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL *
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

April 12, 1989

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Texas Rule of Appellate Procedure 47(a)

Dear Rusty:

Enclosed herewith please find a copy of a letter forwarded to me by Justice William Kilgarlin regarding TRAP 47(a). Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

LUTHER H. SOULES III

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

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

Texas Rules of Appellate Procedure

Rule 47. ~~Supersedeas-Bond-or-Deposit-in-Civil-Cases~~ [Suspension of Enforcement of Judgment Pending Appeal in Civil Cases]

(a) ~~May--Suspend--Execution.~~ [Suspension of Enforcement.] Unless otherwise provided by law or these rules, ~~an-appellant~~ [a judgment debtor] may suspend the execution of the judgment by filing a good and sufficient bond to be approved by the clerk, [subject to review by the court on hearing,] or making the deposit provided by Rule 48, payable to the ~~appellee~~ [judgment creditor] in the amount provided below, conditioned that the ~~appellant~~ [judgment debtor] 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 perform its judgment, sentence or decree and pay all such damages and costs as said court may award against him. If the bond or deposit 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. [The trial court may make such orders as will adequately protect the judgment creditor against any loss or damage occasioned by the appeal.]

(b) Money Judgment. When the judgment awards recovery of a sum of money, the amount of the bond or deposit shall be at least the amount of the judgment, interest, and costs. [The trial court may make an order deviating from this general rule if after notice to all parties and a hearing the trial court finds that posting the amount of the bond or deposit will cause irreparable harm to the judgment debtor, and not posting such bond or deposit will cause no substantial harm to the judgment creditor. In such a case, the trial court may stay enforcement of the judgment based upon an order which adequately protects the judgment creditor against any loss or damage occasioned by the appeal.]

(c) Land or Property. When the judgment is for the recovery of land or other property, [then] the bond[,] or deposit [, or orders which adequately protect the judgment creditor for any loss or damage occasioned by the appeal] shall be further conditioned that the ~~appellant~~ [judgment debtor] shall, in case the judgment is affirmed, pay to the ~~appellee~~ [judgment creditor] the value of the rent or hire of such property during the appeal, and the bond[,] or deposit[, or alternate security] shall be in the amount estimated or fixed by the trial court.

(d) Foreclosure on Real Estate. When the judgment is for the recovery of or foreclosure upon real estate, the ~~appellant~~ [judgment debtor] may ~~supersede~~ [suspend] the [enforcement of the] judgment insofar as it decrees the recovery of or foreclosure against said specific real estate by ~~filing--a supersedeas-bond-or-making-a-deposit~~ [posting security] in the amount [and type] to be ~~fixed~~ [ordered] by the [trial] court

COAJ Recommendation (Court Rule

below, not less than the rents and hire of said real estate; but if the amount of ~~said supersedeas bond or deposit~~ [the security] is less than the amount of [any] money judgment, with interest and costs, then the [judgment creditor can execute against any other property of the judgment debtor unless the ~~appellee shall be allowed to have his execution against any other property of appellant.~~ trial court within its discretion orders a suspension of enforcement of 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~~ [judgment debtor] may ~~supersede~~ [suspend] the [enforcement of the] judgment insofar as it decrees the recovery of or foreclosure against said specific personal property ~~or by filing a supersedeas bond or making a deposit~~ [by posting security] in an amount [and type] to be ~~fixed~~ [ordered] by the [trial] court below, not less than the value of said property on the date of rendition of judgment, but if the amount of the ~~supersedeas bond or deposit~~ [security] is less than the amount of the money judgment with interest and costs, then the [judgment creditor can execute against any other property of the judgment debtor unless the ~~appellee shall be allowed to have his execution against any other property of appellant.~~ trial court within its discretion orders a suspension of enforcement of 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 ~~bond or deposit~~ [security] shall be in such amount [and type] to be ~~fixed~~ [ordered] by the ~~said~~ [trial] court below as will secure the ~~plaintiff in judgment~~ [judgment creditor] ~~in~~ [for] any loss or damage occasioned by the ~~delay on appeal, but t~~[. T]he [trial] court may decline to permit the judgment to be suspended on filing by the ~~plaintiff~~ [judgment creditor] of ~~a bond or deposit to be fixed~~ [security to be ordered] by the [trial] court in such an amount as will secure the ~~defendant~~ [judgment debtor] in any loss or damage ~~occasioned~~ [caused] by any relief granted if it is determined on final disposition that such relief was improper.

(g) ~~Child~~ [Conservatorship or] Custody. When the judgment is one involving the care [conservatorship] or custody of a child, the appeal, with or without ~~a supersedeas bond or deposit~~ [security] shall not have the effect of suspending the judgment as to the care [conservatorship] 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 ~~bond or deposit~~ [security] shall be allowed and its amount [and type ordered] ~~fixed~~ within the discretion of the trial court, and the liability of the ~~appellant~~ [judgment debtor] shall be for the ~~face~~ amount [of the security] if the appeal is not prosecuted with effect. ~~The discretion of the trial court in fixing the amount shall be subject to review. Provided, that~~ u[U]nder equitable circumstances and for good cause shown by affidavit or otherwise, the court rendering judgment on the ~~bond or deposit~~ [security] may allow recovery for less than its full ~~face~~ amount.

(i) Certificate of Deposit. If the ~~appellant~~ [judgment debtor] makes a deposit in lieu of a bond, the clerk's certificate that the deposit has been made shall be sufficient evidence thereof.

(j) Effect of ~~Bond or Deposit~~ [Security]. Upon the filing and approval of a proper supersedeas bond ~~or the making of a deposit in compliance with these rules~~ [, deposit, or the provision of such alternate security as ordered by the trial court in compliance with these rules], execution of the judgment or so much thereof as has been superseded, shall be suspended, and if execution has been issued, the clerk shall forthwith issue a writ of supersedeas.

[(k) 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 order the amount and the type of security and the sufficiency of sureties and, upon any changed circumstances, to modify the amount or the type of security required to continue the suspension of the execution of the judgment. If the security or sufficiency of sureties is ordered or altered by order of the trial court after the attachment of jurisdiction of the court of appeals, the judgment debtor 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.

cc Jamie Kronzer
Jeffers
PIA
MRY

RECD 12/18/87

MEMORANDUM

November 20, 1987

RECEIVED
NOV 23 1987
H.M.R.

TO: Harry M. Reasoner

FROM: Janice Cartwright

RE: Joint Special Committee on Security for Judgments

Attached are the following materials distributed at today's Joint Special Committee on Security for Judgments meeting:

1. Statement of Professor Elaine A. Carlson

2. Amended Texas Rules of Appellate Procedure Rule 47 and Amended Texas Rules of Appellate Procedure Rule 49

As you are aware, this committee is a result of the Texaco/Pennzoil case. I thought this might be of interest to you.

JACA

cc: Marion Sanford, Jr.

CC to Luke Soules

SCAC

Xc to files TRAP 47 & 49

STATEMENT OF PROFESSOR ELAINE A. CARLSON

VISITING PROFESSOR OF LAW, UNIVERSITY OF TEXAS SCHOOL OF LAW

PROFESSOR OF LAW, SOUTH TEXAS COLLEGE OF LAW

before the

Joint Special Committee on Security for Judgments

of the Texas Legislature

November 20, 1987

Chairmen and Members of the Committee,

I appreciate the trust that you have placed in me by your request that I address this distinguished audience on matters raised by Senate Concurrent Resolution No. 122, and I welcome the opportunity to provide this synopsis of pertinent Texas law. In particular my remarks will concentrate on constitutional provisions concerning appeals in civil cases and whether the Texas procedure for establishing a supersedeas bond to suspend execution of a judgment pending appeal is in harmony with any such due process guarantees. It is my understanding that all committee members have received a copy of an extensive law review article I recently authored on this subject entitled, "Mandatory Supersedeas Bond Requirements-A Denial of

Due Process Rights?" which appears in Volume 39 of the Baylor Law Review at page 29. Due to time restrictions, my remarks today will summarize its principal conclusions. In addition, I will address amendments to the Texas Rules of Appellate Procedure concerning security on appeal, which were recently ordered by the Texas Supreme Court on recommendation of the Supreme Court Advisory Committee and which technically are effective the first of January, 1988.

I. CONSTITUTIONAL REQUIREMENTS

The Federal Due Process Clause provides that no state shall "deprive any person of life, liberty or property without due process of law." This language has been construed to mandate that all citizens shall enjoy free and open access to the courts of the United States in order to obtain redress for injury. Due process requires that the opportunity to obtain access to the courts be granted to all litigants "at a meaningful time and in a meaningful manner." Procedural due process is said to insure citizens their day in court by providing notice of the proceeding and an opportunity to be heard. How many courts does a litigant have a right to be heard in a trial court, an appellate court, two appellate courts, the United States Supreme Court? Constitutional due process does not require that individual states provide open access to their appellate courts. This right of access vel non

is wholly within the discretion of the state. Consequently, the right to appellate review is not conferred by the United States Constitution.

II. TEXAS OPEN COURTS PROVISION

Texas provides its citizens with guaranteed rights of appellate access by article I, section 13 of the Texas Constitution. This open courts provision provides that "all courts shall be open, and every person for an injury done him in his lands, goods, person or property shall have remedy by due course of law." The due process pledge enunciated in this section originates from the Magna Carta and ensures that Texas litigants will not unreasonably be denied access to any of the state's courts. The constitutions of thirty-eight states contain similar provisions. This right is a substantive state constitutional right which cannot be compromised by judicial decree, legislative mandate, or rules of procedure..

In order for the right of appeal, as established in the Texas Constitution, to satisfy the requirements of due process, it must afford all litigants with a "fair opportunity" to obtain a "meaningful appeal" on the merits. Absent the guidelines of due process, the right of appeal would be reduced to merely a right of access; appeal becomes a meaningless ritual when the opportunity to effectively present appellant arguments does not exist.

Texas courts have liberally construed laws prescribing procedures for appeal in order to protect this constitutional right. However, liberal statutory construction is unavailable when the law is set forth in clear and unambiguous language.

III. TEXAS PROCEDURE TO OBTAIN A MEANINGFUL APPEAL

A. Cost Bond to Perfect Appeal

When a final judgment is rendered in a civil cause of action in Texas, the Texas procedure provides the judgment debtor with several options: Texas Rules of Appellate Procedure 40 and 41 establish that the judgment debtor has, as a general rule, a thirty day period after the judgment is signed to either perfect his right of appeal, file a motion for new trial or simply let the judgment become final. As soon as the thirty days has elapsed, the rules grant the judgment creditor the right to begin immediate execution upon such judgment.

If the judgment debtor desires to appeal the trial court decision, he must take the appropriate steps to perfect his appeal as set forth by Rule 46 of the Texas Rules of Appellate Procedure. Perfecting appeal requires the execution of a cost bond, also known as an appeal bond, to the clerk of the trial court in the amount of one thousand dollars. The trial court is empowered with the discretionary authority to alter the cost

bond amount should the costs of court vary from that amount. (The cost bond is conditioned on the appellant executing his appeal with effect and paying all costs.)

When the appellant is financially unable to pay the amount of the cost bond, Appellate Rule 40 enables him to preserve his right of appeal by proceeding in forma pauperis and filing with the clerk an affidavit which states that he lacks the necessary financial resources.

The flexibility in the Texas rules prevents payment of a cost bond from being an absolute precondition to the perfection of an appeal, thus allowing the appellant an opportunity for judicial review.

B. Supersedeas Bond to Stay a Money Judgment Prior to Recent Rules Amendments Ordered Effective January 1, 1988.

After an appeal has been perfected, the appellant may suspend enforcement of a trial court judgment in order to preserve the pre-judgment status quo pending completion of the appeal. Although the common law rule was contrary, presently in Texas the filing of an appeal does not work an automatic stay of a money judgment. The losing litigant effectuates a suspension of execution of judgment by filing a supersedeas bond with the trial court, which must be approved by the clerk. Appellate rule 47 currently facially mandates that the amount of bond (or deposit) shall be at least the amount of the

judgment, if a money judgment, interest and costs. The filing of the supersedeas bond suspends the power of the trial court to issue any execution on the judgment and provides security to the judgment creditor for the delay in the enforcement of the judgment. The supersedeas bond does not suspend the validity of the judgment; it only suspends the execution of the judgment against the appellant pending appeal, thereby operating as a stay.

Under appellate rules technically effective until January 1, 1988, unless a supersedeas bond is filed, a money judgment of a Texas trial court is enforceable, and it is the duty of the clerk to pay out any funds in his hands to the judgment creditor and to issue execution pending appeal upon application, notwithstanding that an appeal is perfected and is pending. This is true even though the appellant has timely filed a cost bond. (As previously noted, the cost bond serves a distinctive purpose than the supersedeas bond: the former secures the costs incurred at the trial court, while the latter protects the judgment creditor from dissapation of assets when execution of the judgment is suspended pending an appeal.) Until recently, Texas procedure has necessarily interposed the ability of an appellant to pay a supersedeas bond as a condition precedent to the right to suspend execution of a money judgment pending appeal. This inflexible requirement of posting such a bond to forestall execution of a money judgment coupled with the lack of judicial discretion to examine

circumstances and provide for alternate forms and amounts of security which would adequately protect a judgment creditor, denies an appellant's due process right to an effective appeal as guaranteed by the open courts provision of the Texas Constitution.

Decisions of the Texas Supreme Court construing the open courts provision reaffirm that any law "that unreasonably abridges a justifiable right to attain redress for injuries caused by the wrongful act of another amounts to a denial of due process under Article I, section 13 and is therefore void." Validly enacted rules of civil procedure have the force and effect of law and thus are subject to this same constitutional constraint.

C. Texas Procedure To Stay a Money Judgment Pending Appeal Under Amended Rules Ordered Effective January 1, 1988.

Recently, the Texas Supreme Court ordered that procedural rules providing for the posting of security on appeal be amended effective January 1, 1988. (See attached) Texas Rule of Appellate Procedure 47, subsection b, is amended to empower the trial court with discretion to determine the type and amount of security necessary to suspend enforcement of a civil money judgment pending appeal. Specifically, if the trial court, after notice and hearing, finds that the posting of a supersedeas bond in the amount of the judgment, interest, and

costs will cause irreparable harm to the judgment debtor (the appellant) and that not posting the bond will cause no substantial harm to the judgment creditor (the appellee), the court may condition a stay of the judgment upon the posting of such security, if any, it finds necessary to adequately protect the judgment creditor against loss occasioned by the appeal. This modification to Texas procedure-removing in extenuating circumstances the absolute requirement of posting a bond to forestall execution coupled with the clothing of judicial discretion to provide for alternate security which otherwise will protect the judgment creditor-opens up an efficacious avenue for meaningful appellate review envisioned and guaranteed by the Texas Constitution.

Not only is the appellate courthouse door open for review on the merits of the underlying cause of action, but by virtue of amendments to Texas Rule of Appellate Procedure 49, subsection c, a trial court's order concerning security necessary to suspend enforcement of a civil judgment pending appeal is subject to review on motion as well. The motion is to be heard at the earliest practical time by the intermediate court which is empowered to issue any temporary orders necessary to preserve the rights of the parties; remand to the trial court for any necessary fact findings or taking of evidence; and to order a change in the trial court's order concerning security it finds proper. If additional security is

ordered by the appellate court to suspend enforcement of the judgment, the judgment debtor has twenty days to comply or execution may issue.

An additional significant modification to Texas practice is that amended Texas Rule of Appellate Procedure 47, subsection k, now empowers the trial court with continuing jurisdiction during the appeal, notwithstanding the loss of plenary power, to make orders concerning security on appeal inclulding orders pertaining to the sufficiency of sureties. If changed circumstances mandate, the trial court may modify its earlier order concerning security. Any such order of the trial court is subject to appellate review as discussed above.

Do these amended rules protect the constitutional right of access to a meaningful appellate review? I believe so. In analyzing the constitutionality of the amended Texas supersedeas bond requirement as a prerequisite to stay a money judgment in light of the open court provision, it is necessary to first ascertain the purpose of the alleged barrier to judicial access (here the security requirement) and then balance this purpose against the interference that the rule creates with the ability of a litigant to obtain effective access to Texas appellate courts.

It is clear that the general purpose of the supersedeas bond requirement is to protect the judgment creditor from the dissipation of assets that he is entitled to by the judgment

which may occur as a direct result of a delay in the enforcement of the judgment pending appeal.

The second prong of the open courts provision test traditionally applied by the Texas courts requires a showing that the litigant's ability to access Texas courts is not unreasonably restrained by the rule, statute, or other law under consideration.

A judgment debtor who wishes to appeal the decision of the trial court when the judgment exceeds his financial worth will be able to perfect his right to appeal, but will not possess the capability to file a supersedeas bond to suspend execution of the judgment. A direct relationship between the appellant's deprivation of his property pending appeal and his right to suspend judgment is apparent. However, in balancing the purpose of the obligatory supersedeas bond requirement against the restriction of access to an appeal unfettered by execution on the underlying judgment, it would seem that the restrictions imposed by the supersedeas bond requirements are neither onerous nor unreasonable. One must be mindful that the appellant has had his day, at least before the trial court with the commensurate opportunity to present evidence and be heard, yet was unsuccessful. The property rights of the successful litigant in the ordered recovery must be considered as well. Reasonable procedural provisions to safeguard litigated property rights have been judicially sanctioned by the United States Supreme Court. Further, execution on a money judgment

pending appeal does not moot the appeal or require dismissal of the appeal. If the judgment of the trial court is reversed on appeal, the judgment creditor is liable to the appellant in restitution. Mandatory supersedeas bond requirements do not result in the denial of an appellant's due process rights when the appellant lacks the financial ability to post adequate security to protect the appellee and execution on the judgment transpires pending the appeal.

A different conclusion would be mandated under the procedural scheme in Texas prior to the recent amendments to Appellate rules 47 and 49 if the judgment debtor were rigidly and absolutely required to post a supersedeas bond in the amount of the judgment, interest and costs when the judgment debtor would be seriously injured by this precondition to forestall execution AND could by the posting of alternate security otherwise protect the judgment creditor. This prior practice created the potential for an unreasonable precondition which would deny access to an effective appeal. Under the amended scheme however, whereby both the trial court and the appellate court on review may order alternate security which protects the successful trial court litigant and also forestalls execution, the absolute and unreasonable precondition is removed.

4543.001

South Texas College of Law

July 10, 1989

Mr. Luther Soules
175 E. Houston Street
Republic of Texas Plaza-10th Floor
San Antonio, TX 78205

RE: Special Report on Modifications to TRAP Rules 47 & 49- Concerning Security on Appeal

Dear Luke:

Enclosed is a "marked-up" version of Appellant Rules 47 & 49 to reflect;

1) Modification of the standard for security on appeal in conformity with Senate Bill 134, effective September 1, 1989, (attached is the Bill and its enrolled form) and,

2) Modification of Appellant Rule 49 (b) to clarify the Texas Supreme Court's authority to review security on appeal for excessiveness. This concern was raised in Justice Kilgarlin's letter to you of April 25, 1988. (attached) I noticed in going through the Supreme Court Advisory Committee materials from our May meeting, that the COAJ did not concur in recommending a rule change to Rule 49(b). (See attached)

I believe that this addresses all of the concerns raised on this subject. If I can be of any further assistance in this matter, please feel free to contact me. I will be present to report on this matter at our meeting this Saturday.

Sincerely,

Elaine A. Carlson
Professor of Law

00167

1303 San Jacinto Street, Houston, Texas 77002-7006 (713) 659-8040

Rule 49. Appellate Review of Bonds in Civil Cases

(a) Sufficiency. The sufficiency of a cost or supersedeas bond or deposit or the sureties thereon or of any other bond or deposit under Rule 47 shall be reviewable by the appellate court for ~~in~~[sufficiency] of the amount or of the sureties or of the securities deposited, whether arising from initial ~~in~~[sufficiency] or from any subsequent condition which may arise affecting the sufficiency of the bond or deposit. The court in which the appeal is pending shall, upon motion showing ~~such~~ insufficiency, require an additional bond or deposit to be filed with and approved by the clerk of the trial court, and a certified copy to be filed in the appellate court. [If the appellate court finds that the amount of security is excessive, the appellate court may reduce the security accordingly.]

(b) Appellate Review of Suspension of Enforcement of Judgment Pending Appeal. The trial court's order ~~pursuant to Rule 47~~ is subject to review by a motion to the ~~court of appeals~~ [appellate court]. Such motions shall be heard at the earliest practical time. The appellate court may issue such temporary orders as it finds necessary to preserve the rights of the parties.

The ~~court of appeals~~ [appellate court] review~~ing~~ [of] the trial court's order may require a change in the trial court's order. The ~~court of appeals~~ [appellate court] may remand to the trial court for findings of fact or the taking of evidence.

(c) (No change.)

As adopted: (a) No change. (b)

THE SUPREME COURT OF TEXAS

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

April 25, 1988

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

Dear Luke:

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

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

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

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

Sincerely,

William W. Kilgarlin

WWK:sm

Encl.

Should be "5"

DISCUSSION: Tex. R. App. P. 47 pertains to the establishment of a supersedeas bond for various types of judgments. This rule was amended by Supreme Court order of July 15, 1987, effective January 1, 1988. The current version of Rule 47 contains section (k). The language in this new section provides the TC with continuing jurisdiction over a supersedeas bond during the pendency of an appeal, even after the expiration of the TC's plenary power. Section (k) also authorizes the TC to modify the amount of a bond upon a finding of changed circumstances. The TC's exercise of discretion under this rule is subject to review under Rule 49.

Tex. R. App. P. 49 pertains to appellate review of the TC's discretion in setting and modifying a supersedeas bond. This rule was amended at the same time as Rule 47.

ISSUE: As a result of the amended langauge to Rule 49, I am concerned that it no longer provides the Supreme Court with jurisdiction to review a supersedeas bond for excessiveness as opposed to insufficiency. This motion apparently presents a matter of first impression under amended Rule 49.

ANALYSIS: Tex. R. App. P 3(a), which contains definitions of terms used in the rules of appellate procedure is the starting point for review. This rule defines the term "Appellate Court" to include: "the courts of appeals, the Supreme Court and the Court of Criminal Appeals." In interpreting Rule 49, this definition will be applied.

Section (a) of Rule 49

The amended language of Tex. R. App. P. 49(a) did not substantially alter the previous version of this section. The amended version is set forth below:

> (a) **Sufficiency.** The sufficiency of a cost or supersedeas bond or deposit or the sureties thereon or of any other bond or deposit under Rule 47 shall be reviewable by the appellate court for insufficiency of the amount or of the sureties or of the securities deposited, whether arising from initial insufficiency or from any subsequent condition which may arise affecting the sufficiency of the bond or deposit. The court in which the appeal is pending shall, upon motion showing such insufficiency, require an additional bond or deposit to be filed with and approved by the clerk of the trial court, and a certified copy to be filed in the appellate court.

By applying the definition of "Appellate Court" as set forth in Rule 3(a), section (a) of Rule 49 still enables the Supreme Court to review a supersedeas bond for insufficiency. The rule contemplates the situation where a judgment creditor complains that the amount of a supersedeas bond is insufficient to adequately protect his interest while his ability to execute on his judgment is suspended. It does not address the situation where the judgment debtor complains that the amount of a supersedeas bond is excessive.

Section (b) of Rule 49

The previous version of section (b) is set forth below:

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

In accordance with the definition of "Appellate Court" as set forth in Rule 3(a), the Supreme Court clearly was empowered to review for excessiveness a supersedeas bond. However, this language has been entirely deleted from the current version of section (b) as amended by the Supreme Court. This language was retained in the current version of section (b) to Rule 49 which was adopted by the Court of Criminal Appeals.

The amended version of section (b) is set forth below:

> **(b) Appellate Review of Suspension of Enforcement of Judgment Pending Appeal.** The trial court's order pursuant to Rule 47 is subject to review by a motion to the court of appeals. Such motions shall be heard at the earliest practical time. The appellate court may issue such temporary orders as it finds necessary to preserve the rights of the parties.
>
> The court of appeals reviewing the trial court's order may require a change in the trial court's order. The court of appeals may remand to the trial court for findings of fact or the taking of evidence.

change to appellate court

The basis of my concern that Rule 49 no longer provides the Supreme Court with jurisdiction to review a supersedeas bond for excessiveness, is founded in the interpretation of three key sentences in the amended language of section (b).

The first key sentence states that: "The trial court's order pursuant to Rule 47 is subject to review by a motion to the court of appeals." This language provides that when the trial court modifies the amount of a supersedeas bond, upon a finding of changed circumstances, the court of appeals by motion can review the decision. When read in conjunction with section (a), this enables the court of appeals to review a supersedeas bond for excessiveness as well as for insufficiency. If the drafters had intended to also enable the Supreme Court to review a supersedeas bond for excessiveness, they would have employed the term appellate court as defined in Tex. R. App. P. 3(a).

However, in the second key sentence of section (b) to amended Rule 49, the drafters did make this distinction: "The appellate court may issue such temporary orders as it finds necessary to preserve the rights of the parties." This language clearly authorizes the action this court took on April 8th in granting movant's motion for a temporary order to stay enforcement of the TC order increasing the supersedeas bond.

In the third key sentence, the drafters again change terms to apparently make a distinction: "The court of appeals reviewing the trial court's order may require a change in the trial court's order." When read with the first sentence of section (b), this language permits the court of appeals to decrease the amount of a supersedeas bond upon a determination that it is excessive.

CONCLUSION: Based upon the plain language in the amended version of section (b), and as read in conjunction with section (a) and Rule 47, it does not appear that the drafters restored the authority of this court to review a supersedeas bond for excessiveness.

Sections (a) and (b) of Rule 49 permit a court of appeals to review for insufficiency and excessiveness a supersedeas bond and to change the amount of the bond accordingly. These sections enable the Supreme Court to review a supersedeas bond only for insufficiency. The rule does, however, authorize the Supreme Court to issue a temporary order to preserve the rights of the parties.

A review of the Supreme Court Advisory Committee Minutes of June 16-27, 1987, does not indicate whether this distinction was actually intended. The Minutes do show that the drafters were concerned with providing a method of review when a TC exercises its discretion, under Rule 47, before or during attachment of jurisdiction by a court of appeals. However, the Minutes do not indicate that a method of review for excessiveness was contemplated for when a TC increases the amount of a supersedeas bond during the period of time after a court of appeals denies a final motion for rehearing and before the time that this court acquires jurisdiction of the matter. Section (b) of Rule 49 also does not provide for review for excessiveness of a supersedeas bond that is increased by a TC after the Supreme Court has obtained jurisdiction of the matter. In the present case, the TC increased the amount of the bond approximately one week before the movant filed his application for writ of error with this court.

This ambiguity can be remedied by substituting the term "Appellate Court" for the term "Court of Appeals" in each of the sentences in section (b) of Rule 49.

Rule 49. Appellate Review of Bonds in Civil Cases

(a) (No change.)

(b) Appellate Review of Suspension to Enforcement of Judgement Pending Appeal. The trial court's order pursuant to Rule 47 is subject to review by a motion to the ¢ø¼ŕŧ/ø£/á₱₱é á l$ [appellate court]. Such motions shall be heard at the earliest practical time. The appellate court may issue such temporary orders as it finds necessary to preserve the rights of the parties.

The ¢ø¼ŕŧ/ø£/á₱₱é á l$ [appellate court] reviewing the trial court's order may require a change in the trial court's order. The ¢ø¼ŕŧ/ø£/á₱₱é á l$ [appellate court] may remand to the trial court for findings of fact or the taking of evidence.

(c) (No change.)

COAJ disapproves

HELD OVER FROM MAY 26-27 Meeting

FULBRIGHT & JAWORSKI
1301 McKINNEY
HOUSTON, TEXAS 77010

TELEPHONE: 713/651-5151
TELEX: 76-2829
TELECOPIER: 713/651-5246

HOUSTON
WASHINGTON, D.C.
AUSTIN
SAN ANTONIO
DALLAS
LONDON
ZURICH
FULBRIGHT JAWORSKI & REAVIS McGRATH
NEW YORK
LOS ANGELES

May 15, 1989

Re: Committee on Administration of Justice

Mr. Luther H. Soules III
Soules & Wallace
800 Milam Building
San Antonio, Texas 78705-2230

Dear Luke:

I enclose my proposed revision of Bill Dorsaneo's drafted amendment to Texas Rule of Appellate Procedure 40(a)(4):

> "(c) Unless the scope of an appeal is limited in accordance with this Rule 40(a)(4)(A), any appellee who has been aggrieved by the judgment can seek a more favorable judgment against any party to the appeal by cross-point as an appellee in the courts of appeals without perfecting a separate appeal. To seek a more favorable judgment against one who is not a party to the appeal, however, an appellee must perfect a separate appeal."

The intent of my proposal is to let a party know it may be involved in an appeal no later than 90 days after the judgment is signed. The danger is that a party against whom the appellant has no complaint may close its file and not worry about what the record contains, only to find that a co-appellee has raised cross-points against it many months later.

Very truly yours,

Roger Townsend

Roger Townsend

RT/sp

00175

How abouta Rule that in cross appeals the parties be designated as in trial court?

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE – TEXAS RULES OF ~~CIVIL~~ APPELLATE PROCEDURE.

I. Exact wording of existing Rule:

Rule 40.

(4) Notice of Limitation of Appeal. No attempt to limit the scope of an appeal shall be effective as to a party adverse to the appellant unless the severable portion of the judgment from which the appeal is taken is designated in a notice served on the adverse party within fifteen days after judgment is signed, or if a motion for new trial is filed by any party, within seventy-five days after the judgment is signed.

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

Rule 40.

(4) Notice of Limitation of Appeal [And Perfection of Appeal By Other Parties.]

(A) No attempt to limit the scope of an appeal shall be effective as to a party ~~adverse to the appellant~~ any party unless the severable portion of the judgment from which the appeal is taken is designated in a notice served on ~~the adverse party~~ all parties to the suit within fifteen days after judgment is signed, ~~or if a motion for new trial is filed by any party, within seventy-five days after the judgment is signed~~.

(B) If the scope of an appeal is limited in accordance with this Rule 40(a)(4), any other party may cross-appeal any other portion or portions of the judgment by timely perfecting a separate appeal.

(C) Unless the scope of an appeal is limited in accordance with this Rule 40(a)(4), the entire judgment is subject to appellate review. Once an unlimited appeal has been perfected by any party, any other party who has been aggrieved by the judgment may seek a more favorable judgment in the courts of appeal by crosspoint as an appellee without perfecting a separate appeal.

(CBA) ~~Disapproved~~

00176

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

Rule 74(e) of the Rules of Appellate Procedure contemplates that any party aggrieved by a judgment may present cross-points as an appellee, even if it has not perfected an appeal, except when the judgment is severable and the appeal has been limited by the appellant to a severable portion. Recent courts of appeals decisions have expansively interpreted the exception to deny jurisdiction of appellees' cross-points even in two-party cases. The mechanism for limiting appeals provided by Rule 40(a)(4) is proving inadequate to abrogate the effect of those decisions.

Uncertainty over when a cross-point requires an independent appeal will result in precautionary perfection of appeals by appellees, rendering the intent behind 74(e), to simplify the procedural burden placed on appellees and to reduce duplication at the appellate level, a nullity. The proposed amendments will clarify the requirements.

Respectfully submitted,

_____
Name

_____

_____
Address

Date _____ 198___

January 31, 1989

Luther H. Soules III
Soules & Wallace
Republic of Texas Plaza
175 East Houston St.
San Antonio, Texas 78205 2230

Re: Texas Rules of Appellate Procedure 4, 5 and 40

Dear Luke,

Enclosed please find proposals for amendment of Appellate Rules 4, 5 and 40 together with explanatory memoranda. Can these be added to the agenda for our May 26-27 meeting?

Best wishes,

Bill

William V. Dorsaneo, III

SCHOOL OF LAW
SOUTHERN METHODIST UNIVERSITY / DALLAS, TEXAS 75275-0116 / 214 • 692-3249

M E M O R A N D U M

TO : The Committee on Administration of Justice

FROM: William V. Dorsaneo III (with Ruth A. Kollman)

DATE: January 30, 1989

RE : Requirement that appellees perfect an appeal in order to assign cross-points of error

Rule 74(e) of the Texas Rules of Appellate Procedure contemplates that any party aggrieved by a judgment may present cross-points as an appellee, even if it has not perfected an appeal. The only exception is when the judgment is severable and the appeal has been limited by the appellant to a severable portion. Both the history of Appellate Rule 74 and Texas Supreme Court decisions support this construction. However, through expansive interpretation of the exception, recent lower court decisions in both multiple-party and two-party cases have developed unnecessary procedural requirements. The purpose of this memorandum is to explore the scope of the exception and to suggest a revision to Rule 40(a)(4) to solve the problem.

Development in the Texas Supreme Court

Prior to the adoption of the Texas Rules of Civil Procedure in 1940, the procedural picture was drawn in cases like Barnsdall Oil Co. v. Hubbard, 130 Tex. 476, 109 S.W.2d 960 (1937). In that case, numerous parties disputed title to two separate tracts of land. Several parties perfected an appeal complaining of the judgment of the trial court concerning one of

the tracts. The appellee sought to assign cross-points of error related to the second tract. As a result of limiting language in the appeal bond, the appellants did not contest and explicitly did not appeal that portion of the judgment. The Texas Supreme Court held:

> We think it likewise obvious that the [appellee] was attempting to have the Court of Civil Appeals revise the judgment of the trial court affecting its 25-acre tract, rather than merely urge counter propositions by cross assignments in the appeal affecting the 84 acres. This it manifestly could not do without prosecuting an appeal from that part of the judgment.

Id. at 964 (citations omitted).

Shortly after deciding Barnsdall, the Texas Supreme Court obtained legislative authority to promulgate new Texas rules of procedure. The resulting Texas Rules of Civil Procedure were published and made effective as of September 1, 1941.

One of the new rules, not based on any prior statutory rule of procedure but reflecting the existing practice, was Rule 420:

> The brief for the appellee shall reply to the points relied upon by appellant in due order when practicable, and in case of cross-appeal the brief shall follow substantially the form of the brief for appellant.

TEX.R.CIV.P. 420 (Vernon 1941). That rule was only in effect for four months. After publication and discussion of the ramifications of the new rules, changes were proposed. Amended Rule 420, effective December 31, 1941, read as follows:

> The brief of the appellee shall reply to the points relied upon by the appellant in due order when practicable; and in case the appellee desires to complain of any ruling or action of the trial court, his brief in regard to such matters shall follow substantially the form of the brief for appellant.

TEX.R.CIV.P. 420 (Vernon Supp. 1941). The substitution of the language "in case the appellee desires to complain of any ruling or action of the trial court" for the earlier "in case of cross-appeal" wording suggests the drafter's intention to allow an appellee to present cross-points without having to perfect an appeal. With only minor textual changes which reflect its applicability to civil cases only, Rule 74(e) of the Texas Rules of Appellate Procedure is substantially identical.

The drafters of Rule 420 must have placed great importance on simplifying the procedural burden placed on appellees to have made such an amendment so quickly after adoption. Commentaries available after the promulgation of amended Rule 420 support this view. In 1944, the Texas Bar Journal published a series of questions concerning the new rules, with responses provided by three rules committee members. (Stayton, Carter, and Vinson). Their answer to a question concerning cross-points by non-appealing parties supports a reading of the amended Rule 420 as allowing cross-points without requiring appellee to perfect an appeal:

> Laying aside consideration of complaints by one appellee against another appellee ... , we are of the opinion that appellee in the Court of Civil Appeals may, without cross-appeal or cross-assignment of error, urge against appellant any complaints concerning the matter as to which the appellant has perfected his appeal, by the use of "points" in his brief. Cross-appeal was mentioned in original Rule 420 but the amendment to the rule omits mention of it. It is not necessary in Texas as to any complaints concerning the matter brought up by appellant; and that ordinarily means all complaints that appellee has. In some cases, however, appellant may sever, that is, take up a part

only of the matter as it stood in the trial court.

> In such cases ... appellee may not complain of anything within the scope solely of the part not brought up.

7 Tex.B.J. 15 (1944). The notes to Rule 420 published with the 1948 amendments contain similar language and also support that analysis. Interpretation of Rules by Subcommittee, TEX.R.CIV.P. 420 (Vernon 1948).

More authoritatively, the Supreme Court of Texas explained its interpretation of former Rule 420 as follows:

> This rule of practice, which does away with the necessity for prosecuting two appeals from the same judgment and bringing up two records, is well founded and should not be departed from except in cases where the judgment is definitely severable and appellant strictly limits the scope of his appeal to a severable portion thereof.

Dallas Electric Supply Co. v. Branum Co., 143 Tex. 366, 185 S.W.2d 427, 430 (1945).

The exception articulated in Branum is a narrow one. It is three-pronged as well as conjunctive: (1) the judgment itself must be definitely severable; and (2) appellant must strictly limit the scope of its appeal; and (3) the limitation must be to a severable portion of the judgment.

The seminal modern case which articulates the proper analysis is Hernandez v. City of Fort Worth, 617 S.W.2d 923 (Tex. 1981). The Texas Supreme Court cited Branum in overruling the Court of Civil Appeals' holding that it had no jurisdiction to consider appellees' cross-points. The cross-points asserted that the trial court had erred in failing to render judgment for all

the relief to which appellees were entitled. The Court emphatically reiterated its holding in Branum:

> It is not necessary to perfect two separate and distinct appeals, unless the judgment of the trial court is definitely severable, and appellant strictly limits the scope of his appeal to a severable portion.

Id. at 924. The Court went on to specifically repudiate an intermediate appellate court's opinion to the contrary in RIMCO Enterprises, Inc. v. Texas Electric Service Co., 599 S.W.2d 362, 366-67 (Tex. Civ. App. -- Fort Worth 1980, writ ref'd n.r.e.).

After Hernandez the issue appeared to be resolved. Unfortunately, it was not. As explained below, the courts of appeals developed poorly-defined exceptions to the high Court's holdings in Branum and Hernandez that have obscured and undermined the general rule. As Robert W. Stayton observed in his introduction to the first official publication of the new rules in 1942:

> The Texas Rules ... are beset by certain dangers, namely, that future legislative enactments and the decisions of the many intermediate appellate courts, each practically immune from prompt centralized guidance and control, may tend to cause the rules to disappear and the former systems to be reinstated. ...

Stayton, Introduction, TEX.R.CIV.P. (Vernon 1942).

The earlier practice of requiring all appellees to perfect an appeal before asserting cross-points is gradually creeping back. The following paragraphs show how this wrongheaded trend has evolved.

The Courts of Appeals Cases

In 1968, the El Paso court cited both Barnsdall and Branum, without discussing the impact of the 1941 amendment to Rule 420, in expressing reservations about the jurisdiction of the court to consider appellees' cross-points in a multiple-party case. Scull v. Davis, 434 S.W.2d 391 (Tex. Civ. App. -- El Paso 1968, writ ref'd n.r.e.). The Court nonetheless considered and overruled the cross-points. Id. at 395.

The First Court also considered the issue in connection with multiple-party litigation in 1984 in Young v. Kilroy Oil Company of Texas, Inc., 673 S.W.2d 236 (Tex. App. -- Houston [1st Dist.] 1984, writ ref'd n.r.e.). Most of the current requirements for independent perfection of appeals by appellees can be traced directly to this decision. Hence, its procedural history is described in detail.

In Young the plaintiff sued 1) his employer, 2) the operator of the lease and 3) the owner of the offshore drilling platform where his injury occurred. The operator cross-claimed against the employer for contractual indemnity. The plaintiff entered into a Mary Carter Agreement with his employer and the owner. The jury found the employer 50% negligent, the operator 40% negligent, and the plaintiff 10% negligent. Damages were found to be $505,000. Despite these findings, the trial court rendered judgment notwithstanding the verdict. The court's decision was based on its determination that the employer owed contractual indemnity to the operator, combined with the provisions of the

Mary Carter Agreement. The net result was a take-nothing judgment as to plaintiff and a judgment in favor of the operator against the employer for attorneys' fees. Only the plaintiff perfected an appeal.

The employer filed a cash deposit in lieu of a supersedeas bond when the operator attempted to execute on the judgment some seven months later. The trial court found that the employer had not properly perfected an appeal. The court vacated the writ of supersedeas, disbursed the amount of the judgment to the operator, and returned the remainder of the deposit to the employer.

The employer attempted to assert cross-points on appeal which alleged error in the judgment in ordering the employer to pay the operator's attorney's fees, and in the order vacating the writ of supersedeas and foreclosing on the cash deposit. The court of appeals denied jurisdiction of the cross-points, stating that the cross-points placed the employer in the role of an appellant and required the timely perfection of an appeal by the employer. Id. at 242.

In Young the First Court cited both Hernandez and Scull in support of its holding that the right of an appellee to use cross-points to obtain a better judgment without perfecting an independent appeal "is subject to the limitation that such cross-points must affect the interest of the appellant or bear upon matters presented in the appeal." Id. at 241 (emphasis in original; citations omitted).

After Young was decided other appellate courts cited it in support of holdings which enlarged the exception further. For example, in 1987 the Beaumont court relied upon Young when the issue arose in a multiple-party case. Miller v. Presswood, 743 S.W.2d 275 (Tex. App. -- Beaumont 1987, no writ). The court observed that no portion of the judgment was favorable to the appellee and held that "[a] cross-point that is not directed to the defense of the judgment against an appellant places the party asserting the cross-point in the role of an appellant," and requires the independent perfection of an appeal. Id. at 279.

The Beaumont court quoted directly from Young in Gulf States Underwriters of La. v. Wilson, 753 S.W.2d 422, 431 (Tex. App. -- Beaumont 1987, no writ). The court considered and sustained a cross-point related to the method of payment of the judgment but denied jurisdiction of a cross-point that complained that the judgment in appellee's favor should have been joint and several as to the appellant and the appellant's co-defendant. The court held that it had no jurisdiction over the cross-point because the appellant had directed no points of error toward the co-defendant. The Beaumont Court reasoned that the co-defendant was, therefore, not a party to the appeal, and without an independent appeal the appellee could not assign cross-points as to the co-defendant. Id. at 431-432.

The Corpus Christi Court came to a similar conclusion in holding that a separate appeal should have been perfected when an

appellee presented cross-points as to a party who had not joined the appellant in the appeal. Yates Ford, Inc. v. Benavides, 684 S.W.2d 736, 740 (Tex. App. -- Corpus Christi 1984, no writ). See also City of Dallas v. Moreau, 718 S.W.2d 776 (Tex. App. -- Corpus Christi 1986, no writ) (where the appellee's cross-points concerned the granting of a summary judgment in favor of two of the defendants; the third defendant had appealed a judgment against it based on a jury verdict).

The San Antonio court recapitulated one variation of the new rule in simple terms: "An appellee may not assign cross points against a co-appellee unless he perfects his own appeal." Southwestern Bell Telephone Co. v. Aston, 737 S.W.2d 130, 131 (Tex. App. -- San Antonio 1987, no writ). Yet more recently in Bonham v. Flach, 744 S.W.2d 690 (Tex. App. -- San Antonio 1988, no writ), the same court stated: "There being no limitation in connection with appellant's appeal from the judgment below, we must consider the cross-point of error." Id. at 694.

As a number of commentators have noted, a line of recent opinions out of the Dallas court found no jurisdiction over cross-points in both multiple-party and two-party appeals. First, in Miller v. Spencer, 732 S.W.2d 758, 761 (Tex. App. -- Dallas 1987, no writ), the Dallas Court cited Barnsdall (again without considering the effect of the 1941 amendment to Rule 420), Yates and Young in a two-party appeal, where the appellees' cross-points alleged error in the granting of the appellant's motion to set aside a default judgment.

The Dallas court also has broadened the Young exception in Triland Inv. Group v. Warren, 742 S.W.2d 18, 25 (Tex. App. -- Dallas 1987, no writ). Warren cited Young in requiring a separate cost bond for an appellee to perfect appeal of cross-points "unrelated to the defense of the judgment or to the grounds of appeal raised by [appellant]." The court further complicated the issue by considering cross-points related to evidentiary matters pertaining to submitted jury issues but dismissing cross-points related to rulings of the trial court on evidence pertaining to damages and on other causes of action asserted by the appellee. Id. at 25-26.

The Dallas court has also found no jurisdiction over cross-points asserted by appellees in a series of recent cases: Chapman Air Conditioning, Inc. v. Franks, 732 S.W.2d 737 (Tex. App. -- Dallas 1987, no writ); Ragsdale v. Progressive Voters League, 743 S.W.2d 338 (Tex. App. -- Dallas 1987, no writ); and Essex Crane Rental Corporation v. Striland Construction Company, Inc., 753 S.W.2d 751 (Tex. App. -- Dallas 1988, no writ).

Finally, the most recent Dallas Court of Appeals case of Agricultural Warehouse v. Uvalle, 759 S.W.2d 691 (Tex. App. -- Dallas 1988, no writ) took the trend to its logical conclusion. Even in an essentially two-party case (there had been a worker's compensation carrier/intervenor and a defaulted co-defendant), the court cited its own prior opinions in Essex and Chapman in denying jurisdiction of appellee's single cross-point:

> By cross-point [appellee] complains that the trial court erred in granting [appellant's] motion to disregard jury findings and in failing to award exemplary damages in the judgment. [Appellee's] cross-point places it in the role of an appellant. As an appellant, [appellee] must timely file a cost bond pursuant to Texas Rules of Appellate Procedure 41(a). As no cost bond was filed, he is not entitled to have his cross-point considered.

Id. at 696 (citations omitted).

Recommendations

Given the above, it could be argued that the careful practitioner should now always timely perfect an appeal -- win, lose, or draw -- just to make sure he or she preserves the client's right to bring cross-points as appellee. It is difficult (and professionally perilous) to determine when an appellate court will find that a cross-point requires a separate appeal and when it will not; the jurisdictional line is now not only ill-defined, it is ambulatory. Once again, Judge Stayton's prediction rings true: the application of the rule has come full circle.

Appellate Rule 40(a)(4) now provides a mechanism for notice of limitation of appeal by an appellant, but the effects of limitation or non-limitation are not explained in the rule. As the line of cases decided since the enactment of the Rules of Appellate Procedure indicate, broad exceptions to the concept that an appellee may obtain a better judgment by cross-point, within perfecting an independent appeal, have been devised. The

most expeditious way to clarify the requirements would be to revise Rule 40(a)(4) of the Texas Rules of Appellate Procedure as follows:

> (4) Notice of Limitation of Appeal.
>
> (A) No attempt to limit the scope of an appeal shall be effective as to any party unless the severable portion of the judgment from which the appeal is taken is designated in a notice served on all parties to the suit within fifteen days after judgment is signed, or if a motion for new trial is filed by any party, within seventy-five days after the judgment is signed.
>
> (B) If the scope of an appeal is limited in accordance with this Rule 40(a)(4), any other party may cross-appeal any other portion or portions of the judgment by timely perfecting a separate appeal.
>
> (C) Unless the scope of an appeal is limited in accordance with this Rule 40(a)(4), the entire judgment is subject to appellate review. Once an unlimited appeal has been perfected by any party, any other party ~~who has been aggrieved by the judgment~~ may seek a more favorable judgment in the courts of appeal by cross-point as an appellee without perfecting a separate appeal.

In the words of the Dallas Court of Appeals (albeit on another jurisdictional question), until the issue is resolved "[t]he appellate court's jurisdiction [must now] be determined case by case, and litigants ... have no assurance of the court's jurisdiction until such a determination [is] made. To make jurisdiction depend on such a 'degree' of difference is to thwart the purpose behind the rules of appellate procedure." Brazos Electric Power Cooperative, Inc. v. Callejo, 734 S.W.2d 126 (Tex. App. -- Dallas 1987, no writ).

REPORT December 1, 1988

of the

COMMITTEE ON THE ADMINISTRATION OF JUSTICE

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

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

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

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

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

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

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

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

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

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

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

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

Stanton B. Pemberton

Stanton B. Pemberton, Chairman

LAW OFFICES

LUTHER H. SOULES III
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

May 17, 1989

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Proposed Changes to Texas Rule of Appellate Procedure

Dear Rusty:

Enclosed please find a copy of a letter sent to me by Justice Nathan L. Hecht regarding proposed changes to Rules 4, 5, 40, 51, 84, 90, 182(b), and 130(a). Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Stanley Pemberton

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711
(512) 463-1312

May 15, 1989

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

Dear Luke:

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Nathan L. Hecht
Justice

OK

March 2, 1989

Honorable Mary M. Craft, Master
314th District Court
Family Law Center
4th Floor
1115 Congress
Houston, Texas 77002

Dear Master Craft:

Chief Justice Phillips has referred to me, as the Justice having primary responsibility for oversight of the rules, your very insightful letter regarding indigent civil appeals.

I am most grateful for your thoughts and expect they will be carefully considered as we look toward amendments in the rules this year.

I hope if you have additional suggestions you will feel free to let me know.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Hecht

MARY M. CRAFT
MASTER, 314TH DISTRICT COURT
FAMILY LAW CENTER, 4TH FLOOR
1115 CONGRESS
HOUSTON, TEXAS 77002
(713) 221-6475

February 9, 1989

Mr. Thomas S. Morgan
2500 N. Big Spring
Suite 120
Midland, Texas 79705

Dear Tom:

I read your article in the last Juvenile Law Section Newsletter, and I agree that appealing a delinquency case for an indigent client is tricky. However, I have been concerned for some time about the problem of civil appeals for all indigents and offer the following thoughts.

An indigent's appeal in a criminal case differs from that in a civil case in that a criminal appellant is only required to file a written notice of appeal in the trial court within 30 days of the judgment's signing. T.R.App.P. 41(b)(1). The clerk is required to forward a copy of the notice of appeal to the appellate court and the attorney for the state. T.R.App.P. 40(b)(1). A pauper's affidavit requesting a free statement of facts may be filed in the trial court within the same 30-day period. T.R.App.P. 53(j)(2). Apparently the pauper's affidavit is seldom challenged, especially if appellant had appointed trial counsel. This procedure in indigent criminal appeals is substantially different from that in civil indigent appeals.

THE PROCESS IN INDIGENT CIVIL APPEALS

Presently, the procedure for appeal on behalf of an indigent in a civil case is as follows:

1. An affidavit of inability to pay costs (as an alternative to a cost bond) must be filed by appellant with the clerk of the trial court within 30 days after signing of the order which is being appealed. T.R.App.P. 40(a)(3)(A). Appeal is then perfected. T.R.App.P. 41(a)(1).

2. Notice of the filing of appellant's affidavit must be given by appellant to the opposing party or his attorney and to the court reporter of the court in which the case was tried within

two days after the filing. Without notice the appellant "shall not be entitled to prosecute the appeal without paying the costs or giving security therefor." T.R.App.P. 40(a)(3)(B).

3. Any contest to the affidavit (by a party or court officer) must be filed within 10 days after notice is received. If a contest is filed a hearing is set by the court and notice given by the clerk. T.R.App.P. 40(a)(3)(C). The court must rule against the affidavit by signed order within 10 days of filing of the contest or the affidavit is taken as true. T.R.App.P. 40(a)(3)(E).

THE PROBLEMS

At first glance these rules would appear to facilitate indigent appeals, but the opposite is true. As you point out, many attorneys who practice primarily criminal law, or civil law for paying clients, are not familiar with the procedure and inadvertently lose their right to appeal.

The possibility of losing a right to appeal because of failure to give proper notice is obvious from the cases you mentioned and others. For example, In re V.G., 746 S.W.2d 500 (Tex. App.--Houston [1st Dist.] 1988, no writ), followed the Corpus Christi court's decisions in In re R.R. and In re R.H. In V.G. an indigent's appeal from a certification judgment was dismissed because the state's attorney did not receive the two-day notice that a pauper's affidavit had been filed. Reading between the lines in V.G., it is possible the D.A. actually knew of the filing of the pauper's affidavit and chose not to file a contest in the trial court.

You may also have come across the Texas Supreme Court case of Jones v. Stayman, 747 S.W.2d 369 (Tex. 1987), a per curiam mandamus decision which seemed to provide some hope that notice requirements would be construed with flexibility. The trial court in this termination case had neglected to sign an order determining the contest or extending the time within 10 days of filing the contest. The state contended that a letter sent to the court reporter one day after the affidavit of inability was filed stating counsel's intention to request a free statement of facts was inadequate under T.R.App.P. 40(a)(3)(B). The Court stated that the letter, though "not a model of precision" sufficiently fulfilled the purpose of the rule. The Court further noted that 1) the letter was timely mailed, and 2) the court reporter was

present at the hearing and did not object to lack of proper notice.

A recent case from Houston, Wheeler v. Baum, No. 01-88-00919-CV, is presently pending before the Supreme Court. Application for leave to file writ of mandamus was granted on February 2, 1989, docketed as No. C-8194. This is a termination case from the First Court of Appeals in which the trial judge did not sign the order determining the contest within the required 10 days from the date of contest. The court of appeals relied on Bantuelle v. Renfro, 620 S.W.2d 635 (Tex. Civ. App.--Dallas 1981 no writ), and In re V.G., supra, and held that "giving of the 2-day notice to the court reporter is mandatory and absent the notice, the appellant cannot prosecute an appeal without paying costs or giving security. An objection at the hearing is not necessary because if no notice is given, a hearing is not required." Interestingly, the real party in interest, Harris County Children's Protective Services, received its notice and filed a contest, but objected to the lack of notice to the court reporter. No testimony was taken on the merits of the indigency claim of appellant. A similar case is Furr v. Furr, 721 S.W.2d 565 (Tex. App.--Amarillo 1986, no writ).

The absurdity of the court reporter notice requirement is demonstrated by Matlock v. Garza, 725 S.W.2d 527 (Tex. App.--Corpus Christi 1987, no writ), decided by the same court that gave us In re R.R. and In re R.H. In dismissing the appeal because the court reporter did not receive the two-day notice, the court found that handing the court reporter the affidavit to be marked as an exhibit during the hearing on the contest did not constitute personal service, reasoning that the court reporter cannot be expected to read every exhibit so presented. Id. at 529.

An insidious aspect of the indigency appeal procedure is that notice of filing the affidavit must be actually received by the opposing party and the court reporter within two days, or on the next business day following two days, unless it is mailed. In Fellowship Missionary Baptist Church of Dallas, Inc., v. Sigel, 749 S.W.2d 186 (Tex. App.--Dallas 1988, no writ), the court of appeals raised the notice issue on its own motion. It found that the allegations in the affidavit of inability to pay costs should be taken as true because the trial court had sustained the contest, but failed to enter a timely written order. However, in calculating whether appellant had properly used the "mailbox rule," T.R.App.P. 4(b), in delivering its notice to the court

reporter, the court ruled that since the affidavit was filed on Thursday, the last day to serve the reporter was Monday. Appellant mailed the notice on Monday, and it was one day too late. Had it been mailed on Sunday, whether postmarked or not, it would have been valid service. The court construed T.R.App.P. 4(b) to require that depositing a document in the mail one day before the last day of the period for taking action was a "condition precedent" for triggering the extension provided by rule 5(a) for mailed documents. Because notice to the court reporter was untimely the appeal was dismissed, even though no objection was made in the trial court by anyone.

THE FLAWS

The flaws in the procedure for indigents' appeals are obvious.

First, two days is simply too short a time to get notice out. Some Monday and Friday holidays are federal but not state, or county but not federal, etc. Secretaries (and lawyers) neglect to go to the post office on Friday, and wait until Monday to send the mail.

Second, why is notice to the court reporter required at all? The reporter is not a party to the suit, is not an attorney, and does not have the benefit of legal counsel to assist in a contest. In fact, I have not come across any reported case in which a court reporter filed a contest, although this is the stated basis for requiring notice. Jones v. Stayman, supra. Presumably the court reporter, after notice, can contest providing a statement of facts for no additional compensation. Although paid a regular salary, they are required to prepare a free statement of fact in any indigent's civil appeal. T.R.App.P. 53(j). In criminal cases, T.R.App.P. 53(j)(2), and Title 3 indigent appeals, Tex. Fam. C. sec. 56.02(b)(c), the trial judge sets the amount of payment to the court reporter which is paid from the county general fund.

Further, if a non-indigent appellant perfects an appeal, the bond or cash deposit only has to be filed in the statutory amount of $1,000.00, unless the court fixes a different amount upon its own motion or motion of either party or any interested officer of the court. T.R.App.P. 40(a)(1), 46. No notice is required to be given to the court reporter, although it is a rare case indeed when this amount will cover the cost of preparing a

statement of facts.

Third, the appellate courts' treatment of the notice provisions as quasi-jurisdictional, and not subject either to waiver or the harmless error rule, goes against the grain of modern procedure. Absent a showing of harm by the state's attorney or the court reporter, the failure of the appealing indigent to give notice of intent to seek an appeal without posting a cost bond should never result in loss of the appeal. The language of T.R.App.P. 40(a)(3)(B) has been construed far too strictly by ignoring the possibility that lack of notice is either non-waivable or harmless, or that actual knowledge of filing the affidavit is sufficient "notice."

PROPOSED SOLUTIONS

My experience indicates that the majority of attempted indigent appeals are dismissed for lack of jurisdiction because of failure to comply with notice requirements. I agree with your proposal to liberalize the requirements and suggest the following additional proposals for your consideration:

1. Amend T.R.App.P. 40(a)(3)(A) by adding: "The affidavit of inability to pay costs on appeal shall be in the form specified in Rule 145 of the Texas Rules of Civil Procedure."

2. Amend T.R.App.P. 40(a)(3)(B) to provide that the civil notice requirement be the same as the criminal, i.e., that the clerk notify opposing counsel of the filing of the affidavit of inability, and eliminate altogether the requirement of notice to the court reporter.

3. Amend T.R.App.P. 40(a)(3)(B) by deleting the language following the semi-colon ("otherwise . . ..) and substituting the following:

> "Should it appear to the court that notice has not been given under this subsection the court shall direct the clerk to notify opposing counsel and extend the time for hearing an additional ten days after the date of the order of extension."

This would be consistent with the provisions of T.R.App.P. 40(a)(3)(E) and 41(a)(2).

4. Instead of proposing that no bond or affidavit be filed (only notice of appeal be given), amend T.R.App.P. 40(a)(3)(D) and place the burden on the party contesting the affidavit of inability to show appellant is able to pay costs in any case in which an attorney was appointed to represent the appellant in the trial court. (Even a criminal appellant is required to file a pauper's oath and request to waive bond.)

5. Amend T.R.App.P. 40(a)(3)(E) by adding the following:

"Upon proof that the appellant is presently receiving a governmental entitlement based on indigency, the court shall deny the contest. If the court sustains the contest and finds that appellant is able to pay costs, the reasons for such a finding shall be contained in an order. Evidence shall be taken of the estimated cost of preparing a statement of facts and transcript."

6. Amend T.R.App.P. 51, covering the transcript on appeal, by adding a provision requiring the clerk to furnish a free transcript on appeal if the appellant is found unable to pay costs. This should parallel T.R.App.P. 53(j)(1), covering the free statement of facts.

Given the historically irrational nature of attorney/guardian ad litem distinctions, I don't think it's useful to rely on the cases which allow the guardian (but not the attorney) ad litem, who appeals in his representative capacity to do so without filing a cost bond, cash deposit or affidavit in lieu thereof.

I look forward to seeing you in Austin on the 18th. If you think these proposals merit further discussion, I would enjoy getting together with you and anyone else interested in this issue at a mutually convenient time.

Very truly yours,

MARY MANSFIELD CRAFT

MMC/cm

P.S. Oral argument has been scheduled in Wheeler v. Baum, for March 1, 1989 at 9:00 a.m. in the Texas Supreme Court.

cc: Mr. Robert O. Dawson
University of Texas
School of Law
727 E. 26th St.
Austin, Texas 78705

cc: Texas Supreme Court
Civil Rules Advisory Committee
c/o Hon. Thomas R. Phillips
Supreme Court Building
Austin, Texas 78711

LAW OFFICES

LUTHER H. SOULES III
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

August 31, 1988

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Texas Rules of Appellate Procedure 40 and 53(j)

Dear Rusty:

Enclosed herewith please find a copy of a letter I received from Justice William W. Kilgarlin regarding Texas Rules of Appellate Procedure 40 and 53(j). Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin
Honorable Antonio A. Zardenetta

THE SUPREME COURT OF TEXAS

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

August 17, 1988

HJH
SCAC Subcommittee
TRCP 145
TRAP
Agenda at Both.
Z

Hon. Antonio A. Zardenetta
111th Judicial District
Laredo, Texas 78040

Dear Judge Zardenetta:

I am in receipt of your letter of May 19, 1988 regarding the proposed changes to the Rules of Civil Procedure, and I appreciate your taking the time to write.

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

Sincerely,

William W. Kilgarlin

WWK:sm

xc: Mr. Luther H. Soules, III

Antonio A. Zardenetta
DISTRICT JUDGE
111TH JUDICIAL DISTRICT
LAREDO, TEXAS 78040
AC 512 / 727-7272

May 19, 1988

Hon. William Kilgarlin
Associate Justice
Supreme Court of Texas
Supreme Court Building
Austin, TX 78701

Mr. Doak R. Bishop, Chairman
State Bar Committee Administration
of Justice Committee
2800 Momentum Place
1717 Main
Dallas, TX 75201

Re: Advisory Committee on the Rules of Civil and Appellate Procedure
Texas Rules of Civil Procedure 145 Affidavit of Inability
Texas Rules of Appellate Procedure 40--Appeal in Civil Cases
Texas Rules of Appellate Procedure 53(j)--Free Statement of Facts

Dear Judge Kilgarlin and Mr. Bishop:

I have encountered a problem with regard to Texas Rules of Civil Procedure 145, Affidavit of Inability, and Texas Rules of Appellate Procedure No. 40, Appeal in Civil Cases, and No. 53(j), Free Statement of Facts; all, of course, with regard to Civil Proceedings. Recently, my Court Reporter prepared a Statement of Facts for an Indigent Party whom the Court determined to be Indigent, after a hearing for that purpose, by virtue of Texas Appellate Procedure Rule 40. The cost of the Statement was substantial. The Court Reporter's request for payment was rejected by the County, as per Texas Appellate Procedure Rule 53(j). This past week, we had another similar situation, and I can readily foresee numerous other cases proceeding in the same fashion, either because of T.R.C.P. 145, or that rule, if construed together with Texas Rules of Appellate Procedure Nos. 40 and 53(j).

00207

I do not mean, by any means, to deprive parties who are genuinely indigent of their just and lawful right to access to our courts. I am, however, having a more difficult time comprehending the inequity, to say the least, of compensation for services rendered to reporters in criminal proceedings but not for civil litigation. Also, does the Pauper's Affidavit, under Rule 145, serve as a the basis, in whole or in part, for the Appellant's alleged indigency for the hearing called for under Appellate Procedure Rule 40, or may that indigency hearing proceed anew with the burden of proof, as called for under the rule? If it does, then, under Appellate Procedure Rule 40, the Court Reporter would conceivably be contesting that Affidavit, and/or others, for the first time. But, irregardless, if indigency is established, the result is the same--Appellate Procedure Rule 53(j) denies the Reporter any compensation for what can easily be voluminous and costly Statements of Facts.

Another query is whether, under T.R.C.P. 145, the Court can compel payment of court costs, including those of the Indigent Party, by any non-indigent party, including the Defendant, before Judgment; or only by the prevailing party, after Judgment and in the latter instance, that would include the indigent party, assuming a substantial monetary award was granted to cover court costs. If the Court can, prejudgment, compel payment of court costs by any non-indigent party, the County, through the District Clerk, could conceivably and as a matter of course and procedure, derive some of these costs, otherwise unpaid by the indigent party(ies). And the same would be true if these costs were to be paid by the prevailing party, whether the Indigent or the Defendant, thereby assuring the payment of court costs and the indigent party's(ies') access rights to our courts.

Under rule of Appellate Procedure 40, must Counsel for the alleged Indigent Party certify by affidavit, or otherwise, that he/she is providing legal services on a Pro Bono basis, or on a contingency, as a factor for the Court to consider under the Rule 40 hearing?

Enclosed please find copies of my Court Reporter's letter to our County Auditor, my letter to our Presiding Administrative Judge and our County Judge and our State Legislators, a copy of our Presiding Judge's letter to the Hon. John Hill and his letters to Ms. Anna Donovan, our Court Reporter, all dealing with this dilemma.

As a practical matter, until this problem can be fairly addressed and resolved, I believe there would be no other recourse for a Court other than to allow his/her Official Court Reporter out-of-court time to prepare and timely file the Indigent Party's Statement of Facts while engaging a Deputy Court Reporter to provide in-court services; in either case, the county to pay for these expenses.

Please favor me with your comments and suggestions, so that we may act in the best interests of a due administration of justice for all concerned.

Sincerely,

ANTONIO A. ZARDENETTA

Z/yo
Enclosure

XC: Hon. Manuel R. Flores
Hon. Elma T. Salinas Ender
Hon. Raul Vasquez
Hon. Andres "Andy" Ramos
Hon. Manuel Gutierrez
Ms. Maria Elena Quintanilla
Mr. Emilio Martinez
Mr. Armando X. Lopez
Ms. Rebecca Garza
Ms. Trine Guerrero
Ms. Anna Donovan
Ms. Bettina Williams
Ms. Rene King

7/3 HJH, TRAP Subc(3) SBAC agenda

MEMORANDUM

TO: Luther H. Soules III

FROM: Sarah B. Duncan

RE: Proposed changes to Texas Rules of Appellate Procedure 51 and 53

Attached is a copy of *Odom v. Olafson*, 675 S.W.2d 581 (Tex.App.--San Antonio 1984, writ dism'd w.o.j.), which held that a late request for a statement of facts deprived the appellate court of the power to accept even a timely-tendered statement of facts for filing. Also attached is a copy of *Adams v. H.R. Mgt.*, 696 S.W.2d 256 (Tex.App.--San Antonio 1985)(en banc), in which the San Antonio Court of Appeals overruled the holding of *Odom*. Prior to *Adams*, however, the Fourteenth Court of Appeals followed the *Odom* rule in *Caldwell & Hurst v. Myers*, 705 S.W.2d 703 (Tex.App.--Houston [14th Dist.] 1985)(en banc)(copy attached). Although one court has inferred that the the last sentence of Rule 54(c), Tex.R.App.P., was added to overrule the holding in *Caldwell*, there may still be some possible confusion on this issue.

I would suggest that Rules 51(b) and 53(a), Tex.R.App.P., be amended to provide:

Rule 51. The Transcript on Appeal

(b) Written Designation. At or before the time prescribed for perfecting the appeal, any party may file with the clerk a written designation specifying matter for inclusion in the transcript; the designation must be specific and the clerk shall disregard any general designation such as one for "all papers filed in the cause." The party making the designation shall serve a copy of the designation on all other parties. Failure to timely make the designation provided for in this paragraph shall not be grounds for refusing to file a transcript or supplemental transcript tendered within the time provided by Rule 54(a); however, the failure of the clerk to include designated matter will not be grounds for complaint on appeal if the designation specifying such matter is not timely filed.

The last two sentences of Rule 51 have been reversed, so they appear in the chronology of the appellate sequence. Additionally, the rule as amended provides that a late designation shall not be grounds for refusing to file a transcript or supplemental transcript tendered for filing within the time provided by Rule 54(a).

Rule 53. The Statement of Facts on Appeal

(a) Appellant's Request. The appellant, at or before the time prescribed for perfecting the appeal, shall make a written request to the official reporter designating the portion of the evidence and other proceedings to be included therein. A copy of such request shall be filed with the clerk of the trial court and another copy served on the appellee. Failure to timely request the statement of facts under this paragraph shall not

preclude the filing of a statement of facts or a supplemental statement of facts within the time prescribed by Rule 54(a).

An additional sentence has been added to Rule 53 to provide that a late request shall not be grounds for refusing to file a statement of facts or supplemental statement of facts tendered for filing within the time provided by Rule 54(a).

S.B.D.

final. We agree. The state introduced a pen packet for the 1960 conviction, however, the judgment and sentence in the packet fail to establish the date the offense was committed. *Cooper v. State*, 631 S.W.2d 508 (Tex.Crim.App.1982). Appellant took the stand during the guilt stage of the trial, but his testimony does not establish that the 1957 conviction became final before the second offense resulting in the 1960 conviction was committed. Ground of error four is sustained.

[4] In his third ground of error appellant claims the state failed to prove properly appellant's identity as the person convicted of a felony offense in cause number 5460 in the Colorado County District Court as alleged in the first enhancement paragraph. Since this ground of error attacks the sufficiency of the evidence to prove identity as to prior conviction, we will address it. The state offered into evidence the penitentiary packet containing a judgment and sentence describing a conviction of a person named Melvin Douglas Sanders for the offense of theft of automobile on September 19, 1960, in cause number 5460 in the District of Colorado County, Texas. Additionally as a part of the packet was a form containing a description of the prisoner as a black male born November 1, 1935 and naming his relative as "Mrs. Marie Madison, Larned, Kansas". On cross-examination, appellant admitted he was the same Melvin Douglas Sanders who was convicted of theft of an automobile in Colorado County and received five years in 1960. Further, he testified he was born November 1, 1935 and that his grandmother, named "Mrs. Marie Madison" lived in Kansas. We find the above testimony sufficient to prove identity as to appellant's first prior conviction. The third ground of error is overruled.

The judgment is reversed and the cause remanded for a new trial, but only as a second offender. *Carter v. State*, —— S.W.2d —— No. 612–83 (Tex.Crim.App., May 16, 1984) (not yet reported).

Harold A. ODOM, Jr., Appellant,

v.

James W. OLAFSON, et al., Appellees.

No. 04–84–00259–CV.

Court of Appeals of Texas,
San Antonio.

July 11, 1984.

Rehearing Denied Aug. 30, 1984.

On appeal from an order of the 37th District Court, Bexar County, Richard J. Woods, J., appellant filed a motion to extend time for filing a statement of facts. The Court of Appeals held that appellant was not entitled to extension of time for filing statement of facts due to failure to timely request preparation of statement of facts.

Motion denied.

Appeal and Error ⇐564(3)

Appellant was not entitled to extension of time for filing statement of facts due to his failure to timely request preparation of statement of facts. Vernon's Ann.Texas Rules Civ.Proc., Rules 356(a), 377(a).

Gordon R. Cooper, II, Houston, for appellant.

Justin M. Campbell, Michael S. Goldberg, Bakee & Batts, Houston, Eugene B. Labay, Cox & Smith, San Antonio, for appellees.

Before CADENA, C.J., and REEVES and TIJERINA, JJ.

OPINION

PER CURIAM.

Appellant, Harold A. Odom, Jr., has filed a motion to extend the time for filing the statement of facts to September 6, 1984. The statement of facts was due to be filed by June 8, 1984. TEX.R.CIV.P. 386. Ap-

pellant's motion states that the court reporter was requested by letter on May 17, 1984, to prepare the statement of facts. The court reporter's affidavit attached to the motion indicates that she did not receive her first written notice to prepare the statement of facts until May 22, 1984.

TEX.R.CIV.P. 377(a), as amended effective April 1, 1984, states that in order to present a statement of facts on appeal, the appellant shall make a written request to the court reporter for its preparation at or before the time prescribed for perfecting the appeal. In the instant case the appeal was due to be perfected by May 9, 1984. TEX.R.CIV.P. 356(a), while the request was not received until May 22.

Rule 377(a) apparently was amended with the intention of compelling appellants to request their statements of facts at a time in the appellate process which would insure that more statements of facts would be completed within the time allowed. The goal was to eliminate the all too frequent occurrence of an appellant waiting to request the statement of facts until its due date.

As the rule now reads, we have no discretion to permit the filing of a statement of facts by an appellant who has not complied with the mandate of the rule. The statement of facts may not be presented on appeal.

While the penalty for noncompliance is harsh, compliance requires no additional effort. An appellant will still have to request the statement of facts, but that request will have to be made at an earlier time than many attorneys are accustomed to.

Appellant's motion for extension of time will be denied due to his failure to timely request preparation of the statement of facts in accordance with Rule 377(a). The clerk of this Court is directed not to file a statement of facts in this case.

In view of this ruling appellant's motion for extension of time to file the brief is denied.

Greg Roger BRATBY, Appellant,

v.

The STATE of Texas, Appellee.

No. 05-83-01037-CR.

Court of Appeals of Texas, Dallas.

July 12, 1984.

Rehearing Denied July 26, 1984.

Defendant was convicted in the County Criminal Court #5, Dallas County, Tom Price, J., of possession of a usable quantity of marijuana in an amount of less than two ounces, and he appealed. The Court of Appeals, Akin, J., held that police had probable cause for a search warrant based on their observation of marijuana plants which were in plain view on second floor balcony leading to defendant's apartment, but in absence of some circumstance excusing necessity of a warrant, they could not conduct a search of apartment without a warrant, and their seizure of marijuana during that search was therefore illegal, requiring suppression of marijuana in subsequent prosecution, where defendant had a reasonable expectation that his balcony would be free from unwarranted governmental intrusion, and police had no fear that marijuana would be destroyed during time that would have been required to secure a warrant.

Reversed and remanded.

1. Drugs and Narcotics ⇐185

Observation of police officers when, from a distance of from five to ten feet, they viewed marijuana plants growing in small pots on a second floor balcony leading to defendant's apartment was not a search subject to warrant requirements. U.S.C.A. Const.Amend. 4.

2. Searches and Seizures ⇐7(20)

Warrantless search of apartment was illegal where defendant had reasonable ex-

diagnosis of any medical or psychological condition" of Carol Ann Bailey.

Relator contends that by virtue of Rule 510(d)(6), Texas Rules of Evidence, such records are discoverable because they would be relevant to the parent-child relationship issue in determining managing conservatorship.

The petition for mandamus shows the divorce case is set for trial August 19, 1985. There is no explanation for relator having waited from April 10 to August 2 to attempt to file this proceeding. While relators argument appears to have merit, we decline to grant permission to file the petition for writ of mandamus because of the long delay involved and in waiting until only two weeks prior to the trial setting to present the matter to us. There appears to be no reason, however, why relator cannot compel the attendance of the two doctors at the trial of the divorce suit on its merits; place each on the stand as a witness and develop the issue at that time for consideration by the trial court. Should the trial court refuse to order disclosure of the records, a sufficient record can then be made for appellate review.

The motion for leave to file petition for writ of mandamus is denied.

Joanne Nix ADAMS, Appellant,

v.

H.R. MANAGEMENT AND La PLAZA, LTD., Appellees.

No. 04-84-00562-CV.

Court of Appeals of Texas, San Antonio.

Aug. 21, 1985.

Appellant requested additional time in which to file her statement of facts in connection with judgment entered by the 285th District Court, Bexar County, David Peeples, J. The Court of Appeals, Cadena, C.J., held that appellant's reasonable explanation for late request with court reporter for preparation of statement of facts and fact that tardy request played no part in delay in filing statement of facts excused appellant's failure to comply with rule governing request for statement of facts; thus, appellant's request for extension of time would be granted.

Motion granted; time for filing statement of facts extended.

Reeves, J., filed dissenting opinion.

Appeal and Error ⇐607(1)

Appellant's reasonable explanation for late request with court reporter for preparation of statement of facts and fact that tardy request played no part in delay in filing statement of facts excused appellant's failure to comply with Vernon's Ann. Texas Rules Civ.Proc., Rule 377(a) governing request for statement of facts; thus, appellant's request for extension of time would be granted.

Stephen F. White, Jack H. Robison, Hollon, Marion & Richards, Boerne, for appellant.

Thomas E. Quirk, Beckman, Krenek, Olson & Quirk, San Antonio, for appellees.

Before the court en banc.

ON APPELLANT'S FIRST MOTION FOR RECONSIDERATION EN BANC OF APPELLANT'S SECOND MOTION TO EXTEND TIME FOR FILING RECORD

CADENA, Chief Justice.

In two previous opinions we have considered appellant's requests for additional time in which to file her statement of facts. In the first opinion dated February 28, 1985, we granted the motion to extend time for filing the record for the reason that the

request included both the transcript and the statement of facts, and a reasonable explanation for extending the time to file the transcript was presented. *See Embry v. Bel-Aire Corp.*, 502 S.W.2d 543, 544 (Tex.1973); *Hill Chemicals Co. v. Miller*, 462 S.W.2d 568, 569 (Tex.1971); *Duncan v. Duncan*, 371 S.W.2d 873, 874 (Tex.1963); *Anzaldua v. Richardson*, 279 S.W.2d 169, 170–71 (Tex.Civ.App.—San Antonio 1955, no writ). We denied the second request for an extension of time in which to file the statement of facts in an opinion dated April 3, 1985. Although the motion was couched in terms of a request for extension of time file the record, the transcript had already been filed, and thus the only matter presented for our consideration was whether to extend time to file the statement of facts. We denied the motion because appellant had not filed a written request with the court reporter for the preparation of the statement of facts by December 13, 1984, the time by which the appeal was to be perfected. *Odom v. Olafson*, 675 S.W.2d 581, 582 (Tex.App.—San Antonio 1984, writ dism'd w.o.j.); Rule 377(a).[1] Written request to the court reporter was made on December 26, 1984, thirteen days after the time prescribed for perfecting the appeal. Appellant has now filed a motion for reconsideration en banc of our denial of her motion for an extension of time.

This motion for reconsideration contains two affidavits—one from one of the court reporters who transcribed the testimony at trial, and one from Stephen F. White, one of appellant's trial attorneys. They show the following:

This was an eight day trial, and the statement of facts will run to several hundred pages. On either November 27th or 29th, White spoke with both court reporters about the statement of facts. He was told that it would be quite some time before preparation of the statement of facts could begin since both reporters were busy working on several other records. He requested affidavits to that effect from both reporters in anticipation of filing a motion for extension of time. White's conversations with the two reporters led him to believe his co-counsel had already made a written request, and the only discussion White conducted with them concerned financial arrangements. White also had a lengthy conversation with the trial judge regarding arrangements for payment of the reporters. From the tenor of this conversation, White again assumed that the written request had been filed; otherwise, he assumed, the judge would not have required the making of financial arrangements unless he, too, assumed that a proper written request had been made.

White first noticed the absence of a written request upon his review of the appellate record on December 26, 1984. He discussed this with his co-counsel who indicated that he thought White had filed the request. The written request was immediately prepared and filed on December 26, 1984.

In summation, White concludes that the late filing of the request resulted from a lack of communication with his law office and his misinterpretation of the signals he received from the reporters and the judge.

A panel of this court in *Odom* held that the language of Rule 377(a) left us no discretion to permit the filing of a statement of facts by an appellant who has not complied with the mandate of the rule. 675 S.W.2d at 582. While the rule is written in mandatory language, there are certain situations in which such an interpretation is much too harsh. The better view is that the supreme court did not, by its amendment to Rule 377(a), intend to impose a new restrictive deadline in the appellate process. *Monk v. Dallas Brake & Clutch Service Co.*, 683 S.W.2d 107, 109 (Tex.App.—Dallas 1984, no writ). Such an interpretation would be consistent with the supreme court's objective in promulgating its recent amendments to the rules of appellate procedure. That objective was to eliminate as far as possible the technical restrictions which sometime result in the disposition of

1. All references to rules are to the Texas Rules of Civil Procedure.

appeals on grounds unrelated to the merits. *B.D. Click Co. v. Safari Drilling Corp.*, 638 S.W.2d 860, 861 (Tex.1982); *Monk*, 683 S.W.2d at 109. As we wrote in *Odom*, the purpose of the amendment to Rule 377(a) seemed to be to promote the timely filing of statements of facts insofar as that goal could be accomplished. 675 S.W.2d at 582. The instant case illustrates that that laudable goal is not furthered by strict adherence to the rule in each and every instance.

It is apparent in the instant case that compliance with Rule 377(a) would not have resulted in the timely filing of the statement of facts. Both reporters were so encumbered with pending work that even if they had received a timely written request in accordance with Rule 377(a), they would not have been able to prepare the statement of facts in this case by the time it was due. A rigid adherence to a mandatory interpretation of Rule 377(a) in every case will not further the purpose of the rule—the prompt and efficient disposition of appeals. In cases where that goal is not advanced—such as the instant case—rigid adherence to Rule 377(a) will not promote the efficiency of the appellate process. It will resurrect the old *in terrorem* philosophy of appeals which the supreme court has sought to bury. Pope & McConnico, *Practicing Law with the 1981 Texas Rules*, 32 BAYLOR L.REV. 457, 492 (1980). It heralds a return to disposition of appeals by technicality rather than on their merits.

We refuse to apply Rule 377(a) strictly in situations where the written request, timely filed, would not have insured that the statement of facts would be filed on time. Accordingly, we limit the holding in *Odom* to the more extreme facts of that case.

Our holding in this case does not mean that Rule 377(a) may be ignored with impunity. An appellant who makes a late request to the reporter will have a greater burden of explanation in a motion for extension of time than one who has made a timely request but must still ask for an extension. An appellant whose late request contributes to the tardiness of the statement of facts may have an insurmountable burden to overcome in a motion for extension of time. The most prudent policy, of course, is for appellants' attorneys to incorporate Rule 377(a) requests into their appellate timetables. We realize, however, that through inadvertence or mistake a busy attorney may sometimes neglect to make a timely request. In such situations we should not automatically slam the door to the appellate forum in his face. Rather, the appellant should be accorded the opportunity to reasonably explain the late filing of the request as he is able to do when the bond, transcript or statement of facts has been filed late. *See* Rules 21c, 356(b).

Appellant's reasonable explanation for the late request and the fact that the tardy request played no part in the delay in the filing of the statement of facts excuse the failure to comply with Rule 377(a). The motion for reconsideration is granted. Our opinion of April 3, 1985, is withdrawn, and appellant's second motion for extension of time is granted. In accordance with that motion the time for filing the statement of facts is extended to April 25, 1985.

REEVES, Justice, dissenting.

I respectfully dissent. The language of Rule 377(a) is clear, unambiguous and unequivocal. It says that in order to present a statement of facts on appeal, the appellant *shall* make a written request to the official reporter for its preparation at or before the time prescribed for perfecting the appeal. It is hard to imagine how the rule could have been more clearly written. The rule was, in fact, rewritten to make it clear and explicit. Prior to its amendment in 1984, the rule required the request to be made "promptly." The 1984 amendments eliminated this imprecise standard and replaced it with the unequivocal specification that the request shall be made "at or before the time prescribed for perfecting the appeal."

The trial attorney has told us in his affidavit that he failed to comply with Rule 377(a). Although he discussed the preparation of the statement of facts with the reporters and the trial judge, he neglected

the simple expedients of asking them or checking the appellate record to determine whether a written request had in fact been filed. He chose instead to rely on assumptions based on the verbal "signals" he received from the reporters and the judge that his co-counsel made the written request to the court reporter.

The majority observes that in this case a "rigid adherence" to Rule 377(a) produces a harsh result. This is true, however, in every case in which a party fails to follow a mandatory rule of procedure. Admittedly, Rule 377(a) is imperfect. It does not provide an opportunity to reasonably explain failure to comply with its mandate. The penalty for noncompliance in certain circumstances is too harsh. Perhaps the instant case is an illustration of such a situation. Yet it is not our function to rewrite the rules. That duty is reserved to the supreme court. TEX.REV.CIV.STAT. ANN. art. 1731a (Vernon 1962). Our duty is to apply and enforce the rules as they are written. Today, however, we have taken a simple rule, unambiguously written, and have redrafted it to conform to our own perception of propriety and fair play. I would adhere to the proper interpretation of the rule as set out in *Odom*. I would deny the motion for reconsideration.

Rudy GARZA, Bexar County Tax Assessor-Collector and Albert Bustamante, County Judge, Bexar County, Texas, Appellants,

v.

BLOCK DISTRIBUTING COMPANY, INC., Appellee.

No. 04-83-00436-CV.

Court of Appeals of Texas, San Antonio.

Aug. 21, 1985.

Taxpayer brought suit challenging additional ad valorem taxes upon personal property which resulted from an increase in valuation of its property. The 37th District Court, Bexar County, Rose Spector, J., entered judgment in favor of taxpayer, granting permanent injunction restraining any effort to collect additional taxes, and appeal was taken. The Court of Appeals, Quentin Keith, Assigned Justice, held that: (1) failure of taxpayer to pay entire amount of taxes due upon increased assessment did not result in forfeiture of its right to complain, and (2) Appraisal Board, in absence of notice to taxpayer, never acquired jurisdiction to consider any increase in taxpayer's valuation; therefore, its approval thereof was a void act and subject to challenge at any time or place.

Affirmed.

1. Taxation ⇐493.6

Failure of taxpayer to pay entire amount of taxes due upon increased assessment did not result in forfeiture of its right to complain so as to deprive trial court of jurisdiction to hear taxpayer's claim of an unconstitutional increase in valuation without a hearing, where taxpayer paid the taxes which assessor-collector certified on his statement were due, and there was no possibility that a final judgment would not be entered disposing of entire controversy.

2. Taxation ⇐493.4

Where taxpayer's valuation was increased without prior notice having been given, Appraisal Board never acquired jurisdiction of the imposed increase in value. As a result, its approval thereof was a void act and subject to challenge at any time or place.

Michael L. Davis, Dist. Atty's. Office, San Antonio, for appellants.

Lester L. Klein, Klein & Klein, Mitchell S. Rosenheim, San Antonio, for appellee.

Before BUTTS, TIJERINA and QUENTIN KEITH, JJ.

providing conditions of "probation," does not assess punishment within the meaning of Article 37.07, § 3(a) and (d), for "there has been no conviction," *Ex parte Schillings*, 641 S.W.2d 538, 540 (Tex.Cr.App. 1982); "no sentence [sic] is assessed and imposition of sentence is not suspended," *McNew v. State*, 608 S.W.2d 166, 172, 176–178 (Tex.Cr.App.1978, 1980). Therefore, a condition of "probation" purporting to require that accused be incarcerated is unreasonable because it "stems from an offense for which there has been no conviction," *Ex parte Schillings*, supra, at 540.

[2] For the same reasons, that upon agreement of the parties an order finding that evidence substantiates guilt and that "the best interest of society and defendant will be served," deferring adjudication of guilt and providing conditions of "probation," does not assess punishment within the meaning of Article 37.07, § 3(a) and (d).

[3] Furthermore, though availability of the option provided by § 3d(a) is limited to those accused who plead guilty or nolo contendere, "practical knowledge" is that it will "very often be utilized as part of a plea-bargain arrangement;" we also know that because deferring adjudication upon probationary conditions is entirely within the discretion of a trial court, absent a plea bargain an accused cannot be assured of receiving it, yet having received it, during its term still risks being sentenced "to the maximum term provided for the offense to which he pled guilty" should he violate any condition. *Reed v. State*, 644 S.W.2d 479, 483–484 (Tex.Cr.App.1983).

[4] Article 44.02 contemplates an appeal after assessment of punishment and "sentencing." The proviso bars a defendant from prosecuting an appeal "who has been *convicted* [upon plea of guilty or nolo contendere before the court] and the court *assesses punishment* [that] does not exceed [what is] recommended by the prosecutor and agreed to by the defendant and his attorney"—except as provided. Since an order conforming with plea bargain for deferred adjudication is not an appealable order and does not assess punishment within meaning of Article 37.07, § 3(a) and (d), and within contemplation of Article 44.02, it follows that a defendant is not precluded from prosecuting an appeal after adjudication of guilt, judgment and sentencing merely because he initially bargained for deferred adjudication and was admonished according to Article 26.13(a)(3). There may still be hurdles in the way, such as a *second plea bargain* after adjudication of guilt with respect to punishment to be assessed, *Ex parte Howard*, 685 S.W.2d 672, n. 1, 673, n. 2 (Tex.Cr.App.1985), but we need not decide whether applicant in this cause has cleared them.

[5] Though applicant asserts he is being denied his right of appeal and thus due process and due course of law, in his application for writ of habeas corpus applicant never indicates just what alleged error he would seek to raise on appeal. The burden of proving allegations entitling him to relief is upon applicant. *Ex parte Alexander*, 598 S.W.2d 308, 309 (Tex.Cr.App.1980). In the context of a deferred adjudication proceeding, since some alleged errors are appealable while others are not, that omission alone dooms our granting relief.

Relief is denied.

McCORMICK and WHITE, JJ., concur in result.

CALDWELL & HURST, a Partnership, Appellant,

v.

Louis MYERS aka Lewis Myers, Independent Co-Executor of the Estate of Saora Myers, Deceased, Appellee.

No. A14–85–688–CV.

Court of Appeals of Texas, Houston (14th Dist.).

Oct. 17, 1985.

Appellant filed motion for rehearing en banc from prior denial of appellant's mo-

tion to extend time to file its statement of facts. The Court of Appeals, J. Curtiss Brown, C.J., held that the rule requiring appellants to file request with court reporter for preparation of statement of facts at or before time prescribed for perfecting appeal allowed no discretion for extension of time to file, even though appellant's request for preparation of statement of facts was only one day late.

Motion for rehearing denied.

Appeal and Error ⇐607(1)

Vernon's Ann.Texas Rules Civ.Proc., Rule 377(a), requiring appellant to make written request to reporter for preparation of statement of facts "at or before the time prescribed for perfecting the appeal," does not allow even limited discretion to grant extension for reasonable failure to comply; declining to follow *Monk v. Dallas Brake & Clutch Service Co.*, 683 S.W.2d 107 (Tex. App.); *Adams v. H.R. Management and La Plaza Ltd.*, 696 S.W.2d 256 (Tex.App.); and *In the Interest of Phillips*, 691 S.W.2d 714 (Tex.App.).

Steve Underwood, of Caldwell & Hurst, Houston, for appellant.

James C. Mulder, of Parks, Tradd, Mulder & Miller, Houston, for appellee.

Before the court en banc.

OPINION

J. CURTISS BROWN, Chief Justice.

On September 12, 1985, a panel of this court denied appellant's motion to extend time to file its statement of facts. The motion was denied because appellant had not filed a written request with the court reporter for the preparation of the statement of facts by August 1, 1985, the time by which the appeal was to be perfected. TEX.R.CIV.P. 377(a); *Intertex, Inc. v. Walton*, 683 S.W.2d 599 (Tex.App.—Houston [14th Dist.] 1985, no writ); *Banctexas Allen Parkway v. Allied American Bank*, 683 S.W.2d 600 (Tex.App.—Houston [14th Dist.] 1985, no writ). Appellant has now filed a motion for rehearing en banc of our denial of an extension of time. En banc consideration was granted October 10, 1985.

The motion for rehearing contains the affidavit of Robert L. Krippner, the court reporter who transcribed the testimony at trial. Mr. Krippner recites he received a written request for the preparation of the statement of facts August 2, 1985. He also avers he had earlier advised appellant's counsel an extension of time would be necessary. Mr. Krippner further swears: "... [I]t would have made absolutely no difference in the time required by me to make and prepare the Statement of Facts ... whether I had received his request on August 1, 1985."

The statement of facts was received by this Court September 16, 1985, thirteen days after they were due. TEX.R.CIV.P. 386.

In addition to our previously cited panel opinions, interpretation of R.377(a) has occasioned opinions by three other courts of appeal since its adoption became effective April 1, 1984.

In a panel decision, the Fourth Court of Appeals held the language of Rule 377(a) left no discretion to permit the filing of a statement of facts by an appellant who failed to comply with the mandate of the rule. *Odom v. Olafson*, 675 S.W.2d 581 (Tex.App.—San Antonio 1984, writ dism'd).

A panel of the Fifth Court of Appeals rejected that interpretation. That court held a late request is of no consequence if the statement of facts is timely filed. If a motion for extension of time to file statement of facts is necessary, the failure timely to request preparation of the statement of facts may be excused by a reasonable explanation presented in accordance with Rule 21c. *Monk v. Dallas Brake & Clutch Service Co.*, 683 S.W.2d 107 (Tex.App.—Dallas 1984, no writ).

The Seventh Court of Appeals, en banc, unanimously agreed failure to make a timely written request for preparation of the

statement of facts was not grounds for dismissal of an appeal or affirmance of the trial court's judgment. The justices disagreed, however, whether Rule 377(a) was mandatory or directory. Two justices agreed with the *Odom* decision and two disagreed. *In the Interest of Phillips*, 691 S.W.2d 714 (Tex.App.—Amarillo 1985, no writ).

Most recently, the Fourth Court of Appeals, sitting en banc, limited the holding in *Odom* to the extreme facts of that case. The Court ruled that Rule 377(a) will not be applied strictly if an untimely filing of a written request played no part in the delay and a reasonable explanation is advanced to explain the late request. *Adams v. H.R. Management and La Plaza Ltd.*, 696 S.W.2d 256 (Tex.App.—San Antonio, 1985, not yet reported). The court rejected "a rigid adherence" to Rule 377(a). *Id.* at 258.

The facts of the case before us—a request only one day late which was not responsible for the minimal thirteen-day delay in tendering the statement of facts—emphatically illustrates the harshness which the San Antonio and Dallas courts repudiated.

While we are certainly comfortable with the results in *Monk* and *Adams*, we are intellectually uneasy with the reasoning in those cases. We would be pleased if Rule 377(a) read as those courts have interpreted it.

The rule, however, is clear, unambiguous, and unequivocal. "In order to present a statement of facts on appeal, the appellant, *at or before* the time prescribed for perfecting the appeal, *shall* make a written request to the official reporter designating the portion of the evidence and other proceedings to be included therein." (Emphasis added). TEX.R.CIV.APP. 377(a).

Unlike other mandatory appellate rules—for perfecting appeal, filing the transcript and statement of facts, and filing briefs—nothing in Rule 377(a) allows us to extend the mandatory timetable. *See* TEX.R.CIV. APP. 21c, 356, 385, 386, 414.

Rule 377(a), as it is written, simply gives us no discretion, not even the limited discretion of Rule 21c, to grant an extension for a reasonable failure to comply with its mandate.

We cannot rewrite the rule. We must reluctantly follow its clear mandate until the Supreme Court clarifies it to the contrary.

The motion for rehearing is denied.

DRAUGHN, J., not participating.

Harold SMITH, et al., Appellant,

v.

Hunt GRAHAM, et al., Appellee.

No. 9401.

Court of Appeals of Texas, Texarkana.

Nov. 26, 1985.

Rehearing Denied Dec. 27, 1985.

Grantees appealed from judgment of the 188th District Court, Gregg County, Marcus Vascocu, J., construing four deeds as conveying only working interest in certain oil and gas leases rather than fee mineral interests. The Court of Appeals, Cornelius, C.J., held that the deeds conveyed fee mineral interests.

Reversed and rendered.

1. Deeds ⇐93

In interpreting a deed, it is not subjective intention parties may have had but failed to express that controls, but intention that is expressed by the deeds; that is, question is not what parties meant to say or thought they said, but meaning of what they did say.

TRAP 52.

Add as the last paragraph of 52(d):

A party desiring to complain on appeal in a non-jury case that the evidence was legally or factually insufficient to support a finding of fact, that a finding of fact was established as a matter of law or was against the overwhelming weight of the evidence, or of the inadequacy or excessiveness of the damages found by the court, shall not be required to comply with subdivision (a) of this rule.

6/29/89

To: Holly Halfacre

From: Hadley Edgar

Re: Supreme Court Advisory Committee

Holly, here are some changes to TRCP 299, TRAP 52 and new TRCP 299a which should be included on the agenda for the July 15 meeting.

Thanks.

HELD OVER FROM MAY 26-27 Meeting

Rule 82. Judgment on Affirmance or Rendition in a Civil Case

When a court of appeals affirms the judgment or decree of the court below, or proceeds to modify the judgment and to render such judgment or decree against the appellant as should have been rendered by the court below, it shall render judgment against the appellant and the sureties on 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 and the sureties on his appeal or supersedeas bond, if any, for such costs as are taxed against him.

[NEW RULE]

Rule 82a

When a court of appeals reverses the judgment or decree of the court below, or proceeds to modify the judgment and to render such judgment or decree in favor of the appellant as should have been rendered by the court below, it shall render judgment in favor of the appellant 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 appellee and ordering the clerk of the court of appeals ~~shall~~ to notify the district clerk to abstract and enforce the judgment of the court of appeals as in other cases.

TRAP 90. Opinions, Publication and Citation

(a) Decision and Opinion. (No change.)

(b) Signing of Opinions. (No change.)

(c) Standards for Publication. (No change.)

(d) Concurring and Dissenting Opinions. (No change.)

(e) Determination to Publish. (No change.)

(f) Rehearing. (No change.)

(g) Action of Court En Banc. (No change.)

(h) Order of the Supreme Court. Upon the grant or refusal of an application for writ of error, whether by outright refusal or by refusal no reversible error, an opinion previously unpublished shall forthwith be released [by the clerk of the court of appeals] for publication[.]/ /*if /the /supreme /court /so ordered/*

(i) Unpublished Opinions. (No change.)

HELD OVER FROM 11/17/89 MEETING

LAW OFFICES

LUTHER H. SOULES III
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

May 17, 1989

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Proposed Changes to Texas Rule of Appellate Procedure

Dear Rusty:

Enclosed please find a copy of a letter sent to me by Justice Nathan L. Hecht regarding proposed changes to Rules 4, 5, 40, 51, 84, 90, 182(b), and 130(a). Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Stanley Pemberton

00225

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711
(512) 463-1312

May 15, 1989

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

Dear Luke:

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Nathan L. Hecht
Justice

OK

March 2, 1989

Honorable Mary M. Craft, Master
314th District Court
Family Law Center
4th Floor
1115 Congress
Houston, Texas 77002

Dear Master Craft:

Chief Justice Phillips has referred to me, as the Justice having primary responsibility for oversight of the rules, your very insightful letter regarding indigent civil appeals.

I am most grateful for your thoughts and expect they will be carefully considered as we look toward amendments in the rules this year.

I hope if you have additional suggestions you will feel free to let me know.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Hecht

MARY M. CRAFT
MASTER, 314TH DISTRICT COURT
FAMILY LAW CENTER, 4TH FLOOR
1115 CONGRESS
HOUSTON, TEXAS 77002
(713) 221-6475

February 9, 1989

Mr. Thomas S. Morgan
2500 N. Big Spring
Suite 120
Midland, Texas 79705

Dear Tom:

I read your article in the last Juvenile Law Section Newsletter, and I agree that appealing a delinquency case for an indigent client is tricky. However, I have been concerned for some time about the problem of civil appeals for all indigents and offer the following thoughts.

An indigent's appeal in a criminal case differs from that in a civil case in that a criminal appellant is only required to file a written notice of appeal in the trial court within 30 days of the judgment's signing. T.R.App.P. 41(b)(1). The clerk is required to forward a copy of the notice of appeal to the appellate court and the attorney for the state. T.R.App.P. 40(b)(1). A pauper's affidavit requesting a free statement of facts may be filed in the trial court within the same 30-day period. T.R.App.P. 53(j)(2). Apparently the pauper's affidavit is seldom challenged, especially if appellant had appointed trial counsel. This procedure in indigent criminal appeals is substantially different from that in civil indigent appeals.

THE PROCESS IN INDIGENT CIVIL APPEALS

Presently, the procedure for appeal on behalf of an indigent in a civil case is as follows:

1. An affidavit of inability to pay costs (as an alternative to a cost bond) must be filed by appellant with the clerk of the trial court within 30 days after signing of the order which is being appealed. T.R.App.P. 40(a)(3)(A). Appeal is then perfected. T.R.App.P. 41(a)(1).

2. Notice of the filing of appellant's affidavit must be given by appellant to the opposing party or his attorney and to the court reporter of the court in which the case was tried within

two days after the filing. Without notice the appellant "shall not be entitled to prosecute the appeal without paying the costs or giving security therefor." T.R.App.P. 40(a)(3)(B).

3. Any contest to the affidavit (by a party or court officer) must be filed within 10 days after notice is received. If a contest is filed a hearing is set by the court and notice given by the clerk. T.R.App.P. 40(a)(3)(C). The court must rule against the affidavit by signed order within 10 days of filing of the contest or the affidavit is taken as true. T.R.App.P. 40(a)(3)(E).

THE PROBLEMS

At first glance these rules would appear to facilitate indigent appeals, but the opposite is true. As you point out, many attorneys who practice primarily criminal law, or civil law for paying clients, are not familiar with the procedure and inadvertently lose their right to appeal.

The possibility of losing a right to appeal because of failure to give proper notice is obvious from the cases you mentioned and others. For example, In re V.G., 746 S.W.2d 500 (Tex. App.--Houston [1st Dist.] 1988, no writ), followed the Corpus Christi court's decisions in In re R.R. and In re R.H. In V.G. an indigent's appeal from a certification judgment was dismissed because the state's attorney did not receive the two-day notice that a pauper's affidavit had been filed. Reading between the lines in V.G., it is possible the D.A. actually knew of the filing of the pauper's affidavit and chose not to file a contest in the trial court.

You may also have come across the Texas Supreme Court case of Jones v. Stayman, 747 S.W.2d 369 (Tex. 1987), a per curiam mandamus decision which seemed to provide some hope that notice requirements would be construed with flexibility. The trial court in this termination case had neglected to sign an order determining the contest or extending the time within 10 days of filing the contest. The state contended that a letter sent to the court reporter one day after the affidavit of inability was filed stating counsel's intention to request a free statement of facts was inadequate under T.R.App.P. 40(a)(3)(B). The Court stated that the letter, though "not a model of precision" sufficiently fulfilled the purpose of the rule. The Court further noted that 1) the letter was timely mailed, and 2) the court reporter was

present at the hearing and did not object to lack of proper notice.

A recent case from Houston, Wheeler v. Baum, No. 01-88-00919-CV, is presently pending before the Supreme Court. Application for leave to file writ of mandamus was granted on February 2, 1989, docketed as No. C-8194. This is a termination case from the First Court of Appeals in which the trial judge did not sign the order determining the contest within the required 10 days from the date of contest. The court of appeals relied on Bantuelle v. Renfro, 620 S.W.2d 635 (Tex. Civ. App.--Dallas 1981 no writ), and In re V.G., supra, and held that "giving of the 2-day notice to the court reporter is mandatory and absent the notice, the appellant cannot prosecute an appeal without paying costs or giving security. An objection at the hearing is not necessary because if no notice is given, a hearing is not required." Interestingly, the real party in interest, Harris County Children's Protective Services, received its notice and filed a contest, but objected to the lack of notice to the court reporter. No testimony was taken on the merits of the indigency claim of appellant. A similar case is Furr v. Furr, 721 S.W.2d 565 (Tex. App.--Amarillo 1986, no writ).

The absurdity of the court reporter notice requirement is demonstrated by Matlock v. Garza, 725 S.W.2d 527 (Tex. App.--Corpus Christi 1987, no writ), decided by the same court that gave us In re R.R. and In re R.H. In dismissing the appeal because the court reporter did not receive the two-day notice, the court found that handing the court reporter the affidavit to be marked as an exhibit during the hearing on the contest did not constitute personal service, reasoning that the court reporter cannot be expected to read every exhibit so presented. Id. at 529.

An insidious aspect of the indigency appeal procedure is that notice of filing the affidavit must be actually received by the opposing party and the court reporter within two days, or on the next business day following two days, unless it is mailed. In Fellowship Missionary Baptist Church of Dallas, Inc., v. Sigel, 749 S.W.2d 186 (Tex. App.--Dallas 1988, no writ), the court of appeals raised the notice issue on its own motion. It found that the allegations in the affidavit of inability to pay costs should be taken as true because the trial court had sustained the contest, but failed to enter a timely written order. However, in calculating whether appellant had properly used the "mailbox rule," T.R.App.P. 4(b), in delivering its notice to the court

reporter, the court ruled that since the affidavit was filed on Thursday, the last day to serve the reporter was Monday. Appellant mailed the notice on Monday, and it was one day too late. Had it been mailed on Sunday, whether postmarked or not, it would have been valid service. The court construed T.R.App.P. 4(b) to require that depositing a document in the mail one day before the last day of the period for taking action was a "condition precedent" for triggering the extension provided by rule 5(a) for mailed documents. Because notice to the court reporter was untimely the appeal was dismissed, even though no objection was made in the trial court by anyone.

THE FLAWS

The flaws in the procedure for indigents' appeals are obvious.

First, two days is simply too short a time to get notice out. Some Monday and Friday holidays are federal but not state, or county but not federal, etc. Secretaries (and lawyers) neglect to go to the post office on Friday, and wait until Monday to send the mail.

Second, why is notice to the court reporter required at all? The reporter is not a party to the suit, is not an attorney, and does not have the benefit of legal counsel to assist in a contest. In fact, I have not come across any reported case in which a court reporter filed a contest, although this is the stated basis for requiring notice. Jones v. Stayman, supra. Presumably the court reporter, after notice, can contest providing a statement of facts for no additional compensation. Although paid a regular salary, they are required to prepare a free statement of fact in any indigent's civil appeal. T.R.App.P. 53(j). In criminal cases, T.R.App.P. 53(j)(2), and Title 3 indigent appeals, Tex. Fam. C. sec. 56.02(b)(c), the trial judge sets the amount of payment to the court reporter which is paid from the county general fund.

Further, if a non-indigent appellant perfects an appeal, the bond or cash deposit only has to be filed in the statutory amount of $1,000.00, unless the court fixes a different amount upon its own motion or motion of either party or any interested officer of the court. T.R.App.P. 40(a)(1), 46. No notice is required to be given to the court reporter, although it is a rare case indeed when this amount will cover the cost of preparing a

statement of facts.

Third, the appellate courts' treatment of the notice provisions as quasi-jurisdictional, and not subject either to waiver or the harmless error rule, goes against the grain of modern procedure. Absent a showing of harm by the state's attorney or the court reporter, the failure of the appealing indigent to give notice of intent to seek an appeal without posting a cost bond should never result in loss of the appeal. The language of T.R.App.P. 40(a)(3)(B) has been construed far too strictly by ignoring the possibility that lack of notice is either non-waivable or harmless, or that actual knowledge of filing the affidavit is sufficient "notice."

PROPOSED SOLUTIONS

My experience indicates that the majority of attempted indigent appeals are dismissed for lack of jurisdiction because of failure to comply with notice requirements. I agree with your proposal to liberalize the requirements and suggest the following additional proposals for your consideration:

1. Amend T.R.App.P. 40(a)(3)(A) by adding: "The affidavit of inability to pay costs on appeal shall be in the form specified in Rule 145 of the Texas Rules of Civil Procedure."

2. Amend T.R.App.P. 40(a)(3)(B) to provide that the civil notice requirement be the same as the criminal, i.e., that the clerk notify opposing counsel of the filing of the affidavit of inability, and eliminate altogether the requirement of notice to the court reporter.

3. Amend T.R.App.P. 40(a)(3)(B) by deleting the language following the semi-colon ("otherwise . . ..) and substituting the following:

> "Should it appear to the court that notice has not been given under this subsection the court shall direct the clerk to notify opposing counsel and extend the time for hearing an additional ten days after the date of the order of extension."

This would be consistent with the provisions of T.R.App.P. 40(a)(3)(E) and 41(a)(2).

4. Instead of proposing that no bond or affidavit be filed (only notice of appeal be given), amend T.R.App.P. 40(a)(3)(D) and place the burden on the party contesting the affidavit of inability to show appellant is able to pay costs in any case in which an attorney was appointed to represent the appellant in the trial court. (Even a criminal appellant is required to file a pauper's oath and request to waive bond.)

5. Amend T.R.App.P. 40(a)(3)(E) by adding the following:

"Upon proof that the appellant is presently receiving a governmental entitlement based on indigency, the court shall deny the contest. If the court sustains the contest and finds that appellant is able to pay costs, the reasons for such a finding shall be contained in an order. Evidence shall be taken of the estimated cost of preparing a statement of facts and transcript."

6. Amend T.R.App.P. 51, covering the transcript on appeal, by adding a provision requiring the clerk to furnish a free transcript on appeal if the appellant is found unable to pay costs. This should parallel T.R.App.P. 53(j)(1), covering the free statement of facts.

Given the historically irrational nature of attorney/guardian ad litem distinctions, I don't think it's useful to rely on the cases which allow the guardian (but not the attorney) ad litem, who appeals in his representative capacity to do so without filing a cost bond, cash deposit or affidavit in lieu thereof.

I look forward to seeing you in Austin on the 18th. If you think these proposals merit further discussion, I would enjoy getting together with you and anyone else interested in this issue at a mutually convenient time.

Very truly yours,

MARY MANSFIELD CRAFT

MMC/cm

P.S. Oral argument has been scheduled in Wheeler v. Baum, for March 1, 1989 at 9:00 a.m. in the Texas Supreme Court.

cc: Mr. Robert O. Dawson
University of Texas
School of Law
727 E. 26th St.
Austin, Texas 78705

cc: Texas Supreme Court
Civil Rules Advisory Committee
c/o Hon. Thomas R. Phillips
Supreme Court Building
Austin, Texas 78711

On the criminal side, we no longer impose a fifty page limitation on briefs.

Also, optionally, add to the comment "conformably with Rules 74(h) and 136(e)," so that comment would read:

COMMENT TO 1990 CHANGE: To provide for a maximum length for amicus curiae briefs conformably with Rules 74(h) and 136(e).

After headings for sections twelve, thirteen and fourteen, insert:

SECTION SEVENTEEN. SUBMISSIONS, ORAL ARGUMENTS AND OPINIONS [IN THE COURT OF CRIMINAL APPEALS]

SHC

cc: Chief Justice Thomas R. Phillips

Justice Nathan L. Hecht

Luther H. Soules III, Chairman

LHS Copy
Orig to Lyn
6/26/89

7/3 HJH,
SCAC Agenda
TRAP Subc (3)

MEMO

TO: ALL JUDGES

FROM: SAM HOUSTON CLINTON, Rules Committee Chair

RE: Recommendations on SCAC proposed TRAP amendments

DATE: JUNE 23, 1989

The Rules Committee recommends that the Court adopt all proposed amendments to Texas Rules of Appellate Procedure attached to a June 12, 1989 memorandum to all members of the Supreme Court Advisory Committee from Luther H. Soules III, Chairman, but with the following modifications.

Rule 1: Add to the last sentence "who requests it," so that the sentence would read:

> When an appeal or original proceeding is docketed, the clerk shall mail a copy of the court's local rules to all counsel of record who requests it.

To provide prosecuting attorneys and criminal defense attorneys located and regularly practicing within the district a copy of local rules every time a cause is docketed in which one is counsel is redundant and, frankly, wasteful.

Rule 20. Begin the first bracketed sentence with "In civil cases," so the sentence would read:

> In civil cases, an amicus curiae brief shall not exceed 50 pages in length, exclusive of pages containing the table of contents, index of authorities, points of error and any addendum containing statutes, rules regulations, etc.

HELD OVER FROM MAY 26-27 Meeting

Rule 13. Effect of Signing of Pleadings, Motions and Other Papers; Sanctions

The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Attorneys or parties 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 which they know 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. 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 215-2b, 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 order. "Groundless" for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law. ~~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 or prior to the expiration of the~~

trial court's plenary power, whichever first occurs, 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.

LAW OFFICES

SOULES & WALLACE
ATTORNEYS-AT-LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
RICHARD M. BUTLER
W. CHARLES CAMPBELL
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
SARAH B. DUNCAN
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
RONALD J. JOHNSON
REBA BENNETT KENNEDY
PHIL STEVEN KOSUB
GARY W. MAYTON
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL *
LUTHER H. SOULES III †‡
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

TELEFAX
SAN ANTONIO
(512) 224-7073
AUSTIN
(512) 327-4105

June 5, 1989

Mr. Frank L. Branson
Law Offices of Frank L. Branson, P.C.
2178 Plaza of the Americas
North Tower, LB 310
Dallas, Texas 75201

Re: Proposed Change to Rule 13

Dear Mr. Branson:

Enclosed please find a copy of a letter sent to me by Mr. David J. Beck regarding changes to Rules 13. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

LUTHER H. SOULES III

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

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

6/1 HJH, SCAC Agenda COAS

FULBRIGHT & JAWORSKI
1301 McKINNEY
HOUSTON, TEXAS 77010

TELEPHONE: 713/651-5151
TELEX: 76-2829
TELECOPIER: 713/651-5246

HOUSTON
WASHINGTON, D.C.
AUSTIN
SAN ANTONIO
DALLAS
LONDON
ZURICH

FULBRIGHT JAWORSKI &
REAVIS McGRATH
NEW YORK
LOS ANGELES

Xc D. Beck

May 31, 1989

Re: Supreme Court Advisory Committee

Mr. Luther H. Soules, III
Soules & Reed
800 MIlam Building
San Antonio, Texas 78205-1695

Dear Luke:

At our next meeting, I would propose that the Committee consider suggesting to the Texas Supreme Court an amendment to Rule 13 of the Texas Rules of Civil Procedure. You will recall that when Tex. R. Civ. P. 13 was last amended, there were numerous inclusions that made Rule 13 materially different from its federal counterpart, Fed. R. Civ. P. 11. While reasonable minds can differ as to the necessity for some of those inclusions, my concern is with the provision that allows an offending party 90 days after the court has determined that a violation has, in fact, occurred to withdraw with impunity the offensive pleading, motion, or other paper.

I have had several recent experiences in which this provision has been invoked to the serious detriment of my clients. As we know, the purpose of Rule 13 (and its federal counterpart) is to deter the making of frivolous claims and filings by plaintiffs and defendants. Obviously, the Rule cannot have that effect if a party is permitted to file an offensive pleading, have a court conclude that the Rule has been violated, and then, to avoid sanctions, merely withdraw the offensive pleading within 90 days. My most recent experience illustrates the point. I represented a law firm

that was named as a defendant because the primary defendant was insolvent. The allegations against the defendant law firm had no basis in law or fact and after the taking of certain discovery and the filing of a motion for sanctions pursuant to Rule 13 by me, the plaintiffs non-suited their claims. Unfortunately, our client had incurred substantial attorneys' fees in defending the frivolous claims against them. I doubt that the suit ever would have been filed against the defendant law firm if our general sanctions rule did not contain the 90 day provision; or, if the lawsuit would have been filed in the face of a Rule 13 without the 90 day provision, the defendant law firm would have at least had the opportunity to recover its attorneys' fees and costs incurred as a result of the clear violation of the Rule.

My suggestion therefore is that the TEX. R. CIV. P. 13 be amended to delete the following sentence:

> "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 or prior to the expiration of the trial court's plenary power, whichever first occurs, the offending party withdraws or amends the pleading, motion or other paper, or offending portion thereof to the satisfaction of the court."

Very truly yours,

David J. Beck

DJB/st

cc: The Honorable Nathan L. Hecht
5th District Court of Appeals
County Courthouse
Dallas, Texas 75202

3766B

HELD OVER FROM MAY 26-27 MEETINGS

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

Doak
Bill
Hagenela

November 30, 1987

Doak Bishop
Hughes & Luce
2800 Momentum Place
1717 Main Street
Dallas, Texas 75201

Re: Direct Actions Against Insurers
and Rules 38(c) and 51(b), T.R.C.P.

Dear Doak:

I received your note of the 19th with memos and correspondence today. An incorrect zip code and the vagaries of the county's in-house mail service are the culprits.

The memo from Eddie Molter to Judge Robertson of October 30, 1986, is incomplete. I received pages 1, 3, 5 and 7. What about the others? Is the Chuck Lord memo to Judge Wallace only a single page? Can you help on this? Can Broadus?

I am sending a letter out to some selected practitioners and academics soliciting their views. It would seem from the memos that a rule change alone would not be enough to usher in direct actions. This would be such a big change in our practice it should be approached cautiously.

I am copying Broadus Spivey, Luke Soules and the members of the COAJ "think tank" subcommittee. I would like to send my fellow think tankers copies of the complete memos. I will send you, Broadus and Luke copies of anything my letter generates.

Very truly yours,

Mike

Michael D. Schattman

00243

MDS/lw

xc: B. Spivey, L. Soules, Mike Handy, Bill Dorsaneo, Pat Hazel, Charles Tighe

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
REBA BENNETT KENNEDY
DONALD J. MACH
ROBERT D. REED
HUGH L. SCOTT, JR.
DAVID K. SERGI
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

December 9, 1987

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

Re: Tex. R. Civ. P. 38(c) and 51(b)

Dear Sam:

I have enclosed a letter sent to me through Michael D. Schattman regarding Rules 38(c) and 51(b). Please prepare to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

LUTHER H. SOULES III

LHS/hjh
SCACII:003
Enclosure
cc: Justice James P. Wallace
Mr. Michael D. Schattman

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
REBA BENNETT KENNEDY
DONALD J. MACH
ROBERT D. REED
HUGH L. SCOTT, JR.
DAVID K. SERGI
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

October 23, 1987

Honorable James P. Wallace
Justice, Supreme Court of Texas
P.O. Box 12248
Capitol Station
Austin, Texas 78767

Dear Justice Wallace:

At the request of Broadus Spivey made at the SCAC session of June 27, 1987, I appointed a Special Subcommittee to study TRCP 38(c) and 51 (b) which deal with the same subject, i.e. "direct actions." That committee consists of Frank Branson, Franklin Jones, and Broadus Spivey, who are to work with Sam Sparks (El Paso) who is the Standing Subcommittee Chair for Rules 15-166a.

The work of this subcommittee on these rules will likely be one of the leading studies for the proposed rules admendments to be effective January 1, 1990. By copy of this letter, I am requesting that Doak Bishop, Chairman of the COAJ for the ensuing year, set up a similar special subcommittee to investigate these rules to determine whether today in Texas direct actions should be permissible under the Rules of Civil Procedure.

I hope this sufficiently responds to your inquiry.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tct
xc: Mr. Doak Bishop
Chairman COAJ

Mr. Frank Branson
Mr. Franklin Jones
Mr. Broadus Spivey

SPIVEY, GRIGG, KELLY AND KNISELY
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
1111 WEST 6TH STREET, SUITE 300
P. O. BOX 2011
AUSTIN, TEXAS 78768-2011
(512) 474-6061

BROADUS A. SPIVEY
BOARD CERTIFIED†
PERSONAL INJURY TRIAL LAW
DICKY GRIGG
BOARD CERTIFIED†
PERSONAL INJURY TRIAL LAW
PAT KELLY
BOARD CERTIFIED†
PERSONAL INJURY TRIAL LAW
PAUL E. KNISELY

OF COUNSEL
J. PATRICK HAZEL
BOARD CERTIFIED†
PERSONAL INJURY TRIAL LAW
CIVIL TRIAL LAW

INVESTIGATORS†
JOHN C. LUDLUM
RICK LEEPER

BUSINESS MANAGER:
MELVALYN TOUNGATE

November 9, 1987

BAS87.266

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

Re: Special Subcommittee - TRCP 38(c) and 51(b)
Direct Actions

Dear Chairman Sam:

Since I have really dropped the ball on this assignment, I need to call upon you for help in restoring my appearance of reliability.

On June 27, 1987, Luke Soules appointed a special subcommittee to study these rules. The subcommittee consists of you as chairman, Frank Branson, Franklin Jones, and myself as members.

I inquired of Justice Wallace as to the existence of any briefing or information that had accumulated with the Supreme Court over a period of years. This has been a rather lively topic of discussion in the legal community ever since I have been practicing, and I knew the Supreme Court had to have some material gathered. On July 8, 1987 Judge Wallace forwarded to me copies of research done on the subject. Like a good committee member, I procrastinated "until tomorrow." Now, "manaña" has come.

I am forwarding a copy of the material furnished to me by Judge Wallace and a copy of his accompanying letter of July 8, 1987.

We need to get together, and that should be without further delay. It will make you look good to act in a rather hasty fashion while you can compare your conduct with my speed.

Additionally, I have received several inquiries from lawyers who are not even members of our committee and some from defense lawyers, too, asking when we were going to move on this issue. There is more interest than I had thought. I would suggest a Thursday or Friday meeting in Austin within the next three or four weeks.

I apologize to you, Luke Soules, and especially to Judge Wallace, for my inertia.

Sincerely,

Broadus A. Spivey

BAS:jk

c: Hon. James P. Wallace
Mr. Luther H. Soules III
Mr. Frank Branson
Mr. Franklin Jones
Mr. Doak Bishop, Chairman, COAJ

6202

THE SUPREME COURT OF TEXAS

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

July 8, 1987

87 JUL 10 A9:51

Mr. Broadus A. Spivey
Spivey, Grigg, Kelly & Knisely
P. O. Box 2011
Austin, Texas 78768

Dear Broadus:

As per your request of last week, I am forwarding copies of research done by various court personnel into direct action against insurance companies in Texas. I hope this is of some help to you and I look forward to your subcommittee report to the Supreme Court Advisory Committee.

Sincerely,

James P. Wallace
Justice

JPW/cw

00248

EARLY DEVELOPMENT OF LAW AND EQUITY IN TEXAS

Burke in his *Tract on the Popery Laws* used the famous dictum:

> "There are two, and only two, foundations of law, equity and utility."

In the Texas constitutional convention of 1845, Thomas J. Rusk, the President of the Convention, paraphrased Burke's dictum and a text he had learned from Blackstone, in these words:

> "When cases are to be decided, the eternal principles of right and wrong are to be first considered, and the next object is to give general satisfaction in the community."[1]

He was advocating the employment of juries in equity cases. He urged that juries were better acquainted with the neighborhood and local conditions and circumstances than a chancellor and were generally as competent in suits in equity as in cases at law.

> "And if twelve men determine against a man he does not go away abusing the organs of the law; he comes to the conclusion that he is in the wrong."

The proposed jury "innovation"—for it was an innovation in American jurisprudence—was not adopted without strong opposition, led by Chief Justice John Hemphill, who was Chairman of the Committee on Judiciary. In the course of his address on the subject, Judge Hemphill said:

> "I cannot say that I am very much in favor of either chancery or the common-law system. I should much have preferred the civil law to have continued here in force for years to come. But inasmuch as the chancery system, together with the common law, has been saddled upon us, the question is now whether we shall keep up the chancery system or blend them together. If we intend to keep it up as it is known to the courts of England, of the United States, and of many of the states, we should oppose this

[1] *Debates of the Texas Convention*, Sess. July 28, 1845, Wm. F. Weeks, reporter, published by the authority of the convention (Houston, 1846) p. 274.

> innovation; for I do not know of any alteration which could be a greater innovation."[2]

It will be necessary to recall that Texas declared its independence of Mexico on March 2, 1836. The Constitution of the Republic of Texas, adopted on March 17, 1836, had provided[3] that the Congress of the Republic should, by statute,

> "introduce the common law of England, with such modifications as our circumstances, in their judgment, may require; and in all criminal cases, the common law shall be the rule of decision."

Until such time as the Congress should act in this regard, the "laws now in force in Texas" were to remain in force. The convention of 1836 broke up in disorder because of the shocking news of the fall of the Alamo and the invasion in force of the Mexican armies under the dictator, General Santa Anna. The first three congresses of the young Republic were engrossed largely with war legislation and political measures. On Jan. 20, 1840, the Fourth Congress in terms repealed "all the laws in force in this Republic prior to the first of Sept., 1836," (i. e., the Mexican and Spanish law, including their common law, which is essentially Roman) and enacted that,

> "the common law of England (so far as it is not inconsistent with the constitution or the acts of Congress now in force) shall, together with such acts, be the rule of decision in this Republic."

To the superficial observer, it might seem that in the contest on this remote frontier, the common law of England had gained the day over the civil law of Rome by reason of its greater virility and superior excellence. The colonists who were the fathers of the Republic of Texas were almost exclusively Anglo-Saxons, emigrants from the United States. They had come so recently under Mexican rule that they had neither time, facilities, nor inclination to become familiar with the Spanish language and the Spanish jurisprudence. Even the great Hemphill arrived in Texas as late as 1838 and acquired his knowledge of the Spanish law after that date. The wide expanse of country embraced in the Republic was very sparsely settled (the total

---

[2] *Ibid.*, pp. 271-272.
[3] Art. IV, sec. 13.

population estimated at 20,000), the ox-cart was the usual means of transportation, Indian raids and Mexican incursions kept all the men virtually under arms, and the population were put to it to produce enough from the soil to keep alive. The simple fact is the early Texans neither gave nor could give any discriminating thought to their system of private law. This question was overshadowed by the greater public questions of the maintenance of independence, of annexation to the United States, of public land grants, and slavery. Besides, after their experience with Mexican cruelty and treachery, they had a natural suspicion of everything Mexican. Little wonder then that they abruptly rejected a system of law which was contained in a strange language and adopted a system with which they were familiar and the records of which were written in their own tongue. Had the local conditions been different then, it is possible Texas like Louisiana, could have been cited by Dr. Hannis Taylor as a striking corroboration of his thesis that,

> "out of this fusion of Roman private and English public law there is arising throughout the world a new and composite state system, whose outer shell is English constitutional law, including jury trials in criminal cases, and whose interior code is Roman private law."[4]

It is a fact, however, that the Republic of Texas retained much of "the law as it aforetime was."

Having adopted the English common law as "the rule of decision," the Congress proceeded immediately by various statutory enactments to introduce important modifications of the common law. The Spanish community system of marital property rights was retained[5]; common-law rules as to succession were replaced by the civil-law rules[6]; the laws[7] exempting property, including the homestead, from forced sale were taken from Spanish prototypes[8]; the doctrines of the common law as to the estates arising

[4] Address before the Texas Bar Association, *Proceedings* (1914) p. 178.
[5] Act, Jan. 20, 1840.
[6] Acts, Jan. 28, 1840, and Feb. 5, 1840.
[7] Acts, Jan. 26, 1839, and Dec. 22, 1840.
[8] Sayles, *Early Laws of Texas*, Introduction by Judge Willie, p. vi. Dillon, *Laws and Jurisprudence of England and America*, p. 360, writes: "The Republic of Texas passed the first homestead act in 1836. It was the gift of the infant Republic of Texas to the world." The act of Jan. 26, 1830, is the first Texas legislation on the subject of the homestead.

under a mortgage were entirely disregarded in the act of Feb. 5, 1840, providing for the foreclosure of mortgages on real and personal property to satisfy "the lien created by the making of the mortgage"; the common-law rules as to the assignment of choses in action were abolished, as were also livery of seisin and common-law formalities in conveyancing.[9] The act of Jan. 28, 1840, on wills retained the legitime and other features of the civil law; and most sweeping of all, the act of Feb. 5, 1840, expressly discarded the entire common-law system of pleading and provided,

> "that the proceedings in all civil suits shall, as heretofore, be conducted by petition and answer."[10]

In the interval between the enactment of the last mentioned act and the constitutional convention of 1845, and in the face of the rejection of the common-law system of pleading, various statutes were enacted which referred in terms to the twofold jurisdiction of law and chancery. The very act of Feb. 5, 1840, which preserved the former simple system of "petition and answer"—a system to which the artificial distinction between actions at law and in equity was wholly foreign—contains a clause providing that,

> "in every civil suit in which sufficient matter of substance may appear upon the petition to enable the court to proceed upon the merits of the cause, the suit shall not abate for want of form; the court shall in the first instance endeavor to try each cause by the rules and principles of law; should the cause more properly belong to equity jurisdiction, the court shall, without delay, proceed to try the same according to the principles of equity."

This is a general exemption statute. The distinctive provision that the homestead owned by a married man could not be alienated by him without the consent of his wife first appeared in the constitution of 1845 by vote of the convention taken Aug. 5, 1845. It was debated in the convention as a matter of first impression.

[9] Act, Jan. 25, 1840.

[10] Later acts imported other elements of the civil law into the jurisprudence of Texas. We mention here as an example the act of Jan. 16, 1850, on the institution of a stranger as heir by adoption. Cf. *Eckford et ux v. Know* (1886) 67 Tex. 200, 204. It is not within the scope of this article to indicate all the numerous changes in the common law made by constitutional or statutory enactment, such as the abolition of dower, curtesy, primogeniture, estates tail, outlawry, trial by wager of battle, and wager of law, modifications as to the law of libel, etc.

It was of this passage that the supreme court of the Republic said:

> "A hundred judges, in almost any conceivable case, might differ in some degree as to its interpretation and exact function."[11]

They suggested that the district judge try each cause as at law, and "if he cannot succeed in the effort, then ascend the woolsack and chancel it." Other later statutes of the Republic recognized the distinction between actions at law and in equity and added to the perplexity of the courts in their efforts to harmonize the civil and the common-law systems.[12]

This state of confusion called for fundamental treatment and the constitutional convention of 1845 supplied it. Upon the initiative of Hemphill and Rusk, the following provisions were written into the Constitution of Texas[13]:

> "The District Court shall have original jurisdiction . . . . of all suits, complaints and pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at, or amount to, one hundred dollars exclusive of interest; and the said courts, or the judges thereof, shall have power to issue all writs necessary to enforce their own jurisdiction and give them a general superintendence and control over inferior jurisdictions."[14]

---

[11] *Whiting v. Turley* (1842) Dallam (Tex.) 453.

[12] The act of Feb. 5, 1840, to regulate proceedings in civil suits: sec. 2, as to costs "in any cause whether at law or equity."

The act of Feb. 5, 1840, on admission to the bar: sec. 2, admittance "to practice law in all the courts of law and equity."

The act of Jan. 25, 1841, to empower the judges of the district courts to submit issues of fact to a jury "in chancery cases," sec. 7.

The act of Feb. 5, 1841, on limitations: sec. 9, to the effect that "no bill of review shall be granted to any decree pronounced in equity after two years."

The act of Feb. 5, 1841, on sales by "courts of chancery."

These instances bear out Rusk's statement made in the convention of 1845: "Now, sir, the legislature has brought all things into confusion. Immediately after the revolution it was determined that one court should have jurisdiction over all cases, rejecting the useless distinction between law and equity, which has since grown up." *Debates*, p. 274.

[13] Art. IV, sec. 10.

[14] The proposal to create "separate chancery courts" was voted down in the convention. *Journal of the Convention*, p. 191.

As to whether Texas or New York is entitled to the credit of being

Despite this clear-cut abolition of a dual jurisdiction emigrant legislators and judges, steeped in the notions of their early legal training in common-law states and unfamiliar with the civil law, continued, as in the period from 1840 to 1845, to introduce into the jurisprudence of Texas occasional fragments of the common-law system.[15] This tendency disappeared as the indigenous system evolved and bench and bar became better acquainted with it. Apart from the special statutory action of trespass to try title for the recovery of land, it is recognized that there is in Texas but one form of civil action for the enforcement of private rights of whatever nature.

To abolish the common-law forms of action (including the chancery system) and yet retain the common law of England as "the rule of decision" is like trying to remove the motor nerves from a living being and leave the sensory nerves intact. The operation has not been successful in Texas.

Mr. Pomeroy asserts that the adoption of the system of code pleading,

> "has not produced, and was not intended to produce, any alteration of, nor direct effect upon, the primary rights, duties and liabilities of persons, created by either department of the municipal law. . . . The codes do not assume to abolish the distinctions between 'law' and 'equity' regarded as two complementary departments of the municipal law."[16]

The remark is not applicable to Texas. Texas has never been a "code state" nor a "quasi-code state."[17] Its system of pleading arose out of the civil law as truly as did that of Louisiana.[18]

---

the first state in the Union to adopt the blended system, see the Report of the Texas Bar Association Committee reproduced in (1896) 30 Am. L. Rev. 813. Mr. Sayles' remark (*ibid.*, p. 825) is suggestive: "As Texas never was a common-law state it cannot be said that she was the first to abolish the common-law system of practice, but it is the very highest evidence of the hard common sense of the pioneers of Texas that they retained these admirable features of the civil law."

[15] Cf. *Blumberg v. Mauer* (1873) 37 Tex. 2; *Grassmeyer v. Beeson* (1857) 18 Tex. 753, 766; *New York & Texas Land Company v. Hyland* (1894) 28 S. W. (Tex.) 206, 214.

[16] *Code Remedies* (4th ed.) sec. 8.

[17] So classified by Mr. Hepburn in his valuable article, The Historical Development of Code Pleading in America and England in *Select Essays in Anglo-American Legal History*, Vol. II, p. 672.

[18] John C. Townes, *Pleading in the District and County Courts of Texas* (2d ed.) pp. 84, 85.

Moreover the constitutional abolition of the distinction between law and equity in the administration of justice in the Texas courts is not limited in terms or by right interpretation to the mere abolition of the distinction between legal and equitable procedure.[18] Unfortunately, the opinions of the appellate courts still abound in loose references to "legal" titles and "equitable" titles (though the latter are said to be as "potent" as the former); the statutory action of trespass to try title is declared "essentially a legal action"; the plea of limitation under the statute is denominated a "legal defense," and so on. Over against these we get an occasional trenchant pronouncement like Hemphill's in *Bennett v. Spillars*:[19]

> "If the rules and principles arising from the antagonisms of the common law and equitable jurisdictions were thoroughly extirpated from the mind the provisions of legislation and the decisions and practice of the courts would become more harmonious and more in accordance with our system of judicial procedure."

The English common-law system has been further mutilated in Texas by many statutory enactments and by the adoption of important fractions of a rival system so that its inner harmony is destroyed. Moreover, the Texas courts have not hesitated to declare the rules of the common law inapplicable to our conditions and inconsistent with our usages.[21] Doubts have also recently arisen as to what is meant by the expression "the common law of England" in the Act of 1840 quoted above. In *The Indorsement Cases*,[22] decided in reconstruction days by a supreme court appointed by Major-General Griffin and commanding little respect in Texas, it was held that the law merchant constituted no part of the law of Texas because it was no part of the common law, i. e., the "ante-statute law of England." The Court of Criminal Appeals—the court of last resort in all criminal cases—by a vote

[18] *Hamilton v. Avery* (1857) 20 Tex. 612: "A subsisting equity, by the laws of this state that recognize no distinction between law and equity either in rights or their judicial preservation, confers a right of property by as strong a sanction as that which exists by a right purely legal."

[19] (1852) 7 Tex. 600, 602.

[20] *Stroud v. Springfield* (1866) 28 Tex. 649, 666; *Pace v. Potter* (1893) 85 Tex. 473; *Robertson v. State of Texas* (1911) 63 Ct. Cr. App. (Tex.) 216; *Clarendon Land Co. v. McClelland Bros.* (1893) 86 Tex. 179, 185.

[21] (1869) 31 Tex. 693.

of two to one held in 1911 that Texas has adopted also the English statutes in aid or amendment of the common law, passed before the emigration of our ancestors.[23] In 1913, the Supreme Court of Texas in holding that cohabitation was necessary to constitute a common-law marriage announced that,

> "the common law of England adopted by the Congress of the Republic (of Texas) was that which was declared by the courts of the different states of the United States. . . . . The decisions of the courts of those states determine what rule of the common law of England apply to this case. The effect of the act of 1840 was not to introduce and put into effect the body of the common law, but to make effective the provisions of the common law so far as they are not inconsistent with the conditions and circumstances of our people."[24]

Thus, the English decisions are not controlling as to the common law in Texas. The doctrine of *stare decisis* receives a body blow. A maze of sources is now to be drawn upon. The common law is not uniform throughout the states. Some have adopted the "ancient common law"; others the common law with reference to specific dates, with or without the statutes passed in amendment thereof; others, like Texas, without reference to any date.[25] None have retained it without important modifications.

The upshot of the whole matter is that our complex jurisprudence in Texas has become a storehouse of authorities for any rule the courts deem suited to our peculiar conditions and to the exigencies of any particular case, so as to assure to the litigants substantial justice. The simplicity and flexibility of the Texas system of pleading, and the variety and complexity—not to say confusion—in the sources of our rules of substantive law have had the effect of freeing the Texas courts largely from the restraints of outworn distinctions and rigid classifications and reasonings of the remote past and lifting them into the clearer atmosphere of a living law which is more nearly the reflection of the economic and social ideals of our time. The jurisprudence of Texas to-day is essentially a system of Freirecht. Various factors have operated to make it such. It is a fatal mistake

[23] *Robertson v. State of Texas, supra.*
[24] *Grigsby v. Reib et al.* (1913) 105 Tex. 597.
[25] Cf. (1916) 16 Col. L. Rev. 499, note.

to assume
of the juri
courts alon
Early T
gave limite
authorities.
Apart from
of the Lo
Louisiana c
in the enact
the viewpoi

"In
Judge
To d
law a
silent.

We frequen

"Th
consci
h f
ance

And:

It
must r
averme
ant be
if it be
in all e

I think we r

[23] Quite recen
given in honor
district court b
addresses urgen
refinements of
broad basis of
they assured him
[24] On Dec. 18,
Texas Congress
books and they
priated for book
or not is not kn
[25] *Hunt v. Tur*
[25] *Porter v. Mi*

to assume that one can get a correct or comprehensive view of the jurisprudence of a state from the opinions of appellate courts alone.[26]

Early Texas precedents were made under conditions that gave limited opportunity for the examination of even secondary authorities and called for large creative freedom in the courts.[27] Apart from Spanish authorities, Kent and Story, the decisions of the Louisiana courts were most frequently cited. The Louisiana civil code was admired and was freely drawn upon in the enactment of early laws. Its article 21 certainly reflected the viewpoint of the early Texas decisions:

> "In civil matters, where there is no express law, the Judge is bound to proceed and decide according to equity. To decide equitably an appeal is to be made to natural law and reason, or received usages, where positive law is silent."

We frequently find such expressions as these:

> "The *moral sense* of what is enjoined by *equity and good conscience* must be exceedingly obtuse to suppose that such flagrant *injustice* would receive the slightest countenance from any judicatory however organized."[28]

And:

> "It appears, then, that the liability of the defendant must result from the *facts of the case*, and not from the averments of the petition. If the possession of the defendant be wrongful, *in the popular acceptation of the term*, if it be inequitable and *unconscientious* . . . . he should *in all events* be responsible for the value of the property."[29]

I think we may safely say that apart from occasional lapses

---

[26] Quite recently the writer had the privilege of attending a banquet given in honor of a young lawyer who had just been appointed to the district court bench. Three members of the appellate courts in their addresses urgently advised the young jurist to pay little attention to the refinements of the law, to decide the causes submitted to him upon the broad basis of conscience and his conception of right and wrong, and they assured him he would be seldom reversed.

[27] On Dec. 18, 1837, Messrs. Jack and Kaufman were appointed by the Texas Congress to draft a code of laws, but the Republic had no law books and they made no progress. On Jan. 23, 1839, $1,000.00 was appropriated for books for these commissioners. Whether they got the books or not is not known. They failed to submit a code.

[28] *Hunt v. Turner* (1853) 9 Tex. 385.

[29] *Porter v. Miller* (1852) 7 Tex. 468, 479, opinion by Hemphill.

toward formalism, we have had in Texas from the very beginning a jurisprudence founded upon a "natural law with a variable content."

Besides the variety and richness of the sources of our jurisprudence, and the direction given by early precedents, the personnel of the judiciary has had much to do with the freedom of our jurisprudence from scholastic subtleties and slavish veneration for the ancient landmarks of the law. We certainly cannot complain of any *Weltfremdheit* on the part of our judges. All judicial offices in Texas have generally been elective and for comparatively short terms.[20] During the Republic the supreme court was composed of a chief justice, elected by the joint vote of both houses of Congress, and the several district judges as associate members. The judges of the Texas appellate courts have been drawn chiefly directly from the bar, at which they had achieved such success as brought them into prominence. Taken thus from the body of the people and dependent upon the suffrage of the people for re-election, it is unreasonable to suppose that the judges would consciously seek to bring about any estrangement between the people and the law. Furthermore, the overwhelming majority of the Texas judges, trial and appellate, have lacked and do lack a systematic law school education. Of the present membership of the two highest courts in Texas, not a single man has even attended a law school. After a painstaking search through available published and unpublished biographies, I find that only five of the sixty-six members of the Supreme Court of Texas graduated from a law school of any sort. Court opinions aside, not one has ever published a work of constructive legal scholarship. This is, of course, no reflection on their native ability nor necessarily on their learning. But it will not be held unbecoming in me, I am sure, to say that as a rule the opinions of the appellate courts in Texas do not disclose such an acquaintance with legal history, legal philosophy, and the science of jurisprudence, or such a degree of "discrimination in the use of the expository authorities"[21] as one should expect from schooled jurists. It is vital that only

[20] The only exceptions occurred in the brief intervals 1845-1850 and 1873-1876 when members of the supreme court were to be appointed by the Governor.

[21] Cf. Dean Wigmore's trenchant criticisms in The Qualities of Current Judicial Decisions (1915) 9 Ill. L. Rev. 529.

men of profound knowledge in legal science should be chosen to administer justice in a system characterized by such elasticity and freedom as ours. The appellate courts of Texas are now turning out about 1,800 published opinions a year—no other state has such an output. We have had—and are still having—a rough, blundering, frontier sort of justice. There has been much talk the past two years of "law reform" in Texas, which means more new and poorly considered legislation. But the heart of our jurisprudence is sound. If the time ever comes when the voices of our law professors will be effectively heard and respected in the forums of justice and the halls of legislation in this country, we may have a more constructive part in preserving the true principles of the law and keeping its evolution in right lines. Meantime, in harmony with or in defiance to "authority," we have the inspiring task of shaping the professional ideals and standards of the next generation of lawyers.

GEORGE C. BUTTE.

LAW SCHOOL, UNIVERSITY OF TEXAS.

MEMORANDUM

TO: Judge Wallace

FROM: Chuck Lord

DATE: January 29, 1987

RE: Direct Action Against Insurer and TEX. R. CIV. P. 38(c)

The general common law rule is that no privity exists between an injured person and the tortfeasor's liability insurer; therefore the injured person has no right of action directly against the insurer and cannot join the insured and the liability insurer as co-defendants. In some states, statutes have been enacted enabling an injured party to proceed directly against the liability insurer. In one state, Florida, the court created a common law right of direct action; however, this common law right was promptly superseded by legislative action. No other state has followed the Florida Supreme Court.

The creation of a right of direct action against an insurer is not simply a matter of repealing the prohibition against joinder, TEX. R. CIV. P. 38(c), although clearly this would be the logical first step. The next impediment is the "no action" clause contained in the contract between insurer and insured. This clause prohibits legal action against the insurer until a judgment against the insured has been rendered. Here is the typical clause:

> LEGAL ACTION AGAINST US
>
> No legal action may be brought against us until there has been full compliance with all the terms of this policy. In addition, under Liability Coverage, no legal action may be brought against us until:
>
> 1. We agree in writing that the covered person has an obligation to pay; or
> 2. The amount of that obligation has been finally determined by judgment after trial.
>
> No person or organization has any right under this policy to bring us into any action to determine the liability of a covered person.

In Kuntz v. Spence, 67 S.W.2d 254 (Tex. Comm'n App. 1935, holding approved), the court concluded that the no-action clause did not violate public policy.

Finally the court must consider what important public policy is furthered by permitting joinder of the insurer and whether it is properly a decision for this court or the legislature. Other states, with the exception of Florida, have deferred to the legislature.

The argument for changing Rule 38(c) is that the insurance companies at present benefit from a double standard, the insurance company may control the defense of its insured, yet cannot be named as a party defendant. In point of fact, the insurance company does not benefit from this perceived "double standard" because as the price for control the insurer is bound by the judgment against its insured.

Even if the court is convinced that under modern practice no prejudice will be injected into the suit by joinder of the insurer, the second reason for non-joinder, relevance, appears to be as valid today as it was 40 years ago. That is, whether an alleged tortfeasor has insurance is wholly irrelevant to any issue in the liability action.

I doubt that much is to be gained by joining insurance companies in liability suits and such joinder may complicate such cases. For example, at present an insurance company may face a real dilemma when it believes that the suit against its insured is excluded from coverage under the policy. If the insurance company rejects coverage and declines to defend, it does so at great risk. It cannot intervene in the liability suit and litigate coverage. See State Farm v. Taylor, ___ S.W.2d ___ (Tex. App. - Fort Worth 1986, writ ref'd n.r.e.) (C-5419). If, however, the insurance company is properly a party in the liability suit, then arguably it could raise and litigate policy defenses in that same suit greatly complicating and protracting such litigation.

Attached to this memo is a memorandum prepared for Judge Robertson on the subject of direct action against insurers. It does a good job of setting out where Texas and the other states are at present on this issue. See also 12A Couch on Insurance Second § 45:784 et seq., and Appleman, 8 Insurance Law & Practice § 4861 et seq.

MEMORANDUM

TO: Judge Robertson

FROM: Eddie Molter

DATE: October 30, 1986

RE: Direct Action Against Insurer

A. Background on Texas Law

Early Texas cases held that an insurer might be joined as a defendant in the case of a liability policy. American Automobile Insurance Co. v. Streeve, 218 S.W. 534, 535 (Tex. Civ. App. - San Antonio 1920, writ ref'd) (following the rule that joinder is proper when the causes of action grow out of the same transaction and rejecting the contention that joinder resulted in an improper reference to insurance); Monzingo v. Jones, 34 S.W.2d 662, 663-64 (Tex. Civ. App. - Beaumont 1931, no writ) (same but also indicating that policy language that insurer was not liable until after judgment has been awarded against insured is not inconsistent with joinder). However, Ray v. Moxon, 56 S.W.2d 469 (Tex. Civ. App. - Amarillo 1933) aff'd 81 S.W.2d 488 (Tex. Comm'n App. 1935, opinion adopted) started a trend toward holding that "no action" clauses prevent joinder or direct action against the insurer prior to judgment against the insured. See Kuntz v. Spence, 67 S.W.2d 254 (Tex. Comm'n App. 1934, holding approved); Grasso v. Cannon, 81 S.W.2d 485 (Tex. Comm'n App. 1935, opinion adopted); American Fidelity & Casualty Co. v. McClendon, 81 S.W.2d 493 (Tex. Comm'n App. 1935, opinion adopted); Seaton v. Pickens, 87 S.W.2d 709 (Tex. Comm'n App. 1935, opinion adopted).

In Kuntz, 67 S.W.2d at 255, the court, in talking about a no action clause, said that it prevents the casualty company from being bound

> as for primary liability to an injured party so that it can be sued alone prior to a judgment against the insured, or sued with the insured before such judgment against him is obtained.... [I]t fully guards against such suit. If there is a reason why such provision in the contract should not be given effect, we are unable to think of it. Such provision violates no statute, and is certainly not against public policy.

The court also gave another reason for prohibiting direct action. It said:

> [I]t is certainly very important to the insurance company that it not be sued with the insured. In this respect we judicially know that juries are much more apt to return a verdict for the injured party, and for a larger amount, if they know the loss is ultimately to fall on an insurance company.

Id. at 256.

The court in Seaton, 87 S.W.2d at 711, went even further. It said:

> The policy in the instant case does not provide in terms that no action shall be brought on it until after judgment in favor of the injured person against the assured, but its effect is the same when it specifically states the limit of the company's liability as being the payment of a final judgment that may be rendered against the insured.

Therefore, it seems a "no action" clause may not be necessary to prevent direct action.

Furthermore, there seems to be some statutory basis for arguing that a claimant has no direct action against the insurer, at least in connection with motor carrier liability insurance. See Tex. Rev. Civ. Stat. Ann. art. 911a, § 11 (Vern. 1964) (Such policy or policies shall furthermore provide that the insurer will pay all judgments which may be recovered against the insured motor bus company....); Tex. Rev. Civ. Stat. Ann. art. 911b § 13 (Vern. 1964) (the obligor therein will pay to the extent of the face amount of such insurance policies and bonds all judgments which may be recovered against the motor carrier....)

In Grasso v. Cannon Ball Motor Freight Lines, 81 S.W.2d at 484-85, the court emphasized the language "will pay all judgments" in concluding that the statute barred direct action. It said:

> In this regard the statute by express words, and all fair implication to be drawn from the express words used, makes the basis of a suit by an injured party against the insurance company a "judgment" against the truck operator, and no authority for a suit against such insurance company is authorized or has any basis whatever unless and until there is a judgment.

Id. Moreover, the court held that the legislative history of the statutes demonstrated a "conclusive legislative intent not to allow insurance companies .... to be sued in the same suit with the motor carriers or operators." Id. at 485. See also American

Fidelity, 81 S.W.2d at 495; Elliot v. Lester, 126 S.W.2d 756, 758 (Tex. Civ. App. - Dallas 1939, no writ) ("The procedure, to the effect that the insurance carriers be not directly sued or mentioned in the pleadings and proof, obviously, was for the beneficial convenience of the insurance companies.")

In addition, the rules of civil procedure prohibit joinder of a liability or indemnity insurance company unless the company is by statute or contract directly liable to the injured party. Tex. R. Civ. P., Rules 50(b), 97(f). See also Webster v. Isbell, 100 S.W.2d 350 (Tex. 1937) (holding that insurer may not be joined unless the injured party shows he was made a beneficiary of the insurance contract by statute or the terms of the policy). Of course, such a rule leaves open an avenue for joinder in the case of required policies if the court holds that the policy provides for direct liability.

B. Compulsory Insurance and Direct Action in Texas

"When ... insurance is required by a statute or ordinance, the protection of the insured is not the primary objective of the insurance. Even in the absence of specific language securing to injured persons direct rights under the policy, there is inherent in such a policy an inference of a compulsory undertaking on the part of the insurer to answer in damages to the injured person." Annot., 20 A.L.R.2d 1097 (1951). See also Dairyland County Mutual Insurance Company of Texas v. Childress, 650 S.W.2d 770, 775 (Tex. 1983) ("There is no question in our minds that the compulsory insurance requirement of the Texas motor vehicle safety law implies that all potential claimants resulting from automobile accidents are intended as beneficiaries of the statutorily required automobile liability coverage.")

In Texas, a determination of whether a claimant can bring a direct action under a compulsory policy has depended in large part upon the language of the statute or ordinance making insurance compulsory. For example, in Scroggs v. Morgan, 107 S.W.2d 911 (Tex. Civ. App. - Beaumont 1937) rev'd on other grounds 130 S.W.2d 283, an ordinance established mandatory liability insurance for taxis with a direct action against the insurer. The court rejected the insurer's claim that it should not be joined because juries are more likely to award verdicts against insurance companies because the ordinance provided otherwise. However, the ordinance establishing mandatory insurance for taxis in the City of Houston said that insurers "shall pay all final judgments" rendered against the insured. Crone v. Checker Cab & Baggage Co., 135 S.W.2d 696, 697 (Tex. Comm'n App. 1940, opinion adopted). The court held that this language precluded any cause of action against the insurer until an obligation arose from a rendition of a final judgment against the insured. Id. See also Grasso, 81 S.W.2d 842 (same in regards to art. 911b, § 13); American Fidelity, 81 S.W.2d 493 (same in regards to art. 911a, § 11).

Art. 6701h, § 1A establishes mandatory motor vehicle liability coverage. It reads as follows:

> On and after January 1, 1982 no motor vehicle may be operated in this State unless a policy of automobile liability insurance in at least the minimum amounts to provide evidence of financial responsibility under this Act is in effect to insure against potential losses which may arise out of the operation of that vehicle.

Art. 6701h, § 1(10) defines "Proof of Financial Responsibility." It merely sets the amount of coverage needed. Neither it or § 1A contain any language that would seem to prevent direct action. In other words, there is no "shall pay all final judgment" language as there is in art. 911a and art. 911b.

However, the standard automobile liability policy in Texas contains a "no action" clause. Under the current case law, this would probably be an insurmountable barrier to direct action.

C. Compulsory Insurance and Direct Action in Other States

Some states have permitted direct action or joinder where compulsory insurance was involved. See American Southern Insurance Co. v. Dime Taxi Service, 275 Ala. 51, 151 So.2d 783 (1963); Millison v. Dittman, 180 Cal. 443, 181 Pa. 7879 (1919); Addington v. Ohio Southern Exp., Inc., 165 S.E.2d 658 (Ga. App. 1968); Kirtland v. Tri-State Insurance, 556 P.2d 199 (Kan. 1976). Apparently, the pervasive rationale was that required policies are primarily for the benefit of the general public rather than the insured. Other states, including Texas as discussed above, have refused to permit direct action or joinder even in the case of a required policy. See Smith Stage Co. v. Eckert, 21 Ariz. 28, 184 P. 1001 (1919); Williams v. Frederickson Motor Express Lines, 195 N.C. 682, 143 S.E. 256 (1928); Petty v. Lemons, 217 N.C. 492, 8 S.W.2d 616 (1940); Keseleff v. Sunset Highway Motor Freight Co., 187 Wash. 642, 60 P.2d 720 (1936). At least one state that authorized direct action under these circumstances has refused to do so when the policy contained a no action clause. Southern Indemnity Co. v. Young, 102 Ga. App. 914, 117 S.E.2d 882 (1961).

D. Direct Action By Judicial Fiat

At one time, Florida had direct action by judicial fiat; however, the legislature overruled the holding of the case by enacting a statute prohibiting direct action. Shepardizing the Florida case reveals that every other jurisdiction faced with the prospects of adopting the Florida court's rationale refused to do so. A major consideration in many of those cases seemed to be that the legislature had overruled the decision.

Even though the case has been legislatively overruled, a

discussion of its analysis is useful in providing an example of how direct action could be justified by the Texas Supreme Court.

The threshhold case is styled Shingleton v. Bussey, 223 So.2d 713 (Fla 1969). The court began its analysis by saying the state's Financial Responsibility law was evidence that members of the injured public were meant to be third party beneficiaries of the insurance contract because the insured acquired the insurance as a means of discharging his obligations that may accrue to members of the public arising out of his negligent operation of a motor vehicle. Viewed in this light the court held "there exists sufficient reason to raise by operation of law the intent to benefit injured third parties and thus render motor vehicle liability insurance amenable to the third party beneficiary doctrine." Id. at 716. As noted earlier, Texas has already taken this step via the Childress case.

However, the Florida court recognized this was only the first step. They still had to decide when the injured party could exercise his right to sue on the contract. Id.

It recognized liability of the insured was a condition precedent to liability of the insurer, but it felt that this did not have the effect of postponing liability until a judgment had been rendered against the insured. Id. at 717.

The court felt that since insurance had always been heavily regulated by the state, it was not unreasonable to limit the effect of express contractual provisions where they collide with the public interest. Id. The court believed that "no action" clauses greatly hindered an injured person's right to an adequate "remedy by due course of law without denial or delay." Id. It recognized that a carrier could impose reasonable limits on its responsibilities to pay benefits, but it cannot unreasonably burden the injured person's rights. Id. The court then concluded that the insured and insurer had no right to contract away the injured party's rights through a "no action" clause. Id. at 718.

Furthermore, the court recognized the argument that juries are more likely to find negligence or enlarge damages when an affluent institution has to bear the loss, but the court felt that a stage has "been reached where juries are more mature." Id. It also felt that candid admissions of existence and policy limits of insurance would benefit insurers by limiting their policy judgment payments because the opposite approach "may often mislead juries to think insurance coverage is greater than it is."

As additional reasons for authorizing direct action, the court cited the fact that the rules of joinder were adopted with the purpose of avoiding multiplicity of suits. It saw no reason why insurance companies should be exempt from the law in that respect.

It also felt that it is anomalous to deprive the ultimate beneficiary of the proceeds of a policy because the insured failed to satisfy any conditions of payment. It felt by allowing joinder, all of those types of issues would be on the table so the injured party could protect his rights against the insurer. By allowing joinder "the interests of all the parties and the concommittant right to expeditiously litigate the same in concert are preserved." Id. at 720.

E. Direct Action by Statute

Approximately twelve states have enacted some form of direct action statutes. See 12A COUCH ON INSURANCE § 45:797, p. 452, n.18. In accord with general principles relating to the supremacy of statutory provisions over contract provisions, the right to direct action cannot be modified by contract. Malgrem v. Southwestern Automobile Insurance, 201 Cal. 29, 255 P. 512 (1927). In other words, direct action statutes take precedence over "no action" clauses.

Conclusion

While the Florida case establishes some framework for establishing direct action by judicial feat, adopting such rationale in Texas would require overruling a long line of precedents. As Bussey indicates, the idea that keeping the information concerning insurance from the jury may be outmoded, but the Grasso case also rested on the grounds that a "no action" clause did not violate public policy in Texas. As indicated earlier, the fact that the Childress court found that injured parties are third party beneficiaries to the insurance contract is only the beginning. The court must still decide when the injured party can sue. This is where the "no action" clause comes into play. One can argue that it establishes a condition precedent for suit by the third party. This would recognize that the third party has a right to sue but would place some limits on that right.

Getting around art. 911a and 911b would seem to be even more difficult. (These only deal with motor carrier liability.) There has been no change in the language of those statutes since the 1930's. Therefore, one would have to expressly overrule cases construing them.

There seem to be two possible solutions to the problem. The first is legislative action. The second is to get insurance companies to drop the "no action" clause from their policies. If they really believe it is in their best interest to eliminate the intermediary steps as the amicus suggested, it is easily in their hands to remedy the situation.

As a further note, it seems that if this court was to follow the Florida case in respect to direct action, it is entirely

possible that our legislature would follow the Florida legislature's course of action. Insurance lobbies seem to be strong and powerful. Unless they really believe that direct action is in their best interests, it is a good bet that they would be on the doorsteps of the capitol immediately following an adverse decision in this regard.

SUPPLEMENTAL MEMORANDUM

TO: Judge Wallace

FROM: Chuck Lord

DATE: January 30, 1987

RE: Direct Action Against Insurer

As we anticipated, the fact that the Insurance Board is the agency directly responsible for the "no action" clause does not lighten the task this court must undertake to undo its effect. In Texas Liquor Control Board v. Attic Club, Inc., 457 S.W.2d 41, 45 (Tex. 1970), we said that a rule or order promulgated by an administrative agency acting within its delegated authority is to be considered under the same principles as if it were a legislative act. In Lewis v. Jacksonville Building & Loan Assoc., 540 S.W.2d 307, 311 (Tex. 1976), Judge Denton wrote:

> Valid rules and regulations promulgated by an administrative agency acting within its statutory authority have the force and effect of legislation.

Attached are the statutes which delegate to the board the power to prescribe policy forms and endorsements.

State; provided, however, that any insurer may use any form of endorsement appropriate to its plan of operation, provided such endorsement shall be first submitted to and approved by the Board; and any contract or agreement not written into the application and policy shall be void and of no effect and in violation of the provisions of this subchapter, and shall be sufficient cause for revocation of license of such insurer to write automobile insurance within this State.

Acts 1951, 52nd Leg., ch. 491.

For text of article effective January 1, 1982, see art. 5.06, post.

Art. 5.06. Policy Forms and Endorsements

Text of article effective January 1, 1982

(1) In addition to the duty of approving classifications and rates, the Board shall prescribe certificates in lieu of a policy and policy forms for each kind of insurance uniform in all respects except as necessitated by the different plans on which the various kinds of insurers operate, and no insurer shall thereafter use any other form in writing automobile insurance in this State; provided, however, that any insurer may use any form of endorsement appropriate to its plan of operation, provided such endorsement shall be first submitted to and approved by the Board; and any contract or agreement not written into the application and policy shall be void and of no effect and in violation of the provisions of this subchapter, and shall be sufficient cause for revocation of license of such insurer to write automobile insurance within this State.

(2) An insurer, if in compliance with applicable requirements and conditions, may issue and deliver a certificate of insurance as a substitute for the entire policy of insurance. The certificate of insurance shall make reference to and identify the Board prescribed policy or policy form for which the substitution of certificate is made. The certificate shall be in such form as is prescribed by the State Board of Insurance. The certificate will represent the policy of insurance, and when issued, shall be evidence that the certificate holder is insured under such identified policy and policy form prescribed by the Board. The certificate is subject to the same limitations, conditions, coverages, selection of options, and other provisions of the policy as are provided in the policy, and that insurance policy information is to be shown on and adequately referenced by the certificate of insurance issued by the insurer to the insured. Policy forms include endorsements, whether those endorsements are attached initially with the is-

Art. 5.35. Uniform Policies

The Board shall make, promulgate and establish uniform policies of insurance applicable to the various risks of this State, copies of which uniform policies shall be furnished each company now or hereafter doing business in this State. After such uniform policies shall have been established and promulgated and furnished the respective companies doing business in this State, such companies shall, within sixty (60) days after the receipt of such forms of policies, adopt and use said form or forms and no other; also all companies which may commence business in this State after the adoption and promulgation of such forms of policies, shall adopt and use the same and no other forms of policies.

Acts 1951, 52nd Leg., ch. 491.

Historical Note

Source:
Based on Vernon's Ann.Civ.St. art. 4888 (Acts 1913, p. 195), without substantive change.

Cross References

Condominium regime, insurance and use of proceeds, see Vernon's Ann.Civ.St. art. 1301a, §§ 19 to 21.

Lloyd's plan, applicability of this article, see art. 18.23.

Policies and applications, see art. 21.35.

Law Review Commentaries

Annual survey of Texas law:
Burden of proof. Harvey L. Davis, 22 Southwestern L.J. (Tex.) 30, 45 (1968).
Fire and casualty insurance. Harvey L. Davis, 23 Southwestern L.J. (Tex.) 130 (1969); Royal H. Brin, Jr., 26 Southwestern L.J. (Tex.) 174 (1972).
Insurance law. Royal H. Brin, Jr., 25 Southwestern L.J. (Tex.) 106 (1971).

Change of ownership within the meaning of the standard fire policy. 8 Baylor L. Rev. 213 (1956).

Fire insurance—community property—"sole ownership" clauses. 13 Southwestern L.J. (Tex.) 373 (1959).

Friendly and hostile fires. 33 Texas L. Rev. 954 (1955).

Recovery for damages caused by sonic boom under the aircraft provision. 12 Baylor L.Rev. 343 (1960).

Texas standard homeowners policy. Larry L. Collaher, 24 Southwestern L.J. (Tex.) 636 (1970).

Library References

Insurance ⇐133(1).
C.J.S. Insurance § 227 et seq.

Appleman, Insurance Law and Practice, §§ 10422, 10423.

Notes of Decisions

Note 60

60. Attorney's fees

In insured's action seeking to recover upon fire insurance policy for total loss of dwelling and household goods located therein, any error in admitting testimony relating to attorney fees incurred by insured after which trial court refused to submit issues to jury as to such an element of recovery was harmless. Allstate Ins. Co. v. Chance (Civ.App.1979) 582 S.W.2d 530, reversed on other grounds 590 S.W.2d 703.

There is no authority that would authorize recovery for attorney fees in insured's suit upon fire insurance policy. Id.

In absence of statutory authority or contractual provision, attorney fees are not ordinarily recoverable in an action on fire policy. First Preferred Ins. Co. v. Bell (Civ.App.1979) 587 S.W.2d 798, ref. n. r. e.

Article 6.13 which provides that fire policy, in case of total loss by fire of insured property, shall be held and considered to be liquidated demand against insurer for full amount of such policy, but which does not specifically provide for recovery of attorney fees, did not authorize award of attorney fees in action to recover under oral contract for fire insurance. Id.

61. Review

Where Court of Civil Appeals, on appeal from summary judgment for insured in suit on homeowners' policy, determined that loss was within exclusionary clause of policy, judgment was required to be reversed and judgment would be entered that insurer's motion for summary judgment be sustained and that insureds take nothing by their suit. State Farm Fire & Cas. Co. v. Volding (Civ.App.1968) 426 S.W.2d 907, ref. n. r. e.

Where electrical subcontractor found liable to general contractor and parties for whom buildings were being built, for negligent damage to building by fire failed to affirmatively plead contract wherein general contractor assertedly waived its fire insurer's subrogation rights against electrical subcontractor, electrical subcontractor could not contend on appeal that trial court erred in permitting recovery in face of the alleged waiver of subrogation rights. Seamless Floors by Ford, Inc. v. Value Line Homes, Inc. (Civ.App.1969) 438 S.W.2d 598, ref. n. r. e.

Insured's complaint that no evidence existed to support jury finding that insured was contributorily negligent in failing to report, as required by fire policy, value of computer and other equipment on last monthly report before fire destroyed computer and equipment could not be made on appeal inasmuch as trial court never ruled on issue of contributory negligence and insured failed to file motion for new trial assigning "no evidence" issue as point of error. Northern Assur. Co. of America v. Stan-Ann Oil Co., Inc. (Civ.App.1980) 603 S.W.2d 218.

Art. 5.36. Standard Forms

The Board shall prescribe all standard forms, clauses and endorsements used on or in connection with insurance policies. All other forms, clauses and endorsements placed upon insurance policies shall be placed thereon subject to the approval of the Board. The Board shall have authority in its discretion to change, alter or amend such form or forms of policy or policies, and such clauses and endorsements used in connection therewith, upon giving notice.

Acts 1951, 52nd Leg., ch. 491.

Historical Note

Source:

Based on Vernon's Ann.Civ.St. art. 4889 (Acts 1913, p. 195), without substantive change.

Cross References

Lloyd's plan, applicability of this article, see art. 18.23.

00272

exclusively in board of insurance commissioners, and rates promulgated by commission are not subject to alteration by agreement, waiver, estoppel or any other device, and insurance carrier agrees to collect, and subscriber agrees to pay, premium rate prescribed by commission, and insurance carrier cannot charge more, nor bind itself to take less, than lawful rate. Id.

Contract to rebate, directly or indirectly, any part of workmen's compensation policy premium as prescribed by state board of insurance commissioners, is illegal and void, and is no defense in suit for full premium. Id.

Where compensation insurance rate is prescribed by one of state's regulatory bodies, it is the only rate parties to contract thereunder can contract for. Id.

Oral agreement under which insured was to be given guaranteed 20 per cent premium discount was invalid, and not available as defense to suit for premiums. Id.

The Board of Insurance Commissioners may not legally approve an insurance company's plan of operation and endorsement as requested and which required that the endorsement be attached to policies for risks of given size or greater than the given size and may not be attached to risks of less than the given size. Op.Atty.Gen.1940, No. O-2049.

Art. 5.57. Uniform Policy

The Board shall prescribe a uniform policy for workmen's compensation insurance and no company or association shall thereafter use any other form in writing workmen's compensation insurance in this State, provided that any company or association may use any form of endorsement appropriate to its plan of operation, if such endorsement shall be first submitted to and approved by the Board, and any contract or agreement not written into the application and policy shall be void and of no effect and in violation of the provisions of this subchapter, and shall be sufficient cause for revocation of license to write workmen's compensation insurance within this State.

Acts 1951, 52nd Leg., ch. 491.

Historical Note

Source:

Based on Vernon's Ann.Civ.St. art. 4913 (Acts 1923, p. 408), without substantive change.

Library References

Workers' Compensation ⇐1061.
C.J.S. Workmen's Compensation § 369.

Appleman, Insurance Law and Practice, §§ 10422 to 10424.

Notes of Decisions

1. Construction and application

Oral agreement by insurer to compensate insured for short rate premiums which previous insurer might charge because of cancellation of policy, made in contravention of written policy and accompanied by agreement of insured's president to buy large amount of stock of insurer, particu-

and fixed a rate of $4.36 for boat building not otherwise classified, and employer was engaged in building government boats 110 feet in length, action of commissioners in applying higher rate to employer by limiting application of lower rate to pleasure craft in a particular instance was error and not binding on federal court. Rice v. Continental Cas. Co. (C.C.A.1946) 153 F.2d 964.

The function of the Texas state board of insurance commissioners in applying the proper rate for workmen's compensation to particular risks being purely ministerial, federal district court, in a diversity of citizenship case arising out of such rates, was competent to adjudicate issues arising on application of rate to particular risk. Id.

Art. 5.56. To Prescribe Standard Forms

The Board shall prescribe standard policy forms to be used by all companies or associations writing workmen's compensation insurance in this State. No company or association authorized to write workmen's compensation insurance in this State shall, except as hereinafter provided for, use any classifications of hazards, rates or premium, or policy forms other than those made, established and promulgated and prescribed by the Board.

Acts 1951, 52nd Leg., ch. 491.

Historical Note

Source:

Based on Vernon's Ann.Civ.St. art. 4908 (Acts 1923, p. 408), without substantive change.

Library References

Workers' Compensation ⇐1061.
C.J.S. Workmen's Compensation § 369.
Appleman, Insurance Law and Practice, §§ 10422 to 10424.

Notes of Decisions

1. Construction and application

Oral agreement by insurer to compensate insured for short rate premiums which previous insurer might charge because of cancellation of policy, made in contravention of written policy and accompanied by agreement of insured's president to buy large amount of stock of insurer, particularly where daughter of insured's president was insurer's agent, was invalid and unenforceable. Continental Fire & Cas. Ins. Corp. v. American Mfg. Co. (Civ.App.1949) 221 S.W.2d 1006, error refused.

Establishment of premium rates for workmen's compensation insurance is exclusively vested in Board of Insurance Commissioners and rates promulgated by Board are not subject to alteration by agreement, estoppel, waiver or otherwise. Traders & Gen. Ins. Co. v. Frozen Food Exp. (Civ.App.1953) 255 S.W.2d 378, ref. n. r. e.

The uniform policy requirements of the Insurance Code were not intended to prevent promulgation of different policy forms to fit different types of coverage or risk assumption by a compensation insurance carrier, and did not preclude use of different policy form for employers choosing between retrospective plan of premium computation and guaranteed cost discount plan, since all that law requires is that policies within each class be uniform. Associated Indem. Corp. v. Oil Well Drilling Co. (Civ.App.1953) 258 S.W.2d 523, affirmed 153 T. 153, 264 S.W.2d 697.

Intent of this article and arts. 5.55, 5.57 and 5.60, is to remove premiums on workmen's compensation policies from field of bargaining. Associated Emp. Lloyds v. Dillingham (Civ.App.1954) 262 S.W.2d 544, error refused.

Establishment of premium rates for workmen's compensation policies is vested

MEMORANDUM

TO: Judge Robertson

FROM: Eddie Molter

DATE: October 30, 1986

RE: Direct Action Against Insurer

A. Background on Texas Law

Early Texas cases held that an insurer might be joined as a defendant in the case of a liability policy. American Automobile Insurance Co. v. Streeve, 218 S.W. 534, 535 (Tex. Civ. App. - San Antonio 1920, writ ref'd) (following the rule that joinder is proper when the causes of action grow out of the same transaction and rejecting the contention that joinder resulted in an improper reference to insurance); Monzingo v. Jones, 34 S.W.2d 662, 663-64 (Tex. Civ. App. - Beaumont 1931, no writ) (same but also indicating that policy language that insurer was not liable until after judgment has been awarded against insured is not inconsistent with joinder). However, Ray v. Moxon, 56 S.W.2d 469 (Tex. Civ. App. - Amarillo 1933) aff'd 81 S.W.2d 488 (Tex. Comm'n App. 1935, opinion adopted) started a trend toward holding that "no action" clauses prevent joinder or direct action against the insurer prior to judgment against the insured. See Kuntz v. Spence, 67 S.W.2d 254 (Tex. Comm'n App. 1934, holding approved); Grasso v. Cannon, 81 S.W.2d 485 (Tex. Comm'n App. 1935, opinion adopted); American Fidelity & Casualty Co. v. McClendon, 81 S.W.2d 493 (Tex. Comm'n App. 1935, opinion adopted); Seaton v. Pickens, 87 S.W.2d 709 (Tex. Comm'n App. 1935, opinion adopted).

In Kuntz, 67 S.W.2d at 255, the court, in talking about a no action clause, said that it prevents the casualty company from being bound

> as for primary liability to an injured party so that it can be sued alone prior to a judgment against the insured, or sued with the insured before such judgment against him is obtained.... [I]t fully guards against such suit. If there is a reason why such provision in the contract should not be given effect, we are unable to think of it. Such provision violates no statute, and is certainly not against public policy.

The court also gave another reason for prohibiting direct action. It said:

> [I]t is certainly very important to the insurance company that it not be sued with the insured. In this respect we judicially know that juries are much more apt to return a verdict for the injured party, and for a larger amount, if they know the loss is ultimately to fall on an insurance company.

Id. at 256.

The court in Seaton, 87 S.W.2d at 711, went even further. It said:

> The policy in the instant case does not provide in terms that no action shall be brought on it until after judgment in favor of the injured person against the assured, but its effect is the same when it specifically states the limit of the company's liability as being the payment of a final judgment that may be rendered against the insured.

Therefore, it seems a "no action" clause may not be necessary to prevent direct action.

Furthermore, there seems to be some statutory basis for arguing that a claimant has no direct action against the insurer, at least in connection with motor carrier liability insurance. See Tex. Rev. Civ. Stat. Ann. art. 911a, § 11 (Vern. 1964) (Such policy or policies shall furthermore provide that the insurer will pay all judgments which may be recovered against the insured motor bus company....); Tex. Rev. Civ. Stat. Ann. art. 911b § 13 (Vern. 1964) (the obligor therein will pay to the extent of the face amount of such insurance policies and bonds all judgments which may be recovered against the motor carrier....)

In Grasso v. Cannon Ball Motor Freight Lines, 81 S.W.2d at 484-85, the court emphasized the language "will pay all judgments" in concluding that the statute barred direct action. It said:

> In this regard the statute by express words, and all fair implication to be drawn from the express words used, makes the basis of a suit by an injured party against the insurance company a "judgment" against the truck operator, and no authority for a suit against such insurance company is authorized or has any basis whatever unless and until there is a judgment.

Id. Moreover, the court held that the legislative history of the statutes demonstrated a "conclusive legislative intent not to allow insurance companies ... to be sued in the same suit with the motor carriers or operators." Id. at 485. See also American

Fidelity, 81 S.W.2d at 495; Elliot v. Lester, 126 S.W.2d 756, 758 (Tex. Civ. App. - Dallas 1939, no writ) ("The procedure, to the effect that the insurance carriers be not directly sued or mentioned in the pleadings and proof, obviously, was for the beneficial convenience of the insurance companies.")

In addition, the rules of civil procedure prohibit joinder of a liability or indemnity insurance company unless the company is by statute or contract directly liable to the injured party. Tex. R. Civ. P., Rules 50(b), 97(f). See also Webster v. Isbell, 100 S.W.2d 350 (Tex. 1937) (holding that insurer may not be joined unless the injured party shows he was made a beneficiary of the insurance contract by statute or the terms of the policy). Of course, such a rule leaves open an avenue for joinder in the case of required policies if the court holds that the policy provides for direct liability.

B. Compulsory Insurance and Direct Action in Texas

"When ... insurance is required by a statute or ordinance, the protection of the insured is not the primary objective of the insurance. Even in the absence of specific language securing to injured persons direct rights under the policy, there is inherent in such a policy an inference of a compulsory undertaking on the part of the insurer to answer in damages to the injured person." Annot., 20 A.L.R.2d 1097 (1951). See also Dairyland County Mutual Insurance Company of Texas v. Childress, 650 S.W.2d 770, 775 (Tex. 1983) ("There is no question in our minds that the compulsory insurance requirement of the Texas motor vehicle safety law implies that all potential claimants resulting from automobile accidents are intended as beneficiaries of the statutorily required automobile liability coverage.")

In Texas, a determination of whether a claimant can bring a direct action under a compulsory policy has depended in large part upon the language of the statute or ordinance making insurance compulsory. For example, in Scroggs v. Morgan, 107 S.W.2d 911 (Tex. Civ. App. - Beaumont 1937) rev'd on other grounds 130 S.W.2d 283, an ordinance established mandatory liability insurance for taxis with a direct action against the insurer. The court rejected the insurer's claim that it should not be joined because juries are more likely to award verdicts against insurance companies because the ordinance provided otherwise. However, the ordinance establishing mandatory insurance for taxis in the City of Houston said that insurers "shall pay all final judgments" rendered against the insured. Crone v. Checker Cab & Baggage Co., 135 S.W.2d 696, 697 (Tex. Comm'n App. 1940, opinion adopted). The court held that this language precluded any cause of action against the insurer until an obligation arose from a rendition of a final judgment against the insured. Id. See also Grasso, 81 S.W.2d 842 (same in regards to art. 911b, § 13); American Fidelity, 81 S.W.2d 493 (same in regards to art. 911a, § 11).

Art. 6701h, § 1A establishes mandatory motor vehicle liability coverage. It reads as follows:

> On and after January 1, 1982 no motor vehicle may be operated in this State unless a policy of automobile liability insurance in at least the minimum amounts to provide evidence of financial responsibility under this Act is in effect to insure against potential losses which may arise out of the operation of that vehicle.

Art. 6701h, § 1(10) defines "Proof of Financial Responsibility." It merely sets the amount of coverage needed. Neither it or § 1A contain any language that would seem to prevent direct action. In other words, there is no "shall pay all final judgment" language as there is in art. 911a and art. 911b.

However, the standard automobile liability policy in Texas contains a "no action" clause. Under the current case law, this would probably be an insurmountable barrier to direct action.

C. Compulsory Insurance and Direct Action in Other States

Some states have permitted direct action or joinder where compulsory insurance was involved. See American Southern Insurance Co. v. Dime Taxi Service, 275 Ala. 51, 151 So.2d 783 (1963); Millison v. Dittman, 180 Cal. 443, 181 Pa. 7879 (1919); Addington v. Ohio Southern Exp., Inc., 165 S.E.2d 658 (Ga. App. 1968); Kirtland v. Tri-State Insurance, 556 P.2d 199 (Kan. 1976). Apparently, the pervasive rationale was that required policies are primarily for the benefit of the general public rather than the insured. Other states, including Texas as discussed above, have refused to permit direct action or joinder even in the case of a required policy. See Smith Stage Co. v. Eckert, 21 Ariz. 28, 184 P. 1001 (1919); Williams v. Frederickson Motor Express Lines, 195 N.C. 682, 143 S.E. 256 (1928); Petty v. Lemons, 217 N.C. 492, 8 S.W.2d 616 (1940); Keseleff v. Sunset Highway Motor Freight Co., 187 Wash. 642, 60 P.2d 720 (1936). At least one state that authorized direct action under these circumstances has refused to do so when the policy contained a no action clause. Southern Indemnity Co. v. Young, 102 Ga. App. 914, 117 S.E.2d 882 (1961).

D. Direct Action By Judicial Fiat

At one time, Florida had direct action by judicial fiat; however, the legislature overruled the holding of the case by enacting a statute prohibiting direct action. Shepardizing the Florida case reveals that every other jurisdiction faced with the prospects of adopting the Florida court's rationale refused to do so. A major consideration in many of those cases seemed to be that the legislature had overruled the decision.

Even though the case has been legislatively overruled, a

discussion of its analysis is useful in providing an example of how direct action could be justified by the Texas Supreme Court.

The threshhold case is styled Shingleton v. Bussey, 223 So.2d 713 (Fla 1969). The court began its analysis by saying the state's Financial Responsibility law was evidence that members of the injured public were meant to be third party beneficiaries of the insurance contract because the insured acquired the insurance as a means of discharging his obligations that may accrue to members of the public arising out of his negligent operation of a motor vehicle. Viewed in this light the court held "there exists sufficient reason to raise by operation of law the intent to benefit injured third parties and thus render motor vehicle liability insurance amenable to the third party beneficiary doctrine." Id. at 716. As noted earlier, Texas has already taken this step via the Childress case.

However, the Florida court recognized this was only the first step. They still had to decide when the injured party could exercise his right to sue on the contract. Id.

It recognized liability of the insured was a condition precedent to liability of the insurer, but it felt that this did not have the effect of postponing liability until a judgment had been rendered against the insured. Id. at 717.

The court felt that since insurance had always been heavily regulated by the state, it was not unreasonable to limit the effect of express contractual provisions where they collide with the public interest. Id. The court believed that "no action" clauses greatly hindered an injured person's right to an adequate "remedy by due course of law without denial or delay." Id. It recognized that a carrier could impose reasonable limits on its responsibilities to pay benefits, but it cannot unreasonably burden the injured person's rights. Id. The court then concluded that the insured and insurer had no right to contract away the injured party's rights through a "no action" clause. Id. at 718.

Furthermore, the court recognized the argument that juries are more likely to find negligence or enlarge damages when an affluent institution has to bear the loss, but the court felt that a stage has "been reached where juries are more mature." Id. It also felt that candid admissions of existence and policy limits of insurance would benefit insurers by limiting their policy judgment payments because the opposite approach "may often mislead juries to think insurance coverage is greater than it is."

As additional reasons for authorizing direct action, the court cited the fact that the rules of joinder were adopted with the purpose of avoiding multiplicity of suits. It saw no reason why insurance companies should be exempt from the law in that respect.

It also felt that it is anomalous to deprive the ultimate beneficiary of the proceeds of a policy because the insured failed to satisfy any conditions of payment. It felt by allowing joinder, all of those types of issues would be on the table so the injured party could protect his rights against the insurer. By allowing joinder "the interests of all the parties and the concommittant right to expeditiously litigate the same in concert are preserved." Id. at 720.

E. Direct Action by Statute

Approximately twelve states have enacted some form of direct action statutes. See 12A COUCH ON INSURANCE § 45:797, p. 452, n.18. In accord with general principles relating to the supremacy of statutory provisions over contract provisions, the right to direct action cannot be modified by contract. Malgrem v. Southwestern Automobile Insurance, 201 Cal. 29, 255 P. 512 (1927). In other words, direct action statutes take precedence over "no action" clauses.

Conclusion

While the Florida case establishes some framework for establishing direct action by judicial feat, adopting such rationale in Texas would require overruling a long line of precedents. As Bussey indicates, the idea that keeping the information concerning insurance from the jury may be outmoded, but the Grasso case also rested on the grounds that a "no action" clause did not violate public policy in Texas. As indicated earlier, the fact that the Childress court found that injured parties are third party beneficiaries to the insurance contract is only the beginning. The court must still decide when the injured party can sue. This is where the "no action" clause comes into play. One can argue that it establishes a condition precedent for suit by the third party. This would recognize that the third party has a right to sue but would place some limits on that right.

Getting around art. 911a and 911b would seem to be even more difficult. (These only deal with motor carrier liability.) There has been no change in the language of those statutes since the 1930's. Therefore, one would have to expressly overrule cases construing them.

There seem to be two possible solutions to the problem. The first is legislative action. The second is to get insurance companies to drop the "no action" clause from their policies. If they really believe it is in their best interest to eliminate the intermediary steps as the amicus suggested, it is easily in their hands to remedy the situation.

As a further note, it seems that if this court was to follow the Florida case in respect to direct action, it is entirely

possible that our legislature would follow the Florida legislature's course of action. Insurance lobbies seem to be strong and powerful. Unless they really believe that direct action is in their best interests, it is a good bet that they would be on the doorsteps of the capitol immediately following an adverse decision in this regard.

C-5027

MEMORANDUM

TO: Judge Robertson

FROM: Eddie Molter

DATE: October 30, 1986

RE: Direct Action Against Insurer

A. Background on Texas Law

Early Texas cases held that an insurer might be joined as a defendant in the case of a liability policy. American Automobile Insurance Co. v. Streeve, 218 S.W. 534, 535 (Tex. Civ. App. - San Antonio 1920, writ ref'd) (following the rule that joinder is proper when the causes of action grow out of the same transaction and rejecting the contention that joinder resulted in an improper reference to insurance); Monzingo v. Jones, 34 S.W.2d 662, 663-64 (Tex. Civ. App. - Beaumont 1931, no writ) (same but also indicating that policy language that insurer was not liable until after judgment has been awarded against insured is not inconsistent with joinder). However, Ray v. Moxon, 56 S.W.2d 469 (Tex. Civ. App. - Amarillo 1933) aff'd 81 S.W.2d 488 (Tex. Comm'n App. 1935, opinion adopted) started a trend toward holding that "no action" clauses prevent joinder or direct action against the insurer prior to judgment against the insured. See Kuntz v. Spence, 67 S.W.2d 254 (Tex. Comm'n App. 1934, holding approved); Grasso v. Cannon, 81 S.W.2d 485 (Tex. Comm'n App. 1935, opinion adopted); American Fidelity & Casualty Co. v. McClendon, 81 S.W.2d 493 (Tex. Comm'n App. 1935, opinion adopted); Seaton v. Pickens, 87 S.W.2d 709 (Tex. Comm'n App. 1935, opinion adopted).

In Kuntz, 67 S.W.2d at 255, the court, in talking about a no action clause, said that it prevents the casualty company from being bound

> as for primary liability to an injured party so that it can be sued alone prior to a judgment against the insured, or sued with the insured before such judgment against him is obtained.... [I]t fully guards against such suit. If there is a reason why such provision in the contract should not be given effect, we are unable to think of it. Such provision violates no statute, and is certainly not against public policy.

The court also gave another reason for prohibiting direct action. It said:

> [I]t is certainly very important to the insurance company that it not be sued with the insured. In this respect we judicially know that juries are much more apt to return a verdict for the injured party, and for a larger amount, if they know the loss is ultimately to fall on an insurance company.

Id. at 256.

The court in Seaton, 87 S.W.2d at 711, went even further. It said:

> The policy in the instant case does not provide in terms that no action shall be brought on it until after judgment in favor of the injured person against the assured, but its effect is the same when it specifically states the limit of the company's liability as being the payment of a final judgment that may be rendered against the insured.

Therefore, it seems a "no action" clause may not be necessary to prevent direct action.

Furthermore, there seems to be some statutory basis for arguing that a claimant has no direct action against the insurer, at least in connection with motor carrier liability insurance. See Tex. Rev. Civ. Stat. Ann. art. 911a, § 11 (Vern. 1964) (Such policy or policies shall furthermore provide that the insurer will pay all judgments which may be recovered against the insured motor bus company....); Tex. Rev. Civ. Stat. Ann. art. 911b § 13 (Vern. 1964) (the obligor therein will pay to the extent of the face amount of such insurance policies and bonds all judgments which may be recovered against the motor carrier....)

In Grasso v. Cannon Ball Motor Freight Lines, 81 S.W.2d at 484-85, the court emphasized the language "will pay all judgments" in concluding that the statute barred direct action. It said:

> In this regard the statute by express words, and all fair implication to be drawn from the express words used, makes the basis of a suit by an injured party against the insurance company a "judgment" against the truck operator, and no authority for a suit against such insurance company is authorized or has any basis whatever unless and until there is a judgment.

Id. Moreover, the court held that the legislative history of the statutes demonstrated a "conclusive legislative intent not to allow insurance companies ... to be sued in the same suit with the motor carriers or operators." Id. at 485. See also American

Fidelity, 81 S.W.2d at 495; Elliot v. Lester, 126 S.W.2d 756, 758 (Tex. Civ. App. - Dallas 1939, no writ) ("The procedure, to the effect that the insurance carriers be not directly sued or mentioned in the pleadings and proof, obviously, was for the beneficial convenience of the insurance companies.")

In addition, the rules of civil procedure prohibit joinder of a liability or indemnity insurance company unless the company is by statute or contract directly liable to the injured party. Tex. R. Civ. P., Rules 50(b), 97(f). See also Webster v. Isbell, 100 S.W.2d 350 (Tex. 1937) (holding that insurer may not be joined unless the injured party shows he was made a beneficiary of the insurance contract by statute or the terms of the policy). Of course, such a rule leaves open an avenue for joinder in the case of required policies if the court holds that the policy provides for direct liability.

B. Compulsory Insurance and Direct Action in Texas

"When ... insurance is required by a statute or ordinance, the protection of the insured is not the primary objective of the insurance. Even in the absence of specific language securing to injured persons direct rights under the policy, there is inherent in such a policy an inference of a compulsory undertaking on the part of the insurer to answer in damages to the injured person." Annot., 20 A.L.R.2d 1097 (1951). See also Dairyland County Mutual Insurance Company of Texas v. Childress, 650 S.W.2d 770, 775 (Tex. 1983) ("There is no question in our minds that the compulsory insurance requirement of the Texas motor vehicle safety law implies that all potential claimants resulting from automobile accidents are intended as beneficiaries of the statutorily required automobile liability coverage.")

In Texas, a determination of whether a claimant can bring a direct action under a compulsory policy has depended in large part upon the language of the statute or ordinance making insurance compulsory. For example, in Scroggs v. Morgan, 107 S.W.2d 911 (Tex. Civ. App. - Beaumont 1937) rev'd on other grounds 130 S.W.2d 283, an ordinance established mandatory liability insurance for taxis with a direct action against the insurer. The court rejected the insurer's claim that it should not be joined because juries are more likely to award verdicts against insurance companies because the ordinance provided otherwise. However, the ordinance establishing mandatory insurance for taxis in the City of Houston said that insurers "shall pay all final judgments" rendered against the insured. Crone v. Checker Cab & Baggage Co., 135 S.W.2d 696, 697 (Tex. Comm'n App. 1940, opinion adopted). The court held that this language precluded any cause of action against the insurer until an obligation arose from a rendition of a final judgment against the insured. Id. See also Grasso, 81 S.W.2d 842 (same in regards to art. 911b, § 13); American Fidelity, 81 S.W.2d 493 (same in regards to art. 911a, § 11).

Art. 6701h, § 1A establishes mandatory motor vehicle liability coverage. It reads as follows:

> On and after January 1, 1982 no motor vehicle may be operated in this State unless a policy of automobile liability insurance in at least the minimum amounts to provide evidence of financial responsibility under this Act is in effect to insure against potential losses which may arise out of the operation of that vehicle.

Art. 6701h, § 1(10) defines "Proof of Financial Responsibility." It merely sets the amount of coverage needed. Neither it or § 1A contain any language that would seem to prevent direct action. In other words, there is no "shall pay all final judgment" language as there is in art. 911a and art. 911b.

However, the standard automobile liability policy in Texas contains a "no action" clause. Under the current case law, this would probably be an insurmountable barrier to direct action.

C. Compulsory Insurance and Direct Action in Other States

Some states have permitted direct action or joinder where compulsory insurance was involved. See American Southern Insurance Co. v. Dime Taxi Service, 275 Ala. 51, 151 So.2d 783 (1963); Millison v. Dittman, 180 Cal. 443, 181 Pa. 7879 (1919); Addington v. Ohio Southern Exp., Inc., 165 S.E.2d 658 (Ga. App. 1968); Kirtland v. Tri-State Insurance, 556 P.2d 199 (Kan. 1976). Apparently, the pervasive rationale was that required policies are primarily for the benefit of the general public rather than the insured. Other states, including Texas as discussed above, have refused to permit direct action or joinder even in the case of a required policy. See Smith Stage Co. v. Eckert, 21 Ariz. 28, 184 P. 1001 (1919); Williams v. Frederickson Motor Express Lines, 195 N.C. 682, 143 S.E. 256 (1928); Petty v. Lemons, 217 N.C. 492, 8 S.W.2d 616 (1940); Keseleff v. Sunset Highway Motor Freight Co., 187 Wash. 642, 60 P.2d 720 (1936). At least one state that authorized direct action under these circumstances has refused to do so when the policy contained a no action clause. Southern Indemnity Co. v. Young, 102 Ga. App. 914, 117 S.E.2d 882 (1961).

D. Direct Action By Judicial Fiat

At one time, Florida had direct action by judicial fiat; however, the legislature overruled the holding of the case by enacting a statute prohibiting direct action. Shepardizing the Florida case reveals that every other jurisdiction faced with the prospects of adopting the Florida court's rationale refused to do so. A major consideration in many of those cases seemed to be that the legislature had overruled the decision.

Even though the case has been legislatively overruled, a

discussion of its analysis is useful in providing an example of how direct action could be justified by the Texas Supreme Court.

The threshhold case is styled Shingleton v. Bussey, 223 So.2d 713 (Fla 1969). The court began its analysis by saying the state's Financial Responsibility law was evidence that members of the injured public were meant to be third party beneficiaries of the insurance contract because the insured acquired the insurance as a means of discharging his obligations that may accrue to members of the public arising out of his negligent operation of a motor vehicle. Viewed in this light the court held "there exists sufficient reason to raise by operation of law the intent to benefit injured third parties and thus render motor vehicle liability insurance amenable to the third party beneficiary doctrine." Id. at 716. As noted earlier, Texas has already taken this step via the Childress case.

However, the Florida court recognized this was only the first step. They still had to decide when the injured party could exercise his right to sue on the contract. Id.

It recognized liability of the insured was a condition precedent to liability of the insurer, but it felt that this did not have the effect of postponing liability until a judgment had been rendered against the insured. Id. at 717.

The court felt that since insurance had always been heavily regulated by the state, it was not unreasonable to limit the effect of express contractual provisions where they collide with the public interest. Id. The court believed that "no action" clauses greatly hindered an injured person's right to an adequate "remedy by due course of law without denial or delay." Id. It recognized that a carrier could impose reasonable limits on its responsibilities to pay benefits, but it cannot unreasonably burden the injured person's rights. Id. The court then concluded that the insured and insurer had no right to contract away the injured party's rights through a "no action" clause. Id. at 718.

Furthermore, the court recognized the argument that juries are more likely to find negligence or enlarge damages when an affluent institution has to bear the loss, but the court felt that a stage has "been reached where juries are more mature." Id. It also felt that candid admissions of existence and policy limits of insurance would benefit insurers by limiting their policy judgment payments because the opposite approach "may often mislead juries to think insurance coverage is greater than it is."

As additional reasons for authorizing direct action, the court cited the fact that the rules of joinder were adopted with the purpose of avoiding multiplicity of suits. It saw no reason why insurance companies should be exempt from the law in that respect.

It also felt that it is anomalous to deprive the ultimate beneficiary of the proceeds of a policy because the insured failed to satisfy any conditions of payment. It felt by allowing joinder, all of those types of issues would be on the table so the injured party could protect his rights against the insurer. By allowing joinder "the interests of all the parties and the concommittant right to expeditiously litigate the same in concert are preserved." Id. at 720.

E. Direct Action by Statute

Approximately twelve states have enacted some form of direct action statutes. See 12A COUCH ON INSURANCE § 45:797, p. 452, n.18. In accord with general principles relating to the supremacy of statutory provisions over contract provisions, the right to direct action cannot be modified by contract. Malgrem v. Southwestern Automobile Insurance, 201 Cal. 29, 255 P. 512 (1927). In other words, direct action statutes take precedence over "no action" clauses.

Conclusion

While the Florida case establishes some framework for establishing direct action by judicial feat, adopting such rationale in Texas would require overruling a long line of precedents. As Bussey indicates, the idea that keeping the information concerning insurance from the jury may be outmoded, but the Grasso case also rested on the grounds that a "no action" clause did not violate public policy in Texas. As indicated earlier, the fact that the Childress court found that injured parties are third party beneficiaries to the insurance contract is only the beginning. The court must still decide when the injured party can sue. This is where the "no action" clause comes into play. One can argue that it establishes a condition precedent for suit by the third party. This would recognize that the third party has a right to sue but would place some limits on that right.

Getting around art. 911a and 911b would seem to be even more difficult. (These only deal with motor carrier liability.) There has been no change in the language of those statutes since the 1930's. Therefore, one would have to expressly overrule cases construing them.

There seem to be two possible solutions to the problem. The first is legislative action. The second is to get insurance companies to drop the "no action" clause from their policies. If they really believe it is in their best interest to eliminate the intermediary steps as the amicus suggested, it is easily in their hands to remedy the situation.

As a further note, it seems that if this court was to follow the Florida case in respect to direct action, it is entirely

possible that our legislature would follow the Florida legislature's course of action. Insurance lobbies seem to be strong and powerful. Unless they really believe that direct action is in their best interests, it is a good bet that they would be on the doorsteps of the capitol immediately following an adverse decision in this regard.

HELD OVER - FROM MAY 26-27 Meeting

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
REBA BENNETT KENNEDY
DONALD J. MACH
ROBERT D. REED
HUGH L. SCOTT, JR.
DAVID K. SERCI
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

October 23, 1987

Honorable James P. Wallace
Justice, Supreme Court of Texas
P.O. Box 12248
Capitol Station
Austin, Texas 78767

Dear Justice Wallace:

At the request of Broadus Spivey made at the SCAC session of June 27, 1987, I appointed a Special Subcommittee to study TRCP 38(c) and 51 (b) which deal with the same subject, i.e. "direct actions." That committee consists of Frank Branson, Franklin Jones, and Broadus Spivey, who are to work with Sam Sparks (El Paso) who is the Standing Subcommittee Chair for Rules 15-166a.

The work of this subcommittee on these rules will likely be one of the leading studies for the proposed rules admendments to be effective January 1, 1990. By copy of this letter, I am requesting that Doak Bishop, Chairman of the COAJ for the ensuing year, set up a similar special subcommittee to investigate these rules to determine whether today in Texas direct actions should be permissible under the Rules of Civil Procedure.

I hope this sufficiently responds to your inquiry.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tct
xc: Mr. Doak Bishop
Chairman COAJ

Mr. Frank Branson
Mr. Franklin Jones
Mr. Broadus Spivey

00290

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
REBA BENNETT KENNEDY
DONALD J. MACH
ROBERT D. REED
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
DAVID K. SERGI
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELEPHONE
(512) 224-9144

TELECOPIER
(512) 224-7073

August 7, 1987

TO ALL SUPREME COURT ADVISORY COMMITTEE MEMBERS:

The Chairman of the Special Subcommittee to Study Texas Rule of Civil Procedure 51(b) and its companion rules is Sam Sparks (El Paso). The members of that subcommittee are:

Frank Branson
Franklin Jones
Broadus Spivey

This Special Subcommittee is to:

(1) thoroughly study the issues;

(2) draft proposed rules and rule amendments whether or not the Subcommittee recommends their adoption;

(3) make a full report at our next scheduled meeting.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
enclosure

SPECIAL SUBCOMMITTEE TO STUDY RULE 51(b)
AND ITS COMPANION RULES

Chairperson:

Mr. Sam Sparks
Grambling and Mounce
P.O. Drawer 1977
El Paso, Texas 79950-1977
(915) 532-3911

Members:

Mr. Frank L. Branson
Law Offices of Frank L. Branson, P.C.
Allianz Financial Centre
LB 133
Dallas, Texas 75201
(214) 748-8015

Mr. Franklin Jones
Jones, Jones, Baldwin, Curry & Roth
P.O. Drawer 1249
Marshall, Texas 75670
(214) 938-4395

Mr. Broadus Spivey
Spivey, Kelly & Knisely
P.O. Box 2011
Austin, Texas 78768-2011
(512) 474-6061

Special Subcommittee Rule 51

natural person." Okay. Thank you.

Now, what do we do to 614? And one reason I couldn't follow you with looking at page 358 is because that's the page in the rule book. I was looking at 358 but a different page.

PROFESSOR BLAKELY: You probably don't have it in --

CHAIRMAN SOULES: The same place.

PROFESSOR BLAKELY: But the same thing.

CHAIRMAN SOULES: The same thing, okay.

(Off the record discussion ensued.

CHAIRMAN SOULES: Okay. What's next?

MR. SPIVEY: Mr. Chairman?

CHAIRMAN SOULES: Yes, sir.

MR. SPIVEY: We're fixing to lose some people. And I'd like to move the chair to appoint a special subcommittee to study Rule 51(b), which that provision says this rule shall not be applied in tort cases so as to -- this is the parties rule. "This rule shall not be applied in tort cases so as to permit the joinder of a liability

insurance company unless such company is by statute or contract directly liable to the person injured or damaged."

CHAIRMAN SOULES: Okay. That is assigned to -- as of this time -- as of this moment, that is assigned to the standing subcommittee that embraces those rules. And if anyone wants to work with them -- let's see, who's the chair of that? The chairman of that is Sam Sparks, El Paso, and if you want to work with him, write him. And Tina will get out a letter that that is being assigned to him for study within his standing subcommittee.

MR. SPIVEY: Okay, thank you.

PROFESSOR DORSANEO: Mr. Chairman, there are a number of other rules that are companions to 51(b) that contain that same concept, and they all need to be examined together.

MR. BRANSON: Mr. Chairman, I would urge that's a large enough problem -- Chairman Sparks has his hands full with all those rules and would urge the chair to appoint a subcommittee directed specifically to that problem.

MR. SPIVEY: That is sort of a special

problem. And I don't think it's going to divide the plaintiffs and the defense lawyers as much as it's going to be a controversial matter.

CHAIRMAN SOULES: That's fine. Broadus, do you have a standing subcommittee? I don't know what your current assignments are. Let me look and see here. You had a special subcommittee to handle that.

PROFESSOR EDGAR: Well, Sam ought to be on it.

CHAIRMAN SOULES: What I'd like to do is keep the first assignment within the standing subcommittee for overall control. And, of course, anyone can generate work -- you know, work product for Sam and feed that, and if it gets to be -- in other words, let him decide whether it needs a special subcommittee. I'm not trying to be argumentative with you, Frank, but I am trying to keep as much organization. Even the COAJ now knows who on their committee keys to what rule numbers. So, they can consult with --

MR. BRANSON: Well, my only concern is this is a rule that I would urge probably is going to require some study and a pretty extensive report. And with all deference to Sam, he's in El

Paso and there's one airplane on Saturday that goes to El Paso. If you could --

CHAIRMAN SOULES: For purposes of this rule, I appoint Frank Branson, Franklin Jones and Broadus Spivey as special members of that subcommittee and ask them to take the initiative with Sam to get him the work product that they want considered by that committee.

MR. JONES: Can I make a comment, Mr. Chairman, which I think might let the chair know where we're coming from?

CHAIRMAN SOULES: Yes, sir.

MR. JONES: I don't know about Broadus or Frank, but I've had four members of the Court tell me that they wanted the committee to look at this rule, and that's where we're coming from on this.

CHAIRMAN SOULES: Okay. Well, it's going to be looked at now. And the three of you-all are special members of Sam's subcommittee to take the initiative to get to his subcommittee what you want him to look at. And if he wants some of you-all to handle the report, you know, he's got that prerogative and you-all certainly can ask him. And he may want you to specially

handle that particular part of his report next time.

Okay. We've still got a lot of rules to work through, so let's go on with our agenda. We've got Rusty McMains, Tony Sadberry, Steve McConnico and Professor Carlson. Now, since Steve and Elaine are both Austin residents and Tony and Rusty are going to have to travel, I would propose that we take the two out-of-towners first in case they must go. Is that okay with you Elaine and Steve?

PROFESSOR CARLSON: Yes.

MR. McCONNICO: Yes.

CHAIRMAN SOULES: Rusty, between you and Tony, flip a coin or discuss who wants to go first. What are your travel schedules?

MR. SADBERRY: I'm driving, Luke. And mine is probably not --

CHAIRMAN SOULES: Tony, go ahead.

MR. SADBERRY: Okay.

CHAIRMAN SOULES: While Tony is tuning up, I've got a repealer in here of 164 which we failed to do last time after we combined 164 into 162. So, all in favor of that, say "I." Okay.

MR. SADBERRY: Okay. Mr. Chairman,

HJH - SC AC Subc + Assembly

Insurance Comm has a regulation?

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

March 3, 1988

To: Members of the Planning Subcommittee of the
State Bar Committee on the Administration of Justice

Re: Direct Actions

Although I anticipated a maelstrom of letters from lawyers and academics in response to my inquiry it has not developed. Enclosed are copies of all of the written responses I received to some 20 letters. I will summarize the 2 telephone calls (one from Phil Hardberger) as follows: "It would be a good idea and would stop deceiving the jury; but it would also end the new breach of the duty of good faith cause of action which may be a better remedy. The Supremes cannot do this by rule changes."

I think you will find Prof. John Sutton's letter to be the most intriguing. He approaches this from a different angle entirely.

Given Judge Kilgarlin's concurrence in Cont'l Casualty v. Huizar, we may wish to recommend that no effort be made to allow direct actions through a rules change, but that study of the ethics issue raised by John Sutton should be pursued instead. Please let know your reaction to this, before the March 12 meeting if possible.

I would also like to hear from those of you who are working on separate projects (work product; pleadings; findings and conclusions), so that either you or I can give a short report at the meeting.

Very truly yours,

Michael D. Schattman

MDS/lw

xc: Doak Dishop
encl.

GLEN WILKERSON
ATTORNEY AT LAW
1680 ONE AMERICAN CENTER
600 CONGRESS AVENUE
AUSTIN, TEXAS 78701

December 7, 1987

BOARD CERTIFIED
CIVIL TRIAL LAW
PERSONAL INJURY TRIAL LAW
TEXAS BOARD OF
LEGAL SPECIALIZATION

AREA CODE 512
TELEPHONE 476-6491

Judge Michael Schattman
348th District Court
Tarrant County Court House
Fort Worth, Texas 76196-0281

Dear Mike:

It was good to hear from you even if it was a "judicial inquiry." I have heard many good things from a lot of people about the strong public service you are giving the citizens of Tarrant County. As an old Fort Worth boy (getting older), I can say that they need it.

As to the subject of your inquiry, I believe that it would be a mistake to change the rules on this point to permit direct actions. My primary objection after some 15 years on both sides of the docket (plaintiff and defendant) is that (1) there is really no overpowering need to change the present law; (2) if there is a "need," it is a need primarily driven by the "need" for higher verdicts; (3) the result will be a complicating overlay of new rules, new procedures which will literally take years to sort out whatever benefits flow from the change are outweighed by the costs.

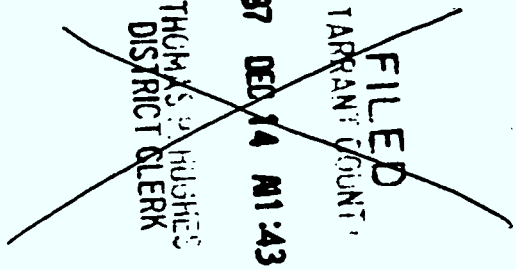
Thank you for writing.

Respectfully,

Glen Wilkerson

Glen Wilkerson

GW/ll



00299

SCHOOL OF LAW
THE UNIVERSITY OF TEXAS AT AUSTIN

727 East 26th Street · Austin, Texas 78705 · (512)471-5151

December 14, 1987

Judge Michael D. Schattman
348th Judicial District of Texas
Tarrant County Courthouse
Fort Worth, Texas 76196-0281

Re: Direct Actions Against Insurers

Dear Judge Shattman:

I have two or three reactions to the problems raised in your letter of November 30.

At the outset, it seems to me that cases such as the very recent Supreme Court case of Continental Casualty Co. v. Huizar (decided November 25, 1987) forcefully suggest that direct actions should be allowed against insurance companies, and normally this would be a joinder of the insured and insurer as defendants.

My main reason for favoring direct actions, however, is that the lawyers hired by insurance companies to represent insureds when damage suits are filed against the insureds are placed in very difficult positions, from a standpoint of professional ethics. Therefore, a change to direct actions should also include a change in the liability policies, taking away from the insurance companies the duty and right to defend the case and substituting a duty and right to employ counsel for the insured with such counsel thereafter to be solely responsible to the insured and with no obligations whatever to the insurer.

My third reaction is that the Supreme Court does not have authority to make this needed change. Legislation would be required, in my opinion.

With best wishes,

Sincerely yours,

John F. Sutton, Jr.
A.W. Walker, Jr. Centennial
Chair in Law

JFS/cva

00300

Jenkens & Gilchrist
ATTORNEYS

1600 ONE AMERICAN CENTER
POST OFFICE BOX 2987
AUSTIN, TEXAS 78769-2987
(512) 478-7100

T. RICHARD HANDLER
(214) 855-4329

3200 ALLIED BANK TOWER
DALLAS, TEXAS 75202-2711

(214) 855-4500
TELECOPIER (214) 855-4300

TELEX 73-2595
TWX 910-861-4047

3850 TEXAS COMMERCE TOWER
HOUSTON, TEXAS 77002-2909
(713) 227-2700

December 21, 1987

Don M. Dean, Esq.
Underwood, Wilson, Berry,
Stein & Johnson
P.O. Box 9158
Amarillo, TX 79105

Dear Don:

Attached you will find a letter I received from Judge Michael Schattman, 348th District Court, of Fort Worth, who is chairing the State Bar's subcommittee investigating whether "direct actions" against insurance carriers are preferable or not.

Because your practice is probably more insurance-oriented than my own and because I respect your insights and points of view, if you have some knowledge and interest in the subject you might take a few minutes to give Judge Schattman the benefit of your thoughts on this subject.

I would appreciate the favor of a copy of any correspondence you generate, so that I can also educate myself.

I hope this letter finds you in good health and enjoying the holidays.

Kindest personal regards.

Sincerely,

Ric

T. Richard Handler

TRH:cb
Enclosure
cc: The Honorable Michael D. Schattman

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

November 30, 1987

Richard Handler
Jenkens & Gilchrist
3200 Allied Bank Tower
Dallas, Texas 75202-2711

Re: Direct Actions Against Insurers

Dear Ric:

There are two study groups presently investigating whether to authorize "direct actions" under the Rules of Civil Procedure. One group is a subcommittee of the Supreme Court's Rules Advisory Committee chaired by Broadus Spivey of Austin. The other is a subcommittee of the State Bar's Committee on the Administration of Justice. I am the chair of the State Bar's subcommittee and I am writing to you and other lawyers around the state to get your thoughts and advice on this issue.

Would you mind, after kicking this around with friends and colleagues, writing me a letter on your (and their) perceptions of the pros and cons of such a change in Texas practice? This would change both the approach and philosophy of Texas tort litigation. Is this wise? Would counter-claims also be direct actions? Would we now reveal the existence or absence of all parties' liability insurance? Should direct actions be limited only to situations where coverage and/or defense is denied? Will a rules change be sufficient -- given the authority over policy language granted to the State Board of Insurance by statute, does the Supreme Court even have this authority?

I truly appreciate your taking the time to respond and give us your help on exploring this issue. Thank you.

Very truly yours,

Michael D. Schattman

MDS/lw
xc

00302

Jenkens & Gilchrist
ATTORNEYS

1600 ONE AMERICAN CENTER
POST OFFICE BOX 2987
AUSTIN, TEXAS 78769-2987
(512) 478-7100

T. RICHARD HANDLER
(214) 855-4329

3200 ALLIED BANK TOWER
DALLAS, TEXAS 75202-2711

(214) 855-4500
TELECOPIER (214) 855-4300

TELEX 73-2595
TWX 910-861-4047

3850 TEXAS COMMERCE TOWER
HOUSTON, TEXAS 77002-2909
(713) 227-2700

December 21, 1987

C. L. Mike Schmidt, Esq.
Stradley, Schmidt, Stephens & Wright
One Campbell Centre
Dallas, TX 75206

Frank Baker, Esq.
One Alamo Center
106 St. Mary's
San Antonio, TX 78205

Doyle Curry, Esq.
201 W. Houston Street
Marshall, TX 75670

Terry Tottenham, Esq.
One American Center
600 Congress Avenue
Austin, TX 78701

Forrest Bowers, Esq.
1401 Texas Avenue
Lubbock, TX 79048

Gentlemen:

Attached you will find a letter I received from Judge Michael Schattman, 348th District Court, of Fort Worth, who is chairing the State Bar's subcommittee investigating whether "direct actions" against insurance carriers are preferable or not.

Because your practices are probably more insurance-oriented than my own, because of your current positions in the Litigation Section, and because I respect your insights and points of view, each of you who has some knowledge and interest in the subject might take a few minutes to give Judge Schattman the benefit of your thoughts on this subject.

I would appreciate the favor of a copy of any correspondence you generate, so that I can also educate myself.

I hope this letter finds each of you in good health and enjoying the holidays.

Kindest personal regards.

Sincerely,

T. Richard Handler

TRH:cb
Enclosure
cc: The Honorable Michael D. Schattman

DOGGETT, JACKS, MARSTON & PERLMUTTER

A PROFESSIONAL CORPORATION

ATTORNEYS & COUNSELORS AT LAW

AUSTIN:
1206 SAN ANTONIO
AUSTIN, TEXAS 78701-1887
(512) 476-4851

HOUSTON:
ONE ALLEN CENTER
PENTHOUSE, SUITE 3450
HOUSTON, TEXAS 77002-4793
(713) 739-1133

PLEASE REPLY TO:
☒ AUSTIN OFFICE
☐ HOUSTON OFFICE

LLOYD DOGGETT
Board Certified
Personal Injury Trial Law
Texas Board of Legal Specialization

TOMMY JACKS
Board Certified
Civil Trial Law
Personal Injury Trial Law
Texas Board of Legal Specialization

MARK L. PERLMUTTER
Board Certified
Civil Trial Law
Texas Board of Legal Specialization

JAMES D. MARSTON

December 23, 1987

Hon. Michael D. Schattman
348th Judicial District Court
Tarrant County Courthouse
Fort Worth, TX 76196-0281

Dear Mike:

Thank you for your letter of November 30, 1987, which arrived while, coincidentally, I was in your hometown engaged in settlement negotiations in a construction accident case in which, as I recall, you presided over an early hearing regarding the scheduling of certain defense witness depositions. The case settled just before the December 7 trial date for a little over two million dollars, I am happy to report.

I know that that has nothing to do with the matter you wrote me about, but you know we plaintiff's lawyers can't resist a little gratuitous bragging every now and then.

I appreciate your soliciting my opinion about the issue of direct actions against insurers. I believe that there is a divergence of opinion amongst members of the plaintiffs' trial bar on this issue. As you might expect, there is one school of thought that direct action against insurers is just what the doctor ordered. For my part, however, I question the wisdom of this and certain other "reform" proposals being discussed presently. I do not applaud the movement toward telling the jury all there is to know about the background of a lawsuit, because I believe that distracts them from the true issues of the case. (For the same reason, I object to a "cure" general charge and to the notion that it's okay to tell the jury the effect of their answers). I recognize that in some cases it would be to my benefit to be able to sue insurers directly and to tell jurors what they're up to, but in other cases it cuts the other way, and in few cases does the jury really need to know all those things in order to get about their business.

I may be getting conservative in my old age, but I generally subscribe to the "don't fix it if it ain't broke" school of legal reform. It ain't broke.

Thanks again for soliciting my views. If I can think of any case in which direct action against insurers should be permitted, it is in the case where a claim for breach of duty of good faith and fair dealing is combined with the liability suit giving rise to that claim (e.g., in the third-party liability situation where the insurer has denied or delayed the fair settlement of the claim or has engaged in other abusive settlement practices.

Please feel free to call me at any time.

Cordially yours,

Tommy Jacks

TJ/cmak

McGUIRE
&
LEVY

ATTORNEYS AND COUNSELORS AT LAW

LONNIE C. McGUIRE, JR.
ALBERT LEVY
KIP A. PETROFF
MIKE CHAMBERS

MacArthur Plaza, Suite 650
5525 MacArthur Boulevard
Post Office Box 165507
Irving, Texas 75016-5507
214/580-1777
Metro 751-1120

January 14, 1988

Hon. Michael D. Schattman
District Judge
348th Judicial District
Tarrant County Courthouse
Fort Worth, TX 76196-0281

RE: Direct Actions Against Insurers

Dear Judge Schattman:

When I received your correspondence of November 30, 1987, I really didn't know enough about direct action statutes to give you an intelligent appraisal. I wrote to Jerry Kwilosz, a former claim manager and presently a lawyer for Reliance Insurance Company, and asked him if he would be kind enough to share his observations and experience with us concerning Reliance's Louisiana experience.

I enclose a copy of his correspondence to me dated January 11, 1988. If you have any further questions, please feel free to contact Jerry directly as I know he'll be delighted to share his experiences of the past 25 years with you.

If there's any way we can be of service to you at any time, please feel free to call upon us.

Sincerely,

McGUIRE & LEVY

Lonnie C. McGuire, Jr.

LCM:vb
Enc.

cc Jerry Kwilosz

Reliance

JANUARY 11, 1988

JAN 14 1987

LONNIE C. MC GUIRE, JR.
MC GUIRE & LEVY
ATTORNEYS AND COUNSELORS AT LAW
P. O. BOX 165507
IRVING, TEXAS 75016-5507

RE: DIRECT ACTIONS AGAINST INSURERS

DEAR LONNIE:

I HAVE YOURS OF DECEMBER 30, 1987, ALONG WITH THE NOVEMBER 30TH LETTER OF DISTRICT JUDGE MICHAEL D. SCHATTMAN REGARDING THE ABOVE CAPTIONED SUBJECT. JUDGE SCHATTMAN'S LETTER INDICATES THAT THERE ARE TWO BAR STUDY GROUPS INVESTIGATING "DIRECT ACTIONS" AGAINST INSURANCE CARRIERS. WITHOUT FURTHER INFORMATION, I ASSUME THE CONTEMPLATED PROCEDURE WOULD BE MUCH LIKE THE SITUATION AS IT EXISTS IN LOUISIANA. THERE, IN THE USUAL CASE, PLAINTIFF SUES A DEFENDANT AND USF&G, HIS INSURANCE CARRIER. THESE ARE THE NAMED DEFENDANTS IN A LAW SUIT. THE PLEADINGS USUALLY STATE THAT THE DEFENDANT IS USF&G, INSURED, AND THAT THE INSURANCE COMPANY IS RESPONSIBLE IN PAYMENT FOR WHATEVER NEGLIGENT ACTIVITIES THE DEFENDANT MIGHT BE FOUND RESPONSIBLE FOR.

I HAVE BEEN INVOLVED IN MUCH OF THIS TYPE OF LITIGATION AND I HAVE NOT FELT THAT THE CARRIER'S PRESENCE MAKES THE CASE WORSE, SO TO SPEAK, FROM THE DEFENSE STANDPOINT. CURRENT JURY PANELS ARE NOT SO NAIVE AS TO BE UNAWARE THAT THERE IS INSURANCE COVERAGE PRESENT IN MOST ALL OF THE LITIGATION WE SEE PRESENTLY.

THERE ARE ADVANTAGES TO BOTH SIDES WHERE THE CIVIL PROCEDURE ALLOWS SUCH DIRECT ACTIONS. ONE IMPORTANT ONE WOULD BE THE ABILITY TO HAVE EVIDENCE INTRODUCED ON COVERAGE WHERE THIS ISSUE IS IN THE CASE. IN THE USUAL SITUATION IN LOUISIANA WHERE THERE IS SOME COVERAGE PROBLEM AND THE CARRIER IS DIRECTLY NAMED IN THE ACTION ALONG WITH ITS INSUREDS, THE CARRIER'S ANSWER USUALLY ADDRESSES ITSELF TO THE COVERAGE ISSUE, TO SET UP THE COVERAGE DEFENSE. THIS ORDINARILY IS DONE, OF COURSE, BY A DIFFERENT LAWYER REPRESENTING THE INSURANCE COMPANY ONLY. THIS SITUATION CURRENTLY PRESENTS A PROBLEM IN TEXAS WHERE THE DUTY TO DEFEND

Reliance Insurance Company
1320 Greenway Drive, Irving, Texas 75038
Mailing Address: P.O. Box 660621, Dallas, Texas 75266-0621
Telephone: (214) 550-0068

IS PROBABLY THE ONLY THING THAT CAN BE ADDRESSED IN THE LAW SUIT IN CHIEF.

ANOTHER ADVANTAGE WOULD BE IN HAVING THE EXISTENCE OR ABSENCE OF LIABILITY INSURANCE FOR ALL PARTIES TO BE A MATTER OF RECORD. IN LOUISIANA, FOR INSTANCE, THE PARTIES SUBMIT THE CERTIFIED COPIES OF ALL COVERAGE AND THIS BECOMES PART OF THE RECORD FOR EVERYONE TO KNOW.

I WOULD NOT BE IN FAVOR OF DIRECT ACTIONS ONLY IN COVERAGE MATTERS. I WOULD PREFER THAT THE DIRECT ACTION PROCEDURE APPLY IN ALL LITIGATION. I THINK TO LIMIT IT TO COVERAGE MATTERS WOULD BE MUCH TOO CUMBERSOME.

I COULD SEE WHERE SOME CARRIERS WOULD BE PRETTY MUCH AGAINST THIS CHANGE IN THE CIVIL PROCEDURE IN THAT THEY MIGHT FEEL THAT BECAUSE OF WHO THEY ARE THAT THEY COULD BE A TARGET, THAT JURIES WOULD BE MUCH MORE PRONE TO RULE ON THIS EMOTION THAN ON THE FACTS OF THE CASE. I THINK THIS WOULD BE LIMITED TO CARRIERS OF SUBSTANTIAL NATIONAL STATURE - ALLSTATE, STATE FARM.

I HOPE THE ABOVE CAN HELP YOU IN YOUR REPLY TO JUDGE SCHATTMAN. IF YOU HAVE ANY QUESTIONS, GIVE ME A CALL.

BEST REGARDS.

JERRY KWILOSZ

JJK:AK

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205-1695

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
REBA BENNETT KENNEDY
ROBERT W. LOREE
DONALD J. MACH
ROBERT D. REED
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
THOMAS G. WHITE

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

March 11, 1988

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

Re: Direct Actions Against Insurers

Dear Sam:

I have enclosed a copy of a letter sent to me from Michael D. Shattman regarding direct actions against insurers. Please prepare to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice William W. Kilgarlin

00310

LHS

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

Sade
Subc
Jill
Dagenda

November 30, 1987

Doak Bishop
Hughes & Luce
2800 Momentum Place
1717 Main Street
Dallas, Texas 75201

Re: Direct Actions Against Insurers
and Rules 38(c) and 51(b), T.R.C.P.

Dear Doak:

I received your note of the 19th with memos and correspondence today. An incorrect zip code and the vagaries of the county's in-house mail service are the culprits.

The memo from Eddie Molter to Judge Robertson of October 30, 1986, is incomplete. I received pages 1, 3, 5 and 7. What about the others? Is the Chuck Lord memo to Judge Wallace only a single page? Can you help on this? Can Broadus?

I am sending a letter out to some selected practitioners and academics soliciting their views. It would seem from the memos that a rule change alone would not be enough to usher in direct actions. This would be such a big change in our practice it should be approached cautiously.

I am copying Broadus Spivey, Luke Soules and the members of the COAJ "think tank" subcommittee. I would like to send my fellow think tankers copies of the complete memos. I will send you, Broadus and Luke copies of anything my letter generates.

Very truly yours,

Mike

Michael D. Schattman

MDS/lw

00311

xc: B. Spivey, L. Soules, Mike Handy, Bill Dorsaneo, Pat Hazel, Charles Tighe

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
REBA BENNETT KENNEDY
DONALD J. MACH
ROBERT D. REED
HUGH L. SCOTT, JR.
DAVID K. SERGI
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

December 9, 1987

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

Re: Tex. R. Civ. P. 38(c) and 51(b)

Dear Sam:

I have enclosed a letter sent to me through Michael D. Schattman regarding Rules 38(c) and 51(b). Please prepare to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

LUTHER H. SOULES III

LHS/hjh
SCACII:003
Enclosure
cc: Justice James P. Wallace
Mr. Michael D. Schattman

00312

SPIVEY, GRIGG, KELLY AND KNISELY
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
1111 WEST 6TH STREET, SUITE 300
P. O. BOX 2011
AUSTIN, TEXAS 78768-2011
(512) 474-6061

BROADUS A. SPIVEY
BOARD CERTIFIED†
PERSONAL INJURY TRIAL LAW
DICKY GRIGG
BOARD CERTIFIED†
PERSONAL INJURY TRIAL LAW
PAT KELLY
BOARD CERTIFIED†
PERSONAL INJURY TRIAL LAW
PAUL E. KNISELY

OF COUNSEL
J. PATRICK HAZEL
BOARD CERTIFIED†
PERSONAL INJURY TRIAL LAW
CIVIL TRIAL LAW

INVESTIGATORS†
JOHN C. LUDLUM
RICK LEEPER

BUSINESS MANAGER:
MELVALYN TOUNGATE

November 9, 1987

BAS87.266

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

Re: Special Subcommittee - TRCP 38(c) and 51(b)
Direct Actions

Dear Chairman Sam:

Since I have really dropped the ball on this assignment, I need to call upon you for help in restoring my appearance of reliability.

On June 27, 1987, Luke Soules appointed a special subcommittee to study these rules. The subcommittee consists of you as chairman, Frank Branson, Franklin Jones, and myself as members.

I inquired of Justice Wallace as to the existence of any briefing or information that had accumulated with the Supreme Court over a period of years. This has been a rather lively topic of discussion in the legal community ever since I have been practicing, and I knew the Supreme Court had to have some material gathered. On July 8, 1987 Judge Wallace forwarded to me copies of research done on the subject. Like a good committee member, I procrastinated "until tomorrow." Now, "manaña" has come.

I am forwarding a copy of the material furnished to me by Judge Wallace and a copy of his accompanying letter of July 8, 1987.

We need to get together, and that should be without further delay. It will make you look good to act in a rather hasty fashion while you can compare your conduct with my speed.

Additionally, I have received several inquiries from lawyers who are not even members of our committee and some from defense lawyers, too, asking when we were going to move on this issue. There is more interest than I had thought. I would suggest a Thursday or Friday meeting in Austin within the next three or four weeks.

I apologize to you, Luke Soules, and especially to Judge Wallace, for my inertia.

Sincerely,

Broadus A. Spivey

BAS:jk

c: Hon. James P. Wallace
Mr. Luther H. Soules III
Mr. Frank Branson
Mr. Franklin Jones
Mr. Doak Bishop, Chairman, COAJ

6202

THE SUPREME COURT OF TEXAS

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

July 8, 1987

87 JUL 10 A9:51

Mr. Broadus A. Spivey
Spivey, Grigg, Kelly & Knisely
P. O. Box 2011
Austin, Texas 78768

Dear Broadus:

As per your request of last week, I am forwarding copies of research done by various court personnel into direct action against insurance companies in Texas. I hope this is of some help to you and I look forward to your subcommittee report to the Supreme Court Advisory Committee.

Sincerely,

James P. Wallace
Justice

JPW/cw

LAW OFFICES

SOULES & WALLACE
ATTORNEYS-AT-LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
RICHARD M. BUTLER
W. CHARLES CAMPBELL
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
SARAH B. DUNCAN
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
RONALD J. JOHNSON
REBA BENNETT KENNEDY
PHIL STEVEN KOSUB
GARY W. MAYTON
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL *
LUTHER H. SOULES III †‡
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

TELEFAX
SAN ANTONIO
(512) 224-7073
AUSTIN
(512) 327-4105

June 20, 1989

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

Re: Proposed Change to Rule 57
Texas Rules of Civil Procedure

Dear Mr. Beck:

Enclosed please find a copy of a letter sent to me by Mr. Harry Tindall. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

LUTHER H. SOULES III

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

00316

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

TINDALL & FOSTER
Attorneys at Law
2800 Texas Commerce Tower
600 Travis St.
Houston, Texas 77002
(713) 229-8733
Fax (713) 228-1303

Copy
✓ 6-19-89

HJH
SCAC Subc
7/15 Agenda
flx

TELEFAX COVER LETTER

TO: Luther Soules

TELEFAX NUMBER: 512-224-7073

FROM: HARRY L. TINDALL

DATE: June 19, 1989

RE:

2 PAGES SENT INCLUDING TELEFAX COVER LETTER.

Attention: If you do not receive the total number of pages sent, please call Myra Smith or Karen Howard, legal assistants, immediately.

COMMENTS: I have reviewed all of the proposed rule changes. They appear acceptable to me. I especially approve the change to Rule 21a authorizing service by telecopier. However, we should also amend Rule 57 at the same time. I attach a copy of the proposed change. I assume this can be done by telephone poll of the committee. Please call me if I can help.

60317

06. 19. 89 02:20PM *TINDALL & FOSTER P01

RULE 57. SIGNING OF PLEADINGS

Proposed Change:

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, and, if available, telecopier number. A party not represented by an attorney shall sign his pleadings, state his address, ~~and~~ telephone number, and, if available, telecopier number.

HELD OVER FROM MAY 26-27 Meeting

Rule 120a. Special Appearance

1. Notwithstanding the provisions of Rules 121, 122 and 123, a special appearance may be made by any party either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant on the ground that such party or property is not amenable to process issued by the courts of this State. A special appearance may be made as to an entire proceeding or as to any severable claim involved therein. Such special appearance shall be made by sworn motion filed prior to motion to transfer venue or any other plea, pleading or motion; provided however, that a motion to transfer venue and any other plea, pleading, or motion may be contained in the same instrument or filed subsequent thereto without waiver of such special appearance; and may be amended to cure defects. The issuance of process for witnesses, the taking of depositions, the serving of requests for admission, and the use of discovery and related processes, shall not constitute a waiver of such special appearance. Every appearance, prior to judgment, not in compliance with this rule is a general appearance.

2. Any motion to challenge the jurisdiction provided for herein shall be heard and determined before a motion to transfer venue or any other plea or pleading may be heard. No determination of any issue of fact in connection with the objection to jurisdiction is a determination of the merits of the case or any aspect thereof.

[3. The court shall determine the special appearance on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony. The affidavits, if any, shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.]

~~3.~~ 4. If the court sustains the objecton to jurisdiction, an appropriate order shall be entered. If the objection to jurisdiction is overruled, the objecting party may thereafter appear generally for any purpose. Any such special appearance or such general appearance shall not be deemed a waiver of the objection to jurisdiction when the objecting party or subject matter is not amenable to process issued by the courts of this State.

[Note: Added Language Underscored]

3751B

6/1 HJH, SCAC Agenda Costs

FULBRIGHT & JAWORSKI
1301 McKINNEY
HOUSTON, TEXAS 77010

TELEPHONE: 713/651-5151
TELEX: 76-2829
TELECOPIER: 713/651-5246

HOUSTON
WASHINGTON, D.C.
AUSTIN
SAN ANTONIO
DALLAS
LONDON
ZURICH

FULBRIGHT JAWORSKI &
REAVIS McGRATH
NEW YORK
LOS ANGELES

May 31, 1989

Re: Tex. R. Civ. P. 120a

The Honorable Nathan L. Hecht
5th District Court of Appeals
County Courthouse
Dallas, Texas 75202

Dear Justice Hecht:

Pursuant to your request at the recent meeting of the Supreme Court Advisory Committee, I enclose a draft of a proposed change to Rule 120A for the Court's consideration. The purpose of this proposal is to allow the use of affidavits to resolve the jurisdiction issue.

Very truly yours,

Original Signed By
DAVID J. BECK
David J. Beck

DJB/st

Enclosure

cc: Luther H. Soules, III, Esq. - w/attachment

3784B

HELD OVER FROM MAY 26-27 Meeting

Rule 166. Pre-Trial Procedure; Formulating Issues

In any action, the court may in its discretion direct the attorneys for the parties and the parties or their duly authorized agents to appear before it for a conference to consider:

(a) All dilatory pleas and all motions and exceptions relating to a suit pending;

(b) The simplification of the issues;

(c) The necessity or desirability of amendments to the pleadings;

(d) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(e) The limitation of the number of expert witnesses;

(f) The advisability of a preliminary reference of issues to a master or auditor for findings to be used as evidence when the trial is to be by jury.

[(g) The Settlement of the case. To aid such consideration, the court may encourage settlement.]

~~(g)~~ (h) Such other matters as may aid in the disposition of the action. The court shall make an order which recites the action taken at the pre-trial conference, the amendments allowed to the pleadings, the time within which same may be filed, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered shall control the subsequent course of the

action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or extend it to all actions.

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

1. Forms of Discovery. (No change.)

2. Scope of Discovery. Except as provided in paragraph 3 of this rule, unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

a. In General. (No change.)

b. Documents and Tangible Things. (No change.)

c. Land. (No change.)

d. Potential Parties and Witnesses. (No change.)

e. Experts and Reports of Experts. Discovery of the facts known, mental impressions and opinions of experts, otherwise discoverable because the information is relevant to the subject matter in the pending action but which was acquired or developed in anticipation of litigation and the discovery of the identity of experts from whom the information may be learned may be obtained only as follows:

(1) In General. A party may obtain discovery of the identity and location (name, address and telephone number) of an expert who may be called as a[n expert] witness, the subject matter on which the witness is expected to testify, the mental impressions and opinions held by the expert and the facts known to the expert (regardless of when the factual information was acquired) which relate to or form the basis of the

mental impressions and opinions held by the expert. The disclosure of the same information concerning an expert used for consultation and who is not expected to be called as a[n expert] witness at trial is required if the expert's work product forms a basis either in whole or in part of the opinions of an expert who is to be called as a witness.

(2) Reports. A party may also obtain discovery of documents and tangible things including all tangible reports, physical models, compilations of data and other material prepared by an expert or for an expert in anticipation of the expert's trial and deposition testimony. The disclosure of material prepared by an expert used for consultation is required even if it was prepared in anticipation of litigation or for trial when it forms a basis either in whole or in part of the opinions of an expert who is to be called as a[n expert] witness.

(3) Determination of Status. (No change.)

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

f. Indemnity, Insuring and Settlement Agreements. (No change.)

g. Statements. (No change.)

h. Medical Records; Medical Authorization. (No change.)

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

a. Work Product. (No change.)

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

c. Witness Statements. (No change.)

d. Party Communications. (No change.)

e. Other Privileged Information. (No change.)

4. Presentation of Objections. (No change.)

5. Protective Orders. (No change.)

6. Duty to Supplement. (No change.)

[COMMENT TO 1990 CHANGE: Suggestion of Luke Soules to make express in the rule that expert reports are not discoverable if the consultant is to be a fact witness only and not an expert. A physician who viewed an accident might consult on a protected basis although testifies to the observation at the time and place of the accident.

ROUGH DRAFT

ADD A NEW PARAGRAPH 7 TO RULE 166B, RULES OF CIVIL PROCEDURE:

7. DISCOVERY MOTIONS

All discovery motions shall contain a certificate by the party filing same that efforts to resolve the discovery dispute without the necessity of court intervention have been attempted and failed.

ELIMINATE THE PROPOSED CHANGE TO TRCP 215, PARAGRAPH 3, TO-WIT: "All motions to compel discovery and all motions for sanctions shall contain a certificate by the party filing same that efforts to resolve the discovery dispute without the necessity of court intervention have been attempted and failed."

LAW OFFICES

SOULES & WALLACE
ATTORNEYS-AT-LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
RICHARD M. BUTLER
W. CHARLES CAMPBELL
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
SARAH B. DUNCAN
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
RONALD J. JOHNSON
REBA BENNETT KENNEDY
PHIL STEVEN KOSUB
GARY W. MAYTON
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL *
LUTHER H. SOULES III †*
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

TELEFAX
SAN ANTONIO
(512) 224-7073
AUSTIN
(512) 327-4105

June 27, 1989

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Re: Proposed Changes to Rule 166b and 215
Texas Rules of Civil Procedure

Dear Bill:

Enclosed herewith please find copy of a letter I received from Mr. Tom Davis regarding proposed changes to Rule 166b and 215. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht
Honorable Stan Pemberton

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

BYRD, DAVIS AND EISENBERG
ATTORNEYS AND COUNSELORS
PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

707 West 34th Street, Austin, Texas 78705-1294
(512) 454-3751

June 26, 1989

Mr. Luther H. Soules III
Soules & Wallace
Tenth Floor, Republic of Texas Plaza
175 East Houston Street
San Antonio, TX 78205-9144

Dear Luke:

Enclosed is a proposed rule change which I discussed with you over the phone last week.

If you have any corrections or suggestions, please give me a call.

Yours very truly,

Tom

Tom Davis

TD/ah
Enclosure

HJH,
put with R1166 agenda item for 7/15 & Xc Subc.

LAW OFFICES

SOULES & REED

TENTH FLOOR
TWO REPUBLICBANK PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
JUDITH L. RAMSEY
ROBERT D. REED
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
THOMAS G. WHITE

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

June 9, 1988

Marian Taylor
Assistant Public Counsel
Office of Public Utility Council
8140 Mopac
Westpark III, Suite 120
Austin, Texas 78759

Dear Marian:

I have never been able to locate the Motion and Response in connection with the question of deposing an "expert" who is to be a "witness" although not a designated expert witness. However, it went along the lines that I earlier discussed with you by telephone. Because I cannot find the motion, I am not able to give you any further documentation by way of assistance, but I would be happy to talk to you by telephone at any time as I am sure you know.

Very truly yours,

Luther H. Soules III

LHSIII:gc
letters\015

LAW OFFICES

SOULES & WALLACE
ATTORNEYS-AT-LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

TELEFAX
SAN ANTONIO
(512) 224-7073
AUSTIN
(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
RICHARD M. BUTLER
W. CHARLES CAMPBELL
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
SARAH B. DUNCAN
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
RONALD J. JOHNSON
REBA BENNETT KENNEDY
PHIL STEVEN KOSUB
GARY W. MAYTON
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

July 5, 1989

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Re: Proposed Changes to Rule 166b
Texas Rules of Civil Procedure

Dear Bill:

Enclosed herewith please find copy of a letter I sent to Marian Taylor regarding TRCP 166b. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht
Honorable David Peeples

00331

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

Rule 237a. Cases Remanded From Federal Court

When any cause is removed to the Federal Court and is afterwards remanded to the state court, the plaintiff shall file a certified copy of the order of remand with the clerk of the state court and shall forthwith give written notice of such filing to the attorneys of record for all adverse parties. All such adverse parties shall have fifteen days from the receipt of such notice within which to file an answer. [No default judgment shall be rendered against a party in a removed action remanded from federal court if that party filed an answer in federal court during removal.]

[Comment: Suggestion made by Professor Dorsaneo to include language here instead of in Rule 239.]

RULE 278. SUBMISSION OF QUESTIONS, DEFINITIONS AND INSTRUCTIONS

[1. General] 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. Failure to submit a question 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 complaining party of the judgment, provided, however, that the 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 of instruction has been requested in writing and tendered by the party complaining of the judgment.

[2. Matters Relied upon by a Party. If a question, including an element thereof or instruction or definition pertaining thereto, is omitted from the charge or is included in the charge defectively, such omission or defect shall not be a ground for reversal of a judgment unless its submission in substantially correct wording has been requested in writing and tendered by the party relying upon it. The trial court's endorsement as required by Rule 276 will preserve any error related thereto and no further objection will be necessary.

[3. Matters Not Relied upon by a Party. If a question, including an element thereof or instruction or definition pertaining thereto, not relied upon by a party, is omitted from the charge or is included in the charge defectively, such omission or defect shall not be a ground for reversal of a judgment unless an objection thereto has been made by such party.

4. Matters Not Relied upon by Either Party. An instruction or definition which is not included in the charge or is included defectively which is not relied upon by either party shall not be deemed a ground for reversal unless its submission in substantially correct wording has been requested in writing and tendered by the party complaining of the judgment. The trial court's endorsement as required by Rule 276 will preserve any error related thereto and no further objection will be necessary.]

4543.001

UTK HJH
copy LHS
✓ 7-16-89
83

Texas Tech University

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

July 6, 1989

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

Re: Tex. R. Civ. P. 278

Dear Luke:

Time constraints have precluded me from discussing the change to the above rule with Justice Hecht, Buddy, and Tom.

I have taken the liberty of drafting a change which incorporates the thoughts expressed at our last meeting. Please include it in our agenda for next Saturday.

Copies are being provided to those listed below who are in no way responsbile for its contents.

Sincerely,

J. Hadley Edgar
Robert H. Bean Professor of Law

JHE/nt
Enclosures

cc: Gilbert I. Lowe
Tom L. Ragland
Justice Nathan L. Hecht

00336

HELD OVER FROM MAY 26-27 Meeting

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. Failure to submit a question shall not be grounds for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the complaining party, however, that objection to such failure shall suffice in such respect if the question is one relied upon by the opposing party. A definition or instruction shall not be grounds 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.

[To complain of and seek reversal of a judgment because of the court's:

a. failure to submit a question, the party relying on the question must request and tender it in writing in substantially correct form, while the party not relying on the question must either request and tender the question in writing in substantially correct form or object to the court's failure to include it in the charge;

b. submission of a defective question, the party relying on the question must request and tender in writing in substantially correct form, while the party not relying on the question must either request and tender the question in writing in substantially correct form or objection to the court's defective submission;

c. failure to submit a definition or instruction, the party must request and tender the definition or instruction in writing in substantially correct form;

d. submission of a defective or improper definition or instruction, the party must either request and tender the definition or instruction in writing in substantially correct form or object to the court's defective submission.]

LAW OFFICES

SOULES & WALLACE
ATTORNEYS-AT-LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

(512) 299-5434

TELEFAX
SAN ANTONIO
(512) 224-7073
AUSTIN
(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
RICHARD M. BUTLER
W. CHARLES CAMPBELL
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
SARAH B. DUNCAN
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
RONALD J. JOHNSON
REBA BENNETT KENNEDY
PHIL STEVEN KOSUB
GARY W. MAYTON
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL *
LUTHER H. SOULES III †‡
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

June 5, 1989

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

Re: Tex. R. Civ. P. 278

Dear Hadley:

Enclosed herewith please find a copy of a letter sent to me by Gilbert I. Low regarding proposed changes to Rule 278. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Stan Pemberton
Honorable Nathan L. Hecht

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

6/5 — HJH COAJ SCAC sub c SCAC Agenda SBD

JOHN G. TUCKER
CLEVE BACHMAN
STANLEY PLETTMAN
JAMES W. HAMBRIGHT
GILBERT I. LOW
BENNY H. HUGHES, JR.
J. HOKE PEACOCK II
LAWRENCE L. GERMER
JOHN CREIGHTON III
JAMES H. CHESNUTT II
J. B WHITTENBURG
PAUL W. GERTZ
GARY NEALE REGER
JOHN W. NEWTON III
D. ALLAN JONES
HOLLIS. HORTON
LOIS ANN STANTON
ROBERT J. HAMBRIGHT
HOWARD L. CLOSE
CURRY L. COOKSEY

ORGAIN, BELL & TUCKER

ATTORNEYS AT LAW

470 ORLEANS STREET

BEAUMONT, TEXAS

77701

TELEPHONE (409) 838-6412

CHARLES K. KEBODEAUX
RAY B. JEFFREY
MICHAEL J. TRUNCALE
LANCE C. FOX
LORI B. BELLOWS
GREGG R. BROWN
CLAUDE R LEMASTERS
LOUIS H KNABESCHUH, JR.
LEANNE JOHNSON
BRIAN L. PLOTTS
DAVID J. FISHER
FRANK R. STAMEY
JOHN W JOHNSON
SCOT G. DOLLINGER
LINDA S. LEMMONS

B. D. ORGAIN, OF COUNSEL

WILL E. ORGAIN (1882-1965)
MAJOR T. BELL (1897-1969)

May 30, 1989

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

Dear Luke:

I'm sorry that I had to leave at noon on Saturday. However, for the Memorial Day Weekend, I had longstanding plans.

Judge Hecht spoke for some simpler method of determining when a party needs to object and when a party needs to submit a request in writing in proper form. This is somewhat complicated for two reasons. First, certain instructions and definitions may be relied upon by both parties. Secondly, some defects could be considered an omission and some omissions could be considered a defect. Further, a party usually prepares only the instructions, definitions, and questions upon which his suit or defense depends. Therefore, with this in mind, I don't feel it would be unreasonable to have a rule something similar to the following:

When any element of a party's cause of action or defense, upon which that party has the burden of proof, properly includes a question, an instruction or a definition, and said question, instruction or definition is either omitted, or is improper, defective or incomplete, said party must submit to the court in proper written form such question, instruction or definition prior to jury argument. Thereafter, no objection is necessary in order to preserve any error pertaining thereto.

When any element of a cause of action or defense, upon which a party does not have the burden of proof, properly includes a question, instruction or definition, and said question, instruction or definition is either omitted or is improper, defective or incomplete, said party who does not have the burden of proof thereon, may preserve error by objecting thereto as required by these rules. No tender of a properly written question, instruction or definition is necessary for said party without the burden of proof thereon.

Under the above, or some version thereof, a party ordinarily would already have a proper written question, definition or instruction before submission of the case because he would prepare the things upon which he has the burden of proof. I don't submit this as a polished version but something of this nature may suffice.

Sincerely,

Gilbert I. Low

GIL:cc

cc: Justice Nathan Hecht
Chief Justice Thomas Phillips

RULE 299. OMITTED FINDINGS

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

6/29/89

To: Holly Halfacre

From: Hadley Edgar

Re: Supreme Court Advisory Committee

Holly, here are some changes to TRCP 299, TRAP 52 and new TRCP 299a which should be included on the agenda for our July 15 meeting.

Thanks.

New Rule:

RULE 299A. FILING CONCLUSIONS OF FACT AND LAW

Findings of fact and conclusions of law shall be filed with the clerk of the court as a document or documents separate and apart from the judgment.

Upon appeal, if there is a conflict between the judgment and any findings of fact and conclusions of law, the findings and conclusions will control.

6/29/89

To: Holly Halfacre

From: Hadley Edgar

Re: Supreme Court Advisory Committee

Holly, here are some changes to TRCP 299, TRAP 52 and new TRCP 299a which should be included on the agenda for our July 15 meeting.

Thanks.

HELD OVER FROM MAY 26-27 Meeting

Rule 305 Draft

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

[Rule 305. Proposed Judgment

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

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

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

LAW OFFICES

SOULES & WALLACE
ATTORNEYS-AT-LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
RICHARD M. BUTLER
W. CHARLES CAMPBELL
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
SARAH B. DUNCAN
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
RONALD J. JOHNSON
REBA BENNETT KENNEDY
PHIL STEVEN KOSUB
GARY W. MAYTON
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC I. SCHNALL *
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

TELEFAX
SAN ANTONIO
(512) 224-7073
AUSTIN
(512) 327-4105

June 5, 1989

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

Re: Tex. R. Civ. P. 305

Dear Mr. Tindall:

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

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan L. Hecht
Honorable Stanley Pemberton
Mr. James N. Parsons III
Mr. Samuel M. George

00347

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

4543.001

PARSONS & THORN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
501 EAST KOLSTAD STREET
P.O. DRAWER 1670
PALESTINE, TEXAS 75801

TELEPHONE (214) 729-6087
FAX (214) 729-7605

JAMES N. PARSONS, III
BOARD CERTIFIED
PERSONAL INJURY AND CIVIL TRIAL
TEXAS BOARD OF LEGAL SPECIALIZATION
CIVIL TRIAL ADVOCATE
NATIONAL BOARD OF TRIAL ADVOCACY

TERRY M. THORN
BOARD CERTIFIED
RESIDENTIAL REAL ESTATE LAW &
FARM AND RANCH REAL ESTATE LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

JACK K. SELDEN, JR.
CIVIL TRIAL ASSISTANT

GEORGE ANN DAVIS, B.S., M.A.
REGISTERED PHARMACIST
LEGAL ASSISTANT

May 23, 1989

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
SOULES & REED
800 Milam Building
San Antonio, TX 78205-1695

In Re: Suggested Rule for the Preparation and Entrance of Judgments

Dear Luke:

Please find enclosed a letter I received May 22, 1989, with regard to the preparation and entrance of judgments and other orders of the Court.

Many courts handle this on a local basis.

However, I think a good point is made with regard to standardization and expedition of the entry of orders.

Please feel free to contact Mr. George directly if you have any additional questions.

I look forward to working with your committee in the upcoming years.

Very truly yours,

James N. Parsons, III

JNP/db
Enc/

cc: Mr. Samuel M. George
Honorable Ruth Blake
Honorable Cynthia Kent
Honorable Randal Rogers
Honorable Joe Clayton
Honorable Joe Tunnell
Honorable Bill Coats

00348

GEORGE, DUNN & PARKER
ATTORNEYS AND COUNSELORS AT LAW
400 TROUP ROAD
TYLER, TEXAS 75701
(214) 595-6000

SAMUEL M. GEORGE
THOMAS A. DUNN*
EDWARD L. PARKER

*BOARD CERTIFIED CRIMINAL LAW
BOARD CERTIFIED FAMILY LAW
BY TEXAS BOARD OF LEGAL
SPECIALIZATION

May 18, 1989

Honorable Jim Parsons, President Elect
State Bar of Texas
P.O. Drawer 1670
Palestine, Texas 75801

Re: Suggested rule to the Rules of Civil Procedure

Dear President Elect Parsons,

Honestly, I did not know how to address you, but also, honestly, Jim, we lawyers here in Tyler are ELATED that you won. I think that the practice of law is still most respected in smaller towns and communities such as Palestine, and that the Court system is still most respected in small towns and communities. For some reason I do not consider Tyler within that category anymore. Congratulations on your election.

I would like to suggest an idea for a new rule to be added to the **Rules of Civil Procedure.**

It has long been a custom at the conclusion of a trial, jury or non-jury, for the Court to instruct one of the attorneys to prepare a judgment and forward it to the opposing attorney or attorneys, as the case may be, for approval as to form, then submit it to the Court.

I can only name about five lawyers in town with whom I have had dealings, myself included, that promptly review and return to opposing counsel or send in to the Court an approved final judgment. In the remainder of the situations, you have to call, write letters, and finally file a Motion to Enter Judgment, and most of the courts here do not set hearings on those motions immediately, but set it off three to five weeks. That period of time in getting a written order or a judgment entered can be significant, especially in family law cases where oftentimes third party creditors or debtors have to be informed of the decision of the Court as to management of property, et cetera.

I would like to see a rule passed that requires the attorney requested by the Court to prepare a judgment to do so and circulate it to the other lawyer within 10 days, sent either by hand delivery or by certified mail. The other attorney would then have 10 days to review it, approve it, or negotiate changes, and if changes cannot be agreed to, then prepare up his own proposed judgment and submit it to the Court with a Motion for Entry of Judgment. I would like the rule to require that the Court set a hearing on any Motion to Enter Judgment within 10 working days of the filing of a motion. At any time the attorneys could by agreement extend the deadlines. Then last, but not least, and actually first, any Motion to Enter Judgment can actually include a request for sanctions for attorney fees for abusing the post-trial approval of judgment procedure. I would like to see the rule applied to any final judgment or any temporary, interlocutory, or summary judgment or order.

The above rule would assist the Courts in disposing of cases, and it would help prevent the situation that often happens, especially in divorces, where people look up six months, or much later than that, and realize that no judgment was entered.

I try to make a habit to prepare up a judgment within 24-hours of the hearing, and get it to the other lawyer within two or three days after the final hearing. Many a lawyers who sit on a case do so to delay the beginning of the appellate process.

I hope that you agree with my suggestion and would assign this idea to the committee that considers these things prior to final presentation to the Supreme Court.

Very truly yours,

GEORGE & PARKER

Samuel M. George

SMG;seh

cc. The Honorable Ruth Blake, Judge
321st Judicial District Court
Smith County Courthouse
Tyler, Texas 75702

cc. The Honorable Cynthia Kent, Judge
114th Judicial District Court
Smith County Courthouse
Tyler, Texas 75702

cc. The Honorable Randal Rogers, Judge
County Court at Law Number Two
Smith County Courthouse
Tyler, Texas 75702

cc. The Honorable Joe Clayton, Judge
County Court at Law
Smith County Courthouse
Tyler, Texas 75702

cc. The Honorable Joe Tunnell, Judge
241st Judicial District Court
Smith County Courthouse
Tyler, Texas 75702

cc. The Honorable Bill Coats, Judge
7th Judicial District Court
Smith County Courthouse
Tyler, Texas 75702

RULE 308a. ~~IN CHILD SUPPORT CASES~~
IN ORDERS ON SUITS AFFECTING PARENT-CHILD RELATIONSHIP

~~In cases where~~ When the court has ordered ~~periodical payments for the~~ child support or possession of or access to a child ~~of a child or children, as provided in the statutes relating to divorce~~, and it is claimed that such order has been ~~disobeyed~~ violated, the person claiming that such ~~disobedience~~ violation has occurred shall make the same known to ~~the judge of~~ the court. ~~ordering such payments.~~ ~~Such judge~~ The court may thereupon appoint a member of the bar to investigate the claim to determine whether the court order has been violated~~of that court to advise with and represent said claimant~~. It shall be the duty of ~~said~~ the attorney, if the attorney in good faith believes that ~~said~~ the order has been ~~contemptuously disobeyed~~ violated, to file with the clerk of said court a ~~written statement~~ verified motion for enforcement, ~~verified by the affidavit of said claimant,~~ describing the violation ~~such claimed disobedience~~. Upon the filing of such motion ~~statement~~, ~~or upon its own motion,~~ the court may ~~issue~~ sign an ~~show cause~~ order directed to the person alleged to have ~~disobeyed~~ violated such ~~support~~ order, commanding that person to personally appear and respond to the motion for enforcement ~~show cause why they should not be held in contempt of court~~. Notice of such order shall be served on the respondent in such proceedings in the manner provided ~~in Rule 21a~~ by the Family Code, but not less than ten days prior to the hearing date ~~on such order to show cause~~. ~~The hearing on such order may be held either in term time or in vacation. No further written pleadings shall be required.~~ The hearing will be conducted as in other enforcement proceedings under Chapter 14, Family Code. ~~The court, the parties and the attorneys may call and question witnesses to ascertain whether such support order has been disobeyed.~~ Upon a finding of a violation of the court's order~~such disobedience~~, the court may enforce its judgment by orders as in other ~~cases of civil contempt~~ suits affecting the parent-child relationship.

Except by order ~~with the consent~~ of the court, no fee shall be charged by or paid to the attorney representing the claimant for any services. If the court is ~~shall be~~ of the opinion that an attorney's fee should ~~shall~~ be paid, the fees ~~same~~ shall be adjudged ~~assessed~~ against the party who violated the court's order ~~in default~~ and collected as costs, by judgment or both.

7/4

HJH,
SCAC Agenda
+ Suit

J

TINDALL & FOSTER
Attorneys at Law
2800 Texas Commerce Tower
600 Travis St.
Houston, Texas 77002
(713) 229-8733
Fax (713) 228-1303

TELEFAX COVER LETTER

TO: Luther Soules

TELEFAX NUMBER: 512-224-7073

FROM: HARRY L. TINDALL

DATE: July 3, 1989

RE: Rule 308a

-3- PAGES SENT INCLUDING TELEFAX COVER LETTER.

Attention: If you do not receive the total number of pages sent, please call Myra Smith or Karen Howard, legal assistants, immediately.

COMMENTS: Please add the proposed amendment to Rule 308a to the July 15th agenda. Thanks.

TELEFAX REPLY:

LAW OFFICES

SOULES & WALLACE
ATTORNEYS-AT-LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

(512) 299-5434

TELEFAX
SAN ANTONIO
(512) 224-7073
AUSTIN
(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
RICHARD M. BUTLER
W. CHARLES CAMPBELL
CHRISTOPHER CLARK
HERBERT CORDON DAVIS
SARAH B. DUNCAN
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
RONALD J. JOHNSON
REBA BENNETT KENNEDY
PHIL STEVEN KOSUB
GARY W. MAYTON
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III †‡
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

July 5, 1989

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

Re: Tex. R. Civ. P. 308a

Dear Hadley:

Enclosed herewith please find a copy of a letter sent to me by Harry Tindall regarding proposed changes to Rule 308a. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan L. Hecht
Honorable David Peeples

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

00355

HELD OVER FROM MAY 26-27 meeting

PROPOSED RULE CHANGES

RULE 329b, Tex.R.Civ.P., TIME FOR FILING MOTIONS.

The following rules shall be applicable to motions for new trial and motions to modify, correct, or reform judgments (other than motions to correct the record under Rule 316) in all district and county courts:

(a) A motion for new trial, if filed, shall be filed prior to or within ~~thirty~~ twenty-eight days after the judgment or other order complained of is signed.

(b) One or more amended motions for new trial may be filed without leave of court before any preceding motion for new trial filed by the movant is overruled and within ~~thirty~~ twenty-eight days after the judgment or other order complained of is signed.

(c) In the event an original or amended motion for new trial or a motion of modify, correct or reform a judgment is not determined by written order signed within ~~seventy-five~~ seventy days after the judgment was signed, it shall be considered overruled by operation of law on expiration of that period.

(d) The trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within ~~thirty~~ twenty-eight days after the judgment is signed.

(e) If a motion for new trial is timely filed by any party, the trial court, regardless of whether an appeals has been perfected, has plenary power to grant a new trial

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

(f) [Same.]

(g) [Same.]

(h) [Same.]

REASONS FOR THE CHANGES

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

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

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

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

00357

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

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

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

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

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

00358

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

TELEFAX

SAN ANTONIO
(512) 224-7073

AUSTIN
(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

February 15, 1989

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

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

Dear Mr. Tindall:

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

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

Very truly yours,

LUTHER H. SOULES III

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

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 202
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

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

Copy to file
2-10-89

Rule 329

February 10, 1989

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

Dear Luke:

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

Sincerely

Michol O'Connor

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

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

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

(b) Execution of such judgment shall not be suspended unless the party applying therefor shall give a good and sufficient bond payable to the plaintiff in the judgment, in an amount fixed in accordance with Appellate Rule 47 relating to supersedeas bonds, to be approved by the clerk, and conditioned that the party will prosecute his petition for new trial to effect and will perform such judgment as may be rendered by the court should its decision be against him.

(c) If property has been sold under the judgment and execution before the process was suspended, the defendant shall not recover the property so sold, but shall have judgment against the plaintiff in the judgment for the proceeds of such sale.

"(d) If an interest in property has been leased under the judgment, before the process was suspended, the defendant shall not be allowed to rescind the lease, but shall have judgment against the plaintiff for the proceeds resulting from the lease of such interest."

(e) If the motion is filed more than thirty days after the judgment was signed, the time period shall be computed pursuant to Rule 306a(7).

LAW OFFICES

LUTHER H. SOULES III
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

August 31, 1988

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

Re: Tex. R. Civ. P. 329

Dear Mr. Tindall:

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

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

Very truly yours,

LUTHER H. SOULES III

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

00362

Copy to LITS
Cng to file
8-18-88
lgh

LAY & COFFEY
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
SUITE 1000
400 WEST 15TH STREET
AUSTIN, TEXAS 78701-1647

SKIPPER LAY*
WILLIAM DAVID COFFEY III**
CARTER C. RUSH

*BOARD CERTIFIED - OIL, GAS & MINERAL LAW
**ALSO LICENSED IN CALIFORNIA

TELEPHONE
(512) 474-6556
FACSIMILE
(512) 469-0123

HJH
SCAC Surf C
+ Agenda

August 16, 1988

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

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

Dear Bob:

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

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

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

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

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

Sincerely yours,

LAY & COFFEY, P.C.

By: Skipper Lay
Skipper Lay

SL/fdw
Enclosure
cc: Mr. Jan E. Rehler
Chairman
Oil, Gas & Mineral Law Section
Feferman & Rehler
P. O. Box 23041
Corpus Christi, TX 78403

Mr. Philip M. Hall
Prichard, Peeler, Hatch, Cartwright,
Hall & Kratzig
Attorneys at Law
Suite 1500 Texas Commerce Plaza
Corpus Christi, TX 78470

Mr. Jon R. Ray
Cox & Smith
Attorneys at Law
600 National Bank of Commerce Building
San Antonio, TX 78205

Mr. Luther H. Soules, III
Chairman
Supreme Court Advisory Committees
Soules, Reed & Butts
Attorneys at Law
800 Milam Building
San Antonio, TX 78205

P... 1990

Childress
Groesbeck
...rs *Texarkana*
San Marcos
Dallas
Corpus Christi
...n *Dallas*
San Antonio
Longview
Lubbock

... Holmes, Longview

**Public Member*

SUPREME COURT APPOINTED COMMITTEES

THE SUPREME COURT ADVISORY COMMITTEE

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

MEMBERSHIP
SUPREME COURT ADVISORY COMMITTEE

Terms 1/1/85 to 1/1/91

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

Gilbert T. Adams, Jr.
Law Offices of Gilbert T. Adams
1855 Calder Avenue
Beaumont 77701

Pat Beard
Beard & Kultgen
P.O. Box 21117
Waco 76702-1117

Frank L. Branson
Law Offices of Frank L. Branson, P.C.
Highland Park Natl. Bank Bldg.
Penthouse Suite, 4514 Cole Avenue
Dallas 75201

Elaine A.G. Carlson
5318 Western Hills Drive
Austin 78731

Solomon Casseb, Jr.
Casseb, Strong & Pearl, Inc.
127 East Travis Street
San Antonio 78205

Vester T. Hughes, Jr.
Hughes & Luce
1000 Mercantile Dallas Building
Dallas 75201

Charles Morris
Morris, Craven & Sulak
1010 Brown Building
Austin 78701

John M. O'Quinn
O'Quinn, Hagans & Wettman
3200 Texas Commerce Tower
Houston 77002

Hon. Jack Pope
2803 Stratford Drive
Austin 78746

Tom L. Ragland
Clark, Gorin, Ragland & Mangrum
P.O. Box 239
Waco 76703

Harry M. Reasoner
Vinson & Elkins
3000 1st City Tower
Houston 77002-6760

Broadus A Spivey
Spivey & Grigg, P.C.
P.O. Box 2011
Austin 78768

Hon. Linda B. Thomas
Judge, 256th District Court
Old Red Courthouse, 2nd Floor
Dallas 75202

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

Continued on next page

Terms 1/1/82 to 1/1/88

David J. Beck
Fulbright & Jaworski
800 Bank of Southwest Bldg.
Houston 77002

Prof. Newell Blakely
University of Houston Law Center
4800 Calhoun Road
Houston 77004

Prof. William V. Dorsaneo III
Southern Methodist University
Dallas 75275

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

Kenneth D. Fuller
Koons, Rasor, Fuller & McCurley
2311 Cedar Springs Rd., Suite 300
Dallas 75201

Franklin Jones, Jr.
Jones, Jones, Baldwin, Curry & Roth, Inc.
P.O. Drawer 1249
Marshall 75670

Gilbert I. Low
Orgain, Bell & Tucker
Beaumont Savings Bldg.
Beaumont 77701

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

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

Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi 78403

Harold W. Nix
P.O. Box 679
Daingerfield 75638

Hon. Raul Rivera
Judge, 288th District Court
Bexar County Courthouse
San Antonio 78205

Anthony J. Sadberry
Sullivan, King & Sabom
5005 Woodway Drive
Houston 77056

Sam Sparks
Grambling, Mounce, Sims, Galatzan & Harris
P.O. Drawer 1977
El Paso 79950

Sam D. Sparks
Webb, Stokes & Sparks
P.O. Bos 1271
San Angelo 76902

Hon. Bert H. Tunks
Abraham, Watkins, Nichols, Ballard, Alstead & Friend
800 Commerce Street
Houston 78284

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

Rule 329c Motions to Set Aside Default Judgments

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

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

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

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

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

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

LH 8
Info.
Copy

LAW OFFICES
McCAMISH, INGRAM, MARTIN & BROWN
A PROFESSIONAL CORPORATION

650 MBANK TOWER
221 WEST 6TH STREET
AUSTIN, TEXAS 78701
(512) 474-6575
TELECOPIER (512) 474-1388

1200 FIRST REPUBLICBANK TOWER
175 E. HOUSTON
SAN ANTONIO, TEXAS 78205
(512) 225-5500
TELEX 910871104
TELECOPIER (512) 225-1283

SUITE 915
WATERGATE SIX HUNDRED BUILDING
WASHINGTON, D.C. 20037
(202) 337-7900
TELECOPIER (202) 338-1299

January 6, 1987

1-15-88
Holly
R339b State Secy
XC Jackson

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

Dear Ms. Halfacre:

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

Thank you for your cooperation in this matter.

Very truly yours,

Aaron L. Jackson

ALJ:tes

Enclosures

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
REBA BENNETT KENNEDY
DONALD J. MACH
ROBERT D. REED
HUGH L. SCOTT, JR.
DAVID K. SERGI
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

January 18, 1988

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

RE: Rule 329b

Dear Harry:

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

Very truly yours,

LUTHER H. SOULES III

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

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

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

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

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

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

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

Strackbein

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

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

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

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

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

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

After Strackbein: Southland

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

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

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

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

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

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

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

After Strackbein: Barber

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

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

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

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

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

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

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

* * *

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

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

(Emphasis added.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 329c Motions to Set Aside Default Judgments

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

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

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

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

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

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

ENDNOTES

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

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

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

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

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

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

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

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

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

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

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

9. Id. at 38-9.

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

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

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

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

(Emphasis added).

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

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

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

13. Id. at 811.

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

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

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

(Emphasis in original.)

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

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

16. 733 S.W.2d 679.

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

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

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

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

20. Id., Transcript at 18.

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

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

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

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

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

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

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

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

28. Implied in Strackbein v. Prewitt, id.

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

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

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

HELD OVER FROM MAY 26-27 Meeting

LAW OFFICES

LUTHER H. SOULES III
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

May 17, 1989

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

Re: Tex. R. Civ. P. 330

Dear Mr. Tindall:

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

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

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Stanley Pemberton

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711
(512) 463-1312

May 15, 1989

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

Dear Luke:

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Nathan L. Hecht
Justice

4543.001

South Texas College of Law

July 10, 1989

Mr. Luther Soules
175 E. Houston Street
Republic of Texas Plaza-10th Floor
San Antonio, TX 78205

RE: Subcommittee Report on TRCP 749c

Dear Luke:

The subcommittee for Rules 737-813 has considered modification of Texas Rule of Civil Procedure 749c as suggested by Justice Hecht in his letter of May 25, 1989 to you. (attached) Those subcommittee members who responded, voted to recommend no change to the full committee and that this matter be tabled. I tend to concur with this recommendation, as the pending case challenging the constitutionality of Rule 749c (Walker v. Blue Water Garden Apartments) results from an unpublished court of appeal's opinion. A review of the points of error on which the Supreme Court has granted writ (attached), really does not clarify the concerns surrounding the rule nor offer much guidance to suggesting appropriate modifications. Accordingly, until that case is concluded, the subcommittee recommendation to the full committee is that Rule 749c not be amended at this time.

If you wish the subcommittee to reconsider this matter or to entertain other matters within our area of responsibility, please feel free to let me know.

Sincerely,

Elaine A. Carlson
Professor of Law

/gr

cc: Subcommittee Chair Members

1303 San Jacinto Street, Houston, Texas 77002-7006 (713) 659-8040

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711
(512) 463-1312

May 25, 1989

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

Dear Luke:

I find no provision in the appellate rules for substitution of parties except Rule 9. That rule does not cover the situation, quite common in these hard times, in which a new entity (like the FDIC or the FSLIC) succeeds to the interest of a party on appeal. Perhaps an amendment to Rule 9 should be considered at the May meeting of the Advisory Committee.

Texas Rule of Civil Procedure 749c requires a pauper appellant in a forcible detainer case involving non-payment of rent to deposit one rental period's rent into the court registry to perfect the appeal. This deposit is not in the nature of a supersedeas, which is provided for in Rule 749b. A pending case challenges the constitutionality of Rule 749c. *Walker v. Blue Water Garden Apartments*, C-7798. This may be another problem we want to discuss.

Finally, a local justice of the peace recently complained of inconsistencies in the requirements for service of citation under Rules 99-107 and 533-536 of the Texas Rules of Civil Procedure. He suggested that the latter rules were simply overlooked when changes in the former rules were made.

As always, the Court is grateful to you for your dedicated assistance in developing our Rules.

Sincerely,

Nathan L. Hecht
Justice

00397

THE TEXAS SUPREME COURT JOURNAL

Published every week in the year that the Supreme Court of Texas convenes in regular session—i.e., every week in the year except as indicated below—at Austin, Texas. Subscriptions $167.29 per year (price includes State and Austin City Sales and Municipal Transit Taxes).

Post Office Address: Box 13086, Capitol Station, Austin, Texas 78711

Vol. 32 (Pages 119-149) December 17, 1988 No. 9

COVERING SESSION OF THE SUPREME COURT OF TEXAS
WEDNESDAY, DECEMBER 14, 1988

The Texas Supreme Court Journal is published every week in the year that the Supreme Court of Texas convenes in regular weekly session—i.e., usually every week in the year except during the month of August, the first week in September, one week at Christmas, and one week in July. All opinions of the Court are published in full for the first time and usually within forty-eight hours after they are handed down. Also, a compilation of the weekly proceedings of the Supreme Court of Texas, list of all cases filed in the Supreme Court, and the points on which the Court grants writs of error are published. An index based upon the points of law set out in the abstracts and reports of decisions is published periodically. Subscriptions are $167.29 per year (sales taxes included). No extra copies are sold to non-subscribers. WE ASSUME NO RESPONSIBILITY OR LIABILITY, EXPRESS OR IMPLIED, FOR ERRORS OR OMISSIONS OF ANY KIND, AND NO WARRANTIES OF MERCHANTABILITY OR FITNESS, EXPRESS OR IMPLIED, ARE MADE OR ARE TO BE IMPLIED, THE PRODUCT, INCLUDING ISSUES AND INDEXES, BEING ACCEPTED AS IS AND WITH ALL FAULTS. Street address: 708 Colorado, Suite 709, Austin, Texas 78701. Address all correspondence, including changes of address, to: The Texas Supreme Court Journal, Box 13086, Capitol Station, Austin, Texas 78711. Tel. 1-512-869-0385. In Austin, call 476-7533. We reserve the right to change postage class, form of business and business operations at any time. To obtain extra binders, send $9.63 (sales taxes included) to Box 13086, Capitol Station, Austin, Texas 78711. Please enclose a copy of your mailing label with all correspondence.

Printed in Austin by Aus-Tex. 78701

The Texas Court of Criminal Appeals has already rejected the contention that the barratry statute 'is unconstitutional because it imposes a limitation on the right of free speech.' "

The Supreme Court then says: "We decline to hold that the right of free speech under the Texas Constitution guarantees a lawyer the right to solicit business for pecuniary gain under the circumstances alleged in the State Bar's disciplinary petition. We do hold that prosecution of the State Bar's disciplinary action violates none of O'Quinn's rights under Tex. Const. art. I, § 8."

The Supreme Court continues: "We overrule O'Quinn's state and federal equal protection challenges. *** . . . [W]e find no open courts violation resulting from a ban on lawyer solicitation for pecuniary gain. . . . We hold that the disciplinary rules prohibiting in-person solicitation by lawyers or their agents do not violate Tex. Const. art. I, § 13."

The Supreme Court concludes: "We overrule all of O'Quinn's constitutional attacks before us and affirm the order of the trial court. This cause is remanded to that court for further proceedings."

—"Runners" for Attorneys

—State Bar Act

—Due Process

—First Amendment Protections

—U.S. Constitution

—Texas Constitution

—Solicitation of Employment for Attorneys

—Supreme Court Disciplinary Rules

—Direct Appeals

—Equal Protection

—Barratry

—Open Courts Provision—Texas Constitution

—Jurisdiction—Direct Appeal

—Solicitation

—Legitimate State Goals

—Fourteenth Amendment

—Free Speech

GRANTED WRIT OF ERROR

Walker v. Blue Water Garden Apartments, No. C-7799. (Opinion of Court of Appeals not published, Rule 90, T.R.A.P.)

This case involves a county court's dismissal of an appeal *in forma pauperis* because of alleged defects in form and substance in the affidavit of inability to pay costs.

Blue Water Garden Apartments (Blue Water) brought this forcible entry and detainer action against Opal Lee Walker in the Justice Court of Deaf Smith County. The Justice Court rendered judgment that Blue Water have a writ of restitution, and that it recover rent from Ms. Walker in the sum of $833.00 plus postjudgment interest.

Ms. Walker then sought to appeal the judgment of dismissal to the County Court. She filed a sworn statement, but it did not contain the statutorily required elements of a pauper's affidavit. And she did not pay into the registry of the justice court "one rental period's rent" as required by T.R.C.P. 749c.

The County Court accordingly dismissed the appeal for want of jurisdiction.

On further appeal to the Court of Appeals, Ms. Walker contended that the requirements for appeal in forma pauperis (Rule 749c, T.R.C.P.) unconstitutionally deprived her of the right to appeal.

The Court of Appeals said: "The question of the constitutionality of the rule is not reached, because the judgment of dismissal must be affirmed for a more basic lack of jurisdiction by the county court."

The Court of Appeals continued: ". . . [N]one of the declarations in her sworn statment includes what is required for a pauper's affidavit; consequently, the sworn statement did not even substantially comply with the requirement for a rule-749b pauper's affidavit, thereby causing it to be fundamentally defective. The defect is jurisdictional . . . and although not heretofore raised, it is fundamental and may not be ignored."

The Court of Appeals concluded: "Accordingly, the judgment of dismissal is affirmed."

The Supreme Court grants writ of error with the notation: "Granted on Points 1 and 2."

POINTS OF ERROR

POINT ONE—THE COURT OF APPEALS ERRED IN DISMISSING, UPON UNASSIGNED ERROR, PETITIONER'S APPEAL TO THE COUNTY COURT FROM A FORCIBLE DETAINER ACTION DUE TO DEFECTS IN THE AFFIDAVIT OF INABILITY TO PAY COSTS OF APPEAL, BECAUSE DEFECTS IN FORM AND SUBSTANCE CONTAINED IN SUCH AFFIDAVITS ARE NOT JURISDICTIONAL AND THEREFORE DO NOT CONSTITUTE FUNDAMENTAL ERROR. (Germane to Assignment of Error 1, Motion for Rehearing).

POINT TWO—THE COURT OF APPEALS ERRED IN HOLDING THAT APPELLANT'S AFFIDAVIT OF INABILITY TO PAY COSTS WAS NOT IN SUBSTANTIAL COMPLIANCE WITH THE STATUTE, BECAUSE THE AFFIDAVIT WAS SUFFICIENT TO DEMONSTRATE HER INABILITY TO PAY THE COSTS OF THE APPEAL OR ANY PART

(Unpublished ct. of appeals opinion)

OPINIONS OF THE SUPREME COURT OF TEXAS

JOHN M. O'QUINN vs.
STATE BAR OF TEXAS

No. C-6790

Direct Appeal from Harris County filed September 14, 1987, (30 Tex. Sup. Ct. Jour. 609), (Submitted in oral argument March 30, 1988).

Order of the trial court denying injunctive relief is affirmed and the cause is remanded to that court for further proceedings. (Opinion by Justice Kilgarlin, Concurring opinion by Chief Justice Phillips, separate concurring by Justice Gonzalez, Justice Ray notes his dissent. Justice Cook not sitting)

For Appellant: Luther H. Soules, III, Law Ofcs. of Luther H. Soules, III, San Antonio Tx. Richard Haynes, Haynes & Fullenweider, Houston, Tx. T. Gerald Treece, Dean, South Texas College of Law, Houston, Tx. David Berg, Berg & Androphy, Houston Tx. Stanley B. Binion, Baker, Brown, Sharman & Parker, Houston, Tx. James R. Leahy, Reynolds, Shannon, Miller, Blinn, White & Cook, Houston, Tx.

For Appellee: Tom Alexander, Alexander & McEvily, Houston, Tx. Steven M. Smott. First Asst.' General Counsel, State Bar of Texas, Austin, Tx. Jim Mattox, Attorney General of Texas, Austin, Tx. Javier P. Guajardo, Attorney General's Office, Austin, Tx.

This direct appeal, filed by John M. O'Quinn against the State Bar of Texas, is brought pursuant to Tex. Const. art. V, § 3-b, Tex. Gov't Code Ann. § 22.001(c) (Vernon 1988), and Tex. R. App. P. 140.[1] In response to the State Bar's disciplinary petition against him, attorney O'Quinn requested in district court a temporary and permanent injunction against prosecution of the action based on alleged federal and state constitutional deficiencies in the State Bar Act and certain disciplinary rules. The trial court denied O'Quinn's request for injunctive relief and, in its order, expressly found that the statute and rules complained of were constitutional, which serves as the basis for conferring direct appeal jurisdiction on this court. We now affirm the order denying injunctive relief and remand to the trial court for further proceedings.

On February 26, 1987, the State Bar filed its disciplinary action against O'Quinn pursuant to the State Bar Act, Tex. Rev. Civ. Stat. Ann. art. 320a-1 (repealed), and certain disciplinary rules promulgated by this court. (Effective September 1, 1987, the State Bar Act was codified as chapter 81 of the Texas Government Code.) To put the matter in context, we quote from the thus far unproved allegations against O'Quinn in the State Bar's disciplinary petition:

II.

Various non-lawyers, including, but not limited to, Robert Loving, James C. McNeilley, Joe Coddington, Lloyd Donner, Terry Clark, and Gary Thomas, have at Respondent's behest recommended employment of Respondent to various potential clients who had not sought their or Respondent's advice regarding employment of an attorney. Some of such recommendations resulted in Respondent's employment and some did not. In instances where employment resulted, Respondent paid some of these non-lawyers sums of money for recommending and securing such employments. Respondent also

[1] It will be noted that in the 1988 West Publishing Company's Texas Rules of Court there are two appellate rules denominated "140" (as there are also two rules 15a, 43, 47, 49, 54, 84, 85, 90, 133 and 182). The reason for this confusing situation is that the Supreme Court initially signed an order in March, 1987 amending the rules. The Court of Criminal Appeals concurred in those amendments. Then, on July 15, 1987, the Supreme Court issued a supplemental order, adopting many new amendments, but also changing some amendments, all to become effective January 1, 1988. Somehow, that order was never submitted to the Court of Criminal Appeals for its approval. Consequently, two versions appear in some instances. All of the dual rules are applicable to civil proceedings, and the Supreme Court version should be followed. For example, under the Court of Criminal Appeals version of Tex. R. App. P. 133, the Supreme Court would still be engaged in refusing writs, no reversible error, a practice we discontinued on January 1, 1988.

LAW OFFICES

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
RICHARD M. BUTLER
W. CHARLES CAMPBELL
CHRISTOPHER CLARK
HERBERT CORDON DAVIS
SARAH B. DUNCAN
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
RONALD J. JOHNSON
REBA BENNETT KENNEDY
PHIL STEVEN KOSUB
GARY W. MAYTON
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL *
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

SOULES & WALLACE
ATTORNEYS-AT-LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

TELEFAX
SAN ANTONIO
(512) 224-7073
AUSTIN
(512) 327-4105

May 8, 1989

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

Re: Tex. R. Civ. P. 749

Dear Elaine:

Enclosed herewith please find a copy of a letter sent to me by Justice Nathan L. Hecht regarding proposed changes to Rule 749. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

LUTHER H. SOULES III

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

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

4543.001

Copy CHS
✓ 7-11-89

LAW OFFICES OF

LOCKE PURNELL RAIN HARRELL

(A PROFESSIONAL CORPORATION)

2200 ROSS AVENUE SUITE 2200
DALLAS·TEXAS 75201·6776
(214) 740·8000

TELECOPIER: (214) 740·8800
TELEX: 73·0911 LOCKE DAL
WRITER'S DIRECT DIAL NUMBER

July 10, 1989

7/11 HJH - Agenda this part only.

FEDERAL EXPRESS

Mr. Luther H. Soules, III
175 E. Houston, 10th Floor
San Antonio, Texas 78205-2230

Re: Supreme Court Advisory Committee - Statute Regarding Adoption of Rules Establishing Guidelines for Determining Whether Civil Case Records Should be Sealed

Dear Luke:

This letter will confirm the request of our client, The Dallas Morning News, to express its views to the Supreme Court Advisory Committee regarding recently passed House Bill 1637 which provides:

> "The Supreme Court shall adopt rules establishing guidelines for the courts of this state to use in determining whether in the interest of justice the records in a civil case, including settlements, should be sealed."

We understand that the Supreme Court Advisory Committee, at the request of the Court, will study the matter. We understand that you will appoint a sub-committee of the Advisory Committee.

We respectfully request the opportunity to:

1. Submit a written summary of the views of The Dallas Morning News to the sub-committee when it has been appointed; and

2. Meet in person with the sub-committee for a brief opportunity to discuss our views with the sub-committee and to answer any questions it may have.

The Dallas Morning News has performed detailed research on the practice of sealing court records in Dallas County. In a series of articles on the subject, The News reported that for the period

1920 to 1980 only 80 Dallas County cases were sealed; whereas since 1980, 202 non-child related civil cases have been sealed. Several recent attempts by the media to obtain an authoritative decision on the merits from the Texas Supreme Court have not succeeded. For example, in Times Herald Printing Co. v. Jones, 730 S.W.2d 648 (Tex. 1987) the Court did not reach the merits of the issue, disposing of it upon procedural grounds relating to the right of intervention after the judgment of the trial court had become final. In 1988 The News filed a declaratory judgment suit in Dallas County against Bill Long, District Clerk of Dallas County. This case was decided upon cross motions for summary judgment and is now pending on appeals, filed by both parties, in the Dallas Court of Appeals. The case has not yet been set for submission. Among the issues before the Dallas Court of Appeals are the contentions that a local Dallas district court rule, purporting to give broad discretion to seal records, is unconstitutionally overbroad and violative of common law rules of access to public records.

In view of the public importance of the question, and the more pervasive importance of the statewide rules to be promulgated by the Texas Supreme Court under the new statute, we believe the importance of the guidelines to be adopted by the Supreme Court will eclipse the significance of the case now pending before the Dallas Court of Appeals.

In formulating the issues to be studied by the sub-committee of the Supreme Court Advisory Committee, we respectfully suggest that the following issues be examined:

1. Procedural guidelines for the trial courts in hearing sealing motions, including:

   A. Notice requirements.

   B. Opportunity for non-parties to the original suit (i.e. the public or the news media) to be heard on the question of sealing.

   C. Requirements that specific and affirmatively articulated findings be contained upon the face of any sealing order.

D. Requirements that if any portion of the record is to be sealed that sealing be limited to those specific portions of the record rather than the entire case file.

E. Requirement that a sealing order set the length of time the order is to be effective.

F. Requirement that the sealing order itself should not be sealed.

2. Substantive guidelines for the trial and appellate courts, including:

A. Allocation of the burden of proof in deciding a sealing motion.

B. The standard by which sealing motions are to be determined. E.g., the Dallas Local Rule, challenged by The News in its suit, purports only to require "good cause." "Good cause" is not defined in the Dallas local rule. Federal Courts and other state jurisdictions have recognized that more stringent standards such as "most compelling reasons" or "compelling need" are mandated by the Constitution or the common law.

3. Elimination of the time limit which prevents non-parties from challenging a sealing order after the judgment of the trial court becomes "final." A recent example of the failure of an attempt to obtain review on the merits because of this procedural ground is the decision in The Express-News Corp. v. Spears, 766 S.W.2d 885 (Tex. App. - San Antonio - March 15, 1989, orig. proceeding).

Another issue which may be of interest to the sub-committee is whether the guidelines to be adopted by the Supreme Court should give separate or special treatment for claims of confidentiality regarding discovery. In this regard, the 1988 decision of the Third Circuit in Littlejohn v. BIC Corp., 851 F.2d 673 contains a discussion about the interrelationship between protective orders pertaining to discovery and more general sealing orders and the problems resulting from the introduction in evidence during trial

of material previously covered by a protective order. Cf. Public Citizen Litigation Group v. Liggett Group, Inc., 858 F.2d 755 (1st Cir. 1988) (recognizing that protective orders governing discovery are separate and distinct from sealing orders).

For your ready reference, we are enclosing copies of the following:

1. House Bill 1637, requiring the Supreme Court to adopt guidelines regarding sealing.

2. A proposed set of guidelines we submitted to the Dallas County District Judges.

3. A copy of the judgment in the suit by The Dallas Morning News against the District Clerk which is now the subject of the appeal pending in the Dallas Court of Appeals.

4. The opening appellate brief of The Dallas Morning News in the Dallas Court of Appeals.

5. A reply brief labeled "Brief for Cross-Appellee The Dallas Morning News Company" in the Dallas Court of Appeals. (The prayer at pages 24-27 of this brief succinctly summarizes the relief sought in the appeal).

6. A marked copy of the decision in Publicker Industries, Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984) recognizing many of the procedural and substantive constitutional and common law issues regarding attempts to limit public access to judicial records.

7. The opinion in Express-News Corp. v. Spears, 766 S.W.2d 885, another recent sealing case in which the majority did not reach the merits but in which Chief Justice Cadena, in a dissent, provides what we believe to be a brief and well-considered recognition of the importance of the right of public access to court records.

The materials we have enclosed are, of course, not exhaustive. The state and federal courts in other jurisdictions continue to hand down opinions in this area quite frequently. Because the appellate briefs which we submitted to the Dallas Court of Appeals are not in a format directly addressed to the broader concerns of

the Supreme Court Advisory Committee, we feel it would be helpful for us to write, and submit to the sub-committee, a succinct paper outlining the constitutional and common law concerns to be accommodated in the guidelines ultimately to be adopted by the Supreme Court.

After the sub-committee has been appointed, we would appreciate hearing from you as to the sub-committee's timetable and its willingness to consider the written paper to be submitted by us and our request for an opportunity to briefly meet with the sub-committee.

Kindest regards.

Very truly yours,

John H. McElhaney

JHM:slh
Enclosures

A543.001

SULLIVAN, KING & SABOM
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
5005 WOODWAY
HOUSTON, TEXAS 77056
(713) 871-1185

CHARLES J. SULLIVAN
JOHN J. KING
ROBERT T. SABOM
WILLIAM F. HENRI
ANTHONY J. SADBERRY
DOUGLAS R. DRUCKER
MELINDA WINN
JAMES T. MAHONEY*
SUZANNE K. O'MALEY
JOEL K. FRENCH
MARY E. SLAY

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

MAILING ADDRESS:
POST OFFICE BOX 2482
HOUSTON, TEXAS 77252

TELECOPIER (713) 960-1741

July 10, 1989

FILE NO.:

Tom H. Davis, Esq.
Byrd, Davis & Eisenberg
707 W. 34th Street
Austin, TX 78765

John M. O'Quinn, Esq.
O'Quinn & Associates
3200 Texas Commerce Tower
Houston, TX 77002

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

Tom L. Ragland, Esq.
Clark, Gorin, Bagland
& Mangrum
P. O. Box 239
Waco, TX 76703

Charles F. Herring, Esq.
Small, Craig & Werkenthin
2500 Interfirst Tower
Austin, TX 78768

Honorable Paul Rivera
Judge, 288th District Court
Bexar County Courthouse
San Antonio, TX 78205

Charles "Lefty" Morris, Esq.
Morris, Craven & Sulak
600 Congress Ave., Suite 2350
Austin, TX 78701-3234

Sam D. Sparks, Esq.
P. O. Drawer 1977
El Paso, TX 79959

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

Dear Colleagues:

This letter follows a successful meeting of the Supreme Court Advisory Committee last May. At the conclusion of that meeting the Committee recommended the Subcommittee's report to delete the 90 day provision from Rule 534 T.R.C.P. and I thank you for your work in that effort.

Subsequent to that meeting I received from our Chairman, Luke Soules, a letter to him from Justice Nathan L. Hecht dated May 25, 1989, copy enclosed. As you will note Justice Hecht observed the complaints raised by a local justice of the peace pointing to inconsistencies in the requirements for service of citation and suggesting that the justice of the peace rules were overlooked when changes were made in the service of citation rules for District and County Courts. The changes in the 90 day provision will of course already address part of these inconsistencies. The other inconsistencies that you may possibly want to address are the provisions for service by mail, etc., which may be appropriate for consideration. However, since no specific proposal or

recommendation has been forwarded to this Subcommittee, I do not have any such recommendation to offer for your consideration.

While this matter does not appear on the preliminary agenda for the Supreme Court Advisory Committee meeting of July 15, 1989, I did want to make this observation in the event that our Chairman requests some response from our Subcommittee on the advisability of making any changes in the next rules report to the Supreme Court from the Advisory Committee.

Therefore, I would ask that you at least be mindful of this issue as we approach the forthcoming meeting and if you have any comments be prepared to make same at the committee meeting, or if you cannot attend please do not hesitate to call my office or send me a letter so that I will be aware of any views you may have on this topic.

Thank you for your usual support.

Yours sincerely,

Anthony J. Sadberry

AJS/stb
enclosure

cc: Hon. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Wallace
Republic of Texas Plaza, Tenth Floor
175 East Houston Street
San Antonio, TX 78205-2230

May 25, 1989

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

Dear Luke:

I find no provision in the appellate rules for substitution of parties except Rule 9. That rule does not cover the situation, quite common in these hard times, in which a new entity (like the FDIC or the FSLIC) succeeds to the interest of a party on appeal. Perhaps an amendment to Rule 9 should be considered at the May meeting of the Advisory Committee.

Texas Rule of Civil Procedure 749c requires a pauper appellant in a forcible detainer case involving non-payment of rent to deposit one rental period's rent into the court registry to perfect the appeal. This deposit is not in the nature of a supersedeas, which is provided for in Rule 749b. A pending case challenges the constitutionality of Rule 749c. *Walker v. Blue Water Garden Apartments*, C-7798. This may be another problem we want to discuss.

Finally, a local justice of the peace recently complained of inconsistencies in the requirements for service of citation under Rules 99-107 and 533-536 of the Texas Rules of Civil Procedure. He suggested that the latter rules were simply overlooked when changes in the former rules were made.

As always, the Court is grateful to you for your dedicated assistance in developing our Rules.

Sincerely,

Nathan L. Hecht
Justice

00409