# AGENDA
# NOVEMBER 17-18, 1995
# SCAC MEETING

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## RULE 145 AFFIDAVIT OF INABILITY

In lieu of ~~filing security for~~ paying costs of an original action, a party who is unable to afford ~~said~~ costs shall file an affidavit as herein described. A "party who is unable to afford costs" is defined as a person who is presently receiving a governmental entitlement based on indigency or any other person who has no ability to pay costs. ~~The affidavit, and the party's action, shall be processed by the clerk in the manner prescribed by this rule~~. Upon the filing of the affidavit, the clerk shall docket the action, issue citation and provide other customary services as are provided any party.

**~~2.~~1. Affidavit.** The affidavit shall contain complete information as to the party's identity, nature and amount of governmental entitlement, nature and amount of employment income, other income, (interest, dividends, etc.), spouse's income if available to the party, property owned (other than homestead), cash or checking account, dependents, debts and monthly expenses. The affidavit shall contain the following statements: "I am unable to pay the court costs. I verify that the statements made in this affidavit are true and correct." The affidavit shall be sworn before a ~~N~~notary ~~P~~public or other officer authorized to administer oaths. ~~**3. Attorney's Certification**~~. If the party is represented by an attorney who is providing free legal services, without contingency, due to the party's indigency, ~~said~~ the attorney may file ~~an~~ ~~affidavit~~ statement to that effect to assist the court in understanding the financial condition of the party.

**2. IOLTA Certificate.** If the party is represented by an attorney who is providing free legal services, without contingency, due to the party's indigency and the attorney is providing services either directly or by referral from a program funded by the Interest on Lawyers Trust Accounts (IOLTA) program, the attorney may file an IOLTA certificate. The certificate shall confirm that the party has been screened for income eligibility under the IOLTA income guidelines by the IOLTA-funded program or that the party has been referred to the attorney from an IOLTA-funded program and the program represents that it has screened the party for income eligibility under the IOLTA income guidelines. A party's affidavit of inability accompanied by an attorney's IOLTA certificate may not be contested.

~~**1.** 3. Contest.~~ After service of citation, the defendant or the clerk may contest ~~the~~ an affidavit that is not accompanied by an IOLTA certificate by filing a written contest giving notice to all parties, provided that temporary hearings will not be continued pending the filing of the contest. If the court shall find at the first regular hearing in the course of the action that the party (other than a party receiving a governmental entitlement) is able to afford costs, the party shall pay the costs of the action. Reasons for such a finding shall be contained in an order. Except with leave of court, no further steps in the action will be taken by a party who is found able to afford costs until payment is made. If the party's action results in a monetary award, and the court finds sufficient monetary award to reimburse costs, the party shall pay the costs of the action. ~~If the court finds that another party to the suit can pay the costs of the action, the other party shall pay the costs of the action.~~

**4. Attorney's fees and costs.** Nothing herein shall preclude any existing right to recover attorney's fees, expenses, or costs from any other party.

REDLINE VERSION
RULES 296-331

## RULE 296. REQUESTS FOR FINDINGS OF FACT S AND CONCLUSIONS OF LAW

~~In any case tried in the district or county court without a jury.~~ A ~~any~~ party in a case in which an issue of fact was tried by the judge may request the ~~court~~ the judge to state in writing ~~its~~ findings of fact and conclusions of law. Trial of an issue of fact to a jury in the same case does not excuse the judge from making findings of fact on an issue tried by the judge. Such a request shall be entitled "Request for Finding of Fact and Conclusions of Law" and shall be filed within twenty days after judgment is signed with the clerk of the court, who shall immediately call such request to the attention of the judge who tried the case. The party making the request shall serve it on all other parties in accordance with ~~Rule~~ Texas Rule of Civil Procedure 21a. A request for findings of fact is not proper and has no effect with respect to an appeal of a summary judgment.

**Source: Rule 296.**

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

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

(b) **Late Filing.** If the ~~court~~ judge fails to file timely findings of fact and conclusions of law, the party making the request shall, within thirty days after filing the original request, file with the clerk and serve on all other parties in accordance with Rule 21a a "Notice of Past Due Findings of Fact and Conclusions of Law" which shall be immediately called to the attention of the ~~court~~ judge by the clerk. Such notice shall state the date the original request was filed and the date the findings and conclusions were due. Upon filing this notice, the time for the ~~court~~ judge to file findings of fact and conclusions of law is extended to forty days from the date the original request was filed. The judge's authority and duty to file findings and conclusions, whether original, additional or amended, are not affected by expiration of the court's plenary power over the judgment.

**Source: Rule 297.**

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

After the ~~court~~ judge files original findings of fact and conclusions of law, any party may file with the clerk of the court a request for specified additional or amended findings or conclusions. The request for these findings shall be made within ~~ten~~ twenty days after the filing of the original findings and conclusions by the ~~court~~ judge. Each request made pursuant to this rule shall be served on each party to the suit in accordance with ~~Rule 297(a).~~ Texas Rules of Civil Procedure 21a.

The ~~court~~ judge shall file any additional or amended finding and conclusions that are appropriate within ten days after such request if 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~~ judge to make any additional findings or conclusions.

**Source: Rule 298.**

## RULE 299. OMITTED FINDINGS

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

**Source: Rule 299.**

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

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

**Source: Rule 299a.**

## RULE 300. JUDGMENTS, DECREES AND ORDERS

**(a) Rendition, Signing And Entry.** A judgment is rendered when the judge orally announces it in open court or, if not so announced, when a judgment is signed by the judge. A judgment orally announced in open court shall be promptly reduced to writing and signed by the judge. A signed judgment shall be promptly filed with the clerk for entry in the minutes of the court. "Judgment" as used in these rules includes a decree or an order that disposes of a claim or defense.

**Source: New rule; codification of existing law.**

**(b) Form And Substance: General.** A judgment shall: (1) contain the names of the parties; (2) specify the relief to which each party is entitled; and (3) if appropriate, direct the issuance of processes and writs as may be necessary to enforce the judgment. The judgment ~~of the court~~ shall conform to the pleadings, the nature of the case proved and the jury's verdict or the judge's findings of fact or conclusions of law, unless a judgment is rendered as a matter of law.

**Source: Rules 300, 301, 306, 308**

**(c) Form and Substance: Specific.**

**(1) Personal Property.** ~~Where the~~ A judgment ~~is~~ for personal property, ~~and it is shown by the pleadings, and evidence and the verdict~~ ~~if any, that such property~~ ~~has an especial value to the plaintiff, the court~~ may ~~award a special~~ provide for a writ for ~~the~~ seizure and delivery of such property ~~to the plaintiff and in such case may enforce its judgment by attachment, fine and imprisonment~~.

**Source: Rule 308, after first clause of first sentence.**

**(2) Foreclosure Proceedings.** A judgments for ~~the~~ foreclosure of ~~a~~ mortgages ~~and~~ or other liens shall ~~be~~ provide for: (i) recovery of ~~that~~ the plaintiff's ~~his~~ debt, damages and costs; (ii) ~~with a~~ foreclosure of the plaintiff's lien on the property subject ~~thereto, and,~~ to the lien; (iii) ~~that~~ an order ~~of sale shall issue to any sheriff or any constable within the State of Texas, directing him to seize and sell the same, for~~ to sale of the property as under execution, except in judgments against ~~executors, administrators and guardians~~ personal representatives, ~~in satisfaction of the judgment~~; and (iv) ~~that~~ if the property cannot be found, or if the proceeds of ~~such~~ the sale ~~be~~ are insufficient to satisfy the judgment, then

execution ~~to take the money or any balance thereof remaining unpaid, shall be taken out of any~~ on other property of the judgment debtor ~~defendant as in the case of ordinary executions.~~ for the balance remaining unpaid. ~~When An order~~ The judgment foreclosing a ~~line~~ lien ~~upon~~ on real estate ~~is made in a suit having as its object the foreclosure of such lien, such order shall have all the~~ has the force and effect of a writ of possession as between the parties ~~to the foreclosure suite~~ and any person claiming under the judgment debtor ~~defendant to such suit~~ by ~~any~~ right acquired pending ~~such~~ suit; and the ~~court~~ judgment shall so provide ~~direct in the judgment providing for issuance of such order.~~ The judgment shall also direct the sheriff or other officer ~~executing such order of sale~~ to place the purchaser of the property ~~sold thereunder~~ in possession ~~thereof~~ within thirty days after the ~~day of~~ date of the foreclosure sale.

**Sources: Rule 309, 310.**

**(3) Personal Representative.** A judgment for the recovery of money against a personal representative, whether an executor, administrator~~,~~ or guardian, shall state that it is to be paid in the due course of administration. No ~~execution~~ enforcement shall be attempted ~~issue thereon,~~ on a judgment against a personal representative, but it shall be certified to the ~~county~~ court, sitting in ~~matters of~~ probate, to be ~~there~~ enforced ~~in accordance with~~ under the law, except that~~.~~ ~~but~~ a judgment against an independent executor ~~appointed and acting under a will dispensing with the action of the county court in reference to such estate shall~~ may be enforced against the property of the testator in the hands of the independent ~~executor, by execution, as in other cases.~~

**Source: Rule 313.**

## RULE 301. MOTIONS BEFORE AND AFTER JUDGMENT
[In part moved to proposed TRCP 300(b)]

**(a) Motion for Judgment On The Verdict.** ~~Any~~ party may ~~prepare and submit~~ move for judgment on the verdict of the jury. ~~a proposed judgment to the court for signature.~~

**Source: Rule 305.**

**(b) Motion Judgment As A Matter Of Law.** A party may move for judgment as a matter of law on a claim or defense:

(1) if the evidence, at the close of the adverse party's evidence, or at the close of all of the evidence, or after the verdict in a jury case and before judgment, (i) is legally insufficient to support a particular issue of fact in favor of the adverse party

or conclusively establishes a particular issue of fact in favor of the movant; and (ii) the particular issue of fact, under the controlling law, determines a claim or defense; or

(2) if the application of controlling law to a claim or defense otherwise determines a claim or defense as a matter of law.

**Source: Rules 268, 301; FED. R. CIV. P. 50**

**(c) Motion to Modify Judgment.** A party may move to modify a judgment and render the judgment that should have been rendered:

(1) if the evidence (i) is legally insufficient to support a particular issue of a fact in favor of the adverse party or conclusively establishes a particular issue of fact in favor of the movant and (ii) the particular issue of fact, under the controlling law, determines a claim or defense; or

(2) if the application of controlling law to a claim or defense otherwise determines the claim or defense as a matter of law; or

(3) if the judgement should be modified, corrected or reformed in any respect; or

(4) if a request for an additional or amended finding of fact, if made, on an issue of fact tried by a judge requires a different judgment.

**Source: Rules 301, 329b**

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

**Source: New rule to incorporate purposed TRCP 302 in listing of permissible motions.**

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

**Source: Rule 316.**

(f) **Motion Practice.** A motion under this rule shall state the specific grounds for the motion and shall be served on adverse parties pursuant to Texas Rule of Civil Procedure 21a. A party may file for one or more motions pursuant to this rule without the denial of any motion precluding consideration by the judge of any other motion under this rule. A party may submit a proposed judgment for signature with the motion.

**Source: Rule 268, 305; in part new to clarify that motions should be considered independently.**

~~**RULE 302. ON COUNTERCLAIM**~~
**RULE 302. MOTIONS FOR NEW TRIAL**

~~On Counterclaim. If the defendant establishes a demand against the plaintiff upon a counterclaim exceeding that established against him by the plaintiff, the judge shall render a judgment for the defendant for the excess.~~

(a) **Grounds.** For good cause, a new trials, or partial new trial under paragraph (f), may be granted and a judgment may be set aside ~~for good cause~~ on motion of a party or on the judge's ~~court's~~ own motion, ~~on such terms as the court shall direct~~ in the following instances, among others:

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

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

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

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

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

has probably resulted in injury to the movant;

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

probably caused the rendition of an improper judgment;

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

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

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

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

(11) when a case has been dismissed for want of prosecution; or[1]

(12) when any other ground warrant a new trial in the interest of justice.

**Source: Rules 165a, 320, 327 and 329**

(b) **Form.** Complaints in general terms shall not be considered. Each complaint in a motion for new trial shall identify the matter of which complaint is made in such a way that the complaint can be understood by the judge. ~~Grounds of objections couched in general terms—as that the court erred in its charge, in sustaining or overruling exceptions to the pleadings, and in excluding or admitting evidence, the verdict of the jury is contrary to law, and the like—shall not be considered by the court. Each point relied upon in a motion for new trial or in arrest of judgment shall briefly refer to that part of the ruling of the court, charge given to the jury, or charge refused, admission or rejection of evidence, or other proceedings which are designated to be complained of, in such a way that the objection can be clearly identified and understood by the court.~~

**Source: First sentence — Rule 322; second sentence — Rule 321.**

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

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[1]If a motion to reinstate is treated as a motion for new trial, then Texas Rule of Civil Procedure 165a needs to be amended to eliminate the procedure that is only a duplication of the new trial procedure.

(1) jury misconduct;

(2) newly discovered evidence;

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

(4) dismissal for want of prosecution; or

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

**(d) Procedure For Jury Misconduct.**

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

(2) Testimony Of Jurors. A juror may not testify as to any matter or statement occurring during the ~~course of the~~ jury's deliberations, or ~~to the effect of anything upon his or~~ on any ~~other~~ juror's mind or emotions or mental processes, as influencing any other juror's ~~him to~~ assent to or dissent from the verdict ~~concerning his mental processes in connection therewith, except that a juror may testify whether any outside influence was improperly brought to bear upon any juror~~. Nor may ~~a~~ juror's ~~his~~ affidavit or ~~evidence of~~ any statement by a juror ~~him~~ concerning ~~a~~ any matter about which the juror ~~he~~ would be precluded from testifying be ~~received for~~ admitted in evidence for any of these purposes. However, a juror may testify whether any outside influence was improperly brought to bear upon any juror.

**Source: Rule 327**

**(e) Excessive Damages; Remittitur**

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

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

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

**Source: Paragraph (2) — Rule 315.**

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

**Source: Rule 320.**

## ~~RULE 303. ON COUNTERCLAIM FOR COSTS~~
## RULE 303. PRESERVATION OF COMPLAINTS

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

**(a) General Preservation Rule.** ~~In order to preserve~~ As a prerequisite to the presentation of a complaint for appellate review, ~~a party must have presented to the trial court~~ a timely request, objection, or motion must appear of record, stating the specific grounds for the ruling ~~he~~ that the complaining party desired the trial court to make if the specific grounds were not apparent from the context. No complaint shall be considered waived if the ground stated is sufficiently specific to make the judge aware of the complaint. ~~It is also necessary for the complaining party to obtain a~~ The judge's ruling upon the complaining party's request, objection or motion must also appear of record provided that the overruling by operation of law of a motion for new trial or a motion to modify the judgment is sufficient to preserve for appellate review the complaints properly made in the motion, unless the taking of evidence is necessary for proper presentation of the complaint in the trial court. A ruling may be shown in the judgment, in a signed separate order, in the

statement of facts, or in a formal bill of exceptions. If the trial judge refuses to rule, an objection to the judge's ~~court's~~ refusal to rule is sufficient to preserve the complaint. ~~It is not necessary to formally except~~ Formal exceptions to rulings or orders of the trial court are not required.

**Source: Texas Rule Of Appellate Procedure 52(a).**

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

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

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

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

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

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

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

**Source: Rule 324(b).**

**(c) ~~Necessity for Motion for New Trial in Civil Cases~~ Nonjury Cases: Legal and Factual Sufficiency of Evidence.** ~~A point in a motion for new trial is prerequisite to appellate complaint in those instances provided in Rule 324(b) of the Texas Rules of Civil Procedure. A party desiring to complain on appeal in a nonjury 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 paragraph (a) of this rule.~~ In a nonjury case, a complaint regarding the legal or factual insufficiency of the evidence, including a complaint that the damages found by the court are excessive or inadequate, as distinguished from a request that the judge amend a fact finding or make an additional finding of fact, may be made for the first time on appeal in the

complaining party's brief.

**Source: Texas Rule of Appellate Procedure 52(d).**

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

**Source: Texas Rule of Appellate Procedure 52(b).**

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

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

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

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

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

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

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

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

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

(9) In the event of ~~a formal bill of exceptions is filed and there is a~~ conflict between a formal bill and ~~its provisions and the provisions of~~ the statement of facts, the bill ~~of exceptions~~ shall control.

(10) Anything occurring in open court or in chambers that is reported or recorded and so certified by the court reporter or recorder may be included in the statement of facts rather than in a formal bill of exception; ~~provided that~~ In a civil case the party requesting that all or part of the jury arguments or the voir dire examination of the jury panel be included in the statement of facts shall pay the cost thereof, which ~~cost~~ shall be separately listed in the certified bill of costs ~~certificate of costs prepared by the clerk of the trial court~~, and ~~the same~~ may be taxed in whole or in part by the appellate court against any party to the appeal.

(11) Formal bills of exception shall be filed in the trial court within sixty days after the judgment is signed in a civil case or within sixty days after the sentence is pronounced or suspended in open court in a criminal case, or if a timely motion for

new trial, motion to modify, request for findings, or motion to reinstate pursuant to Texas Rule Of Civil Procedure 165a[2] has been filed, formal bills of exception shall be filed within ninety days after the judgment is signed in a civil case or within ninety days after sentence is pronounced or suspended in open court in a criminal case. When a formal bills of exception ~~are~~ is filed, it ~~they~~ may be included in the transcript or in a supplemental transcript.

**Source: Texas Rule of Appellate Procedure 52(c).**

## ~~RULE 304. JUDGMENT UPON~~ RECORD[PROPOSED FOR REPEAL]
## RULE 304. TIMETABLES

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

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

**Source: New rule in part; Rule 301 in part.**

(b) **Motion To Modify Judgment.**

(1) A motion to modify a judgment may be filed within thirty days after a final judgment or appealable order is signed.

(2) A motion to modify may also be filed within seventy-five days after the final judgment or appealable order which the motion attacks is signed, if: (i) the trial court still retains plenary power; and (ii) the motion requests relief which has not been previously denied. No motion to modify shall be filed more than seventy-five days after the final judgment or appealable order is signed.

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[2] If a motion to reinstate is considered a motion for new trial per proposed TRCP 302(a)(11) and (c)(4), then this should be changed.

(3) A motion to modify a judgment may be amended, on one or more occasions without leave or court, before any preceding motion requesting the same relief filed by the movant is overruled, if the amended motion is filed within the time permitted by paragraph (b)(1) or (b)(2) of this rule.

(4) If an original or an amended motion to modify, is not determined by order signed within seventy-five days after the final judgment or appealable order was signed, the motion shall be considered overruled by operation of law upon the expiration of the seventy-five day period.

**Source: New rule in part; Rule 329b**

**(c) Motion For New Trial.**

(1) A motion for new trial ~~,if filed, shall~~ may be filed ~~prior to~~ within thirty days after ~~the~~ a final judgment or appealable ~~other~~ order ~~complained of~~ is signed.

(2) ~~One or more amended~~ A motions for new trial mayalso be filed within seventy-five days after the final judgment or appealable order which the motion attacks is signed, if: (i) the trial court still retains plenary over; and (ii) the motion requests relief which has not been previously denied. Except as provided in paragraph (c)(5) or (c)(6) of this rule, no motion for new trial shall be filed more than seventy-five days after the final judgment or appealable order is signed. ~~without leave of court before any preceding motion for new trial filed by the movant is overruled and within thirty days after the judgment or other order complained of is signed.~~

(3) A ~~In the event an original or amended~~ motion for new trial may be amended, on one or more occasions without leave of court, before any preceding motion requesting the same relief filed by the movant ~~or to modify , correct, or reform the judgment~~ is overruled, if the amended motion is filed ~~not determined by written order signed~~ within ~~seventy-five days after the judgment~~ the time permitted by pragraph (c)(1) and (c)(2) of this rule. ~~was signed, it shall be considered overruled by operation of law at the expiration of that period.~~

(4) If an original or an amended motion for new trial, is not determined by order signed within seventy-five days after the final judgment or appealable order was signed, the motion shall be considered overruled by operation of law upon the expiration of the seventy-five day period.

(5) In a case when judgment has been rendered by default against a party who did not participate either in person or by attorney in the actual trial of the case, a motion for new trial by the party against whom judgment was rendered shall be file within six months after the judgment was signed, unless a motion has been previously filed pursuant to paragraph (c)(1) or (c)(2) of this rule.

(6) In a case when judgment has been rendered on citation by publication and the defendant did not appear in person or by an attorney selected by the defendant, a motion for new trial shall be filed within two years after the judgment was signed, unless a motion has been previously filed pursuant to paragraph (c)(1) or (c)(2) of this rule.

**Source: Rules 329, 329b; Tex.R.App. 45**

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

**Source: New rule in part; Rule 329b in part.**

**(e) Effective Dates And Beginning Of Periods ~~Periods to Run from Signing of Judgment.~~**

(1) **Beginning of Periods.** The date ~~a of~~ final judgment or appealable order is signed as shown of record ~~shall~~ determines the ~~beginning of the periods prescribed by these rules for the court's~~ beginning of the period during which (i) the court may exercise plenary power to grant ~~a new trial or to~~ a motion to ~~vacate,~~ modify, a motion for new trial or a motion to correct the judgment record, a motion to reinstate a case dismissed for want of prosecution and a request for findings of fact and conclusions of law or to vacate a judgment, and (ii) a party may timely file any document necessary to preserve the rights of the party on appeal. ~~or reform a judgment or order and for filing in the trial court the various documents that these rules authorize a party to may file within such those periods, including, but not limited to, motions for new trial, motions to modify judgment, motions to reinstate a case dismissed for want of prosecution, and motions to vacate a judgment requests for findings of fact and conclusions of law. but this rule shall not determine what constitutes rendition of a judgment or order for any other purpose.~~

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

(3) **Notice of Judgment.** When ~~the final judgment or other appealable order~~ a final judgment or appealable order is signed, the clerk of the court shall immediately give notice of the signing to the parties ~~or their attorneys of record~~ by first-class mail ~~advising that the judgment or the order was signed.~~ Failure to comply with ~~the provisions of~~ this rule shall not affect the periods mentioned in paragraph (1) ~~of this rule~~, except ~~as provided in~~ under paragraph (4).

(4) **No Notice of Judgment; Additional Time.** ~~If within twenty days after the judgment or other appealable order is signed, a party adversely affected by it or his attorney has neither received the notice required by paragraph (3) nor acquired actual knowledge of the order, then with respect to that party all the periods mentioned in paragraph (1) shall begin on the date that such party or his attorney received such notice or acquired actual knowledge of the signing, whichever occurred first, but in no event shall those periods begin more than ninety days after the original judgment or other appealable order was signed.~~ If a party affected by a final judgment or appealable order has not, within twenty days after the final judgment or appealable order was signed, received the notice require by paragraph (3) and has not acquired actual knowledge of the signing of the final judgment or appealable order, then all periods provided in these rules that run from the date the final judgment or appealable order is signed shall begin for that party on the date that party received notice or acquired actual knowledge of the signing of the final judgment or appealable order, whichever occurred first; provided, however, that in no event shall the periods begin more than ninety days after the final judgment or appealable order was signed.

(5) ~~**Motion, Notice, and Hearing.**~~ **Procedure to Gain Additional Time.** ~~In order to~~ To establish the application of ~~sub~~paragraph (4) ~~of this rule~~, the party adversely affected must file a motion in the trial court stating ~~is required to prove in the trial court, on sworn motion and notice,~~ the date on which the party or the party's ~~his~~ attorney first either received a notice of the final judgment or appealable order or acquired actual knowledge of the signing of the final judgment or appealable order and that this date was more than twenty days after the final judgment or appealable order was signed. The trial judge shall promptly set the motion for hearing, and after conducting a hearing on the motion, shall find the date ~~upon which~~ the party or the

party's ~~his~~ attorney first either received a notice of the final judgment or appealable order or acquired actual knowledge of the signing of the final judgment or appealable order ~~at the conclusion of the hearing~~ and include this finding in a written ~~the court's~~ order.

(6) ~~Nunc Pro Tunc Order.~~ **Periods Affected by Modified Judgment.** If a judgment is modified in any respect during the period of the trial court's plenary power, all periods provided in these rules which run from the date the judgment is signed shall run from the time the modified judgment is signed. ~~when a corrected judgment has been signed~~ If a correction to a judgment is made pursuant to Texas Rule of Civil Procedure 301(e) after expiration of the trial court's plenary power, ~~pursuant to Rule 316 of the Texas Rules of Civil Procedure, the periods mentioned in subparagraph (b)(1) of this rule~~ all periods provided in these rules which run from the date the judgment is signed shall run from the date of the signing of the corrected judgment ~~with respect to~~ for any complaint that would not ~~be applicable~~ apply to the original judgment.

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

(8) **Premature Filing.** ~~No~~ A motion for new trial or request for findings of fact and conclusions of law ~~shall be held in~~ are effective ~~because~~ although prematurely filed. ~~but every such~~ A motion for new trial shall be deemed to have been filed on the date of, but subsequent to, the ~~time of~~ signing of the judgment the motion ~~assails~~ attacks. ~~, and every such~~ A request for findings of fact and conclusions of law shall be deemed to have been filed on the date of, but subsequent to, the ~~time of~~ signing of the judgment.

**Source: ¶¶ 1-6, Rule 306a; ¶ 7, Rule 329b(h); ¶ 8, Rule 306c.**

~~**RULE 305. PROPOSED JUDGMENT**~~

[Moved to proposed TRCP 301(a) ]

**RULE 305. PLENARY POWER OF THE TRIAL COURT**

**(a) Duration.** A trial court has plenary power:

(1) for thirty days after a final judgment is signed in all instances;

(2) for one hundred and five days after a final judgment is signed, regardless of whether an appeal has been perfected, if any party has timely filed (i) within thirty days after the final judgment is signed a motion to modify a judgment, a motion for new trial, a motion to correct judgment record, or (ii) within twenty days after the final judgment is signed, a request for findings of fact and conclusions of law on an issue of fact tried to a judge; and

(3) for thirty days after (i) the judge signs an order exercising judicial discretion if the judge had plenary power at the time of signing or (ii) a pending motion to exercise judicial discretion is overruled, either by a signed order or by operation of law, whichever occurs first.

**Source: New rule in part; Rule 329b.**

(b) **Exercise.** Regardless of whether an appeal has been perfected, the trial court has plenary power to:

(1) grant a motion to modify or a motion for new trial or to vacate the judgment within thirty days after the judgment is signed; and

(2) grant a motion to modify or a motion for new trial or to vacate the judgment until thirty days after all of those timely-filed motions are overruled, either by signed order or by operation of law, whichever occurs first.

**Source: 329b(d)(e).**

(c) **Expiration.** On expiration of the time within which the trial court has plenary power:

(1) the trial judge cannot set aside a judgment except on bill of review for sufficient cause filed within the time allowed by law;

(2) the trial judge, however, may at any time, correct a clerical error in the record of a judgment and render judgment *nunc pro tunc* pursuant to Tex. R. Civ. P. 302(f);

(3) the trial judge may also sign an order declaring a previous judgment or order to be void because signed after expiration of the trial court's plenary power; and

(4) the trial court may also file findings of fact and conclusions of law if within the time allowed by Tex. R. Civ. P. 297.

Source: 329b(g)(h).

**RULE 306. RECITATION OF JUDGMENT**
[Moved to proposed TRCP 300(b)]

**RULE 306a. PERIODS TO RUN FROM SIGNING OF JUDGMENT**
[Moved to proposed TRCP 304(c)(1)-(6)]

**RULE 306b. [PREVIOUSLY REPEALED]**

**RULE 306c. PREMATURELY FILED DOCUMENTS**
[Moved to proposed TRCP 304(c)(8)]

**RULE 306d. [PREVIOUSLY REPEALED]**

~~**RULE 307. EXCEPTIONS, ETC., TRANSCRIPT**~~ **[PROPOSED FOR REPEAL]**

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

**RULE 308. COURT SHALL ENFORCE ITS DECREES**
[Moved to proposed TRCP 300(b)(4), 300(c)(1)]

**RULE 308a. IN SUITS AFFECTING THE PARENT-CHILD RELATIONSHIP[PROPOSED FOR REPEAL]**

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

~~finding of a violation, the court may enforce its order as provided in Chapter 14, Family Code.~~

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

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

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

## RULE 309. IN FORECLOSURE PROCEEDINGS

[Moved to proposed TRCP 300(c)(2)]

## RULE 310. WRIT OF POSSESSION

[Moved to proposed TRCP 300(c)(2)]

## RULE 311. ON APPEAL FROM PROBATE COURT

[Proposed for transfer to Judge Till's subcommittee]

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

## RULE 312. ON APPEAL FROM JUSTICE COURT

[Proposed for transfer to Judge Till's subcommittee]

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

## RULE 313. AGAINST EXECUTORS, ETC.

[Moved to proposed TRCP 300(c)(3)]

## ~~RULE 314. CONFESSION OF JUDGMENT~~ [PROPOSED FOR REPEAL]

~~Any person against whom a cause of action exists may, without process, appear in~~

~~person or by attorney, and confess judgment therefor in open court as follows:~~

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

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

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

**RULE 315. REMITTITUR**
[Moved to proposed TRCP 302(c)(2)]

**RULE 316. CORRECTION OF CLERICAL MISTAKES IN JUDGMENT RECORD**
[Moved to proposed TRCP 301(e), 302(a)]

**RULE 317 to 319 [PREVIOUSLY REPEALED]**

**RULE 320. MOTION AND ACTION OF COURT THEREON**
[Moved to proposed TRCP 301(d), 302(a), (f)]

**RULE 321. FORM**
[Moved to proposed TRCP 302(a), (b)]

**RULE 322. GENERALITY TO BE AVOIDED**
[Moved to proposed TRCP 302(b)]

**RULE 323. [PREVIOUSLY REPEALED]**

**RULE 324. PREREQUISITES OF APPEAL**
[Moved to proposed TRCP 303(b), TRAP 74(e)]

**RULE 325. [PREVIOUSLY REPEALED]**

**~~RULE 326. NOT MORE THAN TWO~~ [PROPOSED FOR REPEAL]**

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

## RULE 327. FOR JURY MISCONDUCT
[Moved to proposed TRCP 302(d)]

## RULE 328. [PREVIOUSLY REPEALED]

## RULE 329. MOTION FOR NEW TRIAL ON JUDGMENT FOLLOWING CITATION BY PUBLICATION
[In part proposed for repeal and in part proposed for move]

~~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 after such judgment was signed. The parties adversely interested in such judgment shall be cited as in other cases.

[Moved to proposed TRCP 302(a)(8), 302(c)(5)]

(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.

[Proposed for move to TRAP 47 and TRCP 621 et seq.]

(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.

[Proposed for move to TRCP 621 et seq.]

(d) If the motion is filed more than thirty days after the judgment was signed, the time period shall be computed pursuant to Rule 306a(7).

[Moved to proposed TRCP 304(c)(7)]

## RULE 329a. COUNTY COURT CASES
[No change.]

## RULE 329b. TIME FOR FILING MOTIONS
[Moved to proposed TRCP 304(b),(c),(d), 305 (b),(c)]

## RULE 330. RULES OF PRACTICE AND PROCEDURE IN CERTAIN DISTRICT COURTS
[In part proposed for repeal and in part proposed for move]

~~The following rules of practice and procedure shall govern and be followed in all civil actions in district courts in counties where the only district court of said county vested with civil jurisdiction, or all the district court thereof having civil jurisdiction, have successive terms in said county throughout the year, without more than two days intervening between any of such terms, whether or not any one or more of such district courts include one or more other counties within its jurisdiction.~~

**(a) Appealed Cases.** In cases appealed to said district courts from inferior courts, the appeal, including transcript, shall be filed in the district court within thirty (30) days after the rendition of the judgment or order appealed from,, and the appellee shall enter his appearance on the docket or answer to said appeal on or before ten o'clock a.m. of the Monday next after the expiration of twenty (20) days from the date the appeal is filed in the district court.

[Proposed for transfer to Judge Till's subcommittee]

**(b)** Repealed by order of July 22, 1975, eff. Jan. 1, 1976.

**(c) Postponement or Continuance.** Cases may be postponed or continued by agreement with the approval of the court, or upon the court's own motion or for cause. When a case is called for trial and only one party is ready, the court may for good cause either continue the case for the term or postpone and reset it for a later day in the same or succeeding term.

[Proposed for move to TRCP 251-54]

**(d) Cases May Be Reset.** A case that is set and reached for trial may be postponed for a later day in the term or continued and reset for a day certain in the succeeding term on the same grounds as an application for continuance would be granted in other district courts. After any case has been set and reached in its due order and called for trial two (2) or more times and not tried, the court may dismiss the same unless the parties agree to a postponement or continuance but the court shall respect written agreements of

counsel for postponement and continuance if filed in the case when or before it is called for trial unless to do so will unreasonably delay or interfere with other business of the court.

[Proposed for move to TRCP 251-54]

**(e) Exchange and Transfer.** Where in such county there are two or more district courts having civil jurisdiction, the judges of such courts may, in their discretion, exchange benches or districts from time to time, and may transfer cases and other proceedings from one court to another, and any of them may in his own courtroom try and determine any case or proceeding pending in another court without having the case transferred, or may sit in any other of said courts and there hear and determine any case there pending, and every judgment and order shall be entered in the minutes of the court in which the case is pending and at the time the judgment or order is rendered, and two (2) or more judges may try different cases in the same court at the same time, and each may occupy his own courtroom or the room of any other court. The judge of any such court may issue restraining orders and injunctions returnable to any other judge or court, and any judge may transfer any case or proceeding pending in his court to any other of said courts, and the judge of any court to which a case or proceeding is transferred shall receive and try the same, and in turn shall have the power in his discretion to transfer any such case to any other of said courts and any other judge may in his courtroom try any case pending in any other of such courts.

[Proposed for move to the Government Code]

**(f) Cases Transferred to Judges Not Occupied.** Where in such counties there are two or more district courts having civil jurisdiction, when the judge of any such court shall become disengaged, he shall notify the presiding judge, and the presiding judge shall transfer to the court of the disengaged judge the next case which is ready for trial in any of s aid courts. Any judge not engaged in his own court may try any case in any other court.

[Proposed for move to the Government Code]

**(g) Judge May Hear Only Part of Case.** Where in such counties there are two or more district courts having civil jurisdiction, any judge may hear any part of any case or proceeding pending in any of said courts and determine the same, or may hear and determine any question in any case, and any other judge may complete the hearing and render judgment in the case.

[Proposed for move to the Government Code]

**(h) Any Judge May Hear Dilatory Pleas.** Where in such county there are two or more district courts having civil jurisdiction, any judge may hear and determine motions,

petitions for injunction, applications for appointment of receivers, interventions, pleas of privilege, please in abatement, all dilatory pleas and special exceptions, motions for a new trial and all preliminary matters, questions and proceedings and may enter judgment or order thereon in the court in which the case is pending without having the case transferred to the court of the judge acting, and the judge in whose court the case is pending may thereafter proceed to hear, complete and determine the case or other matter, or any part thereof, and render final judgment therein. Any judgment rendered or action taken by any judge in any of said courts in the county shall be valid and binding.

[Proposed for move to the Government Code]

**(i) Acts in Succeeding Terms.** If a case or other matter is on trial, or in the process of hearing when the term of court expires, such trial, hearing or other matter may be proceeded with at the next or any subsequent term of court and no motion or plea shall be considered as waived or overruled, because not acted upon at the term of court at which it was filed, but may be acted upon at any time the judge may fix or at which it may have been postponed or continued by agreement of the parties with leave of the court. This subdivision is not applicable to original or amended motions for new trial which are governed by Rule 329b.

[Proposed for move to the Government Code]

**RULE 331. [PREVIOUSLY REPEALED]**

# CLEAR VERSION OF RULES 296-305

## RULE 296. REQUESTS FOR FINDINGS OF FACT S AND CONCLUSIONS OF LAW

A party in a case in which an issue of fact was tried by the judge may request the the judge to state in writing findings of fact and conclusions of law. Trial of an issue of fact to a jury in the same case does not excuse the judge from making findings of fact on an issue tried by the judge. Such a request shall be entitled "Request for Finding of Fact and Conclusions of Law" and shall be filed within twenty days after judgment is signed with the clerk of the court, who shall immediately call such request to the attention of the judge who tried the case. The party making the request shall serve it on all other parties in accordance with Texas Rule of Civil Procedure 21a. A request for findings of fact is not proper and has no effect with respect to an appeal of a summary judgment.

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

(a) **Time to File.** The judge shall file findings of fact and conclusions of law within twenty days after a timely request is filed. The judge shall cause a copy of the findings and conclusions to be mailed to each party in the suit.

(b) **Late Filing.** If the judge fails to file timely findings of fact and conclusions of law, the party making the request shall, within thirty days after filing the original request, file with the clerk and serve on all other parties in accordance with Rule 21a "Notice of Past Due Findings of Fact and Conclusions of Law" which shall be immediately called to the attention of the judge by the clerk. Such notice shall state the date the original request was filed and the date the findings and conclusions were due. Upon filing this notice, the time for the judge to file findings of fact and conclusions of law is extended to forty days from the date the original request was filed. The judge's authority and duty to file findings and conclusions, whether original, additional or amended, are not affected by expiration of the court's plenary power over the judgment.

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

After the judge files original findings of fact and conclusions of law, any party may

file with the clerk of the court a request for specified additional or amended findings or conclusions. The request for these findings shall be made within twenty days after the filing of the original findings and conclusions by the judge. Each request made pursuant to this rule shall be served on each party to the suit in accordance with Texas Rules of Civil Procedure 21a.

The judge shall file any additional or amended finding and conclusions that are appropriate within ten days after such request if 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 judge to make any additional findings or conclusions.

## RULE 299. OMITTED FINDINGS

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

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

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

## RULE 300. JUDGMENTS, DECREES AND ORDERS

**(a) Rendition, Signing And Entry.** A judgment is rendered when the judge orally announces it in open court or, if not so announced, when a judgment is signed by the judge. A judgment orally announced in open court shall be promptly reduced to writing and signed by the judge. A signed judgment shall be promptly filed with the clerk for entry in the minutes of the court. "Judgment" as used in these rules includes a decree or an order that

disposes of a claim or defense.

(b) **Form And Substance: General.** A judgment shall: (1) contain the names of the parties; (2) specify the relief to which each party is entitled; and (3) if appropriate, direct the issuance of processes and writs as may be necessary to enforce the judgment. The judgment shall conform to the pleadings, the nature of the case proved and the jury's verdict or the judge's findings of fact or conclusions of law, unless a judgment is rendered as a matter of law.

**(c) Form and Substance: Specific.**

(1) **Personal Property.** A judgment for personal property, may provide for a writ for seizure and delivery of such property.

(2) **Foreclosure Proceedings.** A judgment for foreclosure of a mortgage or other lien shall provide for: (i) recovery of the plaintiff's debt, damages and costs; (ii) foreclosure of the plaintiff's lien on the property subject to the lien; (iii) an order to sale of the property as under execution, except in judgments against personal representatives; and (iv) if the property cannot be found or if the proceeds of the sale are insufficient to satisfy the judgment, then execution on other property of the judgment debtor for the balance remaining unpaid. The judgment foreclosing a lien on real estate has the force and effect of a writ of possession as between the parties and any person claiming under the judgment debtor by right acquired pending suit, and the judgment shall so provide. The judgment shall also direct the sheriff or other officer to place the purchaser of the property in possession within thirty days after the date of the foreclosure sale.

(3) **Personal Representative.** A judgment for the recovery of money against a personal representative, whether an executor, administrator or guardian, shall state that it is to be paid in the due course of administration. No enforcement shall be attempted on a judgment against a personal representative, but it shall be certified to the court, sitting in probate, to be enforced under the law, except that a judgment against an independent executor may be enforced against the property of the testator in the hands of the independent.

## RULE 301. MOTIONS BEFORE AND AFTER JUDGMENT

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

**(b) Motion Judgment As A Matter Of Law.** A party may move for judgment as a matter of law on a claim or defense:

(1) if the evidence, at the close of the adverse party's evidence, or at the close of all of the evidence, or after the verdict in a jury case and before judgment, (i) is legally insufficient to support a particular issue of fact in favor of the adverse party or conclusively establishes a particular issue of fact in favor of the movant; and (ii) the particular issue of fact, under the controlling law, determines a claim or defense; or

(2) if the application of controlling law to a claim or defense otherwise determines a claim or defense as a matter of law.

**(c) Motion to Modify Judgment.** A party may move to modify a judgment and render the judgment that should have been rendered:

(1) if the evidence (i) is legally insufficient to support a particular issue of a fact in favor of the adverse party or conclusively establishes a particular issue of fact in favor of the movant and (ii) the particular issue of fact, under the controlling law, determines a claim or defense; or

(2) if the application of controlling law to a claim or defense otherwise determines the claim or defense as a matter of law; or

(3) if the judgement should be modified, corrected or reformed in any respect; or

(4) if a request for an additional or amended finding of fact, if made, on an issue of fact tried by a judge requires a different judgment.

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

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

**(f) Motion Practice.** A motion under this rule shall state the specific grounds for

the motion and shall be served on adverse parties pursuant to Texas Rule of Civil Procedure 21a. A party may file for one or more motions pursuant to this rule without the denial of any motion precluding consideration by the judge of any other motion under this rule. A party may submit a proposed judgment for signature with the motion.

## RULE 302. MOTIONS FOR NEW TRIAL

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

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

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

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

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

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

has probably resulted in injury to the movant;

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

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

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

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

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

(11) when a case has been dismissed for want of prosecution; or

(12) when any other ground warrant a new trial in the interest of justice.

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

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

(1) jury misconduct;

(2) newly discovered evidence;

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

(4) dismissal for want of prosecution; or

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

**(d) Procedure For Jury Misconduct.**

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

(2) Testimony Of Jurors. A juror may not testify as to any matter or statement occurring during the jury's deliberations, or on any juror's mind or emotions or mental processes, as influencing any other juror's assent to or dissent from the verdict. Nor may a juror's affidavit or any statement by a juror concerning

any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes. However, a juror may testify whether any outside influence was improperly brought to bear upon any juror.

**(e) Excessive Damages; Remittitur**

(1) Excessive Damages. If the judge is of the opinion that the damages found by the jury are not supported by factually sufficient evidence, the judge may determine the greatest amount of damages supported by the evidence and may, as a condition of overruling a motion for new trial, suggest that the party claiming such damages file a remittitur of the excess within a specified period.

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

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

## RULE 303. PRESERVATION OF COMPLAINTS

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

are not required.

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

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

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

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

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

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

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

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

(d) **Informal Bills Of Exception And Offers Of Proof.** When evidence is excluded, the offering party shall as soon as practicable, but before the charge is read to the jury or before the judgment is signed in a nonjury case, be allowed to make, in the absence of the jury, an offer of proof in the form of a concise statement. The judge may, or at the request of a party shall, direct the making of the offer in question and answer form. A transcription of the reporter's notes or of the electronic tape recording showing the offer, whether by concise statement or question and answer, showing the objections made, and showing the ruling , when included in the statement of facts certified by the reporter or recorder, shall establish the nature of the evidence, the objections and the ruling. The judge may add any other or further statement showing the character of the evidence, the form in which offered, the objection made and the ruling. No further offer need be made. No formal bills of exception are needed to authorize appellate review of exclusion of evidence. When the judge hears objections to offered evidence out of the presence of the jury and rules that the evidence be admitted, the objections are deemed to apply to such evidence when it is

admitted before the jury without the necessity of repeating them.

The preparation and filing of formal bills of exception shall be governed by the following rules:

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

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

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

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

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

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

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

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

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

(10) Anything occurring in open court or in chambers that is reported or recorded and so certified by the court reporter or recorder may be included in the statement of facts rather than in a formal bill of exception. In a civil case the party requesting that all or part of the jury arguments or the voir dire examination of the jury panel be included in the statement of facts shall pay the cost thereof, which shall be separately listed in the certified bill of costs, and may be taxed in whole or in part by the appellate court against any party to the appeal.

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

## RULE 304. TIMETABLES

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

**(b) Motion To Modify Judgment.**

(1) A motion to modify a judgment may be filed within thirty days after a final judgment or appealable order is signed.

(2) A motion to modify may also be filed within seventy-five days after the final judgment or appealable order which the motion attacks is signed, if: (i) the trial court still retains plenary power; and (ii) the motion requests relief which has not been previously denied. No motion to modify shall be filed more than seventy-

five(e) **Formal Bills Of Exception.** days after the final judgment or appealable order is signed.

(3) A motion to modify a judgment may be amended, on one or more occasions without leave or court, before any preceding motion requesting the same relief filed by the movant is overruled, if the amended motion is filed within the time permitted by paragraph (b)(1) or (b)(2) of this rule.

(4) If an original or an amended motion to modify, is not determined by order signed within seventy-five days after the final judgment or appealable order was signed, the motion shall be considered overruled by operation of law upon the expiration of the seventy-five day period.

**(c) Motion For New Trial.**

(1) A motion for new trial may be filed within thirty days after a final judgment or appealable order is signed.

(2) A motion for new trial may also be filed within seventy-five days after the final judgment or appealable order which the motion attacks is signed, if: (i) the trial court still retains plenary over; and (ii) the motion requests relief which has not been previously denied. Except as provided in paragraph (c)(5) or (c)(6) of this rule, no motion for new trial shall be filed more than seventy-five days after the final judgment or appealable order is signed.

(3) A motion for new trial may be amended, on one or more occasions without leave of court, before any preceding motion requesting the same relief filed by the movant is overruled, if the amended motion is filed within the time permitted by paragraph (c)(1) and (c)(2) of this rule.

(4) If an original or an amended motion for new trial, is not determined by order signed within seventy-five days after the final judgment or appealable order was signed, the motion shall be considered overruled by operation of law upon the expiration of the seventy-five day period.

(5) In a case when judgment has been rendered by default against a party who did not participate either in person or by attorney in the actual trial of the case, a motion for new trial by the party against whom judgment was rendered shall be file within six months after the judgment was signed, unless a motion has been previously filed pursuant to paragraph (c)(1) or (c)(2) of this rule.

(6) In a case when judgment has been rendered on citation by publication and the defendant did not appear in person or by an attorney selected by the defendant, a motion for new trial shall be filed within two years after the judgment was signed, unless a motion has been previously filed pursuant to paragraph (c)(1) or (c)(2) of this rule.

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

**(e) Effective Dates And Beginning Of Periods**

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

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

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

(4) **No Notice of Judgment: Additional Time.** If a party affected by a final judgment or appealable order has not, within twenty days after the final judgment or appealable order was signed, received the notice require by paragraph (3) and has not acquired actual knowledge of the signing of the final judgment or appealable order, then all periods provided in these rules that run from the date the final judgment or appealable order is signed shall begin for that party on the date that

party received notice or acquired actual knowledge of the signing of the final judgment or appealable order, whichever occurred first; provided, however, that in no event shall the periods begin more than ninety days after the final judgment or appealable order was signed.

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

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

(7) **Process by Publication.** For a motion for new trial filed more than thirty days but within two years after the judgment was signed when process has been served by publication, the periods shall be computed as if the judgment were signed on the date of filing the motion.

(8) **Premature Filing.** A motion for new trial or request for findings of fact and conclusions of law are effective although prematurely filed. A motion for new trial shall be deemed to have been filed on the date of, but subsequent to, the signing of the judgment the motion attacks. A request for findings of fact and conclusions of law shall be deemed to have been filed on the date of, but subsequent to, the signing of the judgment.

## RULE 305. PLENARY POWER OF THE TRIAL COURT

(a) **Duration.** A trial court has plenary power:

(1) for thirty days after a final judgment is signed in all instances;

(2) for one hundred and five days after a final judgment is signed, regardless of whether an appeal has been perfected, if any party has timely filed (i) within thirty days after the final judgment is signed a motion to modify a judgment, a motion for new trial, a motion to correct judgment record, or (ii) within twenty days after the final judgment is signed, a request for findings of fact and conclusions of law on an issue of fact tried to a judge; and

(3) for thirty days after (i) the judge signs an order exercising judicial discretion if the judge had plenary power at the time of signing or (ii) a pending motion to exercise judicial discretion is overruled, either by a signed order or by operation of law, whichever occurs first.

(b) **Exercise.** Regardless of whether an appeal has been perfected, the trial court has plenary power to:

(1) grant a motion to modify or a motion for new trial or to vacate the judgment within thirty days after the judgment is signed; and

(2) grant a motion to modify or a motion for new trial or to vacate the judgment until thirty days after all of those timely-filed motions are overruled, either by signed order or by operation of law, whichever occurs first.

(c) **Expiration.** On expiration of the time within which the trial court has plenary power:

(1) the trial judge cannot set aside a judgment except on bill of review for sufficient cause filed within the time allowed by law;

(2) the trial judge, however, may at any time, correct a clerical error in the record of a judgment and render judgment *nunc pro tunc* pursuant to Tex. R. Civ. P. 302(f);

(3) the trial judge may also sign an order declaring a previous judgment or order to be void because signed after expiration of the trial court's plenary power; and

(4) the trial court may also file findings of fact and conclusions of law if within the time allowed by Tex. R. Civ. P. 297.

# *INQUIRY DISPOSITION CHART*
## *TEXAS RULES OF CIVIL PROCEDURE 300-331*

| Rule No. | Page No. | Change Suggested | Recommended Action | Reason |
|---|---|---|---|---|
| 301 | Pg 879-882 | Harry L. Tindall and John W. Harris complain that proposed amendment of 4/90, eff. 9/90, saying that a judgment was not rendered until signed, would be a disaster. | None. | Amendment was withdrawn on 9/4/90, eff. 9/1/90; complaint already cured. |
| 306 | Pg 883 | Duncan F. Wilson makes the same complaint as shown for Rule 301 but believes amendment will be made to Rule 306; *i.e.*, same complaint, wrong number. | None. | Real complaint as to Rule 301 already cured. |
| 306a | Pg 884 | Unknown recommends that Rule 306a(4) [now proposed Rule 322(c)(3)] be amended to say that a party may give notice of a judgment in addition to the clerk. | None. | No one believes such an amendment would be helpful or necessary. |
| 307 | Pg 885 | Charles A. Spain, Jr. comments that the Texas rules use "non-jury" and "nonjury" in a number of rules. He suggests the rules should be uniform. | None. | Proposed TRAP rules uniformly use "non jury" as does our proposed rules. *See* proposed TRCP 321(d). |
| 324 | Pg 886-900 | Chief Justice Max N. Osborn (now retired) inquires if TRCP 324(a) conflicts with TRAP 52(a). He also suggests reduced time limits on appeal. | None.<br><br>None. | This has been cured by proposed amendments to TRAP 52(a).<br><br>No one believes such a reduction will be helpful. |
| 324(a) | Pg 901 | Same as on Rule 307. | None. | See Rule 307. |
| 329b | Pg 902-905 | Martin L. Peterson suggests that Rule 329b be rewritten to eliminate confusion on "vacating" a judgment. | An amendment is being recommended to cure problem | Good idea. |

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|---|---|---|---|---|
| 329(b) | Spg 425-427 | Charles A. Spain, Jr. suggests that date motion for new trial overruled as a matter of law be changed from 75 to 60 days to cure *Casebolt* problem. | None. | No one believes such an amendment is necessary. |
| 320 | S Sp 447-449 | Damon Ball requests amendment requiring motion for entry of default judgment. | None. | No one believes such an amendment is necessary. |
| 329b | S Sp 450-451 | Martin L. Peterson resubmits his suggestion shown at Pg 902-905. | Same as Pg 902-905. | See Pg 902-905 |
| 329b | S Sp 452-454 | Charles A. Spain, Jr., suggests a new, general rule on TC's plenary power and when it expires. | An amendment is being proposed as a partial cure. | Needed to complete amended rule. |
| 330 | S Sp 452-454 | Charles A. Spain, Jr., suggests broader rule needed on terms of court. | None. | No one believes such an amendment is necessary. |
| 330 | S Sp 455-57 | Thomas B. Alleman suggests that new rules needed on control of visiting judges. | None. | Does not come within purview of Rule 330. |

RED-LINED VERSION

# REPORT OF THE SUPREME COURT ADVISORY COMMITTEE ON PROPOSED CHANGES TO THE SANCTION RULES

November 8, 1995

## RULE 13. EFFECT OF PRESENTING PLEADINGS, MOTIONS AND OTHER PAPERS; SANCTIONS

(a) Presenting pleadings, motions, and other papers. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, motion, or other paper, an attorney or unrepresented party is certifying that to the best of the presenter's knowledge, information, and belief, formed after reasonable inquiry:

(1) the pleading, motion, or other paper is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or by the establishment of new law;

(3) the allegations and other factual contentions in the pleading, motion, or other paper have evidentiary support, or, for specifically identified allegations or factual contentions, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) each denial in a pleading, ~~or~~ motion, or other paper of a factual contention is warranted on the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief; provided however, that the filing of a general denial under Rule 92 does not violate this provision.

(b) Motion for sanctions. A party seeking sanctions under this rule shall file a motion for sanctions separately from other motions or requests, and shall describe the specific conduct alleged to violate paragraph (a) of this rule. The motion shall be served not less than twenty-one (21) days before being either filed or presented to the court; if the challenged pleading, motion, or other paper is withdrawn or corrected within that twenty-one (21) day period, the motion shall neither be filed nor presented to the court. The court may award to a party prevailing on a motion under this rule the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.

(c) Court's initiative. The court on its own initiative may make an order describing the specific conduct that appears to violate paragraph (a) of this rule and directing the alleged violator to show cause, with notice of not less than twenty-one days, why the conduct has not violated the rule. If the challenged pleading, motion, or other paper is withdrawn or corrected within that twenty-one day period, no sanctions shall be imposed.

(d) Sanctions. A court that determines that a person has presented a pleading, motion, or other paper ~~pleading~~ in violation of paragraph (a) of this rule may impose a sanction on the person, a party represented by the person, or both. Any sanction shall be limited to what is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated. A sanction may include any of the following:

(1) an order striking the motion, pleading, or other paper;

(2) an order directing the violator to perform, or refrain from performing, an act;

(3) an order to pay a penalty into court;

(4) an order to pay the other party the amount of the reasonable expenses incurred by the other party because of the presentation of the pleading, motion, or other paper, including reasonable attorney's fees; and

(5) upon a showing of (i) repeated and continuing violations of paragraph (a), and (ii) failure to exercise diligence to avoid such violations, an award of an appropriate amount of litigations costs and expenses incurred or caused by the subject litigation.

The court may not award monetary sanctions against a represented party for a violation of paragraph (a)(2). The court may not award monetary sanctions on its own initiative unless the court issues its show-cause order before a voluntary dismissal or voluntary settlement of the claims made by or against the party or the party's attorney against whom sanctions are proposed.

An order under this rule shall contain written findings, or be supported by oral findings on the record, stating specifically (1) the conduct meriting sanctions, and (2) why a lesser sanction would be ineffective.

Except with respect to pleadings, motions, or other papers ~~and pleadings~~ involving post-judgment discovery under Rule 621a, the trial court may grant relief under this rule only while the court has plenary jurisdiction.

(e) Exception. This rule is inapplicable to discovery requests and responses, including objections and claims of privilege.

Comments. This rule incorporates provisions from Chapter 10 of the Texas Civil Practice and Remedies Code. In applying the rule, courts should exercise care to avoid unnecessary disruption of the attorney-client relationship, including unnecessary disclosures of attorney-client communications.

## RULE 166d. FAILURE TO MAKE OR COOPERATE IN DISCOVERY: REMEDIES

1. Procedure.

*(a) Motion.* Any person affected by a failure of another person to respond to or supplement discovery, or by an abuse of the discovery process in seeking or resisting discovery, may file a motion specifically describing the violation. The motion shall be filed in the court in which the action is pending, except that a motion involving a person or entity who is not a party shall be filed in any district court in the district where the discovery is to take place. Nonparties affected by the motion shall be served as if parties. The motion shall contain a certificate that the movant (or the movant's counsel) has spoken with the opposing party (or the opposing party's counsel if represented by counsel) in person or by telephone to try to resolve the discovery dispute, or has made diligent attempts to do so, and that such efforts have failed.

*(b) Hearing.* Oral hearing is required for motions requesting relief under this rule, unless waived by those involved.

*(c) Order.* An order under this rule may compel, limit or deny discovery, award expenses pursuant to paragraph 2, and impose sanctions pursuant to paragraph 3. The order shall be in writing. An order granting relief or imposing sanctions shall be against the party, attorney, law firm, or other person or entity whose actions necessitated the motion. An order imposing sanctions under paragraph 3 of this rule shall contain written findings, or be supported by oral findings on the record, stating specifically (1) the conduct meriting sanctions, and (2) why a lesser sanction would be ineffective.

2. Expenses for compelling, limiting, or denying discovery. The court may make an award of expenses, including attorney's fees, incurred in connection with a motion made pursuant to paragraph 1 or a written response to such a motion, only if the court finds that: (a) the amount of expenses, including attorney's fees, incurred in connection with the prosecution or defense of the motion, is unreasonably burdensome on the party seeking relief, and (b) the party against whom relief is sought was not reasonably justified in seeking or resisting the discovery at issue.

3. Sanctions.

(a) *Sanctionable conduct.* In addition to or in lieu of the relief provided above, the court may impose sanctions as set forth in subparagraph (b) below if the court finds that:

(i) a person subject to an order relating to discovery, other than a Discovery Control Plan under Rule 1, has failed to comply with the order; or

(ii) a party, a party's attorney, or a person under the control of a party: (A) has disregarded a rule, a Discovery Control Plan, or subpoena repeatedly or in bad faith; or (B) has destroyed evidence in bad faith or engaged in other conduct that an order compelling, denying, or limiting discovery cannot effectively remedy; or (C) has repeatedly made discovery responses that are untimely, clearly inadequate or made for purposes of delay; or (D) has repeatedly made discovery requests or objections to discovery or claims of privilege that are not reasonably justified; or (E) has otherwise abused the discovery process in seeking, making or resisting discovery.

(b) *Sanctions.* A court may impose any of the following sanctions that are just, directed to remedying the particular violations involved, and are no more severe than necessary to satisfy the legitimate purposes of the sanctions imposed:

(1) Reprimanding the offender;

(2) Allowing or disallowing further discovery in whole or in part, including changing discovery limitations;

(3) Assessing discovery or trial expenses, including attorney's fees, caused by the sanctionable conduct;

(4) Deeming certain facts or matters to be established for the purposes of the action;

(5) Barring introduction of evidence supporting or opposing designated claims or defenses;

(6) Striking pleadings or portions thereof, staying further proceedings until an order is obeyed, dismissing with or without prejudice the action or any part thereof, or rendering a default judgment;

(7) Granting the movant a monetary award in addition to or in lieu of actual expenses; or

(8) Making such other orders as are just under the circumstances.

4. Time for Compliance. Orders under this rule shall be operative at such time as directed by the court. If a party contends that monetary award precludes access to the court, the judge must either (i) provide that the award is payable only at a date that coincides with or follows entry of a final order terminating the litigation, or (ii) makes written findings or oral findings on the record after a hearing that the award does not preclude access to the court.

5. Review. An order under this rule shall be subject to review on appeal from the final judgment by any person or entity affected by the order.

Comment. Paragraph (5) does not change or address the availability of mandamus relief in sanctions proceedings. *See, e.g., Walker v. Packer, 827 S.W.2d 833 (Tex. 1992).*

CLEAN VERSION

# REPORT OF THE SUPREME COURT ADVISORY COMMITTEE ON PROPOSED CHANGES TO THE SANCTION RULES

November 8, 1995

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(a) Presenting pleadings, motions, and other papers. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, motion, or other paper, an attorney or unrepresented party is certifying that to the best of the presenter's knowledge, information, and belief, formed after reasonable inquiry:

(1) the pleading, motion, or other paper is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or by the establishment of new law;

(3) the allegations and other factual contentions in the pleading, motion, or other paper have evidentiary support, or, for specifically identified allegations or factual contentions, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) each denial in a pleading, motion, or other paper of a factual contention is warranted on the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief; provided however, that the filing of a general denial under Rule 92 does not violate this provision.

(b) Motion for sanctions. A party seeking sanctions under this rule shall file a motion for sanctions separately from other motions or requests, and shall describe the specific conduct alleged to violate paragraph (a) of this rule. The motion shall be served not less than twenty-one (21) days before being either filed or presented to the court; if the challenged pleading, motion, or other paper is withdrawn or corrected within that twenty-one (21) day period, the motion shall neither be filed nor presented to the court. The court may award to a party prevailing on a motion under this rule the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.

(c) Court's initiative. The court on its own initiative may make an order describing the specific conduct that appears to violate paragraph (a) of this rule and directing the alleged violator to show cause, with notice of not less than twenty-one days, why the conduct has not violated the rule. If the challenged pleading, motion, or other paper is withdrawn or corrected within that twenty-one day period, no sanctions shall be imposed.

(d) Sanctions. A court that determines that a person has presented a pleading, motion, or other paper in violation of paragraph (a) of this rule may impose a sanction on the person, a party represented by the person, or both. Any sanction shall be limited to what is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated. A sanction may include any of the following:

(1) an order striking the motion, pleading, or other paper;

(2) an order directing the violator to perform, or refrain from performing, an act;

(3) an order to pay a penalty into court;

(4) an order to pay the other party the amount of the reasonable expenses incurred by the other party because of the presentation of the pleading, motion, or other paper, including reasonable attorney's fees; and

(5) upon a showing of (i) repeated and continuing violations of paragraph (a), and (ii) failure to exercise diligence to avoid such violations, an award of an appropriate amount of litigation costs and expenses incurred or caused by the subject litigation.

The court may not award monetary sanctions against a represented party for a violation of paragraph (a)(2). The court may not award monetary sanctions on its own initiative unless the court issues its show-cause order before a voluntary dismissal or voluntary settlement of the claims made by or against the party or the party's attorney against whom sanctions are proposed.

An order under this rule shall contain written findings, or be supported by oral findings on the record, stating specifically (1) the conduct meriting sanctions, and (2) why a lesser sanction would be ineffective.

Except with respect to pleadings, motions, or other papers involving post-judgment discovery under Rule 621a, the trial court may grant relief under this rule only while the court has plenary jurisdiction.

(e) Exception. This rule is inapplicable to discovery requests and responses, including objections and claims of privilege.

Comments. This rule incorporates provisions from Chapter 10 of the Texas Civil Practice and Remedies Code. In applying the rule, courts should exercise care to avoid unnecessary disruption of the attorney-client relationship, including unnecessary disclosures of attorney-client communications.

## RULE 166d. FAILURE TO MAKE OR COOPERATE IN DISCOVERY: REMEDIES

1. Procedure.

*(a) Motion.* Any person affected by a failure of another person to respond to or supplement discovery, or by an abuse of the discovery process in seeking or resisting discovery, may file a motion specifically describing the violation. The motion shall be filed in the court in which the action is pending, except that a motion involving a person or entity who is not a party shall be filed in any district court in the district where the discovery is to take place. Nonparties affected by the motion shall be served as if parties. The motion shall contain a certificate that the movant (or the movant's counsel) has spoken with the opposing party (or the opposing party's counsel if represented by counsel) in person or by telephone to try to resolve the discovery dispute, or has made diligent attempts to do so, and that such efforts have failed.

*(b) Hearing.* Oral hearing is required for motions requesting relief under this rule, unless waived by those involved.

*(c) Order.* An order under this rule may compel, limit or deny discovery, award expenses pursuant to paragraph 2, and impose sanctions pursuant to paragraph 3. The order shall be in writing. An order granting relief or imposing sanctions shall be against the party, attorney, law firm, or other person or entity whose actions necessitated the motion. An order imposing sanctions under paragraph 3 of this rule shall contain written findings, or be supported by oral findings on the record, stating specifically (1) the conduct meriting sanctions, and (2) why a lesser sanction would be ineffective.

2. Expenses for compelling, limiting, or denying discovery. The court may make an award of expenses, including attorney's fees, incurred in connection with a motion made pursuant to paragraph 1 or a written response to such a motion, only if the court finds that: (a) the amount of expenses, including attorney's fees, incurred in connection with the prosecution or defense of the motion, is unreasonably burdensome on the party seeking relief, and (b) the party against whom relief is sought was not reasonably justified in seeking or resisting the discovery at issue.

3. Sanctions.

(a) *Sanctionable conduct.* In addition to or in lieu of the relief provided above, the court may impose sanctions as set forth in subparagraph (b) below if the court finds that:

(i) a person subject to an order relating to discovery, other than a Discovery Control Plan under Rule 1, has failed to comply with the order; or

(ii) a party, a party's attorney, or a person under the control of a party: (A) has disregarded a rule, a Discovery Control Plan, or subpoena repeatedly or in bad faith; or (B) has destroyed evidence in bad faith or engaged in other conduct that an order compelling, denying, or limiting discovery cannot effectively remedy; or (C) has repeatedly made discovery responses that are untimely, clearly inadequate or made for purposes of delay; or (D) has repeatedly made discovery requests or objections to discovery or claims of privilege that are not reasonably justified; or (E) has otherwise abused the discovery process in seeking, making or resisting discovery.

(b) *Sanctions.* A court may impose any of the following sanctions that are just, directed to remedying the particular violations involved, and are no more severe than necessary to satisfy the legitimate purposes of the sanctions imposed:

(1) Reprimanding the offender;

(2) Allowing or disallowing further discovery in whole or in part, including changing discovery limitations;

(3) Assessing discovery or trial expenses, including attorney's fees, caused by the sanctionable conduct;

(4) Deeming certain facts or matters to be established for the purposes of the action;

(5) Barring introduction of evidence supporting or opposing designated claims or defenses;

(6) Striking pleadings or portions thereof, staying further proceedings until an order is obeyed, dismissing with or without prejudice the action or any part thereof, or rendering a default judgment;

(7) Granting the movant a monetary award in addition to or in lieu of actual expenses; or

(8) Making such other orders as are just under the circumstances.

4. Time for Compliance. Orders under this rule shall be operative at such time as directed by the court. If a party contends that monetary award precludes access to the court, the judge must either (i) provide that the award is payable only at a date that coincides with or follows entry of a final order terminating the litigation, or (ii) makes written findings or oral findings on the record after a hearing that the award does not preclude access to the court.

5. Review. An order under this rule shall be subject to review on appeal from the final judgment by any person or entity affected by the order.

Comment. Paragraph (5) does not change or address the availability of mandamus relief in sanctions proceedings. *See, e.g., Walker v. Packer, 827 S.W.2d 833 (Tex. 1992).*

## DISPOSITION CHART
## TEXAS RULES OF CIVIL PROCEDURE 13 & 215

| RULE NO. | PAGE NO. | CHANGE SUGGESTED/BY | RECOMMENDED ACTION | REASON |
|---|---|---|---|---|
| 13 | Pg 38 | Substantially rewrite Rules 13 and 215/ Shelby Sharpe | Amended Rules 13 & 215 | Amended Rule 13 to conform to new statute |
| | Pg 39-41 | Add a safe harbour provision to Rule 13/Luke Soules | Safe harbour restored to Rule 13 | Amended Rule 13 to conform to new statute |
| | Pg 42-73 | Amend Rule 13 perhaps to conform to Federal Rule 11/ Karen Johnson | Amended Rule 13 | Amended Rule 13 to conform to new statute |
| | Pg 74 | Inquires as to whether certain changes should be made to Rule 13 in light of a study of Federal Rule 11/ Prof. Hadley Edgar | Amended Rule 13 | Amended Rule 13 to conform to new statute |
| | Pg 75-106 | Suggests passing State Rules to provide for the capability of hand-ling sanctionable conduct in RICO cases filed in State Court/Michael Pezzulli | None | None needed |
| | Pg 107 | Suggests amending Rule 13 dealing with frivolous pleadings, etc./Kenneth Fuller | Amended Rule 113 | Amended Rule 13 to conform to new statute |
| | Pg 108-110 | Urges amending Rule 13 so that trial judges can have a tool to deal with frivolous cases/ Judge Guy Jones | Amended Rule 13 | Amended Rule 13 to conform to new statute |

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| 215 | Pg 682-683 | Suggests amending the discovery rules so that identification of a person is someone with know-ledge of relevant facts or an expert witness by any party shall suffice, etc./ Bruce E. Anderson | Supplementation Rules amended by change in Discovery Rules | Discovery Rules Extensively Amended |
| | Pg 684-685 | Substantially rewrite Rules 13 and 215/ Shelby Sharpe | See page 38 above | |
| | Pg 686-698 | Suggests severe limitations on discovery/Judge Brent Keiss | Passage of New Recommended Discovery Rules | |
| | Pg 699-703 | Suggests certain clarifications to Rule 215/Shelby Sharpe | Recommended New Rule 166d | |
| | Pg 699-711 | These pages to not contain any question or request so no response is necessary | | |
| | Pg 712-718 | Suggests simplifying discovery to avoid mandatory exclusion of evidence/James R. Bass | Supplementation Rules amended by change in Discovery Rules | Discovery Rules Extensively Amended |
| | Pg 719-723 | Suggests amending sanctions rules to allow judges to impose sanctions more freely in certain situ-ations/Stephen R. Marsh | New discovery and sanctions rules passed | |
| | Pg 724-725 | Proposes amending Rule 215 to avoid what sometimes turn out to be harsh and unfair sanctions/Sidney Floyd | Discovery and Sanctions Rules amended | |

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| | Pg 726-727 | Proposes softening the rules providing for automatic exclusion of testimony of witnesses when it is clear that the testimony comes as no actual surprise/T. B. Wright | Discovery and Sanctions Rules amended | |
| | Pg 728-729 | This letter has nothing to do with anything having to do with discovery or sanctions/Joe Bax | | |
| | Pg 730-731 | Proposes softening automatic exclusion of witnesses, rules/ James V. Hammett | Automatic exclusion provisions have been significantly amended | |
| | Pg 732-741 | Proposes softening exclusion rules/ Judge Pat M. Baskin | ditto | |
| | Pg 742 | Questions whether Rule 215 should be amended to amend the court's ability to impose extreme sanctions/Steve McConnico | Rules on sanctions have been significantly amended | |
| | Pg 743 | Ditto/Judge Wm. Kilgarlin | ditto | |
| | Pg 744 | Dan Price, the author of this letter is deceased | | |
| | Pg 745-746 | Ditto/Phillip W. Gilbert | Rules on sanctions have been significantly amended | |
| 215a | Pg 747-755 | Amend Rule 215a/ Luke Soules | incorporate changes to a new sanctions rule - 166d | 215a is repealed, and 215 will become 166d |
| 13 | Spg 25-27 | Suggests changing Rule 13 to deal with abusive motions in limine/Robert Barfield | Amendment of Rule 13 | To conform with statute |

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| Proposed General Rule 13 | SSp 393-394 | Replace Rule 13 with amendments to Rule 5 on signing pleadings/Clarence A. Guittard | None | Subcommittee and committee have chosen to retain Rule 13 with amendments to reflect new state sanctions statute |
| 13 | SSp 395-414 | Revised Rule 13 proposed/State Bar of Texas Committee on Court Rules | Adopt in part. See proposed Rule 13 | State Bar Rule and new statute both patterned on Fed. R. Civ. P. 11; proposed rule 13 tracks new statute |
| 215 | SSp 415-424 | Dallas Court of Appeals has held Rule 215 unconstitutional/ John Ernest Boundy | None | Dallas decision relates to court's contempt powers and not sanctions powers |
| | SSp 425-430 | Revised Rule 215 proposed/State Bar of Texas Committee on Court Rules | Adopt in part. See proposed rule 166d and new discovery rules | Rule 215 required amendment to reflect court sanctions decisions and to better fit with new discovery rules |

# DISPOSITION CHART
# TEXAS RULES OF CIVIL PROCEDURE 15 - 165a
# (as of November 17, 1995)

| RULE NO. | PAGE NO. | CHANGE SUGGESTED/BY | RECOMMENDED ACTION | REASON |
|---|---|---|---|---|
| 18a | Pg 111-113 | Permit late-filing of m. to disqualify/recuse based on grounds not known or upon due diligence knowable until past deadline. By Justice Charles Bleil. See his article on "Focus on Judicial Recusal: A Clearing Picture," 25 TEX. TECH L. REV. 773, 782-83 (1994). | Unanimously recommend that disqualification can be raised at any time. Vote of 4-3 that you can file recusal up to 10 days prior to first hearing or trial, and after that can only raise matters subsequently arising, and they will be handled in a parallel proceeding while trial judge proceeds with case. | Disqualification grounds are constitutional and already can be raised at any time. Recusal should be raised at first opportunity. Permitting recusal within 10 days of trial risks use as disguised continuance. Avoid that by permitting judge to proceed to trial, while recusal is handled in a parallel proceeding under the existing procedure of assignment to another judge. |
| 20 | Pg 114-116 | Eliminate requirement that special judge sign minutes of proceedings before him. By David Beck. | Eliminate reading and signing of minutes at end of court term, altogether, by eliminating Rule 20. | The procedure is no longer generally observed, and is unnecessary. |
| 21 | Pg 117-129 | Require that cert. of service reflect to whom service was made, and the address, and date and manner of service. By Larry W. Wise. | Adopt suggested change. Further provide that receiving party can rebut the recital of the manner of service. | Eliminates uncertainty as to how service was effected. |

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| 21a | Pg 127-128 | Rule 21a permits service upon a party or his atty of record. Service should be on atty and not party. By Wendell S. Loomis. | Once party receives notice that opposing party is represented by counsel, service is upon that counsel. | Service upon the client and not the attorney creates delays, lost papers, invades privacy, etc. |
| | Pg 130 | Eliminate provision that service by telefax after 5 p.m. is effective next day. By Luke Soules. | Reject suggestion. Furthermore, hand-delivery after 5 pm should be effective next day. | Some offices close and lawyers leave at 5 pm. Delivery after 5 pm is tantamount to delivery next day, anyway. |
| | Pg 133-134 | Eliminate service by telefax. By Jose Lopez II. | Reject suggestion. Further, service should be permitted by electronic mail on parties who indicate in their initial pleading or by subsequent filing that service by E-mail is acceptable. | Telefax service is quick and effective. Also, E-mail is an efficient and quick way to transmit data. Permit service by E-mail on all parties willing to accept E-mail service. |
| | Pg 137-138 | Require lawyers to include on pleading a telefax no. for service, and if no telefax no. given, then no service by telefax except upon Rule 11 agreement. By Ken Fuller. | Reject suggestion. | Having the option of service by telefax is beneficial. Telefax number should be required. |
| 21b | Pg 159-163 | This letter does not implicate Rule 21b, which relates to "Sanctions for Failure to Serve or Deliver Copy of Pleadings and Motions." | Fold Rule 21b regarding sanctions into new service rule. | Consolidate related rules. |

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| 23 | Pg 164-165 | Continue random case assignment by having clerks "designate the suits by regular consecutive numbers....," to help combat forum shopping. By John Appleman, Jefferson Co. Dist. Clerk. | No change. | Rule 23 provides for sequential cause numbers and not sequential assignment to courts. |
| 26 | Pg 166-167 | Does record keeping under Rule 26 include J.P. courts or just district and county courts, since J.P. courts are covered under Rule 524? By Bill Willis | Yes, Rule 26 does apply. No change. | J.P. courts have worked successfully with existing rules. |
| 41 | Pg 168-169 | Rules 174 and 41 are at odds. Joinder matters are within discretion of TC and subject to abuse of discretion review. TC should be able to join parties if not too expensive and not prejudicial to parties. By Professor Jack Ratliff. | This Subcommittee will study revising joinder of parties, for this and other reasons. | |
| 46(b) | Pg 170-172 | Misnomer: letter actually requests change to Rule 146. | Subcommittee recommends that this matter be referred to Judge Till's Committee. | This is within the scope of Judge Till's Committee. |

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| 47 | Pg 173-177 | The Rule 47(b) ban against pleading the amount of unliquidated damages in an original pleading can affect the question of county court at law jurisdiction. By Broadus Spivey. | Subcommittee recommends Rule stays as it is. | This is not perceived as a problem in actual practice. |
| | | Party can fortunate shop by filing a pleading seeking an indefinite amount of damages and then amend to assert a recovery in excess of the county court at law's jurisdictional limits. By Pat McMurray. | Subcommittee recommends Rule stays as it is. | This is not perceived as a problem in actual practice. |
| 48 | Pg 178-180 | Misnomer: letter actually requests change to Rule 148. | Subcommittee recommends that this request be referred to Judge Till's Committee. | |
| 63 | Pg 181-184 | Change from 7 days prior to trial to 30 days prior to trial. Court can grant leave to file amended pleadings but movant must show "good cause," and no surprise on opposing party. By Glen Wilkerson. | Change Rule to set deadline at 45 days before discovery cut off date. | Relation back doctrine is statutory. |
| | Pg 183-184 | Proposed addition to Rule 63 permitting the amendment of pleadings to include a party that has been overlooked or misidentified in the original pleadings, if certain criteria are met. By Gilbert Low. | Examine relevant statute to see what would be subject to rule-making power of Supreme Court. | |

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| 64 | Pg 185-186 | Allow amendment by designating page or paragraph amended. Not necessary to replead everything. By Richard H. Sommer. | Recommend that the Rule not be changed. | This has already been debated by SCAC. Judges might have to go through several volumes. |
| 67 | Pg 187 | No amendment to pleadings within 30 days of trial. Court can grant leave to file amended pleadings but movant must show "good cause," and no surprise on opposing party. By Glen Wilkerson. | Recommend no change to Rules 66 & 67, due to changes recommended to Rule 63. | We have advanced the deadline for amending pleadings, but not altered burden of proof as to good cause. |
| 74 | Pg 188-200 | Permit clerks to file faxed documents, and to choose preferred method of securing payment for that service. | Recommend SCAC consider uniform telefax filing rule, yet to be prepared. This Subcommittee will prepare proposed rules, if desired. | |
| 75a & 75b | Pg 5-7 | Exhibits are filed with the court clerk but court reporter transmits them to the appellate court. By Michael Northrup. | Will make all rules gender neutral. Reference to TRCP 379 will be changed to refer to new TRAP. Concern over exhibits has been addressed by TRAP changes. | |

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| 76a | Pg 201-203 | Rule 76a(8) suggests that you can appeal from a temporary sealing order, even though based upon affidavit or verified petition. Make Rule clear that temporary sealing order is analogous to TRO and can't be appealed. By Bernard Fischman. | Recommend no change. | Temporary order should be subject to appellate review. |
| | Pg 204-208 | 1st Ct. App. ruled that Rule 76a does not apply to protective orders. No particular change suggested. By Jack J. Garland, Jr. | Change Rule 76a to provide that a confidentiality order relating to unfiled discovery is not a Rule 76a order unless the order is contested on the basis of Rule 76a. | Clarification is needed. Recommend new Rule 76a(2)(a)(4) that would exclude from "court records": "unfiled discovery for which a protective order is sought and, there is no claim that the provisions of 76a2(c) apply." |
| 86 | Pg 211 | Rule does not specify time to file motion to transfer venue based on inability to obtain fair trial. Case law says motion can be filed on day of trial. By J. Hadley Edgar. | Subcommittee recommends that this and all venue rules be consolidated and caused to conform to existing venue statutes, while remaining general enough to minimize future rule changes based upon further legislative activity. | Legislature has put itself in the middle of venue rights. Rules need to provide a procedure to implement legislative mandates, but not so closely that every legislative change requires a rule change. |

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| 87 | Pg 212-216 | If venue is challenged, a determination based on a preponderance of the evidence should be made to be certain that the resident defendant is the real defendant. By William J. Wade. | Subcommittee will evaluate new venue rules. | Addressed in new statute. |
| 90 | Pg 217-221 | Special exception needs to be presented to the trial court prior to trial to avoid waiver. By J. Hadley Edgar. | Prof. Dorsaneo is rewriting Rules 90-91. See Dallas Local Rule 1.10.a. Recommend general pretrial rule requiring disposition of motions/exceptions before trial. | Court Rules Committee suggests that 30 days before trial be the deadline for resolving special exceptions. Subcommittee would tie the deadline to the end of the discovery period, as recommended with deadline for amending pleadings. |

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| 91 | Pg 222-225 | Letter does not relate to R 91. By Wendell Loomis. | Prof. Dorsaneo is rewriting Rules 90-91. | |
| | Pg 226-229 | Special exceptions should be filed 10 days prior to trial. By Broadus Spivey. | Subcommittee recommends counting back from end of discovery period. | |
| | Pg 228-229 | Special exceptions must be filed 30 days prior to trial if pertinent pleading has been on file for 30 days. Court may allow for good cause exceptions at any time. By unknown party; submitted by Broadus Spivey, who disagreed with the amendment. | Subcommittee recommends counting back from end of discovery period. | |
| | Pg 230-231 | This letter relates to TRAP 91, not TRCP 91. By Bruce Pauley. | | |
| 93 | Pg 232-235 | Notes and Comments should be changed to reflect the correct numbered paragraphs instead of letter paragraphs. By Bill Willis. | Fix the comments to reflect proper letters. | |
| 98a | Pg 236-239 | Comments on proposed "offer of judgment rule." No proposed rule was enclosed. Presume this would be like Federal Rule. | Subcommittee will consider this proposal. | The Federal rule may have beneficial effect if implemented in Texas practice. |

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| 100 | Pg 240-241 | $5 research fee demanded by Dist. Clerk is "one of the most stupid applications of money grubbing I have every heard." E.J. Wolt. | No action. There is no Rule 100. | |

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| 103 | Pg 242<br><br><br><br>Pg 244<br><br><br><br><br><br>Pg 245<br><br><br><br>Pg 247<br><br>Pg 248-249<br><br><br>Pg 250 | Threshold of qualifications for process servers is too low. By Robert Hurlbut.<br><br>Proposed Rule 103 imposing requirement that process servers be registered with the Secretary of State. Also permit private process servers to serve writs of garnishment. By [unknown].<br><br>Bexar County local rules re: private process servers, and req. of $100,000/ 300,000 liability insurance.<br><br>Private process server advertisement.<br><br>Do not allow private process servers to serve eviction notices. By Joe G. Bax.<br><br>Allow for service by any person authorized in writing by the plaintiff and eliminate requirement of written order. Judge Louis Lopez. | | |

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| 105 | Pg 253 | To protect officer or other person, add clause that officer or person may delay execution upon request of issuing party or their attorney. | | |
| 106 | Pg 254-255 | Amend rule to permit delivery to an occupant over 16 at the defendant's place of abode. | | |
| 111 | Pg 256-257 | This letter does not address Rule 111. By Bruce Pauley. | Recommend no action. | |
| 114 | Pg 258-259 | This letter does not address Trial Rule 114. It refers to Appellate Rule 114. By Bruce Pauley. | Refer to Appellate Rules Subcommittee. | |
| 117(a)(6) | Pg 260-261 | Delete the paragraph saying "[I]f this citation is not served within 90 days after the date of its issuance, it shall be returned unserved," so that citations do not have to be reissued. By Bexar County District Clerk, David J. Garcia. | | |
| 124 | Pg 262-266 | Delete parenthesis. Should be Rule 21a instead of 21(a). | | |

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| 145 | Pg 267-273 | Court clerks should be able to challenge indigency affidavit. Pro bono attys with clients referred by IOLTA programs should be able to use certificate of indigency. | Amend Rule 145 to permit clerks to contest affidavits; permit pro bono attys to establish indigency by IOLTA certificate. | Clerks should be able to contest indigency affidavits. If clients are prescreened for indigency, pro bono attorneys should not have to go through contest proceedings. |
| 146 | Pg 180 | Should be able to appeal J.P. judgment by cash bond. | Refer to Judge Till's Committee. | |
| 148 | Pg 180 | Should be able to appeal J.P. judgment by cash bond. | Refer to Judge Till's Committee. | |
| 156 | Pg 274 | Rules 90, 156, 216(1), 307, 542 say "non-jury" and Rules 324(a) and Rule of Judicial Administration 6(b)(2) say "nonjury." Be consistent in using either "non-jury" or "nonjury." Should be consistent in all rules. By Charles Spain. | | |
| 162 | Pg 275 | Submitted notice of amendment of Federal Rule of Civil Procedure 41, regarding terminating nonjury trials on the merits, and provided judgment on partial findings in Rule 52(c). By [unknown]. | | |

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| 165 | Pg 276-293 | Should be amended to provide that notice of dismissal be given in excess of 45 days to allow time to set the case for trial. By Howard Hasting.<br><br>The word "judgment" should be replaced with the words "order of dismissal" in the first sentence in the last paragraph of 165a.3. By Prof. J. Hadley Edgar. | | |
| 45-47 | SPg 28-31 | Amend Rules 45 & 47 to make parties plead constitutional, statutory, or regulatory provisions relied upon. By Richard Orsinger. | Amend Rule 47 to require pleader to state the legal basis for each claim and give a general description of the factual circumstances suff. to give fair notice. | This change conforms the rule to existing case-law and is salutory. |
| 87 | SPg 32-34 | Amend Rule 87(2). Party who wishes to maintain venue in particular county has burden of proof, while party who seeks to transfer venue has burden to show venue maintainable in target county. Conflict? By Wendell Loomis. | Need to redo venue rules, in accord with statutes. | Statutory changes require changes to venue rules. |
| 162 | SPg 35 | After verdict is returned in 1st phase of bifurcated trial, can plaintiff non-suit his entire case before resting in 2nd phase of trial? By Supreme Court Justice Nathan Hecht. | Provide that plaintiff can nonsuit only as to bifurcated untried issues. Write new rule for bifurcated trials. | Case law and statute require punitive damages to be tried separately, upon proper request. Need rule to provide how to conduct bifurcated trials. |

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| 18a | SSp 47-49 | Where grounds for recusal not known until after 10 days before trial, motion to recuse can be filed but judge can continue to hear case and recusal hearing before other judge proceeds independently. By Jim Parker. | By 4-3 vote, adopt recommendation. See pg 1 of this Disposition Chart. | |
| Proposed General Rule 9, Replacing Rule 182 | SSp 50-53 | Combine appellate and trial rules regarding disqualification and recusal. By Clarence A. Guittard. | | |
| Proposed General Rule 5, Replacing Rule 21 | SSp 54-58 | Fold TRAP 4(e) and Rule 21 into new general Rule 5, regarding "Signing, Filing and Service." | | |
| 21a | SSp 61-62 | When constitutionality of statute, rule or ordinance is questioned, must notify AG, city attorney, or other appropriate person, or else constitutional challenge is waived. By Charles Spain. | | |
| 21a | SSp 64-65 | Telefax transmissions should be effective when last page is sent, receiver's time. By Jim Parker. | | |
| Proposed General Rule 21a | SSp 66-67 | Fold Rule 21a "Methods of Service" into new Rule 5, which applies to trial and appellate courts. By Clarence A. Guittard. | | |

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| Proposed General Rule 21b | SSp 68-69 | Delete Rule 21b "Sanctions for Failure to Serve or Deliver Copy of Pleadings and Motions," and fold into new Rule 5 "Signing, Filing and Service." Use generic description rather than list. By Clarence A. Guittard. | | |
| 63 | SSp 70-79 | Deadline for amending pleadings would be 30 days prior to trial, not the current 7 days prior to trial. By SBOT Rules Committee. | Full SCAC should consider the proposal. Consider also Discovery Subcommittee proposed new Rule 63. The Subcommittee recommends the Discovery Subcommittee's approach. | The Rules Committee has trial-related deadlines, while the Discovery Subcommittee has a discovery cut-off related deadline. The SCAC needs to reconcile the two approaches. Rules 66 & 67 should stay the same. |
| Proposed General Rule 74 | SSp 80-81 | Delete Rule 74 "Filing With the Court Defined" and fold into new Rule 5 "Signing, Filing, and Service." | | |
| Proposed General Rule 76 | SSp 82-83 | Delete Rule 76 "May Inspect Papers" and fold into Rule 12 "Attorney May Inspect." By Clarence A. Guittard. | | |
| 76a | SSp 84-123 | Texas should permit audio-video cameras in courtroom. By Court Television. | Adopt uniform statewide rules. Chip Babcock is preparing draft. | Currently local rules vary. Uniform statewide rules are desirable. |
| 86 | SSp 124-127 | Waiver of venue change by one defendant shouldn't waive for all defendants. By Susan S. Fortney. | Venue rules must be rewritten to conform to new statutes. New rules still under construction. | Governed by legislation passed in 1995 Session. |

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| 90 | SSp 128-136 | Exceptions to pleadings must be heard a reasonable time but not less than 30 days prior to trial. By SBOT Rules Committee. | | |
| 103 | SSp 137-186 | Heard of instances where private process server served citation, interviewed defendant, and obtained admissions against interest, and was listed by plaintiff as a witness. By Larry L. Gollaher. | | |
| 145 | SSp 187-192 | Clerks should be permitted to contest affidavits of inability. Clerks should be subject to Rule 13 provisions and sanctions. By Earl Bullock. | See p. 12 above. | |
| Proposed General Rule 145 | SSp 193-195 | Various edits to Rule 145, "Affidavit of Inability." | Make any appropriate changes to new version of Rule 145. See p. 12 above. | |
| 165a | SSp 196-198 | The merits of the case should be considered before it is put on the dismissal docket and subsequently dismissed. By Richard Worsham. | | |

# INITIAL REPORT OF THE RULES 15-165a SUBCOMMITTEE

# REGARDING THE RECOMMENDATIONS OF

# THE SUPREME COURT TASK FORCE ON REVISION OF THE TEXAS RULES OF CIVIL PROCEDURE

November 17, 1995

INITIAL REPORT OF RULE 15-165A SUBCOMMITTEE

TO THE SUPREME COURT ADVISORY COMMITTEE

ON TASK FORCE RECOMMENDATIONS AS TO REWRITING RULES

NOVEMBER 17, 1995

1. Task Force Recommendations. Professor Dorsaneo chaired a Supreme Court Task Force on rewriting the Rules of Civil Procedure. The Task Force forwarded its recommendations to the Supreme Court on November 8, 1993. Those Task Force recommendations relate to the overall structure of the Texas Rules of Civil Procedure, as well as rewriting various groups of rules, and rewriting specific rules. This Task Force's recommendations have not been formally considered by the Supreme Court Advisory Committee. Now is the time to begin considering those proposals, since they impact so heavily on Rules 15 through 165a.

Professor Dorsaneo's cover letter enclosing the Task Force Report, and setting out its nature in broad terms, is attached to this Initial Subcommittee Report.

a. Consolidation. The Task Force determined that related rules were scattered throughout the Rules of Procedure, and that related rules should be consolidated. For example, rules relating to the duties of court clerks are spread throughout the rules, instead of being gathered into one area or one rule.

b. Restructuring. The Task Force determined that the structure of the Rules of Civil Procedure is more attributable to historical happenstance and not conscious planning. For example, originally Texas had a plea-oriented practice, not a motion practice. We have been slowly moving toward a motion practice (e.g., plea of privilege is now a motion to transfer, etc.). The Task Force recommended that we move away from a plea practice to a motion practice.

c. Style. The original rules in many instances copied statutory language. Some rules are written using rule-related conventions, while some rules carry forward the statutory style of writing. The Task Force recommends that we use the same conventions for the TRCP as we do for the Rules of Appellate Procedure and the Rules of Evidence.

RECAP:

(1) Under the Task Force's approach, the worst thing would be to let the rules that need to be at the end of the Rules continue to be sprinkled throughout the rules. The Task Force believes that its recommendation would be a great improvement in this area. We need to cut down on the number of general rules.

(2) The Task Force would like for the Rules to say what is permitted in a cohesive and coherent way.

(3) The Task Force believes that rules relating to parties need to be fixed. The Task Force suggests that we make our Rules look more like the federal scheme, which they partly copy. We're close to but slightly different from the Federal approach.

## THE SUBCOMMITTEE'S CONCLUSION

The Subcommittee on Rule 15-165a unanimously resolves:

> While we do not want to copy the structure of the federal rules, per se, we will take the structure outlined by the Task Force as a starting point for our subcommittee work, and treat the proposed restructuring as a "working hypothesis."

The SCAC should decide this point before the Subcommittee goes much further in its work.

Submitted by

Richard R. Orsinger
Subcommittee Chair

November 8, 1993

To: The Honorable Nathan L. Hecht
Rules Member, Supreme Court of Texas

From: William V. Dorsaneo, III
Chairman, Task Force on Revision of the Texas Rules of Civil Procedure

Re: Recodification of the Texas Rules of Civil Procedure

Status Report

1. The Need for Recodification: Background.

As originally promulgated, the Texas Rules of Civil Procedure consisted of approximately 822 separate rules divided into eight parts:

I. General Rules.
II. Rules of Practice in District and County Courts.
III. Rules of Procedure for the Courts of Civil Appeals.
IV. Rules of Practice for the Supreme Court.
V. Rules of Practice in Justice Courts.
VI. Rules Relating to Ancillary Proceedings.
VII. Rules Relating to Special Proceedings.
VIII. Closing Rules.

This original structure has been rendered substantially obsolete by subsequent Texas Supreme Court orders. As a result of the adoption of the Texas Rules of Appellate Procedure, Parts III and IV were completely repealed and the number of civil procedural rules was reduced by approximately 130 rules. In addition to the large gap that was created by the promulgation of the Rules of Appellate Procedure, another consequence of their removal from the Rules of Civil Procedure is that the civil procedural rulebook now begins with two separate sections of "general rules," i.e., the General Rules (Rules 1-14c) contained in Part I and the General Rules (Rules 15-21b) contained in the first section of Part II.

In addition to the major structural change that resulted from the adoption of the appellate rules, other major revisions have been made in Part II of the rulebook. Most notably, the rules concerning pretrial discovery, venue practice, the jury charge, and findings of fact in bench trials and have been rewritten; the rules concerning the need for and the procedural mechanisms for serving papers and notices on other parties or

their counsel have been changed; the rules concerning postjudgment motions and the duration and extent of the trial court's plenary power have been substantially revised; new rules have been adopted recognizing new procedural mechanisms, i.e. special appearances, summary judgments, mental and physical examinations; and a large number of rules have been repealed for a variety of reasons. Nonetheless, despite all of this activity, many of the current rules are substantially verbatim renditions of the parts of the Revised Civil Statutes of 1925 that were deemed procedural and, therefore, appropriate for inclusion in the rules of civil procedure by the Texas Supreme Court and the original rules committee.

Currently, the Texas Rules of Civil Procedure are divided into six parts and numbered 1-14c (general rules), 15-330 (district and county level courts) 523-591 (justice court rules) 572-734 (ancillary proceedings), 737-813 (special proceedings) and 814-822 (closing rules). Parts I and II contain the most important rules and include the following sections and subsections:

I. General Rules (1-14c)
II. Rules of Practice in District and County Courts
- Sec. 1 General Rules (15-21b)
- Sec. 2 Institution of Suit (22-27)
- Sec. 3 Parties to Suits (28-44)
- Sec. 4. Pleading
  - A. General (45-77)
  - B. Pleadings of Plaintiff (78-82)
  - C. Pleadings of Defendant (83-98)
- Sec. 5. Citation (99-124)
- Sec. 6. Costs and Security Therefor (125-149)
- Sec. 7. Abatement and Discontinuance of Suit (150-165a)
- Sec. 8. Pre-Trial Procedure (166-175)
- Sec. 9. Evidence and Depositions
  - A. Evidence (176-105)
  - B. Depositions (187-215)
- Sec. 10. The Jury in Court (216-236)
- Sec. 11. Trial of Causes
  - A. Appearance and Procedure (237-250)
  - B. Continuance and Change of Venue (251-261)
  - C. The Trial (262-270)
  - D. Charge to the Jury (271-279)
  - E. Case to the Jury (280-289)
  - F. Verdict (290-295)
  - G. Findings by Court (296-299a)
  - H. Judgments (300-314)
  - I. Remittitur and Correction (315-316)
  - J. New Trials (320-329b)
  - K. Certain District Courts (330)

2. The Desirability of Reorganization.

The Task Force recommends that Parts I and II of the Texas Rules of Civil Procedure containing Rules 1-330 be substantially reorganized. From an overall standpoint, the members of the Task Force have concluded that it is feasible and desirable to reorganize the Texas Rules of Civil Procedure in the current rulebook in the following manner:

I. General Rules
II. Commencement of Action; Service of Process, Pleadings, Motions and Orders
III. Pleadings and Motions
IV. Parties
V. Discovery and Pretrial Procedure
VI. Trial
VII. Judgments; Motions for Judgment; New Trials
VIII. Provisional and Final Remedies
IX. Special Proceedings
X. Counsel, Courts, Clerks, Court Reporters, Court Records, and Court Costs
XI. Closing Rules.

The method of organization is based on the way that the Federal Rules of Civil Procedure are organized except for the inclusion of a separate subsection for Pretrial Procedure in the structure that we recommend. We believe that this organization is far superior to the current one for two basic reasons. First, the changes made in the original rules have impaired the structural utility of the original rulebook. Second, the proposed general structure is substantially less complicated as well as being more in tune with modern procedural thinking concerning particular procedural subjects and, therefore, more user friendly. In other words, given the procedural developments that have occurred in Texas since the rules were promulgated originally, the federal structure is a better one than the original structure.

A detailed table of contents based on the proposed structure is attached to this memorandum as an appendix.

3. The Need for Revision of Sections and Specific Rules With or Without Substantive Changes.

The Task Force also recommends that the sections and the specific rules of procedure concerning practice in district and county level courts within each part and section be amended by combining discrete rules, by eliminating unnecessary rules and by reordering the remaining rules into a more workable and understandable organization within each section of the new

general structure. Many of the current Texas Rules of Civil Procedure governing the practice in district and county level courts are one paragraph items with relatively uninformative titles that could and should be combined, with or without substantive change. This is especially so in contrast to the current federal rules and the Texas rules that were based on the 1937 draft of the federal rules, which are longer rules having titled subparts.

Probably, the original drafters thought it wise not to change the predecessor rules and statutes too much in 1939-1940, because of a presumed familiarity with them by the bench and bar. However, because of the fractionalization of particular subjects into a large number of short rules it is frequently difficult for lawyers and judges to see and appreciate the relationship between related matters. As a result, this method of organization and drafting is also productive of needless complexity, uncertainty and some procedural stupidity. Of course, this part of the revision process is an especially difficult and time-consuming one for several reasons.

First, because the original rules were copied from the revised civil statutes of 1925, which were themselves copied from earlier codifications, they are poorly worded and poorly ordered. Unlike each of the codes "recodifying" the statutes that have been enacted in the past twenty-five years, the Texas rules of procedure have not been restated in modern language, rearranged into a more logical order, or systematically cleansed of duplicative, expired or other ineffective provisions.

Second, when the original rules were promulgated, although many of them were in fact taken from the then existing federal rules, a number of changes were made in them either organizationally or textually. For the most part, these changes were mistakes that should be reversed.

Third, despite the fact that most of the major efforts at revising specific parts of the rulebook that have been undertaken during the past fifteen years have produced substantial improvements, a number of other piecemeal changes that have been made over time have compromised the overall utility of the rulebook.

A preliminary and working draft of a set of reorganized rules developed by the Task Force as well as a disposition table are also attached to this memorandum as appendices.

4. The Need for More Work on Ancillary and Special Proceedings.

The third recommendation of the Task Force is that the rules governing Ancillary Proceedings and Special Proceedings be

substantially revised in two fundamental ways. First, many of the subjects covered in both the Ancillary Proceedings and Special Proceedings sections of the current rulebook are also covered both procedurally and substantively in either the Civil Practice and Remedies Code, the Property Code or in some other codification. The Task Force believes that this truncation or in some cases duplication of coverage is undesirable. Although we have not completed our analysis of the Ancillary Proceedings and Special Proceedings and are not in a position to make specific recommendations, one major part of the revision process would entail the repeal of procedural rules coupled with statutory amendments.

## Conclusion

Since the original promulgation of the Texas Rules of Civil Procedure, amendments have been made or are being made on the most important procedural subjects. Most of these changes have been beneficial and they can be retained in substantial measure. Nonetheless, the sophistication of modern Texas lawyers is not matched by the overall organization of our procedural rules which contain an excessive number of rules, incomplete treatment of important subjects, a separation of pertinent information concerning an individual subject into a number of rules that are not in reasonable proximity to each other, as well as unnecessary redundancy. Despite the fact that current rules are workable and notwithstanding the overall contributions of the fine lawyers and jurists who have worked for the improvement of the rules in the years following their initial promulgation, after more than fifty years of service, the rulebook needs special attention.

It is our privilege to be of service to the Court in pursuit of this worthwhile endeavor.

Respectfully submitted,

William V. Dorsaneo III

William V. Dorsaneo III
Chairperson, Task Force
on Revision of the Texas
Rules of Civil Procedure

# RULE 15-165a SUBCOMMITTEE'S

# PROPOSAL REGARDING

# RULE 18a

# RECUSAL AND DISQUALIFICATION OF JUDGES

November 17, 1995

## RULE 18a. RECUSAL OR DISQUALIFICATION OF JUDGES

(a) Motion. ~~At least ten days before the date set for trial or other hearing in any court other than the Supreme Court, the Court of Criminal Appeals or the court of appeals,~~ ~~a~~Any party may file with the clerk of the court a motion stating grounds why the judge before whom the case is pending should not sit in the case. The ~~grounds~~ motion may include any ~~disability~~ ground for disqualification or recusal described in Rule 18b ~~of the judge to sit in the case~~. The motion shall be verified and must state with particularity the grounds why the judge before whom the case is pending should not sit. The motion shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence provided that facts may be stated upon information and belief if the grounds of such belief are specifically stated. A judge's rulings shall not be used as the grounds for the motion but may be used as evidence supporting the motion.

(b) Time for Filing. A motion to disqualify under Rule 18b(1) may be filed at any time. A motion to recuse under Rule 18b(2) must be filed at least ten days before the first hearing or trial that occurs after the grounds for recusal arise. If within ten days of the date set for trial or other hearing a judge is assigned to a case, the motion shall be filed at the earliest practicable time prior to the commencement of the trial or other hearing.

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

~~(c)~~(d) Hearing. Prior to any further proceedings in the case, the judge shall either recuse himself or request the presiding judge of the administrative judicial district to assign a judge to hear such motion. If the judge recuses himself, he shall enter an order of recusal and request the presiding judge of the administrative judicial district to assign another judge to sit, and shall make no further orders and shall take no further action in the case except for good cause stated in the order in which such action is taken.

~~(d)~~(e) Referral. If the judge declines to recuse himself, he shall forward to the presiding judge of the administrative judicial district, in either original form or certified copy, an order of referral, the motion, and all opposing and concurring

statements. Except for good cause stated in the order in which further action is taken, the judge shall make no further orders and shall take no further action in the case after filing of the motion and prior to a hearing on the motion. The presiding judge of the administrative judicial district shall immediately set a hearing before himself or some other judge designated by him, shall cause notice of such hearing to be given to all parties or their counsel, and shall make such other orders including orders on interim or ancillary relief in the pending cause as justice may require. The Chief Justice of the Supreme Court may also appoint and assign judges in conformity with this rule and pursuant to statute.

~~(e) If within ten days of the date set for trial or other hearing a judge is assigned to a case, the motion shall be filed at the earliest practicable time prior to the commencement of the trial or other hearing.~~

(f) Late Motion. If the grounds for recusal were not known and could not with due diligence have been known until after the tenth day prior to a hearing or trial, then a motion based on those grounds may be filed after the deadline in paragraph (b) above. If the court denies the late-filed motion to recuse, then the recusal shall immediately be referred to the presiding judge as provided in paragraph (d) for prompt disposition, but the court may proceed with the scheduled trial or hearing. The same procedure shall apply to a motion to disqualify filed after the tenth day prior to a hearing or trial.

~~(f)~~(g) Appeal. If the motion is denied, it may be reviewed for abuse of discretion on appeal from the final judgment. If the motion is granted, the order shall not be reviewable, and the presiding judge shall assign another judge to sit in the case.

~~(g) The Chief Justice of the Supreme Court may also appoint and assign judges in conformity with this rule and pursuant to statute.~~

~~(h)~~(h) If a party files a motion to disqualify or recuse under this rule and it is determined by the presiding judge or the judge designated by him at the hearing and on motion of the opposite party, that the motion to disqualify or recuse ~~is~~ was brought solely for the purpose of delay and without sufficient cause, the judge hearing the motion may, in the interest of justice, impose any sanction authorized by Rule ~~215(2)(b)~~ _____.

(Added June 10, 1980, 1eff. Jan. 1, 1981; amended Dec. 5, 1983, eff. April 1, 1984; April 10, 1986, eff. Sept. 1, 1986; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

This is a new rule.

Change by amendment effective April 1, 1984: Section (a) is changed textually.

Comment: The words "the Court of Criminal Appeals" have been added in (a); and subsection "1" has been added to (g).

*Subcommittee's Comment*

*The Subcommittee unanimously adopted the amendment specifying that disqualification can be raised at any time. The Subcommittee adopted the change permitting the filing of a motion to recuse within 10 days of hearing or trial by a vote of 4-to-3.*

# DRAFT OF RULE 18c GOVERNING RECORDING AND BROADCASTING OF COURT PROCEEDINGS

A trial court may permit broadcasting, televising, recording or photographing of proceedings in the courtroom on the following basis:

**1. Construction.** The policy of this rule is to allow electronic media coverage of public civil court proceedings. This rule is to be construed to facilitate the free flow of information to the public concerning the judicial system and to foster better public understanding about the administration of justice while at the same time maintaining the dignity, decorum and impartiality of the court proceeding.

**2. Definitions.** Certain terms are defined for purposes of these rules as follows.

2.1 "Court" means the particular judge or master who is presiding over the proceeding.

2.2 "Electronic media coverage" means any recording or broadcasting of court proceedings by the media using television, radio, photographic or recording equipment.

2.3 "Media" or "media agency" means any person or organization engaging in news gathering or reporting and includes any newspaper, radio or television station or network, news service, magazine, trade paper, in-house publication, professional journal, or other news reporting or news gathering person or agency.

**3. Electronic media coverage permitted.**

3.1 Electronic media coverage is allowed in the courtroom only as permitted by this rule.

3.2 If electronic media coverage is of investiture or ceremonial proceedings permission for, and the manner of such coverage, are determined solely by the court, with or without guidance from other provisions of this rule.

3.3 Electronic media coverage under this rule is permitted only after written notice filed with the district clerk or county clerk, as applicable, and served on the parties to the proceeding no later than 1:00 p.m. the day prior to the scheduled proceeding unless the proceeding is set on less than a day's notice in which case the notice shall be filed as soon as practicable. Such notice shall be signed by an authorized media representative and acknowledge that such media has received a copy of this rule and that this rule is binding upon it. Upon the filing of such notice and prior to the commencement of the proceeding, any party may obtain a hearing on objections to such coverage. Objections to media coverage must be in writing, filed with the court and provided to all parties and the media that filed the notice, not later than the commencement of the hearing. The written objection should state the specific harm alleged

to result from media coverage. The hearing shall be held at such a time so as not to substantially delay the proceedings. The court shall, by written order, either allow, deny or limit coverage. If the court denies coverage, it shall set forth in its order the findings upon which such denial is based. The court has the discretion to allow, deny, limit or terminate electronic media coverage of a proceeding when it is in the interests of justice to protect the rights of the parties, witnesses, or the dignity of the court, or to assure the orderly conduct of the proceedings, or for any other reason considered necessary or appropriate by the court.

**4. Electronic media coverage prohibited.**

4.1 Electronic media coverage of proceedings held in chambers, proceedings closed to the public, and jury selection is prohibited. Conferences between an attorney and client, witness or aide, between attorneys, or between counsel and the court at the bench shall not be recorded or received by sound equipment.

4.2 Filming, photographing or recording jurors or alternate jurors in the courtroom or in the jury deliberation room is prohibited.

4.3 In cases originally arising under the family code, courts may establish and publish additional policies regarding electronic media coverage.

**5. Equipment and personnel.** The court may require media personnel to demonstrate that proposed equipment complies with this rule. The court may specify the placement of media personnel and equipment to permit reasonable coverage without disruption to the proceedings. Unless the court in its discretion, and for good cause orders otherwise, the following standards apply to electronic media coverage.

5.1 One television camera and one still camera, with a combined crew of no more than three persons, are allowed; in the event the electronic media makes known to the court its intent to cover any entire or lengthy proceeding, or in other appropriate circumstances, the court in its discretion may allow an unmanned second television camera into the courtroom. Tape recorders are allowed.

5.2 Equipment shall not produce distracting sound or light. Signal lights or devices which show when equipment is operating shall not be visible. Moving lights, flash attachments, or sudden lighting changes shall not be used.

5.3 Existing courtroom sound and lighting systems shall be used without modification unless approved by the trial court. Microphones and wiring shall be unobtrusively located in places approved by the court.

5.4 Operators shall not move equipment while the court is in session, or otherwise cause a distraction. All equipment shall be in place in advance of the commencement of the proceeding or session that is the subject of the coverage.

**6. Delay of proceedings.** No proceeding or session will be delayed or continued for the sole purpose of allowing media coverage unless allowed by the court.

**7. Pooling.** If more than one media agency of one type wish to provide electronic media coverage of a proceeding or session, they shall make pool arrangements and designate a person as a pool coordinator to interact with the court. If they are unable to agree, the court shall select the pool coordinator who in the opinion of the court is able by experience and competence to carry out electronic coverage in compliance with this rule.

**8. Official record.** Films, videotapes, photographs or audio reproductions made in court proceedings shall not be considered as part of the official court record.

**9. Enforcement.** In any proceeding to which this rule applies, this rule shall have the force and effect of a judicial order and may be enforced by the court as allowed by law. A violation by the electronic media may be sanctioned by appropriate measures, including, without limitation, barring the particular media from access to future electronic media coverage of proceedings in that courtroom for a defined period of time.

THE RULE 15-165a SUBCOMMITTEE'S
PROPOSED CHANGES TO
RULE 47

November 17, 1995

RULE 47. CLAIMS FOR RELIEF

An original pleading which sets forth a claim for relief, whether an original petition, counterclaim, cross-claim, or third party claim, shall contain

(a) a short statement of the causes of action, stating the legal basis for each claim and giving a general description of the factual circumstances sufficient to give fair notice of the claim involved,

(b) in all claims for unliquidated damages only the statement that the damages sought are within the jurisdictional limits of the court, and

(c) a demand for judgment for all the other relief to which the party deems himself entitled.

Relief in the alternative or of several different types may be demanded; provided, further, that upon special exception the court shall require the pleader to amend so as to specify the maximum amount claimed.

Notes and Comments

Subsection (b) was amended in 1996 to provide that claims for relief should provide both the legal basis for the claim and a general description of the facts upon which liability is founded. A description of the legal basis for a claim would identify the cause of action by name, and refer to any constitutional, statutory or regulatory provision upon which the claim is founded. The factual circumstances supporting a claim may be described generally, but in sufficient detail so that the opposing party can determine from the pleading the circumstances sued upon. Examples would include: "Plaintiff sues Defendant for breach of contract," or "Plaintiff sues Defendant for negligence, in part for violating Tex. Rev. Civ. Stat. Ann. art. 6701d, § 35," or "Plaintiff seeks recovery of attorney's fees under Tex. Civ. Prac. & Rem. Code, ch. 38," or "Plaintiff was contributorily negligent, and Defendant invokes the comparative responsibility provisions of Chapter 33 of the Tex. Civ. Prac. & Rem. Code," or "Defendant asserts the statute of limitations, Tex. Civ. Prac. & Rem. Code § 16.004, as a defense."

THE RULE 15-165a SUBCOMMITTEE'S
PROPOSED CHANGES TO
RULE 63

November 17, 1995

[Current version of rule]

## RULE 63. AMENDMENTS AND RESPONSIVE PLEADINGS

Parties may amend their pleadings, respond to pleadings on file of other parties, file suggestions of death and make representative parties, and file such other pleas as they may desire by filing such pleas with the clerk at such time as not to operate as a surprise to the opposite party; provided, that any pleadings, responses or pleas offered for filing within seven days of the date of trial or thereafter, or after such time as may be ordered by the judge under Rule 166, shall be filed only after leave of the judge is obtained, which leave shall be granted by the judge unless there is a showing that such filing will operate as a surprise to the opposite party.

(Amended July 26, 1960, eff. Jan. 1, 1961; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Source: Art. 2001, subdivisions 1 and 2.

Change: This rule authorizes amendment without leave of court when filed seven days or more before the date of trial. It requires leave to amend thereafter, which may be granted by the judge instead of by the court. Subdivision 3 of Article 2001 is superseded by Rules 66 and 67.

Change by amendment effective January 1, 1961: Language "or after such time as may be ordered by the judge under Rule 166" added.

Comment to 1990 change: To require that all trial pleadings of all parties, except those permitted by Rule 66, be on file at least seven days before trial unless leave of court permits later filing.

[Proposed new version of rule]

## RULE 63. AMENDMENTS AND RESPONSIVE PLEADINGS

Parties may file new pleadings, amend, and supplement their pleadings and respond to other parties' pleadings at any time that will not prejudice the opposing party in maintaining its action or defense upon the merits. Leave of court is required if the new pleading is submitted after the 45th day before the end of the applicable discovery period. The court may allow specific additional discovery made necessary by any new pleading.

TO: The Members of the Supreme Court Advisory Committee

FROM: William V. Dorsaneo, III

RE: Proposed Revisions of Civil Procedure Rules 90 and 91

DATE: November 16, 1995

As a result of discussions and proposals made to the subcommittee responsible for Civil Procedure Rules 15 through 165A, and particularly discussions concerning the specificity requirements for pleading claims and defenses in accordance with Civil Procedure Rules 45 and 47, it was determined that Civil Procedure Rules 90 and 91 should also be amended.

Civil Procedure Rule 90 (Waiver of Defects in Pleading.) currently provides:

> General Demurrers should not be used. Every defect, omission or fault in a pleading either of form or of substance, which is not specifically pointed out by exception in writing and brought to the attention of the judge in the trial court before the instruction or charge to the jury or, in a nonjury case, before the judgment is signed shall be deemed to have been waived by the parties seeking reversal on such account; provided that this rule shall not apply as to any party against whom default judgment is rendered.

As currently drafted there are three problems with Civil Procedure Rule 90 as follows:

1. The time for raising the defect does not correspond with modern practice or rules of court promulgated and followed in major metropolitan areas.
2. The waiver provided for in the procedural rule "by the parties seeking reversal on such account" is too limited and depends upon who is the ultimate winner in the court below.

3. The proviso is too broad because it literally would authorize the overturning of a default judgment because of a technical failure to plead all of the elements of a cause of action despite the fact that the defendant had received fair notice of the plaintiffs' factual and legal theories.

I suggest that the procedure rule would be improved by substitution of the following paragraph.

> Every defect in a pleading either of form or substance, that is not specifically identified by special exception brought to the attention of the trial judge at least _____ days before trial shall be deemed to have been waived by the party failing to except, provided that this rule shall not apply as to any party against whom a default judgment is rendered when fair notice to the defaulted party of the [claimant's cause of action or the claimant's legal claim or claim involved] has not been given by the allegations as a whole.

It may also be necessary or desirable to amend Civil Procedure Rule 91 in order for that rule to make reference to the fair notice concept that is at the foundation of Civil Procedure Rule 45 and 47.

# CLERKS COMMITTEE REPORT TO SUBCOMMITTEE ON RULES 15 - 165

By: Bonnie Wolbrueck
**Date: 11-17-95**

## RULE 15 WRITS AND PROCESS

The style of all writs and process shall be "The State of Texas" and unless otherwise specially provided by law or these rules every such writ and process shall be directed to any sheriff or any constable within the State of Texas, ~~shall be made returnable on the Monday next after expiration of twenty days from the date of service thereof,~~ and shall be ~~dated and attested~~ signed by the clerk ~~with the~~ under the seal of the court ~~impressed thereon;~~ and the date of issuance shall be noted thereon.

*COMMITTEE COMMENT: Writs are issued under the direction of the court's order and do not contain the "Monday next after expiration of twenty days" language. Citations contain the language and the requirement is in the citation rules. "Impressed thereon" is deleted to clarify that rubber stamps may also be used by clerks.*

## RULE 17 OFFICER TO EXECUTE PROCESS

~~Except where otherwise expressly provided by law or these rules, the officer receiving any process to be executed shall not be entitled in any case to demand his fee for executing the same in advance of such execution, but his fee shall be taxed and collected as other costs in the case.~~

## RULE 126 FEE FOR EXECUTION OF PROCESS, DEMAND

No sheriff or constable shall be compelled to execute any process in civil cases ~~coming from any county other than the one in which he is an officer,~~ unless the fees allowed him by law for the service of such process shall be paid in advance; except when affidavit is filed, as provided by law or these rules. The clerk issuing the process shall endorse thereon the words "pauper oath filed," and sign his name officially below them; and the officer in whose hands such process is placed for service shall serve the same. <u>The fee shall be taxed as costs in the case.</u>

*COMMITTEE COMMENT: Rule 17 does not require fees in advance and Rule 126 requires fees paid in advance for an "out of county" request. The two rules seem to be in conflict. Additionally, a recent Attorney General opinion that was requested questioned if Rule 17 is unconstitutional because it extends credit in violation of Tex. Const.Art. III Sec. 52 and Art. XI, Sec. 37. Change would require all fees be paid in advance.*

## RULE 19 NON-ADJOURNMENT OF TERM

~~Every term of court shall commence and convene by operation of law at the time fixed by statute without any act, order, or formal opening by a judge or other official thereof, and shall continue to be open at all times until and including the last day of the term unless sooner adjourned by the judge thereof.~~

*COMMITTEE COMMENT: Delete - obsolete*

## RULE 20 MINUTES READ AND SIGNED

~~On the last day of the session, the minutes shall be read, corrected and signed in open court by the judge. Each special judge shall sign the minutes of such proceedings as were had by him.~~

*COMMENT: Delete. No longer common practice.*

## RULE ___ DUTIES OF THE CLERK OF THE COURT

~~**Rule 23 SUITS TO BE NUMBERED CONSECUTIVELY**~~

~~It shall be the duty of the clerk to designate the suits by regular consecutive numbers, called file numbers, and he shall mark on each paper in every case the file number of the cause.~~

**(a) Assignment of File Numbers and Denoting File Numbers on Documents**. The clerk of the court shall assign suits consecutive file numbers and shall mark on each document in every case the file number of the cause. Upon signing of an order for severance, the clerk of the court shall assign to the severed suit a new file number without additional letters or digits **OR** Upon signing of an order for severance, the clerk of the court shall assign to the severed suit the same file number as the original suit with the addition of a letter.
(New Rule from Rule 23)

*COMMITTEE COMMENT: It is interesting to note that the words suits, case and cause are all used in Rule 23. The clerks feel that the rules should be consistent in the use of words but are uncertain as to the possible purpose of each word in this rule. The assignment of the file number in a severance cause has been added. When case law has been reviewed on the matter, a decision will be made on which sentence to include in the rule. The preferred numbering would be a new file number.*

~~**RULE 24 DUTY OF THE CLERK**~~

~~When a petition is filed with the clerk he shall indorse thereon the file number, the day on which it was file and the time of filing, and sign his name officially thereof.~~

**(b) Endorsement.** The clerk of the court shall endorse the file number, the date and time of filing, and sign the clerk's name officially on each document received for filing.
(New Rule from Rule 24)

*COMMITTEE COMMENT: Rule 24 was in the "Institution of Suit" section and the endorsement requirement was for a petition. This would clarify that all documents received by the clerk shall be file marked.*

~~**RULE 25 CLERK'S FILE DOCKET**~~

~~Each clerk shall keep a file docket which shall show in convenient form the number of the suit, the names of the attorneys, the names of the parties to the suit, and the nature thereof, and, in brief form, the officer's return on the process, and all subsequent proceedings had in the case with the dates thereof.~~

~~**RULE 26 CLERK'S COURT DOCKET**~~

~~Each clerk shall also keep a court docket in a permanent record that shall include the number of the case and the names of the parties, the names of the attorneys, the nature of the action, the pleas, the motions, and the ruling of the court as made.~~

~~**RULE 27 ORDER OF CASES**~~

~~The cases shall be placed on the docket as they are filed.~~

~~**RULE 218 JURY DOCKET**~~

~~The clerks of the district and county courts shall each keep a docket, styled, "The Jury Docket," in which shall be entered in their order the cases in which jury fees have been paid or affidavit in lieu thereof has been filed as provided in the two preceedings rules.~~

**(c) Record**. A record, entered in chronologically order, shall be kept by the clerk of the court that includes the file number of each suit, the names of the attorneys and the parties to the suit, the nature of the suit and, in brief form including date, all proceedings had in the case. (including but not limited to all appearances, pleadings filed, process issued and returns made thereon, orders, verdicts, judgments and notices) The record shall include all taxable court costs stating the party or attorney paying the costs and the date of payment.

The clerk of the court shall keep an index of the parties to all suits. The index must list the parties alphabetically using their full names and must be cross-referenced to the other parties to the suit.

The permanent record maintained by the clerk of the court shall include the file number of the suit, the names of the parties, the names of the attorneys, the nature of the suit, the index and the rulings of the court.

(New Rule from Rule 25, Rule 26, Rule 27 and Rule 218)

*COMMITTEE COMMENT: This is a consolidation of Rule 25 (Clerk's File Docket), Rule 26 (Court's Docket), Rule 27 (Order of Cases) and Rule 218 (Jury Docket). This rule requires the clerk to keep a record of all filings, issuance, pleadings, orders, etc. The word "proceedings" is taken from Rule 25. The committee was uncertain to the necessity of defining "proceedings" and how to define. With consideration of the resources from county to county, the rule would allow the "record" to be kept manually in books and/or docket sheets or to be kept electronically. A rule on an index was added from the statutes. The State Library sets retention periods for all records and this rule clarifies the information in "the record" that is required to be permanent.*

~~RULE 656 — EXECUTION DOCKET~~

~~The clerk of each court shall keep an execution docket in which he shall enter a statement of all executions as they are issued by him, specifying the names of the parties, the amount of the judgment; the amount due thereon, the rate of interest when it exceeds six per cent, the costs, the date of issuing the execution, to whom delivered, and the return of the officer thereon, with the date of such return. Such docket entries shall be taken and deemed to be a record. The clerk shall keep an index and cross-index to the execution docket. When execution is in favor or against several persons, it shall be indexed in the name of each person. Any clerk who shall fail to keep said execution docket and index thereto, or shall neglect to make the entries therein, shall be liable upon his official bond to any person injured for the amount of damages sustained by such neglect.~~

**(d) Executions** The clerk of the court shall keep a permanent record of all writs of executions issued and the returns thereon. The record shall include the information contained in the execution as required by these rules. All parties in the execution shall be indexed and cross indexed.
(New Rule from Rule 656)

*COMMITTEE COMMENT: Rule 656 requires an execution docket that is never used. This rule requires the same information as Rule 656 but allows the clerk to keep a "record" in any format available to the clerk for the tracking of dormant judgments. Repeating the index may not be necessary.*

**(e) Exhibits and Depositions**. The clerk of the court in which the exhibits, deposition transcripts and depositions upon written questions are filed shall retain and dispose of the exhibits as directed by the Supreme Court.
(Rule 14b and Rule 209)

**Supreme Court Order Relating to Retention and Disposition of Exhibits and Depositions**

In compliance with the provisions of Rule _____ ~~Rule 14b and Rule 209~~, the Supreme Court hereby directs that exhibits offered or admitted into evidence, deposition transcripts and depositions upon written questions shall be retained and disposed of by the clerk of the court in which the exhibits or depositions are filed upon the following basis.

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

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

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

*COMMITTEE COMMENT: Addresses change after many years and notices mailed by the clerk after the retention period are often returned. Frequently attorneys receiving notices must call the clerk or research their archives for information on the case because many years have passed. The notice cost is considerable for counties. This would clarify that exhibits/ depositions may be disposed of by the clerk after the retention periods. Any party wanting the exhibits/depositions may request the court for the release of same.*

**(f) Copy of Decree** The(~~district~~) clerk of the court shall forthwith mail a certified copy of the final divorce decree or order of dismissal to the party signing a memorandum waiving issuance of service of process. Such divorce decree or order of dismissal shall be mailed to the signer of the memorandum at the address stated in such memorandum or to the office of ~~his~~ the signer's attorney of record.
(Rule 119a)

*COMMITTEE COMMENT: This should be in the Family Code.*

**(g) Notices**

(1) Default Judgment ~~At or immediately~~ Prior to the time ~~in~~ an interlocutory or final default judgment is rendered, the party taking the same or his attorney shall certify to the clerk of the court in writing the last known mailing address of the party against whom the judgment is taken, which certificate shall be filed ~~among the papers in the cause~~ with the clerk of the court. ~~Immediately~~ Within five days ~~upon~~ of the signing of the judgment, the clerk of the court shall give ~~mail written~~ notice by first-class mail ~~thereof~~ to the party against whom the judgment was rendered at the address shown in the certificate~~, and note the fact of such mailing on the docket.~~ The notice shall state the number and style of the case, the court in which the case is pending, the names of the parties in whose favor and against whom the judgment was rendered, and the date of the signing of the judgment. Failure to comply with the provisions of this rule shall not affect the finality of the judgment.
(Rule 239a)

*COMMITTEE COMMENT: The word "immediately" is a concern for clerks. The mailing within 5 days should give sufficient time for the filing of a motion for new trial.*

(2) Appealable Order When the final judgment or other appealable order (???) is signed, the clerk shall, ~~immediately~~ within five days of the signing of the judgment or order, give notice to the parties or their attorneys of record by first-class mail advising that the judgment or order was signed. Failure to comply with the provisions of this rule shall not affect the periods mentioned in ~~paragraph (1) of this rule, except as provided in paragraph (4).~~ Rule 306a except as noted in such rule.
(Rule 306a(3))

*COMMITTEE COMMENT: Clerks have a very difficult time in defining an appealable order and would like some assistance with this rule. As an alternative to knowing what is an appealable order, notices are mailed on most orders which is very, very costly for counties. The word "immediately" is a concern for clerks. The mailing within 5 days should be sufficient for the filing of a motion for new trial.*

(3) Settings The clerk of the court shall ~~keep a record in his office of all cases set for trial, and it shall be his duty to inform~~ notify any non-resident attorney of the date of setting of any case upon request by mail from such attorney, accompanied by a return envelope properly addressed and stamped. Failure of the clerk to furnish such information on proper request shall be sufficient ground for continuance or for a new trial when it appears to the court that such failure has prevented the attorney from preparing or presenting his claim or defense.
( Rule 246)

*COMMITTEE COMMENT: Optional suggestion for Rule 245 and Rule 246 is on page 7 of this report. A decision will need to be made on either stating the notice information in the "Duties of the Clerk" Rule or in Rule 245.*

**RULE 75 FILED PLEADINGS; WITHDRAWAL**

All filed pleadings shall remain ~~at all times in the clerk's office or in the court or~~ in the custody of the clerk, except that the court may by order ~~entered on the minutes~~ allow a filed pleading to be withdrawn for a limited time whenever necessary, on leaving a certified copy on file. The party withdrawing such pleading shall pay the costs of such order and certified copy.

*COMMITTEE COMMENT: See Rule 75b*

**RULE 75b FILED EXHIBITS: WITHDRAWAL**

All filed exhibits admitted in evidence or tendered on bill of exception shall, until returned or otherwise disposed of as authorized by Rule 14b, remain ~~at all times in the clerk's office or in the court or~~ in the custody of the clerk except as follows:

(a) The court may by order ~~entered on the minutes~~ allow a filed exhibit to withdrawn by any party only upon such party's leaving on file a certified, photo, or other reproduced copy of such exhibit. The party withdrawing such exhibit shall pay the costs of such order and copy.

(b) The court reporter or stenographer of the court conducting the hearing, proceedings, or trial in which exhibits are admitted or offered in evidence, shall have the right to withdraw filed exhibits, upon giving the clerk proper receipt therefor, whenever necessary for the court reporter or stenographer to transmit such original exhibits to an appellate court under the provisions of Rule 379 or to otherwise discharge the duties imposed by law upon said court reporter or stenographer.

*COMMITTEE COMMENT: Change in Rule 75 and Rule 75b is to follow Government Code Sec. 51.303 "The clerk of a district court has custody of and shall carefully maintain and arrange the records relating to or lawfully deposited in the clerk's office..." and to allow storage outside of the clerk's office. "Entered on the minutes" is unnecessary.*

## RULE 103 WHO MAY SERVE

Citation and other notice may be served anywhere by (1) any sheriff or constable or other person authorized by law or, (2) by any person authorized by law or by written order of the court who is not less than eighteen years of age. No person who is a party to or interested in the outcome of a suit shall serve any process. Service by registered or certified mail ~~and citation by publication~~ shall, if requested, be made by the clerk of the court in which the case is pending. The order authorizing a person to serve process may be made without written motion and no fee shall be imposed for issuance of such order.

*COMMITTEE COMMENT: Rule 116 states who can serve a citation by publication.*

## RULE 120 ENTERING APPEARANCE

The defendant may, in person, or by attorney, or by his duly authorized agent, enter an appearance in open court. Such appearance shall be noted by the judge upon his docket ~~and entered in the minutes~~, and shall have the same force and effect as if the citation had been duly issued and served as provided by law.

*COMMITTEE COMMENT: Entering appearance in the minutes seems unnecessary and is not common practice.*

## RULE 216 REQUEST AND FEE FOR JURY TRIAL

a. Request. No jury trial shall be had in any civil suit, unless a written request for a jury trial is filed with the clerk of the court a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than thirty days in advance.

b. Jury Fee. Unless otherwise provided by law, 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.~~

*COMMITTEE COMMENT: To be consistent with the rule on the clerk keeping a record.*

## RULE 245 ASSIGNMENT OF CASES FOR TRIAL

a. Setting. The court may set contested cases on written request of any party, or on the court's own motion, with reasonable notice of not less than forty-five 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.

b. Request. 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.

~~RULE 246 — CLERK TO GIVE NOTICE OF SETTINGS~~

c. Notice. ~~The clerk shall keep a record in his office of all cases set for trial, and it shall be his duty to inform any non-resident attorney of the date of setting of any case upon request by mail from such attorney, accompanied by a return envelope properly addressed and stamped.~~ Any party setting a case for trial shall notify all other parties of the trial setting not less than three days before the time specified for the hearing unless otherwise provided by these rules or shortened by the court. If the court sets the case for trial without knowledge to the parties, the clerk shall notify all parties of the setting by first class mail. Failure of the clerk to furnish such ~~information on proper request~~ notice shall be sufficient ground for continuance or for a new trial when it appears to the court that such failure has prevented the attorney from preparing or presenting his claim or defense.

*Comment: This rule combines Rule 245 and Rule 246. It clarifies who shall give notice of trial settings. The three days notice is taken from Rule 21.*