# AGENDA
# MARCH 15-16, 1996
# SCAC MEETING

## INDEX


1. Report of Subcommittee on Texas Rules of Civil Evidence dated January 23, 1996
2. Report of Subcommittee on TRCP 216-295 dated March 14, 1996
3. Report of Subcommittee on TRCP 13 and 215
4, Report of Subcommittee on TRCP 296-331 dated March 15, 1996
5. Report on TRCP 18c
6. Report on TRCP 86

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cc: LHS

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January 23, 1996

Mr. Luther H. Soules III
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100 W. Houston, Suite 1500
San Antonio, TX 78205-1457

Dear Luke:

I apologize I was not able to meet on Saturday. I assume the Evidence Committee's work will be considered at the next meeting. Since I have to fly from Beaumont and have to bring two full briefcases, I really don't have room to bring thirty-six copies of my committee's work. Therefore, I am enclosing herein a complete copy of the work and I ask if you will be able to copy it and have it available for distribution at the next meeting. I am enclosing herein everything we propose to consider. I don't know if my committee will have completed the work on the unified rules but this will be enough to discuss at one meeting. We are beginning to work on the unified rules.

Luke, it was a pleasure seeing you. Thanks for all the good work you do for us.

Sincerely,

Gilbert I. Low

GIL:cc

Enclosures

DISPOSITION CHART
TEXAS RULES OF CIVIL EVIDENCE

| RULE NO. | PAGE NO. | CHANGE SUGGESTED/BY | RECOMMENDED ACTION | REASON |
|---|---|---|---|---|
| 606 - CIV<br>606 - CRIM | Pg 1129-1131 | Judge Gene L. Dulaney:<br>Clarify CRIM Rule 606 | Amend both CIV Rule 606 and CRIM Rule 606 - Change "he" to "juror" - take out reference to "indictment" in civil rule - follow federal rule with modification - allow testimony of juror qualifications | Clarify rule and purpose of rule |
| 204 - CIV<br>204 - CRIM | Pg 1132-1133 | Charles Adkin Spain, Jr.:<br>Delete from caption and body "Texas Register" and "Texas Administrative Code" | Make deletion - amend CRIM 204 to conform to amended CIV 204 - add footnote to CIV 204 and CRIM 204 | Part deleted no longer necessary and make both CIV and CRIM 204 same |
| 407a - CIV | Pg 1134-1136 | R. Doak Bishop:<br>Delete last sentence pertaining to strict liability products cases | None (Vote 2 to 1) | Cases and products liability law make this unnecessary |
| 413 - CIV (NEW) | Pg 1137-1139 | R. Doak Bishop:<br>No evidence of defendant's net worth or wealth admissible until liability for exemplary damages is found | None | (1) Moriel establishes procedure;<br>(2) Bifurcation under Moriel should be by amendment to Rule 174 of Rules of Civil Procedure |
| 510(d)(6) - CIV | Pg 1140-1146 | Peter S. Chamberlain:<br>Protection of psychological records of counselor or expert | None | Other rules give adequate protection - particularly 403 |

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|---|---|---|---|---|
| 703 - CIV | Pg 1147-1152 | Stephen A. Mandel: Tex.Civ.App. Rule 168 be amended to conform to Rule 703 | None | 703 does not need to define every type of hearsay included in rule |
| 902(10) - CIV | Pg 1153-1155 | Judge Michael Schattman: Amend rule to be consistent with Section 18.001 of Civil Practices & Remedy Code | None | No inconsistency |
| 514 - CIV (NEW) | Spg 601-608 | David J. Beck: Privilege for self-critical analysis | None (Vote 2 to 1) | Current protection is adequate - do not favor creation of new privilege |
| 503(a)(2) CIV | Spg 609-623 | Mark Sales: Modify rule pursuant to discussion in National Tank Co. v. Brotherton | None | Not to expand existing privileges |
| 509(d) & 510(d) - CIV | Spg 624-626 | Amend 509(d) and 510(d) to be consistent with Section 5.08, Article 4495(b) | Amend 510(d) so exceptions apply also to administrative proceedings | Consistency |
| 412 - CIV | SSp0698-708 | Debra Danburg: New rule pertaining to victim's past sexual behavior or alleged sexual pre-disposition - (patterned after federal rule) | No action be taken | Present rules pertaining to whether relevance outweighs prejudice is sufficient. Note: There is presently Crim Rule 412 |
| 702 - CIV 702 - CRIM | SSp0709-711 | Michael Paul Graham: Limit testimony to that based upon well-founded methodology | None (Vote 2 to 1) | duPont v. Robinson sets forth standard |

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|---|---|---|---|---|
| 182 CIV | (Material attached) | Judge Kevin R. Madison: Procedure for using when firearms and ammunition are evidence in a civil case | None | No specific problems have developed and courts can deal with this on individual basis |
| 504 - CRIM | SSp0712-713 | Fred Maddox: Do away with privilege not to be called as a witness against spouse with regard to crime threatened or committed against spouse | None | As rule is drawn spouse has option of either claiming the privilege or waiving the privilege and testifying - favor present option |

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RULE 606 - CIV and CRIM - Pg 1129-1131

CHANGE SUGGESTED/BY: Judge Gene L. Dulaney

Clarify CRIM Rule 606.

RECOMMENDED ACTION:

Amend both CIV Rule 606 and CRIM Rule 606.

Change "he" to "juror" - take out reference to "indictment" in civil rule - follow federal rule with modification - allow testimony or juror qualifications.

REASON:

Clarify rule and purpose of rule.

Criminal rule is ambiguous and says, "except that a juror may testify as to any matter relevant to the validity of the verdict or indictment." Civil rule says, "except that a jury may testify whether any outside influence was improperly brought to bear upon any juror." I think the criminal rule was that way so as to allow a juror to testify as to his statutory qualifications as a juror.

## RULE 606 OF THE RULES OF CRIMINAL EVIDENCE

RULE 606. COMPETENCY OF JUROR AS A WITNESS

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which {he} the juror is sitting {as a juror} or has sat. If {he} the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) **Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, 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} that or any other juror's mind or emotions as influencing {him} the juror to assent to or dissent from the verdict or indictment or concerning {his} the juror's mental processes in connection therewith, except that a juror may testify {as to any matter relevant to the validity of the verdict or indictment} on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may {his} a juror's affidavit or evidence of any statement by {him} the juror concerning a matter about which {he} the juror would be precluded from testifying be received for these purposes. A juror may be called to testify concerning the question of whether or not the juror was qualified to serve.*

*Brackets are deletion and underline is addition.

## RULE 606 OF THE RULES OF CIVIL EVIDENCE

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(a) **At the trial.** A member of the jury may not testify as a witness before that jury in the trial of the case in which {he} the juror is sitting or has sat (as a juror). If {he} the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) **Inquiry into validity of verdict {or indictment}.** Upon an inquiry into the validity of a verdict {or indictment}, 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} that or any other juror's mind or emotions as influencing {him} the juror to assent to or dissent from the verdict {or indictment} or concerning {his} the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may {his} a juror's affidavit or evidence of any statement by {him} the juror concerning a matter about which {he} the juror would be precluded from testifying be received for these purposes. A juror may be called to testify concerning the question of whether or not the juror was qualified to serve.*

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(b) **Inquiry into validity of verdict.** Upon an inquiry into the validity of a verdict, 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 that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes. A juror may be called to testify concerning the question of whether or not the juror was qualified to serve.

Criminal Procedure, both of which contain provisions for the appointment and compensation of interpreters.

1987 AMENDMENT

The amendment is technical. No substantive change is intended.

## Rule 605. Competency of Judge as Witness

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

NOTES OF ADVISORY COMMITTEE ON 1972 PROPOSED RULES

In view of the mandate of 28 U.S.C. § 455 that a judge disqualify himself in "any case in which he * * * is or has been a material witness," the likelihood that the presiding judge in a federal court might be called to testify in the trial over which he is presiding is slight. Nevertheless the possibility is not totally eliminated.

The solution here presented is a broad rule of incompetency, rather than such alternatives as incompetency only as to material matters, leaving the matter to the discretion of the judge, or recognizing no incompetency. The choice is the result of inability to evolve satisfactory answers to questions which arise when the judge abandons the bench for the witness stand. Who rules on objections? Who compels him to answer? Can he rule impartially on the weight and admissibility of his own testimony? Can he be impeached or cross-examined effectively? Can he, in a jury trial, avoid conferring his seal of approval on one side in the eyes of the jury? Can he, in a bench trial, avoid an involvement destructive of impartiality? The rule of general incompetency has substantial support. See Report of the Special Committee on the Propriety of Judges Appearing as Witnesses, 36 A.B.A.J. 630 (1950); cases collected in Annot. 157 A.L.R. 311; McCormick § 68, p. 147; Uniform Rule 42; California Evidence Code § 703; Kansas Code of Civil Procedure § 60–442; New Jersey Evidence Rule 42. Cf. 6 Wigmore § 1909, which advocates leaving the matter to the discretion of the judge, and statutes to that effect collected in Annot. 157 A.L.R. 311.

The rule provides an "automatic" objection. To require an actual objection would confront the opponent with a choice between not objecting, with the result of allowing the testimony, and objecting, with the probable result of excluding the testimony but at the price of continuing the trial before a judge likely to feel that his integrity had been attacked by the objector.

## Rule 606. Competency of Juror as Witness

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, 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 that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes. (As amended Pub.L. 94–149, § 1(10), Dec. 12, 1975, 89 Stat. 805; Mar. 2, 1987, eff. Oct. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON 1972 PROPOSED RULES

**Subdivision (a).** The considerations which bear upon the permissibility of testimony by a juror in the trial in which he is sitting as juror bear an obvious similarity to those evoked when the judge is called as a witness. See Advisory Committee's Note to Rule 605. The judge is not, however in this instance so involved as to call for departure from usual principles requiring objection to be made; hence the only provision on objection is that opportunity be afforded for its making out of the presence of the jury. Compare Rule 605.

**Subdivision (b).** Whether testimony, affidavits, or statements of jurors should be received for the purpose of invalidating or supporting a verdict or indictment, and if so, under what circumstances, has given rise to substantial differences of opinion. The familiar rubric that a juror may not impeach his own verdict, dating from Lord Mansfield's time, is a gross oversimplification. The values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment. *McDonald* v. *Pless*, 238 U.S. 264, 35 S.Ct. 785, 59 L.Ed. 1300 (1915). On the other hand, simply putting verdicts beyond effective reach can only promote irregularity and injustice. The rule offers an accommodation between these competing considerations.

The mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment. See *Grenz* v. *Werre*, 129 N.W.2d 681 (N.D.1964). The authorities are in virtually complete accord in excluding the evidence. Fryer, Note on Disqualification of Witnesses, Selected Writings on Evidence and Trial 345, 347 (Fryer ed. 1957); Maguire, Weinstein, et al., Cases on Evidence 887 (5th ed. 1965); 8 Wigmore § 2340 (McNaughton Rev. 1961). As to matters other than mental operations and emotional reactions of jurors, substantial authority refuses to allow a juror to disclose irregularities which occur in the jury room, but allows his testimony as to irregularities occurring outside and allows outsiders to testify as to occurrences both inside and out. 8 Wigmore § 2354 (McNaughton Rev.



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1961). However, the door of the jury room is not necessarily a satisfactory dividing point, and the Supreme Court has refused to accept it for every situation. *Mattox* v. *United States*, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892).

Under the federal decisions the central focus has been upon insulation of the manner in which the jury reached its verdict, and this protection extends to each of the components of deliberation, including arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process. Thus testimony or affidavits of jurors have been held incompetent to show a compromise verdict, *Hyde* v. *United States*, 225 U.S. 347, 382 (1912); a quotient verdict, *McDonald* v. *Pless*, 238 U.S. 264 (1915); speculation as to insurance coverage, *Holden* v. *Porter*, 495 F.2d 878 (10th Cir. 1969), *Farmers Coop. Elev. Ass'n* v. *Strand*, 382 F.2d 224, 230 (8th Cir. 1967), cert. denied 389 U.S. 1014; misinterpretations of instructions, *Farmers Coop. Elev. Ass'n* v. *Strand, supra;* mistake in returning verdict, *United States* v. *Chereton*, 309 F.2d 197 (6th Cir. 1962); interpretation of guilty plea by one defendant as implicating others, *United States* v. *Crosby*, 294 F.2d 928, 949 (2d Cir. 1961). The policy does not, however, foreclose testimony by jurors as to prejudicial extraneous information or influences injected into or brought to bear upon the deliberative process. Thus a juror is recognized as competent to testify to statements by the bailiff or the introduction of a prejudicial newspaper account into the jury room, *Mattox* v. *United States*, 146 U.S. 140 (1892). See also *Parker* v. *Gladden*, 385 U.S. 363 (1966).

This rule does not purport to specify the substantive grounds for setting aside verdicts for irregularity; it deals only with the competency of jurors to testify concerning those grounds. Allowing them to testify as to matters other than their own inner reactions involves no particular hazard to the values sought to be protected. The rule is based upon this conclusion. It makes no attempt to specify the substantive grounds for setting aside verdicts for irregularity.

See also Rule 6(e) of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3500, governing the secrecy of grand jury proceedings. The present rule does not relate to secrecy and disclosure but to the competency of certain witnesses and evidence.

### NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

As proposed by the Court, Rule 606(b) limited testimony by a juror in the course of an inquiry into the validity of a verdict or indictment. He could testify as to the influence of extraneous prejudicial information brought to the jury's attention (e.g. a radio newscast or a newspaper account) or an outside influence which improperly had been brought to bear upon a juror (e.g. a threat to the safety of a member of his family), but he could not testify as to other irregularities which occurred in the jury room. Under this formulation a quotient verdict could not be attacked through the testimony of a juror, nor could a juror testify to the drunken condition of a fellow juror which so disabled him that he could not participate in the jury's deliberations.

The 1969 and 1971 Advisory Committee drafts would have permitted a member of the jury to testify concerning these kinds of irregularities in the jury room. The Advisory Committee note in the 1971 draft stated that "• • • the door of the jury room is not a satisfactory dividing point, and the Supreme Court has refused to accept it." The Advisory Committee further commented that—

> The trend has been to draw the dividing line between testimony as to mental processes, on the one hand, and as to the existence of conditions or occurrences of events calculated improperly to influence the verdict, on the other hand, without regard to whether the happening is within or without the jury room. • • • The jurors are the persons who know what really happened. Allowing them to testify as to matters other than their own reactions involves no particular hazard to the values sought to be protected. The rule is based upon this conclusion. It makes no attempt to specify the substantive grounds for setting aside verdicts for irregularity.

Objective jury misconduct may be testified to in California, Florida, Iowa, Kansas, Nebraska, New Jersey, North Dakota, Ohio, Oregon, Tennessee, Texas, and Washington.

Persuaded that the better practice is that provided for in the earlier drafts, the Committee amended subdivision (b) to read in the text of those drafts.

### NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93–1277

As adopted by the House, this rule would permit the impeachment of verdicts by inquiry into, not the mental processes of the jurors, but what happened in terms of conduct in the jury room. This extension of the ability to impeach a verdict is felt to be unwarranted and ill-advised.

The rule passed by the House embodies a suggestion by the Advisory Committee of the Judicial Conference that is considerably broader than the final version adopted by the Supreme Court, which embodies long-accepted Federal law. Although forbidding the impeachment of verdicts by inquiry into the jurors' mental processes, it deletes from the Supreme Court version the proscription against testimony "as to any matter or statement occurring during the course of the jury's deliberations." This deletion would have the effect of opening verdicts up to challenge on the basis of what happened during the jury's internal deliberations, for example, where a juror alleged that the jury refused to follow the trial judge's instructions or that some of the jurors did not take part in deliberations.

Permitting an individual to attack a jury verdict based upon the jury's internal deliberations has long been recognized as unwise by the Supreme Court. In *McDonald* v. *Pless*, the Court stated:

• • •

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated

### RULE 511. WAIVER OF PRIVILEGE BY VOLUNTARY DISCLOSURE

A person upon whom these rules confer a privilege against disclosure waives the privilege if (1) he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged or (2) he or his representative calls a person to whom privileged communications have been made to testify as to his character or a trait of his character, insofar as such communications are relevant to such character or character trait.

### RULE 512. PRIVILEGED MATTER DISCLOSED UNDER COMPULSION OR WITHOUT OPPORTUNITY TO CLAIM PRIVILEGE

A claim of privilege is not defeated by a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege.

### RULE 513. COMMENT UPON OR INFERENCE FROM CLAIM OF PRIVILEGE; INSTRUCTION

(a) Comment or Inference Not Permitted. Except as provided in Rule 504(a), the claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel, and no inference may be drawn therefrom.

(b) **Claiming Privilege Without Knowledge of Jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) **Jury Instruction.** Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

## ARTICLE VI. WITNESSES

### RULE 601. COMPETENCY AND INCOMPETENCY OF WITNESSES

(a) Every person is competent to be a witness except as otherwise provided in these rules. The following witnesses shall be incompetent to testify in any proceeding subject to these rules:

(1) *Insane Persons.* Insane persons who, in the opinion of the court, are in an insane condition of mind at the time when they are offered as a witness, or who, in the opinion of the court, were in that condition when the events happened of which they are called to testify.

(2) *Children.* Children or other persons who, after being examined by the court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated.

### RULE 602. LACK OF PERSONAL KNOWLEDGE

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

### RULE 603. OATH OR AFFIRMATION

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

### RULE 604. INTERPRETERS

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

### RULE 605. COMPETENCY OF JUDGE AS WITNESS

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

### RULE 606. COMPETENCY OF JUROR AS A WITNESS

(a) **At the Trial.** A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) **Inquiry Into Validity of Verdict or Indictment.** Upon an inquiry into the validity of a verdict

or indictment, 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 any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify as to any matter relevant to the validity of the verdict or indictment. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

## RULE 607. WHO MAY IMPEACH

The credibility of a witness may be attacked by any party, including the party calling him.

## RULE 608. EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

**(a) Opinion and Reputation Evidence of Character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

**(b) Specific Instances of Conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence.

## RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

**(a) General Rule.** For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record but only if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party.

**(b) Time Limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

**(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation.** Evidence of a conviction is not admissible under this rule if (1) based on the finding of the rehabilitation of the person convicted, the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment, or (2) probation has been satisfactorily completed for the crime for which the person was convicted, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment, or (3) based on a finding of innocence, the conviction has been the subject of a pardon, annulment, or other equivalent procedure.

**(d) Juvenile Adjudications.** Evidence of juvenile adjudications is not admissible under this rule unless required to be admitted by the Constitution of the United States or Texas.

**(e) Pendency of Appeal.** Pendency of an appeal renders evidence of a conviction inadmissible.

**(f) Notice.** Evidence of a conviction is not admissible if after timely written request by the adverse party specifying the witness or witnesses, the proponent fails to give to adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

## RULE 610. MODE AND ORDER OF INTERROGATION AND PRESENTATION

**(a) Control by Court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

**(b) Scope of Cross-Examination.** A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.

**(c) Leading Questions.** Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

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The credibility of a witness may be attacked by any party, including the party calling him.

## RULE 608. EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

(a) Opinion and Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence.

## RULE 609. IMPEACH BY EVIDENCE OF CONVICTION OF CRIME

(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record but only if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten (10) years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if (1) based on the finding of the rehabilitation of the person convicted, the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment, or (2) probation has been satisfactorily completed for the crime for which the person was convicted, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment, or (3) based on a finding of innocence, the conviction has been the subject of a pardon, annulment, or other equivalent procedure.

(d) Juvenile Adjudications. Evidence of juvenile adjudications is not admissible under this rule unless required to be admitted by the Constitution of the United States or Texas.

(e) Pendency of Appeal. Pendency of an appeal renders evidence of a conviction inadmissible.

(f) Notice. Evidence of a conviction is not admissible if after timely written request by the adverse party specifying the witness or witnesses, the proponent fails to give to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

## RULE 610. RELIGIOUS BELIEFS OR OPINIONS

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

(Adopted Nov. 10, 1986, eff. Jan. 1, 1988.)

### Notes and Comments

Comment to 1988 Amendment: This is a new rule, thus causing renumbering of former Rules 610 to 611.

While the rule forecloses inquiry into the religious beliefs or opinions of a witness for the purpose of showing



TEX CIV

RULE 204 TEXAS RULES OF CIVIL EVIDENCE - Pg 1132-1133

CHANGE SUGGESTED/BY: Charles Adkin Spain, Jr. - Austin

Delete from caption and body of rule "Texas Register" and "Texas Administrative Code."

RECOMMENDED ACTION:

1. Delete from caption of both Civil 204 and Criminal 204 "THE CONTENTS OF THE TEXAS REGISTER, THE RULES OF AGENCIES PUBLISHED IN THE ADMINISTRATIVE CODE."

2. Delete from body of Civil 204 and Criminal 204 "of the contents of the Texas Register, and of the codified rule of the agencies published in the Administrative Code."

3. Put footnote to both Civil 204 and Criminal 204 stating that Section 2002.022 of the Government Code requires judicial notice of the contents of the Texas Register and Section 2002.054 of the Government Code requires judicial notice of state agency rules published in the Administrative Code.

4. Amend Criminal Rule 204 to conform to Civil Rule 204 as amended.

REASON:

Government Code provides for judicial notice. Make both CIV and CRIM 204 same.

# RULE 204 OF THE RULES OF CRIMINAL EVIDENCE

RULE 204. DETERMINATION OF TEXAS CITY AND COUNTY ORDINANCES {THE CONTENTS OF THE TEXAS REGISTER, THE RULES OF AGENCIES PUBLISHED IN THE ADMINISTRATIVE CODE}

A court upon its own motion may, or upon the motion of a party shall, take judicial notice {may be taken} of the ordinances of municipalities and counties of Texas {of the contents of the Texas Register, and of the codified rules of the agencies published in the Administrative Code}. Any party requesting that judicial notice be taken of such matter shall furnish the court sufficient information to enable it properly to comply with the request, and shall give all parties such notice, if any, as the court may deem necessary, to enable all parties fairly to prepare to meet the request. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. The court's determination shall be subject to review as a ruling on a question of law.

Note: Section 2002.022 of the Government Code requires judicial notice of the contents of the Texas Register. Section 2002.054 requires judicial notice of state agency rules published in the Administrative Code.

# RULE 204 OF THE RULES OF CIVIL EVIDENCE

RULE 204. DETERMINATION OF TEXAS CITY AND COUNTY ORDINANCES {THE CONTENTS OF THE TEXAS REGISTER, THE RULES OF AGENCIES PUBLISHED IN THE ADMINISTRATIVE CODE}

A court upon its own motion may, or upon the motion of a party shall, take judicial notice of the ordinances of municipalities and counties of Texas {of the contents of the Texas Register, and of the codified rules of the agencies published in the Administrative Code}. Any party requesting that judicial notice be taken of such matter shall furnish the court sufficient information to enable it properly to comply with the request, and shall give all parties such notice, if any, as the court may deem necessary, to enable all parties fairly to prepare to meet the request. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. The court's determination shall be subject to review as a ruling on a question of law.

NEW RULE 204, TEXAS RULES OF CIVIL EVIDENCE
AND TEXAS RULES OF CRIMINAL EVIDENCE

RULE 204. DETERMINATION OF TEXAS CITY AND COUNTY ORDINANCES

A court upon its own motion may, or upon the motion of a party shall, take judicial notice of the ordinances of municipalities and counties of Texas. Any party requesting that judicial notice be taken of such matter shall furnish the court sufficient information to enable it properly to comply with the request, and shall give all parties such notice, if any, as the court may deem necessary, to enable all parties fairly to prepare to meet the request. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. The court's determination shall be subject to review as a ruling on a question of law.

Note: Section 2002.022 of the Government Code requires judicial notice of the contents of the Texas Register. Section 2002.054 requires judicial notice of state agency rules published in the Administrative Code.

# ARTICLE II. JUDICIAL NOTICE

## RULE 201. JUDICIAL NOTICE OF ADJUDICATIVE FACTS

(a) Scope of Rule. This rule governs only judicial notice of adjudicative facts.

(b) **Kinds of Facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) **When Discretionary.** A court may take judicial notice, whether requested or not.

(d) **When Mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) **Opportunity to Be Heard.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) **Time of Taking Notice.** Judicial notice may be taken at any stage of the proceeding.

(g) **Instructing Jury.** The court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

## RULE 202. DETERMINATION OF LAW OF OTHER STATES

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

## RULE 203. DETERMINATION OF THE LAWS OF FOREIGN COUNTRIES

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

## RULE 204. DETERMINATION OF TEXAS CITY AND COUNTY ORDINANCES, THE CONTENTS OF THE TEXAS REGISTER, THE RULES OF AGENCIES PUBLISHED IN THE ADMINISTRATIVE CODE

Judicial notice may be taken of the ordinances of municipalities and counties of Texas, of the contents of the Texas Register, and of the codified rules of the agencies published in the Administrative Code. Any party requesting that judicial notice be taken of such matter shall furnish the court sufficient information to enable it properly to comply with the request, and shall give all parties such notice, if any, as the court may deem necessary, to enable all parties fairly to prepare to meet the request. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. The court's determination shall be subject to review as a ruling on a question of law.

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(Amended June 25, 1984, eff. Nov. 1, 1984; Nov. 10, 1986, eff. Jan. 1, 1988.)

### Notes and Comments

Change by amendment effective November 1, 1984: Language has been added and deleted to make it clear that all parties are entitled to notice and hearing of the court's taking judicial notice of the law of other states. The last four sentences have been added.

## RULE 203. DETERMINATION OF THE LAWS OF FOREIGN COUNTRIES

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

(Amended June 25, 1984, eff. Nov. 1, 1984.)

### Notes and Comments

Change by amendment effective November 1, 1984: The words "all parties" has been substituted for "to the opposing party or counsel" in the first and second sentences. In the fourth sentence, "all" has been substituted for "the." In the last sentence, "The court's" has been substituted for "It's" and the words "on appeal" have been deleted.

## RULE 204. DETERMINATION OF TEXAS CITY AND COUNTY ORDINANCES, THE CONTENTS OF THE TEXAS REGISTER, THE RULES OF AGENCIES PUBLISHED IN THE ADMINISTRATIVE CODE

A court upon its own motion may, or upon the motion of a party shall, take judicial notice of the ordinances of municipalities and counties of Texas, of the contents of the Texas Register, and of the codified rules of the agencies published in the Administrative Code. Any party requesting that judicial notice be taken of such matter shall furnish the court sufficient information to enable it properly to comply with the request, and shall give all parties such notice, if any, as the court may deem necessary, to enable all parties fairly to prepare to meet the request. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. The court's determination shall be subject to review as a ruling on a question of law.

(Added June 25, 1984, eff. Nov. 1, 1984; amended Nov. 10, 1986, eff. Jan. 1, 1988.)

### Notes and Comments

Note: New Rule.

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1S ), 71st Leg., ch. 236, § 2.
1981, 67th Leg., p. 168, ch. 76, § 2.
on's Ann.Civ.St. art. 6252-13a, § 21(a).

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'87, 70th Leg., ch. 220, § 1
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Historical and Statutory Notes

Prior Laws:
Acts 1977, 65th Leg., p.1703, ch. 678.
Vernon's Ann.Civ.St. art. 6252-13b, § 3(b).

## § 2002.053. Purchase and Resale of Administrative Code

(a) To promote efficiency and economy in state government, the secretary of state may periodically purchase copies of the administrative code for resale and distribution to other branches of state government, state agencies, or institutions.

(b) The purchase does not require the secretary of state to engage in competitive bidding procedures to enter into the contract or license to publish the code.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

Historical and Statutory Notes

Prior Laws:
Acts 1989, 71st Leg., ch. 297, § 6.
Vernon's Ann.Civ.St. art. 6252-13b, § 3(c).

## § 2002.054. Evidentiary Value of Administrative Code

State agency rules published in the administrative code, as approved by the secretary of state and as amended by documents later filed with the office of the secretary:

(1) are to be judicially noticed; and

(2) are prima facie evidence of the text of the rules and of the fact that they are in effect on and after the date of the notation.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

Historical and Statutory Notes

Prior Laws:
Acts 1977, 65th Leg., p.1703, ch. 678.
Acts 1981, 67th Leg., p. 169, ch. 76, § 3.
Vernon's Ann.Civ.St. art. 6252-13b, § 4.

## § 2002.055. Rules

(a) The secretary of state may adopt rules to ensure the effective administration of this subchapter.

(b) The rules may establish:

(1) titles of the administrative code; and

(2) a system of classification of the subject matter of the administrative code.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

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## § 2002.021. Agency Liaison

A state agency shall designate at least one individual to act as a liaison through whom all required documents may be submitted to the secretary of state for filing and publication.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

### Historical and Statutory Notes

**Prior Laws:**

Acts 1975, 64th Leg., p. 136, ch. 61.
Vernon's Ann.Civ.St. art. 6252-13a, § 9(d).

## § 2002.022. Evidentiary Value of Texas Register; Citation

(a) The contents of the Texas Register are to be judicially noticed and are prima facie evidence of the text of the documents and of the fact that they are in effect on and after the date of the notation.

(b) Without prejudice to another mode of citation, the contents of the Texas Register may be cited by volume and page number.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

### Historical and Statutory Notes

**Prior Laws:**

Acts 1981, 67th Leg., p. 168, ch. 76, § 1.
Vernon's Ann.Civ.St. art. 6252-13a, § 4(c).

## § 2002.023. Exceptions

This subchapter does not apply to:

(1) a suspension, revocation, cancellation, denial, or disqualification of a driver's license or commercial driver's license as authorized by:

(A) Article IV, Chapter 173, Acts of the 47th Legislature, Regular Session, 1941 (Article 6687b, Vernon's Texas Civil Statutes);

(B) the Texas Commercial Driver's License Act (Article 6687b-2, Revised Statutes);

(C) the Texas Motor Vehicle Safety-Responsibility Act (Article 6701h, Vernon's Texas Civil Statutes);

(D) Chapter 434, Acts of the 61st Legislature, Regular Session, 1969 (Article 6701*l*-5, Vernon's Texas Civil Statutes); or

(E) Section 13, Article 42.12, Code of Criminal Procedure;

(2) matters related solely to the internal personnel rules and practices of a state agency; or

(3) the Texas Employment Commission, other than to matters of unemployment insurance maintained by the commission.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

RULE 407(a) - CIV - Pg 1134-1136

CHANGE SUGGESTED/BY: R. Doak Bishop - Dallas

Delete last sentence pertaining to strict liability products case.

RECOMMENDED ACTION:

None. (Vote 2 to 1)

REASON:

Cases and products liability law make this unnecessary.

## RULE 407(a) TEXAS RULES OF CIVIL EVIDENCE

RULE 407. SUBSEQUENT REMEDIAL MEASURES; NOTIFICATION OF DEFECT

(a) **Subsequent Remedial Measures.** When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control or feasibility of precautionary measures, if controverted, or impeachment.

lend themselves to the characterization of 'invariable regularity.' [1 Wigmore 520.] Certainly the very volitional basis of the activity raises serious questions as to its invariable nature, and hence its probative value." *Id.* at 272.

These rulings are not inconsistent with the trend towards admitting evidence of business transactions between one of the parties and a third person as tending to prove that he made the same bargain or proposal in the litigated situation. Slough, Relevancy Unraveled, 6 Kan.L.Rev. 38–41 (1957). Nor are they inconsistent with such cases as *Whittemore* v. *Lockheed Aircraft Corp.*, 65 Cal. App.2d 737, 151 P.2d 670 (1944), upholding the admission of evidence that plaintiff's intestate had on four other occasions flown planes from defendant's factory for delivery to his employer airline, offered to prove that he was piloting rather than a guest on a plane which crashed and killed all on board while en route for delivery.

A considerable body of authority has required that evidence of the routine practice of an organization be corroborated as a condition precedent to its admission in evidence. Slough, Relevancy Unraveled, 5 Kan.L.Rev. 404, 449 (1957). This requirement is specifically rejected by the rule on the ground that it relates to the sufficiency of the evidence rather than admissibility. A similar position is taken in New Jersey Rule 49. The rule also rejects the requirement of the absence of eyewitnesses, sometimes encountered with respect to admitting habit evidence to prove freedom from contributory negligence in wrongful death cases. For comment critical of the requirements see Frank, J., in *Cereste* v. *New York, N.H. & H.R. Co.*, 231 F.2d 50 (2d Cir. 1956), cert. denied 351 U.S. 951, 76 S.Ct. 848, 100 L.Ed. 1475, 10 Vand.L.Rev. 447 (1957); McCormick § 162, p. 342. The omission of the requirement from the California Evidence Code is said to have effected its elimination. Comment, Cal.Ev.Code § 1105.

## Rule 407. Subsequent Remedial Measures

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

### NOTES OF ADVISORY COMMITTEE ON 1972 PROPOSED RULES

The rule incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault. The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Or, as Baron Bramwell put it, the rule rejects the notion that "because the world gets wiser as it gets older, therefore it was foolish before." *Hart* v. *Lancashire & Yorkshire Ry. Co.*, 21 L.T.R.N.S. 261, 263 (1869). Under a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one. (2) The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety. The courts have applied this principle to exclude evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees, and the language of the present rules is broad enough to encompass all of them. See Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 590 (1956).

The second sentence of the rule directs attention to the limitations of the rule. Exclusion is called for only when the evidence of subsequent remedial measures is offered as proof of negligence or culpable conduct. In effect it rejects the suggested inference that fault is admitted. Other purposes are, however, allowable, including ownership or control, existence of duty, and feasibility of precautionary measures, if controverted, and impeachment. 2 Wigmore § 283; Annot., 64 A.L.R.2d 1296. Two recent federal cases are illustrative. *Boeing Airplane Co.* v. *Brown*, 291 F.2d 310 (9th Cir. 1961), an action against an airplane manufacturer for using an allegedly defectively designed alternator shaft which caused a plane crash, upheld the admission of evidence of subsequent design modification for the purpose of showing that design changes and safeguards were feasible. And *Powers* v. *J. B. Michael & Co.*, 329 F.2d 674 (6th Cir. 1964), an action against a road contractor for negligent failure to put out warning signs, sustained the admission of evidence that defendant subsequently put out signs to show that the portion of the road in question was under defendant's control. The requirement that the other purpose be controverted calls for automatic exclusion unless a genuine issue be present and allows the opposing party to lay the groundwork for exclusion by making an admission. Otherwise the factors of undue prejudice, confusion of issues, misleading the jury, and waste of time remain for consideration under Rule 403.

For comparable rules, see Uniform Rule 51; California Evidence Code § 1151; Kansas Code of Civil Procedure § 60–451; New Jersey Evidence Rule 51.

## Rule 408. Compromise and Offers to Compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice

not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

## RULE 407. SUBSEQUENT REMEDIAL MEASURES; NOTIFICATION OF DEFECT

**(a) Subsequent Remedial Measures.** When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control or feasibility of precautionary measures, if controverted, or impeachment. Nothing in this rule shall preclude admissibility in products liability cases based on strict liability.

**(b) Notification of Defect.** A written notification by a manufacturer of any defect in a product produced by such manufacturer to purchasers thereof is admissible against the manufacturer on the issue of existence of the defect to the extent that it is relevant.

## RULE 408. COMPROMISE AND OFFERS TO COMPROMISE

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice or interest of a witness or a party, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

## RULE 409. PAYMENT OF MEDICAL AND SIMILAR EXPENSES

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

## RULE 410. INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS AND RELATED STATEMENTS

Except as otherwise provided in this rule, evidence of the following is not admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty or nolo contendere which was later withdrawn;

(2) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding a plea of guilty or nolo contendere which was later withdrawn; or

(3) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or a plea of nolo contendere or which result in a plea of guilty or a plea of nolo contendere later withdrawn. However, such a statement is admissible in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it.

## RULE 411. LIABILITY INSURANCE

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently. This rule does not require the exclusion of evidence of insurance against liability when offered for another issue, such as proof of agency, ownership, or control, if disputed, or bias or prejudice of a witness.

## RULE 412. EVIDENCE OF PREVIOUS SEXUAL CONDUCT

(a) In a prosecution for sexual assault or aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, reputation or opinion evidence of the past sexual behavior of an alleged victim of such crime is not admissible.

(b) In a prosecution for sexual assault or aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, evidence of specific instances of an alleged victim's past sexual behavior is also not admissible, unless:

(1) such evidence is admitted in accordance with paragraphs (c) and (d) of this rule;

(2) it is evidence (A) that is necessary to rebut or explain scientific or medical evidence offered by the state; (B) of past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior which is the basis of the offense charged;

Comment to 1988 Amendment: Judicial notice upon motion of a party is made mandatory rather than discretionary.

# ARTICLE III.

[No rules recommended at this time.]

# ARTICLE IV. RELEVANCY AND ITS LIMITS

## RULE 401. DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

(Amended June 25, 1984, eff. Nov. 1, 1984.)

**Notes and Comments**

Change by amendment effective November 1, 1984: Title and entire rule has been changed.

## RULE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as otherwise provided by Constitution, by statute, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is inadmissible.

## RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON SPECIAL GROUNDS

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

## RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) **Character Evidence Generally.** Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) *Character of Party Accused of Conduct Involving Moral Turpitude.* Evidence of a pertinent trait of his character offered by a party accused of conduct involving moral turpitude, or by the accusing party to rebut the same;

(2) *Character of Alleged Victim of Assaultive Conduct.* Evidence of character for violence of the alleged victim of assaultive conduct offered on the issue of self-defense by a party accused of the assaultive conduct, or evidence of peaceable character to rebut the same;

(3) *Character of Witness.* Evidence of the character of a witness, as provided in rules 607, 608 and 609.

(b) **Other Wrongs or Acts.** Evidence of other wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

## RULE 405. METHODS OF PROVING CHARACTER

(a) **Reputation or Opinion.** In all cases in which evidence of character or trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) **Specific Instances of Conduct.** In cases in which character or trait of character of a person is an essential element of a claim or defense, proof may also be made of specific instances of his conduct.

## RULE 406. HABIT; ROUTINE PRACTICE

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

## RULE 407. SUBSEQUENT REMEDIAL MEASURES; NOTIFICATION OF DEFECT

(a) **Subsequent Remedial Measures.** When, after an event, measures are taken which, if taken previously, would have made the event less likely to

occur, evidence of the subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control or feasibility of precautionary measures, if controverted, or impeachment. Nothing in this rule shall preclude admissibility in products liability cases based on strict liability.

**(b) Notification of Defect.** A written notification by a manufacturer of any defect in a product produced by such manufacturer to purchasers thereof is admissible against the manufacturer on the issue of existence of the defect to the extent that it is relevant.

### RULE 408. COMPROMISE AND OFFERS TO COMPROMISE

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for, or invalidity of, the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice or interest of a witness or a party, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

### RULE 409. PAYMENT OF MEDICAL AND SIMILAR EXPENSES

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

### RULE 410. INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS AND RELATED STATEMENTS

Except as otherwise provided in this rule, evidence of the following is not admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting attorney which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it.

### RULE 411. LIABILITY INSURANCE

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another issue, such as proof of agency, ownership, or control, if disputed, or bias or prejudice of a witness.

## ARTICLE V. PRIVILEGES

### RULE 501. PRIVILEGES RECOGNIZED ONLY AS PROVIDED

Except as otherwise provided by Constitution, by statute, by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority, no person has a privilege to:

(1) Refuse to be a witness; or

(2) Refuse to disclose any matter; or

(3) Refuse to produce any object or writing; or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

### RULE 502. REQUIRED REPORTS PRIVILEGED BY STATUTE

A person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so provides. A public officer or agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides. No privilege exists under this rule in actions involving perjury,

The attorneys represented to the court that P. Ex-1 became available in 1979 or 1980. Appellant argues that P. Ex-1 is not admissible because the appellees pled negligent design. Appellees responded that they pled defective design and defective manufacture, thus making the exhibit admissible under TEX.R.EVID. 407. Neither side is correct.

[2] Rule 407 concerns "Subsequent Remedial Measures." Under the rule, evidence of measures taken subsequent to the event which, "if taken previously, would have made the event less likely to occur ..." is not admissible. The rule does not *prevent* admissibility of such evidence in products liability cases based on strict liability. Nor, however, does the rule automatically render such evidence admissible. Other rules of evidence may apply to bar the admission of such evidence. Appellees did plead defective manufacture. We have carefully examined their pleadings and find *no* pleading of defective design. Nevertheless, the defective manufacture pleading was sufficient to make this case a products liability case, at least in part. Of course, evidence of subsequent design changes was not admissible to prove the negligence of the appellant. The trial court so instructed the jury when P. Ex-1 was admitted, and again in the charge to the jury at the submission of the case.

[3] Appellant argues that rule 407 only applies to design defect. It cites no authority for such a narrow construction of the rule, and we have found none. Appellant's first point of error is overruled.

Appellant complains in its ninth point of error about the form of special issue number one in that it was not supported by the pleadings. Appellant argues that since appellees only plead defective manufacture, the issue should have been submitted in a narrow fashion, rather than in a general manner.

[4] The State Bar of Texas, *Texas Pattern Jury Charges*, Vol. 3 (1982), contains sample special issues on various products liability issues. The sample broad-form issue for multiple manufacturing defects is identical to the one for single manufacturing defects. *Pattern Jury Charges* (PJ 71.01A; 71.01F. Although the appella properly requested a form of the issue t conformed to the appellees' pleadings. trial court has broad discretion in how issues shall be submitted. *Ford Motor v. Durrill*, 714 S.W.2d 329, 334 (Tex.App Corpus Christi 1986, no writ); TEX CIV.P. 277. Point of error nine is ov ruled.

In its eighth point of error, appell contends the trial court erred in overrul its motion for judgment N.O.V. because switch and panel board were not in same condition at the time of the explos as they were when they left the hands the appellant. Because the $A_1$ and screws (Diagram # 1) had been remo prior to the occurrence, appellant arg the appellees had altered the switch manner not foreseen by appellant. W ing on the switch while energized was er intended by the appellant. Appel argues that appellees had the burde pleading and proving by preponderanc the evidence that Federal Pacific desig the equipment knowing or expectin would be disassembled while energize

According to *PJC*, 70.05, when the ments of substantial change or alter are raised by the evidence, an instru on such should be submitted followin definition of "unreasonably danger *See Caterpillar Tractor Co. v. Gon* 599 S.W.2d 633, 636-37 (Tex.Civ.App Paso 1980, writ ref'd n.r.e.).

[5] Appellant contends *Colvin* Steel Co., 682 S.W.2d 243, 246 (Tex holds that an essential element of the uct liability plaintiff's cause of actio finding that the product was not fit intended or reasonable foreseeable the time it left the manufacturer. was an instructed verdict case, and we agree with the legal theories in we do not construe it to hold that products liability case goes to the there must be an issue worded accor such ruling from *Colvin*, rather than part of a definition or instruction. lant failed to request the altered co

RULE 413 - CIV (NEW) - Pg 1137-1139

CHANGE SUGGESTED/BY: R. Doak Bishop

No evidence of defendant's net worth or wealth admissible until liability for exemplary damages found.

RECOMMENDED ACTION:

None.

REASON:

(1) Moriel establishes procedure; (2) Bifurcation under Moriel should be by amendment to Rule 174 of Rules of Civil Procedure.

PROPOSED RULE - IF COMMITTEE DECIDES
TO DRAFT NEW RULE 413

RULE 413. EVIDENCE OF WEALTH OR NET WORTH

When the court, in an exemplary damage suit, has ordered bifurcation of the amount of punitive damages from the remainder of the case, no evidence pertaining to the wealth or networth of one against whom exemplary damages are sought may be presented to, or in the presence of, the jury, until after the trier of fact has found liability for exemplary damages.

However, evidence of a defendant's net worth, which is generally relevant only to the *amount* of punitive damages, by highlighting the relative wealth of a defendant, has a very real potential for prejudicing the jury's determination of other disputed issues in a tort case. We therefore conclude that a trial court, if presented with a timely motion, should bifurcate the determination of the amount of punitive damages from the remaining issues. *See Wal-Mart*, 868 S.W.2d at 329–32 (Gonzalez, J., concurring). Under this approach, the jury first hears evidence relevant to liability for actual damages, the amount of actual damages, and liability for punitive damages (e.g., gross negligence), and then returns findings on these issues. If the jury answers the punitive damage liability question in the plaintiff's favor, the same jury is then presented evidence relevant only to the amount of punitive damages, and determines the proper amount of punitive damages, considering the totality of the evidence presented at both phases of the trial.

At least thirteen states now require bifurcation of trials in which punitive damages are sought.[28] Ten of these, California, Georgia, Kansas, Missouri, Montana, Nevada, Ohio, Tennessee, Utah, and Wyoming, generally follow the procedure outlined above, in which the *amount* of punitive damages is bifurcated from the remaining issues. The other states require bifurcation of the entire punitive damage claim, including liability and amount. We believe the former approach is preferable, as some of the evidence relevant to punitive damage *liability*, such as evidence of gross negligence, will also be relevant to liability for actual damages. Bifurcating only the amount of punitive damages therefore eliminates the most serious risk of prejudice, while minimizing the confusion and inefficiency that can result from a bifurcated trial. *See Lunsford*, 746 S.W.2d at 477 (Phillips, C.J., dissenting on motion for reh'g).[29]

The issue in this Court is not whether *bifurcation of punitive damage claims* is constitutionally required, but whether our system of imposing punitive damages, on the whole, provides adequate procedural safeguards to protect against awards that are grossly excessive. Concluding that the current procedures are not adequate, we hereby adopt the requirement of bifurcated trials in punitive damage cases.

### B. Court of Appeals Review of the Evidence

[16] A court of appeals may vacate a damage award or suggest a remittitur only if the award is "so factually insufficient or so against the great weight and preponderance of the evidence as to be manifestly unjust." *Pope v. Moore*, 711 S.W.2d 622, 624 (Tex. 1986); *see Pool*, 715 S.W.2d at 635; *In Re King's Estate*, 150 Tex. 662, 244 S.W.2d 660, 661 (1951). A court of appeals is also governed by this same standard when reviewing a trial court's suggestion of remittitur. *Larson v. Cactus Util. Co.*, 730 S.W.2d 640 (Tex. 1987). While we do not alter this level of

28. CAL.CIV.CODE § 3295(d) (West Supp.1993); GA. CODE ANN. § 51–12–5.1(d) (Supp.1992); KAN.STAT. ANN § 60–3701(a) (Supp.1993); MINN STAT.ANN. § 549.20(4) (West Supp.1993); MO.ANN STAT. § 510.263 (Vernon Supp.1992); MONT CODE ANN. § 27–1–221(7) (1991); NEV.REV.STAT. § 42.005(3) (1991); N.J.STAT ANN § 2A:58C–5(b) (West 1987); N.D.CENT.CODE § 32–03.2–11(2) through (4) (1993); OHIO REV CODE ANN. § 2315.21(C) (Baldwin 1993); UTAH CODE ANN § 78–18–1(2) (1992); *Campen v. Stone*, 635 P.2d 1121, 1132 (Wyo. 1981); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn.1992).

29. Despite the authority of trial courts to order separate trials under Tex.R.Civ.P. 174(b), we have previously held that liability and damages may not be bifurcated in a personal injury action. *Iley v. Hughes*, 158 Tex. 362, 311 S.W.2d 648, 651 (1958). Citing our "long standing policy and practice" against "piecemeal trials," *id.* 311 S.W.2d at 651, the court said: "[T]he public interest, the interests of litigants and the administration of justice [are] better served by rules of trial which avoid a multiplicity of suits." *Id.* Arguably, this holding would apply to punitive, as well as actual, liability and damages. *But see Beverly Enterprises of Texas, Inc. v. Leath*, 829 S.W.2d 382, 387 (Tex.App.—Waco 1992, no writ) (the court, without citing *Iley v. Hughes*, held that a trial court does have discretion under Rule 174(b) to bifurcate the amount of punitive damages from punitive liability); *Miller v. O'Neill*, 775 S.W.2d 56, 59 (Tex.App.—Houston [1st Dist.] 1989, orig. proceeding) (same). Although we remain resolute that piecemeal trials as a general rule should be avoided, given the importance of the considerations we have discussed, we conclude that punitive damage cases should be the exception to the rule.

RULE 510(d)(6) - CIV - Pg 1140-1146

CHANGE SUGGESTED/BY: Peter S. Chamberlain

Protection of psychological records of counselor or expert.

RECOMMENDED ACTION:

None.

REASON:

Other rules give adequate protection - particularly 403.

PROPOSED RULE - IF COMMITTEE
DECIDES TO AMEND PRESENT RULE

RULE 510 CIV. CONFIDENTIALITY OF MENTAL HEALTH INFORMATION

(d)(6) When the disclosure is relevant to any suit affecting the parent-child relationship. However, this exception does not include records of the identity, diagnosed for evaluation or treatment of a counselor or an expert witness involved in the case.

RULE 510(d)(6)

RULE 510. CONFIDENTIALITY OF MENTAL HEALTH INFORMATION

(d) pertains to exceptions. Specifically Section (6) provides, "when the disclosure is relevant in any suit affecting the parent-child relationship." It has been recommended that we look into this because it is stated that a large number of professionals dealing with sexually abused children perhaps had been victims and if this were admissible they would not want to get involved and would not want to testify. It has been recommended that we provide for certain safeguards to prevent such evidence coming out against an expert in one of these cases. Therefore, it was recommended that we make some further exception pertaining to experts in child abuse cases.

The committee feels that nothing should be changed here because the exception states when the disclosure "is relevant." Even though something may be relevant if the relevance is outweighed by the prejudice, the judge can keep it out. Generally the courts have been able to handle a problem like this and we don't see any reason to make a change.

(8) in any proceeding regarding the abuse or neglect, or the cause of any abuse or neglect of the resident of an "institution" as defined in Sec. 1, Ch. 684, Acts of the 67th Legislature, Regular Session, 1981 (Art. 4442c, Sec. 2, Vernon's Texas Civil Statutes).

(e) Consent.

(1) Consent for the release of privileged information must be in writing and signed by the patient, or a parent or legal guardian if the patient is a minor, or a legal guardian if the patient has been adjudicated incompetent to manage his personal affairs, or an attorney ad litem appointed for the patient, as authorized by the Texas Mental Health Code (Article 5547–1 et seq., Vernon's Texas Civil Statutes); the Mentally Retarded Persons Act of 1977 (Article 5547–300, Vernon's Texas Civil Statutes); Section 9, Chapter 411, Acts of the 53rd Legislature, Regular Session, 1953 (Article 5561c, Vernon's Texas Civil Statutes); Section 2, Chapter 543, Acts of the 61st Legislature, Regular Session, 1969 (Article 5561c–1, Vernon's Texas Civil Statutes); Chapter 5, Texas Probate Code; and Chapter 11, Family Code; or a personal representative if the patient is deceased, provided that the written consent specifies the following:

(A) the information or medical records to be covered by the release;

(B) the reasons or purposes for the release; and

(C) the person to whom the information is to be released.

(2) The patient, or other person authorized to consent, has the right to withdraw his consent to the release of any information. Withdrawal of consent does not affect any information disclosed prior to the written notice of the withdrawal.

(3) Any person who received information made privileged by this rule may disclose the information to others only to the extent consistent with the authorized purposes for which consent to release the information was obtained.

(Amended June 25, 1984, eff. Nov. 1, 1984; Nov. 10, 1986, eff. Jan. 1, 1988.)

**Notes and Comments**

Comment: This rule only governs disclosures of patient-physician communications in judicial or administrative proceedings. Whether a physician may or must disclose such communications in other circumstances is governed by TEX.REV.CIV.STAT.ANN. art. 4495b, Sec. 5.08.

Changed by amendment effective November 1, 1984: In (a)(2) the words "in any state or nation, or reasonably believed by the patient so to be" have been added; in (b)(3) the word "provisions" has been substituted for "prohibitions;" the word "rule" has been substituted for "section continue to;" the phrase "to confidential communications or records concerning any patient irrespective" has been deleted; "even if" has been substituted for "of when;" in (b)(3) the phrase "prior to the enactment of the Medical Practice Act, TEX.REV.CIV.STAT.ANN. art. 4590i (Vernon Supp.1984)." has been added; in (c)(1) the words "by a representative of the patient" has been substituted for the word "physician" and in (d)(7) the words "when the disclosure is relevant to" have been deleted and the words "proceeding, proceeding for court-ordered treatment, or probable cause hearing" substituted for "or hospitalization proceeding."

Comment on 1988 Amendment to (d)(4): The entire section is rewritten.

## RULE 510. CONFIDENTIALITY OF MENTAL HEALTH INFORMATION

**(a) Definitions.** As used in this rule:

(1) "Professional" means any person (A) authorized to practice medicine in any state or nation; or (B) licensed or certified by the State of Texas in the diagnosis, evaluation or treatment of any mental or emotional disorder; or (C) involved in the treatment or examination of drug abusers; or (D) reasonably believed by the patient to be included in any of the preceding categories.

(2) "Patient" means any person who (A) consults, or is interviewed by, a professional for purposes of diagnosis, evaluation, or treatment of any mental or emotional condition or disorder, including alcoholism and drug addiction; or (B) is being treated voluntarily or being examined for admission to voluntary treatment for drug abuse.

(3) A representative of the patient is (A) any person bearing the written consent of the patient; or (B) a parent if the patient is a minor; or (C) a guardian if the patient has been adjudicated incompetent to manage his personal affairs; or (D) the patient's personal representative if the patient is deceased.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the diagnosis, examination, evaluation, or treatment, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis, examination, evaluation, or treatment under the direction of the professional, including members of the patient's family.

(b) General Rule of Privilege.

(1) Communication between a patient and a professional is confidential and shall not be disclosed.

(2) Records of the identity, diagnosis, evaluation, or treatment of a patient which are created or maintained by a professional are confidential and shall not be disclosed.

(3) Any person who received information from confidential communications or records as defined herein, other than a representative of the patient acting on the patient's behalf, shall not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

(4) The provisions of this rule apply even if the patient received the services of a professional prior to the enactment of TEX.REV.CIV.STAT.ANN. art. 5561h (Vernon Supp.1984).

**(c) Who May Claim the Privilege.**

(1) The privilege of confidentiality may be claimed by the patient or by a representative of the patient acting on the patient's behalf.

(2) The professional may claim the privilege of confidentiality but only on behalf of the patient. The authority to do so is presumed in the absence of evidence to the contrary.

**(d) Exceptions.** Exceptions to the privilege in court proceedings exist:

(1) when the proceedings are brought by the patient against a professional, including but not limited to malpractice proceedings, and in any license revocation proceedings in which the patient is a complaining witness and in which disclosure is relevant to the claim or defense of a professional;

(2) when the patient waives his right in writing to the privilege of confidentiality of any information, or when a representative of the patient acting on the patient's behalf submits a written waiver to the confidentiality privilege;

(3) when the purpose of the proceeding is to substantiate and collect on a claim for mental or emotional health services rendered to the patient; or

(4) when the judge finds that the patient after having been previously informed that communications would not be privileged, has made communications to a professional in the course of a court-ordered examination relating to the patient's mental or emotional condition or disorder, providing that such communications shall not be privileged only with respect to issues involving the patient's mental or emotional health. On granting of the order, the court, in determining the extent to which any disclosure of all or any part of any communication is necessary, shall impose appropriate safeguards against unauthorized disclosure;

(5) as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense;

(6) when the disclosure is relevant in any suit affecting the parent-child relationship;

(7) in any proceeding regarding the abuse or neglect, or the cause of any abuse or neglect of the resident of an "institution" as defined in TEX.REV. CIV.STAT.ANN. art. 4442c, Sec. 2 (Vernon Supp. 1984).

(Amended June 25, 1984, eff. Nov. 1, 1984; Nov. 10, 1986, eff. Jan. 1, 1988.)

Notes and Comments

Comment: This rule only governs disclosures of patient/professional communications in judicial or administrative proceedings. Whether a professional may or must disclose such communications in other circumstances is governed by TEX.REV.CIV.STAT.ANN. art. 5561h (Vernon Supp.1984).

Change by amendment effective November 1, 1984: In the phrase "patient/client" the word "client" has been deleted throughout this rule. In 2(A) the word "other" has been deleted; in (b)(4) the word "provisions" has been substituted for the word "prohibitions" and the words "continue to" "to confidential communications or records concerning any patient/client irrespective of when" has been deleted. In (d)(5) the entire language has been substituted. In (d)(7) the words TEX.REV.CIV.STAT. ANN. art. 4442c, Sec. 2 (Vernon Supp.1984) have been substituted for the words "Sec. 1, Ch. 684, Acts of the 67th Legislature, Regular Session 1981 (Art. 4442c, Sec. 2, Vernon's Texas Civil Statutes)."

## RULE 511. WAIVER OF PRIVILEGE BY VOLUNTARY DISCLOSURE

A person upon whom these rules confer a privilege against disclosure waives the privilege if (1) he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged, or (2) he or his representative calls a person to whom privileged communications have been made to testify as to his character or a trait of his character insofar as such communications are relevant to such character or character trait.

(Amended June 25, 1984, eff. Nov. 1, 1984.)

Notes and Comments

Change by amendment effective November 1, 1984: Numbers (1) and (2) have been added; the words "unless such disclosure itself is privileged, or (2) he or his representative calls a person to whom privileged communications have been made to testify as to his character or a trait of his character, insofar as such communications are relevant to such character or character trait." have been added. The last sentence has been deleted.

## RULE 512. PRIVILEGED MATTER DISCLOSED UNDER COMPULSION OR WITHOUT OPPORTUNITY TO CLAIM PRIVILEGE

A claim of privilege is not defeated by a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege.

RULE 703 - CIV - Pg 1147-1152

CHANGE SUGGESTED/BY: Stephen A. Mandel

Tex.Civ.App. Rule 168 be amended to conform to Rule 703.

RECOMMENDED ACTION:

None.

REASON:

Rule 703 does not need to define every type of hearsay included in rule.

This request is mainly to amend Texas Rule of Civil Procedure 186 so that answers to interrogatories of a non-adverse party can be considered by an expert under Civil Evidence Rule 703. 703 says that, "The facts or data need not be admissible into evidence." However, there could be some question as to whether answers to interrogatories qualifies under Rule 703 "if of a type reasonably relied upon by experts in the particular field in forming opinions."

PROPOSED RULE - IF COMMITTEE
DECIDES TO AMEND PRESENT RULE

RULE 703 CIV. BASIS OF OPINION TESTIMONY

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or reviewed by the expert at or before the hearing. If of a type reasonably relied upon by experts in this particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. Such facts or data include, among other things, interrogatory answers of all parties or former parties.*

*(Sentence underlined has been added to present rule.)

# TEXAS RULE OF EVIDENCE 703

RULE 703 - BASES OF OPINION TESTIMONY

Rule 703 of the Texas Rules of Civil Evidence addresses facts and data upon which an expert may base his opinion. It states that the facts or data need not be admissible into evidence. This is the exact provision of the federal rule. The request to look into this rule comes from the fact that Texas Rule of Civil Procedure 168 provides that interrogatories may be used only against the party answering the interrogatories. The federal rule provides that answers to interrogatories "may be used to the extent permitted by the Rules of Evidence." We do not address herein the question of whether or not Texas Rule of Civil Procedure 168 should be changed. We only address the issue of Texas Rule of Civil Evidence 703. Texas Rule of Evidence 705 pertains to disclosure of facts or data underlying the expert's opinion. We see no reason to change Rule 703 or Rule 705. Whether or not a party can read into evidence answers of a non-adverse party should be handled by the committee considering Texas Rule of Civil Procedure 168. We see no need to make reference to "interrogatory answers" in Rule 703 or in Rule 705.

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**(c) Prior Consistent Statements of Witnesses.** A prior statement of a witness which is consistent with his testimony is inadmissible except as provided in Rule 801(e)(1)(B).

(Amended June 25, 1984, eff. Nov. 1, 1984; July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Change by amendment effective November 1, 1984: The sentence "If written, the writing need not be shown to him at that time, but on request the same shall be shown to opposing counsel." has been added to (a) and (b).

Comment to 1988 Amendment: This is former Rule 612; the number has changed and the comma after "interest" in (b) has been deleted. This change supersedes in its entirety the change to this rule made by the Order adopting and amending Texas Rules of Civil Evidence dated November 10, 1986.

### RULE 614. EXCLUSION OF WITNESSES

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person or the spouse of such natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

(Former Rule 613 renumbered and amended July 15, 1987, eff. Jan. 1, 1988.)

## ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

### RULE 701. OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

### RULE 702. TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

### RULE 703. BASES OF OPINION TESTIMONY

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

(Amended April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Comment to 1990 change: This amendment conforms this rule of evidence to the rules of discovery in utilizing the term "reviewed by the expert." See also comment to Rule 166b.

### RULE 704. OPINION ON ULTIMATE ISSUE

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

### RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data.

(Amended June 25, 1984, eff. Nov. 1, 1984.)

Notes and Comments

Change by amendment effective November 1, 1984: The words "disclose on direct examination, or" and "on cross-examination," have been added to the last sentence.

### RULE 706. AUDIT

Despite any other evidence rule to the contrary, verified reports of auditors prepared pursuant to Texas Rule of Civil Procedure 172, whether in the form of summaries, opinions, or otherwise, shall be admitted in evidence when offered by any party whether or not the facts or data in the reports are otherwise admissible and whether or not the reports embrace the ultimate issues to be decided by the trier of fact. Where exceptions to the reports have

RULE 902(10) - Pg 1153-1155

CHANGE SUGGESTED/BY: Judge Michael Schattman

Amend rule to be consistent with Section 18.001 of Civil Practice & Remedies Code.

RECOMMENDED ACTION:

None.

REASON:

No inconsistency. Section 18.001 pertains to affidavit concerning underlying costs and necessary services. In this case the affidavit itself is offered as substantive evidence concerning costs and services. Texas Rule of Civil Evidence 902(10) pertains only to records kept in the regular course of business accompanied by an affidavit. The affidavit itself is not being offered as substantive evidence.

Note: If change is to be made then fourteen days should be changed to thirty days.

PROPOSED RULE - IF COMMITTEE
DECIDES TO AMEND PRESENT RULE

RULE 902 CIV. SELF AUTHENTICATION

Rule 902 ...that such record or records along with such affidavit are filed with the clerk of the court for inclusion with the papers in the cause in which the record or records are sought to be used as evidence at least {fourteen (14)} thirty (30) days prior to the day upon which trial of said cause commences...

RULE 902(10)

It has been recommended that we change this Rule of Civil Evidence because it is in conflict with Section 18.001 of the Texas Civil Practices & Remedies Code. The committee does not feel that a change is necessary. Section 18.001 originally provided for fourteen days. It was amended in 1987 to provide that an affidavit must be filed with the clerk at least thirty days before the day on which the evidence is first presented. We do not see a conflict. First of all, Section 18.001 pertains to affidavits concerning costs and necessity of services. This is where the affidavit itself is offered as substantive evidence concerning costs and services. Texas Rule of Civil Evidence 902(10) pertains only to business records accompanied by an affidavit. This is not where the affidavit itself is being offered as substantive evidence but it is only where an affidavit is given stating that the person is custodian of a particular business record. In the opinion of the committee they deal with two different things. If some change is to be made, it should only be made because the court feels that fourteen days is not sufficient time.

number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) *Public Records or Reports.* Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) *Ancient Documents or Data Compilation.* Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence twenty years or more at the time it is offered.

(9) *Process of System.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) *Methods Provided by Statute or Rule.* Any method of authentication or identification provided by statute or by other rule prescribed by the Supreme Court pursuant to statutory authority.

## RULE 902. SELF-AUTHENTICATION

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) **Domestic Public Documents Under Seal.** A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) **Domestic Public Documents Not Under Seal.** A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) **Foreign Public Documents.** A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification. The final certification shall be dispensed with whenever both the United States and the foreign country in which the official record is located are parties to a treaty or convention that abolishes or displaces such requirement, in which case the record and the attestation shall be certified by the means provided in the treaty or convention.

(4) **Certified Copies of Public Records.** A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2) or (3) of this rule or complying with any statute or other rule prescribed by the Supreme Court pursuant to statutory authority.

(5) **Official Publications.** Books, pamphlets, or other publications purporting to be issued by public authority.

(6) **Newspapers and Periodicals.** Printed materials purporting to be newspapers or periodicals.

(7) **Trade Inscriptions and the Like.** Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) **Acknowledged Documents.** Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) **Commercial Paper and Related Documents.** Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

**(10) Business Records Accompanied by Affidavit.**

a. *Records or Photocopies; Admissibility; Affidavit; Filing.* Any record or set of records or photographically reproduced copies of such records, which would be admissible under Rule 803(6) or (7) shall be admissible in evidence in any court in this state upon the affidavit of the person who would otherwise provide the prerequisites of Rule 803(6) or (7), that such records attached to such affidavit were in fact so kept as required by Rule 803(6) or (7), provided further, that such record or records along with such affidavit are filed with the clerk of the court for inclusion with the papers in the cause in which the record or records are sought to be used as evidence at least fourteen (14) days prior to the day upon which trial of said cause commences, and provided the other parties to said cause are given prompt notice by the party filing same of the filing of such record or records and affidavit, which notice shall identify the name and employer, if any, of the person making the affidavit and such records shall be made available to the counsel for other parties to the action or litigation for inspection and copying. The expense for copying shall be borne by the party, parties or persons who desire copies and not by the party or parties who file the records and serve notice of said filing, in compliance with this rule. Notice shall be deemed to have been promptly given if it is served in the manner contemplated by Rule 21a, Texas Rules of Civil Procedure, fourteen (14) days prior to commencement of trial in said cause.

b. *Form of Affidavit.* A form for the affidavit of such person as shall make such affidavit as is permitted in paragraph (a) above shall be sufficient if it follows this form, though this form shall not be exclusive, and an affidavit which substantially complies with the provisions of this rule shall suffice, to-wit:

No. _____

| | |
|---|---|
| John Doe (Name of Plaintiff) | IN THE _____ COURT IN AND FOR _____ COUNTY, TEXAS |
| v. | |
| John Roe (Name of Defendant) | |

AFFIDAVIT

Before me, the undersigned authority, personally appeared _____, who, being by me duly sworn, deposed as follows:

My name is _____, I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the custodian of the records of _____. Attached hereto are ___ pages of records from _____. These said ___ pages of records are kept by _____ in the regular course of business, and it was the regular course of business of _____ for an employee or representative of _____, with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original.

_____
Affiant

SWORN TO AND SUBSCRIBED before me on the _____ day of _____, 19__.

_____

My commission expires:

_____

_____
Notary Public, State of Texas
Notary's printed name:

**(11) Presumptions Under Statutes or Other Rules.** Any signature, document, or other matter declared by statute or by other rules prescribed by the Supreme Court pursuant to statutory authority to be prima facie genuine or authentic.

(Amended Nov. 10, 1986, eff. Jan. 1, 1988.)

**Notes and Comments**

Comment: Paragraph (10) is based on portions of the affidavit authentication provisions of TEX.REV.CIV. STAT.ANN. art. 3737e. The most general and comprehensive language from those provisions was chosen. It is intended that this method of authentication shall be available for any kind of regularly kept record that satisfies the requirements of Rule 803(6) and (7), including X-rays, hospital records, or any other kind of regularly kept medical record.

## RULE 903. SUBSCRIBING WITNESS' TESTIMONY UNNECESSARY

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

SUBCHAPTER A. DOCUMENTARY EVIDENCE

## § 18.001. Affidavit Concerning Cost and Necessity of Services

(a) This section applies to civil actions only, but not to an action on a sworn account.

(b) Unless a controverting affidavit is filed as provided by this section, an affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary.

(c) The affidavit must:

(1) be taken before an officer with authority to administer oaths;

(2) be made by:

(A) the person who provided the service; or

(B) the person in charge of records showing the service provided and charge made; and

(3) include an itemized statement of the service and charge.

(d) The party offering the affidavit in evidence or the party's attorney must file the affidavit with the clerk of the court and serve a copy of the affidavit on each other party to the case at least 30 days before the day on which evidence is first presented at the trial of the case.

(e) A party intending to controvert a claim reflected by the affidavit must file a counteraffidavit with the clerk of the court and serve a copy of the counteraffidavit on each other party or the party's attorney of record:

(1) not later than:

(A) 30 days after the day he receives a copy of the affidavit; and

(B) at least 14 days before the day on which evidence is first presented at the trial of the case; or

(2) with leave of the court, at any time before the commencement of evidence at trial.

(f) The counteraffidavit must give reasonable notice of the basis on which the party filing it intends at trial to controvert the claim reflected by the initial affidavit and must be taken before a person authorized to administer oaths. The counteraffidavit must be made by a person who is qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 167, § 3.04(a), eff. Sept. 1, 1987.

## § 18.002. Form of Affidavit

(a) An affidavit concerning cost and necessity of services by the person who provided the service is sufficient if it follows the following form:

RULE 514 - CIV (NEW) - Spg 601-608

CHANGE SUGGESTED/BY: David J. Beck

Privilege for self-critical analysis.

RECOMMENDED ACTION:

None (Vote 2 to 1)

REASON:

Current protection is adequate - do not favor creation of new privilege.

PROPOSED RULE - IF THE COMMITTEE DECIDES TO DRAFT NEW RULE 514

RULE 514: PRIVILEGE FOR SELF-CRITICAL ANALYSIS

General rule. Subject to subsection (a), if discovery of a self-critical analysis is sought by any party, the holder, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing the self-critical analysis. A "self-critical analysis" is an internal review of a major policy, practice or procedure, conducted by or on behalf of a business's management, and containing subjective evaluations concerning the policy, practice or procedure.

(a) **Order compelling disclosure.** If a claim of privilege is made on the basis of a self-critical analysis, the party seeking discovery may move the court for an order compelling production of the self-critical analysis.

(1) **Burden of holder of privilege.** The holder of privilege against which discovery is sought shall have the burden of demonstrating (A) that the document satisfies the definition of self-critical analysis set forth above; and (B) that the self-critical analysis concerns matters that directly serve the public interest.

(2) **Burden of party seeking discovery.** The party seeking discovery shall have the burden of demonstrating (A) that the information contained in the report is not of a type whose flow would be curtailed if discovery were allowed; and (B) that the party's need for the information in preparing the case is exceptional and substantially outweighs the public benefit from non-disclosure.

## ALTERNATIVE TO PROPOSED NEW RULE 514 - CIV

Modify present Rule 407 by adding the following to paragraph:

(a) Subsequent remedial measures include self-critical analysis, as that term is defined hereinafter. By the term "self-critical analysis" is meant a subsequent material change in policy, practice or procedure brought about by an internal review of a major policy, practice or procedure, as well as the conclusions and opinions arrived at in such internal review. However, such does not include investigative reports, investigative facts, and matters included in an internal review which are not conclusions or opinions. The discoverability or admissibility of such investigative reports, investigative facts, and matters included in an internal review which are not conclusions or opinions will be governed by other Rules of Civil Procedure or Rules of Evidence.

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December 20, 1993

**Re: Self-Critical Analysis Privilege**

Gilbert I. Low, Esq.
Orgain, Bell & Tucker
470 Orleans Street, Suite 400
Beaumont, Texas 77701

Dear Buddy:

I propose for consideration by your committee a new rule creating a privilege for self-critical analysis. The new privilege, if adopted, would fall within Article V of the Texas Rules of Civil Evidence. Since this is a newly emerging privilege, discussion relating appears only in the caselaw. However, several states have suggested that the creation of such a privilege is a matter for the legislature. *See Lamitie v. Emerson Electric Co.-White Rodgers Division*, 142 A.D.2d 293, 535 N.Y.S.2d 650 (N.Y. App. Div. 1988); *Scroggins v. Uniden Corp. of America*, 506 N.E.2d 83 (Ind. App. 1987); *Southern Bell Tel. and Tel. Co. v. Beard*, 597 So.2d 873 (Fla. App. 1992).

The privilege for self-critical analysis protects an organization's internal investigations and analytical reports from discovery under certain circumstances. The privilege has been discussed and advocated by numerous commentators.[1] The privilege is intended to promote the societal goal of encouraging the candid appraisal of problems as an

[1] Bush, *Stimulating Corporate Self-Regulation -- The Corporate Self-Evaluative Privilege: Paradigmatic Preferentialism or Pragmatic Panacea*, 87 NW. U. L. Rev. 597 (Winter, 1993); Peloso, *The Privilege for Self-Critical Analysis: Protecting the Public by Protecting the Confidentiality of Internal Investigations in the Securities Industry*, 18 Securities Reg. Law J. 227 (Fall 1990); David P. Leonard, *Codifying a Privilege for Self-Critical Analysis*, 25 Harv. J. on Legis. 113 (1988); Note, *The Privilege of Self-Critical Analysis*, 96 Harv. L. Rev. 1083 (1983); Crisman & Mathews, *Limited Waiver of Attorney-Client Privilege and Work-Product Doctrine in Internal Corporate Investigations: An Emerging Corporate Self-Evaluative Privilege*, 21 Am. Crim. L. Rev. 123 (1983); Murphy, *The Self-Evaluative Privilege*, 7 J. Corp. L. 489 (1982).

aid to implementing beneficial change. Without such a privilege, and the resulting assurance of confidentiality, an organization is unlikely to conduct a candid appraisal of its problems because of the following facts:

1. organizations faced with potentially crippling litigation expenses do not want to create damaging "paper trails;" and

2. individuals within an organization, knowing that damaging revelations could lead to reprisals if liability results, are reluctant to come forward and to speak candidly.

Of course, the benefits of the privilege must be weighed against:

1. a general policy favoring the free flow of information; and

2. the discovering party's need for the privileged information.

Acknowledging these competing concerns, the articles and cases which have discussed the privilege have developed four circumstances in which the information contained in "self-critical analyses" may be obtained:

1. where the opponent demonstrates "exceptional need;"

2. where there was no expectation that the information remain confidential;

3. where factual data can be removed from evaluative portions of a report; and

4. for voluntary peer review reports and evaluations in employment discrimination cases.[2]

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[2] Note, *The Privilege of Self-Critical Analysis*, 96 Harv. L. Rev. 1083, 1098-9 (1983); *Hardy v. New York News, Inc.*, 114 F.R.D. 633 (S.D.N.Y. 1987); *Roberts v. National Detroit Corp.*, 87 F.R.d. 30 (E.D. Mich. 1980); *LeMasters v. Christ Hospital*, 791 F. Supp. 188, 190 (S.D. Ohio 1991); *Dowling v. American Hawaii Cruises, Inc.*, 133 F.R.D. 150 (D. Haw. 1990).

I would submit that the privilege of self-critical analysis, when consistently applied within these limitations, will encourage beneficial, uninhibited internal debate within organizations while at the same time allowing litigants reasonable access to relevant information.

Enclosed is a draft of a new rule creating a privilege for self-critical analysis.

Very truly yours,

David J. Beck

DJB/ig

cc: Luther H. Soules, III, Esq.

## Privilege for Self-Critical Analysis

*General rule.* Subject to subsection (a), if discovery of a self-critical analysis is sought by any party, the holder, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing the self-critical analysis. A "self-critical analysis" is an internal review of a major policy, practice or procedure, conducted by or on behalf of a business's management, and containing subjective evaluations concerning the policy, practice or procedure.

(a) *Order compelling disclosure.* If a claim of privilege is made on the basis of a self-critical analysis, the party seeking discovery may move the court for an order compelling production of the self-critical analysis.

(1) *Burden of holder of privilege.* The holder of the privilege against which discovery is sought shall have the burden of demonstrating (A) that the document satisfies the definition of self-critical analysis set forth above; and (B) that the self-critical analysis concerns matters that directly serve the public interest.

(2) *Burden of party seeking discovery.* The party seeking discovery shall have the burden of demonstrating (A) that the information contained in the report is not of a type whose flow would be curtailed if discovery were allowed; and (B) that the party's need for the information in preparing the case is exceptional and substantially outweighs the public benefit from non-disclosure.

With respect to David Beck's suggestion, I would point out that there already are several layers of protection to the corporate decision-making/self-analyzing process. Under current law, the investigation of the accident in question, including those parts of the accident investigation which include "self-critical analysis" are shielded from discovery absent an extraordinary showing of need on the plaintiff. Additionally, any such self-critical analysis material that is directed to or channeled through corporate counsel are protected from discovery by the attorney-client privilege. Moreover, all attorney work product materials, not only for the case being litigated, but also for all other similar cases involving the same company, is shielded from discovery. Finally, all "party communications" among employees, representatives, and agents of the company relating to the facts resulting in litigation are protected from discovery.

If, in addition to all these barriers to discovery, we also create a privilege for "self-critical analysis," even the relatively few crumbs of information which remain unprivileged under current law will be swept under the ever-expanding rug of corporate secrecy.

Much of my law practice is in the area of medical malpractice, where practically everything that happens in the hospital is protected by a pervasive "hospital committee privilege." The result is that doctors and hospital employees are able -- and, sadly, all to willing -- to lie with impunity because the truth is shrouded behind the cloak of secrecy that necessarily results from so broad a privilege. There, as in the case of the privilege that David Beck proposes, the justification is that critical analysis will not take place unless such secrecy is mandated by law. The result is that perjury and deception become the order of the day because the parties involved have the comfort of knowing that the truth is so heavily shielded from the plaintiff, the court, and the jury that it will never see the light of day. I hope that our subcommittee and the full Advisory Committee will not be a party to an extension of these principles into other areas of law.

Sincerely,

TOMMY JACKS

TJ/db
C04DB.886

RULE 503(a)(2) - CIV - Spg 609-623

CHANGE SUGGESTED/BY: Mark Sales

Modify rule pursuant to discussion in National Tank Co. v. Brotherton.

RECOMMENDATION ACTION:

None.

REASON:

Not to expand existing privileges. If the Supreme Court had thought a change was necessary in National Tank they could have put language in suggesting that change should be made.

PROPOSED RULE - IF THE COMMITTEE DECIDES TO DRAFT NEW RULE 503(a)(2)

RULE 503(a)(2)

(2) A representative of a client other than a legal entity is one having authority either to obtain professional legal services or to act on advice rendered pursuant thereto on behalf of the client. If the client is a legal entity other than a natural person, a representative of such client is (A) a partner, officer, director, or employee having authority either to obtain professional legal services or to act on advice rendered pursuant thereto on behalf of the entity, or (B) an agent or employee of the entity who has been requested by such partner, officer, director, or such superior employee to communicate with a lawyer on a subject matter within the scope of the employee's or agent's duties in connection with securing legal advice by the entity. The term agent as used in this rule does not include an independent contractor.

ALTERNATE

(2) A representative of a client other than a corporate client is one having authority either to obtain professional legal services or to act on advice rendered pursuant thereto, on behalf of the client. A representative of a corporate client is a corporate officer in the upper echelon of corporate management, a corporate officer or employee having express or implied authority either to obtain professional legal services or to act on advice rendered pursuant thereto on behalf of the corporation, or an agent or employee of the corporation who has been requested or directed by such corporate officer or such superior employee to communicate with a lawyer in connection with the securing of legal advice by the corporation.

by such manufacturer to purchasers thereof is admissible against the manufacturer on the issue of existence of the defect to the extent that it is relevant.

### RULE 408. COMPROMISE AND OFFERS TO COMPROMISE

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for, or invalidity of, the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice or interest of a witness or a party, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

### RULE 409. PAYMENT OF MEDICAL AND SIMILAR EXPENSES

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

### RULE 410. INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS AND RELATED STATEMENTS

Except as otherwise provided in this rule, evidence of the following is not admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting attorney which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it.

### RULE 411. LIABILITY INSURANCE

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another issue, such as proof of agency, ownership, or control, if disputed, or bias or prejudice of a witness.

## ARTICLE V. PRIVILEGES

### RULE 501. PRIVILEGES RECOGNIZED ONLY AS PROVIDED

Except as otherwise provided by Constitution, by statute, by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority, no person has a privilege to:

(1) Refuse to be a witness; or

(2) Refuse to disclose any matter; or

(3) Refuse to produce any object or writing; or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

### RULE 502. REQUIRED REPORTS PRIVILEGED BY STATUTE

A person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so provides. A public officer or agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides. No privilege exists under this rule in actions involving perjury, false statements, fraud in the return or report, or other failure to comply with the law in question.

### RULE 503. LAWYER–CLIENT PRIVILEGE

(a) **Definitions.** As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2) A representative of the client is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.

(3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) A "representative of the lawyer" is: (i) one employed by the lawyer to assist the lawyer in the rendition of professional legal services; or (ii) an accountant who is reasonably necessary for the lawyer's rendition of professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

**(b) General Rule of Privilege.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself or his representative and his lawyer or his lawyer's representative, (2) between his lawyer and the lawyer's representative, (3) by him or his representative or his lawyer or a representative of the lawyer to a lawyer, or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

**(c) Who May Claim the Privilege.** The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

**(d) Exceptions.** There is no privilege under this rule:

(1) *Furtherance of Crime or Fraud.* If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) *Claimants Through Same Deceased Client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by *inter vivos* transactions;

(3) *Breach of Duty by a Lawyer or Client.* As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer;

(4) *Document Attested by a Lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(5) *Joint Clients.* As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

(Amended June 25, 1984, eff. Nov. 1, 1984.)

**Notes and Comments**

Comment: This rule governs only the lawyer/client privilege. It does not restrict the scope of the work product doctrine. See Tex.R.Civ.P. 166b. The language of former paragraph (d) was deleted because it was deemed unnecessary. This deletion was not intended to change the common law rule that communications privileged under this rule do not lose their privileged status by reason of the termination of the lawyer/client relationship.

## RULE 504. HUSBAND–WIFE COMMUNICATION PRIVILEGE

**(a) Definition.** A communication is confidential if it is made privately by any person to his spouse and it is not intended for disclosure to any other person.

**(b) General Rule of Privilege.** A person, whether or not a party, or the guardian or representative of an incompetent or deceased person, has a privilege during their marriage and afterwards to refuse to disclose and to prevent another from disclosing a confidential communication made to his spouse while they were married.

**(c) Who May Claim the Privilege.** The privilege may be claimed by the person or his guardian or representative, or by the spouse on his behalf. The authority of the spouse to do so is presumed.

**(d) Exceptions.** There is no privilege under this rule:

(1) *Furtherance of Crime or Fraud.* If the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or fraud.

(2) *Proceeding Between Spouses.* In (A) a proceeding brought by or on behalf of one spouse against the other spouse, or (B) a proceeding between a surviving spouse and a person who claims through the deceased spouse, regardless of whether the claim is by testate or intestate succession or by *inter vivos* transaction.

(3) *Commitment or Similar Proceeding.* In a proceeding to commit either spouse or otherwise to place him or his property, or both, under the control of another because of his alleged mental or physical condition.

RULE 509(d) and 510(d) - CIV - Spg 624-626

CHANGE SUGGESTED/BY:

Amend 509(d) and 510(d) to be consistent with Section 5.08, Article 4495(b).

RECOMMENDED ACTION:

Amend 510(d) so exceptions apply also to administrative proceedings.

REASON:

Consistency.

RULE 510(d) - CIV

RULE 510(d). CONFIDENTIALITY OF MENTAL HEALTH INFORMATION

Exceptions. Exceptions to {the} confidentiality or privilege in court or administrative proceedings exist:

RULE 412 - CIV - SSp0698-708

CHANGE SUGGESTED/BY: Debra Danburg

New rule pertaining to victim's past sexual behavior or alleged sexual predisposition patterned after federal rule.

RECOMMENDED ACTION:

No action be taken.

REASON:

Present rules pertaining to whether relevance outweighs prejudice is sufficient.

Note: There is presently Crim Rule 412.

PROPOSED RULE - IF THE COMMITTEE DECIDES TO DRAFT NEW RULE 412

RULE 412. SEX OFFENSE CASES; RELEVANCE OF ALLEGED VICTIM'S PAST SEXUAL BEHAVIOR OR ALLEGED SEXUAL PREDISPOSITION

(a) Evidence generally inadmissible. The following evidence is not admissible in any civil proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that an alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions.

Evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) Procedure to determine admissibility.

(1) A party intending to offer evidence under subsection (b) must:

(A) File a written motion at least fourteen days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) Serve the motion on all parties and notify the alleged victim or,

when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and the parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

Note: The above is verbatim from the federal rule except the exception that pertains only to criminal cases is deleted and one other reference to criminal cases is deleted.

ADVISORY COMMITTEE NOTES

1987 Amendment

The amendment is technical. No substantive change is intended.

LAW REVIEW COMMENTARIES

Admissibility of insurance policy limits. Comment, 45 La.L.Rev. 1299 (1985).

NOTES OF DECISIONS

New trial 15

7. —— Miscellaneous purposes

Client's receipt of proceeds under fidelity bond for employee's embezzlement could not be admitted in client's action against its accounting firm for accounting malpractice and breach of contract to demonstrate, as exception to rule against admission of evidence of insurance coverage, whether client maintained adequate internal controls or whether client looked to accounting firm to protect it from embezzlement. Garnac Grain Co., Inc. v. Blackley, C.A. 8 (Mo.) 1991, 932 F.2d 1563.

Evidence of state's liability insurance was inadmissible in personal injury and wrongful death action against state and others resulting from two separate motorcycle accidents, despite contention that liability insurance was admissible to eliminate any bias of jurors as taxpayers of state. Higgins v. Hicks Co., C.A.8 (S.D.) 1985, 756 F.2d 681.

In wrongful death action brought against board of county road commissioners on allegation that accident resulting in motorist's death was caused by county's failure to properly mark intersection, should nature of county's proofs have been such that jury might have inferred its inability to pay a judgment, evidence that it had liability insurance may have become admissible as exception to general prohibition of insurance evidence. Bernier v. Board of County Road Com'rs for Ionia County, D.C.Mich.1983, 581 F.Supp. 71.

Evidence of existence of carrier's liability insurance was admissible to establish employer-employee relationship between carrier and driver for purposes of personal injury action arising from automobile accident that was alleged result of driver's negligence, where trial court instructed jury that it could consider evidence of insurance only on employment issue. Clarke v. Vandermeer, Wyo.1987, 740 P.2d 921.

14. Harmless or prejudicial error

Error in admission of evidence of limits of alleged tort-feasor's insurance coverage was not harmless even as to issue of tort-feasor's liability for damages arising out of an automobile accident. Reed v. General Motors Corp., C.A.5 (La.) 1965, 773 F.2d 660.

15. New trial

Former officers and directors of defunct bank were not entitled to new trial of Federal Deposit Insurance Corporation (FDIC) alleging breach of fiduciary duties, breach of contract, and negligence in handling of loan files based on any mention of insurance at trial; any reference to insurance was insurance for the bank, not officers and directors, and former officers and directors were those not prejudiced. F.D.I.C. v. Burrell, S.D.Iowa 1991, 779 F.Supp. 998.

Not every mention of the word "insurance" or reference to the fact that defendant carries insurance requires the granting of motion for new trial. Devillier v. Penrod Drilling Co., E.D.Tex. 1987, 115 F.R.D. 32.

## Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition

(a) Evidence generally inadmissible.—The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions.—

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) Procedure to determine admissibility.—

(1) A party intending to offer evidence under subdivision (b) must—

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(As amended Nov. 18, 1988, Pub.L. 100–690, Title VII, § 7046(a), 102 Stat. 4400; Apr. 29, 1994, eff. Dec. 1, 1994; Sept. 13, 1994, Pub.L. 103–322, Title IV, § 40141(b), 108 Stat. 1919.)

## HISTORICAL AND STATUTORY NOTES

### 1988 Amendment

Heading. Pub.L. 100–690, § 7046(a)(1), substituted "Sex Offense" for "Rape".

Subd. (a). Pub.L. 100–690, § 7046(a)(2), (3), substituted "an offense under chapter 109A of title 18, United States Code" and "offense" for "rape or of assault with intent to commit rape" and "rape or assault", respectively.

Subd. (b). Pub.L. 100–690, § 7046(a)(2), substituted "an offense under chapter 109A of title 18, United States Code" for "rape or of assault with intent to commit rape".

Subd. (b)(2)(B). Pub.L. 100–690, § 7046(a)(5), substituted "such offense" for "rape or assault".

Subd. (c)(1). Pub.L. 100–690, § 7046(a)(4), substituted "an offense under chapter 109A of title 18, United States Code" for "rape or assault with intent to commit rape".

Subd. (d). Pub.L. 100–690, § 7046(a)(4), substituted "an offense under chapter 109A of title 18, United States Code" for "rape or assault with intent to commit rape".

### Legislative History

For legislative history and purpose of Pub.L. 100–690, see 1988 U.S. Code Cong. and Adm. News, p. 5937.

## ADVISORY COMMITTEE NOTES

### 1994 Amendments

Rule 412 has been revised to diminish some of the confusion engendered by the original rule and to expand the protection afforded alleged victims of sexual misconduct. Rule 412 applies to both civil and criminal proceedings. The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders

Rule 412 seeks to achieve these objectives by barring evidence relating to the alleged victim's sexual behavior or alleged sexual predisposition, whether offered as substantive evidence of for impeachment, except in designated circumstance in which the probative value of the evidence significantly outweighs possible harm to the victim.

The revised rule applies in all cases involving sexual misconduct without regard to whether the alleged victim or person accused is a party to the litigation. Rule 412 extends to "pattern" witnesses in both criminal and civil cases whose testimony about other instances of sexual misconduct by the person accused is otherwise admissible. When the case does not involve alleged sexual misconduct, evidence relating to a third-party witness' alleged sexual activities is not within the ambit of Rule 412. The witness will, however, be protected by other rules such as Rules 404 and 608, as well as Rule 403.

The terminology "alleged victim" is used because there will frequently be a factual dispute as to whether sexual misconduct occurred. It does not connote any requirement that the misconduct be alleged in the pleadings. Rule 412 does not, however, apply unless the person against whom the evidence is offered can reasonably be characterized as a "victim of alleged sexual misconduct." When this is not the case, as for instance in a defamation action involving statements concerning sexual misconduct in which the evidence is offered to show that the alleged defamatory statements were true or did not damage the plaintiff's reputation, neither Rule 404 nor this rule will operate to bar the evidence; Rule 401 and 403 will continue to control. Rule 412 will, however, apply in a Title VII action in which the plaintiff has alleged sexual harassment.

prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice or interest of a witness or a party, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

## RULE 409. PAYMENT OF MEDICAL AND SIMILAR EXPENSES

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

## RULE 410. INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS AND RELATED STATEMENTS

Except as otherwise provided in this rule, evidence of the following is not admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty or nolo contendere which was later withdrawn;

(2) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding a plea of guilty or nolo contendere which was later withdrawn; or

(3) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or a plea of nolo contendere or which result in a plea of guilty or a plea of nolo contendere later withdrawn. However, such a statement is admissible in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it.

## RULE 411. LIABILITY INSURANCE

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently. This rule does not require the exclusion of evidence of insurance against liability when offered for another issue, such as proof of agency, ownership, or control, if disputed, or bias or prejudice of a witness.

## RULE 412. EVIDENCE OF PREVIOUS SEXUAL CONDUCT

(a) In a prosecution for sexual assault or aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, reputation or opinion evidence of the past sexual behavior of an alleged victim of such crime is not admissible.

(b) In a prosecution for sexual assault or aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, evidence of specific instances of an alleged victim's past sexual behavior is also not admissible, unless:

(1) such evidence is admitted in accordance with paragraphs (c) and (d) of this rule;

(2) it is evidence (A) that is necessary to rebut or explain scientific or medical evidence offered by the state; (B) of past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior which is the basis of the offense charged; (C) that relates to the motive or bias of the alleged victim; (D) is admissible under Rule 609; or (E) that is constitutionally required to be admitted; and

(3) its probative value outweighs the danger of unfair prejudice.

(c) If the defendant proposes to introduce any documentary evidence or to ask any question, either by direct examination or cross-examination of any witness, concerning specific instances of the alleged victim's past sexual behavior, the defendant must inform the court out of the hearing of the jury prior to introducing any such evidence or asking any such question. After this notice, the court shall conduct an in camera hearing, recorded by the court reporter, to determine whether the proposed evidence is admissible under paragraph (b) of this rule. The court shall determine what evidence is admissible and shall accordingly limit the questioning. The defendant shall not go outside these limits nor refer to any evidence ruled inadmissible in camera without prior approval of the court without the presence of the jury.

(d) The court shall seal the record of the in camera hearing required in paragraph (c) of this rule for delivery to the appellate court in the event of an appeal.

(e) [*Publisher's Note: This paragraph was disapproved by the Texas Legislature, effective September 1, 1994, in Acts 1993, 73rd Leg., ch. 900, Section 1.17, under the terms of Section 22.109(b) of the Government Code.*] This rule does not limit the right of the accused to produce evidence of promiscuous sexual conduct of a child 14 years old or older as a defense to sexual assault, aggravated sexual assault, indecency with a child or an attempt to commit any of the foregoing crimes. If such evidence is admitted, the

court shall instruct the jury as to the purpose of the evidence and as to its limited use.

(Rule 412(e) disapproved by the Texas Legislature, eff. Sept. 1, 1994, in Acts 1993, 73rd Leg., ch. 900, Section 1.17, under the terms of Section 22.109(b) of the Government Code.)

# ARTICLE V. PRIVILEGES

## RULE 501. PRIVILEGES RECOGNIZED ONLY AS PROVIDED

Except as otherwise provided by these rules or by Constitution, statute, or court rule prescribed pursuant to statutory authority, no person has a privilege to:

(1) Refuse to be a witness; or

(2) Refuse to disclose any matter; or

(3) Refuse to produce any object or writing; or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

## RULE 502. REQUIRED REPORTS PRIVILEGED BY STATUTE

A person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so provides. A public officer or agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides. No privilege exists under this rule in actions involving perjury, false statements, fraud in the return or report, or other failure to comply with the law in question.

## RULE 503. LAWYER–CLIENT PRIVILEGE

(a) **Definitions.** As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2) A representative of the client is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.

(3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) A "representative of the lawyer" is: (i) one employed by the lawyer to assist the lawyer in the rendition of professional legal services; (ii) an accountant who is reasonably necessary for the lawyer's rendition of professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) **General Rule of Privilege.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client and made: (1) between him or his representative and his lawyer or his lawyer's representative, (2) between his lawyer and the lawyer's representative, (3) by him or his representative or his lawyer or a representative of the lawyer to a lawyer, or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client. A client has a privilege to prevent the lawyer or the lawyer's representative from disclosing any other fact which came to the knowledge of the lawyer or the lawyer's representative by reason of the attorney-client relationship.

(c) **Who May Claim the Privilege.** The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) **Exceptions.** There is no privilege under this rule:

(1) *Furtherance of Crime or Fraud.* If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) *Claimants Through Same Deceased Client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

RULE 702 - CIV and CRIM - SSp0709-711

CHANGE SUGGESTED/BY: Michael Paul Graham

Limit testimony to that based upon well-founded methodology.

RECOMMENDED ACTION:

None.

REASON:

duPont v. Robinson sets forth standard.

RULE 702. TESTIMONY OF EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. However, such testimony must be relevant and based upon a reliable foundation. The trial court shall make the threshold determination of admissibility, considering the following factors, as well as other factors relevant thereto, focusing on the underlying principles and methodology: (1) The extent to which the theory has been or can be tested; (2) The extent to which the technique relies upon the subjective interpretation of the expert; (3) Whether the theory has been subjected to peer review and/or publication; (4) The techniques potential rate of error; (5) Whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; (6) The non-judicial uses which have been made of the theory or technique.

After determining that the testimony is relevant and reliable, the court must then determine whether to exclude the testimony considering the following factors, as well as other factors relevant thereto: (1) Whether the probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or potential for misleading the jury; (2) Considerations of undue delay; (3) Needless presentation of cumulative evidence.

The decision whether to admit this evidence rests within the discretion of the trial court. Review will be governed by the abuse of discretion standard.

RULE 182 - CIV - (MATERIAL ATTACHED)

CHANGE SUGGESTED/BY: Judge Kevin R. Madison

Procedure for using when firearms and ammunition are evidence in a civil case.

RECOMMENDED ACTION:

None.

REASON:

No specific problems have developed and courts can deal with this on an individual basis.

## RULE 182

NOTE: The Rules of Evidence generally deal with what is admissible and what is not admissible. This pertains to a procedure or really pertains to precautions or safety.

KEVIN R. MADISON
Cedar Park Presiding Judge
VICTORIA BANK & TRUST BUILDING
912 BASTROP HIGHWAY, SUITE 205
AUSTIN, TEXAS 78741

(512) 389-2889
FAX (512) 389-2897

September 14, 1995

Mr. Lee Parsley
The Supreme Court of Texas
201 West 14th Street
Austin, TX 78711

Re: Rule for Firearms As Evidence in Courtrooms

Dear Mr. Parsley,

I have taken my hand at drafting a rule of procedure for the handling of firearms in court by civil litigants. I thought Section 9 (Evidence & Depositions) of The Texas Rules of Civil Procedure would be an appropriate placement for this rule and I used Rule #182, since it is an available number. This civil rule should also have an identical provision in the Texas Rules of Criminal Procedure.

Rule 182 Firearms As Evidence

(a) This rule shall apply to all firearms brought into the court room to be offered or received into evidence or displayed or utilized in any manner in court proceedings. Any attorney, including a State's attorney, intending to offer a firearm into evidence or to be displayed or utilized in any manner in court proceedings shall inform the trial judge, prior to the commencement of the hearing or trial. The court shall cause the court bailiff, any peace officer, or any other competent and qualified person to inspect the firearm, immediately prior to the offeror establishing foundation for its admissibility, and shall state to the jury, if one is impaneled, that the firearm is in fact unloaded.

(b) Firearm and ammunition brought into the court room to be offered into evidence will be given to and left in the custody of the court clerk or bailiff at all times other than when being handled by State's attorneys, the litigants' attorneys, or witnesses.

(c) No firearm will be displayed to a jury before the inspection is completed or the foundation established for its admission into evidence.

(d) Firearm and ammunition brought into the court room to be offered into evidence will be unloaded in the "open" position with clip removed or cylinder out and chamber open.

(e) No firearm will be pointed at the jury, judge, court personnel, attorneys, or spectators. The barrel of the firearm will be pointed either at the ceiling or floor.

(f) During any recess of the court, firearms shall be returned to the court clerk or the bailiff, who shall maintain direct supervision of said firearm or shall secure said firearm in a locked container or cabinet.

(g) Firearms and ammunition will never be given to a witness, litigant, or the jury at the same time. If a firearm is to be sent into the jury room and ammunition for it has also been admitted into evidence, the jury will be allowed to examine them but the firearm and ammunition will never be sent into the jury room at the same time.

If you have any questions, please contact me. I hope that this proposed rule can be adopted before Texas experiences a tragedy caused by the discharge of a loaded weapon in the court room or jury room. I hope to hear from you as to whether this proposed rule will be adopted. I remain . . .

Yours very truly,

Kevin R. Madison

Kevin R. Madison
Presiding Judge
City of Cedar Park

KRM:jv
cc: Hon. Tom Phillips

RULE 504 - CRIM - SSp0712-713

CHANGE SUGGESTED/BY: Fred Maddox (non-lawyer)

Do away with privilege not to be called as a witness against spouse with regard to crime threatened or committed against spouse.

RECOMMENDED ACTION:

None.

REASON:

As rule is drawn spouse has option of either claiming the privilege or waiving the privilege and testifying - favor present option.

PROPOSED RULE - IF COMMITTEE
DECIDES TO AMEND PRESENT RULE

RULE 504. HUSBAND-WIFE PRIVILEGE

(b) Exceptions

There is no privilege under this rule (1) in proceedings in which an accused is charged with a crime against the person or any minor child or any member of the household of either spouse; or (2) as to matters occurring prior to the marriage; or (3) in a proceeding in which an accused is charged with a crime against his or her spouse.

Note: The above is verbatim with the present rule except the third exception has been added.

(3) *Breach of Duty by a Lawyer or Client.* As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer;

(4) *Document Attested by a Lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(5) *Joint Clients.* As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

Notes and Comments

Comment: This rule governs only the lawyer/client privilege. It does not restrict the scope of the work product doctrine.

## RULE 504. HUSBAND-WIFE PRIVILEGES

**(1) Confidential Communication Privilege.**

(a) *Definition.* A communication is confidential if it is made privately by any person to his spouse and it is not intended for disclosure to any other person.

(b) *General Rule of Privilege.* A person, whether or not a party, or the guardian or representative of an incompetent or deceased person, has a privilege during their marriage and afterwards to refuse to disclose and to prevent another from disclosing a confidential communication made to his spouse while they were married.

(c) *Who May Claim the Privilege.* The privilege may be claimed by the person or his guardian or representative, or by the spouse on his behalf. The authority of the spouse to do so is presumed.

(d) *Exceptions.* There is no privilege under this rule:

(1) Furtherance of Crime or Fraud. If the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or fraud.

(2) In a proceeding in which an accused is charged with a crime against the person of any minor child or any member of the household of either spouse, except in a proceeding where the accused is charged with a crime committed during the marriage against the spouse.

**(2) Privilege Not to Be Called as a Witness Against Spouse.**

(a) *General Rule of Privilege.* The spouse of the accused has a privilege not to be called as a witness for the state. This rule does not prohibit the spouse from testifying voluntarily for the state, even over objection by the accused. A spouse who testifies on behalf of an accused is subject to cross-examination as provided in Rule 610(b). Failure by an accused to call his spouse as a witness, where other evidence indicates that the spouse could testify to relevant matters, is a proper subject of comment by counsel.

(b) *Exceptions.* Except in a proceeding where the accused is charged with a crime committed during the marriage against the spouse, there is no privilege under this rule (1) in a proceeding in which an accused is charged with a crime against the person of any minor child or any member of the household of either spouse; or (2) as to matters occurring prior to the marriage.

## RULE 505. COMMUNICATIONS TO CLERGYMEN

**(a) Definitions.** As used in this rule:

(1) A "clergyman" is a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization or an individual reasonably believed so to be by the person consulting him.

(2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

**(b) General Rule of Privilege.** A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.

**(c) Who May Claim the Privilege.** The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The person who was the clergyman at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

## RULE 506. POLITICAL VOTE

Every person has a privilege to refuse to disclose the tenor of his vote at a political election conducted by secret ballot unless the vote was cast illegally.

## RULE 507. TRADE SECRETS

A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

03-14-96
4543.001
cc: LHS
[redacted]
Vamf

CIVIL DISTRICT COURTS ADMINISTRATION

BEXAR COUNTY COURTHOUSE
100 DOLOROSA, ROOM 305
SAN ANTONIO, TX. 78205
TELEPHONE: (210) 220-2300
FAX: (210) 220-2843

Date: 3-14-96 Time: _____

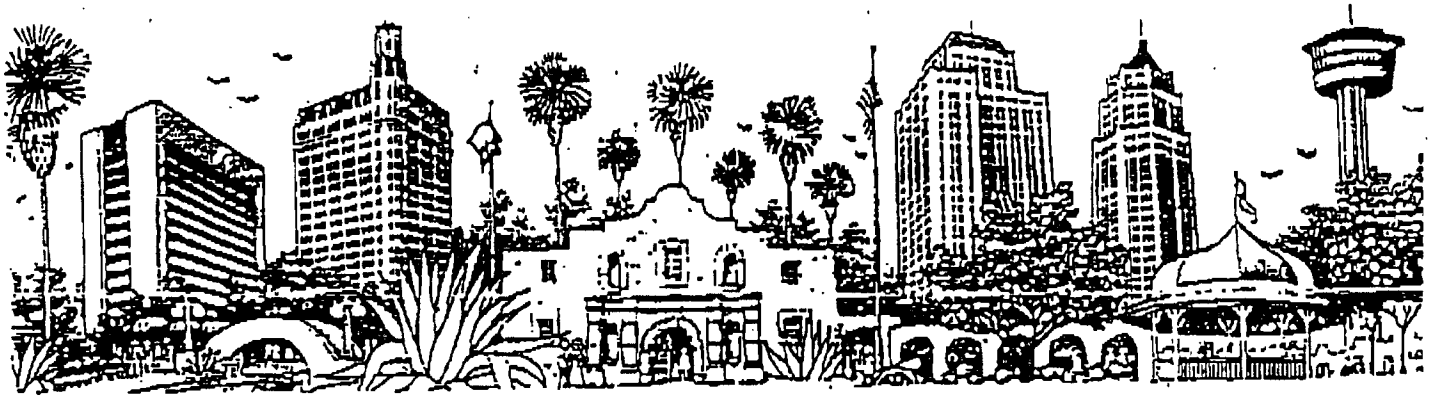
To: Luke Soules

Attention: _____

From: Judge David Peeples

# of Pages: 3 (Including this cover page)

Messages: One of these two memos summarizes SCAC action on Rules 216-295 so far. The other sets out what we need to do in Austin.



# MEMORANDUM

FROM: David Peeples (for the subcommittee on rules 216-295)

TO: Luke Soules

DATE: March 13, 1996

RE: Action to be taken at March SCAC meeting

1. To be discussed and voted on at March meeting

- rule 292 (court's right to excuse juror who is severely ill or whose near relative dies or is severely ill)--Pam Baron has a handout
- rule 216 (delete "on the nonjury docket")

2. For brief discussion and guidance

- rule 226a (instruction concerning felony record of panelists)
- rule 237a (right to make discovery objections after remand from federal court)
- rule 239 (whether to conform rules of procedure to Lawyer's Creed, which says no defaults when you know opposing counsel's identity)
- rule 249 (need to be consistent throughout in spelling of "nonjury" and "non-jury")

3. Still drafting

- rules 221-225, 227-235 (reorganizing rules on peremptory challenges and challenges for cause; drafting Batson procedure)
- Subcommittee is reviewing rules and statutes concerning randomness in selection of jury panels
- Subcommittee is reviewing recent jury reforms in other states concerning right of jurors to take notes, ask questions, etc.

# MEMORANDUM

FROM: David Peeples (for the subcommittee on rules 216-295)

TO: Luke Soules

DATE: March 13, 1996

RE: Summary of action already taken by the SCAC on rules 216-295

1. Revisions previously approved by committee

- rule 226 (oath to jury panel)
- rule 226a (instructions to jury panel)
- rule 236 (oath to jury)
- rules 271-279 (preparation of jury charge)

2. Actions taken at January 1996 meeting

- voted 17-2 to retain rule 223 right to jury shuffle.
- voted 17-0 to delete rule 230, which prevented questioning of jury panel about felonies.
- voted 13-5 to add an instruction to rule 226a to the effect that any juror who has a felony conviction should talk to the bailiff and ask to speak with the judge at the next break. (Subcommittee wants to reconsider this vote.)
- voted unanimously not to change rule 241 and unanimously to delete the phrase "a writ of inquiry awarded" from rule 243.
- voted unanimously not to change rule 257 at this time.
- voted unanimously to modify rule 292 to make clear that when alternates replace any of the original jurors they can vote and help make up the majority just as an original juror can. (Other suggested changes to rule 292 will be presented by Pam Baron on Friday.)

# Rule 292. Verdict by Portion of Original Jury

Existing Rule:

A verdict may be rendered in any cause by the concurrence, as to each and all answers made, of the same ten members of an original jury of twelve or of the same five members of an original jury of six. However, where as many as three jurors die or be disabled from sitting and there are only nine jurors remaining of an original jury of twelve, those remaining may render and return a verdict. If less than the original twelve or six jurors render a verdict, the verdict must be signed by each juror concurring therein.

Discussion:

Revisions to Rule 292 were approved at the January meeting, except for a proposal to add a final sentence to the rule, reading "The trial court may properly determine that a juror is disabled because of the death or severe illness of a near relative." The discussion focused on whether the rule should also include the illness of a juror as a disability. While the general consensus was that a juror's illness should constitute a disability, there was a disagreement as to how severe the illness must be to excuse the juror yet let the trial go forward. The following proposed revision requires that the illness be severe, leaving it to the discretion of the trial court to determine what constitutes a severe illness. The subcommittee believes that deleting the word "severe" would afford the trial court too much discretion and would permit excuses of jurors for headaches, allergies, sniffles, and other minor inconveniences. These types of illnesses should not override the rights of litigants to pick the jurors who will hear their cases.

Proposed last sentence:

The trial court may properly determine that a juror is disabled because of the severe illness of the juror or the death or severe illness of a near relative of the juror.

Revised Rule:

Rule 292. Verdict by Portion of Jury.

A verdict may be rendered in any cause by the concurrence, as to each and all answers made, of the same ten members of a jury of twelve, including any alternate jurors sworn as replacements, or of the same five members of a jury of six, including any alternate jurors sworn as replacements. However, where as many as three jurors die or be disabled or disqualified from sitting and there are only nine jurors remaining of a jury of twelve, including any alternate jurors sworn as replacements, those remaining may render and return a verdict. If fewer than twelve or six jurors render a verdict, the verdict must be signed by each juror concurring therein. The trial court may properly determine that a juror is disabled because of the severe illness of the juror or the death or severe illness of a near relative of the juror.

## 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 |

| | | | | |
|---|---|---|---|---|
| 215 | Pg 682-683 | Suggests amending the discovery rules so that identification of a person is someone with knowledge 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 situations/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 |

CLEAN 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, 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).*

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 <u>just,</u> 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).*

# REDLINE VERSION OF RULES 296-331
# PENDING ACTION BY SUPREME COURT ADVISORY COMMITTEE

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

(a) **Entitlement.** In any case: (a) tried ~~in~~ to the ~~district or county~~ court without a jury,; (b) tried to a jury in which one or more ultimate issues are tried to the court by agreement; or (c) tried to a jury in which one or more ultimate issues must be tried to the court, a ~~any~~ party may request the judge ~~court~~ 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 ultimate issue tried to the judge unless the ground to which the issues is referable has been waived or an omitted element is deemed found as provided in Rule 279. Such request shall be entitled "Request for Findings of Fact and Conclusions of Law" and shall be filed within twenty days after the final 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. A request for findings of fact and conclusions of law is not proper, and has no effect, with respect to an appeal of a summary judgment. ~~The party making the request shall serve it on all other parties in accordance with Rule 21a.~~

(b) **Premature Filing.** A request for findings of fact and conclusions of law is effective although prematurely filed. A premature request for findings of fact and conclusions of law is deemed to have been filed on the date of, but subsequent to, the signing of the judgment.

Source: ¶(a), Rule 296; ¶(b), Rule 306c.

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

* * *

(c) **Form.** The judge shall, whenever feasible, state the findings of fact in broad form on the ultimate issues of all independent grounds of recovery or defense raised by the pleadings and evidence. The judge should make conclusions of law on each independent ground of recovery or defense necessary to support the judgment, but the failure to do so shall not be error. Each finding of fact on an ultimate issue of an independent ground or lefense and each conclusion of law should be stated by a separate numbered paragraph.

Source: ¶¶ (a), (b), Rule 297; ¶(c) new.

## RULE 299. OMITTED GROUNDS AND PRESUMED FINDINGS

* * *

(b) **Presumed Findings.** ~~w~~When ~~one or more~~ an elements ~~thereof~~ of a ground of recovery or defense ~~have~~ has been found by the trial ~~court~~ judge, an omitted unrequested elements of the ground to which the element found is necessarily referable, when supported by factually sufficient evidence, will be supplied by presumption in support of the judgment. ~~Refusal of the court to make a finding requested shall be reviewable on appeal.~~ No finding, however, shall be presumed (i) on an omitted element that has been requested and the request has been denied, or (ii) by any failure of the judge to make additional findings.

Source: Rule 299.

## RULE 300. JUDGMENTS, DECREES AND ORDERS

(a) **Rendition, Signing and Filing.** A judgment is rendered when the judge announces it in open court, or if it is not so announced, when it is signed by the judge. A judgment orally announced shall be promptly reduced to writing and signed by the judge. A signed judgment shall be promptly filed with the clerk of the court.

Source: New rule; codification of existing law.

(b) **Final Judgment.**

(1) **Definition.** A final judgment for purposes of post-trial and appellate procedure in the same case is a signed order disposing of all parties and claims, either expressly or by implication.

(2) **Disposition by Implication.** A claim is disposed of by implication if a judgment is rendered on the merits after a conventional trial and no severance or separate trial of the claim has been ordered.

*Alternative 1*

(3) **Separate Orders, Conflicts.** When different parties or separate claims are disposed of by separate orders, no one of which by its terms disposes of all parties and all claims, the signed order that disposes of the last remaining party or claim is the final judgment. An earlier interlocutory order disposing of a party or claim is included by implication in the final judgment except to the extent that its provisions are in conflict with

the last signed order. If any provision of an earlier interlocutory order conflicts with the final judgment, the final judgment controls.

*Alternative 2*

(3) **Separate Orders, Conflicts.** When different parties or separate claims are disposed of by separate orders, no one of which by its terms disposes of all parties and all claims, none of the orders are final until a judgment is signed that disposes of all parties and claims expressly or by implication. A final judgment may incorporate by reference the provisions of an earlier signed interlocutory order, but if any provision of the earlier order conflicts with the final judgment, the final judgment controls.

Source: New rule.

(c) **Form and Substance: General.** The final judgment shall:

(1) contain the names of the parties;

(2) conform to the pleadings, the facts proved, and the verdict, if any, unless a judgment is rendered as a matter of law;

(3) state the relief granted or denied to or against each party; and

(4) if appropriate, direct the issuance of process and such writs as may be necessary to enforce the judgment.

Source: Rules 300, 301, 306, 308

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

* * *

(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 sell 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 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.

## RULE 301. MOTIONS BEFORE AND AFTER JUDGMENT

* * *

(b) **Motion Judgment As A Matter Of Law.** A party may move for judgment as a matter of law (and include a request to disregard a jury finding as a matter of law) on a claim or defense.

(1) if the evidence, after the adverse party rest its 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 for a reasonable jury to find against the movant on a particular issue of fact or if the evidence conclusively establishes the issue in the movant's favor, and (ii) if, under the controlling law, a judgment cannot properly be rendered against the movant on that claim or defense without a finding adverse to the movant on an issue that has been disregarded, and a judgment as a matter of law should be rendered for movant as to that 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, unless the movant waived application of controlling law by failing to preserve the complaint or error in the court's charge.

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

(c) **Motion to Modify Judgment.** A party may move to modify a judgment as a matter of law (including a request to disregard a jury finding as a matter of law) after a judgment has been rendered.

(1) if the evidence is legally insufficient for a reasonable jury to find against the movant on a particular issue of a fact or if the evidence conclusively establishes the issue in the movant's favor;

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

(3) if the judgement should be vacated, modified, reformed, or corrected in any respect for any reason.

A motion for judgment as a matter of law is not a prerequisite to a motion to modify a judgment.

Source: Rules 301, 329b

* * *

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

Source: Rule 316.

## 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 ~~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:

* * *

(5) when injury to the movant has probably resulted from: (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;

Source: Rule 321, 322

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

* * *

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

**Source: New, to codify existing requirements.**

## RULE 303. PRESERVATION OF COMPLAINTS

* * *

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

* * *

(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~~ A 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 Rule 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 bills of exception ~~are~~ is filed, it ~~they~~ may be included in the transcript or in a supplemental transcript.

## RULE 304. TIMETABLES

(a) **Motion for Judgment on Jury Verdict.** A motion for judgment on the jury

verdict may be presented at any time before a final judgment has been signed. A motion for judgment on the jury verdict is overruled by operation of law when a final judgment is signed that does not grant the motion.

(b) **Motion for Judgment as a Matter of Law.** A motion for judgment as a matter of law may be presented after the adverse party rest its 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 has been signed. A ground in a motion for judgment as a matter of law is overruled by operation of law when a final judgment is signed that does not grant that ground.

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

(c) **Motion to Modify a Judgment and Motion for New Trial.**

(1) **Time to File.** A motion to modify a judgment and a motion for new trial~~, if filed,~~ shall be filed ~~prior to~~ within thirty days after the final judgment ~~or other order complained of~~ is signed. One or more amended or additional motions ~~for new trial~~ may be filed without leave of court within thirty days after the final judgment is signed regardless of whether a prior motion containing requests for the same relief has been overruled ~~before any preceding motion for new trial by the movant is overruled and within thirty days after the judgment or other order complained of is signed~~.

(2) **When Motion Overruled.** ~~In the event an original or an amended~~ If a motion to modify a judgment or a motion for new trial is not determined by order signed within seventy-five days after the final judgment ~~or appealable order~~ was signed, ~~the~~ any such motion shall be considered overruled by operation of law upon the expiration of ~~the seventy-five day~~ that period.

(3) **Special Deadline: Publication.** 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 final judgment was signed, unless a motion has been previously filed by such defendant or attorney pursuant to paragraph (c)(1).

Source: Rule 329, 329(b).

(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 (c) (1).

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 post-judgment 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.~~

* * *

(3) **Notice of Judgment.** When ~~the~~a final judgment or ~~other~~ appealable order is signed, the clerk of the court shall immediately give notice of the signing to each party~~ies~~ or the party's~~sies~~ ~~their~~ attorney~~s 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 (e) (1) ~~of this rule~~, except ~~as provided in~~ under paragraph (e) (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, or the party's attorney, has not, within twenty days

after the final judgment or appealable order was signed, received the notice require by paragraph (e) (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, or the party's attorney, 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 (e)(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 that run from the date the final 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 Rule 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~~ **Citation** ~~Served~~ **by Publication.** ~~With respect to~~ For a motion for new trial filed more than thirty days but within two years after the final judgment was signed, ~~pursuant to Rule 329~~ under ~~sub~~-paragraph (c)(3) ~~on this rule~~when ~~process has been~~ citation was 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 motion for new trial or request for findings of fact and conclusions of law shall be held in effective because prematurely filed, but every such motion shall be deemed to have been filed on the date of but subsequent to the time of signing of the judgment the motion assails, and every such 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.~~ A prematurely filed motion to modify a judgment or a motion for new trial is effective to preserve the complaints made in the motion and is deemed to have been overruled by operation of law on the date of, but subsequent to, the signing of the judgment the motion attacks. No motion to modify a judgment or a motion for new trial filed prior to the signing of the final judgment extends the trial court's plenary provided in Rule 305 or any timetable prescribed in the Texas Rules of Appellate Procedure.

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

## 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: (i) on bill of review for sufficient cause filed within the time allowed by law; or (ii) on motion for new trial for good cause after citation for publication filed within the time allowed by Rule 304 (c)(3); or (iii) when a party is granted additional time pursuant to Rule 304 (e)(5).

(2) the trial judge, however, may at any time, correct a clerical error in the record of a judgment pursuant to Rule 301(e);

(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 judge may also file findings of fact and conclusions of law if within the time allowed by Rule 297.

Source: Rule 329, 329b(g)(h); new rule in part.

## RULE 311. ON APPEAL FROM PROBATE COURT [PROPOSED FOR REPEAL]

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 REPEAL]

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

# *INQUIRY DISPOSITION CHART*
## *TEXAS RULES OF CIVIL PROCEDURE 296-331*

| Rule No. | Page No. | Change Suggested | Recommended Action | Reason |
|---|---|---|---|---|
| 296-299a | Pg 873-878 | Former District Judge Putnam Kaye Reiter suggests that at the conclusion of the case tried to a judge a charge conference be conducted as if it were a jury trial. | Not yet considered. | N/A |
| 296-299a | Pg 873-878 | Justice Clarence Guittard recommends that findings and conclusions be requested and found before judgment and then recited in the judgment. | SCAC rejected suggestion at January 1996 meeting. | Too many old dogs that can't learn new tricks (*i.e.*, old dogs voted against it). |
| 299a | | Lewis Kinard suggests that Rule 299a be amended to eliminate ambiguity of application to findings requested, findings made and presumed findings. | None. | Proposed Rule 299 and 299a cure the ambiguity. |
| 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 he thinks amendment should 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 304(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 "nonjury". *See* proposed TRCP 296(a). |

| | | | | |
|---|---|---|---|---|
| 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. | None | This is being cured by proposed Rule 300(c), Rule 304(c), Rule 304(e)(1) and Rule 305(b). |
| 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. | None. | This has been cured by purposed TRCP 305. |
| 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. |

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|---|---|---|---|---|
| 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. |

REDLINE VERSION
RULES 296-331

## RULE 296. REQUESTS FOR FINDINGS OF FACTS AND CONCLUSIONS OF LAW

ALTERNATIVE ONE:

(a) Entitlement to Findings of Fact. ~~In any~~ A party in a case in which the ultimate issue of fact was tried ~~in the district or county court without a jury,~~ on the merits by the judge ~~any party~~ may request the ~~court~~ 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 ultimate issue tried to the judge unless the ground to which the issue is referable has been waived or an omitted element is deemed found as provided in Rule 279. Such request shall be entitled "Request for Findings 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 21a. A request for findings of fact and conclusions of law is not proper, and has no effect, with respect to an appeal of a summary judgment.

ALTERNATIVE TWO:

(a) Entitlement to Findings of Fact. In any case: (a) tried ~~in~~ to the ~~district or county~~ court without a jury;; (b) tried to a jury in which ~~the~~ ultimate issues are tried to the ~~court by agreement~~; or (c) tried to a jury in which ultimate issues by law must be tried to the court, ~~any~~ a party may request the ~~court~~ judge to state in writing its findings of fact and conclusions of law. Such request shall be entitled "Request for Findings of Fact and Conclusions of Law" and shall be filed 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 21a.~~ A request for findings of fact and conclusions of law is not proper, and has no effect, with respect to an appeal of a summary judgment.

(b) Premature Filing. ~~A~~ request for findings of fact and conclusions of law ~~are~~ effective although prematurely filed. 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 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 the clerk shall ~~be~~ immediately called to the judge's attention ~~of the court by the clerk~~. Such notice shall state the date the original request was filed and the date the findings and conclusions were due. 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.

Unan approved

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

(a) Time for Request. 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 with the clerk~~. The request for these findings shall be made~~ within ~~ten~~ twenty days after the filing of the original findings and conclusions ~~by the court. Each request made pursuant to this rule shall be served on each party to the suit in accordance with Rule 21a.~~

(b) Time for Judge's Response. The ~~court~~ judge shall file any additional or amended findings and conclusions that are appropriate within ten days after ~~such~~ the request is filed~~, and cause a copy to be mailed to each party to the suit~~.

(c) Appellate Review. ~~No findings or conclusions shall be deemed or presumed by any failure of the court to make any additional findings or conclusions.~~ Refusal of the judge to make a finding requested shall be reviewable on appeal.

Unan appvd

## RULE 299. OMITTED GROUNDS AND PRESUMED FINDINGS

(a) Omitted Grounds. 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 of 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~~

(b) Presumed Findings. ~~w~~When one or more elements ~~thereof~~ of a ground of recovery or defense have been found by the trial ~~court~~ judge, omitted unrequested elements of the ground to which the element or elements found are necessarily referable, when supported by factually sufficient evidence, will be supplied by presumption in support of the

judgment. ~~Refusal of the court to make a finding requested shall be reviewable on appeal.~~ No findings shall deemed or presumed by any failure of the judge to make additional findings.

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

Unless otherwise provided by law, ~~F~~findings of fact and conclusions of law shall be requested, prepared and filed with the court clerk as a document separate from the judgment. ~~not be~~ If findings of fact are recited in a judgment in violation of this rule, ~~If~~ ~~if~~ there is a conflict between the findings ~~of fact~~ recited in ~~a~~ the judgment ~~in violation of this rule~~ and the findings ~~of fact~~ made pursuant to Rules 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 it 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) Final Judgment Rule. A final judgment ~~for purposes of appeal and the trial and appellate timetables~~, is the order or series of orders, that disposes of all the parties and issues in the case, expressly or impliedly. When a judgment on the merits is rendered in a case regularly set for conventional trial on the merits, and no order for a separate trial has been made, it is presumed for appellate purposes that the trial judge intended the judgment to be a final and appealable judgment. A final judgment that is signed in a case tried to the court or jury 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: 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 verdict.~~

Source: Rules 300, 301, 306, 308

(d) 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 mortgage~~s 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 thereunde~~r 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.~~

Upon adoption

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 for Judgment or to Disregard a Jury Finding on an Issue as a Matter Of Law. A party may move for judgment as a matter of law or to disregard a jury finding as a matter of law:

(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, (A) is not legally sufficient for a reasonable jury to find against the movant on a particular issue of fact or if the evidence conclusively establishes the issue in the movant's favor; and (B) if, under the controlling law, a judgment cannot properly be rendered against the movant on any claim or defense without a finding adverse to the movant on an issue that has been disregarded, the court may grant a motion for judgment as a matter of law in the movant' favor as to the 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, unless the movant waived application of controlling law by failing to preserve the complaint or error in the court's charge.

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

(c) Motion to Modify Judgment or to Disregard a Jury Finding on an Issue as a Matter of Law. A party may move to modify a judgment or to disregard a jury finding on an issue as a matter of law after judgment:

(1) if the evidence is not legally sufficient to support a reasonable jury to find against the movant on a particular issue of a fact or if the evidence conclusively establishes the issue in the movant's favor;

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

(3) if the judgement should be vacated, modified, altered or amended in any respect for any reason.

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 ~~Nunc Pro Tunc.~~ A party may move, with notice to all parties interested in a judgment, for correction or reformation of clerical mistakes made in reducing to writing the judgment rendered by the judge.

Source: Rule 316.

(f) Motion Practice. A motion listed in this rule must state the specific complaint or request for relief in such a way that the matter can be understood by the judge. A party may file one or more motions identified in this rule and may renew or refile an additional motion of the same type containing additional complaints and requests for relief despite the denial of any previous motion. A party may also submit a proposed judgment or order 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 any other ground warrants 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:

(1) jury misconduct;

(2) newly discovered evidence;

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

(4) 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 in accordance with Rule 304 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[1] 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]

[1] ~~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.~~

## 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 Disregarding a Jury Finding or an Issue as a Matter of Law. A party may move for a judgment as a matter of law or to disregard a jury finding on an issue as a matter of law 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, or after judgment, and shall not be considered waived if not presented earlier. If presented after judgment, the motion should be presented in a motion to modify the judgment within the time allowed for filing such motions. A motion for judgment as a matter of law or to disregard a jury finding on an issue that is filed before judgment is overruled by operation of law when a judgment is signed that does not grant that relief.

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

Post Judgment

(b) ~~Motion For New Trial and~~ Motions .

(1) *Time to File.* A motion for new trial, a motion to modify the judgment and a postjudgment motion to disregard a jury finding on an issue as a matter of law, if filed, ~~,if filed,~~ shall be filed ~~prior to~~ before or within thirty days after the final judgment as defined in Rule 300(b) ~~or other order complained of~~ is signed. One or more amended or additional motions ~~for new trial~~ may be filed without leave of court within thirty days after the final judgment is signed regardless of whether a prior motion containing requests for the same relief has been overruled ~~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~~.

(2) *When Motion Overruled.* If ~~an original or an amended~~ a 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~~ that period.

(3) 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 (b)(1) of this rule.

*NOTE: SCAC conditionally approved this subsection for recommendation to the Court on 11/17/95. In the event the Court wants to give a defaulted party additional time in resolving the writ of error controversy. See page 3126 of*

*transcript.*

(4) 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 ~~(e)(1) or (e)(2)~~ of this rule.

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

(c) Motion To Correct ~~Nunc Pro Tunc~~. 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.

(d) 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 postjudgment motion to disregard a jury finding, 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 motion for new trial or request for findings of fact and conclusions of law shall be held in effective because prematurely filed. but every such motion shall be deemed to have been filed on the date of but subsequent to the time of signing of the judgment the motion assails , and every such 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.~~ A motion for new trial is effective to preserve the complaints made in the motion and is deemed to have been overruled by operation of law on the date of, but subsequent to, the signing of the judgment the motion assails. No motion for new trial filed prior to judgment extends the trial court's plenary power as provided in Rule 305 or any timetable prescribed in the Texas Rules of Appellate Procedure.

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 postjudgment motion to disregard a jury finding, 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, a postjudgment motion to disregard a jury finding 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, a postjudgment motion to disregard a jury finding 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; Or

(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 Rule 302(f). BL ADK 302(e)

(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 Rule 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 296 and 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 of 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.~~

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 REPEAL]~~

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]

# 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.

TO: TRCP 15-165 Members
From: Alex Albright
Re: Venue rules
Date: March 14, 1996

Enclosed is a proposed venue rule, that I drafted and Mike Prince has looked over. It is a general reorganization of existing venue rules with the new statute incorporated. Specifically, I have addressed the transfer for inconvenience and interest of justice. As per our discussion, I have made the decision on this issue on the basis of affidavits, like the statute requires. (Note that Pat Hazel disagrees with this. He feels that the issues require a full evidentiary hearing. I tend to think that is contrary to the statute, and also unnecessary. As some of you noted, federal courts make venue determinations on the basis of affidavits all the time.) The standard of proof for transfer on the basis for inconvenience or in the interest of justice is not "prima facie" so it has its own section in the rule. I have tried to make clear that the court should consider all of the evidence (movants and opponents) in considering this motion and that the movant has the burden of proof and persuasion.

Part 5 is different from current Rule 86(5). The new statute has a provision that says defendants can't waive another defendant's venue rights. I think it impacts this part of the rule and I have tried to fix it.

I have not addressed the joinder and intervention issues in the new statute here, because I think they are best handled in the joinder and intervention rules. I will work on those later. This would replace current rules 86-88. Rule 89 is really a clerk rule and should be placed with the other clerk rules. The motions to transfer because of an unfair forum also need to be rewritten. They are very old and could use some work.

I will be out of town until next Thursday (the day before the SCAC meeting). At the meeting, let me know what you think, and I'll begin work on the other rules.

Alex

## RULE 86: Motion to Transfer [1]

1. **Applicability**. A motion to transfer a case pursuant to Chapter 15 of the Civil Practice and Remedies Code must be filed according to the provisions of this Rule. A motion to transfer a case because an impartial trial cannot be had where the action is pending is governed by the provisions of Rule ___.

2. **Motion, Response and Reply.** A motion to transfer must be made prior to or concurrently with any other plea, pleading or motion other than a special appearance provided for in Rule 120a, and may be contained in a separate instrument or included in the movant's first responsive pleading. The motion shall state that the case should be transferred to another specified county of proper venue, state the legal basis for the transfer, and plead venue facts establishing that the county to which transfer is sought is a proper venue. Verification is not required. The motion may be accompanied by supporting affidavits. The movant must to request a hearing on the motion at a reasonable time prior to commencement of the trial. Except upon leave of court, each party is entitled to 45 days notice of the hearing. Any response including proof filed in opposition to the motion shall be filed at least 30 days prior to the hearing on the motion. Any reply to the response, including additional proof in support of the motion must be filed not later than 7 days prior to the hearing.

5. **Burden of Proof of Proper Venue.** A party seeking to maintain venue in the county of suit has the burden of proof that the county of suit is a proper venue.[2] A party seeking transfer has the burden of proof that the county specified in the motion to which transfer is sought is a proper venue. All venue facts, when properly pleaded, shall be taken as true unless specifically denied by the adverse party. When a venue fact is specifically denied, the party pleading the venue fact satisfies its burden of proof by making prima facie proof of the venue fact. Prima facie proof is made by filing and serving an affidavit and any duly proved attachments thereto that fully and specifically set forth facts that support the specifically denied venue facts. Affidavits shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify. The existence of a claim[3] when pleaded properly shall be taken as established for venue purposes, and no party shall be required to establish a claim by prima facie proof.

6. **Burden of Proof of Transfer pursuant to Civil Practice & Remedies Code § 15.002(b).** A party seeking transfer to another county of proper venue for the convenience of the parties and witnesses and in the interest of justice pursuant to § 15.002(b) of the Civil Practice and Remedies Code has, in addition to the burden of proof of proper venue in

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1 "Motion to Transfer Venue," which is used in the current rule, is really a misnomer. The case is transferred, not venue.

2 "Proper venue" is a defined term in CPRC § 15.001(b)

3 "Claim" is used in CPRC § 15.002 instead of "cause of action" as in the old statute and current rule.

accordance with section 5 of this Rule, the burden of proof that transfer is justified on such grounds regardless of whether the adverse party specifically denies the movant's allegations. Proof is made by filing and serving an affidavit and any duly proved attachments thereto that fully and specifically set forth facts that support the grounds for transfer. Affidavits shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify. The nonmovant may file and serve opposing affidavits that the court shall also consider when determining whether transfer is justified.

6. **Hearing.** The court shall determine the motion to transfer on the basis of the pleadings, any stipulations made by the parties, and the proof filed by the parties. No oral testimony shall be received at the hearing. If the party seeking to maintain venue in the county of suit has established that the county of suit is proper venue, the case shall not be transferred unless the party seeking transfer has established a mandatory venue in another county or the court finds, after reviewing all of the evidence filed in support of and opposing the transfer, that transfer to another proper venue for the convenience of the parties and witnesses and in the interest of justice is warranted pursuant to § 15.002(b) of the Civil Practice and Remedies Code. If the party seeking to maintain venue in the county of suit fails to establish proper venue in the county of suit, the case shall be transferred to the county to which transfer is sought if the movant has established proper venue in that county. If no county of proper venue is established, the court may direct the parties to make further proof.

5. **Motions Filed after Ruling.** If a court has ruled on a motion to transfer venue in the case, no further motions to transfer venue shall be considered except that if the prior motion was overruled, the court shall consider a motion to transfer venue filed by a defendant whose appearance date was subsequent to the venue ruling based upon grounds not asserted in the earlier motion or seeking transfer for the convenience of parties and witnesses and in the interest of justice pursuant to § 15.002(b) of the CPRC. Timely filed motions not considered by the court will preserve the movant's objection to venue for purposes of appeal.

6. **Discovery.** Discovery shall not be abated or otherwise affected by pendency of a motion to transfer. Issuing process for witnesses and taking depositions shall not constitute a waiver of a motion to transfer venue, but depositions taken in such case may be read in evidence in any subsequent suit between the same parties concerning the same subject matter in like manner as if taken in such subsequent suit. Deposition transcripts, responses to requests for admission, answers to interrogatories and other discovery products containing information relevant to a determination of proper venue may be considered by the court in making the venue determination when they are attached to, or incorporated by reference in, an affidavit of a person who has knowledge of such discovery.

7. **Consent.** At any time the parties may file written consent to transfer the case to any other county and the judge shall order transfer accordingly.

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# PROPOSED REVISIONS TO RULES RELATING TO MOTION TO TRANSFER VENUE

PROFESSOR J. PATRICK HAZEL

UNIVERSITY OF TEXAS SCHOOL OF LAW

## RULE 86. MOTION TO TRANSFER VENUE

**1. Time To File.**

(a)[1] ~~An objection to~~ A motion to transfer venue[2] based on improper venue or inconvenient county[3] is waived ~~by the failing defendant~~[4] if not made by written motion filed prior to or concurrently with any other plea, pleading or motion except a special appearance motion provided for in Rule 120a.

(b) A written consent of the parties to transfer the case to another county may be filed with the clerk of the court at any time.

(c) A motion to transfer venue because an impartial trial cannot be had in the county where the action is pending is governed by the provisions of Rule 257.

(d) A motion challenging the joinder of plaintiffs grounded on venue must be included in the original motion to transfer venue. A motion challenging the intervention of new plaintiffs grounded on venue must be made within twenty (20) days of intervenor's pleading. Only one defendant needs to challenge joinder or intervention of plaintiffs grounded on venue.[5]

**2. How to File.** The motion ~~objecting to improper venue~~ to transfer venue and challenging

1. I have endeavored throughout these rules to give the discrete parts some special number or letter of the alphabet for easy reference.

2. Motions to transfer originally were "objections," and to some extent they still are, but they are better called "motions to transfer."

3. Since September 1, 1995, there is a new basis for transferring venue other than the county of suit being one of improper venue. This is the inconvenient county pursuant to TEX. CIV. PRAC. & REM. CODE § 15.002(b).

4. This is not new law but it conforms to the new statutory provision, TEX. CIV. PRAC. & REM. CODE § 15.0641.

5. Different times must be available for making this challenge when it is because plaintiffs are already joined at the time the suit is filed or later attempt to join by intervening. Twenty (20) days seemed an appropriate time when joined by intervention. Further, the last sentence also is consistent with TEX. CIV. PRAC. & REM. CODE § 15.0641.



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joinder grounded on venue[6] may be contained in a separate instrument filed concurrently with or prior to the filing of the movant's first responsive pleading or the motion may be combined with other objections and defenses and included in the movant's first responsive pleading.

**3. Requisites of Motion.** The motion to transfer venue, and any amendments to it, shall state that the action should be transferred to another specified county of proper venue because:

(a) The county where the action is pending is not a proper county with specific denials of any of plaintiff's pleaded venue facts not believed to be true;[7] ~~or~~

(b) Mandatory venue of the action in another county is prescribed by one or more specific statutory provisions which shall be clearly designated or indicated by pleading the venue facts for such provision;[8] or

(c) Maintenance of venue in the county of suit would work an inconvenience to movant.[9]

The motion to transfer venue shall state the legal and factual basis for the transfer of the action, request transfer of the action to a specific county of mandatory or proper venue, and plead venue facts which would establish venue as proper in that county. Verification of the motion is not required. The motion may be accompanied by supporting affidavits as provided in Rule 87 (when affidavits serve as proof.)[10]

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6. Now that there are two bases for challenging the propriety of venue and one for challenging joinder grounded on venue, all these must be included.

7. Neither the present rules nor statutes state where defendant is to make specific denials nor whether they even need to be in writing.

8. This, too, is simply a clarification telling defendant where to do this.

9. This does no more than add the new basis for transfer.

10. Parentheses are used around any portion of the proposed rule which assumes the potential for live testimony and a standard of proof different from *prima facie* proof. The parentheses indicate that some oppose making the standard of proof on ainconvenient county (and improper joinder or intervention due to venue) other than by *prima facie* proof. Their argument is TEX. CIV. PRAC. & REM. CODE § 15.064(a) which provides:

> (a) In all venue hearings, no factual proof concerning the merits of the case shall be required to establish venue. **The court shall determine venue questions from the pleadings and affidavits.** No interlocutory appeal shall lie from the determination. (Emphasis supplied.)

One would think that whether a county is or is not inconvenient is a "venue determination" which should come under the second sentence of this statutory provision. However, the statute further provides for an appeal relating to a venue determination. TEX. CIV. PRAC. & REM. CODE § 15.064(b). The statute governing an inconvenient county, TEX. CIV. PRAC. & REM. CODE § 15.002(c), provides that "[a] court's ruling or decision to grant or deny a transfer under Subsection (b) is not grounds for appeal or mandamus and is not reversible error." Hence, it appears that the statute, TEX. CIV. PRAC. & REM. CODE § 15.064(a), when speaking of a "venue determination," means the determination as to whether or not venue is proper and not whether or not it is inconvenient. Further, the very nature of the factors to be considered by the trial court in making the inconvenience determination are too fact-intensive and potentially

**4. Response and Reply.** Except as provided in paragraph 3(a) of Rule 87, a response to the motion to transfer is not required. Verification of a response is not required.

**5. Service.** A copy of any instrument filed pursuant to Rule 86 shall be served in accordance with Rule 21a.

**RULE 87. DETERMINATION OF MOTIONS[11] ~~TO TRANSFER~~**

**1. Consideration of Motion.**

(a)[12] The determination of a motion to transfer venue shall be made promptly by the court and such determination must be made in a reasonable time prior to commencement of the trial on the merits. The movant has the duty to request a setting on the motion to transfer. Except on leave of court each party is entitled to at least 45 days notice of a hearing on the motion to transfer.

Except on leave of court, any response or ~~opposing~~[13] affidavits shall be filed at least 30 days prior to the hearing of the motion to transfer. The movant is not required to file a reply to the response but any reply and any additional affidavits supporting the motion to transfer must, except on leave of court, be filed not later than 7 days prior to the hearing date.

( (b) A motion to transfer venue based on an inconvenient county may be heard immediately or as soon as is reasonable after proper venue is established based on pleadings and affidavits. If not heard immediately, reasonable notice must be given.)[14]

(c) A motion to strike the joinder or intervention due to venue must be held at a

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disputable to be determined by mere pleadings and affidavits giving *prima facie* proof. *Prima facie* proof cannot be cross-examined, rebutted, impeached, nor disproved. ***Ruiz v. Conoco, Inc.***, 868 S.W.2d 252, 257 (Tex. 1993). Affidaviats can be used: (1) to establish *prima facie* proof; (2) to establish conclusive proof in a motion for summary judgment when uncontested; and (3) to defeat conclusive proof in a motion for summary judgment when by controverting affidavits in a reply to a motion for summary judgment. While live testimony will tend to slow down the process at the trial court level, that seems to be the legislature's choice. There is a third reason to be noted with respect to joinder\intervention of added plaintiffs. If the trial court determines these very potentially disputable, fact-intensive matters by *prima facie* proof and the courts of appeals make an "independent determination," *see*, TEX. CIV. PRAC. & REM. CODE § 15.003(c)(1), it would not only make the courts of appeals fact finders but would make the fact finding of the trial court completely inconsequential. Why have the trial court make a determination when the matter can be appealed by an accelerated process and have the court of appeals make an "independent determination?"

11. The addition of "s" to make motion plural and the deleting of "to transfer" indicates that there may be more than one motion and all are not grounded on the same basis.

12. *See*, footnote 1.

13. The use of "opposing" affidavits implies that one may file affidavits in opposition or counter to those which support *prima facie* proof. This is contrary to ***Ruiz v. Conoco, Inc.***, 868 S.W.2d 752, 757 (Tex. 1993), which provides: "Prima facie proof is not subject to rebuttal, cross-examination, impeachment, or even disproof."

14. *See*, footnote 10.

reasonable time prior to commencement of the trial on the merits. Movant or other defendants have the duty to request a setting for the hearing. Except on leave of court each party is entitled to at least 30 days notice of this hearing.15

**2. Burden of Establishing Venue.**

(a) *In General.*

(1)16 A party who seeks in face of a motion to transfer venue to maintain venue of the action in the ~~a particular~~ county of suit ~~in reliance upon Sections 15.001 (General Rules), Sections 15.011-15.0178 (Mandatory Venue), Sections 15.031-15.040 (Permissive Venue), or Section 15.061 and 15.062 (Multiple Claims), Civil Practice and Remedies Code,~~17 has the burden to make proof, as provided in paragraph 3 of this rule, that venue is proper ~~maintainable~~ in the county of suit.

(2) A party who seeks to transfer venue on the basis of the county of suit being inconvenient must make its proof of inconvenience (by a preponderance of the admissible evidence .)18

(3) A party who seeks to transfer venue of the action to another specified county based on a motion to transfer under the general rule or a permissive provision ~~Sections 15.001 (General Rule), Sections 15.011-15.017 (Mandatory Venue) or Sections 15.031-15.040 (Permissive Venue), or Section 15.061 and 15.062 (Multiple Claims), Civil Practice and Remedies Code,~~19 has the burden to make proof, as provided in paragraph 3 of this rule, that venue is ~~maintainable~~ proper20 in the county to which transfer is sought.

(4) A party who seeks to transfer venue of the action to another specified county ~~under Sections 15.011-15.017, Civil Practice and Remedies Code~~21 on the basis that a mandatory venue provision is applicable and controlling has the burden to make proof, as provided in paragraph 3 of this rule, that venue is ~~maintainable~~ mandatory22 in the county to which transfer is sought by virtue of one or more mandatory venue ~~exceptions~~ provisions.

(b) *Cause of Action.* It shall not be necessary for a claimant to prove the merits of a

15. This proposed provision, too, is based on the assumption that proof will not be by pleadings and affidavits. Thus, it will most likely be controverted by some.

16. *See*, footnote 1.

17. Reference to each of the statutory provisions upon which a party may base proper venue seems unnecessary and potentially confusing.

18. *See*, footnote 10.

19. *See*, footnote 17.

20. "Maintainable" seems to be overly general when the clear intent is that venue must be "proper."

21. *See*, footnote 17.

22. "Maintainable" is less appropriate when the clear meaning is "mandatory."



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cause of action, but the existence of a cause of action, when pleaded properly, shall be taken as established as alleged by the pleadings for purposes of the venue hearing.23 The existence of a cause of action is not a venue fact.24 Whatever a defendant asserts with respect to the existence of a cause of action in a motion to transfer venue shall not constitute an admission that a cause of action exists and cannot be used against the defendant.25 ~~When the defendant specifically denies the venue allegations, the claimant is required, by prima facie proof as provided in paragraph 3 of this rule, to support his pleading that the cause of action taken as established by the pleadings, or a part of such cause of action, accrued in the county of suit. If a defendant seeks transfer to a county where the cause of action or a part thereof accrued, it shall be sufficient for the defendant to plead that if a cause of action exists, then the cause of action or part thereof accrued in the specific county to which transfer is sought, and such allegation shall not constitute an admission that a cause of action in fact exists. But the defendant shall be required to support his pleading by prima facie proof as provided in paragraph 3 of this rule, that, if a cause of actions exists, it or a part thereof accrued in the county to which transfer is sought.~~

When either the claimant or defendant pleads and the defendant or claimant specifically denies that all or a substantial part of the events or omissions giving rise to the claim occurred in the county of suit, then claimant or defendant shall be required to support its pleading by prima facie proof as provided in paragraph 3 of this rule. Where all or a substantial part of the events or omissions giving rise to a claim occurred asserts a venue fact.26

(c) *Other Rules.*

(1)27 A motion to transfer venue based on the written consent of the parties shall be determined in accordance with Rule 255.

(2) A motion to transfer venue on the basis that an impartial trial cannot be had in the courts where the action is pending shall be

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23. This addition makes it clear that at the trial on the merits no such presumption (or whatever this may be) applies.

24. Only "venue facts" need to be supported by both pleadings and affidavit proof (*prima facie* proof) when specifically denied. Since the existence of a cause of action is not a venue fact, it does no good to "specifically deny" it and does not require *prima facie* proof even if specifically denied.

25. This assertion, if placed in the rule, should take care of all the potential problems regarding defendant's "waiver" of plaintiff's need to prove the existence of a cause of action at the trial on the merits. It allows deletion of the language now in the rule.

26. Read footnote 25.

27. *See*, footnote 1.

determined in accordance with Rules 258 and 259.

(3) A motion to transfer based upon an inconvenient county shall be determined by defendant's proving inconvenience in accordance with TEX. CIV. PRAC. & REM. CODE § 15.002(b). (Defendant's allegations relating to an inconvenient county are not venue facts which can be proved by pleadings and affidavits, and there is no need to specifically deny those allegations, and

(4). A motion challenging the joinder or intervention of plaintiffs based on venue shall be determined with respect to the required elements in accordance with Tex. Civ. Prac. & Rem. Code § 15.003 and defendant's allegations relating to such improper joinder or improper intervention based on venue are not venue facts which need to be specifically denied. The burden of proof is upon plaintiffs.)28

**3. Proof.**

(a) *Affidavits and Attachments.* All venue facts (with respect to proper venue)29, when properly pleaded, shall be taken as true unless specifically denied by the adverse party. When a venue fact is specifically denied, the party pleading the venue fact must make prima facie proof of that venue fact; ~~provided, however, that no party shall ever be required for venue purposes to support by prima facie proof the existence of a cause of action or part thereof, and at the hearing the pleadings of the parties shall be taken as conclusive on the issues of existence of a cause of action~~.30 Prima facie proof is made when the venue facts are properly pleaded and an affidavit, and any duly proved attachments to the affidavit, are filed fully and specifically setting forth the facts supporting such pleading. Affidavits shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.

(b) *The Hearing.*

(1)31 The court shall determine the motion to transfer venue (as to whether venue is proper in the county of suit and in the county to which transfer is requested)32 on the basis of the pleadings, any stipulations made by and between the parties and such affidavits and attachments as may be filed by the parties in accordance with the

28. *See*, footnote 10. TEX. CIV. PRAC. & REM. CODE § 15.003(a) and (b) specifically place the burden on plaintiff.

29. *See*, footnote 10.

30. This should be superfluous in light of the text referenced in footnote 17.

31. *See*, footnote 1.

32. *See*, footnote 10.

preceding subdivision of this paragraph 3 or of Rule 88.

( (2) The court shall determine whether a county is inconvenient as alleged by defendant based on evidence admissible in a trial before the court and may be requested to make findings of fact and conclusions of law.

(3) The court shall determine whether plaintiffs are properly joined or have properly intervened based on evidence admissible in a trial before the court and may be requested to make findings of fact and conclusions of law.)33

(c) If a claimant has adequately pleaded and made prima facie proof that venue is proper in the county of suit as provided in subdivision (a) of paragraph 3, then the cause shall not be transferred but shall be retained in the county of suit, unless the motion to transfer is based on the grounds that an impartial trial cannot be had in the county where the action is pending as provided in Rules 257-259; ~~or~~ on an established ground of mandatory venue; or on grounds of an inconvenient county as provided in TEX. CIV. PRAC. & REM. CODE § 15.002(b)34. ~~A ground of mandatory venue is established when the party relying upon a mandatory exception to the general rule makes prima facie proof as provided in subdivision (a) of paragraph 3 of this rule.~~35

(d) In the event that the parties shall fail to make prima facie proof that the county of suit or the specific county to which transfer is sought is a county of proper venue, then the court may direct the parties to make further proof; or transfer the case to any other county of proper venue for which proper evidence does exist.36

**4. No Jury.** All venue challenges discussed in this rule shall be determined by the court without the aid of a jury.

**5. ~~Motion for Rehearing~~Further Motions to Transfer**37. If venue has been sustained as against a motion to transfer, or if an action has been transferred to a proper county in response to a motion to transfer, then no further motions to transfer shall be considered regardless of whether

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33. *Id.*

34. In light of TEX. CIV. PRAC. & REM. CODE § 15.002(b) this exception must be added to this list.

35. How to prove a mandatory county is surplusage.

36. I believe the Supreme Court had a good idea by including the original provision. However, I further believe this addition is necessary, because the provision is discretionary, and the trial court needs some guidance as to what it should do in the event of not making such an order or in the event the order is made but neither party comes forward with further proof.

37. This rule title was earlier changed in 1990 from "No Rehearing" to the present version. The 1990 title seems to imply that a party can seek a rehearing, but the text of the rule was not changed. I have simply conformed the title to the text. This is not the time to engage in whether or not a rehearing or a reconsideration can be made. Such a determination needs full adversarial clashing.



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the movant was a party to the prior proceedings or was added as a party subsequent to the venue proceedings, unless the motion to transfer is based on the grounds that an impartial trial cannot be had under Rules 257-259, ~~or~~ on the ground of mandatory venue, provided that such claim was not available to the other movant or movants, or based on the grounds of an inconvenient county properly raised by a newly added defendant.38

Newly added defendants may timely challenge either joinder or intervention of plaintiffs based on venue unless the trial court is satisfied that this issue has been satisfactorily establish by an earlier challenge or challnges.

Parties who are added subsequently to an action and are precluded by this rule from having a motion to transfer considered may raise the propriety of venue on appeal, provided that the party has timely filed a motion to transfer.

**6.** There shall be no interlocutory appeals from ~~such~~any venue determination, except as provided by statute.39

**RULE 88. DISCOVERY AND VENUE (NO CHANGES)**

Discovery shall not be abated or otherwise affected by pendency of a motion to transfer venue. Issuing process for witnesses and taking depositions shall not constitute a waiver of a motion to transfer venue, but depositions taken in such case may be read in evidence in any subsequent suit between the same parties concerning the same subject matter in like manner as if taken in such subsequent suit. Deposition transcripts, responses to requests for admission, answers to interrogatories and other discovery products containing information relevant to a determination of proper venue may be considered by the court in making the venue determination when they are attached to, or incorporated by reference in, an affidavit of a party, a witness or an attorney who has knowledge of such discovery.

**RULE 89. TRANSFERRED IF MOTION IS SUSTAINED**

If a motion to transfer venue is sustained, the cause shall not be dismissed, but the court shall transfer said cause to the proper court; and the costs incurred prior to the time such suit is filed in the court to which said cause is transferred shall be taxed ~~against the plaintiff~~ as costs of court to

38. In light of TEX. CIV. PRAC. & REM. CODE § 15.002(b) this exception must be added to the list.

39. This phraseology is added to make room for TEX. CIV. PRAC. & REM. CODE § 15.003(c).

be determined by the court to which said cause is transferred.[40]

When defendant proves a county to which transfer is requested is mandatory and plaintiff has failed to prove that the county of suit is mandatory, the entire case must be transferred to the mandatory county.[41]

When defendant proves a county is inconvenient under TEX. CIV. PRAC. & REM. CODE § 15.002(b), the entire case should be transferred to the proper county.[42]

It is preferable, when feasible, to transfer the case, including defendants who failed to file motions to transfer venue, to a single county of proper venue anytime a motion to transfer venue is granted.[43]

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

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40. Since much of the costs of court up until the case is transferred may have nothing to do with venue, it seems better to allow the court where the suit will be tried make this determination.

41. This provision makes the rule conform to TEX. CIV. PRAC. & REM. CODE § 15.004.

42. Since defendant must prove not only that the county of suit is inconvenient to it but that the county to which transfer is made is both proper and would not work an injustice to any other party, it seems right to transfer everything to the new county.

43. This discretionary provision is to encourage trial courts not to split the case into a myriad of cases but transfer all to one proper county if the suit meets the requirements of TEX. CIV. PRAC. & REM. CODE § 15.004.



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